

## TITLE 329 SOLID WASTE MANAGEMENT DIVISION

### LSA Document #21-458

#### SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD

The Indiana Department of Environmental Management (IDEM) requested public comment from July 31, 2024, through August 30, 2024, on IDEM's draft rule language. IDEM received comments from the following parties:

Margaret Connolly (MC)  
Gabriel S. Coriell, Ohio Valley Electric Corporation (OVEC)  
Indra Frank, Hoosier Environmental Council (HEC)  
Danielle McGrath, Indiana Energy Association (IEA)  
Kerwin Olson, Citizen's Action Coalition (CAC)  
Rev. Brian Sauder, Faith in Place (FIP)  
Susan Thomas, Just Transition Northwest Indiana (JTNI)  
Ashley Williams, Just Transition Northwest Indiana (JTNI)

Following is a summary of the comments received and IDEM's responses thereto.

*Comment:* The commenters state that adoption of this rule would result in ineligibility for U.S. EPA approval, because the rule incorporates the outdated July 1, 2023, edition of the Code of Federal Regulations, which excludes further updates that were finalized in the federal coal combustion residuals (CCR) rule on May 8, 2024. (MC, CAC, FIP, HEC, JTNI, IEA)

*Response:* IDEM has amended the draft rule to incorporate the most recent version of the federal CCR Rule.

*Comment:* The commenters state that validation of past coal ash closures does not comply with federal regulations. (MC, CAC, FIP, HEC, JTNI)

*Response:* IDEM has amended the draft rule to incorporate the most recent version of the federal CCR Rule, which includes a validation process for past coal ash closures at 40 CFR 257.101(g). IDEM has also amended the draft rule to clarify that CCR surface impoundment closure plan approvals issued by IDEM before the effective date of the draft rule only remain valid pending transition to permits under this draft rule.

*Comment:* The commenters suggest that IDEM pause the state rulemaking until the federal CCR permitting program rulemaking is finalized. (MC, CAC, FIP, HEC, JTNI)

*Response:* Due to the recent legislation in HEA 1623 amending state law at IC 13-19-3-3, IDEM is required to final adopt the incorporation by reference of the federal requirements at 40 CFR 257, Subpart D. The draft rule creates a CCR permitting process based on the well-established solid waste permitting process the agency has used for several years. IDEM will continue to monitor any developments regarding a federal CCR permitting program and will amend its rules as needed once that program is finalized.

*Comment:* The commenters bring up concerns with several exemptions in the proposed rulemaking that are not contained in current federal regulations and might make the state's CCR rulemaking less protective than the federal rule. Specifically, the commenters point to exemptions at 329 IAC 10-3-1(8), "other coal ash exemptions in 329 IAC 10-3-4," and 329 IAC 10-3-1(16). (MC, CAC, FIP, HEC, JTNI)

*Response:* Regarding the first two items, IDEM agrees with the commenters' assumption "that these exemptions apply to exemption from 329 IAC 10 and do not exempt coal ash disposal sites from the new article at 329 IAC 14." Regarding the last item, IDEM is not intending to amend the exemption at 329 IAC 10-3-1(16). Regardless, similar to the first two items, that subdivision only articulates an exemption to 329 IAC 10, as confirmed by the leading language to 329 IAC 10-3-1.

*Comment:* The commenters point out several draft rule provisions that they see as less protective than the federal CCR rule, including unclear rule language, the omission of the last two sentences at 40 CFR 257.53(b), unclear definitions for "insignificant", "minor", and "major" modifications, and the omission of 40 CFR 257.72(c) and 40 CFR 257.72(d) from the draft language. (MC, CAC, FIP, HEC, JTNI, IEA)

*Response:* Except for the definitions of "insignificant", "minor", and "major" modifications, IDEM has revised the draft rule in response to the commenters' concerns. IDEM has not altered the "insignificant", "minor", and "major" modification definitions because those terms relate strictly to the level of permitting required for various facility changes. Similar terms do not exist in the federal CCR Rule because the federal rule does not contain any permitting provisions.

*Comment:* The commenter suggests that IDEM should adopt the federal rule by reference. (IEA)

*Response:* The draft rule incorporates by reference the federal CCR Rule, in addition to creating a state-specific permitting program for EPA approval, as required by IC 13-19-3-3. Adopting the federal CCR Rule by reference only, without also creating a new permit program, would violate Indiana law.

*Comment:* The commenter asserts that certain substantive requirements are included in the draft rule language that are not present in the federal CCR regulations. (IEA)

*Response:* IDEM has revised the draft rule in response to these concerns and believes the current draft rule is substantively consistent with, and at least as protective as, the federal CCR Rule.

*Comment:* The commenters state that IDEM should include clear requirements for resolving technical disputes between a facility's qualified professional engineer (QPE) and the agency. (IEA, OVEC)

*Response:* IDEM has not amended the draft rule in response to these comments. While IDEM consistently strives to collaborate with all its permittees to resolve technical disputes, the formal dispute resolution process regarding administrative determinations is governed by IC 4-21.5-3. Furthermore, IDEM does not have the authority, through rulemaking or otherwise, to modify the jurisdiction of the Indiana Public Licensing Agency, as requested by one commenter.

*Comment:* The commenter states that IDEM should provide 180 days for submittal of a permit application for all CCR units, regardless of whether such units have an existing approval or not. (IEA)

*Response:* IDEM has revised the draft rule in response to this comment.

*Comment:* The commenter states that the proposed rule language should allow owners and operators of CCR units to submit one permit application for multiple CCR units located at the same facility. (IEA)

*Response:* IDEM agrees and has revised the draft rule in response to this comment.

*Comment:* The commenters assert that IDEM should specify deadlines for permit approval times and responses once applications have been submitted. (IEA, OVEC)

*Response:* IDEM revised the draft rule in response to these comments.

*Comment:* The commenter suggests that IDEM remove the definition of “water table” from the rule due to potential confusion with U.S. EPA’s definition of “uppermost aquifer”. (IEA)

*Response:* IDEM has revised the draft rule to clarify discrepancies in the definitions section in response to this comment.

*Comment:* The commenter states that IDEM should include regulatory language clarifying that in any case where state definitions are inconsistent with the requirements of federal regulations, the federal regulations control. (IEA)

*Response:* IDEM has revised the draft rule to clarify discrepancies in the definitions section in response to this comment.

*Comment:* The commenter suggests that IDEM remove the requirements related to structural integrity assessments under 40 CFR 257.73(d). (IEA)

*Response:* IDEM has revised the draft rule in response to these concerns and believes the current draft rule is substantively consistent with, and at least as protective as, the federal CCR Rule.

*Comment:* The commenter states that IDEM’s requirement that downgradient monitoring wells be spaced at a maximum of 500 feet is a significant change from the federal rule and that IDEM’s rule should allow for greater flexibility, similar to the federal rule. (IEA)

*Response:* IDEM has revised the draft rule in response to these concerns and believes the current draft rule is substantively consistent with, and at least as protective as, the federal CCR Rule.

*Comment:* The commenter asserts that IDEM should include the newly finalized requirements by U.S. EPA related to the closure by removal standard and the closure in place performance standards. (IEA)

*Response:* IDEM has revised the draft rule in response to these concerns and believes the current draft rule is substantively consistent with, and at least as protective as, the federal CCR

Rule.

*Comment:* The commenter urges IDEM to reduce the minimum cost estimates for final cover and vegetation to be consistent with municipal and non-municipal solid waste units. (IEA)

*Response:* The minimum cost estimates for final cover and vegetation are consistent with the analogous estimates required by 329 IAC 10. That article requires that closure cost estimates be updated to account for inflation. *See, e.g.,* 329 IAC 10-22-2(c)(5); 329 IAC 10-39-2(c)(2). The draft rule's cost estimates are based on the cost estimate figures referenced by the commenter; the estimates simply reflect adjustments for inflation.

*Comment:* The commenter states that IDEM must remove all instances of technical, non-permitting, requirements that are currently imposed on CCR units. (OVEC)

*Response:* IDEM has revised the draft rule in response to these concerns and believes the current draft rule is substantively consistent with, and at least as protective as, the federal CCR Rule.

*Comment:* The commenter asserts that IDEM should not add to, revise, or expand any definitions in the federal CCR rule, and explain how every definition in the draft rule relates to a permitting requirement as opposed to a technical requirement. (OVEC)

*Response:* IDEM has revised the draft rule to clarify discrepancies in the definitions section in response to this comment.

*Comment:* The commenter asserts that IDEM should state that the final rule would not become final and effective until after full approval is received from U.S. EPA for its permitting program. (OVEC)

*Response:* In the draft rule's digest, IDEM has clarified, "Pursuant to IC 13-19-3-3(d) and (g), this rule is effective upon the effective date of final approval of the Indiana state permit program by the United States Environmental Protection Agency under 42 U.S.C. § 6945(d)(1)."

*Comment:* The commenter states that IDEM's final rule should become effective 18 months after the approval is received from U.S. EPA for its state CCR permit program. (OVEC).

*Response:* As stated above, IDEM has clarified the rule will not become effective until the effective date of EPA's final approval of the Indiana state permit program. Considering the public participation process for this rulemaking, as well as during EPA's state program approval process (*see* 42 U.S.C. § 6945(d)), IDEM does not wish to delay this rule's effectiveness more than necessary. Furthermore, as stated above, IDEM has revised the draft rule to set a 180-day deadline for all applications for existing CCR units.

*Comment:* The commenter asserts that IDEM should establish a process to review plans, demonstrations, and reports in conjunction with QPEs. (OVEC)

*Response:* IDEM is not revising the draft rule in response to this comment because IDEM believes its current review process sufficiently involves and creates dialogue between permittees and the agency.

*Comment:* The commenter states that groundwater monitoring constituents should be

added by rulemaking, not by permit. (OVEC)

*Response:* The draft rule language at 329 IAC 14-3-4(c) clarifies that the agency may assess whether facilities accepting waste other than and in addition to CCR need to monitor ground water for additional constituents related to that non-CCR waste. IDEM makes these assessments on a case-by-case basis in light of the particular type of waste disposed at a facility. To require a rulemaking every time this situation arose would be overly burdensome to the agency and the permittee.

*Comment:* The commenter states that deadlines in the draft rule should not be shortened without justification. (OVEC)

*Response:* The commenter misstates the nature of the deadlines outlined in the draft rule. Commenter asserts deadlines established at 329 IAC 14-3-3(b)(3) and (10) are shorter than the corresponding federal deadlines at 40 CFR 257.80(c) and 257.84(b). The federal rule provisions establish deadlines for *completing* certain annual reports, while the draft state rule provisions establish deadlines for submitting the report to the agency *after* completion.

Regardless, to assist the agency in monitoring and ensure compliance with the reporting requirements, IDEM has revised those draft subdivisions to simplify the submission timeline and tie the submission deadline to the federal recordkeeping requirements at 40 CFR 257.105(g).

*Comment:* The commenter asserts that the definition of background groundwater should not be expanded. (OVEC)

*Response:* IDEM has revised the draft rule to clarify discrepancies in the definitions section in response to this comment.