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

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| JAMES FARMER, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,<br><br>Defendants,<br><br>and<br><br>NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,<br><br>Intervenor-Defendant. | Civil Action No. 24-cv-01654-DLF<br><br>Hon. Dabney L. Friedrich |

**INTERVENOR-DEFENDANT NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' REPLY IN SUPPORT OF MOTION TO JOIN DEFENDANTS' MOTION TO DISMISS**

In their haste to force the regulation of per- and polyfluoroalkyl substances (PFAS) in biosolids, Plaintiffs maintain the legally unsupported argument that the Clean Water Act (CWA) requires the Court to compel EPA to regulate specific PFAS compounds now. In Plaintiffs' view, EPA cannot first complete its current risk assessment process or determine whether regulation of PFAS in biosolids is or is not warranted at this time. As the Court observed in its decision granting NACWA's intervention, Plaintiffs' requested relief would deny EPA the opportunity to exercise its rulemaking discretion on this topic. *See Farmer v. U.S. EPA*, --- F.Supp.3d ----, 2024 WL 5118193, at *3 (D.D.C. Dec. 16, 2024) ("Should the plaintiffs' suit prove successful . . . EPA would be required to promulgate new regulations concerning PFAS in sewage sludge.")

Rather than engage with the plain text of the CWA, Plaintiffs' Opposition to NACWA's Motion to Dismiss (ECF No. 31) (Opp'n) seeks to rewrite Section 405(d) of the Act. Plaintiffs overlook the unambiguous language and structure of Section 405(d)(2)(C) and instead offer "inferences" that disregard Congress' drafting decisions. In doing so, Plaintiffs only reenforce that Section 405(d)(2)(C) lacks the clear directives and hard deadlines that might give rise to a nondiscretionary duty for EPA that could be enforceable through a citizen suit.

Plaintiffs' arguments that EPA's Biennial Report constitutes a stand-alone final agency action for purposes of their Administrative Procedure Act (APA) claim fare no better. On the contrary, the absence of any public input opportunity on the Biennial Report and EPA's ongoing effort to solicit public input on its recently-published risk assessment for two PFAS compounds demonstrate that the agency is in the middle of its decision-making process. Plaintiffs ignore the Congressionally-mandated procedures for biosolids rulemaking and seek to substitute an unorthodox process foreign to the CWA—judicial, as opposed to administrative, fact-finding concerning the risks posed to human health and environment by certain chemicals—that limits public participation in the decision-making process to only the parties in this lawsuit, rather than the public at large.

Plaintiffs should not be permitted to use this Court to bypass the procedures laid out by Congress in the CWA for the regulation of biosolids and substitute their own judgment for that of EPA. The Court should grant NACWA's Motion and dismiss this action.[1]

[1] In accordance with the Court's order granting NACWA's motion to intervene, *see* Order at 1, ECF No. 28, NACWA certifies that it has conferred with counsel for EPA prior to filing. Because this Reply relates to NACWA's motion to join Defendants' motion to dismiss (ECF No. 30), NACWA files this Reply independently.

## ARGUMENT

### A. Plaintiffs Fail to Identify a Nondiscretionary Duty in the Text or Structure of Section 405(d)(2)(C).

The language, structure, and syntax of Section 405(d)(2)(C) do not support Plaintiffs' argument. Section 405(d)(2)(C) sets forth one duty: that EPA "shall review" existing biosolids regulations periodically. The remainder of the provision explains the *reason* or *purpose* for the biennial review—i.e., "identifying toxic pollutants" and, where necessary, "promulgating regulations."[2] There are no words requiring that EPA "shall" do anything besides reviewing its existing regulations and, therefore, the provision does not create any other duties for EPA beyond the review itself.

In an attempt to circumvent the language of Section 405(d)(2)(C), Plaintiffs ask the Court to infer a nondiscretionary duty from vague cross-references. Regardless of whether Section 405(d)(2)(C)'s reference to "this paragraph" applies to only Section 405(d)(2) or to Section 405(d) overall,[3] the statute does not include any specific deadline for EPA to issue regulations after a biennial review. While both Section 405(d)(1) and Sections 405(d)(2)(A) and (B) contain date-specific deadlines for issuing certain regulations, those deadlines are not at issue here; rather, Plaintiffs' claims turn on the timing of new regulations after a biennial review.[4]

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[2] Specifically, both "identifying" and "promulgating" are gerunds that serve as the objects of the preposition "of" within the paired phrases "for the purpose of." *See* 33 U.S.C. § 1345(d)(2)(C).

[3] Plaintiffs' reliance on Congress' typical "hierarchical scheme" is inapplicable to Section 405. *See* Opp'n at 3, ECF No. 31. Congress clearly did not employ it here. *See* 33 U.S.C. §§ 1345(d)(2)(A)(i), 1345(d)(2)(B)(i) (referring to Section 405(d)(1)(A) as a "paragraph" rather than a subparagraph); 33 U.S.C. § 1345(d)(2)(A)(ii) (referring to Section 405(d)(2)(A)(i) as a "subparagraph" rather than a clause); 33 U.S.C. § 1345(d)(2)(B)(ii) (referring to Section 405(d)(2)(B)(i) as a "subparagraph" rather than a clause).

[4] 33 U.S.C. § 1345(d)(1) (requiring EPA to develop and publish, within one year after December 27, 1977, and from time to time thereafter, regulations for the use and disposal of biosolids); 33 U.S.C. § 1345(d)(2)(A) (requiring EPA to identify pollutants by November 30, 1986 and

Congress set no such deadlines in Section 405(d)(2)(C). Congress knows how to set rulemaking deadlines, and it has a variety of tools at its disposal to establish regulatory timelines—including both date-certain deadlines as well as general deadlines that apply for recurring obligations. *See, e.g.*, *Gen. Motors Corp. v. United States*, 496 U.S. 530, 537–38 (1990) (Congress intended to omit a deadline where the statute section did not expressly contain one and other statute sections did contain express deadlines); *Nat. Res. Def. Council, Inc. v. Browner*, 57 F.3d 1122, 1123, 1127 (D.C. Cir. 1995) (Congress amended the Clean Air Act to extend the Act's attainment deadlines and included specific intermediate deadlines for states to comply); *Kingman Park Civic Ass'n v. U.S. Env't Prot. Agency*, 84 F. Supp. 2d 1, 3 (D.D.C. 1999) ("So important is Section 303(d) to the CWA's overall structure that Congress compelled both the states and EPA to abide by strict, date-certain deadlines . . . ."); *Env't Def. v. Leavitt*, 329 F. Supp. 2d 55, 64 (D.D.C. 2004) (Congress required EPA to act within eighteen months of a specified event).

Despite the availability of all those deadline-setting tools, Plaintiffs ask this Court to infer a deadline for Section 405(d)(2)(C) from the surrounding provisions that is "consistent with the time frames Congress imposed in the initial rounds."[5] Plaintiffs have not identified any authority to assert that date-certain deadlines can be used to infer additional, generally applicable deadlines for a *different* rulemaking. Nor could they, since such an interpretation violates canons of statutory

promulgate final regulations by August 31, 1987 based on "available information"); 33 U.S.C. § 1345(d)(2)(B) (requiring EPA to identify pollutants by July 31, 1987 and promulgate final regulations by June 15, 1988 for pollutants "not identified under subparagraph (A)(i)").

[5] *See* Opp'n at 4. In acknowledging that this "could be" one interpretation, Plaintiffs effectively concede this is a not a plain reading of the statute. But even under Plaintiffs' interpretation, there is no clearly defined time limit since those other provisions employ different time frames. *See* 33 U.S.C. § 1345(d)(2)(A) (establishing the final regulation deadline 274 days after the proposed regulation); 33 U.S.C. § 1345(d)(2)(B) (establishing the final regulation deadline 320 days after the proposed regulation).

interpretation. *See United States ex rel. Vermont Nat'l Tel. Co. v. Northstar Wireless LLC*, 703 F. Supp. 3d 48, 61 (D.D.C. 2023) ("[A] circumstance for which 'a text does not provide is unprovided.'") (quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts 93–100 (2012) (discussing "omitted-case canon")).

Without clear language of command or a precise deadline, Section 405(d)(2)(C) does not establish an obligation to issue new regulations that constitutes an enforceable duty. Plaintiffs offer no legal support to countermand the text of Section 405(d)(2)(C) or to infer a duty to rush to regulate PFAS. EPA is moving forward on its scientific work on PFAS as provided under the law and Plaintiffs can demand no more. As such, Plaintiffs' first and fourth claims must be dismissed.[6]

**B. The Biennial Report Is Not an Independent Final Agency Action.**

Plaintiffs do not raise any new arguments asserting there is a final agency action in this case. *See* Opp'n at 4 (cross referencing prior brief). Instead, they doubled down on an argument that the Court is empowered to take evidence and order the regulation of PFAS as it sees fit, bypassing the public and transparent regulatory processes that are already underway. EPA's processes are authorized by and consistent with the CWA and the APA; Plaintiffs' proposal is not.

As they have done throughout this litigation, Plaintiffs again attempt to artificially cleave a singular, continuous rulemaking process into two distinct segments: the Biennial Report, which Plaintiffs misconstrue as an independent decision on whether to regulate, and a subsequent decision on how to regulate. *See* Opp'n at 4. As a result of this interpretation, Plaintiffs take the remarkable position that "the decision *whether* to regulate a substance in the first instance does

[6] Plaintiffs' Second Amended Complaint (ECF No. 12) alleged five causes of action. The first and fourth causes of action arose under the CWA's citizen suit provision. As EPA explained in connection to its motion to dismiss, such claims require the plaintiff to identify "a failure . . . to perform any act or duty under this chapter which is not discretionary." Defs.' Memo. in Supp. Mot. to Dismiss at 5-6, ECF No. 13-1.

not" require public input. *Id.* This interpretation, however, has no basis in the statute or in principles of administrative law, and it is incorrect from both a factual and legal standpoint.

From a factual standpoint, EPA is actively soliciting public comment on its draft risk assessment for the two major PFAS compounds—PFOS and PFOA—which was recently published on January 15, 2025. This public input process—which NACWA and many other interested stakeholders are vigorously pursuing—will help inform EPA's final assessment concerning the potential risks to human health and the environment posed by certain PFAS in biosolids, and it will subsequently inform EPA's decision regarding whether to issue regulations for those PFAS chemicals under Part 503. USEPA, Draft Sewage Sludge Risk Assessment for Perfluorooctanoic Acid (PFOA) and Perfluorooctane Sulfonic Acid (PFOS), 90 Fed. Reg. 3,859 (Jan. 15, 2025). Specifically, EPA will consider comments and prepare a final risk assessment; if the final risk assessment indicates that the pollutants present risks above acceptable thresholds when managing biosolids, EPA will propose regulations to amend the Part 503 rules under the CWA to mitigate those risks. *Id.* at 3,864. It is only after the risk assessment that EPA makes this decision, and EPA has asked for public comment regarding scientific and technical aspects of the risk assessment and the risk modeling (e.g., the scenarios, biosolids application rates, environmental fate and transport parameters, and human exposure assumptions) to help ensure its scientific rigor. *Id.* EPA's active solicitation of public comment on the risk assessment shows that public input on the question of *whether* to regulate is an important part of the rulemaking process—and that a pollutant's inclusion in the Biennial Report by itself is not a determination that a substance requires regulation.

Moreover, even if EPA's risk assessment did not independently allow for public comment, Plaintiffs' position is contrary to established administrative law. If the science underlying a

rulemaking is unreasonable or based on incorrect data or assumptions, the public may raise those issues in the notice and comment period; if an agency proceeds with the flawed science as the basis for a rulemaking, the public may seek judicial review of the rule. *Huntsman Petrochemical LLC v. Env't Prot. Agency*, 114 F.4th 727, 733–34 (D.C. Cir. 2024) (petitioners challenge aspects of EPA's cancer-risk assessment that the agency relied upon in promulgating rule to regulate air emissions, issues raised by petitioners during the public comment period). Thus, an agency's scientific findings—such as the risk assessment in this case—are subject to public scrutiny under normal administrative procedures.

Here, however, Plaintiffs question whether the risk assessment is even required by the statute, and they ask the Court to make the risk determination in EPA's place without the benefit of a complete administrative record.[7] *See* Opp'n at 5. Again, this position has no basis in the statutory text. In fact, the risk assessment is the long-established process that EPA uses in order to meet its statutory duty of assessing adverse impacts to "public health and the environment." *See* 33 U.S.C. § 1345(d)(2)(D).

Moreover, the CWA specifically entrusts EPA to identify and assess pollutant risks to human health and environment that inform the threshold determination of whether to regulate. *See* 33 U.S.C. § 1345(d)(2)(A) ("[T]he *Administrator* shall identify those toxic pollutants which . . . may be present in sewage sludge in concentrations which may adversely affect public health or the environment . . . ."") (emphasis added); 33 U.S.C. § 1345(d)(2)(B) (same); 33 U.S.C. § 1345 (d)(2)(C) ("[T]he *Administrator* shall review the regulations . . . for the purpose of . . . promulgating regulations . . . ."). Thus, Congress instructed the Agency, not the Court, to conduct

[7] Indeed, Plaintiffs continue to advance the unfounded position that EPA must regulate PFAS, leaving no room for EPA to determine whether it will or will not. *See* Opp'n at 5.

the fact-finding on risk to support a regulation under Section 405. As noted above, a court may then review the rulemaking process (including fact-finding), if necessary, to ensure it is not arbitrary and capricious.[8] *See Huntsman Petrochemical LLC v. Env't Prot. Agency*, 114 F.4th 727, 735 (D.C. Cir. 2024) (reviewing EPA's rulemaking, and the scientific data and risk assessment relied upon by EPA, on an arbitrary-and-capricious standard). Plaintiffs' requested relief, however, seeks to unjustifiably upend this well-established framework simply because it is the only way for Plaintiffs to proceed on their APA claim.[9]

EPA is mid-stream in its review and decision-making on PFAS in biosolids. The Biennial Report, standing alone, is simply an interim step in that process, not a challengeable agency decision. Plaintiffs' third claim fails to identify any final agency action and must be dismissed.[10]

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[8] Plaintiffs' reliance on *Loper Bright Enterprises v. Raimondo* is misplaced, as that decision withdrew agency deference in interpreting *statutes*, not the deference to agencies on their properly delegated fact-finding functions. *See* 603 U.S. 369, 412–13 (2024) ("[C]ourts need not and under the APA may not defer to an agency interpretation *of the law* simply because a statute is ambiguous." (emphasis added)).

[9] In assessing NACWA's motion to intervene, this Court remarked upon the way in which Plaintiffs' requested relief impacted EPA discretion:

> Importantly, both EPA and NACWA maintain that the determination of whether PFAS are toxic substances that must be regulated under statute is a matter for the agency's discretion. *See* EPA Mot. to Dismiss, at 7, Dkt. 13; NACWA Mot. to Join, at 3, Dkt. 20-5. *A ruling granting the plaintiffs' requested relief would deny EPA that discretion* by requiring it to identify and regulate certain PFAS as toxic substances under the CWA. *See* Second Am. Compl. at 31.

*Farmer*, 2024 WL 5118193, at *4 (D.D.C. Dec. 16, 2024) (emphasis added).

[10] Of the five causes of action alleged in the Second Amended Complaint, three arose under the APA. Counts two and five alleged claims under Section 706(1) of the APA, but Plaintiffs have already conceded that those claims should be dismissed. *See* Pls.' Opp'n to Defs.' Mot. to Dismiss at 16, ECF No. 14. Thus, Plaintiffs' only remaining APA is count three, which alleges a violation pursuant to Section 706(2)(A).

## CONCLUSION

The Court should uphold EPA's rules and science-based procedure for regulating PFAS in biosolids. This citizen suit lacks merit, and the relief sought would profoundly disrupt an important agency undertaking that numerous and varied stakeholders are participating in, to the detriment of communities nationwide. The Court should grant NACWA's Motion to Join Defendants' Motion to Dismiss and dismiss this action.

Dated: January 29, 2025

Respectfully submitted,

/s/ *James B. Slaughter*
BEVERIDGE & DIAMOND, P.C.
James B. Slaughter (D.C. Bar No. 417273)
jslaughter@bdlaw.com
1900 N Street NW, Suite 100
Washington, DC 20036
Phone: (202) 789-6000

Allyn L. Stern (*pro hac vice*)
astern@bdlaw.com
600 University Street, Suite 1601
Seattle, WA 98101-3109
Phone: (206) 315-4800

Thomas P. Kolkin (*pro hac vice*)
tkolkin@bdlaw.com
201 North Charles Street, Suite 2210
Baltimore, MD 21201
Phone: (410) 230-1300

*Counsel for National Association of Clean Water Agencies*

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES
Amanda Aspatore
AAspatore@nacwa.org
1130 Connecticut Ave NW, Suite 1050
Washington, DC 20036
Phone: (202) 833-2672

**CERTIFICATE OF SERVICE**

I hereby certify that on January 29, 2025, a true copy of the foregoing Intervenor-Defendant National Association of Clean Water Agencies' Reply in Support of Motion to Join Defendants' Motion to Dismiss was filed using the CM/ECF system and notice sent by the Court's electronic filing system to counsel of record.

/s/ *James B. Slaughter*
James B. Slaughter (D.C. Bar No. 417273)