

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

APPALACHIAN VOICES, *et al.*,
Plaintiffs,)

v.)

GINA McCARTHY, in her official capacity as
Administrator, United States
Environmental Protection Agency,
Defendant,)

and)

UTILITY SOLID WASTE ACTIVITIES
GROUP, and NATIONAL MINING
ASSOCIATION,
Intervenor-Defendants.)

Civ. No. 1:12-cv-00523-RBW

HEADWATERS RESOURCES, INC.,
Plaintiff,)

v.)

GINA McCARTHY, in her official capacity as
Administrator, United States
Environmental Protection Agency,
Defendant.)

Civ. No. 1:12-cv-00585-RBW

BORAL MATERIAL
TECHNOLOGIES, INC.,
Plaintiff,)

v.)

GINA McCARTHY, in her official capacity as
Administrator, United States
Environmental Protection Agency,
Defendant.)

Civ. No. 1:12-cv-00629-RBW

CONSENT DECREE

WHEREAS, these consolidated actions have been brought pursuant to the citizen suit provision of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C.

§ 6972(a)(2) against Defendant Gina McCarthy, in her official capacity as Administrator of the United States Environmental Protection Agency (“EPA”);

WHEREAS, Plaintiff Appalachian Voices, *et al.*, allege in their complaint that EPA has failed to perform a nondiscretionary duty arising under section 2002(b) of RCRA, 42 U.S.C.

§ 6912(b), by failing to complete the required review, at least every three years, and revision if necessary, of RCRA subtitle D regulations pertaining to coal combustion residuals;

WHEREAS, Plaintiffs Headwaters Resources, Inc. and Boral Material Technologies, Inc., similarly allege in their complaints that EPA has failed to perform a nondiscretionary duty arising under section 2002(b) of RCRA, 42 U.S.C. § 6912(b), by failing to complete the required review, at least every three years, and revision if necessary, of RCRA subtitle D regulations pertaining to coal combustion residuals;

WHEREAS, by orders dated September 30, 2013 and October 29, 2013 (Docket Nos. 37 and 41), the Court has granted summary judgment on the merits of Plaintiffs’ claims that EPA has failed to complete the required review at least every three years, and revision if necessary, of RCRA Subtitle D regulations pertaining to coal combustion residuals;

WHEREAS, the Court in its orders dated September 30, 2013 and October 29, 2013 has reserved ruling on establishing a deadline for EPA’s compliance with its obligation to review, and revise if necessary, certain RCRA subtitle D regulations pertaining to coal combustion residuals, and requested supplemental briefing on remedy;

WHEREAS, the Court in its orders dated September 30, 2013 and October 29, 2013, has granted summary judgment to EPA and Intervenor Defendants, on additional claims for relief asserted by Plaintiffs Appalachian Voices, *et al.*, in their complaint;

WHEREAS, in a proposed rule published on June 21, 2010, 75 Fed. Reg. 24,148, EPA proposed, as one regulatory option, to revise its RCRA subtitle D regulations pertaining to coal combustion residuals;

WHEREAS, EPA has solicited comment on its proposal to revise its RCRA subtitle D regulations pertaining to coal combustion residuals, and on new information and data related to its proposal;

WHEREAS, it is in the interest of the public, the parties, and judicial economy to resolve the issues in this action without further litigation;

WHEREAS, by entering into this Consent Decree, the Parties do not waive or limit any claim or defense, on any ground, related to any final agency action taken pursuant to this Consent Decree;

WHEREAS, the Court finds and determines that it has jurisdiction to enter this Decree; and

WHEREAS, the Court finds and determines that this Consent Decree represents a just, fair, adequate, and equitable resolution of the remaining claim raised in this action;

NOW, THEREFORE, it is hereby ORDERED, ADJUDGED, AND DECREED as follows:

I. GENERAL TERMS

1. The Parties to this Consent Decree are Plaintiffs, Defendant, and Intervenor Defendants (hereinafter together and severally the “Parties”). The Parties understand that (a) Gina McCarthy was sued in her official capacity as Administrator of the United States Environmental Protection Agency; and (b) the obligations arising under the Consent Decree are to be performed by EPA and not by Gina McCarthy in her individual capacity.

2. This Consent Decree applies to, is binding upon, and inures to the benefit of the Parties, and their respective successors, assigns, and designees.

II. DEFINITIONS

3. The following definitions shall apply to the terms referred to in this Consent Decree:

- a. “Consent Decree” shall mean this document;
- b. “Coal combustion residuals” shall mean fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste, generated from the combustion of coal;
- c. “EPA” shall mean Gina McCarthy, the Administrator of the United States Environmental Protection Agency;

- d. “Plaintiffs” shall mean Appalachian Voices, Chesapeake Climate Action Network, Environmental Integrity Project, Kentuckians for the Commonwealth, Moapa Band of Paiutes, Montana Environmental Information Center, Physicians for Social Responsibility, Prairie Rivers Network; Sierra Club; Southern Alliance for Clean Energy; Western North Carolina Alliance; Headwaters Resources, Inc., and Boral Material Technologies, Inc.;
- e. “Intervenor Defendants” shall mean the Utility Solid Waste Activities Group and the National Mining Association.

III. DEADLINE FOR AGENCY ACTION

4. The EPA Administrator shall, by December 19, 2014, sign for publication in the Federal Register a notice taking final action regarding EPA’s proposed revision of RCRA subtitle D regulations pertaining to coal combustion residuals. EPA will promptly transmit this signed notice to the Federal Register, and EPA shall provide the Parties with a copy of such notice taking final action within five business days of signature by the Administrator.

IV. EFFECTIVE DATE

5. This Consent Decree shall become effective upon the date of its entry by the Court. If for any reason the Court does not enter this Consent Decree, the obligations set forth in this Consent Decree are null and void.

V. REMEDY, SCOPE OF JUDICIAL REVIEW AND CONTINUING JURISDICTION

6. The Court shall retain jurisdiction to determine and effectuate compliance with this Consent Decree, to resolve any disputes thereunder, and to consider any requests for costs of litigation, including attorney's fees, pursuant to Section XI of this Consent Decree.

7. Nothing in this Consent Decree shall be construed to confer upon this Court jurisdiction to review any decision, either procedural or substantive, to be made by EPA pursuant to this Consent Decree, except for the purpose of determining EPA's compliance with the terms of this Consent Decree.

8. Plaintiffs' sole judicial remedy to address the merits of any final agency action taken by EPA pursuant to this Consent Decree is to file a new lawsuit to challenge such final action. Plaintiffs reserve their right to bring any such challenge. EPA reserves all of its defenses to any such suits. Nothing in this Consent Decree alters or affects the standards for judicial review of final EPA action.

9. The obligations imposed by EPA under Paragraph 4 of this Consent Decree can only be undertaken using appropriated funds. No provision of this Decree shall be interpreted as or constitute a commitment or requirement that EPA obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable federal statute.

VI. COVENANTS AND RESERVATION OF RIGHTS

10. The Parties shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

11. Upon approval and entry of this Consent Decree by the Court in Appalachian Voices et al. v. McCarthy, Case No. Civ. No. 1:12-cv-00523-RBW (and consolidated cases), the

Parties agree that they will not appeal the orders dated September 30, 2013 and October 29, 2013 and any corresponding judgment thereon.

VII. TERMINATION OF CONSENT DECREE

12. After EPA's obligations under Paragraph 4 have been concluded, EPA may move to have this Consent Decree terminated. Plaintiffs shall have 14 days in which to respond to such motion.

VIII. DISPUTE RESOLUTION

13. In the event of a dispute among the Parties concerning the interpretation or implementation of any aspect of this Consent Decree, the disputing Party shall provide the other Parties with a written notice of the dispute requesting informal negotiations. The Parties shall meet and confer to attempt to resolve the dispute. If the Parties cannot reach an agreed-upon resolution after twenty (20) business days following receipt of the written notice, any Party may move the Court to resolve the dispute.

14. No motion or other proceeding to enforce this Consent Decree or for contempt of court shall be properly filed unless the Party seeking to enforce this Consent Decree has followed the procedure set forth in Paragraph 13.

15. It is hereby understood and agreed that this Consent Decree was jointly drafted by the Parties and that any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Consent Decree.

IX. MODIFICATION AND EXTENSIONS

16. The deadline in Paragraph 4 above may be extended by written stipulation executed by counsel for all Plaintiffs and EPA and filed with the Court.

17. The parties recognize that the performance of this Consent Decree is subject to appropriations laws and regulations of the United States. The possibility exists that a government shut-down such as occurred in 1995, 1996 and 2013 could delay EPA's performance of obligations under this Consent Decree. In the event of a government shut-down affecting EPA occurring within one-hundred and twenty (120) days of the deadline set forth in Paragraph 4 above, the deadline in Paragraph 4 shall be extended one day for each day of the shut-down. EPA will provide the Parties and the Court with notice as soon as is reasonably possible in the event that EPA invokes this term of the Consent Decree. Plaintiffs may challenge the invocation of this term of the Consent Decree under the dispute resolution terms of this Consent Decree.

X. AGENCY DISCRETION

18. Nothing in this Consent Decree shall be construed to limit or modify any discretion accorded EPA by RCRA or by general principles of administrative law in taking the action which is the subject of this Consent Decree, including the discretion to alter, amend, or revise any final action contemplated by this Consent Decree. EPA's obligation to perform the action specified by Paragraph 4 does not constitute a limitation or modification of EPA's discretion within the meaning of this paragraph.

XI. COSTS

19. The deadline for filing a motion for costs of litigation (including attorney's fees) for activities performed prior to entry of this Consent Decree is hereby extended until 180 days after entry of this Consent Decree by the Court. During this time Plaintiffs and EPA shall seek to resolve informally any claim for costs of litigation (including attorney's fees), and if they cannot, will submit that issue to the Court for resolution.

XII. NOTICE AND CORRESPONDENCE

20. Any notice, including correspondence, required or made with respect to this Consent Decree, shall be in writing and shall be effective upon receipt. For any matter relating to this Consent Decree, the contact persons are:

For Plaintiffs Appalachian Voices, et al.:

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For Defendant EPA:

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For Intervenor Defendant National Mining Association:

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dpatterson@bdlaw.com

XIII. REPRESENTATIVE AUTHORITY

21. The undersigned certify that they are fully authorized by the Party or Parties they represent to bind that Party or those Parties to the terms of this Consent Decree.

SO ORDERED this _____ day of _____, 2014

HON. REGGIE B. WALTON
UNITED STATES DISTRICT JUDGE

SO AGREED:

FOR DEFENDANT

STEVEN C. SILVERMAN
Deputy Assistant Attorney General
Environment & Natural Resources Division



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FOR PLAINTIFFS APPALACHIAN VOICES, CHESAPEAKE CLIMATE ACTION NETWORK, ENVIRONMENTAL INTEGRITY PROJECT, KETUCKIANS FOR THE COMMONWEALTH, MONTANA ENVIRONMENTAL INFORMATION CENTER, MOAPA BAND OF PAIUTES, PRAIRIE RIVERS NETWORK, PHYSICIANS FOR SOCIAL RESPONSIBILITY, SOUTHERN ALLIANCE FOR CLEAN ENERGY, WESTERN NORTH CAROLINA ALLIANCE, AND SIERRA CLUB

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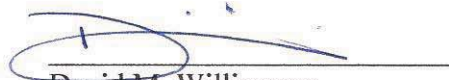
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FOR PLAINTIFF HEADWATER RESOURCES, INC.

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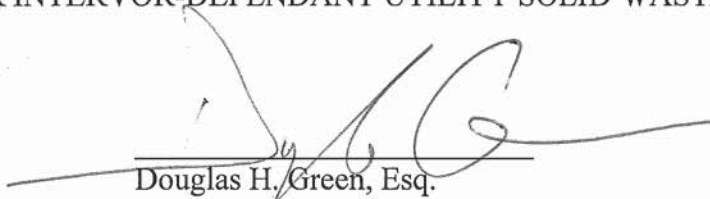
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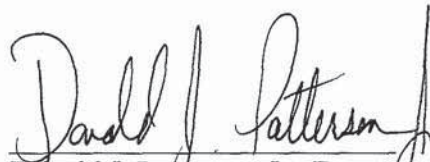
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FOR INTERVOR-DEFENDANT UTILITY SOLID WASTE ACTIVITIES GROUP

A handwritten signature in black ink, appearing to read 'D.H. Green', is written over a horizontal line. The signature is stylized and extends to the right of the line.

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FOR INTERVENOR-DEFENDANT NATIONAL MINING ASSOCIATION

A handwritten signature in cursive script that reads "Donald J. Patterson, Jr." The signature is written in black ink and is positioned above the typed contact information.

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