

**UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA**

BORAL MATERIAL)
TECHNOLOGIES INC.)
200 Mansell Court East, Suite 305)
Roswell, GA 30076)
)
Plaintiff,)
)
v.)
)
LISA P. JACKSON, in her official)
capacity as Administrator, United States)
Environmental Protection Agency)
Ariel Rios Building)
1200 Pennsylvania Avenue, NW)
Washington, D.C. 20460)
)
Defendant.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. Plaintiff, Boral Material Technologies Inc. (hereinafter “Plaintiff” or “BMTI”), brings this action to compel the U.S. Environmental Protection Agency (“EPA” or “the Agency”) to undertake review and, as necessary, revision of its regulations governing coal ash, codified at 40 C.F.R. Part 257, Subpart A, as required under the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6901-6992k.

2. Currently pending before this Court are two related cases, styled as *Appalachian Voices et al. v. Jackson*, Case No. 12-cv-00523-RBW, and *Headwaters Resources, Inc. v. Jackson*, Case No. 12-cv-00585-RBW, in which plaintiffs in those actions have similarly filed suit to compel the EPA to, among other things, undertake review and, as necessary, revision of the Agency’s 40 C.F.R. Part 257, Subpart A regulations governing coal ash under RCRA.

JURISDICTION

3. This action arises under the citizen suit provision of RCRA, 42 U.S.C. § 6972(a)(2).

4. This Court has jurisdiction over this action pursuant to 42 U.S.C. § 6972(a)(2), as well as 28 U.S.C. §§ 1331 and 1361, and may issue a declaratory judgment and grant further relief pursuant to 42 U.S.C. § 6972(a) and 28 U.S.C. §§ 2201 and 2202.

5. Plaintiff has a right to bring this action pursuant to 42 U.S.C. § 6972(a)(2) and the Administrative Procedure Act, 5 U.S.C. §§ 701 to 706.

6. By letter dated February 17, 2012, Plaintiff BMTI gave notice to Defendant of the violations alleged herein, and has thereby complied with the sixty-day notice requirement of RCRA's citizen suit provision. 42 U.S.C. § 6972(c). Defendant has not remedied its violations since the notice was given.

PARTIES

7. Plaintiff BMTI is a leading marketer of fly ash and coal combustion products, known in regulatory parlance as coal combustion residuals ("CCR"). With more than four decades of experience marketing fly ash to the concrete industry, BMTI is a pioneer in the development of new construction material technologies. In addition to fly ash, other coal combustion products such as bottom ash and products resulting from flue-gas desulfurization ("FGD ash") may be used to produce "green" construction materials. The use of CCR in construction materials results in many environmental, energy and economic benefits, including avoidance of virgin material extraction, reduced energy inputs, and enhanced materials performance and durability. BMTI also provides coal-fired power generating plants with on-site ash handling and management, environmental services and

engineering services. BMTI is not only successful in marketing fly ash, but also helps utility plants utilize their coal combustion products through innovative marketing and product development.

8. Defendant Lisa P. Jackson is the Administrator of the EPA and in that role is charged with the duty to review regulations and revise such regulations, as necessary, according to the schedules set forth in RCRA.

NOTICE OF RELATED CASE

9. As indicated in the Notice of Designation of Related Civil Cases Pending, filed in conjunction with this Complaint, pending before this Court are two related cases styled as (1) *Appalachian Voices, et al. v. Jackson*, Case No. 12-cv-00523-RBW, and (2) *Headwaters Resources, Inc. v. Jackson*, Case No. 12-cv-00585-RBW.

10. The plaintiffs in these related actions have similarly filed suit to compel the EPA to, among other things, undertake review and, as necessary, revision of the Agency's 40 C.F.R. Part 257, Subpart A regulations governing coal ash under RCRA.

11. Plaintiff BMTI does not herein assert all of the claims set forth in *Appalachian Voices* and does not fully agree with the *Appalachian Voices* plaintiffs' characterization of the issues. Rather, BMTI aligns its claims and the characterization of the issues with *Headwaters Resources*. Because all three cases involve common issues of law and fact, grow out of the same events and transactions, and involve the same defendant, consolidation of the present action with *Appalachian Voices* and *Headwaters Resources* is warranted, as it would conserve judicial resources and avoid the potential for inconsistent rulings.

STATUTORY AND REGULATORY BACKGROUND

12. The goal of RCRA is to promote the protection of health and the environment and to conserve valuable material and energy resources by promoting, among other things, improved

methods of recovery and use of solid waste and environmentally safe disposal of non-recoverable residues. *See, e.g.*, 42 U.S.C. § 6902(a)(1), (3), (8), (9), (10) and (11).

13. The specific objective of the RCRA subchapter regarding solid waste is to develop and encourage disposal practices that are environmentally sound and that maximize the utilization of valuable resources to encourage resource conservation. 42 U.S.C. § 6941.

14. To achieve these objectives, the Act authorizes the Administrator of EPA to prescribe regulations as necessary to accomplish the goals of the Act. 42 U.S.C. § 6912(a)(1).

15. The regulations that are currently applicable to coal ash disposal, known as “Subtitle D” regulations, are contained in the Criteria for Classification of Solid Waste Disposal Facilities, promulgated in 1979. *See* 40 C.F.R. Part 257, Subpart A. These criteria broadly define the practices that distinguish open dumps from sanitary landfills. Coal ash disposal sites not meeting the standards set forth in 40 C.F.R. Part 257, Subpart A are classified as open dumps, and are prohibited under RCRA section 4005(a). 42 U.S.C. § 6945(a). The Part 257, Subpart A criteria prescribe general environmental performance standards, including, for example, regulations broadly addressing surface water (§ 257.3-3) and groundwater (§ 257.3-4).

16. On September 23, 1981, the EPA amended sections 257.3-3, 257.3-4 and 257.3-7. *See* 46 Fed. Reg. 47,048 (Sept. 23, 1981). The EPA also amended Appendix 1 of 40 C.F.R. Part 257 in 1991. *See* 56 Fed. Reg. 50,978 (Oct. 9, 1991). The EPA amended section 257.3-4 with regard to the disposal of sewage sludge on February 19, 1993. *See* 58 Fed. Reg. 9248 at 9386. The EPA has not published further revisions to the Subpart A regulations.

17. Section 2002(b) of RCRA requires that each regulation promulgated under the Act “shall be reviewed and, where necessary, revised not less frequently than every three years.” 42

U.S.C. § 6912(b). Section 2002(b) imposes a mandatory obligation on the EPA to take such action in accordance with this three-year statutory deadline.

18. On June 21, 2010, EPA published proposed rules for CCRs with one option that would regulate CCRs under subtitle C of RCRA, which governs hazardous waste, and a second option that would regulate CCRs under subtitle D of the Act, which governs solid waste. *See Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities*, 75 Fed. Reg. 35,128 (June 21, 2010). Approximately eighteen months later, rather than issuing a final rule, the EPA published a Notice of Data Availability that solicited additional public comment on the proposed rule. *See 76 Fed. Reg. 63,252* (Oct. 12, 2011). To date, the EPA has issued no final CCR rule.

19. EPA's inordinate delay in making a determination on whether and how to revise its current 40 CFR Part 257, Subpart A rules regarding CCR is creating uncertainty in the beneficial use marketplace. Some consumers that would otherwise readily use CCRs in products and applications, architects and engineers who would specify the use of CCRs in various projects, and utilities that would supply CCRs for beneficial use are refusing to do so, or are doing so only under certain conditions that limit their liability, all due to the regulatory uncertainties being caused by EPA's inaction. As a leading marketer of CCRs that are beneficially used, such uncertainty is having a negative impact on BMTI's business.

20. In addition, EPA's failure to revise its regulations to facilitate and promote the beneficial use of CCRs is constraining the recycling of CCRs, with the attendant result of wasted resources, adverse economic impacts and increased environmental impacts that would otherwise be avoided through beneficial reuse.

CAUSE OF ACTION

FIRST CLAIM FOR RELIEF

**VIOLATION OF 42 U.S.C. § 6912(b)
(Failure to Review and Revise, as Necessary, 40 C.F.R. Part 257, Subpart A)**

21. Plaintiff realleges and incorporates paragraphs 1 through 20.
22. Defendant violated , and is continuously in violation of, section 2002(b) of RCRA by failing to review 40 C.F.R. Part 257, Subpart A concerning coal ash, failing to make a determination of the necessity of revisions, and failing to revise Subpart A, where determined to be necessary, not less frequently than every three years,. 42 U.S.C. § 6912(b).
23. As a result, Defendant has failed to fulfill its obligation under section 2002(b) of RCRA. Defendant's failure to complete a review of these regulations as they apply to coal ash and revise the regulations as necessary pursuant to section 2002(b) of RCRA constitutes a "failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator" within the meaning of 42 U.S.C. § 6972(a)(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff requests that this Court:

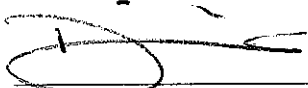
1. Declare that Defendant has violated RCRA in failing to meet the statutory deadlines for completing the requisite review of regulations and revising such regulations where necessary;
2. Order Defendant to complete a review of the 40 C.F.R. Part 257, Subpart A regulations applying to coal ash as soon as possible;
3. Order Defendant to decide whether revisions to its 40 C.F.R. Part 257, Subpart A regulations are necessary or not, and if so, promulgate revisions of the 40 C.F.R. Part 257,

Subpart A regulations it finds to be necessary in accordance with section 2002(b) of RCRA as soon as possible;

4. Retain jurisdiction of this action to ensure compliance with its decree;
5. Award Plaintiff the costs of this action, including attorney's fees; and
6. Grant such other relief as the Court deems just and proper.

DATED: April 20, 2012

Respectfully submitted,



David M. Williamson
D.C. Bar No. 462762
ALSTON & BIRD LLP
950 F Street, NW
Washington, DC 20004
Phone: (202) 239-3223
Fax: (202) 654-4833
Email: max.williamson@alston.com

*Counsel for Plaintiff Boral Material
Technologies Inc.*