

WASHINGTON UPDATE
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Snag in Coal Ash Rulemaking Lawsuit Unlikely to Affect December 2014 Deadline

A federal judge has declined to approve a proposed consent decree that would establish a December 19, 2014, deadline for the U.S. Environmental Protection Agency ("EPA") to conclude its longstanding coal ash disposal rulemaking under the Resource Conservation and Recovery Act ("RCRA.") The deadline, however, does not appear to be in jeopardy. The judge objected to a provision in the consent decree that would have given parties to the agreement the ability to change the deadline without further court approval.

Parties to the consent decree have indicated that they will amend that provision and resubmit the proposed consent decree to the court.

The April 24, 2014, ruling by U.S. District Court Judge Reggie Walton said the consent decree was "generally fair, adequate, reasonable, appropriate and consistent with the public interest." In rejecting the proposal, he wrote: "While the Court finds the deadline set forth in the proposed consent decree consistent with the public interest, because the proposed decree would allow the EPA and the parties to this litigation to unilaterally extend the deadline for the EPA's final action, the Court cannot approve it in its current form."

The consent decree was agreed to by all of the parties to a federal lawsuit that sought to compel a deadline for EPA. In the consent decree, EPA continued to signal that its final regulation would be promulgated under the "non-hazardous" Subtitle D of RCRA.

"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," the consent decree said. EPA has indicated in a related rulemaking on Effluent Limitation Guidelines that the Agency's "current thinking" is that a Subtitle D regulation will be appropriate.

The action resulted from the lawsuit "Appalachian Voices et al vs. Gina McCarthy," in which 11 environmental groups and ash marketers Headwaters Resources and Boral Materials sued EPA seeking a deadline. The Utility Solid Waste Activities Group and the National Mining Association were allowed to intervene.