



STATE OF NORTH DAKOTA
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Drew H. Wrigley
ATTORNEY GENERAL

January 3, 2025

Jane Nishida, Administrator
U.S. Environmental Protection Agency
Office of the Administrator
1200 Pennsylvania Avenue, N.W.
Mail Code 1101A
Washington, DC 20460

Merrick Garland, Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

RE: Notice of Endangerment and Intent to Sue under 42 U.S.C. § 6972(a)(2)

Dear Administrator Nishida and Attorney General Garland:

This letter provides notice that the State of North Dakota (“North Dakota”) and the North Dakota Department of Environmental Quality (“NDDEQ”) intend to file suit against the U.S. Environmental Protection Agency (“EPA”) and Administrator Nishida in her official capacity as Administrator of the EPA for failure to perform nondiscretionary duties as required by the Resource Conservation and Recovery Act (“RCRA”). Pursuant to 42 U.S.C. § 6972(a)(2), a State may bring suit against the EPA “where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.” 42 U.S.C. § 6972(a)(2). Persons, including States, must give notice at least sixty days prior to commencing suit. *Id.* § 6972(c).

I. THE EPA HAS FAILED TO PERFORM NONDISCRETIONARY DUTIES

The NDDEQ submitted its proposed North Dakota’s Coal Combustion Residuals (“CCR”) Permit Program to EPA for approval on September 21, 2020. In response to the EPA’s comments on the initial package submittal, the NDDEQ submitted a revised program package to the EPA on May 21, 2021. On October 28, 2022, the NDDEQ received an e-mail from the EPA’s Office of Resource Conservation and Recovery providing NDDEQ with a final list of revisions to be made or considered, together with further questions. A November 3, 2022 follow-up e-mail from the Region VIII’s Land, Chemicals and Redevelopment Division’s RCRA Branch confirmed that most of the proposed revisions were optional and that the only change required for program approval was a modification of North Dakota’s statutory ground water definition to match the federal definition word-for-word.

The NDDEQ took immediate steps to address the final requirement identified by the EPA. The NDDEQ filed a bill with the 2023 North Dakota Legislative Assembly to change the applicable definition of “ground water” to the CCR program to match the federal definition. By emergency measure, the Legislative Assembly enacted this bill, and the new definition became effective on February 23, 2023. *See* North Dakota Century Code § 23.1-08-04. On March 10,

2023, the NDDEQ submitted a second revised program package to the EPA that included this revised statute.

Pursuant to 42 U.S.C. § 6945 (d)(1)(B), the 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. The EPA's deadline, running from NDDEQ's submission of the March 10, 2023, second revised program package, expired on September 6, 2023. Therefore, EPA failed to comply with the Solid Waste Disposal Act.

II. RCRA CLAIM

Under RCRA, North Dakota intends to pursue injunctive relief, future costs as allowed, and legal fees. North Dakota will bring claims under 42 U.S.C. § 6972(a)(2) against the EPA because the EPA has failed to approve or otherwise “act” on the application for North Dakota's Coal Combustion Residuals Permit Program. As of, at the latest, March 10, 2023, NDDEQ has submitted all evidence required by 42 U.S.C. § 6945(d)(1)(A). Thus, its application is approvable, and the EPA's approval of this application is overdue.

III. PERSONS GIVING NOTICE AND REPRESENTING ATTORNEYS

The identity of the party giving notice is the State of North Dakota, which is a sovereign state, on behalf of the North Dakota Department of Environmental Quality, and which is represented in this matter by its Attorney General, Drew H. Wrigley, whose address and contact information is as follows:

Drew H. Wrigley
North Dakota Attorney General
600 E. Boulevard Ave., Dept. 125
Bismarck, ND 58505-0040
Telephone: (701) 328-2210

Counsel of record in this matter and his contact information is as follows:

Erik Wallevand
Assistant Attorney General
Office of North Dakota Attorney General
500 North 9th Street
Bismarck, ND 58501-4509
Telephone: (701) 328-3640
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IV. CONCLUSION

If the EPA or the Administrator fails to cure its noncompliance with its nondiscretionary duty to act on approval of its state program, North Dakota intends to file suit in federal court seeking declaratory relief, injunctive relief, and litigation costs, as appropriate. Additionally, we would be happy to meet with EPA or its representatives to attempt to resolve these issues within the 60-day notice period.

Sincerely,

Handwritten signature of Erik Wallermd in black ink.

FOR THE STATE OF NORTH DAKOTA

cc: L. David Glatt, Director
North Dakota Department of Environmental Quality
4201 Normandy Street
Bismarck, ND 58503-1324