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' REPLY BRIEF

Emily Miller (CA Bar No. 336417)
Tarah Heinzen (OR Bar No. 191131)
Food & Water Watch
1616 P Street, N.W. Ste. 300
Washington, D.C. 20036
(202) 683-2500 (Miller)
(202) 683-2457 (Heinzen)
eamiller@fwwatch.org
theinzen@fwwatch.org

Allison LaPlante (OR Bar No. 023614)
Attorney at Law
333 NE Russell Street #200
Portland, OR 97212
(503) 351-1326
allison.laplante@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Federal Statutes: **Page(s)**

Federal Register Publications: **Page(s)**

Other Authorities: **Page(s)**

INTRODUCTION

The Environmental Protection Agency (EPA or Agency) openly admits there are "problems" with its currently regulatory regime, under which nearly 10,000 unpermitted concentrated animal feeding operations (CAFOs) are illegally discharging pollution. EPA Br. 55, 57. Nevertheless, the Agency essentially claims unbridled discretion to indefinitely forestall needed rule updates. Even the deference accorded to agency petition denials has its limits, and EPA has surpassed them here. It is failing its mandate to regulate CAFOs in accordance with the Clean Water Act, and though EPA's study plans may appear substantive at first glance, a closer look reveals they are simply not calculated to result in a lawful regulatory program.

The Court can move past the Agency's efforts to limit review; there is no serious dispute that the denial is a reviewable final action despite the potential for some future change of course. Nor is there credible dispute that Petitioners preserved their challenge to both EPA's wholesale Petition denial and its refusal to revise the agricultural stormwater exemption. In addressing the merits, EPA fails to refute Petitioners' arguments, instead sidestepping entire issues and mischaracterizing Petitioners' brief. The Agency has struggled to adequately address CAFO pollution, and understandably fears a powerful industry's backlash. But this cannot justify its Petition denial, and its stated rationales do not hold up under scrutiny.

ARGUMENT

I. EPA CANNOT SURVIVE JUDICIAL REVIEW BY HOLDING OPEN THE POSSIBILITY OF FUTURE REGULATORY REFORM

EPA and Intervenors extensively brief the discretion accorded to agency petition responses, but neither disputes that EPA denied the Petition and such denial is "susceptible to judicial review." *Massachusetts v. EPA*, 549 U.S. 497, 527 (2007); *see Clark v. Busey*, 959 F.2d 808, 811 (9th Cir. 1992) ("An agency's denial of a petition for rulemaking constitutes final, reviewable, agency action"). Nevertheless, the Agency insinuates as much by inaccurately portraying its denial as something other than a refusal to act. Indeed, EPA repeatedly insists that it has *not* refused to make regulatory improvements to its failed CAFO program, it only refuses to do so "at this time." *See, e.g.*, EPA Br. 30. But for purposes of judicial review, that distinction is meaningless; there is *always* potential for future regulatory action. That possibility does not prevent reviewing courts from evaluating agency decisions based on the information available and the explanations given at the time the decision was made. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 50 (1983); *Mass.*, 549 U.S. at 534 (rejecting EPA's decision "not to regulate at this time"). That EPA *might* consider regulatory reform in the future simply has no bearing on the arbitrary and capricious analysis. Accordingly, EPA's noncommittal openness to future regulatory updates neither insulates the Agency's decision nor justifies its inaction.

Indeed, where courts have upheld future regulatory plans as a reasonable basis for a petition denial, such plans were far more concrete than the "maybe someday" EPA offers. For instance, in *Defenders of Wildlife v. Gutierrez*, which EPA relies on to justify its plans, EPA Br. 20, the D.C. Circuit affirmed the denial of an emergency rulemaking request *only* because the agency was already engaged in a notice-and-comment rulemaking on the same subject. 532 F.3d 913, 921 (D.C. Cir. 2008). By contrast, here the Agency will at best "consider" the idea of reform at some future time. ER-221. But agencies always have a duty to consider regulatory changes when the status quo is not meeting their statutory responsibilities. *See 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"); *Level the Playing Field v. FEC*, 232 F. Supp. 3d 130, 148 (D.D.C. 2017) (rejecting petition denial where agency's "lack of rulemaking . . . may be undermining the stated purpose of its regulations and the Act."). Using this ongoing obligation as an excuse for inaction is—despite EPA's claims to the contrary—the quintessential "case of an agency kicking a can down the road." EPA Br. 2.

EPA also fundamentally mischaracterizes what Petitioners requested. The Agency implies that upon receipt of the 2017 Petition, it promptly and thoroughly considered its requests and devised a plan that would ultimately result in any needed rule updates, making it unreasonable for Petitioners to demand immediate action. In

fact, EPA repeatedly asserts that Petitioners demand an "immediate" rulemaking. *See id.* at 2, 17, 23, 26. Quite the opposite. Petitioners waited *six years* for the Agency to address the Petition, which it only did when compelled by litigation. *See* Pet. Br. 20. If the Agency truly "shares [Petitioners'] concerns that CAFOs can be a significant source of pollutants into waters of the United States," ER-220, and "agrees with Petitioners that there are problems" with the CAFO program, EPA Br. 57, then it should not have taken six years and a lawsuit for EPA to even act on the Petition, much less deny it.

The Court need not defer to EPA's refusal to engage in rulemaking "at this time"—or possibly ever—when the record shows both the Agency's significant foot-dragging and that its CAFO regulations are egregiously out of step with what the Clean Water Act requires. Though judicial review of petition denials is deferential, there is a limit to what courts will abide. 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." *Compassion Over Killing v. FDA*, 849 F.3d 849, 857 (9th Cir. 2017) (citation omitted); *see also New York v. EPA*, 921 F.3d 257, 261 (D.C. Cir. 2019) ("[E]ven with respect to a denial to engage in rulemaking, in these, as in more typical reviews, [courts] must consider whether the agency's decisionmaking was reasoned."); *WWHT, Inc. v. FCC*, 656 F.2d 807, 817 (D.C. Cir. 1981) (explaining the

deferential review standard still requires "an articulated justification that makes 'a rational connection between the facts found and the choice made,' and follows upon a 'hard look' by the agency at the relevant issues.") (citation omitted). Furthermore, though EPA may ordinarily have "significant latitude as to the manner, timing, content and coordination of its regulations . . . once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute." *Mass.*, 549 U.S. at 533.

II. PETITIONERS HAVE PROPERLY PRESERVED THEIR ARGUMENTS

EPA insists Petitioners failed to preserve arguments regarding EPA's general duty to act, and improperly "shift tactics" by focusing this challenge on its overarching denial and its refusal to amend the agricultural stormwater exemption. EPA Br. 22. EPA is wrong on both counts. The Petition plainly raises "the broader suggestion that the Agency had a general duty to take some action," *id.*, repeatedly describing how EPA's approach to CAFO regulation falls short of the Clean Water Act's mandate to control point source pollution and protect waterways. In urging the Agency to finally bring its CAFO program into compliance with the law, Petitioners laid out a detailed roadmap explaining how EPA can create a more functional CAFO regulatory system. But Petitioners do not forfeit their right to challenge EPA's refusal to fulfill its Clean Water Act obligations simply because they provided solutions—particularly where, as here, EPA used the detailed study and subcommittee as

grounds for denying the Petition *as a whole*, as well as grounds for denying each individual proposal.[1] Rather than a "shift [in] tactics," EPA Br. 22, Petitioners' challenge appropriately responds to the Agency's wholesale refusal to act, justified by a one-size-fits-all rationale, while also recognizing EPA has discretion over the precise regulatory reforms it pursues as long as the Agency's selection complies with the Clean Water Act.

EPA's complaint that Petitioners did not raise the Agency's duty to take some action to bring its CAFO program in line with the Clean Water Act defies common sense. The Petition clearly makes the overarching request for EPA to amend its regulations to comply with the Act. *See, e.g.*, ER-22 ("Petitioners request that EPA promulgate new CAFO rules that will effectively implement the CWA's pollution control mandate."). The Petition not only urged EPA "to put a regulatory scheme in place that would ensure all CAFO dischargers are subject to NPDES permits and that those permits adequately limit CAFO discharges and protect water quality," it specifically warned the Agency that "*[a]ny action that falls short of achieving these fundamental requirements of the Act would be arbitrary and capricious*." ER-23 (emphasis added). This plea to enact reforms needed to comply with the Act is a far

[1] EPA claims that in addition to its detailed study and subcommittee rationales it "also addressed the specifics of Petitioners' proposals and explained why it would not grant the petition as to each separate proposal." EPA Br. 21. But for the most part, the Agency only reiterated its study plans in the context of discussing each proposal, without further explanation. ER-220–31.

cry from asserting that any EPA action that deviates from Petitioners' detailed list of requests is arbitrary and capricious. EPA cannot credibly argue that Petitioners failed to raise EPA's duty to act.

Petitioners need only provide EPA with notice of an issue and sufficient time to evaluate its merits to preserve it for review. *Bahr v. Regan*, 6 F.4th 1059, 1070 (9th Cir. 2021). By repeatedly explaining the legal deficiencies in EPA's CAFO program and urging the Agency to take remedial action in accordance with law, Petitioners provided such notice. EPA does not argue to the contrary. As such, Petitioners are not now precluded from challenging EPA's refusal to make its regulatory program Clean Water Act compliant.

Nor are Petitioners precluded by general principles of administrative law, as Intervenors claim. Int. Br. 28–29. The cases Intervenors cite for this proposition involved "programmatic attack[s]" that failed to identify a discrete, reviewable agency action. *See Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1010–12 (9th Cir. 2021) (dismissing challenge to agency's general handling of environmental reviews over four decades without "identify[ing] a particular action"); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990) (rejecting challenge to agency program because it was not "an 'agency action' within the meaning of § 702"). Here, the discrete agency action at issue is EPA's Petition denial, which is undeniably subject to judicial review. *See Mass.*, 549 U.S. at 527.

Accordingly, EPA's and Intervenors' allegations that Petitioners failed to preserve their ability to challenge its wholesale inaction are disingenuous, and the Court should reject them.

As EPA notes, Petitioners do not challenge each individual denial of specific Petition requests. Far from an improper way to present their case—*see Greenpeace Found. v. Evans*, No. 00-CV-68, 2001 WL 1266320, at *5 (D. Haw., Jun. 14, 2001) ("As the master of the complaint, the plaintiff is free not to assert certain claims or not to seek certain forms of relief available to him . . .")—this choice reflects a reasonable focus on the most egregious deficiency Petitioners raised—the under-permitting problem. Petitioners put forth two primary proposals for addressing permit evasion: a regulatory presumption of discharge and revisions to the agricultural stormwater exemption. While EPA has authority to adopt a presumption that certain CAFOs actually discharge and require permits,[2] ER-24–25, Petitioners decided to focus on revisions to the agricultural stormwater exemption because closing that loophole would both subject many CAFOs to permitting requirements

[2] Intervenors incorrectly imply that courts have foreclosed EPA's ability to establish a presumption of actual discharge. Int. Br. 37–40. *But see Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 506 n. 22 (2d Cir. 2005) ("[W]e do not now consider whether . . . EPA might properly presume that Large CAFOs—or some subset thereof—actually discharge."); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 750 (5th Cir. 2011) (never analyzing a presumption of discharge, only EPA's "propose to discharge" standard, which it found subjected CAFOs that "are not discharging" to permitting). EPA recognizes its authority to establish such a presumption. ER-223.

without a presumption and provide EPA with an even clearer factual basis to establish a presumption in the future. ER-30–35.

Indeed, EPA's refusal to revise the agricultural stormwater exemption is singularly arbitrary. EPA acknowledges the exemption is "at the core of its CAFO program." EPA Br. 30; ER-226. It is also at the core of the CAFO program's failure: even if EPA's study plans result in stronger permit requirements, it will amount to rearranging deck chairs on the Titanic given the shrinking minority of CAFOs regulated at all. The Petition clearly called on EPA to take such action as needed to fulfill its Clean Water Act obligations and to revise the agricultural stormwater exemption. EPA's waiver arguments fail.

III. DENIAL RATIONALES BASED ON AGENCY RESOURCES, DATA GAPS, AND CONSENSUS ARE NOT REASONABLE, NOR IS EPA'S INCOMPLETE REVIEW OF EVIDENCE

EPA attempts to rationalize its Petition denial by pointing to limited resources, claiming it needs more information, and emphasizing a newfound need for consensus prior to addressing the CAFO regulations. But none of these arguments stand up against the record's clear showing that reform is needed, and EPA's study plans are not calculated to address the cavernous programmatic gaps in its regulations, much less do so comprehensively. Moreover, despite EPA's best efforts to gloss over its seven-year refusal to review data presented in the Petition and

diminish the importance of environmental justice considerations, these flaws in the Agency's decision-making process further render its denial unreasonable.

A. Agency Discretion Over Resources Does Not Justify EPA's Refusal to Update its CAFO Regulations

EPA tries to escape scrutiny by asserting that it denied the Petition primarily out of concern for diverting resources away from other rulemaking efforts, EPA Br. 23, and emphasizing agency discretion over resources and priorities. *Id.* at 19–20.[3] However, this Court has warned that the discretion generally accorded to petition denials "should not be construed as providing a blanket exception to APA review in any matter involving the allocation of agency resources." *Compassion Over Killing*, 849 F.3d at 857; *see also Ctr. for Food Safety v. Regan*, 56 F.4th 648, 658 (9th Cir. 2022) ("[P]rioritizing pressing matters does not mean agencies have license to ignore the law."). Furthermore, the cases EPA relies on to excuse its "resource allocation" decision either found against the agency or are inapposite.

In *Massachusetts v. EPA*, the Supreme Court *rejected* EPA's petition denial, not only because its refusal to reach a threshold "endangerment finding" violated the Clean Air Act, but because the Agency's plan to focus resources on a so-called

[3] While EPA makes this argument in its briefing, it notably does not rely on these rulemakings as an overarching justification in the denial or in its specific refusal to revise the agricultural stormwater exemption. The denial only mentions these rulemakings in the context of Petitioners' request to revise CAFO effluent limitation guidelines. ER-230.

"comprehensive [non-regulatory] approach to the problem" was not reasonable. 549 U.S. at 513, 533–534. In *WildEarth Guardians v. EPA*, the D.C. Circuit accepted as reasonable EPA's refusal to regulate low-emitting coal mines given resource limitations because the Agency had an overwhelming docket of higher priorities (45 nationally applicable clean air rules due for review or promulgation and legal challenges to 15 recently issued rules), on top of a recently-slashed air budget and reduced staffing. 751 F.3d 649, 652–654, 656 (D.C. Cir. 2014). By contrast, here EPA points to only three other ongoing rulemakings for entirely different industry sectors, ER-219, and makes no claim that addressing those sectors would make a bigger impact than addressing CAFO discharges. Finally, in *In re Barr Lab'ys, Inc.*, the court found "no basis for reordering agency priorities" because petitioner drug company's request to compel the FDA to process its generic drug applications ahead of others would amount to a meaningless reshuffling of drug approvals, "produc[ing] no net gain" for public health. 930 F.2d 72, 75–76 (D.C. Cir. 1991). Here, absent the Court's intervention, EPA could choose never to fix its failed CAFO program, only deepening the public health crisis for which its faulty regulations are responsible. Because EPA's heavy reliance on agency discretion over resources is misplaced, its reasoning is not entitled to deference.

B. The Court Should Reject EPA's Failure to Regulate Based on Information Gaps

EPA next argues that it lacked sufficient information to determine whether and what rule changes to pursue. EPA Br. 23–24. The Agency has more than enough information to make regulatory updates to bring its failed CAFO program in line with the Clean Water Act. Pet. Br. 31, *infra* at 15–16. Regardless, even though EPA likely always benefits from more information on regulated industries, Ninth Circuit precedent makes clear that data gaps cannot justify regulatory inaction where there is an obvious need for reform. In *A Community Voice v. EPA*, the Court held EPA acted unlawfully in failing to promulgate necessary regulations due to "significant data gaps" contributing to regulatory uncertainty. 997 F.3d 983, 993 (9th Cir. 2021) ("[EPA] blames its inaction on 'significant data gaps,' a justification we conclude is arbitrary and capricious."). The same is true here, and EPA's attempt to distinguish this on-point precedent is unpersuasive.

The Agency argues that it never raises the concept of "uncertainty" in its denial reasoning, supposedly rendering *A Community Voice* inapplicable. EPA Br. 28–30. EPA quibbles over semantics. It asserts "it needed more information before deciding whether and what CAFO program revisions to undertake." EPA Br. 23. In other words, EPA reasons that data gaps regarding "the extent of CAFO discharges, technologies for controlling such discharges, and implementation issues associated with currently applicable standards" prevent it from pursuing regulatory updates, *id*.

at 24, just as it argued in *A Community Voice* that information gaps related to lead paint hazards prevented the Agency from updating those regulatory standards. 997 F.3d at 993. It is simply irrelevant that EPA does not use the magic word "uncertainty" here when it claims it lacks information needed to know how to revise the CAFO regulations.

Intervenors' efforts to narrow the applicability of *A Community Voice* also fail. Int. Br. 33–34. It is true that in *A Community Voice*, EPA granted a petition and then determined it did not have enough information to issue regulations, whereas here, EPA denied the Petition "at this time" due to purported information gaps. However, the case's central holding—that the Agency cannot refuse to promulgate "obvious[ly] need[ed]" regulations due to "significant data gaps"—applies equally to the case at hand, where there is an obvious need for CAFO regulatory reforms, *see* Pet. Br. 16–19, 27–30, and EPA employs identical reasoning for its inaction. *See Cmty. Voice*, 878 F.3d at 786; 997 F.3d at 993; ER-220–21.

Moreover, contrary to Intervenors' claim, EPA's Clean Water Act mandate compelling CAFO action is just as clear as the statutory directive at issue in *A Community Voice*. Just as the lead paint statutes sought to "eliminate lead-based paint hazards . . . as expeditiously as possible," 42 U.S.C. § 4851(a)(1), authorized EPA to amend regulations when necessary, 15 U.S.C. § 2687, and set up a framework for revising regulations, 42 U.S.C. §§ 4852a(a), (c)(5), the Clean Water Act seeks to

"eliminate" all "discharge of pollutants [from CAFOs] into navigable waters . . . by 1985," 33 U.S.C. §§ 1251(a)(1), 1362(14), authorizes EPA to prescribe regulations when necessary to achieve that goal, *id.* § 1361(a), and establishes a regulatory review and revision framework, *id.* §§ 1311(d), 1314(b) & (m). Accordingly, EPA's refusal to amend its CAFO regulations tracks precisely to the Agency's refusal to amend lead paint regulations in *A Community Voice*.

EPA therefore cannot reasonably base its Petition denial on a lack of data. But regardless, its limited study plans are inadequate to fill any such purported gap. EPA improperly implies that the CAFO detailed study will address far more issues than demonstrated by the record, and blatantly sidesteps Petitioners' argument that a narrowly tailored study of the effluent limitation guidelines (ELGs) in CAFO permits cannot address the threshold issue of under-permitting. To substantiate its claim that the study is a rational reason to put off consideration of regulatory revisions related to under-permitting, EPA vaguely asserts the study will be "wide-ranging and will produce various categories of information," EPA Br. 32, and that "its focus will evolve as information becomes available," *id*. at 33. This may be true within the context of ELGs, but the true limitations of the study's scope are undeniable. EPA ultimately admits that the study is "what EPA needs to assess whether *changes to the CAFO effluent limitations and guidelines* are warranted." *Id.* at 35 (emphasis added)*; see also* ER-218 (clarifying that "EPA will evaluate other

issues *related to the CAFOs ELG*" as the study "evolve[s]") (emphasis added). This simply is not a rational basis for years more delay on issues beyond the ELGs, nor can it fulfill the Agency's stated goal of conducting a "holistic evaluation" of the problem. ER-222.

Moreover, nowhere do Petitioners, as EPA claims, say the study will be "valueless," EPA Br. 34, or yield only "subjective information that will be of little use," *id.* at 31. EPA conflates Petitioners' critiques of the subcommittee with its assessment of the detailed study's limitations. Pet. Br. 33–34. Indeed, the study is the very result of a lawsuit brought by a Petitioner, and Petitioners note that it "may prove an important step towards strengthening outdated pollution standards for the minority of CAFOs currently subject to permit requirements." *Id.* at 34. But setting aside EPA's mischaracterization of Petitioners' brief, the study will not carry the day. The ELGs for permitted CAFOs simply have nothing to do with the "unexpected programmatic gaps" in EPA's CAFO program. EPA Br. 27. Because the study is wholly distinct from a consideration of regulatory revisions related to failure to permit in the first place, it is irrational for EPA to use it as a basis to delay addressing those issues.

EPA's failure to review the relevant evidence Petitioners submitted further undermines its "lack of data" reasoning. *See* Pet. Br. 41–43; *Butte Cnty. v. Hogen*, 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 agency action within the meaning of § 706."). EPA brushes off its duty to review the studies, research, and other information underlying the Petition, relying on its "decades of experience with the regulation of CAFOs" and its "intimate[] familiar[ity] with the concerns raised by Petitioners." EPA Br. 43. But EPA cannot have it both ways, claiming on the one hand it lacks information to make a "reasoned decision" about how to improve the CAFO program, ER-220, and on the other writing off thousands of pages of information on CAFO discharges, the regulatory missteps that have enabled this pollution to proliferate, and rulemaking fixes that can address the problem. EPA Br. 42. *See also Dep't of Commerce v. New York*, 58 U.S. 752, 785 (2019) ("Our review is deferential, but we are 'not required to exhibit a naiveté from which ordinary citizens are free.'") (citation omitted).

In its attempt to minimize its blunder, EPA asserts these materials do not really matter because they contribute no new information, are "silent" on solutions, and only represent the viewpoints of the petitioning environmental groups. EPA Br. 43–45. The Agency is incorrect on all counts. First, these materials did include new information, including documents demonstrating that nutrient management plans (NMPs) do not minimize pollution as the Agency assumed decades ago, calling into question both the efficacy of permits and EPA's agricultural stormwater interpretation. *See* Pet. Br. 60–61. Second, the *entire* Petition is focused on providing

EPA with "solutions" in the form of a regulatory roadmap for fixing its broken CAFO program, and the information submitted supports those recommendations. ER-22–66. EPA cannot credibly claim Petitioners have failed to offer solutions while also criticizing them for "micromanag[ing]" the Agency via such specific requests. EPA Br. 2. Finally, had EPA reviewed the documents at issue, it would know they go far beyond representing Petitioners' "viewpoints." The vast majority of information submitted was scientific research, government data and findings, and legal authorities. ER-9–66. It was irrational for EPA to ignore the data provided, especially when EPA based its denial on needing more information.

EPA could similarly have mitigated its purported data gaps by considering available information related to environmental justice. Contrary to EPA's implications, Petitioners do not ask this Court to scrutinize its "compliance" with executive orders. EPA Br. 46. Rather, these orders highlight the sharp contrast between reasoned decision-making that reflects the administration's priorities and understanding of environmental justice analysis and the short shrift given to environmental justice in the Petition denial. *See* Pet. Br. 44. Moreover, Petitioners explained that the Agency's silence on the issue was arbitrary and capricious in light of its *own findings* that several of the regulatory requests in the Petition would advance environmental justice. *Id.* at 45; ER-138. EPA fails to respond, much less explain why ignoring its own findings is reasonable.

Faced with these inconvenient truths, EPA expounds on the many pages of information it did consider. What EPA neglects to mention, however, is that over 80 percent of that record was made up of the 2003 and 2008 rules themselves, including concurrent regulatory analysis and related court documents. *See* Dkt. No. 22.1, 4–6. In other words, the overwhelming majority of evidence considered had nothing whatsoever to do with how these rules are working (or failing to work) in practice or what might work better—the main focus of the Petition.

C. EPA's Professed Need for Consensus Before Action is Unreasonable and Disingenuous

EPA relies heavily in its brief on the need to forge consensus amongst stakeholders—including the regulated industry from which it fears litigation—before it can proceed with any CAFO regulatory improvements. *See, e.g.*, EPA Br. 28, 39, 43. However, this was not a rationale put forth in its denial, and it cannot be raised for the first time in litigation; "judicial review of agency action is limited to the grounds that the agency invoked when it took the action." *DHS v. Regents of the Univ. of Cal.*, 591 U.S. 1, 20 (2020) (rejecting post hoc rationalizations as "convenient litigating positions" that undermine accountability for agency action); *State Farm*, 463 U.S. at 50 ("It is well-established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself."). Therefore, this Court should reject EPA's purported need for consensus as an impermissible *post hoc* rationalization.

To shoehorn this justification into the Court's analysis, EPA attempts to redefine the "thrust" of its Petition denial reasoning as a need to "explore areas where consensus could be reached [between stakeholders] before making a final decision as to what revisions [to its CAFO program] are needed" based on "lessons learned in the 2003 and 2008 Rules (and subsequent judicial review)." EPA Br. 43. However, nowhere in the denial does EPA mention consensus at all, much less assert that past experience compels it to seek consensus before it can act. The closest thing to this justification EPA provided in its denial is that the Agency wished to "hear from farmers, community groups, researchers, state agencies, and others about the most effective and efficient ways to reduce pollutants generated from CAFOs" and "receive input . . . through the lens of individuals' experiences in implementing the CAFO regulations or their research or expertise addressing the impact of CAFOs on water quality." ER-220–21. Soliciting input from relevant constituencies (as it would with a notice-and-comment rulemaking, or could have done while the Petition was pending as Petitioners requested, *see* ER-22[4]) is wholly different than seeking

[4] EPA does this often. *See, e.g.*, *Mass.*, 549 U.S. at 511 (describing request for comment on "any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of this petition"); *Nw. Coal. for Alts. to Pesticides v. EPA*, 544 F.3d 1043, 1046 (9th Cir. 2008) (outlining practice of publishing pesticide rulemaking petitions for public comment); *Cmty. Voice,* 878 F.3d at 783 (soliciting comment on pending lead paint rulemaking petition); *Pub. Emps. for Env't Resp. v. EPA*, 77 F.4th 899, 908 (D.C. Cir. 2023) (describing process for soliciting comment on solid and hazardous waste-related petitions).

consensus among stakeholders to fortify any future litigating position in which EPA may find itself. Nor can EPA predicate its action on the fact that "prior rulemaking efforts [] were launched without first pursuing consensus among interested parties," EPA Br. 39, when the Agency's denial says nothing of the kind. *See Am. Textile Mfrs. Inst., v. Donovan*, 452 U.S. 490, 539 (1981) ("'[T]he post hoc rationalizations of the agency . . . cannot serve as a sufficient predicate for agency action.'"). Because EPA never raised the desire for stakeholder consensus at the time it made its denial decision, it is barred from doing so now.

Even if the Agency could now assert a need to pursue consensus, refusing to fulfill its statutory mandate to regulate CAFO pollution unless the regulated industry approves amounts to an impermissible abdication of EPA's regulatory authority and cannot justify its Petition denial. Absent statutory authorization, agencies cannot "shift[] to another party almost the entire determination of whether a specific statutory requirement . . . has been satisfied . . . ." *Cooling Water Intake Structure Coal. v. EPA*, 905 F.3d 49, 79 (2d Cir. 2018)*; see also Sierra Club v. Sigler*, 695 F.2d 957, 962 n. 3 (5th Cir. 1983) ("an agency may not delegate its public duties to private entities, particularly private entities whose objectivity may be questioned on grounds of conflict of interest."). And while agencies "may turn to an outside entity for advice and policy recommendations . . . they may not 'rubber-stamp' decisions made by others under the guise of seeking their 'advice.'" *U.S. Telecom Ass'n v. FCC*, 359

F.3d 554, 568 (D.C. Cir. 2004) (citing *Assiniboine & Sioux Tribes of Ft. Peck Indian Reservation v. Board of Oil & Gas Conservation*, 792 F.2d 782, 795 (9th Cir. 1986)).

That is precisely what the Agency is suggesting here. According to EPA, its approach to CAFO reforms is pursuing "stakeholder consensus rather than pushing through agency initiatives." EPA Br. 48. Indeed, it expressly rejects certain reform measures it agrees it has authority to promulgate where it anticipates "industry participants would challenge" such actions. EPA Br. 56. This unwillingness to defy the regulated community amounts to an improper delegation of its statutory duties to "parties [that] will not share the agency's 'national vision and perspective,' and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme." *U.S. Telecom Ass'n*, 359 F.3d at 565–66.

Even if EPA could properly delegate its regulatory authority to third-party stakeholders, here the Agency has set up a Federal Advisory Committee process that belies its (*post hoc*) goal of reaching consensus on CAFO program recommendations. First, EPA completely fails to address the FRRCC parent committee's total control over the subcommittee's recommendations. As Petitioners explained, the subcommittee's "work is entirely advisory;"[5] the subcommittee

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

cannot make recommendations to EPA, only to the FRRCC, which will decide the fate of those recommendations by majority vote. Pet. Br. 36–37. This lack of independent authority contravenes EPA's claim that the group will enable EPA to "receive firsthand input from all sides," EPA Br. 28, and "hear from all perspectives." *Id*. at 37. Given this structure, whether the subcommittee is as "balanced and diverse" as EPA repeatedly asserts, *id.* at 2, 3, 16, 36, 37, misses the point entirely.

EPA ignores the FRRCC's makeup and demonstrated track record of hostility towards water quality protections. Industry representatives comprise the controlling majority of the FRRCC. ER-233–36. This means that the same committee that has specifically discouraged EPA from regulating agricultural groundwater pollution, ER-239, will control whether recommendations regarding how EPA fulfills its obligation to regulate CAFO discharges to waterways via groundwater would ever see the light of day. EPA sidesteps these inconvenient facts, implying that the makeup of the subcommittee is all that matters. EPA knows that is not the case, and its reliance on the subcommittee process to achieve meaningful consensus, make sound recommendations, and fill its information gaps nonetheless is irrational.

It is exceedingly unlikely that even the subcommittee, made up of members with "often-polarized viewpoints,"[6] EPA Br. 28, will meet its newfound goal of

[6] Further underscoring the unreasonableness of EPA pinning its hopes on consensus, the North Carolina Farm Bureau Federation, which is represented on the

achieving consensus on CAFO program improvements. But even if it does, EPA fails to connect the dots between any hopeful consensus from the subcommittee and FRRCC and the broader consensus needed to achieve its goal of avoiding an industry challenge over program reforms. EPA Br. 56. Industry intervenors' brief clearly forecasts the only way EPA will avoid industry litigation over a CAFO rule revision is to not engage in such a rulemaking at all. Int. Br. 27 (characterizing potential future action on the Petition as "an attempt by EPA to exceed its statutory authority); *id*. at 32 (warning pursuit of the requested regulatory reforms "likely would exceed EPA's authority"). Indeed, Intervenors' notion of model regulatory programs are ones that allow CAFOs to pollute with impunity. They extoll the virtues of Iowa's and North Carolina's programs in particular, Int. Br. 11–14, while conspicuously ignoring their real-world impacts. *See, e.g.*, ER-15 (discussing extensive CAFO water pollution in both states); ER-159–62 (describing both states' lax water quality rules). Iowa is well-known for its CAFO-polluted waters, ER-21 and Whelan Decl. ¶¶ 8–10 (documenting hundreds of unpermitted CAFO discharges and inadequate State response), and North Carolina is another poster child for disastrous CAFO pollution and environmental injustice. *See* Amici Curiae Br., Dkt. No. 23.1, 7–14 and Burdette

---

subcommittee, is party to the industry amicus brief in this case supporting Petition denial. Amici Curiae Br., Dkt. No. 52.2.

Decl. ¶¶ 10–14, 21–24 (extensively discussing CAFO pollution impacts to frontline communities and State's deficient regulations).

EPA thus cannot plausibly take the position that any level of stakeholder engagement will spare a future CAFO Clean Water Act rulemaking from legal challenge. In sum, EPA's argument that the subcommittee process will enable it to achieve much-needed consensus comes too late, shirks the Agency's own duties under the Clean Water Act, and is exceedingly unrealistic. While EPA's study and subcommittee plans may appear at first glance like EPA is taking the CAFO problem seriously, a closer look makes clear they do not provide a rational basis to deny the Petition.

IV. EPA FAILS TO JUSTIFY ITS REFUSAL TO REVISE THE AGRICULTURAL STORMWATER EXEMPTION

EPA agrees it has authority to revise its agricultural stormwater exemption as Petitioners request. Not only does the legislative history fully support such revision, but so do the factual developments underscoring the exemption's practical failure that have occurred since promulgation. EPA's denial fails to meaningfully address the strong record supporting revision, and its brief fails to refute Petitioners' arguments. Accordingly, the Court should reject EPA's unreasonable refusal to amend the fundamentally flawed interpretation at the core of its faulty CAFO regulations.

A. EPA Fails to Refute the Legislative History Supporting Petitioners' Request

Again, EPA does not dispute it has authority to act upon Petitioners' agricultural stormwater request, ER-226, nor does it argue congressional intent precludes Petitioners' interpretation. EPA Br. 50–53. Given the exemption's blatant failure in practice, the Court's analysis can stop there. But the Agency's legislative history arguments are simply wrong, and the full history contravenes its denial justification that a revised approach to agricultural stormwater would risk an "adverse [court] ruling." ER-226.

EPA claims the legislative and regulatory history supporting the total exclusion of CAFOs from the exemption is irrelevant because EPA had not clearly interpreted discharges from CAFOs to encompass discharges from CAFO land application areas until 2003. EPA Br. 52–53. This is incorrect. Not only had courts interpreted a CAFO's land areas as part of the CAFO for purposes of the Clean Water Act prior to both the 1987 agricultural stormwater amendment and EPA's 2003 rule—*see, e.g.*, *Concerned Area Residents for Env't v. Southview Farm*, 34 F.3d 114, 115 (2d Cir. 1994) (finding CAFO "liquid manure spreading operations are a point source within the meaning of [the Clean Water Act]"); *Higbee v. Starr*, 598 F. Supp. 323, 330–32 (W.D. Ark. 1984) (analyzing a CAFO's land application practices to determine Clean Water Act compliance)—so too had EPA.

As far back as 1973, EPA required CAFO permit applicants to submit data on the "approximate land available for manure disposal and/or runoff disposal," so that regulators could appropriately apply the "standards and guidelines under the Act" to those operations. 38 Fed. Reg. 10,960, 10,962 & 10967 (May 3, 1973) (codified at 38 Fed. Reg. 18,000 (Jul. 5, 1973)). This was the context in which Congress adopted the 1987 exemption. In 1995, the Agency issued guidance reiterating that "[i]n general, the Clean Water Act does not regulate manure spreading operations, only manure spreading for CAFOs," and confirming CAFOs are Clean Water Act compliant "when a NPDES permit contains conditions for appropriate land application practices, and the permittee complies with those conditions."[7]

Attempting to support EPA's baseless assertion that it never considered CAFO land areas regulatable until 2003, Intervenors cherry-pick a line from a 1999 guidance document stating that "land application areas, which are outside the area of confined animals, do not fall geographically within the regulatory definition of an AFO."[8] But, remarkably, Intervenors ignore the very next sentences: "Nevertheless, discharges of CAFO wastes from land application areas can qualify as point source discharges in certain circumstances. Accordingly, CAFO permits should address

[7] *See* EPA, Guide Manual on NPDES Regulations for Concentrated Animal Feeding Operations 15 (1995), https://www3.epa.gov/npdes/pubs/owm0266.pdf.
[8] EPA, Draft Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations 2-2 (1999), https://nepis.epa.gov/Exe/ZyPDF.cgi/P10059U0.PDF?Dockey=P10059U0.PDF.

land application of wastes from CAFOs." *Id.* (emphasis in original). Intervenors likewise take EPA's 2001 regulatory statement that "it has not previously defined CAFOs to include the land application area" out of context. 66 Fed. Reg. 2,960, 3,008 (Jan. 12, 2001). EPA had just explained "that a CAFO owner or operator's current obligation to apply for an NPDES permit is based not only on discharges from the feedlot area but also on discharges from the land application areas," and that it was merely proposing to formalize this understanding by "explicitly includ[ing] the land application area in the definition of a CAFO." *Id.*

Intervenors also cite several Clean Water Act provisions related to nonpoint source agricultural pollution, none of which refute Petitioners' argument. Int. Br. 50–52. None of these provisions even mentions CAFOs, and since in general the Clean Water Act does not regulate non-CAFO manure spreading operations, any general references to manure or animal wastes in the congressional record are most logically referring to non-CAFO sources (i.e. "nonpoint source pollution from animal wastes"). *Id.* at 50. The lone senate report Intervenors cite referencing "feedlots" was connected to a 1983 bill that was introduced but never passed, *not* the 1987 nonpoint source provision for which they cite it. *Id.* at 50–51. Further, the report shows that the "agricultural" nonpoint sources on which Congress was focused were "croplands, rangelands, pasturelands, [and] forestlands," not CAFOs. S. Rep. No. 98-282, at 7 (1983). Finally, Intervenors' reference to Section 405 sewage sludge

provisions is inapposite, because at the time of passage, sludge disposal methods were not regulated elsewhere in the Act. *See Pacific Legal Found. v. Quarles*, 440 F. Supp. 316, 324 (C.D. Cal. 1977). By contrast, CAFO discharges have always been considered point source discharges, rendering additional measures unnecessary. 33 U.S.C. § 1362(14). Try as they might, neither Intervenors nor EPA can escape the fact that EPA has *always* viewed CAFO land application areas as covered by the Clean Water Act and NPDES permits. The Agency's 2003 rule merely formalized preexisting judicial and agency interpretations.

For this reason, the legislative and regulatory history underlying the agricultural stormwater exemption remains compelling evidence of congressional intent to exclude CAFOs and their land areas from the exemption. The history demonstrates Congress plainly intended to codify EPA's agricultural exclusion, which courts had repeatedly struck down. Pet. Br. 49–50. EPA's contemporaneous understanding of the agricultural stormwater amendment confirms the same. *Id.* at 50. By its own terms, the Agency's agricultural exclusion did not apply to CAFOs. *Id.* at 49. As EPA's regulatory statements make clear, discharges from both CAFOs *and* their land areas were subject to NPDES permitting. Thus, the most reasonable construction of the statute excludes both CAFOs *and* their land areas from the agricultural stormwater exemption. Accordingly, EPA's fear of an "adverse ruling"

is an unfounded and therefore unreasonable basis for denying Petitioners' request. ER-226.

B. EPA Ignores How its Agricultural Stormwater Interpretation Has Failed in Practice Following *Waterkeeper*

EPA's refusal to depart from its "judicially approved" interpretation of agricultural stormwater is unreasonable given the past two decades demonstrating its failure. EPA freely admits that when courts vacated its prior duties to apply, cornerstone provisions crucial to the workability of its agricultural stormwater interpretation, it became exceedingly "difficult for EPA to implement the CAFO permitting program." EPA Br. 55. The Agency also concedes that under its current agricultural stormwater regime, permitting has plummeted. *Id.* In other words, the exemption has not been able to "function sensibly" without the stricken duty to apply provision, *see MD/DC/DE Broads. Ass'n v. FCC*, 253 F.3d 732, 734 (D.C. Cir. 2001) (vacating entire rule where severing only unlawful portion rendered the remainder incapable of "function[ing] sensibly,") and has resulted in rampant permit evasion as EPA anticipated,[9] notwithstanding the potential for "substantial penalties." Int. Br. 57. Indeed, by EPA's own estimate, nearly 10,000 unpermitted facilities are illegally

[9] EPA claims it would not have changed its interpretation even had it known the duty to apply provision would be vacated. The record indicates otherwise, and that EPA viewed these provisions as interrelated for a reason. *See* Pet. Br. 54. The Agency's subsequent failure to address the "programmatic gaps" in its CAFO regulations hardly renders its current position more reasonable.

discharging non-agricultural stormwater pollution, Pet. Br. 55,[10] and unpermitted CAFOs can "claim" the exemption by doing almost nothing. *Id.* at 57–58.

EPA's denial makes no real argument it can fix this under-permitting crisis through better implementation of the exemption. ER-225–26 (acknowledging that "many Large CAFOs are unpermitted" and asserting without support that addressing illegal point source discharges "is foremost a question of implementation and enforcement of the current regulatory scheme."). Given the significant drop in permitting that has occurred since EPA promulgated its stormwater interpretation, notwithstanding its numerous attempts to improve implementation throughout that time, ER-118–22, 241–44, the Agency's desire to refocus once more on implementation is unreasonable. *See* ER-298–99 (EPA determining when a regulatory exemption proves "problematic to properly implement" it must be revised). EPA's confidence in the exemption's 2005 "judicial[] approv[al]" is misplaced in light of the factual developments since, which provide ample support for a revised approach.[11]

---

[10] Intervenors take issue with EPA's estimate that 75 percent of CAFOs discharge. Int. Br. 55. But they make a distinction without a difference; EPA makes crystal clear that this is an estimate of "CAFOs that actually discharge." 73 Fed. Reg. 70418, 70423 (Nov. 20, 2008). Accordingly, EPA has no "quarrel with the statistics in Petitioners' brief concerning the number of permitted CAFOs." EPA Br. 55.

[11] EPA's reliance on *Alt v. EPA*, 979 F. Supp. 2d 701 (N.D. W. Va. 2013), for its argument to the contrary is misplaced. EPA Br. 56. Far from representing the "risk" of reopening the exemption, this case shows that the *current* interpretation is vulnerable to judicial misinterpretation. Petitioners raised this problem in the

C. EPA Fails to Explain How its Agricultural Stormwater Interpretation Remains Rational in Light of New Information

As Petitioners explained, when EPA receives a rulemaking petition and is "confronted with evidence that its current regulations are inadequate or the factual premises underlying its prior judgement have eroded," to withstand judicial scrutiny the Agency must, at minimum, "provide assurance that it considered the relevant factors" and explain "*why*, in light of the studies in the record, its [regulations] remain adequate." *Env't Health Tr. v. FCC*, 9 F.4th 893, 906 (D.C. Cir. 2021). When confronted with evidence exposing the inaccurate factual premises underlying its agricultural stormwater exemption—revealing that its interpretation is allowing far more water pollution to escape regulation than previously understood—EPA failed to do that. Nowhere in the denial does the Agency address the record evidence undermining its agricultural stormwater interpretation or explain how its interpretation nevertheless remains consistent with the Clean Water Act. EPA attempts to diminish its obligation to explain itself by accusing Petitioners of shifting the burden of proof. EPA Br. 49. But EPA must rationally explain its decision, and its failure to do so renders its denial arbitrary and capricious. *Env't Health Tr.*, 9 F.4th at 906; *see also Humane Soc'y v. Locke*, 626 F.3d 1040, 1051 (9th Cir. 2010)

Petition and explained that a revised agricultural stormwater exemption would "remedy much of the uncertainty created by *Alt.*" ER-38. EPA refused.

("[Agency] cannot avoid its duty to confront these inconsistencies by blinding itself to them.").

Grappling with this problematic record evidence for the first time in its brief, EPA not only misses the point of it entirely, but also mischaracterizes what Petitioners seek. The fundamental assumption underlying EPA's agricultural stormwater interpretation is that it is reasonable to exempt land application discharges from regulation when manure is applied using "nutrient management practices [that] minimize runoff." ER-225.[12] The record is replete with evidence—including EPA's own admission—demonstrating this assumption is incorrect. *See* Pet. Br. 60–61; Amici Curiae Br., Dkt. No. 24.1, 16–23 (collecting record studies); ER-115, 184, 277, 286, 288; ER-89 (EPA concluding "Even if CAFOs were to comply with their NMPs, their standards are insufficient" because they "focus on maximizing crop growth, rather than on preventing excess nutrient runoff."). The denial fails to address this evidence, ER-225–26, and EPA attempts to dismiss it now by bizarrely asserting it is unreasonable for Petitioners to ask EPA to abandon NMPs entirely or "limit [CAFOs] to applying nutrients to 'a fraction' of their crops." EPA

[12] Intervenors' claim that EPA's exemption rationale "never hinged" on NMPs minimizing pollution is divorced from reality. Int. Br. 57. *See* 68 Fed. Reg. 7,176, 7,197 (Feb. 12, 2003) (justifying exemption on basis that application "in accordance with practices designed to ensure appropriate agricultural utilization of nutrients" will "minimize[] the potential for a subsequent discharge of pollutants to waters of the United States.").

Br. 58. First, that is not what Petitioners ask. As Petitioners have repeatedly explained, EPA's exemption should reflect scientific reality. This means EPA must stop pretending NMPs accomplish pollution reduction to a degree that they do not, and align the scope of the exemption with the water pollution risk so it can comply with its Clean Water Act obligations. Second, the legally relevant point of this new evidence is that it demonstrates the fundamental factual assumption underlying EPA's stormwater interpretation is incorrect. Because NMPs do not minimize pollution, the interpretation *itself* is no longer reasonable.

Intervenors' attempts to challenge the science fail, especially in light of EPA's admission that its understanding has changed. Int. Br. 57–60. Their repeated emphasis that NMPs are not designed to *eliminate* pollution misses the point, which is that they do not *minimize* pollution to the extent EPA assumed when it adopted the exemption. This mischaracterization of Petitioners' position renders their further critiques of a 2011 record study irrelevant. The purpose of the research was to assess the effectiveness of a "well-designed and executed NMP" at protecting water quality, ER-282, tracking EPA's exemption reasoning. It concluded that NMPs alone may not sufficiently "prevent contamination." ER-286. Intervenors claim another study merely focused on NMP implementation issues, glossing over its findings that NMPs are highly variable in what application rates they allow depending on who writes them, ER-276, and do not "guarantee improvements in water quality." ER-277.

In any event, it was incumbent on *the Agency* to respond to the science when it denied the Petition. EPA is "limited to the grounds that the agency invoked when it took the action," *DHS*, 591 U.S. at 20, and those grounds fail to address the major flaws Petitioners identified with EPA's agricultural stormwater exemption. Research shows that NMPs are not as effective as previously thought. EPA admits that fact, ER-89, and that an NMP's presumed ability to minimize runoff is central to its agricultural stormwater interpretation. ER-225. EPA has also acknowledged that permitting has plummeted since *Waterkeeper*, validating the Agency's concern the exemption could not function without a universal permitting requirement. Pet. Br. 53–54. Yet EPA's position on the exemption will not budge. EPA's authority to close this loophole is clear, as is the need to do so to give effect to the Clean Water Act. The *Waterkeeper* court's judicial approval carries little weight given factual and scientific developments, rendering EPA's ossified position unreasonable.

CONCLUSION

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

Dated this 27th day of June, 2024.

Respectfully submitted,

s/ Emily Miller
Emily Miller (CA Bar No. 336417)
Food & Water Watch
1616 P St. N.W. Ste. 300
Washington, DC 20036
(202) 683-2500
eamiller@fwwatch.org

Counsel for Petitioners

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 June 27, 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 27th day of June, 2024.

s/ *Emily Miller*
Emily Miller
Food & Water Watch
1616 P Street, N.W. Ste. 300
Washington, D.C. 20036
(202) 683-2500
eamiller@fwwatch.org

ADDENDUM OF STATUTES, REGULATIONS, AND OTHER AUTHORITY

Except for the following, all applicable statutes, regulations, and other authorities are contained in the brief or Addendum of Petitioners' Opening Brief, ECF No. 26.1.

INDEX

United States Code

33 U.S.C. 1311 – Effluent Limitations

. . .

(d) Review and revision of effluent limitations. Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

. . .

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

. . .

(m) Schedule for review of guidelines.

(1) Publication. Within 12 months after the date of the enactment of the Water Quality Act of 1987, and biennially thereafter, the Administrator shall publish in the Federal Register a plan which shall—

(A) establish a schedule for the annual review and revision of promulgated effluent guidelines, in accordance with subsection (b) of this section;

(B) identify categories of sources discharging toxic or nonconventional pollutants for which guidelines under subsection (b)(2) of this section and section 306 have not previously been published; and

(C) establish a schedule for promulgation of effluent guidelines for categories identified in subparagraph (B), under which promulgation of such guidelines shall be no later than 4 years after such date of enactment for categories identified in the first published plan or 3 years after the publication of the plan for categories identified in later published plans.

. . .

33 U.S.C. § 1361 – Administration

(a) Authority of the Administrator to prescribe regulations. The Administrator is authorized to prescribe such regulations as are necessary to carry out the functions under this Act.

. . .

Federal Register

38 Fed. Reg. 10,960, 10,962 & 10,967 (May 3, 1973)
Notice of Proposed Rulemaking Regarding Agricultural and Silvicultural Activities

. . .

4. *Short Form B – Agriculture* – Also proposed herein is a revised short form B for those agricultural discharges which are not excluded herein from NPDES filing requirements. The revised form is designed to provide basic information sufficient to permit the application of standards and guidelines under the Act.

Certain information on short form B is to be provided by all agricultural applicants. Other sections are to be completed on the basis of type of facility or activity. Special sections for this purpose are provided for animal confinement and feeding facilities, for fish and aquatic animal production facilities, and for irrigation return flow discharges from point sources.

. . .

National Pollutant Discharge Elimination System—Short Form B

Agriculture

To be completed by confined animal production facilities, fish farms, hatcheries, and preserves, and irrigation activities meeting size or other pertinent criteria described herein.

. . .

II. *Animal Confinement and Feeding Facilities*

1. Largest number of animals held by animal confinement or feeding facilities in previous 1 months by type and number of animals:

Type of animal	*Number of Animals*
----------	----------
----------	----------
----------	----------

2. Approximate area used for animal confinement or feeding: ----- acres

3. Approximate land available for manure disposal and/or runoff disposal:
----- acres

4. A. Animals in this facility are (check one):
   1. ☐ In open confinement.
   2. ☐ Housed under roof.
   3. ☐ Both in open confinement and housed under roof.

   B. If there is open confinement, has a run-off diversion and control system been constructed?
   1. ☐ Yes. 2. ☐ No.

   C. If there are any housed animals at this facility, is there a water carriage system utilized for manure management?
   1. ☐ Yes. 2. ☐ No.

   If yes, is there a discharge to a waterway?
   3. ☐ Yes. 4. ☐ No.

5. Do you anticipate expansion of this facility in the future?
A. ☐ Yes. B. ☐ No.
If yes, give an estimate of date and future operation capacity:
C. Date of future expansion

----------	----------
Month	Year

D. Type of animals

E. No. of animals

. . .

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-2146

I am the attorney or self-represented party.

This brief contains 8262 **words,** including 0 words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ■ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Emily Miller **Date** 6/27/24

*(use "*s/[typed name]*" to sign electronically-filed documents)*