Biosolids/Clean Water Act: Federal Court Addresses Citizen Suit Action Against U.S. Environmental Protection Agency Alleging Failure to Address PFAS

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The United States District for the District of Columbia ("Court") addressed in a September 29th Memorandum Opinion and Order ("Memorandum") an action against the United States Environmental Protection Agency ("EPA"), and intervenor-defendant National Association of Clean Water Agencies ("NACWA") seeking to compel agency action regarding the regulation of sewage sludge (i.e., biosolids) under the Clean Water Act and the Administrative Procedure Act. *See JAMES FARMER, et al., v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.*, No. 24-cv-1654 (DLF).

The Public Employees for Environmental Responsibility (collectively, "Plaintiffs") filed the action on behalf of several Texas farmers and ranchers who had allegedly been harmed by PFAS contamination in biosolids.

The Court notes that Section 405(d)(2)(C) provides that:

…[f]rom time to time, but not less often than every 2 years, the Administrator [of EPA] shall review the regulations promulgated under this paragraph for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants consistent with the requirements of this paragraph.

EPA is noted to have published its most recent review of its sewage-sludge regulations in December 2022.

The Plaintiffs filed a Complaint seeking an order directing EPA:

1. to identify certain PFAS in its next biennial report; and,
2. to regulate certain other PFAS pursuant to deadlines set by this Court.

EPA and the intervenor moved to dismiss the Complaint for lack of subject-matter jurisdiction and for failure to state a claim.

The Court granted EPA's and NACWA's motion to dismiss stating:

…Although the plain language of the CWA imposes a non-discretionary duty on EPA to review its regulations on a biennial basis, it does not mandate that EPA also identify and regulate sewage-sludge pollutants within the same time frame. And neither the Biennial Report nor EPA's failure to list pollutants in that report constitutes a final agency action subject to APA review.

The Court does note, however, that an interested party can initiate legal action against EPA for failing to identify or regulate PFAS. In other words, it notes that an interested party can petition EPA to initiate a rulemaking to identify or regulate any pollutant. Further, EPA's denial of any such petition could constitute a final agency action subject to APA review.

A copy of the Memorandum can be downloaded here.