Biosolids/Clean Water Act: Public Employees for Environmental Responsibility Opening Brief Challenging U.S. Environmental Protection Agency's Alleged Failure to Address PFAS

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Public Employees for Environmental Responsibility ("PEER") filed its Opening Brief in the United States Court of Appeals for the D.C. Circuit in the action styled:

James Farmer, et al., v. Environmental Protection Agency, et al., No. 24-cv-01654-DLF.

The United States District Court for the District of Columbia addressed in a September 29th Memorandum Opinion and Order ("Memorandum") an action by PEER against the United States Environmental Protection Agency ("EPA") seeking to compel agency action regarding the regulation of sewage sludge (i.e., biosolids) under the Clean Water Act and the Administrative Procedure Act.

PEER filed the action on behalf of several Texas farmers and ranchers who had allegedly been harmed by PFAS contamination in biosolids.

The Complaint sought an order directing EPA:

1. Identify certain PFAS in its next biennial report; and
2. Regulate certain other PFAS pursuant to deadlines sent by the Court.

The Court granted EPA and the National Association of Clean Water Agency's motion to dismiss, stating in part:

... 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.

PEER and the plaintiffs filed an appeal to the United States Court of Appeals for the District of Columbia from that final order.

PEER's Opening Brief argues that the United States District Court erred in interpreting the words "for the purpose of" as divorcing the actions of "identifying" and "regulating" from the provision's two-year timeline. It further argues that:

… Based on this interpretation, the District Court dismissed the case, finding that even assuming that the CWA requires EPA to identify and regulate additional pollutants, it does not specify a date-certain deadline for doing so, meaning there is no cause of action under the CWA's citizen suit provision.

PEER argues that this is a flawed interpretation that contravenes the Clean Water Act's:

- Plain language.
- Structure.
- Purpose.
- Historical context.

Key arguments in the Brief include:

- The District Court Erred in Dismissing Plaintiff-Appellants' Case Due to an Incorrect Conclusion that the Biennial Review Provision, 33 U.S.C. § 1345(d)(2), Lacked Deadlines.
- The statute's plain language requires EPA, every two years, to identify additional toxic pollutants in sludge that meet the statutory criteria and regulate them.
- The statute's history and purpose further demonstrate that EPA's duties of "identifying" and "regulating" are biennial.
- Courts have recognized the importance of updating standards to protect public health.
- The District Court's reasoning was flawed.
- The phrase "for the purpose of" is not limited to future conduct.
- Congress's use of "for the purpose of" rather than "and" is not dispositive.
- EPA's Biennial Reports, which merely gather preliminary information, do not fulfill EPA's biennial review duty.

A copy of the Opening Brief can be found here.