

Federal Judge Orders EPA to Provide a Proposed Deadline for Completion of CCR Regulatory Action

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On October 29, 2013, the U. S. District Court for the District of Columbia issued a memorandum opinion and order on the parties' motions for summary judgment in *Appalachian Voices v. McCarthy*. As we [reported](#) earlier this month, the court previously issued an order indicating it would grant summary judgment to the environmental plaintiffs, a number of environmental organizations including Appalachian Voices, the Environmental Integrity Project, and the Sierra Club, and grant in part the summary judgment motion filed by coal combustion residuals (CCR) marketers Headwaters Resources, Inc. and Boral Material Technologies.

The environmental plaintiffs brought three claims: that EPA failed to fulfill its obligation under Section 2002(b) of the Resource Conservation and Recovery Act (RCRA) to review and revise, as necessary, each regulation promulgated under RCRA at least every three years with respect to: (1) the regulation exempting CCR from a hazardous waste; (2) regulations regarding CCR under Subtitle D of RCRA, and (3) the regulation establishing the toxicity characteristic, which would classify a solid waste that is not otherwise excluded from regulation as hazardous. The CCR marketers alleged only that EPA had failed to fulfill its obligation under Section 2002(b) to review and revise, as necessary, the Subtitle D regulations regarding CCR. The court granted summary judgment to EPA on the environmental plaintiffs' first and third claims, but granted summary judgment in part to the plaintiffs' on their shared claim regarding CCR regulations under Subtitle D. The court did not impose any deadline for EPA to complete its review and, if necessary, revision of the regulations. Instead, the court ordered EPA to submit a proposed deadline for its review and, if necessary, revision of the Subtitle D regulations concerning CCR, within 60 days of the date of the court's order.

The court disposed of the intervenor defendants' argument that the plaintiffs' claims were barred by the six-year statute of limitations for claims against the United States, holding that Section 2002(b) of RCRA imposed a continuing obligation on EPA to review the RCRA regulations and revise them as necessary every three years, such that EPA's inaction constituted a continuing violation. The court also disposed of EPA's argument that the CCR marketers lacked standing, reasoning that since the CCR marketers' claim was substantially identical to the environmental plaintiffs' second claim, for which the environmental plaintiffs' standing was uncontested, they did not need to separately establish standing. However, the court held that the environmental plaintiffs did not have standing to bring their third claim regarding the toxicity characteristic rule. The court reasoned that because CCR is excluded from regulation as a hazardous waste, even if EPA were to revise the toxicity characteristic rule such that CCR were to demonstrate the toxicity characteristic, it would still be excluded because EPA's determination relied not only upon the results of the

toxicity leaching procedure, but also other factors. Therefore, the plaintiffs’ harms are not caused by EPA’s failure to revise that rule and would not be redressed by a revision of the rule.

The court held that EPA does not have a non-discretionary duty to review and, if necessary, revise the regulation exempting CCR from regulation under Subtitle C. This is because the regulation excluding CCR from regulation under Subtitle C was simply a codification of a statutory provision known as Bevill Amendment, which set forth a “distinct regulatory process for Bevill wastes that does not fall within the EPA’s routine regulatory authority under the RCRA.” In contrast, however, Section 2002(b) does impose upon EPA a non-discretionary duty to review and, if necessary, revise the Subtitle D regulations concerning CCR.

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