



Walter Wright, Jr.
wwright@mwlaw.com
(501) 688.8839

Citizen Suit Action/Coal Combustion Residue: North Dakota Attorney General Transmits Notice of Intent to Sue Alleging U.S. Environmental Protection Agency Failure to Approve North Dakota Program

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The North Dakota Attorney General (“AG”) transmitted to the United States Environmental Protection Agency (“EPA”) on behalf of the State of North Dakota and the North Dakota Department of Environmental Quality (“NDDEQ”) a Notice of Intent to Sue (“Notice”) for the Administrator’s alleged failure to perform necessary non-discretionary duties as required by the Resource Conservation and Recovery Act (“RCRA”).

The Notice addresses NDDEQ’s prior submittal of its proposed North Dakota Coal Combustion Residuals (“CCR”) Permit Program to EPA for approval on September 21, 2020.

CCR (also referred to as coal ash, fly ash, or bottom ash) is typically created when coal is combusted by power plants to produce electricity. EPA has a set of regulations that address CCR.

The Federal Water Infrastructure Improvements for the Nation Act provided the authority for the states to operate permit programs in addressing CCR if the EPA determines they are at least as protective as the federal baseline requirements. When EPA receives a permit program submission from a state, the federal agency will review the submission to ensure it includes all the required elements. Then the agency sends a letter to the state informing them that their submission is complete or requires additional information. Only three or four states to date have had CCR programs approved by EPA.

NDDEQ has been argued to have promulgated and enforced its own regulations regarding the storage, treatment, and disposal of CCR. The state agency is stated to have prepared and submitted an application soon after EPA announced that it would allow states to apply for program primacy for regulating CCR activities. This is stated to have included a final and complete application in March 2023.

The actions NDDEQ undertook are stated to have included 2023 North Dakota Legislative Assembly legislation to change the applicable definition of groundwater to the CCR Program to match the federal definition. See North Dakota Century Code § 23.1-08-04.

The AG argued that EPA has delayed its decision on NDDEQ’s application. The objective of the Notice is stated to be an attempt to compel EPA to approve NDDEQ’s CCR Permit Program.

The AG argues that pursuant to 42 U.S.C. § 6945(d)(1)(B), that the EPA Administrator, after public notice and an opportunity for public comment, shall approve in whole or in part, a state program no later than 180 days after the date on which a state submits its proposed program application. This deadline is stated to have expired.

A copy of the Notice can be downloaded [here](#).