



# Public Service Commission

## State of North Dakota

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September 30, 2009

The Honorable Lisa Jackson  
Administrator  
U.S. Environmental Protection Agency  
Ariel Rios Building  
1200 Constitution Avenue, N.W.  
Mail Code 1101A  
Washington, DC 20460

Dear Administrator Jackson:

Earlier this year, the U.S. Environmental Protection Agency (EPA) announced that it would be developing a regulatory proposal for the disposal of coal combustion wastes (CCW's), or coal ash, by the end of the year. We now understand that EPA is planning to reverse the agency's May 22, 2000 regulatory determination that coal ash is not hazardous and should not be regulated as a hazardous waste under Subtitle C of the Resource Conservation and Recovery Act (RCRA). As the state agency that oversees the rates charged by investor-owned utility companies in the State of North Dakota, any proposal to consider CCW's as hazardous wastes is of utmost concern to us. This designation would unnecessarily impose a much higher degree of regulation and costs for the disposal of CCW's which will increase the cost of electricity to rate payers. This would also eliminate many beneficial uses of coal combustion by-products and would likely result in negative environmental impacts by causing lands to be disturbed for the construction of new hazardous waste disposal sites.

EPA's May 22, 2000 determination that coal ash is not hazardous was made following several years of review and analyses and we believe good reasoning went into the decision to classify coal ash as a non-hazardous waste. Much of the focus at that time was on CCW's that are placed in mined lands. While some environmental problems may occur if these wastes are not properly managed, EPA noted in the determination that the utility industry had made significant improvement in its waste management practices, including the use of liners and monitoring the groundwater at the landfills. However, the 2000 determination also indicated that further reviews would be conducted to determine if national standards need to be set under Subtitle D of RCRA for the disposal of non-hazardous solid wastes.

Following publication of EPA's 2000 regulatory determination, there were a series of discussions between states, the Office of Surface Mining (OSM) and EPA concerning next steps pursuant to the regulatory determination. Most of the CCW's from North Dakota coal fired power plants are placed in well designed disposal facilities on nearby lands that have been mined. Staff from our Reclamation Division were included in these discussions since one of our responsibilities is the regulation of surface coal mining operations pursuant to the federal Surface Mining Control and Reclamation Act of 1977 (SMCRA). Representatives from the Solid Waste Division of the North Dakota Department of Health were also involved in these discussions since they have regulated the disposal of CCW's under special waste disposal permits since the mid 1980's.

The first of these discussions began in 2001 and over the course of the next three years the parties shared and discussed information and analyses of their respective regulatory programs under SMCRA and RCRA. EPA conducted site reviews of CCW disposal sites in North Dakota and the Department of Health provided data and information to demonstrate that the appropriate environmental protections were being used in North Dakota.

Nearly all of the CCW's disposed of by North Dakota power plants are placed in mined areas under special waste disposal sites that are permitted by the Solid Waste Disposal Division at the State Department of Health. The CCW's disposed of in mined lands are placed in confined areas that are clearly designated for this use. Site characterization, including geologic and hydrologic data, as well as CCW characterization must be carried out as required by the Department of Health. The disposal areas must be designed with bottom, side and top liners as required by their regulations. In addition, long term groundwater monitoring is required during and after placement of the CCW's.

However, due to concerns in some parts of the country about the potential public health and environmental risks associated with using coal ash for reclamation in active and abandoned mines, Congress in 2004 directed EPA to commission an independent study of this topic. The National Research Council (NRC) then established the Committee on Mine Placement of Coal Combustion Wastes to conduct the study. The NRC conducted the study to examine the health, safety, and environmental risks associated with using CCW in reclamation at active and abandoned coal mines. The study was to determine whether CCW's were placed and disposed of in coal mines with adequate safeguards and whether this activity is degrading water supplies in coal mines. Once again, more data and information were provided to the NRC regarding the nature and status of state regulatory program requirements for the placement of CCW's in mines. On March 1, 2006, the NRC released a report entitled *Managing Coal Combustion Residues in Mines*.

That report concluded that the placement of CCW's in mines as part of coal mine reclamation would be an appropriate option if the CCW's are properly characterized and that the sites are designed with the appropriate safeguards and monitored. The report also noted that OSM and related state agencies that implement SMCRA currently have the regulatory framework in place to deal with CCW's. Shortly after the release of that report, OSM in consultation with EPA began to develop rules to address mine placement of CCW's. At that

time, it is our understanding that EPA also began reviewing the need for rules for the placement of CCW's in noncoal mines and other areas. By late 2008, OSM had developed draft proposed rules on mine placement but publication of the proposed rule has been postponed due to the change in administration. We believe EPA needs to work with OSM to continue the federal regulatory process that is well underway.

Also, we want to point out the beneficial use of many of the CCW's, or more properly called coal combustion by-products (CCB's). The Coal Creek Station in North Dakota has been marketing most of its fly ash for many years. This CCB product is used to make a more durable and stronger concrete. This use of fly ash, instead of cement, results in the disturbance of less land for quarrying the raw materials to make cement and less land is needed for disposal of coal ash. In addition, this beneficial use of CCB's produces revenue for the utility instead of having additional costs to dispose of ash.

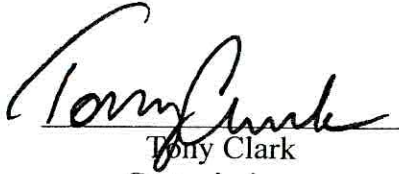
In addition, some of the coal mines use small quantities of fly ash to mix with clay and other earthen materials for stabilizing the surface of mine haul roads and parking lots. These uses of CCB's are also reviewed and approved by the Solid Waste Division of the Department of Health. Similar uses have been approved by the Department of Health for cattle feedlots and other construction projects.

With Department of Health approval, we are also using fly ash in our Abandoned Mine Lands (AML) reclamation projects. The fly ash is used as a cement substitute in grout mixes that are injected to fill subsurface voids associated with abandoned underground coal mines. In early 1995 our AML Division received approval from the Department of Health to use specific grout formulations containing fly ash for abandoned underground mine backfilling projects. This approval was based on the result of a PSC-funded research project that compared physical and chemical characteristics of many different grout formulations that included fly ash. The AML Division has also conducted groundwater monitoring on selected AML grouting projects. This monitoring has included sampling of monitoring wells and/or nearby domestic wells before, during and after the project. Sample analyses usually include general chemistry and have also included heavy metals and radionuclides. No concerns or problems have been identified.

The disposal of CCW's in North Dakota has been occurring for many years with the appropriate environmental safeguards. While certain measures are prudent and necessary to ensure environmental protection, there is no need to consider the coal ash as a hazardous waste that will greatly increase the disposal costs to the utilities that would ultimately be passed on to the electricity rate payers. Such a designation would also eliminate the beneficial use of many coal combustion by-products. If you believe further regulation of CCW's is warranted, we strongly recommend that EPA continue to work with OSM on their draft rules for the mine placement of CCW's and that any other national standards be established under Subtitle D of RCRA for the disposal of non-hazardous solid wastes.

Thank you for the consideration given to these comments.

Sincerely,



Tony Clark  
Commissioner



Kevin Cramer  
Chairman



Brian P. Kalk  
Commissioner

cc: Honorable Kent Conrad, United States Senator  
Honorable Byron Dorgan, United States Senator  
Honorable Earl Pomeroy, United States Representative