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

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| CAPE FEAR RIVER WATCH *et al.*,<br><br>*Petitioners*,<br>v.<br><br>U.S. ENVIRONMENTAL PROTECTION AGENCY *et al.*,<br><br>*Respondents*. | No. 19-2450 |

# CITIZEN GROUPS' RESPONSE IN OPPOSITION TO EPA'S MOTION TO DISMISS FOR LACK OF JURISDICTION

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## PRELIMINARY STATEMENT

Slaughterhouses are among the leading sources of industrial water pollution in the United States, dumping tens of millions of pounds of pollution each year into waterways across the country. Pollution limits for slaughterhouses are sorely outdated. The United States Environmental Protection Agency ("EPA" or "Agency") last updated effluent limitation guidelines ("ELGs") for some slaughterhouses in 2004; others are still operating under ELGs from 1974 or 1975. Meanwhile, EPA has never promulgated pretreatment standards for slaughterhouses that send wastewater to publicly owned treatment works.

EPA has an annual duty to review and, if appropriate, revise ELGs and pretreatment standards. The Agency recently decided against revising pollution limits for slaughterhouses despite strong evidence that the existing limits are outdated and inadequate. This was the Agency's final decision for the year, and the consummation of its mandatory annual review process. EPA attempts to mischaracterize its decision as tentative by pointing to a distinct biennial ELG planning process, which produces final program plans every other year. But the Agency's argument conflates two different statutory requirements. Every year, EPA is required to evaluate the need for revisions and to give a "yes" or "no" answer as to whether revisions are appropriate. Last year, the Agency said "no." That is a reviewable final decision.

## FACTUAL BACKGROUND

The Meat and Poultry Products Point Source Category includes over 6,600 facilities ("slaughterhouses"), in which workers slaughter live animals, process animal carcasses, and render animal scraps into salable products such as tallow, lard, and animal meal. EPA, *Technical Development Document for the Final Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category (40 CFR 432)* at 1-2, 4-1, 4-56 (2004) ("2004 Technical Development Document"), https://www.epa.gov/sites/production/files/2015-11/documents/meat-poultry-products_tdd_2004_0.pdf. Slaughterhouses perform three stages of operations. ***First***, slaughterhouse workers receive live animals; stun, slaughter, and bleed them; and remove their hides, hair, feathers, and internal organs. *Id.* at 4-5–4-10; 4-36–4-44. ***Second***, workers cut the carcasses into smaller segments and process them into consumer products. *Id.* at 4-13, 4-47. ***Third***, workers render byproducts—such as viscera, meat scraps, fat, bone, blood, feathers, and dead animals not suitable for human consumption—into animal feed and other products. *Id.* at 4-56.

Slaughterhouses use large volumes of water to wash animal carcasses, rinse meat, remove animals' hair and feathers, and sanitize equipment and animal holding areas. Wastewater from slaughterhouses thus contains high levels of nitrogen and phosphorus, which originate from animal parts, viscera, urine and

feces, and cleaning solutions. *See* EPA, *Preliminary Effluent Guidelines Program Plan 14* at 3-10 (Oct. 2019) ("Preliminary Plan 14"). These pollutants trigger the growth of algae in receiving waters and, at high levels, cause harmful algal blooms and fish kills. *Id.* at 3-3. Slaughterhouse wastewater also contains high levels of total suspended solids and bacteria, which—when discharged into rivers and streams—can degrade habitat and lower water quality. 2004 Technical Development Document at 5-3, 6-3–6-4. Pollution from slaughterhouses can threaten drinking water quality and endanger human health. *Id*. at 7-10.

The amount of wastewater slaughterhouses generate varies widely based on processing capacity. The Smithfield plant in Tar Heel, North Carolina, can process over 32,000 pigs per day, whereas smaller slaughterhouses may process 10,000 animals in an entire year. Steve Meyer, *Slaughterhouse Capacity Sufficient—For Now*, Nat'l Hog Farmer (Aug. 11, 2015), https://www.nationalhogfarmer.com/marketing/slaughter-capacity-sufficient-now; Abbie Fentress Swanson, *Small Meat Producers Take Their Slaughterhouse Gripes to Congress*, Nat'l Pub. Radio (Oct. 15, 2015), https://www.npr.org/sections/thesalt/2015/10/15/448942740/small-meat-producers-take-their-slaughterhouse-gripes-to-congress. In addition, the amount of water used per 1,000 pounds of animals processed ranges from 580 to 2,440 gallons in poultry slaughterhouses, and from 291 to 532 gallons in cow and pig slaughterhouses. 2004 Technical Development Document at 6-3, 6-8–6-9.

Not only does the amount of wastewater produced by slaughterhouses vary widely, so too does the concentration of pollutants in that wastewater. According to EPA, slaughterhouses are among the leading sources of nitrogen and phosphorus discharges in the United States. Preliminary Plan 14 at 3-4–3-5 figs. 3-1–3-3. Yet EPA has found that many slaughterhouses discharge pollutants at levels "well below" EPA's existing pollution limits. *Id.* at 3-14, 3-11. In other words, EPA's pollution limits for slaughterhouses are far more lax than is technologically or economically necessary—and those limits are failing to drive necessary reductions in water pollution.

## STATUTORY FRAMEWORK

The Clean Water Act ("CWA" or "Act") establishes a "national goal" of eliminating "the discharge of pollutants into . . . navigable waters." 33 U.S.C. § 1251(a)(1). In furtherance of this goal, the Act prohibits "the discharge of any pollutant by any person," *id.* § 1311(a), except—as relevant here—in compliance with a permit setting forth specific "effluent limitations." *Id.* § 1342; *see Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 491 (2d Cir. 2005) (citing *S. Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004)) (explaining that "every . . . permit is statutorily required to set forth, at the very least, 'effluent limitations'"). Effluent limitations are "restriction[s] . . . on [the] quantities, rates, and concentrations of chemical, physical, biological, and other

constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11).[1]

The specific effluent limitations included in each permit must reflect national effluent limitation guidelines, or ELGs, promulgated by EPA for each class or category of industrial polluter. *Id.* § 1314(b) (directing EPA to publish regulations establishing ELGs "[f]or the purpose of adopting or revising effluent limitations"); *see Waterkeeper All., Inc.*, 399 F.3d at 491 ("The specific effluent limitations contained in each individual permit . . . are dictated by the terms of more general [ELGs], which are separately promulgated by . . . EPA."). To ensure that permits are sufficiently strict, Congress directed EPA to develop ELGs that identify the amount of pollution reduction attainable through the application of appropriately advanced wastewater-treatment technology. 33 U.S.C. § 1314(b)(1)(A). By establishing a technology-based federal floor for controlling water pollution, ELGs guarantee "that similar point sources with similar characteristics . . . will meet similar effluent limitations," regardless of their location throughout the country. *Nat. Res. Def. Council v. Train*, 510 F.2d 692, 709–10 (D.C. Cir. 1974) (citation omitted).

[1] A "point source" is "any discernable, confined and discrete conveyance, including but not limited to any pipe, ditch, [or] channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

Some industrial polluters discharge wastewater to "publicly owned treatment works" and, thus, indirectly to navigable waters.[2] If these "indirect" dischargers fail to apply appropriately advanced wastewater-treatment technology, pollutants in their wastewater can interfere with, pass through, or otherwise overwhelm treatment works, resulting in the discharge of pollutants. *See Chem. Mfrs. Ass'n v. EPA*, 870 F.2d 177, 197 (5th Cir. 1989). Accordingly, to control water pollution from indirect dischargers, Congress mandated that EPA establish minimum "guidelines for [the] pretreatment of pollutants . . . not susceptible to treatment by publicly owned treatment works." 33 U.S.C. §§ 1314(g)(1), 1317(b)(1). Like ELGs, these pretreatment standards are technology-based minimum standards for controlling water pollution.

To ensure that the CWA's technology-based standards keep pace with technological improvements—and, thus, continue to push polluters toward the national goal of eliminating water pollution—Congress mandated that EPA fulfill ***three distinct duties***, each according to its own statutory deadline. ***First***, EPA must revise ELGs "at least annually," if appropriate. *Id.* § 1314(b).[3] To fulfill this

[2] The phrase "treatment works" means "any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature." 33 U.S.C. § 1292(2)(A).

[3] Pursuant to 33 U.S.C. § 1311, EPA must develop effluent limitations that correspond to the pollution reduction attainable through the application of

duty, EPA must review existing ELGs every year and, based on this annual review, decide whether revisions are appropriate.[4] *See Defs. of Wildlife v. Jackson*, 284 F.R.D. 1, 4 (D.D.C. 2012) (finding that EPA has a nondiscretionary duty to *complete* its annual review by deciding whether revisions are appropriate); *see also Envtl. Def. Fund v. Thomas*, 870 F.2d 892, 896 (2d Cir. 1989) (concluding, under an analogous review-and-revise provision of the Clean Air Act, that EPA has a nondiscretionary "duty to make *some* decision" regarding revision). ***Second***, EPA must publish pretreatment standards, review those standards "at least annually," and revise them if appropriate. 33 U.S.C. § 1314(g)(1). (EPA also is required to publish pretreatment standards under 33 U.S.C. § 1317(b)(1)). And, ***third***, EPA

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appropriately advanced wastewater-treatment technology and review those effluent limitations at least every five years. As a practical matter,

> EPA has incorporated the effluent limitations required by § 1311(b)(2) into the effluent limitations guidelines regulations it promulgates under § 1314(b). . . . Therefore, through its review of its [ELGs], EPA also reviews the effluent limitations they contain, thus meeting its review requirements under § 1311(d) and § 1314(b) simultaneously.

Dkt. 17, Resp't's Mot. To Dismiss for Lack of Jurisdiction ("EPA Motion to Dismiss") (Feb. 4, 2020).

[4] The particular level of technology required depends on the type of pollution. To control the discharge of pollutants such as nitrogen, EPA must revise ELGs to reflect pollution reduction technology that matches or exceeds the performance of "the *single best-performing plant*" in the industry. *Chem. Mfrs. Ass'n*, 870 F.2d at 226 (emphasis added).

must "biennially . . . publish in the Federal Register a plan . . . establish[ing] a schedule for the annual review and revision of promulgated [ELGs]." *Id.* § 1314(m)(1)(A). The following chart illustrates EPA's three duties:

| Statutory Provision | Duty | Deadline |
|---|---|---|
| 33 U.S.C. § 1314(b) | EPA must review existing ELGs and decide whether revision is appropriate. | At least annually |
| 33 U.S.C. § 1314(g) | EPA must review pretreatment standards and decide whether revision is appropriate. | At least annually |
| 33 U.S.C. § 1314(m) | EPA must establish a schedule for the annual review and revision of existing ELGs. | Biennially |

EPA's three duties are distinct and interlocking. Thus, EPA's annual reviews of existing ELGs and pretreatment standards yield decisions that inform the development of future biennial plans. *See, e.g.*, Preliminary Plan 14 at 1-1 (explaining that EPA identifies ELGs for which revision might be appropriate "[f]rom these [annual] reviews"). As a result, biennial plans typically "provide a summary" of EPA's most recent annual review, even though the review itself is not a component of the plan. *Id.*; *see also id.* at 2-4 ("To increase transparency and stakeholder awareness of its planning process, [EPA] . . . includes in the [biennial] Plans information on its review of existing effluent guidelines and pretreatment

standards."); *Preliminary Effluent Guidelines Program Plan for 2004/2005*, 68 Fed. Reg. 75,515, 75,515 (Dec. 31, 2003) (reporting that a particular biennial plan "present[ed] the results of EPA's [most recent] annual review").

In addition, data and information pertaining to *past* annual reviews—provided to EPA in the form of comments on draft biennial plans—may affect *future* reviews. *See, e.g.*, 68 Fed. Reg. at 75,519 ("[B]y publishing the results of the 2003 annual review [in a draft biennial plan], EPA hope[d] to receive data and information that will inform its review for 2004 and the future."). However, comments cannot alter reviews that, by necessity, must be complete by the time their results are summarized in a draft biennial plan.

## PROCEDURAL HISTORY

On October 24, 2019, EPA published a notice in the Federal Register, announcing that "EPA has concluded that no additional categories [other than the Steam Electric Power Generating Point Source Category] warrant new or revised effluent guidelines at this time." *See Preliminary Effluent Guidelines Program Plan 14*, 84 Fed. Reg. 57,019 (Oct. 24, 2019). In this notice, EPA also announced the availability of Preliminary Plan 14 and explained that Preliminary Plan 14 summarizes the Agency's annual reviews from 2016, 2017, and 2018. *Id*. On December 18, 2019, a coalition of community, environmental, and animal welfare organizations ("Citizen Groups") timely filed a Petition for Review with this

Court, challenging EPA's decision not to revise ELGs and associated effluent limitations or to promulgate pretreatment standards for the Meat and Poultry Products Point Source Category ("Decision"). Dkt. 3-1, Pet'r's Petition for Review (Dec. 18, 2019). EPA moved to dismiss the Petition for lack of jurisdiction on February 4, 2020. EPA Motion to Dismiss.

## ARGUMENT

EPA's Motion to Dismiss focuses on the "tentative or interlocutory . . . nature" of Preliminary Plan 14. *Id.* at 10. Citizen Groups do not dispute that Preliminary Plan 14 is not final. Neither do they challenge that plan. Instead, Citizen Groups challenge EPA's Decision, an independent final agency action subject to immediate review in this Court. EPA's efforts to mischaracterize Citizen Groups' challenge to its Decision as a premature attack on Preliminary Plan 14 are flawed and unavailing.

### I. This Court Has Jurisdiction to Review EPA's Decision.

Contrary to EPA's assertions, its Decision is a reviewable final agency action. EPA's Decision is also a "promulgation" within the meaning of the CWA. Therefore, this Court has jurisdiction to decide Citizen Groups' challenge.

#### A. EPA's Decision constitutes reviewable final agency action.

In analyzing whether agency action is final, "[t]he core question is whether the agency has completed its decisionmaking process, and whether the result of

that process is one that will directly affect the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 797 (1992). Accordingly, the U.S. Supreme Court has established a two-prong test to determine whether agency action is final. *See Bennett v. Spear*, 520 U.S. 154, 177–78 (1997). "First, the action must mark *the consummation of the agency's decisionmaking process*—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which *rights or obligations have been determined* or from which legal consequences will flow." *Golden & Zimmerman, LLC v. Domenech* ("*Golden*"), 599 F.3d 426, 432 (4th Cir. 2010) (quoting *Bennett*, 520 U.S. at 177–78). Application of this two-prong test reveals that EPA's Decision constitutes reviewable final agency action.

1. EPA's Decision represents the consummation of the Agency's decisionmaking process.

The first prong of the *Bennett* test asks whether the action "mark[s] the consummation of the agency's decisionmaking process," *id*., or, in other words, whether the agency "'has rendered its last word on the matter' in question." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 478 (2001) (quoting *Harrison v. PPG Indus.*, 446 U.S. 578, 586 (1980)). A decision that *does* represent the consummation of an agency's decisionmaking process is final and subject to immediate judicial review, even if the agency retains discretion to change that decision at a later point in time. *See Nat'l Envtl. Dev. Ass'n's Clean Air Project v. EPA* ("*Clean Air Project*"), 752 F.3d 999, 1006–07 (D.C. Cir. 2014).

EPA's Decision represents the most recent consummation of the Agency's statutorily mandated duty to review existing ELGs and pretreatment standards "at least annually." *See* 33 U.S.C. §§ 1314(b), 1314(g). As explained above, EPA can discharge this duty only by reaching "*some* decision" as to whether revisions are appropriate. *Envtl. Def. Fund*, 870 F.2d at 896; *see also Defs. of Wildlife*, 284 F.R.D. at 4 (finding that EPA has a nondiscretionary duty to *complete* its annual review by deciding whether revisions are appropriate). EPA did precisely that in October 2019, when it announced its "conclu[sion] that no additional categories [of point sources, other than the Steam Electric Power Generating Point Source Category] warrant new or revised effluent guidelines at this time." 84 Fed. Reg. at 57,019. This Decision represents EPA's last word on the matter of its most recent annual reviews.

Even if EPA were to reach a different conclusion about the necessity of revisions during a *future* annual review, that hypothetical future change does not render the Agency's actual decision non-final *now*. To the contrary, "[a]n agency action may be final even if the agency's position is 'subject to change' in the future." *Clean Air Project*, 752 F.3d at 1006 (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000)). Indeed, "all laws are subject to change. . . . The fact that a law may be altered in the future has nothing to do with whether it is subject to judicial review at the moment." *Appalachian Power*, 208

F.3d at 1022. Thus, in *Clean Air Project*, the U.S. Court of Appeals for the D.C. Circuit concluded that a permitting directive sent by the EPA Administrator to EPA's regional offices marked the end of the Agency's decisionmaking process, even though the directive expressly stated that EPA was still "assessing what additional actions may be necessary," and "EPA's deliberations surrounding the matter [were] ongoing." 752 F.3d at 1006. Despite these qualifications, the court found that the directive "provide[d] firm guidance to enforcement officials about how to handle permitting decisions" and, therefore, "clearly reflect[ed] a settled agency position" subject to immediate review. *Id*. at 1007 (quotation marks omitted).

EPA cannot call the finality of its decision into question by invoking this Court's ruling in *Golden*. *See* EPA Motion to Dismiss at 10 (quoting *Golden*, 599 F.3d at 431). That ruling is entirely inapposite. There, licensed gun dealers sought review of a Frequently Asked Question ("FAQ") included in a particular edition of the "Federal Firearms Regulations Reference Guide," an agency publication intended "to *provide information* . . . to help [licensees] comply with [relevant] laws and regulations." *Golden*, 599 F.3d at 427–28 (emphasis added) (quotation marks omitted). This Court concluded that, to the extent the FAQ "[did] anything other than simply restate the requirements of the [governing statute]," it merely reflected the Agency's decades-old interpretation of the law; indeed, the FAQ had

appeared in editions of the Reference Guide dating back to 1988. *Id.* at 432, 429. Accordingly, the Court found that the FAQ did not represent the *consummation* of the Agency's decisionmaking process—and, thus, failed to satisfy *Bennett's* first prong—because "there was simply no [recent] decisionmaking process" at all. *Id.* at 432. The present situation—in which Citizen Groups challenge a decision representing the consummation of a *statutorily-mandated annual decisionmaking process*—could not be more distinct.

2. EPA's Decision determines "rights or obligations."

To satisfy the second prong of the *Bennett* test, an agency's "action must be one by which *rights or obligations have been determined* or from which legal consequences will flow." *Id.* at 432 (quoting *Bennett*, 520 U.S. at 177–78). In applying *Bennett*'s second prong, courts take a "pragmatic approach . . . to finality." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1815 (2016) (quotation marks omitted). Thus, courts repeatedly have concluded that agency actions "provid[ing] firm guidance to enforcement officials about how to handle permitting decisions" satisfy *Bennett*'s second prong, even if officials have discretion in implementing that guidance. *Clean Air Project*, 752 F.3d at 1007; *see also Safari Club Int'l v. Jewell*, 842 F.3d 1280, 1289 (D.C. Cir. 2016) (concluding that an agency determined the rights of potential permit applicants by deciding that conditions necessary to the approval of any permit were not uniformly met, even

though the agency invited applicants to submit information indicating that the conditions were satisfied under their particular circumstances); *Nat. Res. Def. Council v. EPA*, 643 F.3d 311, 319–20 (D.C. Cir. 2011) (finding that agency guidance met *Bennett*'s second prong by advising regional officials that permittees could adopt extra-statutory alternatives to satisfy their obligations, even though regional officials could have approved alternatives in the absence of guidance, and alternatives were evaluated on a case-by-case basis).

EPA's Decision reaffirms the existing technology-based federal floor for controlling water pollution from slaughterhouses. Thus, this Decision "provides firm guidance" to permit-writers and enforcement officials, *Clean Air Project*, 752 F.3d at 1007, who must continue to rely on existing ELGs and effluent limitations and continue to regulate without national pretreatment standards. *See Waterkeeper All., Inc.*, 399 F.3d at 491 (explaining that ELGs "dictate[]" the "specific effluent limitations contained in each individual [discharge] permit"); *see also Am. Wild Horse Campaign v. Bernhardt*, 2020 WL 736772 at *11 (D.D.C. 2020) ("*Bennett*'s second prong is satisfied by legal consequences that affect only the agency itself.").

EPA's Decision also determines the rights and obligations of private parties. It gives safe harbor to slaughterhouses, which now confidently can postpone adopting advanced wastewater treatment technology. *See U.S. Army Corps of*

*Eng'rs*, 136 S. Ct. at 1814 (concluding that agency actions limiting potential liability satisfy *Bennett*'s second prong). Moreover, it virtually guarantees that Citizen Groups and their members will continue to suffer the negative consequences of excessive pollution from slaughterhouses in rivers and streams across the country. *See Citizens for Clean Energy v. U.S. Dep't of the Interior*, 384 F. Supp. 3d 1264, 1280 (D. Mont. 2019) (finding that an agency decision "lift[ing] environmental protections" satisfied *Bennett*'s second prong).

EPA's decision is not insulated from review simply because the Agency decided *not* to change the status quo. To the contrary, courts regularly evaluate agency actions reaffirming existing rights or obligations. *See, e.g.*, *Havasupai Tribe v. Provencio*, 906 F.3d 1155, 1162–63 (9th Cir. 2018) (concluding that an agency's voluntary confirmation of pre-established mineral rights satisfied *Bennett*'s second prong). As the U.S. Supreme Court has long held, an agency decision that evaluates the merits and "maintain[s] the status quo is an exercise of administrative function, no more and no less, than an order directing some change in status." *City of Chicago v. U.S.*, 396 U.S. 162, 166 (1969) (quotation marks omitted).

**B. EPA's Decision is a "promulgation" reviewable in this Court.**

Not only is EPA's Decision *final* agency action, the Decision is reviewable in this Court because, contrary to EPA's assertions, *see* EPA Motion to Dismiss at

10, it is a "promulgation" of pretreatment standards and effluent limitations. Pursuant to 33 U.S.C. § 1369(b)(1), the courts of appeals have exclusive jurisdiction to review EPA's action "(C) in promulgating any . . . pretreatment standard under [33 U.S.C. § 1317]" and "(E) in approving or promulgating any effluent limitation or other limitation under [33 U.S.C. § 1311]."[5] Because of the close relationship between ELGs and associated effluent limitations, *see, e.g.*, EPA Motion to Dismiss at 4, this Court has affirmed that 33 U.S.C. § 1369(b)(1)(E) vests it "with the responsibility and authority for making a pre-enforcement examination of . . . [effluent limitation] guidelines." *Am. Paper Inst. v. EPA*, 660 F.2d 954, 956 (4th Cir. 1981); *see also Sw. Elec. Power Co. v. EPA*, 920 F.3d 999, 1012 n.12 (5th Cir. 2019) (confirming jurisdiction to decide challenges to ELGs).

EPA appears to argue that, because Preliminary Plan 14 is still in draft form, EPA has not yet *promulgated* anything. *See* EPA Motion to Dismiss at 10. But, as EPA acknowledges, *see id.* at 8, "promulgating" means "issuing a document with legal effect." *Am. Paper Inst. v. EPA*, 882 F.2d 287, 288 (7th Cir. 1989); *see also Iowa League of Cities v. EPA*, 711 F.3d 844, 862–63 (8th Cir. 2013) (interpreting "'promulgating' to include agency actions that are 'functionally similar' to a formal promulgation" and finding that certain agency documents "can be

[5] EPA published its Decision under the authority of 33 U.S.C. §§ 1311 and 1317 (among other sections). *See* 84 Fed. Reg. at 57,019.

considered 'promulgations' . . . because they have a binding effect on regulated entities"). For the reasons explained above, EPA's Decision has binding effects on enforcement officials, slaughterhouses, and Citizen Groups and their members.

In addition, courts have clarified that, "[w]here petitioners' challenge is to the *substance* of a regulation that the [A]gency has already promulgated, exclusive jurisdiction [lies] in the court[s] of appeals." *Maier v. EPA*, 114 F.3d 1032, 1038 (10th Cir. 1997) (emphasis added); *cf. Nat. Res. Def. Council v. EPA*, 542 F.3d 1235, 1243 (9th Cir. 2008) ("[T]he fact that Plaintiffs do not challenge the *substance* of any existing regulations is precisely why [33 U.S.C. § 1369(b)(1)] is inapplicable."). Thus, in *Maier*, the Tenth Circuit found that it had jurisdiction to review a challenge to EPA's *refusal to revise* certain allegedly inadequate effluent limitations. 114 F.3d at 1038. As the court explained, its exercise of jurisdiction was appropriate because "a challenge to the refusal to revise a rule in the face of new information is . . . akin to a challenge to the existing rule." *Id*.

Citizen Groups challenge EPA's Decision in light of the *substantive* inadequacy of EPA's existing ELGs and associated effluent limitations. As explained above, for pollutants such as nitrogen, EPA must revise ELGs to reflect pollution reduction technology that matches or exceeds the performance of "the *single best-performing plant*" in the industry. *Chem. Mfrs. Ass'n*, 870 F.2d at 226 (emphasis added). Yet, EPA's own evidence shows that existing pollution limits

lag far behind the performance of many slaughterhouses. Because Citizen Groups allege that EPA's Decision conflicts with the Agency's statutory responsibilities to drive the reduction—and, ultimately, the elimination—of water pollution, this Court has jurisdiction to review that Decision.[6]

## II. EPA Conflates Two Distinct Statutory Duties.

As explained above, EPA's Motion to Dismiss rests on the faulty premise that its Decision is not reviewable because it was announced in conjunction with Preliminary Plan 14. But Citizen Groups do not challenge Preliminary Plan 14; they challenge EPA's Decision. Not only does EPA misconstrue Citizen Groups' challenge, it ignores the basic structure of the CWA.

EPA's statutory duties to decide whether to revise ELGs and pretreatment standards are plainly *independent* of its duty to publish biennial plans. These three duties are set out in different sub-sections of the CWA, each with its own statutory deadline. *See* 33 U.S.C. § 1314(b) (EPA must review existing ELGs and decide whether revision is appropriate "at least annually"); *id.* § 1314(g) (EPA must review pretreatment standards and decide whether revision is appropriate "at least annually"); *id.* § 1314(m) (EPA must publish a plan establishing a schedule for the

[6] Jurisdiction is proper in this Court specifically because Cape Fear River Watch, Rural Empowerment Association for Community Help, and Waterkeepers Chesapeake reside here. *See* 33 U.S.C. § 1369(b)(1).

annual review and revision of existing ELGs "biennially"). Although EPA may "synchronize[]" publication of its *draft and final* biennial plans with completion of its annual reviews, "the Act does not require this degree of harmonization." *Our Children's Earth Found. v. EPA*, 527 F.3d 842, 851 (9th Cir. 2008).

By maintaining that its Decision can be challenged only after publication of a final biennial plan, EPA Motion to Dismiss at 9, EPA impermissibly attempts to merge these statutory obligations, affording itself a two-year timeline for completion of reviews that, according to the plain language of the CWA, must be conducted at least annually. While EPA can—and does—"summar[ize]" prior annual reviews in draft and final biennial plans, 84 Fed. Reg. at 57,019, the Agency cannot defer its annual obligation to complete those reviews to match its schedule for publication of final biennial plans. Such a reading would allow EPA to convert statutorily mandated annual reviews into reviews that take two years or longer to complete.

EPA implies that its stated intention "to continue to study [slaughterhouse ELGs] as additional information becomes available," Preliminary Plan 14 at 3-14, somehow renders its Decision non-final. *See* EPA Motion to Dismiss at 5–6. This is wrong. Instead, EPA's plan to "continue to review" merely reflects the iterative, annual nature of EPA's review-and-revision duties. When EPA completes an annual review cycle and *decides* that revision is not appropriate, the Agency must

"continue to review" that category of polluter during future reviews; that is precisely what Congress intended. But EPA cannot "simply make no formal decision to revise or not to revise, leaving the matter in a bureaucratic limbo." *Envtl. Def. Fund*, 870 F.2d at 900.

In addition, EPA points to its use of the phrase "at this time" to support its position that the Decision lacks finality. *See* EPA Motion to Dismiss at 9. But, as EPA is well aware, this phrase is not inconsistent with reviewable final agency action. *See, e.g.*, *Clean Air Project*, 752 F.3d at 1003 (concluding that a permitting directive describing, in part, EPA's intention not to change its permitting practices "at this time" constituted final action). Indeed, EPA's most recent *final* biennial plan includes language that is nearly identical to the language of Preliminary Plan 14: "The Final 2016 Plan identifies one new rulemaking (and the associated schedule) for the Steam Electric Power Generating Point Source Category. The EPA has concluded that no additional industries warrant new or revised effluent guidelines *at this time*." *See Final 2016 Effluent Guidelines Program Plan*, 83 Fed. Reg. 19,281, 19,282 (May 2, 2018) (emphasis added). Thus, the phrase "at this time" reflects only the iterative nature of EPA's annual reviews.

Finally, EPA further implies that the fact that Citizen Groups submitted comments on Preliminary Plan 14 indicates that they have somehow acquiesced to the non-finality of EPA's Decision. *See* EPA Motion to Dismiss at 9. This is

ridiculous. Biennial plans must include a schedule for future annual reviews, and EPA must allow the public to review and comment on those proposed schedules. 33 U.S.C. §§ 1314(m)(1)(A), 1314(m)(2). In addition, EPA shares the results of its prior annual reviews in draft biennial plans precisely to receive feedback of the sort Citizen Groups provided. *See*, *e.g.*, 68 Fed. Reg. at 75,519 (explaining that EPA "publish[ed] the results of the 2003 annual review [in a draft biennial plan] . . . to receive data and information that will inform its review for 2004 and the future"). Taking part in the public participation process to guide and improve future reviews plainly does not preclude Citizen Groups from challenging past reviews.

## CONCLUSION

EPA's Decision is reviewable final agency action, and this Court has jurisdiction to decide Citizen Groups' challenge to that Decision.

Respectfully submitted this 21st day of February 2020.

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## CERTIFICATE OF COMPLIANCE

Petitioners' response motion complies with the word limit of Fed. R. App. P. 27(d)(2)(A) because it contains 4,943 words. In addition, the response motion complies with any typeface requirement because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14 point font.

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