

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

CAPE FEAR RIVER WATCH,
et al.,

No. 19-2450

Petitioners,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, et al.,

Respondents.

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**REPLY IN SUPPORT OF
MOTION TO DISMISS FOR LACK OF JURISDICTION**

Respondents the United States Environmental Protection Agency and its Administrator (collectively “EPA” or “Agency”) file this reply in support of their motion to dismiss the petition for review filed by Petitioners Cape Fear River Watch, Rural Empowerment Association for Community Help, Waterkeepers Chesapeake, Animal Legal Defense Fund, Center for Biological Diversity, Comite Civico del Valle, Environment America, Food & Water Watch, the Humane Society of the United States, and Waterkeeper Alliance (collectively “River Watch”) for lack of jurisdiction.

Introduction

The petition should be dismissed because River Watch does not challenge any final action or promulgation by the EPA. Instead, as explained in the EPA's motion to dismiss, River Watch challenges a non-final, non-promulgated statement that the EPA made at the beginning of a public comment process on several issues, including, as relevant here, whether revision of the effluent limitation guidelines for the Meat and Poultry Products industrial point source category, 40 C.F.R. part 432, is appropriate. *See* 84 Fed. Reg. 57,019 (Oct. 24, 2019).

To date, the administrative notice-and-comment process has not concluded. And River Watch did not and cannot identify any statement made by the EPA subsequent to the aforementioned Federal Register notice to indicate that the EPA has completed its process.

Accordingly, there is no final agency action or promulgation as required under the Clean Water Act's judicial review provision, 33 U.S.C. § 1369(b)(1)(C) or (E).

Argument

I. River Watch's petition fails to identify anything reviewable.

River Watch argues that the EPA's motion to dismiss "mischaracterize[s]" and "misconstrue[s]" its petition for review. Opp'n at 10 & 19. But it is River Watch that mischaracterizes the EPA's statement in an attempt to prematurely

obtain judicial review. The petition challenges a statement in the EPA's document entitled "Preliminary Effluent Guidelines Program Plan 14." 84 Fed. Reg. at 57,019. *See* Pet. for Rev. (Electronic Case Filing ("ECF") No. 3-1). Indeed, the EPA's motion reproduces the petition's operative sentence nearly verbatim. Mot. at 10 (quoting Pet. for Rev. at 2). As explained in the EPA's motion, the document in which the EPA made the challenged statement is preliminary, and the Agency expressly solicited comment on "the overall content of Preliminary Plan 14," 84 Fed. Reg. at 57,020, including the Meat and Poultry Products industrial category. Pet. for Rev., Ex. B (Preliminary Effluent Guidelines Program Plan 14) at 6-2.

Under any fair reading of the EPA's motion, it accurately summarizes River Watch's theory of jurisdiction: the EPA made a statement respecting the Meat and Poultry Products industrial category; the statement appears in a Federal Register notice (84 Fed. Reg. at 57,019) and a document referenced therein (Preliminary Effluent Guidelines Program Plan 14); and the EPA, in the same notice, solicited public comment. While River Watch contends that the EPA's statement constitutes a final and reviewable decision, it cannot and does not dispute that the notice-and-comment process has not concluded. Nor has River Watch shown that the EPA has taken any final action or promulgation regarding the Meat and Poultry Products industrial category from which rights or obligations flow. Accordingly, the petition should be dismissed.

A. The first requirement of “finality” is lacking.

River Watch has not established the first requirement of finality, that there has been a “consummation of the agency’s decisionmaking process” *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted). *See also id.* (finality lacking when the agency event is “merely tentative or interlocutory [in] nature”). In particular, River Watch incorrectly portrays the EPA’s October 2019 statement that it has “concluded that no additional categories warrant new or revised effluent guidelines at this time” (84 Fed. Reg. at 57,019; Preliminary Effluent Guidelines Program Plan 14 at 1-1) as “a decision representing the consummation of a *statutorily-mandated annual decisionmaking process*” Opp’n at 14 (emphasis in original).

First, River Watch’s “consummation” argument is disproven by indisputable procedural facts: (1) the EPA made the statement at the initial stage of a public notice-and-comment process; (2) the EPA solicited comments on that very statement (among others); (3) the EPA received comments on that very statement (among others); (4) to date, the EPA has not responded to comments; and (5) to date, the notice-and-comment process has not concluded. *See Mot.* at 5-6.¹

¹ Contrary to River Watch’s suggestion (Opp’n at 21), the EPA’s motion does not argue that the Agency’s use of the phrase “at this time” *alone* shows that finality is lacking. *See Mot.* at 9 (“[T]he statement’s plain terms (‘at this time’) and the context in which the EPA made it (the initial stage of an administrative process

Indeed, the Preliminary Effluent Guidelines Program Plan 14 (at pages 3-1 and 6-1) explains that the Meat and Poultry industrial category (among others) is undergoing analyses for potential development of new or revised effluent limitation guidelines. In contrast, the Preliminary Plan identifies *other* categories (*not* the Meat and Poultry industrial category) for which no further analyses are occurring.

Second, River Watch's position is unsupported by case law, which holds that "a proposed EPA rule is not final agency action subject to judicial review." *Murray Energy Corp. v. EPA*, 788 F.3d 330, 334 (D.C. Cir. 2015) (citations omitted). Although the foregoing decision arose under the Clean Air Act, the Clean Water Act also requires that agency action be "final" to be reviewable. *See* Mot. at 7; *see also* Opp'n at 10 (River Watch acknowledges finality requirement).²

Third, there is no "statutorily-mandated annual decisionmaking process" here, as River Watch contends. With the exception of 33 U.S.C. § 1314(m)(2), which requires EPA to "provide for public review and comment on the plan prior

soliciting public comment) establish that the statement does not qualify as a final action, promulgation, or approval.").

² The EPA does not imply that its October 2019 statement necessarily constituted a proposed *rule*, and the Court need not reach that question. The salient point for jurisdictional purposes is that because a proposed rule lacks finality, something *less* than a proposed rule that is undergoing a notice-and-comment process would also lack finality.

to final publication,” the Clean Water Act does not command the EPA to employ any particular procedure for the subject matter at hand, i.e., whether revision of effluent limitation guidelines and promulgation of pretreatment standards for the Meat and Poultry Products industrial point source category is appropriate. That means the EPA has a choice of procedure; under *SEC v. Chenery Corp.*, 332 U.S. 194 (1947), and its progeny, e.g., *Vermont Yankee Nuclear Power Corp. v. NRDC, Inc.*, 435 U.S. 519, 524-25 (1978); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267 (1974), agencies generally may choose between rulemaking and case-specific procedures to develop law and policy. The EPA having elected to follow a public notice-and-comment process here, River Watch, like any interested person, must await the outcome of that process before seeking judicial review.

B. The second requirement of finality, as well as a promulgation, are lacking.

Because the first requirement of finality is lacking here, the Court need not adjudge the second requirement of finality, which posits whether the EPA’s challenged statement is “one by which rights or obligations have been determined or from which legal consequences will flow.” *Bennett v. Spear*, 520 U.S. at 177-78 (citations and internal quotation marks omitted). *See* Mot. at 10.

Similarly, the Court need not reach the question whether the challenged statement rises to the level of “promulgating any effluent standard, prohibition, or pretreatment standard under [33 U.S.C.] section 1317” or “promulgating any

effluent limitation or other limitation under [33 U.S.C.] sections 1311, 1312, 1316, or 1345” within the meaning of 33 U.S.C. § 1369(b)(1)(C) and (E). The parties agree that “promulgating” means “issuing a document with legal effect.” *See* Mot. at 7; Opp’n at 17 (citing, *inter alia*, *Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989)).

Regardless, on both counts, River Watch has failed to meet its burden. The EPA’s statement did *not* “reaffirm[] the existing technology-based federal floor for controlling water pollution from slaughterhouses,” Opp’n at 15; did *not* “provide[] firm guidance to permit-writers and enforcement officials,” *id.* (internal quotation marks and citation omitted); did *not* “determine[] the rights and obligations of private parties,” *id.*; did *not* constitute a “deci[sion] *not* to change the status quo,” *id.* at 16 (emphasis in original); and did *not* qualify as a “*refusal to revise* certain allegedly inadequate effluent limitations,” *id.* at 18 (emphasis in original; citation omitted). As is clear from the context in which the statement was made, the EPA instead *proposed* not to revise effluent guidelines or establish pretreatment standards for the Meat and Poultry industrial category and solicited public comment on that proposal.

“Proposed rules . . . do not determine rights or obligations, or impose legal consequences.” *Murray Energy*, 788 F.3d at 334 (internal quotation marks and

citation omitted). Just so here.³ The EPA's statement lacks finality and is not a promulgation.

II. River Watch's statutory construction and preclusion arguments are inapposite.

Throughout River Watch's opposition (Opp'n at 6-10 & 19-21), it advances two kinds of arguments that are irrelevant to the jurisdictional question here.

First, River Watch's statutory construction arguments regarding the meaning of the EPA's various obligations under the Clean Water Act, as well as when any such obligations are due to be fulfilled, are out of place. Under River Watch's own theory of jurisdiction, it seeks review of a *completed* EPA determination. Pet. for Rev. at 2. But, as explained in the EPA's motion to dismiss (and herein), the premise of River Watch's petition is incorrect. No such determination has occurred, and, in fact, the Agency is in the midst of a public notice-and-comment process.

To resolve jurisdiction, there is no reason for the Court to adjudicate what are essentially merits arguments from River Watch or otherwise definitively construe the statutory provisions it focuses on, 33 U.S.C. § 1314(b) and (g). It suffices for jurisdictional purposes that nothing in the statute precludes the EPA from choosing to solicit public comment on a proposal (i.e., the statement by the

³ See *supra* at 5 n.2.

EPA that River Watch challenges), and that principles of finality preclude River Watch from seeking judicial review now.

Likewise, there is no need to reach River Watch's timing-of-obligation arguments because if and to the extent that it (or any aggrieved person) claims that the EPA is failing "to perform any act or duty under [the Clean Water Act] which is not discretionary," then such person may seek remedies in U.S. district court. 33 U.S.C. § 1365(a)(2). The statute makes clear that any and all arguments to the effect that EPA has a mandatory duty to make any decision under 33 U.S.C. § 1314(b) or (g) cannot be raised as an original claim in *this* Court.⁴

Second, the EPA is not, contrary to River Watch's contention, arguing that, by participating in the public comment process, River Watch has "acquiesced to . . . non-finality." Opp'n at 21. The EPA is not arguing preclusion for purposes of jurisdiction. The EPA instead focuses on the dispositive fact that River Watch and other interested persons had the *opportunity* to comment, and that the administrative process is not yet complete. *See* Mot. at 6 ("To date, the EPA has not responded to comments submitted by River Watch and other interested persons . . .").

⁴ However, if the Court believes that construing the EPA's obligations under various statutory provisions could be relevant to jurisdiction, the EPA requests that its motion be carried with the case so that the parties can address the issue in more detail in conjunction with merits briefing.

Conclusion

The Court should dismiss River Watch's petition for lack of jurisdiction.

Respectfully submitted,

Dated: March 12, 2020

By: /s/ *Andrew J. Doyle* _____

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CERTIFICATE OF COMPLIANCE

Respondents' Reply complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains no more than 2119 words. In addition, that motion complies with any typeface requirement because it has been prepared in a proportionally spaced typeface using Word 2013 in Times Roman Number 14.

___/s/ *Andrew J. Doyle*_____

CERTIFICATE OF SERVICE

Undersigned counsel for Respondents hereby certifies that, on this date, a true and correct copy of the foregoing Reply was served electronically through the Court's ECF system on all registered counsel.

Dated: March 12, 2020 /s/ *Andrew J. Doyle*