No. 23-2146

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOOD & WATER WATCH, CENTER FOR BIOLOGICAL DIVERSITY, CENTER FOR FOOD SAFETY, DAKOTA RURAL ACTION, DODGE COUNTY CONCERNED CITIZENS, ENVIRONMENTAL INTEGRITY PROJECT, HELPING OTHERS MAINTAIN ENVIRONMENTAL STANDARDS, INSTITUTE FOR AGRICULTURE AND TRADE POLICY, IOWA CITIZENS FOR COMMUNITY IMPROVEMENT, KEWAUNEE CARES, LAND STEWARDSHIP PROJECT, MIDWEST ENVIRONMENTAL ADVOCATES, and NORTH CAROLINA ENVIRONMENTAL JUSTICE NETWORK,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent,

and

NATIONAL PORK PRODUCERS COUNCIL, AMERICAN FARM BUREAU FEDERATION, U.S. POULTRY & EGG ASSOCIATION, and UNITED EGG PRODUCERS,

Intervenor-Respondents.

PETITIONERS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Food & Water Watch, Center for Biological Diversity, Center for Food Safety, Dakota Rural Action, Dodge County Concerned Citizens, Environmental Integrity Project, Helping Others Maintain Environmental Standards, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Kewaunee CARES, Land Stewardship Project, Midwest Environmental Advocates, and North Carolina Environmental Justice Network hereby disclose that they are nonprofit organizations, and as such, have no parent corporations or publicly held corporation owning 10 percent or more of their stock.

Dated this 26th day of February, 2024.

s/ *Emily Miller*
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INTRODUCTION

Concentrated animal feeding operations (CAFOs), which intensively confine large numbers of animals and generate mountains of waste, have come to dominate United States livestock production. As these "sewerless cities" have become larger and more concentrated in certain areas, safely managing and disposing of their many millions of gallons of waste has become increasingly challenging. Foreseeing that this industry posed large-scale threats to waterways and public health, in 1972 Congress specifically identified CAFOs as "point sources" of pollution under the Clean Water Act, subjecting these facilities to permit requirements restricting their discharge of harmful pollutants into rivers and streams.

Half a century later, the United States Environmental Protection Agency's (EPA or the Agency) regulation of CAFOs has become one of the Clean Water Act's greatest unmet promises. Although the majority of CAFOs discharge into waterways, most remain unpermitted due to EPA's ineffective regulatory scheme. In fact, *nearly 10,000* unpermitted CAFOs are illegally discharging pollution nationwide. Even the permits that are in place are woefully ineffective. As a result, the CAFO industry has become a leading source of unchecked water pollution, contaminating drinking water, harming aquatic ecosystems, and rendering lakes, rivers, and streams unfit for recreation.

To remedy this systemic failure, more than thirty organizations petitioned EPA in early 2017 to reform its Clean Water Act regulations for CAFOs (the Petition). The Petition provided EPA with a roadmap for using its established statutory authority to ensure that discharging CAFOs can no longer evade regulation, and to strengthen CAFO permits so that they effectively restrict pollution as the Act requires. After six years of delay, Petitioners filed a Petition for a Writ of Mandamus in this Court that resulted in a settlement committing EPA to answer the Petition by August 15th, 2023. On that date, EPA denied the Petition in full.

In its denial, EPA acknowledged that it has authority to address some of the most critical failures of its current regulations—including the "agricultural stormwater exemption" that has enabled most CAFOs to evade regulation—but concluded that it need not update its regulations to meet its obligations under the Act. Instead, the Agency plans to further study the issue, ensuring years more delay and perpetuating the ongoing harm that unchecked CAFO water pollution is inflicting on Petitioners, their members, and communities across the country. EPA's wholesale denial of the Petition, and most egregiously its refusal to revise its interpretation of the agricultural stormwater exemption, is arbitrary, capricious, and contrary to the Clean Water Act.

JURISDICTIONAL STATEMENT

Clean Water Act section 509(b)(1), 33 U.S.C. § 1369(b)(1), commits review of EPA's final action denying the Petition to the courts of appeals. Section 509 grants the courts of appeals exclusive jurisdiction over any determination EPA makes "in approving or promulgating any effluent limitation" and in "issuing or denying any [National Pollutant Discharge Elimination System (NPDES)] permit." 33 U.S.C. § 1369(b)(1)(E)–(F). These provisions empower appellate courts to review effluent limitation guidelines promulgated by EPA, *see generally E.I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), any "rules that regulate the underlying [NPDES] permitting procedures," and any permit issuances and denials. *NRDC v. EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992). Section 509 also authorizes courts of appeals "to hear a challenge to the EPA's denial of a petition requesting that the EPA initiate a rulemaking" on these matters. *NRDC v. EPA*, 542 F.3d 1235, 1243 (9th Cir. 2008).

Here, the Petition requests EPA overhaul its regulation of CAFOs under the Clean Water Act by revising the rules underlying CAFO permitting procedures and strengthening effluent limitation guidelines applicable to CAFOs. *See* ER-17. As such, any final action EPA undertakes in response to the Petition, including the denial at issue here, is subject to direct Circuit Court review. *See, e.g.*, *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490 (2d Cir. 2005) (challenging EPA's 2003 final CAFO

Clean Water Act rule directly in the Second Circuit).

Venue is appropriate in the Ninth Circuit if any petitioner "resides" or "transacts business which is directly affected by [the challenged] action" within the Circuit. 33 U.S.C. § 1369(b)(1). For purposes of section 509 direct review, an entity "resides" at its place of incorporation and "transacts business" where the challenged action will have a "significant effect" on a petitioner's business. *See Tenneco Oil Co. v. EPA*, 592 F.2d 897, 899 (5th Cir. 1979); *Peabody Coal Co. v. EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975). The Ninth Circuit is an appropriate venue here because three Petitioners (Food & Water Watch, Center for Biological Diversity, and Center for Food Safety) maintain offices within the Circuit and conduct significant advocacy work aimed at strengthening the regulation of CAFO water pollution in states within the Circuit, including California, Oregon, Washington, Idaho, and Hawaii. Hauter Decl. ¶¶ 12–15; Burd Decl. ¶¶ 2, 5; Kimbrell Decl. ¶¶ 7–8.[1]

Petitions for review must be filed within 120 days from the date of final agency action. 33 U.S.C. § 1369(b)(1). Petitioners timely filed this petition 24 days after EPA issued its denial, *see* ER-215; Pet. for Review, ECF 1. Accordingly, this

[1] These declarations are among the 19 declarations that establish Petitioners' standing, which have been appended to a contemporaneously filed Motion for Leave to File Standing Declarations. *See Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997) (considering standing declarations because "petitioners had no reason to include facts sufficient to establish standing as a part of the administrative record").

matter is properly before this Court.

ISSUE PRESENTED

Whether EPA's wholesale denial of the Petition and its denial of the specific Petition request to revise the agricultural stormwater exemption are arbitrary, capricious, and contrary to the Clean Water Act, 33 U.S.C. § 1251 *et seq*, in violation of the Administrative Procedure Act, 5 U.S.C. § 706(2).

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, an addendum at the end of this brief includes the pertinent statutory and regulatory provisions necessary for the Court's determination of the issues presented.

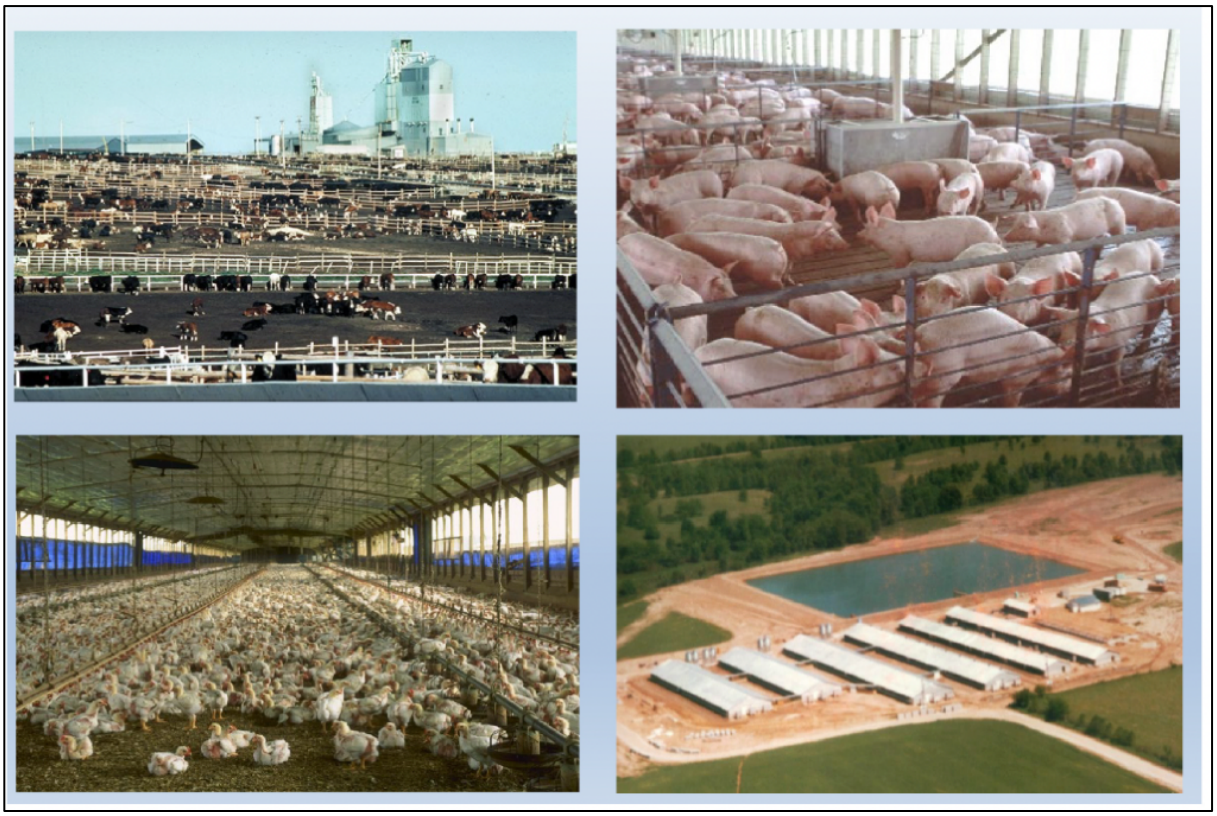
STATEMENT OF THE CASE

The CAFO industry creates and disposes of hundreds of millions of gallons of pollution-laden waste every year, devastating waterways across the country and jeopardizing human health. Though Congress has explicitly directed EPA to regulate CAFO pollution under the Clean Water Act, and EPA acknowledges CAFOs' harmful impacts, EPA's lax oversight of the industry's pollution has left most CAFOs wholly unregulated. To remedy this failure, Petitioners urged EPA to strengthen its regulatory approach to CAFOs, recommending numerous, specific actions the Agency should take to ensure that all discharging facilities are subject to Clean Water

Act permits, and that those permits are sufficiently protective of water quality. Yet nearly seven years later, apparently in denial itself, EPA has denied the Petition in full without adequately justifying its decision or proposing a legitimate plan to correct course.

I. CAFO Water Pollution Poses a Significant Threat to Human Health and the Environment

Food animal production has changed dramatically over the last several decades, with most livestock and poultry now raised in industrial-scale CAFOs that confine thousands—or even millions—of animals at a time. ER-64; ER-74.



ER-82

And as entire livestock sectors have increasingly concentrated in certain watersheds and areas of the country, so too have the vast quantities of waste CAFOs generate. ER-9. In 2003, EPA estimated CAFOs generated approximately 300 million tons of manure every year, twice the amount of raw sewage generated by all humans in the United States. NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7176, 7180 (Feb. 12, 2003). Since then, EPA data show the total number of CAFOs has grown by nearly *40 percent*, with a commensurate increase in waste production. *Compare id. to* ER-85.

This industrialization of livestock production has led to widespread water pollution. Agriculture is now the nation's leading cause of water quality impairments in rivers and lakes, with manure responsible for a significant share of that pollution. *See* ER-9–10, 87, 92. States have specifically identified animal feeding operations as the cause of almost 20,000 miles of polluted rivers and streams, and over 250,000 acres of polluted lakes, reservoirs, and ponds. ER-99. States with high concentrations of CAFOs "experience on average 20 to 30 serious water quality problems per year as a result of manure management problems." ER-10, 103.

Decades of research make clear that EPA-authorized CAFO practices are driving this water pollution crisis. CAFOs typically store millions of gallons of untreated manure and wastewater in open pits or lagoons, then dispose of that waste by spreading or spraying it onto cropland. NPDES CAFO Reporting Rule, 76 Fed.

Reg. 65,431, 65, 433 (Oct. 21, 2011); 40 C.F.R. § 412.4; ER-110. This system allows CAFO waste to pollute surface waters through two major pathways—CAFO production areas and land application fields.[2] Spills, runoff, leaks, and other discharges may occur from numerous parts of a CAFO production area, such as through leaching manure lagoons and stockpiles, leaking equipment, and mortality management areas. ER-10, 284.

ER-96

[2] The CAFO production area "includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." 40 C.F.R. § 122.23(b)(8). The CAFO land application area is land under the control of the CAFO operator "to which manure, litter or process wastewater from the production area is or may be applied." *Id*. § 122.23(b)(3).

ER-97

Hundreds of documented overflows and manure storage system failures have resulted in massive pollution discharges and toxic stream conditions, in addition to uncounted discharges from manure lagoons to groundwater that then flows into surface waters. ER-80. Burdette Decl. ¶ 18 (explaining how breached lagoon waste flooded his home); Duhn Decl. ¶ 19 (discussing the "foul-smelling layer of film" that develops on lake surfaces due to CAFO waste); Masri Decl. ¶ 6 (discussing catastrophic lagoon breaches); Utesch Decl. ¶¶ 6–8, 13 (recounting excessive ground and surface water contamination due to lagoon discharges).

Discharges also occur from land application areas. Frequently, such discharges are due to excessive application of waste to cropland or under high-risk

conditions, such as on frozen, saturated, or sloped ground, or when crops are not in place to uptake nutrients. ER-11, 204. S. Eayrs Decl. ¶ 10; Duhn Decl. ¶ 16.

ER-83

ER-81

EPA has acknowledged that "in many areas, manure is applied in excess of crop needs," ER-112, and that "appropriate nutrient management practices are not followed for *92 percent* of manured acres." ER-110 (emphasis added). CAFO waste production often far surpasses land available for disposal, making the excess susceptible to runoff. ER-67–68, 70, 119. Compounding the problem, many manure application fields contain direct conduits to waterways, such as tile lines, ditches, or sinkholes, which carry improperly-applied manure directly to surface waters. NPDES Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 66 Fed. Reg. 2960, 3054 (Jan. 12, 2001). Moreover, as discussed *infra* Section II.C., even CAFOs applying waste using currently recommended rates and methods discharge.

Researchers have found that CAFOs are frequently sited in low-income communities and communities of color, ER-182, 185, 187, 189, and EPA's analysis of the disproportionate impacts faced by those living in densely concentrated CAFO regions confirms the same. ER-192. The adverse effects of living close to CAFOs are well-documented; frontline communities experience overall worse quality of life and higher rates of illness, hospital admissions, and infant mortalities. ER-286–287; *see also* Masri Decl. ¶ 14 (explaining the cumulative environmental burdens faced by communities neighboring CAFO operations).

Numerous pollutants from CAFOs critically threaten public health and

ecosystems. Nitrates from CAFO waste can contaminate drinking water sources, resulting in serious and sometimes fatal consequences. ER-103. *See* Gibart Decl. ¶ 19 (recounting severe illness and hospitalization of seven-month-old infant following CAFO nitrate exposure); Gillespie Decl. ¶ 13 (describing doctor instructing children to hold their noses and mouths while bathing in CAFO-contaminated well water). Excess nitrogen and phosphorus also create algal blooms that can be toxic to humans and wildlife, and cause hypoxic "dead zones." ER-78; Gibart Decl. ¶ 20 (describing "dead fish that pile up on the shoreline"); Sheets Decl. ¶¶ 6–8 (recalling multiple discharge events killing many thousands of fish); Utesch Decl. ¶ 14 (lamenting the decline of brook trout populations "decimated [by] contaminated runoff").

CAFO waste also contains dangerous pollutants that have no value to crops whatsoever, such as disease-causing pathogens, antibiotics, artificial growth hormones, heavy metals, and pesticides. 76 Fed. Reg. at 65,433–34. EPA has found that "[m]ore than 150 pathogens found in livestock manure are associated with risks to humans, including the six human pathogens that account for more than 90% of food and waterborne diseases." 68 Fed. Reg. at 7236. These pathogens, including *E. coli*, *Salmonella*, and *Giardia*, can cause severe gastrointestinal illness, skin rashes, bacterial infections, and even death. ER-11, 105–107, 290–291; Gillespie Decl. ¶¶ 11–12 (contracting near-fatal blood infection due to exposure); Duhn Decl. ¶ 20

(developing a painful skin rash after kayaking in CAFO-contaminated waters). Feed additives used to promote animal growth can similarly wreak havoc on public health and the environment. EPA has found 80 to 90 percent of antibiotics and heavy metals added to feed end up in animal waste, as do large quantities of natural and synthetic hormones. 76 Fed. Reg. at 65,434; ER-76–77. When disposed of, this waste can cause antibiotic-resistant bacteria to proliferate in waterways, lead to metal-contaminated runoff, and result in hormone-induced damage to endocrine and reproductive systems of aquatic species and humans. *Id.*; *see also* Whelan Decl. ¶ 20; Utesch Decl. ¶ 13 (discussing child who contracted antibiotic-resistant bacterial infection after swimming in CAFO-contaminated waters, requiring partial removal of kneecap).

II. EPA's Attempts to Regulate CAFOs Under the Clean Water Act Have Failed

A. The Clean Water Act and NPDES Permits

"[A] cornerstone of the federal effort to protect the environment," *Waterkeeper*, 399 F.3d at 490, the Clean Water Act aims to "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by prohibiting the "discharge of any pollutant" from any "point source" to navigable waters "except in compliance with law." 33 U.S.C. §§ 1251(a)(1), 1311, 1362. The main way to comply with the Act's discharge prohibition is by obtaining and implementing an NPDES permit, which restricts the discharge of pollutants through effluent

limitations and other conditions. 33 U.S.C. §§ 1311(a), 1342.

Permits identify specific technologies or practices capable of controlling a pollutant and set effluent limitations based on that demonstrated capability. 33 U.S.C 1311(b)(2)(A). Permits and their limits must be revisited every five years. *Id.* § (b)(3)(D). In this manner, the Act was designed to ratchet up water quality protections as pollution control technology advances, improving water quality over time. *NRDC v. EPA*, 808 F.3d 556, 563–64 (2d Cir. 2015) ("Congress designed [these standards] to be technology-forcing, meaning it should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution."). These technology-based limitations are typically expressed numerically, but when "numeric effluent limitations are infeasible," a permit may instead require "[b]est management practices to control or abate the discharge of pollutants." 40 C.F.R. § 122.44(k)(3).

B. Regulation of CAFOs under the Clean Water Act

CAFOs are expressly included in the Clean Water Act's definition of "point source," subjecting CAFO discharges to the Act's general prohibition on unpermitted discharges. 33 U.S.C. § 1362(14). EPA's regulations previously required CAFOs that proposed to discharge due to their design, construction, operation, or maintenance to apply for NPDES permits. Revised NPDES Permit Regulation and Effluent Limitations Guidelines for CAFOs in Response to the

Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,423, 70,469 (Nov. 20, 2008).[3] However, following the Fifth Circuit's vacatur of this requirement in 2011, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011), EPA removed this "duty to apply" provision. NPDES Permit Regulation for CAFOs: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494, 44,494–95 (July 30, 2012). As a result, EPA only requires CAFOs to seek NPDES permit coverage if they admit to or are caught discharging.

EPA's permit regulations establish effluent limitations for CAFO discharges from both their production and land application areas. All permitted CAFOs must implement a site-specific Nutrient Management Plan (NMP) that contains "best management practices necessary to," *inter alia*, "ensure adequate storage of manure, litter, and process wastewater, . . . proper management of mortalities . . . [and] appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater . . . ." 40 C.F.R. § 122.42(e)(1). EPA further prohibits Large CAFO production area discharges, aside from wastewater overflows caused by extreme precipitation events, *id.* § 412.31(a)(1)(i), and requires their land application practices to "minimiz[e] nitrogen and phosphorus movement to surface waters." *Id.*

[3] The 2008 formulation of this "duty to apply" provision followed the Second Circuit's vacatur of a prior iteration of the rule, which required all CAFOs with the potential to discharge to obtain NPDES permits. *See Waterkeeper*, 399 F.3d at 504–506.

§ 412.4(c)(1).

Despite these land application effluent limitations, EPA's current CAFO rules exempt a large swath of land application-related discharges from regulation as "agricultural stormwater." The Clean Water Act specifically excludes "agricultural stormwater" from the definition of a point source, 33 U.S.C. § 1362(14), but does not define the term, leaving EPA some discretion to interpret the exemption's scope. Despite the express *inclusion* of CAFOs in the statutory definition of point source, EPA has adopted an expansive interpretation, defining "agricultural stormwater discharge" as "a precipitation-related discharge of manure, litter, or process waste water from land areas under the control of a CAFO" where such materials have been applied "in accordance with site specific nutrient management practices." 40 C.F.R. § 122.23(e). Under EPA's regulatory scheme, therefore, if a CAFO's land application of waste complies with its NMP, any discharges associated with precipitation are exempt from Clean Water Act permitting requirements. The exemption is available to both permitted and unpermitted CAFOs. *Id.* §§ 122.42(e)(2), (e)(4).

C. EPA Acknowledges its CAFO Regulations Are Failing

EPA acknowledges its CAFO regulations are inadequate. More than a decade ago, EPA conceded that "despite more than 35 years of regulating CAFOs, reports of water quality impacts from large animal feeding operations persist." 76 Fed. Reg. at 65,434. This regulatory failure can be attributed to two critical flaws in the

Agency's CAFO program: (1) the majority of CAFOs discharge yet evade permit coverage, and (2) the CAFO permits that do exist do not effectively control discharges.

EPA admits "[m]any CAFOs are not regulated and continue to discharge without NPDES permits" because its "regulations contain definitions, thresholds and limitations that make it difficult to compel permit coverage." ER-133. The Agency further acknowledges that "while many waters are affected by pollutants from CAFOs, many CAFOs often claim that they do not discharge, and EPA and state permitting agencies lack the resources to regularly inspect these facilities to assess these claims." *Id.* Indeed, although EPA estimates 75 percent of CAFOs discharge due to their "standard operational profiles," 73 Fed. Reg. at 70,469, less than 30 percent of CAFOs are currently permitted. ER-85. In other words, *nearly 10,000* unpermitted CAFOs are illegally polluting.[4]

Further, EPA concedes that even when CAFOs are permitted, EPA's standards fail to effectively "limit the discharge of pollutants under certain circumstances" and do not allow EPA to "enforce requirements even when discharges have been established." ER-133. For example, rather than prohibiting high-risk practices by

[4] EPA estimates there are approximately 21,539 CAFOs nationwide, 6,406 of which have NPDES permits. ER-85. If approximately 75 percent (16,154) of CAFOs discharge, an additional 9,748 unpermitted CAFOs should be covered under the NPDES program.

regulation, EPA instead urges states to do so themselves. *See* ER-200, 202, 204 ("strongly encourag[ing] states to prohibit application [of manure] to frozen, snow-covered, or saturated ground," to "high slopes," and "when measurable precipitation is occurring on the day of application," and to require installation of "an impermeable lining in a lagoon or storage pond" situated near impaired waterbodies). Yet the Agency knows many state permitting agencies are themselves prohibited from exceeding EPA's minimum best management practice requirements, including major livestock-producing states like Iowa, North Carolina, and Wisconsin. *See* Iowa Code § 459.311(2); N.C. Gen. Stat. § 150B-19.3; Wis. Stat. § 283.11(2).

EPA has also acknowledged that "[r]ecommended manure application rates are agronomic rather than water quality based," ER-110, which means "[e]ven if CAFOs were to comply with their NMPs, their standards are insufficient. NMP standards are set by each state, and states typically rely on USDA standards, which focus on maximizing crop growth, rather than on preventing excess nutrient runoff." ER-84. Nonetheless, EPA's regulations remain premised on the outdated expectation that this agronomic approach will enable operations to minimize nutrient loss and comply with effluent limitations. ER-45–48; *see also* Sheets Decl. ¶ 9 (describing mass fish kill events caused by CAFOs complying with NMPs).

Moreover, when land-applied CAFO waste washes into waterways, EPA's

rules allow operators to easily write off the discharges as exempt agricultural stormwater. EPA understands this exemption allows vast quantities of manure nutrients and other CAFO waste pollutants discharged into waterways to escape Clean Water Act regulation. ER-133. The Agency also understands the exemption ties its own and state regulators' hands from implementing the Clean Water Act's mandate to impose stricter pollution limits in permits when needed to meet water quality standards. ER-84 ("As a result of the ag stormwater exemption, facilities that have land-applied in accordance with a nutrient management plan are not subject to water quality-based effluent limitations."). These deficiencies in EPA's approach have resulted in a largely unregulated CAFO industry and CAFO permits, where they exist, that fail to adequately protect water quality.

D. EPA Has Consistently Refused to Update its CAFO Regulations Absent Court Intervention

Although CAFOs are major and largely unregulated sources of water pollution, and EPA has itself attributed these failures to various elements of its regulatory scheme, the Agency has consistently failed to make any improvements to its CAFO rules unless compelled by legal action. In 2003, only in response to a lawsuit did the Agency issue its first-ever update to its 1970 CAFO regulations. *See Waterkeeper*, 399 F.3d at 494, n.12. It then took litigation resulting in a settlement agreement to spur an initial effort to gather a basic inventory of the CAFO industry. 76 Fed. Reg. at 65,435. *But see* NPDES CAFO Reporting Rule, 77 Fed. Reg. 42,679

(July 20, 2012) (withdrawing the proposal rather than finalizing the rule). This Court recently halted EPA's longtime failure to require CAFO discharge monitoring after environmental petitioners sued the Agency for its illegal special treatment. *Food & Water Watch v. EPA*, 20 F.4th 506 (9th Cir. 2021). It took yet another lawsuit for EPA to reconsider its cursory decision not to update its CAFO effluent limitation guidelines. EPA Mot. for Voluntary Remand, ECF 19-1, *Food & Water Watch v. EPA* (9th Cir. 2022) (No. 21-71084); ER-211–214. And the very Petition denial at issue here was only issued pursuant to a court-approved settlement after Petitioners filed a Mandamus petition in this Court to force EPA action. Order, ECF 29, *Food & Water Watch, et al. v. EPA* (9th Cir. 2023) (No. 22-70226). In sum, EPA simply refuses to address CAFO pollution without significant prodding and court intervention.

III. EPA Denied the Petition to Reform its Failed CAFO Program

On March 8, 2017, thirty-four organizations petitioned EPA to revise its Clean Water Act regulations for CAFOs. ER-1–61. The Petition explained how EPA can use its authority to ensure both that discharging CAFOs obtain permits and that those permits adequately control CAFO pollution. *See* ER-17–61. Specifically, Petitioners requested EPA:

1. Revise its interpretation of agricultural stormwater so that no CAFO-related discharges are exempt from regulation;
2. Establish an evidentiary presumption that CAFOs with certain characteristics

discharge;

3. Ensure permitting authorities co-permit integrators with contract producers;
4. Revise certain definitions in the CAFO regulations;
5. Require water quality monitoring in CAFO permits; and
6. Revise CAFO effluent limitation guidelines to address additional pollutants of concern and prohibit practices known to harm water quality. ER-17.

Per the settlement resulting from Petitioners' Mandamus action, EPA responded to the Petition on August 15, 2023. The Agency denied the Petition in full. ER-215–226. In its denial, EPA acknowledged that "CAFOs can be a significant source of pollutants into waters of the United States" and "there may be opportunities to do more . . . [,]" ER-215, but decided to assess whether it can fix the deficiencies in the CAFO program through "improvements to implementation, enforcement, and other non-regulatory initiatives." ER-216. Though it recognized some of Petitioners requests seem "well-founded," "obviously beneficial," and "relatively discrete," ER-217, 223, the Agency announced it would instead rely on two parallel processes to conduct a "holistic evaluation of the best way to improve the CAFO regulations": a detailed study of the CAFO effluent limitation guidelines that EPA had announced in January 2023 in response to another Food & Water Watch lawsuit, ER-211–214, and a new Federal Advisory Committee Subcommittee to assess the Petition's proposals and make non-binding recommendations to the Agency. ER-215–217.

SUMMARY OF THE ARGUMENT

This Court should reject EPA's Petition denial for two reasons: both EPA's insistence that it need not revise any of its CAFO regulations, and its specific refusal to revise the agricultural stormwater exemption that is single-handedly obstructing regulation industry-wide, are arbitrary, capricious, and contrary to the Agency's Clean Water Act obligations.

First, EPA's wholesale denial of the Petition violates the Agency's legal duty to effectively regulate the industry's water pollution. The Agency's inadequate CAFO program allows most discharging CAFOs to avoid permit coverage, subjects the comparatively small number of permitted operations to lax requirements, and has by all accounts failed to protect waterways and frontline communities.

EPA's stated justifications for the denial are also unreasonable. The Agency asserts it cannot engage in a rulemaking because it must first complete further study of CAFO pollution and evaluate ways in which it can improve implementation and enforcement of its existing program. But the evidence before the Agency demonstrates the urgent need for regulatory reform and EPA has already spent decades trying to improve enforcement of the current program, to no avail. EPA's insistence that it needs more study falls particularly flat because it acknowledges it did not even consider extensive evidence submitted in support of the Petition; nor did it consider the environmental justice implications of its denial.

Second, the Agency's specific denial of the Petition request to narrow the agricultural stormwater exemption is arbitrary since it is *independently* standing in the way of adequate regulation of CAFOs. Closing this loophole would be perhaps the single most effective action EPA could take to increase both permit coverage and effectiveness throughout the industry. EPA's interpretation of the exemption has swallowed the rule that CAFOs are point sources, contravening both legislative and regulatory intent, and the Agency's original rationale for applying the exemption to CAFOs was based on fundamentally flawed assumptions about the effectiveness of NMPs. None of EPA's former justifications for applying the exemption to CAFOs remain valid, and EPA's refusal to correct course is unlawful.

ARGUMENT

I. Petitioners Have Standing to Challenge EPA's Petition Denial

An organization has standing if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw Env't Servs., Inc. (TOC)*, 528 U.S. 167, 181 (2000). Requiring EPA to reconsider the Petition and appropriately address the CAFO water pollution crisis threatening waterways and communities across the country is clearly germane to Petitioners' purposes as organizations focused on water protection and/or environmental justice.

Alschuler Decl. ¶¶ 4–6; Burd Decl. ¶¶ 3–5; D. Eayrs Decl. ¶¶ 4–7; Whelan Decl. ¶¶ 4–8; Gibart Decl. ¶¶ 4–7, 10; Hauter Decl. ¶¶ 4–8, 12–13; James Decl. ¶¶ 4–6, 11–12; Kimbrell Decl. ¶¶ 4–9; Lilliston Decl. ¶¶ 3–5, 7–8; Masri Decl. ¶¶ 4–7; Russ Decl. ¶¶ 4–7, 12; Sheets Decl. ¶ 3; Utesch Decl. ¶¶ 4–7. Moreover, individual members' participation is not required for, nor would it aid, the proper resolution of this case. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011).

Petitioners' members also have standing to sue in their own right for their injuries. Individuals have standing when they suffer an (1) "injury in fact" (2) that is fairly traceable to the challenged conduct and (3) capable of redress by a favorable decision from the court. *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014). EPA's Petition denial injures Petitioners' members by maintaining the status quo of failed CAFO regulation, which enables CAFOs to continue polluting waterways these members extensively use and rely on. *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 971 (9th Cir. 2003); Burdette Decl. ¶¶ 9–10; Duhn Decl. ¶¶ 8–9, 19–22; S. Eayrs Decl. ¶¶ 5–7; Gillespie Decl. ¶ 15; Kimbirauskas Decl. ¶¶ 11–18; Mendoza Decl. ¶¶ 6, 14, 16; Utesch Decl. ¶¶ 12–16. Based on concerns about pollution from both permitted and unpermitted CAFOs in the waters they use, as well as documented water quality degradation from pollutants associated with CAFOs, they have reduced their usage of specific waterbodies, limited their recreational activities

within certain waterways, and enjoyed those activities less. Burdette Decl. ¶¶ 19–24; Duhn Decl. ¶¶ 12, 19–22; S. Eayrs Decl. ¶¶ 14–15; Gillespie Decl. ¶ 12; Kimbirauskas Decl. ¶¶ 11, 14–18; Mendoza Decl. ¶¶ 14, 16; Utesch Decl. ¶¶ 12–16. Thus, Petitioners have suffered an injury in fact that is concrete, imminent, and directly traceable to EPA's decision to deny the Petition.

The relief requested would likely redress Petitioners' members' injuries. If this Court vacates EPA's denial and remands it to the Agency for reconsideration, a revised EPA response to the Petition in accordance with the Court's order would likely protect these members' interests by resolving or mitigating various deficiencies in EPA's CAFO program. As such, Petitioners have standing to pursue this petition for review.

II. Standard of Review

The Administrative Procedure Act authorizes a reviewing court to "hold unlawful and set aside agency action, findings and conclusions of law" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706. Agency action is arbitrary and capricious if the agency "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is not in accordance with the law." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463

U.S. 29, 43, 52 (1983). It is the court's duty to "'ensure that agency decisions are founded on a reasoned evaluation of the relevant factors.'" *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027, 1039 (9th Cir. 2023) (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)).

To survive arbitrary and capricious review, an agency must show that it examined "the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Id*. Its decision must also be "rationally supported by record evidence." *City & Cnty. of S.F. v. EPA*, 75 F.4th 1074, 1095 (9th Cir. 2023). This duty to explain is heightened when agency decisions are of national importance and affect public health, like the decision here. *Am. Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554, 563 (D.C. Cir. 2002). In such cases, "that agency has the heaviest of obligations to explain and expose every step of its reasoning." *Am. Lung Ass'n*, 134 F.3d at 392.

In denying a petition for rulemaking, an agency must, at minimum, clearly indicate it has considered the potential problem identified in the petition and provide a "reasonable explanation as to why it cannot or will not exercise its discretion" to initiate rulemaking. *Mass. v. EPA*, 549 U.S. 497, 533 (2007).

III. EPA's Wholesale Denial of the Petition Is Arbitrary and Capricious

A. Refusing to Update the CAFO Program Runs Counter to EPA's Mandate to Regulate the Industry

EPA has a crystal-clear statutory obligation to regulate CAFO water pollution consistent with the Clean Water Act. Though the record demonstrates updated regulations are sorely needed, the Agency remains steadfast in its unreasonable refusal to revise them. EPA cannot justify indefinite delay, in the face of overwhelming evidence, by claiming further study of the issue is necessary. Because the Agency's current rules are failing to uphold the law, the Agency's refusal to make *any* changes to its CAFO regulations is arbitrary and capricious.

1. EPA's Failed CAFO Program Undermines its Clean Water Act Obligations

A "tough law that relie[s] on explicit mandates to a degree uncommon in legislation of this type," *Nw. Envtl. Advocates v. Brown*, 640 F.3d 1063, 1077 (9th Cir. 2011) (citation omitted), the Clean Water Act sets out a very specific regulatory scheme from which EPA cannot deviate. The Act unequivocally bans discharges from point sources into navigable waters unless authorized by an NPDES permit, 33 U.S.C. § 1311(a), and requires permits to include strict pollution controls that will effectively reduce a point source's pollution. *Id.* § 1314(1)(A); *see also Nw. Envtl. Advocates v. EPA*, 537 F.3d 1006, 1022 (9th Cir. 2008) (Congress expressed "a plain . . . intent to require permits in any situation of pollution from point sources.")

(citation omitted); *NRDC v. Costle,* 568 F.2d 1369, 1376 (D.C. Cir. 1977) (discussing the "tough standards" the Act imposes upon "industry . . . and all other sources of pollution") (citation omitted). Though EPA may have some flexibility in how it achieves these directives, it "[is] not at liberty to ignore" the statute's mandates. *Nw. Envtl. Advocates v. Brown*, 640 F.3d at 1077. Above all, EPA "does not have the authority to exempt discharges otherwise subject to the [Clean Water Act]," either explicitly or through plainly inadequate regulation. *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003).

The Clean Water Act expressly singles out CAFOs as point sources, plainly directing EPA to address and control CAFO pollution through the NPDES program. 33 U.S.C. § 1362(14) ("Point source means any discernible, confined and discrete conveyance, including but not limited to any . . . *concentrated animal feeding operation* . . . from which pollutants are or may be discharged") (emphasis added). A mountain of evidence demonstrates that EPA has failed to do so. The Agency admits thousands of CAFOs are illegally discharging without NPDES permits, and that its current regulations are insufficient to compel permit coverage. *See supra* Statement of the Case Section II.C. EPA also concedes it has not required permitted CAFOs to use adequate pollution control technology, with the result that permits do not adequately limit CAFO discharges. *Id*.

EPA's failure to ensure discharging CAFOs obtain NPDES permits most

glaringly contravenes the Clean Water Act. EPA admitted in 2022 that "many CAFOs are not regulated and continue to discharge without NPDES permits," in part because its "regulations . . . make it difficult to compel permit coverage." ER-133. This failure has become the rule, not the exception—nearly *50 percent* of discharging CAFOs do so illegally, *see supra*, note 4, and the problem has only gotten worse under EPA's current rules. Per the Agency's own estimate, there are 3,000 more CAFOs today than in 2011*, compare* ER-227 *to* ER-85, yet the number of permitted CAFOs has *declined* by 1,200 during that same time frame. *Id.* If EPA's regulations prevent the Agency from compelling necessary permit coverage, then EPA *must* change its regulations. *Cmty. Voice v. EPA*, 878 F.3d 779, 786 (9th Cir. 2017) (finding EPA was under a duty to update regulations "in light of the obvious need").

EPA's refusal to update outdated and ineffective permit standards also runs afoul of the Clean Water Act. The Agency acknowledges its regulations "make it difficult to . . . limit the discharge of pollutants under certain circumstances," ER-133, and is further aware the primary land application control technology it has relied on for decades is "insufficient" and outdated. ER-84, 110, 213.

Congress "viewed the NPDES program as its most effective weapon against pollution." *NRDC v. Cnty. of L.A.*, 673 F.3d 880, 892 (9th Cir. 2011). By declining to hold the CAFO industry to the same standard as every other industry subject to

the Clean Water Act, EPA has blunted the Act's most powerful tool. EPA's refusal to revise its failed CAFO regulations is arbitrary and capricious, and contrary to the Clean Water Act's mandate to abate and control point source pollution.

2. EPA Cannot Rely on Purported Uncertainty as an Excuse for Inaction

Where Congress "set EPA a task, authorized EPA to engage in rulemaking to accomplish that task and set up a framework for EPA to amend initial rules and standards in light of new information," the Agency is under a duty to make those necessary updates "in light of the obvious need." *Cmty. Voice*, 878 F.3d at 785–86. In *A Community Voice*, EPA continually refused to make necessary updates to its lead paint regulations for more than a decade, on the grounds it lacked sufficient information to do so. 997 F.3d 983*,* 986–88 (9th Cir. 2021). This Court determined EPA's recalcitrance was arbitrary and capricious because, confronted with significant evidence of lead-based paint dangers, the Agency had no explanation for how necessary data could somehow *still* be lacking. *Id.* at 986. Under such circumstances, "Courts have recognized that an agency cannot rely on uncertainty as an excuse for inaction." *Id.* at 993; *see also State Farm*, 463 U.S. at 52 ("[P]olicymaking in a complex society must account for uncertainty," but that "does not imply that it is sufficient for an agency to merely recite the terms 'substantial uncertainty' as a justification for its actions."); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1028 (9th Cir. 2011) ("It is not enough for the [agency] to

simply invoke 'scientific uncertainty' to justify its actions."); *Nat'l Ass'n of Broadcasters v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984) ("[A]n agency would be paralyzed if all the necessary answers had to be in before any action at all could be taken.").

Just as in *A Community Voice*, EPA's Petition denial improperly invokes alleged uncertainty. The denial decision fails to explain why two separate multi-year evaluations of CAFO pollution are necessary, other than baldly asserting EPA needs a "strong indication that [requested regulatory] revisions are the most effective and appropriate way to reduce discharges from CAFOs before undertaking such an effort," given the expense involved.[5] ER-216.

The ample body of record evidence before EPA clearly showing the need for regulatory reform belies the Agency's position. EPA's rules have allowed one of the nation's largest sources of pollution to largely evade regulation, and the Agency has all the information and authority it needs to finally correct course. But faced with an opportunity to make lasting improvements through the regulatory process and provided with a roadmap for how to do so, EPA has chosen instead to ignore decades of evidence. EPA cannot indefinitely neglect its statutory duty to regulate an entire

[5] Limited resources cannot justify a decision to maintain faulty regulations. "[P]rioritizing pressing matters does not mean agencies have license to ignore the law. Simply put, '[a]bdication of responsibility is not part of the constitutional design.'" *Ctr. for Food Safety v. Regan*, 56 F.4th 648, 658 (9th Cir. 2022) (quotation omitted).

point source category in professed pursuit of perfect knowledge.

Even if more information were somehow necessary—which it is not—Petitioners are rightly dubious of the Agency's assertion, since it has time and again squandered opportunities to secure the very data it now claims to need. In 2008, the Government Accountability Office urged EPA to collect "the information it needs to assess the extent to which CAFOs may be contributing to water pollution . . . [and] ensure compliance with the Clean Water Act." ER-120. Fifteen years later, EPA still claims it has "little data" about CAFO discharges and "lacks a sufficient understanding of [CAFO pollution controls] that may have developed since its 2003 and 2008 rules." ER-213. In 2011, the Agency proposed an information collection rule to obtain basic data from CAFOs "to support EPA in meeting its water protection responsibilities," 76 Fed. Reg. at 65,431, only to promptly withdraw it a year later, finding existing sources of information to be adequate. 77 Fed. Reg. at 42,681. In 2017, when handed over 150 documents demonstrating the need for CAFO regulatory reform, the Agency could not be bothered to read them. *See infra* Section III.C.1. EPA's failure to explain how it still somehow suffers from a chronic "lack of data," which has apparently "persisted for more than a decade, in the face of mounting evidence of [CAFO pollution] dangers, is arbitrary and capricious." *Cmty. Voice*, 997 F.3d at 986.

B. EPA's Plans to Further Study the Problem Cannot Adequately Substitute for Regulatory Reforms

EPA's proposed alternatives to rulemaking cannot salvage its arbitrary denial. EPA claims it needs to engage in a "detailed study" of CAFO pollution standards and "hear from farmers, community groups, researchers, state agencies, and others about the most effective and efficient ways to reduce pollutants generated from CAFOs" to "enable the Agency to make an informed, reasoned decision as to how best to address the concerns raised in the petition." ER-215. Specifically, it intends to focus on "improvements to implementation, enforcement, and other non-regulatory initiatives." ER-216. Only after these multi-year processes are complete will the Agency even "*consider* whether to revise its regulations." *Id*. (emphasis added).

The Agency's information-gathering approach, which is both limited in scope and likely to be influenced by industry, will not yield the comprehensive and objective information the Agency claims to need. Moreover, EPA has already tried avoiding regulatory reform by improving implementation and enforcement of its existing program—and has a decades-long track record of failure. Relying on these non-regulatory proposals in lieu of rulemaking is arbitrary and capricious.

1. EPA's Study Plans Will Not Accomplish its Stated Goals

EPA's refusal to initiate rulemaking is arbitrary and capricious given the inadequate studies it has instead proposed. The detailed study of the CAFO effluent

limitation guidelines—which EPA had already committed to and now recycles as justification for the Petition denial—focuses only on certain permit provisions and cannot address the threshold problem of CAFOs evading regulation. And federal advisory committees are exactly that—merely advisory. EPA's planned Subcommittee certainly cannot substitute for reforms needed to begin regulating nearly 10,000 CAFOs. Together, these processes are likely to be less than the sum of their parts, resulting in years further delay and likely a doubling down on existing rules—far from the "holistic" review promised in the Petition denial. ER-217, 223.

EPA's "detailed study" of certain CAFO permit standards is not a reasonable substitute for regulatory action given its limited scope. EPA announced its plan to undertake this study in January 2023 in response to a lawsuit challenging EPA's inadequate review of the best management practices required by CAFO permits. ER_213. The study may prove an important step towards strengthening outdated pollution standards for the minority of CAFOs currently subject to permit requirements, but it will not examine the broader programmatic failings of EPA's CAFO regulations, including the agricultural stormwater exemption discussed *infra*, leaving most of the issues raised in the Petition untouched.

The Petition addresses how EPA's deeply flawed regulatory scheme has allowed most CAFOs to evade permits altogether, resulting in a largely unregulated industry. ER-17–36. While the Petition did ask EPA to strengthen the permit

standards, a detailed study of the extent to which *permitted* CAFOs are polluting the nation's waters and the availability and economic feasibility of stronger pollution controls in CAFO permits, ER-213, will do nothing to address the lack of permit coverage of the vast majority of CAFOs. As such, EPA's detailed study plans do not justify its denial of Petitioners' request to increase permit coverage, thus "entirely fail[ing] to consider an important aspect of the problem." *State Farm*, 463 U.S. at 43. Using its preexisting study plans as grounds for denying a Petition that raises numerous issues the Agency understands need to be addressed comprehensively is arbitrary and capricious.

The Federal Advisory Committee Subcommittee cannot fill this gap, nor will it result in a "holistic" review of the CAFO regulations. ER-217, 223. The Subcommittee will not represent EPA's own expert analysis; instead, it will convene a group of stakeholders to consider specific questions and provide non-binding recommendations. ER-215–216. Moreover, though the Federal Advisory Committee Act requires committee membership to be "fairly balanced in terms of the points of view represented," 5 U.S.C. § 1004(b)(2), to "assure that the advice and recommendations . . . will not be inappropriately influenced by the appointing authority or by any special interest," *id.* § 1004(b)(3), EPA has a poor track record on this front. EPA's Office of Inspector General recently assessed the functioning and scientific integrity of these committees, and found the majority of staff surveyed

were concerned conflicts of interest created by industry influence were interfering with EPA's ability to receive and incorporate reliable advice from advisory committees into policy decisions.[6] Likewise, a 2019 report from the Government Accountability Office documented significant concerns about the scientific integrity of advisory committees, finding EPA was neglecting a "key step" in its member appointment process by failing to document its rationale for recommending candidates and ensuring a balanced membership.[7]

Given these concerns, the Subcommittee EPA plans to convene in place of rulemaking is cold comfort to citizens and communities who have been waiting for meaningful action for decades. The Subcommittee's parent entity, the Farm, Ranch, and Rural Communities Advisory Committee (FRRCC), is effectively run by the very industry it should be designed to help regulate. Industry affiliated members comprise a controlling fifty-one percent of the FRRCC, *see* ER-228–231, and the water quality recommendations that majority has put forth thus far trend toward

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[6] EPA, Office of Inspector General, Further Efforts Needed to Uphold Scientific Integrity Policy at EPA, 14–15 (May 20, 2020), https://www.epa.gov/sites/default/files/2020-05/documents/_epaoig_20200520-20-p-0173.pdf. This EPA report is publicly available on the Agency's website and is thus subject to judicial notice. *See, e.g.*, *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (allowing judicial notice of information made publicly available through a government website). Where Petitioners ask this Court take judicial notice, we have provided a URL to the government document at issue.

[7] GAO, EPA Advisory Committees: Improvements Needed for the Member Appointment Process, 17 (July 2019), https://www.gao.gov/assets/gao-19-280.pdf.

deregulatory policies. For example, the FRRCC has urged EPA to drastically limit the scope of federal jurisdiction under the Clean Water Act, ER-233–234, curtailing the Agency's authority to protect waterways from pollution. Further, despite rural communities' disproportionate reliance on private wells for drinking water, the FRRCC has also discouraged EPA from regulating agricultural groundwater pollution. ER-234.

The FRRCC is well-positioned to exert its anti-regulatory preferences on the new Subcommittee, which is prohibited from reporting directly to EPA or "work[ing] independently" from the FRRCC.[8] Not only will an FRRCC member chair the Subcommittee, thereby establishing its priorities, but the FRRCC also makes the "final decision" on any projects or recommendations the Subcommittee presents by majority vote.[9] Given these restrictions, the Subcommittee will not fill any information gaps on CAFO pollution or meaningfully advance EPA's analysis of how to fix its broken program—it is merely a tool for more delay.

These proposed plans are a far cry from the "comprehensive strategy to strengthen the CAFO regulations" EPA asserts in its denial. ER-223. Nevertheless, the Agency argues its so-called "holistic" approach is preferable to a "piecemeal

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[8] FRRCC Advisory Committee By-Laws, 3–4 (Sep. 10, 2020), https://www.epa.gov/sites/default/files/2020-09/documents/frrcc_bylaws_final_with_adopted_date_formatted.pdf.

[9] *Id.* at 4–6.

effort." ER-217, 223. Setting aside that Petitioners did not request piecemeal reform, but rather provided a comprehensive blueprint for change, the Supreme Court has rejected such reasoning. In *Massachusetts v. EPA*, EPA asserted that regulating greenhouse gases under the Clean Air Act was an "inefficient, piecemeal approach to addressing the climate change issue," 549 U.S. at 533, preferring instead to pursue a "comprehensive approach" involving technical support, nonregulatory programs to encourage voluntary private-sector reductions, and further research. *Id.* at 513. However, the Court found this non-regulatory proposal lacking, and an insufficiently "reasoned justification" for the Agency's petition denial. *Id.* at 534. This Court should do the same here.

2. EPA's Singular Focus on Improving Implementation of Current Regulations Is Unreasonable

The biggest problem with EPA's non-regulatory proposal is that the Agency will be primarily focused on improving implementation and enforcement of the existing program, despite a multitude of failed prior efforts to do so that have only underscored the need for regulatory reform. Time and again, EPA has declined to close the regulatory loopholes CAFOs are exploiting to avoid regulation. The Agency knows improved implementation cannot obviate the need for strengthened regulations; its denial rationale "runs counter to the evidence" in the record and is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

EPA has already spent more than a decade purportedly prioritizing CAFO

water pollution. From 2005 to 2018, EPA ranked "bringing CAFOs that discharge into compliance with [Clean Water Act] requirements" among its national compliance and enforcement priorities, in response to "state water quality reports of large numbers of surface waters impaired by nutrients and frequent [Clean Water Act] violations in the CAFO industry[.]" ER-239, 236–237. During this time, the Agency used "all available compliance assistance, compliance monitoring and enforcement tools to ensure CAFO compliance with regulatory requirements." ER-237. EPA conducted thousands of CAFO compliance inspections and prosecuted hundreds of violations, with a "primary" emphasis on CAFOs that have failed to obtain an NPDES permit despite illegal discharges. ER-239, 236–237.

The Agency also launched numerous education and technical assistance initiatives to increase compliance and permit coverage. ER-238. EPA provided "extensive information and outreach" to CAFOs, awarded millions of federal grant dollars for technical assistance to livestock operators, and created the National Agriculture Compliance Assistance Center to further support agricultural producers and state regulators. *Id*. In 2013, EPA established an "Animal Agriculture Discussion Group" involving "all major animal ag industry associations, USDA, States, universities [and] extension agencies" to facilitate "two-way understanding" of the industry and the water quality protection measures required of it. ER-113. The Agency partnered with industry groups to develop environmental compliance

videos, ER-114, and spur voluntary manure management innovations. ER-115. EPA collaborated on CAFO matters with USDA and land grant universities on countless occasions. ER-117. These efforts failed. EPA abandoned its CAFO enforcement priority in 2018, in part because "[n]oncompliance is difficult to establish even when water quality impacts have been documented in receiving waters." ER-239.

EPA has used every tool at its disposal to compel CAFO compliance, and permitting has only continued to decline. The problem is plainly the regulations, not the implementation. Yet EPA now indicates it will prioritize rehashing these failed strategies to avoid a rulemaking. When an agency is "confronted with an issue of admitted urgency and public safety, 'doing the same thing over and over again and expecting different results' would seem to be strong evidence of arbitrary and capricious agency action." *Multicultural Media Telecomm. & Internet Council v. FCC*, 873 F.3d 932, 941 (D.C. Cir. 2017) (Millet, J., dissenting) (criticizing FCC for "spending a full decade studying the problem and potential solutions" only to further "stall" by claiming need for further inquiry, focusing on voluntary efforts only, and issuing blanket rejection of petitioners' regulatory recommendations). Thus, EPA's denial of Petitioners' request to update its CAFO regulations is arbitrary and unlawful.

C. EPA Failed to Conduct a Reasoned Evaluation Before Denying the Petition

EPA's wholesale Petition denial is also unlawful because it is grounded in a

wholly inadequate review of the relevant evidence. Not only did the Agency candidly admit to not reviewing the documents submitted in support of the Petition, but it also failed to consider the environmental justice impacts of its decision. This inadequate review of the evidence cannot justify EPA's refusal to initiate rulemaking and renders its Petition denial arbitrary and capricious.

1. EPA Failed to Examine the Relevant Data Petitioners Submitted

EPA admits it did not *even read* the scientific studies, research, or other materials cited in and provided in support of the Petition. Hauter Decl. ¶ 11. The Agency's complete failure to read the evidence submitted to it before coming to a decision runs afoul of the Administrative Procedure Act. Agency action is arbitrary and capricious when the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *State Farm*, 463 U.S. at 43; *see also Sierra Club v. Bosworth*, 510 F.3d 1016, 1023 (9th Cir. 2007) ("We will defer to an agency's decision only if it is 'fully informed and well-considered[.]'"). In other words, "[i]f an agency fails to examine the relevant data . . . it has failed to comply with the [Administrative Procedure Act.]." *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015); *see also Butte Cnty. v. Hogan*, 613 F.3d 190, 194 (D.C. Cir. 2010) ("[A]n agency's refusal to consider evidence bearing on the issue before it constitutes arbitrary and capricious action within the meaning of § 706.").

This is exactly such a situation. When Petitioners filed the Petition, they provided over 150 cited documents detailing the magnitude and severity of the CAFO water pollution problem, demonstrating how EPA's regulations are fundamentally to blame, and supporting the Petition requests for specific regulatory reforms. Hauter Decl. ¶ 8. In the six years it took EPA to respond to the Petition, it did not review this relevant data. According to the Agency, it simply "did not find it necessary to review each of the cited documents independently in formulating its response to the petition." *Id.* ¶ 11, Ex. 1 at 2.[10] This violates the Agency's obligation to—at a bare minimum—"ensure the Court that [it] properly considered the relevant evidence underlying [a] plaintiff's request." *Mori v. Dep't of the Navy*, 917 F. Supp. 2d 60, 65 (D.D.C. 2013) (citing *Occidental Petroleum Corp. v. SEC*, 873 F.2d 325, 338 (D.C. Cir. 1989)).

EPA's failure to consider this evidence is especially unreasonable here, where the Agency's central rationale for its denial is, ironically, a professed need for more information. Having failed to review the data submitted to it, EPA could not have rationally concluded that it lacked a "strong indication" that the requested regulatory revisions are "the most effective and appropriate way to reduce discharges from

[10] The Court may consider extra-record evidence when "necessary to determine whether the agency has considered all the relevant factors and has explained its decision . . . ." *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th Cir. 2014) (internal quotations and citation omitted).

CAFOs[.]" ER-217; *see also Catawba Cnty., N.C. v. EPA*, 571 F.3d 20, 45 (D.C. Cir. 2009) (agencies "have an obligation to deal with newly acquired evidence in some reasonable fashion"). In essence, EPA has "stuck its head in the sand and ignored the evidence that its lack of rulemaking . . . may be undermining the stated purpose of its regulations and the Act," *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 148 (D.D.C. 2017), while also paradoxically claiming to need more evidence. EPA cannot have it both ways. The Agency's refusal to "examine the relevant data," *State Farm*, 463 U.S. at 43, before coming to a decision renders its denial arbitrary and capricious.

2. EPA Failed to Consider the Environmental Justice Impacts of its Decision

In refusing to meaningfully regulate the CAFO industry, EPA has unlawfully failed to incorporate environmental justice into its decision-making. Petitioners can "challenge an agency's environmental justice analysis as arbitrary and capricious under . . . the [Administrative Procedure Act]." *Vecinos para el Bienestar de la Comunidad Costera v. FERC*, 6 F.4th 1321, 1330 (D.C. Cir. 2021). Here, EPA conducted no analysis whatsoever. Rather, it imposed this responsibility on the proposed Subcommittee. *See* ER-216. The Agency's failure to consider the environmental justice impacts of its decision consistent with Executive Order mandates renders its denial unlawful.

Under Executive Orders 12898 and 14096, every federal agency, including

EPA, is required to "make achieving environmental justice part of [its] mission[]." Exec. Order 12898 § 1–101 (Feb. 11, 1994); Exec. Order 14096 § 3 (Apr. 21, 2023). Executive Order 12898 requires EPA to "identify[] and address[], as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations" to "*the greatest extent practicable*." Exec. Order 12898 § 1–101 (emphasis added). Similarly, Executive Order 14096 requires EPA to "build upon and strengthen its commitment to deliver environmental justice," including by "evaluat[ing] relevant legal authorities and, as available and appropriate, tak[ing] steps to address disproportionate and adverse human health and environmental effects . . . ." Exec. Order 14096 §§ 1, 3(ii). Combined, these Executive Orders require EPA to integrate environmental justice considerations into its Clean Water Act regulations and permitting processes, and EPA has acknowledged it must ensure "[n]o segment of the population, regardless of race, color, national origin, or income, as a result of EPA's policies, programs, and activities, suffers disproportionately from adverse human health or environmental effects . . . ." ER-145.

When viewed in light of its Petition denial, EPA's environmental justice commitments ring exceptionally hollow. Decades of studies have documented the disproportionate impacts of CAFOs on marginalized groups. *See* ER-13–14. EPA's own research reveals environmental injustice is endemic to the CAFO industry,

widespread throughout the country and across all livestock sectors. *See* ER-192; ER-133 ("EPA is aware of a growing body of literature suggesting that the communities disproportionately impacted by CAFOs are communities of color and economically disadvantaged communities."). In 2022, EPA acknowledged its regulations fail to protect vulnerable residents living near CAFOs, proposed "explor[ing] its authority to improve the effectiveness of [its] CAFO regulations," and identified a number of regulatory revisions that would accomplish that goal. ER-133. But when given the opportunity to make these changes—all of which were requested in the Petition—not only did EPA refuse, but it was completely silent on the environmental justice impact of its decision.

EPA's failure to regulate hamstrings these communities further by stifling their opportunities to meaningfully participate in the CAFO permitting process. This flouts a central tenet of environmental justice: "meaningful involvement . . . in agency decision-making." Exec. Order 14096 § 2(b). The Agency has known for decades that the "early involvement of affected communities" is essential in "identifying and addressing environmental justice concerns." ER-145–146. By allowing most of the CAFO industry to evade regulation, the Agency severely curbs impacted communities' opportunity to provide "input into the decisions that will impact their lives[.]" ER-146*; see also Waterkeeper,* 399 F.3d at 503 (finding public participation in CAFO permitting critical to accessing information and engaging

with decision-makers).

As a result of EPA's failure to adequately regulate CAFOs, countless communities are shouldering outsized environmental and health burdens. CAFO neighbors experience a dizzying array of physical and mental health issues attributable to water pollution, including increased risk of birth defects and infant mortality, stomach and esophageal cancer, gastrointestinal illnesses, and post-traumatic stress disorder. ER-103–107. The Agency's failure to even consider the environmental justice impacts of its failed CAFO program before denying the Petition is contrary to its environmental justice obligations and is arbitrary and capricious. *Vecinos*, 6 F.4th at 1330.

IV. EPA's Specific Refusal to Revise its Interpretation of the Agricultural Stormwater Exemption Is Arbitrary and Capricious

Not only is EPA's refusal to commit to *any* regulatory reform unlawful, but so too is the Agency's specific failure to at least revise how it applies the agricultural stormwater exemption to CAFOs, since doing so would be perhaps the single most effective action EPA could take to increase permit coverage and effectiveness. Revising the agricultural stormwater exemption is necessary for two main reasons. First, EPA's interpretation has proven to be a cavernous loophole through which thousands of discharging CAFOs have escaped regulation, contravening the legislative and regulatory intent behind the exemption. Second, EPA's original justification for applying the agricultural stormwater exemption to CAFOs is based

on a fundamentally flawed assumption that no longer holds. As such, EPA's excuses for not revising its agricultural stormwater interpretation are patently unreasonable.

A. Narrowing the Agricultural Stormwater Exemption Is Within EPA's Authority and Would Better Conform to Legislative Intent

EPA has the authority to adopt the agricultural stormwater interpretation urged by Petitioners—that no CAFO-related discharges can ever constitute agricultural stormwater. The Clean Water Act specifically defines the term "point source" to include CAFOs. *See* 33 U.S.C. § 1362(14). At the same time, it excludes "agricultural stormwater" from the definition, but does not define the term. *Id.* While this leaves EPA some discretion to interpret the exemption's scope, *see Waterkeeper*, 399 F.3d at 507 (finding the agricultural stormwater provision "self-evidently ambiguous as to whether CAFO discharges can ever constitute agricultural stormwater"), it may not "'refine' the definition[] of point source . . . in a way that contravenes the clear intent of Congress as expressed in the statute." *League of Wilderness Defs. / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002).

EPA agrees it has the authority to revise its interpretation of the exemption. ER-221. Nevertheless, it denied Petitioners' request to do so, asserting that because its current interpretation "has been upheld in court," EPA must "explore all opportunities to support and improve implementation of" the current rule rather than risk an adverse court ruling. *Id.* The record demonstrates this position is

unreasonable. Not only is Petitioners' requested interpretation a more reasonable construction of the statute, it also better aligns with the legislative and regulatory history underlying the provision.

In drafting the 1972 Water Pollution Control Act Amendments, Congress made a policy judgment that CAFO wastes were fundamentally different from other types of agricultural pollution because of the sheer volume and concentration of waste produced. Given the industrial scale of these operations, and the inability of soils to fully absorb the wastes, Congress was particularly concerned with precipitation runoff from CAFOs:

> Animal and poultry waste, until recent years, has not been considered a major pollutant . . . The picture has changed dramatically, however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas. *The recycling capacity of the soil and plant cover has been surpassed . . . . Precipitation runoff from these areas picks up high concentrations of pollutants which reduce oxygen levels in receiving streams and lakes . . . .*

S. Rep. No. 92-414, 92–93 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3761. (emphasis added); *see also Cmty. Ass'n for Restoration of the Env't v. Sid Koopman Dairy*, 54 F. Supp. 2d 976, 981 (E.D. Wash. 1999) (finding it would "avoid the clear intent of Congress as expressed in the [Clean Water Act]" to exempt discharges resulting from land application of manure from the definition of "point source"). Thus, in defining CAFOs as point sources, Congress sought to control these

facilities' precipitation-related runoff along with their other water pollution.

Congress's subsequent establishment of the agricultural stormwater exemption did not change this. To the contrary, the intertwined legislative and regulatory history of the 1987 Amendment, which established the exemption, make clear the terms "agricultural stormwater" and "concentrated animal feeding operation" are most logically read as being mutually exclusive. In a rule first adopted in 1973, EPA attempted to exclude several categories of point sources from the requirement to obtain NPDES permits. *See* NPDES, 38 Fed. Reg. 13,528, 13,530 (May 22, 1973). Among the excluded categories were certain agricultural and silvicultural point sources. However, to effectuate Congress' "intent that [CAFOs] be controlled through the NPDES program," NPDES, 38 Fed. Reg. 10,960, 10,961 (May 3, 1973), EPA's exclusion did *not* include discharges from CAFOs. *See* Guidelines Regarding Agricultural & Silvicultural Activities, 38 Fed. Reg. 18,000, 18,003–04 (July 5, 1973) (applying to "agricultural and silvicultural activities, including runoff from irrigation return flows, runoff from orchards, cultivated crops, pastures, rangelands, and forest lands, *except that this exclusion shall not apply to* . . . animal confinement facilities . . . .") (emphasis added).

This exclusion was successfully challenged, however, as an attempt to override Congress's expansive definition of point source. *See NRDC v. Train*, 396 F. Supp. 1393, 1396 (D.D.C. 1975) (the Clean Water Act does not "allow[] the [EPA]

Administrator the latitude to exempt entire classes of point sources from the NPDES permit requirements"), *aff'd*, *NRDC v. Costle*, 568 F.3d 1369, 1377 (D.C. Cir. 1977). Flouting court decisions, EPA repeatedly promulgated the agricultural exclusion, inviting recurring legal challenge. *See*, *e.g.*, 44 Fed. Reg. 32,854, 32,903 (June 7, 1979); 45 Fed. Reg. 33,290, 33,442 (May 19, 1980); 48 Fed. Reg. 14,146, 14,158 (Apr. 1, 1983); *see also NRDC v. EPA* (D.C. Cir., filed June 3, 1980) (No. 80-1607) (challenging the reissued agricultural exclusion).

Finally, Congress passed the agricultural stormwater discharge amendment in 1987, ratifying EPA's agricultural exclusion and mooting an ongoing legal challenge. *See* 54 Fed. Reg. 246, 247 (Jan. 4, 1989). As EPA argued to the D.C. Circuit:

> The thrust and purpose of the [Clean Water Act] amendments' exclusion of agricultural stormwater discharges is so consonant with EPA's longstanding exemption for agricultural (including silvicultural) stormwater discharges as set forth in 40 C.F.R. § 122.3(e) that it can be taken as *congressional ratification and acceptance of the Agency's view* . . . . [I]t appears that Congress was well aware of the historic controversy over the regulation of stormwater and specifically intended to put a stop to the repeated attacks on the Agency's attempts to narrow the definition of stormwater point source . . . .

EPA Post-Argument Brief at 20, *NRDC v. EPA* (D.C. Cir. July 28, 1987) (No. 80-1607) (emphasis added). In short, Congress ratified an EPA interpretation that did *not* include any CAFO-related discharges within the meaning of "agricultural stormwater."

In fact, in passing the 1987 Amendment, Congress gave no indication of any intent to depart from the then-existing regulatory scheme or reconsider its reasons for including CAFOs in the definition of point source. To the contrary, by retaining the term "concentrated animal feeding operation," unqualified, in the definition of "point source," the legislative history demonstrates the addition of the "agricultural stormwater" exclusion was not intended to alter the scope of the NPDES program with respect to CAFOs whatsoever. "Congress does not alter a regulatory scheme's fundamental details in vague terms or ancillary provisions," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001), and "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, []regulated to agency discretion—and even more unlikely that it would achieve that through . . . a subtle device . . . ." *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

In promulgating its current interpretation of the agricultural stormwater exemption as applied to CAFOs, EPA ignored this legislative and regulatory backdrop, as well as its own contemporaneous understanding of Congress's intent. Though the Second Circuit in *Waterkeeper Alliance* ultimately found EPA's expanded application of the exemption to CAFOs to be a "permissible construction of the Act[,]" 399 F.3d at 509, it did so based on a limited review of legislative history. Notably, the court did not consider EPA's own understanding that Congress

had codified EPA's then-existing stormwater exclusion rule, which expressly did not apply to CAFOs. The court merely found statements made by Congress in 1972 to be a "hazardous basis for inferring the intent of a subsequent Congress." *Id.* at 508. The full history, however, shows EPA's current interpretation is unreasonable and undermines Congress's clear intent. Accordingly, EPA's refusal to revise its interpretation based on supposed concerns about judicial scrutiny is arbitrary and capricious.

B. EPA's Denial Is Unlawful Because it Allows CAFOs to Evade Regulation

The past two decades of the agricultural stormwater exemption in practice have further proven EPA's interpretation to be unreasonable, because it has created a permitting loophole through which thousands of discharging CAFOs have escaped regulation and has made enforcement of existing permits nearly impossible. *See Geller v. FCC*, 610 F.2d 973, 980 (D.C. Cir. 1979) ("Even assuming that the rules in question initially were justified . . . it is plain that that justification has long since evaporated."). EPA knows from past practice that it must revise its CAFO regulations when an exemption threatens to upend the statutory scheme. Moreover, it established this exemption under a very different framework in which all Large CAFOs were required to obtain permits. Things have not gone according to EPA's plans, yet the Agency inexplicably refuses to correct course, reasoning its rule can still be salvaged through improved implementation. ER-221. Its rationale runs

counter to the evidence and is arbitrary and capricious. *State Farm*, 463 U.S. at 43.

When EPA was first contemplating changes to its CAFO regulations in 2001, it was rightly wary of regulatory exemptions that allowed the industry to avoid permitting. At that time, EPA exempted all operations from the definition of a CAFO (and therefore all NPDES permitting requirements) if they discharged only during a 25-year, 24-hour storm event. *See* 68 Fed. Reg. at 7186. In practice, the exemption allowed CAFOs to "avoid the regulatory program altogether merely by claiming that they meet the 25-year, 24-hour storm event criterion," ER-294, which in turn "created confusion and ambiguity that undermine[d] the ability of permitting authorities to implement the CAFO regulations effectively." 68 Fed. Reg. at 7195. Ultimately, EPA found it necessary to eliminate the exemption "to close the existing permitting loophole," ER-292, because the entire Clean Water Act "statutory scheme would be negated if CAFOs were allowed to avoid permitting by claiming they already [met]" the relevant standard. ER-295. Armed with "considerable anecdotal evidence of unpermitted CAFOs with discharges" and the fact that "some States ha[d] failed to issue permits to any CAFOs notwithstanding significant evidence of discharges from CAFOs in those States," EPA concluded though "implementation of current regulations can always be improved . . . this [regulatory exemption] was problematic to properly implement," and must therefore be revised. ER-293–294.

For this very reason, when EPA promulgated the agricultural stormwater

exemption, it acknowledged the provision would open the door to rampant permit avoidance unless it took measures to prevent history from repeating itself. When EPA defined some CAFO discharges as exempt agricultural stormwater, it simultaneously mandated all Large CAFOs apply for a permit even if their only discharges may qualify for the exemption. 66 Fed. Reg. at 3031. Rather than relying on unpermitted CAFOs to make the exemption determination themselves, EPA concluded a universal permitting requirement was "the only way to ensure that all nonagricultural, and therefore point source, discharges from CAFOs are permitted . . . ." *Id*.[11]; *see also* ER-258 ("Throughout history, CAFOs have demonstrated they will not self-regulate . . . often intentionally fail[ing] to comply with current regulations").

As the critical—and only—check on the industry's ability to exploit the agricultural stormwater exemption, this "duty to apply" requirement was essential to EPA's reasoning. But when the Second Circuit vacated this cornerstone provision, *see Waterkeeper*, 399 F.3d at 506–7, it left the agricultural stormwater exemption in place. Because the court was addressing multiple challenges to various components of the CAFO rule via a consolidated appeal, the question of whether the exemption

[11] Just having a permit, however, has not stopped permitted operations from exploiting the exemption. *See* ER-84 (estimating that appropriate nutrient management practices required to claim the agricultural stormwater exemption are not followed for 92% of manured acres).

could sensibly function without the "duty to apply" provision was never squarely put to or addressed by the court. If it had been, the court could have considered the fundamental principle against severing a portion of a rule "if there is 'substantial doubt' that the agency would have adopted the severed portion on its own." *North Carolina v. EPA*, 531 F.3d 896, 929 (D.C. Cir. 2008). Here, the record makes clear that the Agency would not have adopted its interpretation of the agricultural stormwater exemption standing alone given the obvious permitting loophole it could create. Given the exemption's inability to function without universal permit coverage, EPA's continued refusal to revise it is arbitrary and capricious.

Indeed, the standalone exemption has become the very permitting loophole the Agency feared. The exact situation that compelled EPA to eliminate the 25-year, 24-hour storm exemption has again come to pass. Yet this time, EPA refuses to solve the problem. There is once again "considerable anecdotal evidence of unpermitted CAFOs with discharges." ER-293. According to EPA's latest count, less than 30 percent of CAFOs are currently permitted, *see* ER-85, yet EPA estimates at least 75 percent of CAFOs discharge non-agricultural stormwater pollution, 73 Fed. Reg. at 70,469, translating to nearly 10,000 unpermitted facilities illegally discharging. *See also* ER-148–149. But due to the exemption, EPA has been unable to effectively require permits. In fact, "some States have failed to issue permits to [virtually] any CAFOs notwithstanding significant evidence of discharges from CAFOs in those

States," ER-293; *see also* ER-85 (identifying eight states where none of 2,847 total CAFOs have NPDES permits, and ten states where 10 percent or less of 9,275 total CAFOs are permitted).

Two particularly glaring examples are Iowa and North Carolina. Iowa has the most CAFOs in the country—4,203—but *only 4 percent* have NPDES permits. ER-85. Despite having documented numerous manure discharges, state regulators consistently allow these polluters to continue operating unpermitted. ER-260–69; *see also* ER-16. Predictably, there have been no "measurable water quality improvements [] from its regulatory program," ER-58, and Iowans suffer from some of the most severe water quality problems in the nation. *See* ER-166 (cataloguing thousands of CAFO-contaminated drinking wells); Whelan Decl. ¶ 17 (describing millions of dollars spent treating polluted drinking water sources). North Carolina has permitted *only 14 of its 1,222* CAFOs, ER-85, going so far as to explicitly exempt poultry CAFOs from permitting requirements. *See* 15 NCAC § 02T.1303. Regulators have catalogued numerous unpermitted discharges, ER-151, and determined CAFOs "are having a significant negative impact" on many watersheds. ER-158–59, 165. Yet neither the State nor EPA has taken any action.

EPA has itself acknowledged the root cause of this under-permitting crisis stems from discharging CAFOs being able to simply claim they do not qualify as point source dischargers. In 2022, EPA found "[m]any CAFOs are not regulated and

continue to discharge without NPDES permits," and "while many waters are affected by pollutants from CAFOs, many CAFOs often claim that they do not discharge, and EPA and state permitting authorities lack the resources to regularly inspect these facilities to assess these claims." ER-133.

Indeed, the rule has proven so "problematic to properly implement," ER-294, that EPA's hope of saving it through better implementation is nonsensical. ER-221–222. EPA's current interpretation of agricultural stormwater has made it virtually impossible for EPA and state regulators to confirm that discharges are actually caused by precipitation events. The rules impose minimal requirements before a CAFO can avail itself of this blanket exemption from regulation. Unpermitted Large CAFOs must simply maintain on-site documentation demonstrating that they are implementing an NMP and make documentation available to regulators upon request. 40 C.F.R. § 122.23(e)(2). These NMPs are never otherwise submitted or independently verified. *Id.*; ER-27. In fact, there is no federal requirement that regulators exercise any oversight over unpermitted CAFOs' waste management at any point. Permitted CAFOs avail themselves of the exemption similarly. Although permitted CAFOs submit their NMPs to regulators, they do not have to report agricultural stormwater discharges when they occur or as part of their annual reports. 40 C.F.R. §§ 122.42(e)(2), (e)(4). The outcome for either scenario is the same: the CAFO operator may "claim" the agricultural stormwater exemption by simply doing

nothing, *id*. § 122.23(e), and there is no way for regulators to know whether a discharge occurred at all, much less whether it was in fact unlawful.

Courts have rejected EPA's past attempts to similarly shirk oversight over CAFO permits. *See Waterkeeper*, 399 F.3d at 502 ("By not providing for permitting authority review of these application rates, the CAFO rule fails to adequately prevent Large CAFOs from 'misunderstanding or misrepresenting' the application rates they must adopt.") The same logic applies to EPA's failure to properly oversee unpermitted operations claiming the agricultural stormwater exemption. As EPA well knows, "[w]ithout the review of NPDES authorities, the CAFO is essentially encouraged to cheat the numbers for land application rates, because if there happens to be a discharge of pollutants from these land applications, and the CAFO is within the self-created NMP [if one even exists], the pollutants will be considered 'agricultural stormwater discharge' and expressly immune from EPA regulation of any kind." ER-258. At bottom, the current regulations incentivize both permitted and unpermitted CAFO operators to over-apply animal wastes to cropland, while claiming any subsequent discharges are exempt from permitting as agricultural stormwater, thus avoiding regulation entirely (in the case of unpermitted CAFOs) or enforcement (in the case of permitted CAFOs). EPA has allowed this untenable situation to continue unabated for the last two decades in contravention of the Clean Water Act, and its attempt to double down on the status quo by denying the Petition

is arbitrary and capricious.[12]

C. EPA's Current Interpretation Relies on Fundamentally Incorrect Factual Assumptions

EPA's refusal to revise the agricultural stormwater exemption is also arbitrary and capricious because the entire factual premise underlying the rule has evaporated since the Agency first promulgated it. When EPA initially adopted its interpretation, it did so based on the fundamental assumption that when CAFO waste is applied to fields at so-called agronomic rates it can not only "fulfill an important agricultural purpose" but also, critically, "minimize runoff;" thus, EPA concluded any pollution runoff occurring due to rainfall events could reasonably qualify as exempt agricultural stormwater. 68 Fed. Reg. at 7197–98. The Agency reiterated this reasoning in its denial. ER-220. This directly contravenes the significant body of record evidence demonstrating that NMPs, which are designed to maximize crop growth rather than protect water quality, do not effectively minimize pollution—a fact that even the Agency elsewhere admits. *See* ER-84, 110. "Agency reasoning [] must adapt as the critical facts change," *Flyers Rights v. FAA*, 864 F.3d 738, 745 (D.C. Cir. 2017), and EPA's failure to do so here is unlawful.

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[12] EPA's denial reasoning on this point is lacking. In response to Petitioners' arguments about the lack of federal oversight that exists over *unpermitted* operations, EPA "disagrees" by raising the oversight it exerts over *permitted* operations as supposed evidence to the contrary. ER-221–222; ER-27. This reasoning defies logic and "runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

Courts have consistently found "a fundamental change in the factual premises previously considered by the agency" constitutes grounds for overturning an agency decision not to engage in rulemaking. *Env't Health Trust v. FCC*, 9 F.4th 893, 903 (D.C. Cir. 2021); *see also American Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) ("[A] refusal to initiate a rulemaking naturally sets off a special alert when a petition has sought modification of a rule on the basis of a radical change in its factual premises."). Thus, when EPA is "confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded" its refusal to update its regulations can only survive judicial review if it can explain "*why*, in light of the studies in the record, its [regulations] remain adequate." *Env't Health Trust*, 9 F.4th at 903, 906 (emphasis in original).

Here, not only is the record replete with evidence undermining EPA's assumption regarding the efficacy of NMPs—including the Agency's *own* findings—but EPA provides no analysis whatsoever explaining why its agricultural stormwater interpretation nevertheless remains adequate. The record demonstrates that "just having a NMP does not reduce excess nutrient application nor does it guarantee improvements in water quality." ER-272; *see also* ER-179 (citing numerous examples of "well-established scientific evidence demonstrat[ing] that even at recommended rates, land application leads to the addition of more nutrients than plants can take up and soil can retain, posing a serious threat to water

pollution.").

EPA's own studies in the intervening decades have undercut the factual assumptions fundamental to the Agency's agricultural stormwater interpretation. In 2011, EPA tested the "tacit assumption" underlying its CAFO program "that a well designed and executed NMP ensures that all [CAFO] water contaminants (nutrients and pathogens) are retained or taken up in the root zone," thus minimizing pollution to nearby waters. ER-277. The Agency found the difficulties accurately estimating water application complicates nutrient planning and threatens pollution runoff, ER-281, and only a highly conservative plan that "depleted the soil organic reservoir . . . by applying only a fraction" of plant nutrient needs actually minimized pollution. ER-282. In contrast a "more aggressive" plan characteristic of those actually advised by USDA and State conservation standards lead to increased "leaching and contaminant migration." *Id.*

Accordingly, EPA admits "[e]ven if CAFOs were to comply with their NMPs, their standards are insufficient" since NMP standards "typically rely on USDA standards, which focus on maximizing crop growth, rather than on preventing excess nutrient runoff." ER-84; *see also* ER-110 ("Recommended manure application rates are agronomic rather than water quality-based."). In sum, not only does the scientific evidence in the record shake the foundations upon which EPA's interpretation of agricultural stormwater is built, but the Agency itself acknowledges its previous

assumptions were incorrect.

Having been "confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgment have eroded," it was incumbent upon EPA to at the very least "provide assurance that it considered the relevant factors" and explain why, in light of this new information, its agricultural stormwater interpretation remains adequate. *See Env't Health Trust*, 9 F.4th at 903, 906. Yet, the Agency's denial was completely silent on this "radical change in its factual premises." *American Horse Prot. Ass'n*, 812 F.2d at 5. Instead of a reasoned explanation that actually addressed the evidence before it, EPA's denial contradicted its own repeated findings, asserting "EPA's primary concerns about NMPs are not their lack of rigor, but the extent to which they are, or can be, fully and consistently implemented and enforced," ER-222, and that it has therefore "determined that first conducting a robust effort to explore ways of improving implementation of its interpretation . . . would be the most efficient use of limited Agency resources." ER-221. Such counterfactual analysis does not comport with the Administrative Procedure Act's mandate to provide a reasoned explanation for the Agency's action. By the Agency's own admission, even if there were perfect compliance with NMPs, water quality would suffer. *See* ER-84. EPA's head-in-the-sand approach to scientific evidence that undermines its justification of the agricultural stormwater exemption is arbitrary and capricious.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request the Court vacate EPA's Petition denial and remand to the Agency to reconsider the Petition's requests in a manner consistent with the Court's order.

Dated this 26th day of February 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on February 26, 2024. I certify that all participants in the case are registered ACMS users and that service will be accomplished by the ACMS system.

Dated this 26th day of February, 2024.

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ADDENDUM OF STATUTES, REGULATIONS, AND OTHER AUTHORITY

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5 U.S.C. § 706 – Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 1004 – Responsibilities of congressional committees

. . .

(b) Consideration of legislation. In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall—

(1) contain a clearly defined purpose for the advisory committee;
(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;
(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;
(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 1009 of this chapter to be inadequate; and
(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) Adherence to guidelines. To the extent they are applicable, the guidelines set out in subsection (b) shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

33 U.S.C. § 1251 – Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective. The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act —

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this Act to be met through the control of both point and nonpoint sources of pollution.

. . .

33 U.S.C. 1311 – Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law. Except as in compliance with this section and sections 302, 306, 307, 318, 402, and 404 of this Act, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives. In order to carry out the objective of this Act there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 304(b) of this Act, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph

(B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 307 of this Act; and

[(1)(B)] for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 203 of this Act prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 304(d)(1) of this Act; or,

. . .

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 315, that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 304(b)(2) of this Act, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 307 of this Act

. . .

33 U.S.C. 1314 – Information and guidelines

. . .

(b) Effluent limitation guidelines. For the purpose of adopting or revising effluent limitations under this Act the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of enactment of this title, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

. . .

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

[(2)(B)] specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 301 of this Act to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;
. . .

33 U.S.C. § 1342 – National pollutant discharge elimination system

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 318 and 404 of this Act, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301(a), upon condition that such discharge will meet either (A) all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act, (B) or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this Act.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

. . .

33 U.S.C. § 1362 – Definitions

Except as otherwise specifically provided, when used in this Act:

. . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

33 U.S.C. § 1369 – Administrative procedure and judicial review

(b) Review of the Administrator's actions; selection of court; fees.

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 306, (B) in making any determination pursuant to section 306(b)(1)(C), (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 307, (D) in making any determination as to a State permit program submitted under section 402(b), (E) in approving or promulgating any effluent limitation or other limitation under section 301, 302, 306 or 405, (F) in issuing or denying any permit under section 402, and (G) in promulgating any individual control strategy under section 304(l), may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

Code of Federal Regulations

40 C.F.R. § 122.3 – Exclusions.

The following discharges do not require NPDES permits:

. . .

(e) Any introduction of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

. . .

40 C.F.R. § 122.23 – Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25)

(a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

. . .

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) Large concentrated animal feeding operation ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

. . .

(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns,

milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

. . .

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42€(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

. . .

40 C.F.R. § 122.42 – Additional conditions applicable to specified categories of NPDES permits

. . .

(e) Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs €(1) through €(6) of this section.

(1) Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(iii) Ensure that clean water is diverted, as appropriate, from the production area;

(iv) Prevent direct contact of confined animals with waters of the United States;

(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs €(1)(i) through €(1)(viii) of this section.

. . .

(4) Annual reporting requirements for CAFOs. The permittee must submit an annual report to the Director. As of December 21, 2025 or an EPA-approved alternative date (see 40 CFR 127.24(e) or (f)), all annual reports submitted in compliance with this section must be submitted electronically by the permittee to the Director or initial recipient, as defined in 40 CFR 127.2(b), in compliance with this section and 40 CFR. Part 3 (including, in all cases, subpart D to part 3), § 122.22, and 40 CFR part 127. 40 CFR part 127 is not intended to undo existing requirements for electronic reporting. Prior to this date, and independent of 40 CFR part 127, the permittee may be required to report electronically if specified by a particular permit or if required to do so by state law. The annual report must include:

(i) The number and type of animals, whether in open confinement or housed under roof (beef cattle, broilers, layers, swine weighing 55 pounds or more, swine weighing less than 55 pounds, mature dairy cows, dairy heifers, veal calves, sheep and lambs, horses, ducks, turkeys, other);

(ii) Estimated amount of total manure, litter and process wastewater generated by the CAFO in the previous 12 months (tons/gallons);

(iii) Estimated amount of total manure, litter and process wastewater transferred to other person by the CAFO in the previous 12 months (tons/gallons);

(iv) Total number of acres for land application covered by the nutrient management plan developed in accordance with paragraph(e)(1) of this section;

(v) Total number of acres under control of the CAFO that were used for land application of manure, litter and process wastewater in the previous 12 months;

(vi) Summary of all manure, litter and process wastewater discharges from the production area that have occurred in the previous 12 months, including date, time, and approximate volume; and

(vii) A statement indicating whether the current version of the CAFO's nutrient management plan was developed or approved by a certified nutrient management planner; and

(viii) The actual crop(s) planted and actual yield(s) for each field, the actual nitrogen and phosphorus content of the manure, litter, and process wastewater, the results of calculations conducted in accordance with paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section, and the amount of manure, litter, and process wastewater applied to each field during the previous 12 months; and, for any CAFO that implements a nutrient management plan that addresses rates of application in accordance with paragraph (e)(5)(ii) of this section, the results of any soil testing for nitrogen and phosphorus taken during the preceding 12 months, the data used in calculations conducted in accordance with paragraph (e)(5)(ii)(D) of this section, and the amount of any supplemental fertilizer applied during the previous 12 months.

. . .

40 C.F.R. 122.44 – Establishing limitations, standards, and other permit conditions (applicable to State NPDES programs, see § 123.25)

. . .

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

. . .

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

. . .

40 C.F.R. 412.4 – Best Management Practices (BMPs) for Land Application of Manure, Litter, and Process Wastewater

(a) Applicability. This section applies to any CAFO subject to subpart C of this part (Dairy and Beef Cattle other than Veal Calves) or subpart D of this part (Swine, Poultry, and Veal Calves).

. . .

(c) Requirement to develop and implement best management practices. Each CAFO subject to this section that land applies manure, litter, or process wastewater, must do so in accordance with the following practices:

(1) Nutrient Management Plan. The CAFO must develop and implement a nutrient management plan that incorporates the requirements of paragraphs (e)(2) through (e)(5) of this section based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters.

(2) Determination of application rates. Application rates for manure, litter, and other process wastewater applied to land under the ownership or operational control of the CAFO must minimize phosphorus and nitrogen transport from the field to surface waters in compliance with the technical standards for nutrient management established by the Director. Such technical standards for nutrient management shall:

> (i) Include a field-specific assessment of the potential for nitrogen and phosphorus transport from the field to surface waters, and address the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters; and

(ii) Include appropriate flexibilities for any CAFO to implement nutrient management practices to comply with the technical standards, including consideration of multi-year phosphorus application on fields that do not have a high potential for phosphorus runoff to surface water, phased implementation of phosphorus-based nutrient management, and other components, as determined appropriate by the Director.

(3) Manure and soil sampling. Manure must be analyzed a minimum of once annually for nitrogen and phosphorus content, and soil analyzed a minimum of once every five years for phosphorus content. The results of these analyses are to be used in determining application rates for manure, litter, and other process wastewater.

(4) Inspect land application equipment for leaks. The operator must periodically inspect equipment used for land application of manure, litter, or process wastewater.

(5) Setback requirements. Unless the CAFO exercises one of the compliance alternatives provided for in paragraph (e)(5)(i) or (e)(5)(ii) of this section, manure, litter, and process wastewater may not be applied closer than 100 feet to any down-gradient surface waters, open tile line intake structures, sinkholes, agricultural well heads, or other conduits to surface waters.

(i) Vegetated buffer compliance alternative. As a compliance alternative, the CAFO may substitute the 100-foot setback with a 35-foot wide vegetated buffer where applications of manure, litter, or process wastewater are prohibited.

(ii) Alternative practices compliance alternative. As a compliance alternative, the CAFO may demonstrate that a setback or buffer is not necessary because implementation of alternative conservation practices or field-specific conditions will provide pollutant reductions equivalent or better than the reductions that would be achieved by the 100-foot setback.

40 C.F.R. § 412.31 – Effluent limitations attainable by the application of the best practicable control technology currently available (BPT)

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas. Except as provided in paragraphs (a)(1) through (a)(2) of this section, there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area.

(1) Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into U.S. waters provided:

> (i) The production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event;
>
> (ii) The production area is operated in accordance with the additional measures and records required by § 412.37(a) and (b).

. . .

(b) For CAFO land application areas. Discharges from land application areas are subject to the following requirements:

(1) Develop and implement the best management practices specified in § 412.4;

(2) Maintain the records specified at § 412.37(e);

(3) The CAFO shall attain the limitations and requirements of this paragraph by February 27, 2009.

Federal Register

38 Fed. Reg. 10,960 10,961 (May 3, 1973)
Notice of Proposed Rulemaking Regarding Agricultural and Silvicultural Activities

. . .

a. *Animal confinement facilities* –The proposed regulations provide that large animal feedlots and holding facilities will remain subject to NPDES requirements. By the inclusion of the term "concentrated animal feeding operations" in section 502(14) of the Act, Congress indicated its intent that these sources of agricultural pollution be controlled through the NPDES program.

. . .

38 Fed. Reg. 18,000, 18,003-4 (July 5, 1973)
Guidelines Regarding Agricultural & Silvicultural Activities
(formerly codified at 40 C.F.R. § 125.4(j))

. . .

§ 125.4 Exclusions.

The following do not require an NPDES permit:

. . .

(j) Discharges from pollutants from agricultural and silvicultural activities, including irrigation return flow and runoff f rom orchards, cultivated crops, pastures, rangelands, and forest lands, except that this exclusion shall not apply to the following:

(e) Discharges from animal confinement facilities, if such facility or facilitiy contain, or at any time during the previous 12 months contained, for a total of 30 days or more, any of the following types of animals at or in excess of the number listed for each type of animal:

(i) 1,000 slaughter and feeder cattle;
(ii) 700 mature dairy cattle (whether milkers or dry cows);
(iii) 2,500 swine weighing over 55 pounds;
(iv) 10,000 sheep;
(v) 55,000 turkeys
(vi) If the animal confinement facility has continuous overflow watering, 100,000 laying hens and broilers;
(vii) If the animal ffacility has liquid manure handling systems, 30,000 laying hens and broilers
(viii) 5,000 ducks;

. . .

44 Fed. Reg. 32,854, 32,902–32,903, (June 7, 1979)
National Pollutant Discharge Elimination System; Revision of Regulations
(formerly codified at 40 C.F.R. § 122.4(a)(4))

. . .

§ 122.4 Exclusions.

(e) The following discharges do not require an NPDES permit:

. . .
(4) Any introduction of pollutants from agricultural and silvicultural activites, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, except that this exclusion shall not apply to:

(i) Discharges from concentrated animal feeding operations as defined in § 122.42

. . .

45 Fed. Reg. 33,290, 33,441–33,442 (May 19, 1980)
Consolidated Permit Regulations
(formerly codified at 40 C.F.R. § 122.51(c)(2)(v))

. . .

§ 122.51 Purpose and scope of subpart D.

. . .
(c) *Scope of NPDES permit requirement.* The NPDES program requires permits for the discharge of "pollutants" from any "point source" into "waters of the United States." The terms "point source" and "waters of the United States" are defined in § 122.3.

. . .

(2) *Specific exclusions. The following discharges do not require NPDES permits:*

. . .

(v) Any introduction of pollutants from non-point-source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.54, discharges from concentrated aquatic animal production facilities as defined in § 122.55, discharges to aquaculture projects as defined in § 122.56, and discharges from silvicultural point sources as defined in § 122.58.

. . .

48 Fed. Reg. 14146, 14,157–14,158 (Apr. 1, 1983)
Environmental Permit Regulations
(formerly codified at 40 C.F.R. § 122.3(e))

. . .

§ 122.3 Exclusions.

The following discharges do not require an NPDES permit:

. . .

(e) Any introductions of pollutants from non point-source agricultural and silvicultural activities, including runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.
. . .

54 Fed. Reg. 246, 247 & 254 (Jan. 4, 1989)
NPDES Permit Regulations

. . .

2. Agricultural Storm Water Discharges

Section 503 of the WQA amended section 502(14) of the CWA to expressly exclude from the definition of point source agricultural storm water discharges. Thus these discharges are not subject to NPDES permit requirements. Today's rules amends the existing definition of point source in § 122.2 to incorporate this statutory exclusion.

EPA's regulations had previously excluded certain agricultural and silvicultural discharges, which EPA defined as non-point, from the requirement to obtain an NPDES permit (see § 122.3(e)). This exclusion had been challenged by the Natural Resources Defense Council (NRDC) in *NRDC v. EPA,* No. 80-1607 (filed June 3, 1980) as being beyond EPA's authority. In view of the new statutory exclusion for agricultural storm water discharges, the U.S. Court of Appeals for the District of Columbia Circuit dismissed NRDC's challenge to § 122.3(e) as moot.

Today's revision clarifies that the exclusion in § 122.3(e) includes agricultural and silvicultural storm water discharges. Silvicultural point source discharges under § 122.27 are still required to obtain NPDES permits. For consistency, EPA is also adding a reference to § 122.3(e) in the definition of point source.

. . .

§ 122.3 Exclusions.

(e) Any introductions of pollutants from non point-source agricultural and silvicultural activities, including storm water runoff from orchards, cultivated crops, pastures, range lands, and forest lands, but not discharges from concentrated animal feeding operations as defined in § 122.23, discharges from concentrated aquatic animal production facilities as defined in § 122.24, discharges to aquaculture projects as defined in § 122.25, and discharges from silvicultural point sources as defined in § 122.27.

. . .

State Law

Iowa Code § 459.311 – Minimum requirements for manure control.

. . .

(2) Notwithstanding subsection 1, a confinement feeding operation that is a concentrated animal feeding operation as defined in 40 C.F.R. § 122.23(b) shall comply with applicable national pollutant discharge elimination system permit requirements as provided in the federal Water Pollution Control Act, 33 U.S.C. ch. 26 as amended, and 40 C.F.R. pts. 122 and 412, pursuant to rules that shall be adopted by the commission. Any rules adopted pursuant to this subsection shall be no more stringent than requirements under the federal Water Pollution Control Act, 33 U.S.C. ch. 26, as amended, and 40 C.F.R. pts. 122 and 412.

. . .

N.C. Gen. Stat § 150B-19.3 – Limitations on certain environmental rules.

(a) An agency authorized to implement and enforce State and federal environmental laws may not adopt a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule, if a federal law or rule pertaining to the same subject matter has been adopted, unless adoption of the rule is required by one of the subdivisions of this subsection. A rule required by one of the following subdivisions of this subsection shall be subject to the provisions of G.S. 150B-21.3(b1) as if the rule received written objects from 10 or more persons under G.S. 150B-21.3(b2):

. . .

Wis. Stat. § 283.11 – State and federal standards

. . .

(2) Compliance with Federal Standards.

(a) Except for rules concerning storm water discharges for which permits are issued under s. 283.33, all rules promulgated by the department under this chapter as they relate to point source discharges, effluent limitations, municipal monitoring requirements, standards of performance for new sources, toxic effluent standards

or prohibitions and pretreatment standards shall comply with and not exceed the requirements of the federal water pollution control act, 33 USC 1251 to 1387, and regulations adopted under that act.

(b) Rules concerning storm water discharges may be no more stringent than the requirements under the federal water pollution control act, 33 USC 1251 to 1387, and regulations adopted under that act.

. . .

Other Authority

NRDC v. EPA, No. 80-1607 – Post-Argument Brief of Respondent (July 28, 1987)

. . .

[page 20]

The thrust and purpose of the CWA amendments' exclusion of agricultural stormwater discharges is so consonant with EPA's longstanding exemption for agricultural (including silvicultural) stormwater discharges as set forth in 40 C.F.R. § 122.3(e) that it can be taken as congressional ratification and acceptance of the Agency's view. The exempted stormwater discharge from silvicultural activities are virtually identical to stormwater discharges from other crop production and harvesting activities. Moreover, EPA has historically. Treated these practices virtually synonymously. For instance, 40 C.F.R. § 122.3(e) equates runoff from orchards and pastures with runoff from forest lands. In fact, in enacting the Water Quality Act, it appears that Congress was well aware of the historic controversy over the regulation of stormwater and specifically intended to put a stop to the repeated attacks on the Agency's attempt to narrow the definition of stormwater point source. In this respect, Senator Moynihan's comments on the new nonpoint source program are particularly illustrative:

. . .

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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