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



RE: Proposed Regulations Related to Coal Combustion Byproduct Management
COMAR 26.04.10 and 26.21.04
Comments of Mirant

Dear Mr. Pattison:

Mirant Mid-Atlantic, LLC, Mirant Chalk Point, LLC and Mirant Maryland Ash Management, LLC ("Mirant") appreciate the opportunity to provide comments regarding the proposed regulations regarding the management of coal combustion byproducts (CCBs). As a major producer of electricity in the State, which uses coal as a primary fuel, Mirant would be affected if these proposed regulations are promulgated.

Mirant supports a legal regime that maximizes the use of CCBs and removes obstacles to beneficial uses, which include:

- Reduction of the amount of virgin natural resources used for the same purposes;
- Reduction in greenhouse gas emissions to produce products that CCBs can replace; and
- Reduction in the land and other resources needed to dispose of waste materials.

The Maryland legislature recognized the importance of beneficial use of CCBs when the Pozzolan law was enacted. Likewise, when the U.S. Environmental Protection Agency determined its regulatory pathway for CCBs, known as the "Bevill Determination," the Agency said that it "did not wish to place unnecessary burdens on beneficial use."

With an eye towards optimizing beneficial use of CCBs and encouraging a set of rules that are practical, Mirant offers the following specific comments, which are presented in two sections. Section I presents proposed changes that are needed to avoid inconsistencies with respect to existing CCB sites. We believe these changes are not substantive and can be made without repromulgation. Section II presents our other proposed changes, some of which are substantive and some of which are clarifications.

I. REGULATIONS THAT MUST BE CLARIFIED TO AVOID INTERNAL INCONSISTENCY AND ALLOW EXISTING SITES TO CONTINUE TO OPERATE.

A. Existing Ash Sites May Continue to Operate. The language of several regulations appears to be inconsistent with the provisions of proposed COMAR 26.04.10.04(E) for existing ash sites to continue to operate under the Department's authorization. The following regulations must be clarified to ensure that they do not conflict with COMAR 26.04.10.04(E).

COMAR 26.04.10.02 (B)(12) – The definition of “Open Dump” should be revised to exclude ash disposal sites that are operating legally at the time the rules are promulgated. The existing language should be placed into a new subsection (a) and the existing subsections (a) and (b) should be renumbered to (1) and (2). A new subsection (b) should be added as follows: “(b) ‘Open dump’ does not include a coal combustion byproducts facility that was in operation as of April 1, 2008 and operating in accordance with COMAR 26.04.10.04(E).”

COMAR 26.04.10.03(B)(1) – In order to clarify that existing ash sites are not prohibited, the qualifying language “Except as provided in 26.04.10.04(E),” should be added before “A person may not....”

COMAR 26.04.10.04(B) – In order to clarify that existing ash sites are not prohibited, the qualifying language “Except as provided Section E of this regulation,” should be added before “A person shall dispose of”

B. Department Authorization of Existing Ash Sites. COMAR 26.04.10.04(E) would provide that CCB facilities that the Department has authorized for the disposal of CCBs prior to April 1, 2008 may continue to operate under the Department's authorization, except that the Department retains the right to modify an existing authorization “as it considers necessary”. Although Mirant's existing ash sites have not been affirmatively approved as landfills or under permit, they are operating legally under the Department's general authority and should be considered “authorized” operations.¹ The following regulations must be clarified to ensure that existing ash sites may continue to operate under the Department's authorization:

COMAR 26.04.10.04(E) – The restrictive clause “that the Department has authorized for the disposal of coal combustion byproducts prior to April 1, 2008” should be replaced with “that was in operation as of April 1, 2008 and not in violation of any material Department regulation...” In addition, the terms “it considers” is subject to arbitrary interpretation and should be deleted.

¹ Mirant operates three ash sites all of which have NPDES permits. However, they do not have MDE permits related to ash storage/disposal. Two of the facilities also have sediment erosion and control plans approved by the counties. One of the facilities has a landfill/rubblefill permit issued by Prince George's County.

COMAR 26.04.10.04 (F) – In the first sentence, the terms “authorization or” should be deleted.

II. OTHER COMMENTS

A. Comments Regarding Proposed Definitions.

COMAR 26.04.10.02(B)(2) (“Beneficial Use”)– The use of CCB in mine operations or mine reclamation activities is specifically excluded from the proposed definition of beneficial use. The use of ash to reclaim mined lands benefits the State of Maryland by avoiding the need for additional landfill or surface impoundment space, remediating abandoned mines, and conserving natural resources. We recommend that subsection (b) be deleted.

COMAR 26.04.10.02.(B)(3) (“Coal combustion byproducts”) – CCBs are defined as the “residue generated by or resulting from the burning of coal.” However, coal may occasionally be mixed with small amounts of other materials such as biomass, and the resulting ash should still be considered CCB. We suggest inserting the term “primarily” after “resulting.”

COMAR 26.04.10.02(B)(4) (“Coal combustion byproducts facility”) and (9) (“Facility”) – We suggest that the proposed definition of “Facility” be incorporated into the proposed definition of “Coal combustion byproducts facility” to avoid confusion between the two. We propose that subsection (9) be deleted and that the following language be inserted in section (4):

(4) “Coal combustion byproducts facility” means a facility or site where coal combustion byproducts are generated, stored, handled, processed, recycled, disposed of, or used, and includes the entirety of any lot or parcel and all contiguous land and structures, other appurtenances, and improvements on the land which are owned, leased, or used by, or under the control of, the owner or operator of the facility.

COMAR 26.04.10.02(B)(7) (“Disposal”) – The proposed regulation defines “Disposal” as “the discarding or abandonment of coal combustion byproducts so that they are not recycled or used, as determined by the Department.” The language “as determined by the Department” is subject to arbitrary interpretation and does not provide sufficient guidance to regulated entities regarding what conduct is permitted. We suggest deleting the terms “as determined by the Department,” and adding a second sentence to clarify uses that are permissible, as follows:

(7) Disposal.

(a) “Disposal” means the discarding or abandonment of coal combustion byproducts so that they are not recycled or used, ~~as determined by the Department.~~

(b) “Disposal” does not include placement of coal combustion byproducts in a mine, use as structural fill materials, or other beneficial uses.

B. Comments Regarding Descriptions of Prohibited Acts

COMAR 26.04.10.03 (A) – The proposed language would prohibit management of CCBs in a manner that “is likely to” create a nuisance, air pollution, a discharge of pollutants to waters of the State, or a violation of a groundwater quality standard. The phrase “is likely to” provides too much uncertainty for a regulated entity to determine what conduct is prohibited in that it purports to prohibit merely the potential to cause the identified conditions. Accordingly, we suggest that “is likely to” be deleted from the end of Section A, immediately before the numbered subsections.

COMAR 26.04.10.03(A)(1) – The proposed language would prohibit the management of CCBs in a manner likely to create a “nuisance.” The term “nuisance” is highly subjective and subject to arbitrary interpretation. We suggest that the term “nuisance” be defined to include only demonstrable pollution and to specifically exclude minor aesthetic, noise or traffic related matters.

COMAR 26.04.10.03(A)(2) – The proposed language would prohibit the “generation, storage, handling, processing, disposal, recycling, beneficial use, or other use of coal combustion byproducts in a manner that is likely to . . . create air pollution.” It is simply not possible to generate CCBs without creating some air pollution, as is recognized by the voluminous regulations governing air pollution from electric generating units that burn coal. Similarly, the handling and processing of CCBs also creates some air pollution. Accordingly, we suggest adding the word “unpermitted” between “create” and “air pollution.”

COMAR 26.04.10.03(A)(4) – The proposed language would prohibit management of CCBs in a manner that is likely to create a violation of a groundwater quality standard. As written, a single transient exceedance of a groundwater standard would constitute a violation. We recommend redefining a violation as an exceedance of a groundwater quality standard over two or more consecutive monitoring periods.

COMAR 26.04.10.03 (A)(6) – The proposed language would prohibit “generation, storage, handling, processing, disposal, recycling, beneficial use, or other use of coal combustion byproducts in a manner that is likely to . . . create other hazards to the public health, safety, welfare, or comfort as may be determined by the Department.” This language provides too much uncertainty for a regulated entity to determine what conduct is prohibited, and is subject to arbitrary interpretation by the Department. We do not know what is meant by a potential to create a hazard to “welfare” or “comfort.” We suggest deleting the words “welfare” and “comfort.”

C. Comments Regarding Proposed CCB Disposal Regulations

COMAR 26.04.10.04(B) – The proposed language provides that a person shall dispose of CCBs “only in a coal combustion byproducts facility or a solid waste acceptance facility that has been authorized by the Department for the disposal of coal combustion byproducts.” This language suggests that a special Department approval is needed before a permitted landfill may

accept CCBs, when we do not believe that is the Department's intent. We suggest that the section be revised as follows:

B. A person shall dispose of coal combustion byproducts only in a coal combustion byproducts facility ~~or a solid waste acceptance facility~~ that has been authorized by the Department for the disposal of coal combustion byproducts or in a solid waste acceptance facility that may legally receive coal combustion byproducts.

COMAR 26.04.10.04(C) – The proposed language provides that “A person who desires to dispose of coal combustion byproducts in any new coal combustion byproducts facility constructed after April 1, 2008 shall apply for a permit for an industrial waste landfill” This language is unclear regarding the identity of the permit holder. We suggest that the language be revised to clarify that the operator of the facility should be the permit holder: “A person who desires to operate ~~dispose of coal combustion byproducts~~ in any new coal combustion byproducts facility constructed after April 1, 2008 in which coal combustion byproducts will be disposed shall apply for a permit for an industrial waste landfill”

D. Comments Regarding Proposed CCB Storage Regulations

COMAR 26.04.10.05(B) – The proposed language would prohibit storage of CCBs directly on the ground or in an unlined impoundment without the authorization of the Department. An exemption to this provision should be made for those units that store CCBs for short periods during processing (e.g., quench ponds or sedimentation ponds) and to account for events that occur during unplanned maintenance events (e.g., cleaning an ash hopper) when storage of CCB on the ground for a short period may become necessary.

COMAR 26.04.10.05(B), (C), and (D) – The proposed regulations would impose significant new requirements on the storage of CCBs. Regulated entities will require some time to design and build the appropriate structures necessary to comply with the final regulation. We suggest that regulated entities be given at least 270 days from the effective date of the final rules in order to: (i) design, (ii) obtain construction and other necessary permits; and (iii) build appropriate containment structures.

COMAR 26.04.10.05(C) – The proposed regulation would require storage of CCBs “in a manner that prevents contact with precipitation and waters of this State.” It may not be possible to prevent all contact with precipitation and we believe the primary concern should be preventing pollution of waters of the State. We suggest deleting the terms “precipitation and” before “waters of this State.”

COMAR 26.04.10.05(D) – The proposed regulation would require CCB storage systems to be “[c]onstructed of impervious materials and provided with a roof or other protections to prevent nuisance, air pollution, and discharges of contaminated stormwater or leachate to waters of this State.” Because no materials are completely “impervious,” this standard would be

impossible to achieve. We suggest changing the term "impervious" to "low permeability." We also suggest adding the term "unpermitted" before "discharges" for clarity.

COMAR 26.04.10.05(G) – The proposed language would provide that the Department "may impose specific requirements" for the storage of CCBs upon a determination that the storage has caused or is likely to cause a discharge to the waters of the State, a nuisance, or otherwise pose a threat to public health or the environment. The term "specific requirements" is subject to arbitrary interpretation and is too uncertain to provide guidance to regulated entities or Department employees about what the Department may require. We suggest defining what the Department may require.

COMAR 26.04.10.05(H) – The proposed regulation would provide that the owner and operator of a CCB storage system "shall ensure that" releases do not occur, that adequate storage space is available, and that operations are performed in a manner that "shall prevent, contain, and clean up spills" of CCBs. Regulated entities cannot "ensure" that a spill will never occur. (Subsection 3 specifically mentions "spills" and, therefore, contemplates that they may occur despite reasonable precautions.) In addition, subsection (3) is confusing because it does not explain how operations can be performed in a manner that "contain[s]" and "clean[s] up spills." We suggest that the language be revised as follows:

- H. The owner and operator of a storage system shall ~~ensure that:~~
- (1) ~~A-Design and operate systems in a manner that reduces the likelihood that a release of coal combustion byproducts will occur during storage operations due to spilling or overflowing does not occur; and~~
 - (2) ~~Provide Adequate storage space is available to handle the volume of coal combustion byproducts generated and to be stored; and~~
 - (3) ~~Transfer, handling, and storage operations are performed in a manner that shall prevent, contain, and promptly clean up spills of coal combustion byproducts.~~

E. Comments Regarding Proposed Variance Regulations

COMAR 26.04.10.07(B)(1) – The proposed language would provide the basis for a variance application if the application provides "equal or greater protection to prevent a release or discharge of coal combustion byproducts to the environment as would be provided by compliance with the regulation for which a variance is requested." Regulated entities cannot absolutely "prevent" a release or discharge of CCBs, even with reasonable precautions. The term "prevent" should be changed to "reduce the likelihood of...."

COMAR 26.04.10.07(D) - The proposed regulation provides that "When practicable, within 60 days of receipt of a complete application for a variance request as determined by the Department, the Department shall make a determination to either grant or deny the variance." This language is vague and subject to arbitrary interpretation by the Department. We suggest that the terms "When practicable" and "as determined by the Department" be deleted.

F. Comments Regarding Proposed Reporting Requirements

COMAR 26.04.10.08(A) – The proposed regulation would establish certain reporting requirements for generators of CCBs, and would require regulated entities to provide detailed information annually by March 1 of each year. Subsections (3) and (8) would require reporting certain data covering the previous five years. Some of the requested data are not currently being collected by the generators, making the data difficult, if not impossible, to acquire. Additionally, the same data for a given year will be submitted annually over a 5-year period, which is duplicative. We recommend that reporting include only data that are generated after the effective date of the rule. Further, we suggest that each report include only data generated in the previous year.

COMAR 26.04.10.08(A)(4) – The proposed language would require the submission of “[d]escriptions of any modeling and/or risk assessments conducted relating to the coal combustion byproducts or their use.” We suggest inserting the terms “significant, final” before “modeling” in order to avoid requiring submission of preliminary or draft modeling.

COMAR 26.04.10.08(A)(6) and (7) – These proposed sections would purport to require a generator to sign a statement authorizing the Department to conduct inspections of processes that generate CCBs and to collect samples of CCBs. The Department either has the authority or it does not; it should not require regulated entities to confirm that the Department has the authority. Although Mirant intends to cooperate fully with the Department and provide reasonable access when requested, we object to the structure of these sections that would require an annual affirmation granting the Department unfettered access without limitation. Subsections (6) and (7) should be deleted.

COMAR 26.04.10.08(A)(8) – The proposed language would require a generator to submit annually “a description of how the generator disposed of or used its coal combustion byproducts in the last 5 years” Regulated entities may not have all of the data from the previous 5 years and annual submission of data from the preceding 5 years would be unnecessarily duplicative. The terms “last 5 years” should be changed to “previous year.”

COMAR 26.04.10.08(A)(8)(c) – The proposed language would require a generator to submit the “names, addresses, and telephone numbers of the direct recipients of the coal combustion byproducts, the type and volume of coal combustion byproducts provided to each recipient, and if known, how each recipient used the coal combustion byproducts.” The term “direct recipient” is vague. For example, is the “direct recipient” the first person in the chain of title/ownership or the trucking company that takes physical custody of the CCBs? Moreover, customer information may be confidential business information which should not be required to be provided. Subsection (8)(c) should be deleted.

COMAR 26.04.10.08(A)(9) – The proposed language would require a generator to submit a “description of how the generator intends to dispose of or use its coal combustion byproducts in the next 5 years” This prospective information is confidential business information that should not be required to be provided. Subsection (9) should be deleted.

COMAR 26.04.10.08(C) – The proposed language would require a generator to maintain records for “a minimum of 5 years.” The terms “a minimum of” should be deleted for clarity.

G. Comments Regarding Utilization of Coal Combustion Byproducts in Coal Mine Reclamation

COMAR 26.20.24.08 – This section is entitled, “*Utilization of Coal Combustion Byproducts*,” but is specifically directed to CCB use in coal mine reclamation. MDE is planning to promulgate regulations related to beneficial use of CCB in the near future. The title of this section should be changed to more accurately reflect the intent of the section and avoid confusion with future regulations. We suggest adding “in Coal Mine Reclamation” to the title.

COMAR 26.20.24.08(D)(4)(I) – The proposed rule would require that the Toxicity Characteristics Leaching Procedure (TCLP) be used for analysis of CCB. New methods of analytical extraction are under development and review by credible organizations, including the American Society of Testing and Materials (ASTM) that may be more appropriate than the TCLP for evaluation of CCBs. Sufficient flexibility should be built into the rule to account for new analytical methods that become available.

H. Comments Regarding Utilization of Coal Combustion Byproducts In Non-Coal Surface Mine Reclamation

COMAR 26.21.04.03(B)(4) – The proposed rule would require that CCBs not be applied in layers exceeding 12 inches in thickness when used in non-coal surface mine reclamation. At times, some CCBs including bottom ash and slag may be much larger than 12 inches in diameter. The restriction of placing layers in 12-inch thicknesses would require difficult and potentially expensive additional processing of the CCB in order to use it. We recommend a 24-inch limit for layer thickness, which will be similarly environmentally protective to the proposed thickness.

COMAR 26.21.04.10 – The proposed regulation would require a permittee to take a series of action if a drinking water supply is “impacted” by an active operation using CCB for reclamation. The term “impacted” is not defined. We recommend that the trigger for action be when a drinking water supply is determined to exceed a primary or secondary drinking water standard and the CCB operation may reasonably be expected to be the source of contamination.

COMAR 26.21.04.12 – The proposed regulation would provide that any use of CCBs “that is not in compliance with the provisions of this chapter as determined by the Department is a disposal of solid waste and is subject to all applicable laws and regulations governing the disposal of a solid waste, including applicable permit requirements of the Department.” This proposed language would create an impossible compliance standard. Any violation of the chapter, regardless of impact or whether the violation can be promptly and fully remedied, would subject the regulated entity to solid waste regulations and permits, which would be impossible to obtain. We suggest that this proposed regulation be deleted.

Mr. Stephen Pattison, Assistant Secretary
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Again, Mirant appreciates the opportunity to participate in the rulemaking process. If you have any questions or wish to discuss this matter, please call me at 202.585.3812 or Mr. Burt McCullough at 678.579.7263.

Sincerely,
Mirant Mid-Atlantic, LLC
Mirant Chalk Point, LLC
Mirant Maryland Ash Management, LLC



Walter Stone

cc: Burt McCullough
David Cramer
Pat Miglio