23-2146

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FOOD & WATER WATCH, *et al.*,

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

On Petition for Review of a Final Action of the Environmental Protection Agency

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, Intervenor-Respondents National Pork Producers Council, American Farm Bureau Federation, U.S. Poultry & Egg Association, and United Egg Producers respectfully submit the following Corporate Disclosure Statement:

National Pork Producers Council ("NPPC") is a non-profit trade association that has no parent corporation, and no publicly held company has ten percent or greater ownership in NPPC.

American Farm Bureau Federation ("AFBF") is a voluntary general farm organization that has no parent corporation, and no publicly held company has ten percent or greater ownership in AFBF.

U.S. Poultry & Egg Association ("USPOULTRY") is a non-profit trade association that has no parent corporation, and no publicly held company has ten percent or greater ownership in USPOULTRY.

United Egg Producers ("UEP") is a farmer cooperative that has no parent corporation, and no publicly held company has ten percent or greater ownership in UEP.

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INTRODUCTION

This Court should reject Petitioners' attempt to turn a routine rulemaking-petition-denial challenge into a programmatic attack on the U.S. Environmental Protection Agency's ("EPA's") Clean Water Act ("CWA" or "Act") regulatory program for concentrated animal feeding operations ("CAFOs").

The CWA prohibits the discharge of pollutants from any point source without a permit. As many courts have found, Congress gave EPA the authority to regulate actual discharges from point sources, not potential discharges and certainly not the point sources themselves. The Act's definition of "point source" explicitly includes CAFOs, but it simultaneously *excludes* "agricultural stormwater discharges." Other provisions of the CWA that address nonpoint source pollution through nonregulatory programs specifically reference runoff of animal waste from manure disposal areas.

Consistent with Congress's intent, EPA has enacted stringent regulatory requirements for CAFOs: CAFOs must not discharge from production areas or land application areas. The only exceptions are certain precipitation-induced discharges either excluded from permitting by statute (such as agricultural stormwater) or authorized by permits.

Despite EPA's robust CAFO regulations, backed by the CWA's strict liability scheme applicable to permitted and unpermitted facilities alike, Petitioners' core complaint in this case is that not enough CAFOs hold CWA permits. They propose

essentially two ways for EPA to update the CAFO program to try to change that: (1) rewrite the rules to require more CAFOs to obtain permits (whether or not they *actually* discharge), rather than rely on implementation and enforcement of existing rules; and (2) reinterpret the statutory definition of "point source" to categorically prohibit the application of the agricultural-stormwater exemption to CAFOs. Petitioners' problem is that two other courts of appeals have rejected EPA's prior attempts to do both, rendering EPA's denial of their requests eminently reasonable. To avoid the same fate, Petitioners try to redirect this Court away from EPA's actual decision and toward a litany of complaints that boil down to a policy disagreement with Congress and the statute Congress passed. Petitioners' hyperbolic factual recitations and mischaracterizations of record evidence distract from the only question before the Court: whether EPA adequately explained why it declined to reopen its existing regulations—a question on which the Agency receives significant deference. As explained by EPA and in this brief, the answer to that question is yes, EPA did more than enough and therefore, Petitioners' arguments fare no better the third time around.

Even if Petitioners' approach was not foreclosed by precedent, EPA was well within its discretion to deny the petition and focus on implementing and enforcing the existing regulatory framework rather than overhaul the entire CAFO program.

EPA reasonably concluded it need not expend resources in the way Petitioners want, when Petitioners want.

STATEMENT OF JURISDICTION

Intervenors agree with EPA's jurisdictional statement.

STATEMENT OF THE ISSUE

Intervenors agree with EPA's statement of the Issue Presented for Review.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations not in Addendums to Petitioners' and EPA's briefs are included in the addendum to this brief.

STATEMENT OF THE CASE

A. Agricultural Livestock Production

Domestic agricultural livestock production is designed to make available pork, chicken, beef, egg, and dairy products that are affordable, safe, and nutritious. Since the 1950s, livestock and poultry production in the United States has more than doubled "to meet the demands for meat and animal products from a growing human population in the U.S. and abroad." ER-75.

Animal feeding operations "are facilities that house, raise, and feed animals until they are ready for transport to processing facilities that prepare meat for shipment and, eventually, consumption." *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 741 (5th Cir. 2011) ("*NPPC*"). Modern animal feeding operations are

designed and engineered to produce healthy animals and minimize environmental impacts from manure.

The management of animal manure "involves the collection, storage, and eventual use of the manure's nutrients as fertilizer." *NPPC*, 635 F.3d at 742. Manure management practices vary depending on numerous factors, such as the type of animals involved, manure moisture content, type of housing, and available fertilization methods. "Following its collection, the manure is typically transported to an on-farm storage or treatment system." *Id.* Depending on the type of operation, treatment could include solids separation (to remove excess water) or stabilization using anaerobic lagoons, aerobic lagoons, or composting. *E.g.*, SER-29–30; SER-31–33; SER-34–36 (discussing various waste management practices by animal type).

Effluent from human waste, which constitutes the majority of the volume of raw sewage that receives treatment, is generally discharged into waterways following treatment. By contrast, treated manure effluent or dry litter is typically applied to cropland as fertilizer. *See NPPC*, 635 F.3d at 742. "This fertilizing process is called land application." *Id.* Manure is a valuable natural fertilizer, as it "can supply nutrients required by crops and replenish nutrients removed from soil by crop harvest." SER-4 (Sawyer, *et al.*, *Using Manure Nutrients for Crop Production*, Iowa State Univ. Extension & Outreach Pubs. (May 2016)); *accord* U.S. EPA, *et al.*,

Beneficial Uses of Manure and Environmental Protection (Aug. 2015)[1] (describing value of manure and use of constituents "as a resource for crop production, improvement of soil quality, and other purposes, while leading to water quality improvements").

Because modern livestock operations collect and store animal manure for use as fertilizer—and because discharges of animal manure from farms to waterways are unlawful, *see supra* Part C—farms are designed and managed *not* to discharge pollutants to our nation's waterways. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020). For example, at the time the current CAFO rule was developed and ultimately finalized, most egg-laying operations used dry manure handling and utilized "high rise" housing in which "birds are kept on the second floor and the manure drops to the first floor." 66 Fed. Reg. 2960, 2993 (Jan. 12, 2001). Ventilation is drawn from the outside into the second story, and then down into the manure storage area, where it dries the manure. Manure can typically be stored in such housing for up to a year prior to removal for use as fertilizer. *Id.* When one of these systems is managed in accordance with usual industry and state regulatory design standards, rainfall never comes into contact with this manure while it is in storage. As a result, contaminated stormwater or manure itself does not leave the manure

[1] https://www.epa.gov/sites/default/files/2015-08/documents/beneficial_uses_of_manure_final_aug2015_1.pdf.

storage area. These are inherently "no-discharge" systems. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020).

Most swine operations use "deep pit" systems where the animals are housed over a below-ground, steel-reinforced concrete manure storage structure. Such systems are used in the vast majority of new facilities that have been built in the Midwest over the last two decades. "Deep pit systems start with several inches of water" in the pit, and the manure is collected and "stored under the house until it is pumped out" for manure application, typically twice a year. 66 Fed. Reg. at 2991. The manure in a concrete "deep pit" managed according to ordinary standards should never come into contact with rainfall during the storage period, nor should the manure leak out of the concrete pit. SER-15 (NPPC, *et al.* Internal Comment ID 0590.1.020). Manure only leaves the operation when the producer pumps it out for application to cropland. Like the high-rise system in egg-laying operations, manure in a swine deep pit system does not come into contact with rainfall. Both are "no-discharge" systems. *Id.*

Finally, open manure management and storage systems at CAFOs (*e.g.*, open-air effluent lagoons and stormwater containment ponds) typically will not discharge when properly managed, even under extreme weather conditions. Open impoundments with the customary 25-year, 24-hour emergency storm storage capacity that can also maintain twelve inches of freeboard (the area between the top

of the water level and the top of the impoundment structure) can withstand even a storm event with a probable recurrence interval of one in one hundred years, *i.e.*, the 100-year storm. SER-17–18 (NPPC, *et al.* Internal Comment ID 0590.1.020); *see also* 73 Fed. Reg. 70,418, 70,459 (Nov. 20, 2008) ("2008 Rule") ("The record for the 2003 [new source performance standard ("NSPS") for certain large CAFOs] showed that new facilities routinely include systems and employ practices that result in no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production areas.").

When EPA amended its CAFO regulations in 2008, it found that site-specific practices are a key factor in a CAFO's success in preventing any discharge from open manure management systems, as opposed to any particular capacity design standard. *See* 73 Fed. Reg. at 70,459-63 (explaining that permits for "new source" CAFOs with open containment systems may include a site-specific determination that the CAFO will meet the NSPS no discharge requirement, based on an evaluation of the CAFO's design, operational practices, and localized climate, soil, and precipitation conditions). Rates of actual discharge or spill incidents from CAFOs reinforced EPA's findings. Around ***one percent or less*** of swine and egg-layer CAFOs (including both "closed" and "open" waste management systems) experienced discharges or spills during a five-year period leading up to that rulemaking. SER-13–17 (NPPC, *et al.* Internal Comment ID 0590.1.020).

B. Statutory and Regulatory Framework

1. EPA and the States Cooperate to Regulate Discharges Under the CWA

The CWA provides, with certain exceptions, that "the discharge of any pollutant by any person shall be unlawful." 33 U.S.C. § 1311(a). "Discharge of a pollutant" is defined as "any addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12)(A); *see also id.* § 1362(16). "Point source" is in turn defined as a "discernible, confined and discrete conveyance, including … any … concentrated animal feeding operation [CAFO] … from which pollutants are or may be discharged." *Id.* § 1362(14). "This term does not include agricultural stormwater discharges and return flows from irrigated agriculture." *Id.*

Section 402 of the CWA establishes a National Pollutant Discharge Elimination System ("NPDES") program, under which EPA or authorized states may allow point sources to discharge pollutants under conditions specified by the individual NPDES permits issued by EPA and the states. *Id.* § 1342. NPDES permits must include "effluent limitations," which restrict the "quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." *Id.* §§ 1342(d)(2), 1362(11). Permits also include reporting and recordkeeping requirements to help ensure compliance with effluent limitations. *See, e.g.*, 40 C.F.R. §§ 122.41–122.42 (general

conditions and CAFO-specific requirements); *see also id*. § 123.25 (State NPDES program requirements).

All but four U.S. states are currently authorized to administer their own permitting programs, which allows those states to become the NPDES permit-issuing agency in lieu of EPA. *See* 33 U.S.C. § 1342(b); U.S. EPA, *NPDES State Program Authority* (Apr. 22, 2024).[2] EPA retains oversight and veto authority over these state programs, as well as authority to enforce any violation of the CWA or of a state-issued discharge permit. *See* 33 U.S.C. § 1342(c)-(d), (i). This cooperative federalism scheme allows the states to adopt any restriction concerning the discharge of pollutants, including imposing more stringent requirements than the federal NPDES program—so long as states do not impose *less* stringent requirements. *See* 33 U.S.C. § 1370; 40 C.F.R. § 123.1(i).

Water pollution that does not come from a "point source," such as statutorily-excluded "agricultural stormwater discharges" and other precipitation-induced runoff containing nutrients, is nonpoint source pollution.[3] When Congress enacted the CWA, it drew a "clear and precise distinction between point sources, which [are]

[2] https://www.epa.gov/npdes/npdes-state-program-authority.

[3] Although Congress did not define "nonpoint source" in the CWA, this Court has explained that "nonpoint source" generally refers to "pollution that does not result from the 'discharge' or 'addition' of pollutants from a point source." *See Or. Nat. Res. Council v. U.S. Forest Serv.*, 834 F.2d 842, 849 n.9 (9th Cir. 1987).

subject to direct Federal regulation, and nonpoint sources, control of which was specifically reserved to State and local governments through the section 208 process," S. Rep. No. 95-370, at 8 (1977), and section 319 nonpoint source management programs. *See* 33 U.S.C. §§ 1288, 1329; *see also Or. Nat. Desert Ass'n v. U.S. Forest Serv.*, 550 F.3d 778, 785 (9th Cir. 2008) (explaining that nonpoint sources are "generally excluded from CWA regulations, except to the extent that states are encouraged to promote their own methods of tracking and targeting nonpoint source pollution"). The statute does not provide a "direct mechanism to control nonpoint source pollution but rather uses the 'threat and promise' of federal grants to the states to accomplish this task." *Or. Nat. Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998) (citation omitted). The statute further directs EPA to provide information to the states to aid in the control of nonpoint source pollution. *See* 33 U.S.C. § 1314(f).

Consistent with Congress's stated policy to preserve the primary responsibility of States "to prevent, reduce, and eliminate pollution, to plan the development and use . . . of land and water resources, and to consult with the Administrator in the exercise of his authority", 33 U.S.C. § 1251(b), States have taken their regulatory responsibility over CAFOs seriously since at least the 1990s. *See, e.g.*, Terence J. Centner, *Issue in Environmental Law: Establishing a Rational Basis for Regulating Animal Feeding Operations: A View of the Evidence*, 27 Vt. L.

Rev. 115, 126-28 (2002) ("A study of state legislative efforts between 1994 and 1998 showed a trend of more stringent animal manure management legislation intended to reduce pollutants from this sector of agriculture."). Indeed, many states impose more requirements on livestock operations than does the federal program; as early as 2002, EPA noted that "only a handful of states rely solely on their State NPDES regulations to address CAFOs. Rather, most use their NPDES regulations as one part of their CAFO program and supplement these requirements with additional provisions." U.S. EPA, *State Compendium: Programs and Regulatory Activities Related to Animal Feeding Operations* at 3 (May 2002).[4]

Take, for instance, Iowa and North Carolina, two states Petitioners criticize (at 56) for having too few NPDES permits, among other alleged shortcomings. Iowa has a robust regulatory regime for animal feeding operations, embodied in both statute and regulations. *See generally* Iowa Code chapters 459, 459A, and 459B; Iowa Admin. Code r. 567-65.[5] Iowa regulates construction of CAFOs exceeding 1,000 animals, including prescribing construction standards for manure storage. Iowa Admin. Code rr. 567-65.103 & 65.104; *see also id.* r. 567-65.7

[4] https://www3.epa.gov/npdes/pubs/statecom.pdf.

[5] The Iowa Administrative Code provisions were moved to the cited location as of May 15, 2024 and become effective on June 19, 2024. They are *available at* https://www.legis.iowa.gov/law/administrativeRules/rules?agency=567&chapter=65&pubDate=05-29-2024.

(establishing enhanced construction standards for formed manure storage structures located in karst terrain and prohibiting the construction of unformed manure storage structures in karst terrain); *id*. r. 567-65.9 (restricting and prohibiting construction of manure storage in the 100-year floodplain). Iowa also maintains setbacks and prohibitions related to water sources that apply to CAFO construction. *See, e.g.*, Iowa Code § 459.310 (structure setbacks from sinkholes, water sources, designated wetlands and prohibition in floodplains); *id.* § 459.311B (manure stockpile prohibitions and setbacks).

Iowa requires manure management plans for confinement feeding operations larger than 500 animals and nutrient management plans for open feedlots with over 1,000 animals. Unlike EPA's land application regulations, which only apply to land controlled by CAFOs, *see* 40 C.F.R. § 122.23(b), Iowa's regulations require these plans to account for all manure generated, including if the land application occurs on a neighbor's field. *See* Iowa Admin. Code rr. 567-65.110(1), 65.111(5) & (15), and 65.209(8)(c) & (f). Both types of plans cover nitrogen and phosphorus applications. *Id.* r. 567-65.111(3); *id*. r. 567-65.209(8).

To further protect water quality and to minimize impacts on neighbors, Iowa's land application regulations are more prescriptive than federal regulations. *See, e.g.*, *id.* rr. 567-65.100 & 65.200 (minimum controls and prohibitions for manure application); *id*. r. 567-65.101(3) (prohibiting most applications on frozen or snow-

covered ground); *id.* r. 567-65.101(1) and (2) (restrictions on spray irrigation of manure and manure application setback distances from neighboring occupied structures, designated wetlands, rivers, streams, lakes, sinkholes, drinking water wells); *see also* Iowa Code § 459.202 *et seq*. (setback distances for confinement feeding operation structures and dry manure stockpiles from residences, businesses, churches, schools, and public use areas).

North Carolina has one of the strongest permit programs for CAFOs in the nation and "is one of the only states that requires annual inspections of every facility." N.C. Dep't of Envtl. Qual., "Program Summary";[6] *see also* N.C. Gen. Stat. § 143-215.10F. By statute, North Carolina requires swine farms that have more than 250 pigs to obtain an animal waste general permit to lawfully operate. N.C. Gen. Stat. §§ 143-215.10B(1); 143-215.10C(a). Thus, almost every swine farm in the State is regulated by an animal waste general permit. *See* N.C. Dep't of Envtl. Qual., "Animal Feeding Operations: Purpose and Function."[7] North Carolina also requires swine farms to be sited at least 500 feet from wells that supply public and private water sources. N.C. Gen. Stat. § 106-803(a)(4), (5). The outer perimeter of land

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[6] https://www.deq.nc.gov/about/divisions/water-resources/water-quality-permitting/animal-feeding-operations/program-summary (last visited June 5, 2024).

[7] https://www.deq.nc.gov/about/divisions/water-resources/permitting/animal-feeding-operations (last visited June 5, 2024).

application sites must be at least 75 feet from residential property boundaries and perennial streams or rivers, and other animal waste management systems may not be constructed within the 100-year floodplain. N.C. Gen. Stat. § 106-803(a1), (a2).

In addition, North Carolina requires every animal operation having an animal waste management system to have a state-certified "operator in charge" who must satisfy specific training, examination, and continuing education requirements. *See id.* § 90A-47.2 & 90A-47.3. These requirements aim to "protect the public health and to conserve the quality of the State's water resource," while encouraging development and improvement of the State's agricultural land for the production of food and other agricultural products. *Id.* § 90A-47. And significantly, any new or expanded swine farm must meet even more stringent wastewater and air quality performance standards to be allowed to operate. N.C. Gen. Stat. § 143-215.10I(b)(2); 15A N.C. Admin. Code 02T .1307.

To sum up, looking only at the number of CAFOs that have NPDES permits in these two states (or any other states) provides an incomplete snapshot of what water pollution prevention requirements actually apply to CAFOs.

2. EPA's 2003 CAFO Rule

In 2003, EPA promulgated updated CAFO regulations that were upheld in part and vacated in part by the Second Circuit. *See* 66 Fed. Reg. 2960 (Jan. 12, 2001) (proposed rule); 68 Fed. Reg. 7176 (Feb. 12, 2003) ("2003 Rule"). Two aspects of

the 2003 Rule are particularly relevant here: (1) EPA's interpretation of the statutory exclusion of "agricultural stormwater discharges" from the definition of "point source" in 33 U.S.C. § 1362(14); and (2) a rebuttable presumption that large CAFOs had a duty to apply for NPDES permits.

Agricultural Stormwater Exclusion. As described above, the CWA's definition of "point source" expressly includes CAFOs while simultaneously excluding "agricultural stormwater discharges." 33 U.S.C. § 1362(14). Congress did not define either of those terms and thus, the Act's definition of "point source" is "self-evidently ambiguous" because it does not elucidate the overlap between agricultural stormwater discharges from CAFOs and discharges more broadly from CAFOs. *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 507 (2d Cir. 2005). In its 2003 Rule, EPA reconciled the ambiguity as follows: discharges of manure, litter, or process wastewater to navigable waters "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)." 40 C.F.R. § 122.23(e). Agricultural stormwater discharges in turn are "*precipitation-related* discharges" of manure, litter or process wastewater, but *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(e)(1)(vi) through (ix)." *Id.* § 122.23(e)(1).

Several environmental groups challenged the 2003 Rule, contending that the CWA's definition of "point source" encompasses *all* CAFO discharges, including runoff from land application areas. The Second Circuit disagreed, upholding EPA's interpretation as "a reasonable construction in light of the legislative purpose of the agricultural stormwater exemption[.]" *Waterkeeper*, 399 F.3d at 507. The court held it was "reasonable to conclude that when Congress added the agricultural stormwater exemption to the Clean Water Act, it was affirming the impropriety of imposing, on 'any person,' liability for agriculture-related discharges triggered not by negligence or malfeasance, but by the weather—even when those discharges came from what would otherwise be point sources." *Id.* Thus, whether a discharge from a CAFO land application area should be considered a regulated discharge or nonpoint source pollution (because it is an "agricultural stormwater discharge" that is excluded from the definition of "point source") "turned . . . on the primary cause of the discharge." *Id.* at 508.

The *Waterkeeper* court explained that EPA's interpretation aligns with the CWA's text: "like the [CWA] itself, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges." *Id.* at 508-09. And after considering the legislative history—

including the same excerpt that Petitioners rely on in this case, *see id.* at 508 n.23, the court concluded that none of it "comes close to casting doubt on the construction we permit here." *Id.* at 508; *see also id.* at 507 ("There is no authoritative legislative history to the contrary [of EPA's reasonable interpretation].").

Duty to Apply. The 2003 Rule also included a requirement that "[a]ll CAFO owners or operators must … either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit." 68 Fed. Reg. at 7266-67. This "'duty to apply' provision [was] based on the presumption that every CAFO has a *potential to discharge*." *Id.* at 7202 (emphasis added). The Second Circuit vacated that provision after determining that EPA violated the plain text of the CWA by attempting to regulate *all* CAFOs through a blanket duty to apply. By its terms, the "Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, only the discharge of pollutants." *Waterkeeper*, 399 F.3d at 504. It does not authorize the EPA to regulate point sources in and of themselves—without an actual discharge there is "no statutory obligation of point sources to comply with EPA regulations for point source discharges . . . [nor] to seek or obtain an NPDES permit in the first instance." *Id.* at 505. As such, attempting to regulate all CAFOs based on a presumption of their *potential* to discharge exceeded EPA's authority. About this, "Congress left little room for doubt[.]" *Id.* at 504.

3. EPA's 2008 CAFO Rule

In response to the Second Circuit's vacatur of the duty to apply provision in the 2003, EPA further revised the CAFO regulations in 2008. *See* 73 Fed. Reg. 70,418. The 2008 Rule attempted again to expand the universe of regulated CAFOs through a modified duty to apply provision. This time, rather than presuming that CAFOs have a "potential" to discharge, the 2008 Rule presumed that certain CAFOs "propose to discharge." *Id.* at 70,422. The 2008 Rule "clarifie[d] that a CAFO proposes to discharge if based on an objective assessment it is designed, constructed, operated, or maintained such that a discharge will occur, not simply such that it might occur." *Id.* at 70,423. In other words, "proposing" to discharge did not signal an intent or desire to discharge, but was based on an assessment of the characteristics of a CAFO itself, "regardless of whether the operator wants to discharge[.]" *NPPC*, 635 F.3d at 750.

EPA was well aware of the fact that the modified duty to apply provision in the 2008 Rule would not reach as many CAFOs as the blanket duty to apply provision in the 2003 Rule because CAFOs "with no discharges other than precipitation-related discharges from its land application areas" would not need permits. *See* 73 Fed. Reg. at 70,434-35. Consequently, EPA strengthened the requirements for runoff from CAFO land application areas to qualify for the

agricultural stormwater exclusion. *See id.* In the 2008 Rule, EPA added a new provision that clarifies:

> (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(e)(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. § 122.23(e).

The Fifth Circuit vacated the 2008 Rule's duty to apply provision on the same grounds that the Second Circuit vacated the similar provision in the 2003 Rule.[8] Emphasizing (as *Waterkeeper* did) that the scope of EPA's authority under the CWA is "strictly limited to the discharge of pollutants", the Fifth Circuit found no legal distinction between the "potential to discharge" presumption and the "propose to

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[8] Like *Waterkeeper*, the challenge to the 2008 Rule was consolidated by the Judicial Panel on Multi-District Litigation pursuant to 28 U.S.C. § 2112(a)(3), and the Fifth Circuit was randomly selected as the reviewing court. *See NPPC*, 635 F.3d at 741. Accordingly, the Second and Fifth Circuit decisions were nationally applicable holdings. *See Georgia v. President of the United States*, 46 F.4th 1283, 1304-05 (11th Cir. 2022) (explaining binding effect of consolidation process for certain lawsuits against federal agencies).

discharge" presumption. *NPPC*, 635 F.3d at 750-51. Under either presumption, EPA was impermissibly seeking to regulate a point source—CAFOs based on their characteristics—rather than regulating an *actual* discharge from a point source, as required by the CWA. *See id.* (citing *NRDC v. EPA*, 859 F.2d 156, 170 (D.C. Cir. 1988) (CWA "does not empower the agency to regulate point sources themselves"); *Serv. Oil, Inc. v. EPA*, 590 F.3d 545, 550 (8th Cir. 2009) ("[b]efore any discharge, there is no point source")). The Fifth Circuit left intact the 2008 Rule's provisions governing agricultural stormwater discharges for CAFOs that do not have NPDES permits.

After *NPPC*, EPA revised its regulations in 2012 to remove the "propose to discharge" presumption. 77 Fed. Reg. 44,494 (July 30, 2012).

C. Current Regulatory Provisions Governing CAFOs

EPA's Answering Brief (at 7-9) discusses the current permitting requirements and effluent limitations guidelines applicable to CAFOs as set forth in 40 C.F.R. parts 122 and 412. Intervenors write separately to highlight the stringency of the zero discharge provisions as well as the robust regulatory requirements applicable to runoff from land application areas.

Put simply, a "CAFO must not discharge unless the discharge is authorized by an NPDES permit." 40 C.F.R. § 122.23(d)(1). EPA's effluent limitations guidelines in 40 C.F.R. Part 412 generally impose a "zero discharge" requirement

for CAFOs. This means "no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area"[9] except for precipitation-related overflow of process wastewater, but *only if* the permitted "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." 40 C.F.R. §§ 412.31(a), 412.33(a), 412.46(a). But if a CAFO does not have a permit, any discharge from a production area, no matter the size of the storm event, violates the CWA.

To be clear, *all* CAFOs, whether permitted or unpermitted, must meet this zero-discharge standard. As EPA previously explained:

> [t]he CWA is very clear that point source discharges from CAFOs are illegal unless the operator has applied for and obtained an NPDES permit. Thus, 'zero discharge' is the only standard to which EPA can hold unpermitted CAFOs under the CWA. Large storms and chronic rainfall events do occur and production areas built to the 25-year, 24-hour storm design standard can and do discharge during precipitation events. Under the CWA, as previously discussed, a violation of the prohibition against discharging without a permit occurs even if the discharge was not planned or intended. Conversely, in the event of a discharge from a permitted CAFO, the discharge will not violate the CWA if the CAFO is in compliance with its permit.

73 Fed. Reg. at 70,424-25.

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[9] The "production area" is defined broadly and "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 regulations further define what each of those areas encompass. *See id.*

For both permitted and large unpermitted CAFOs, EPA's regulations state in the plainest of terms that "[t]he 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[.]" 40 C.F.R. § 122.23(e). If and only if manure, litter, or process wastewater are applied as fertilizer for crop production in accordance with specified agricultural practices, precipitation-induced discharges from those land application areas are excluded from permitting as agricultural stormwater discharges. *See id.* The exclusion does *not* apply to dry weather discharges, discharges that result from over-application, or land-applied waste that is deposited directly into a navigable water. In those cases, discharges are unlawful and subject to CWA enforcement. In short, precipitation runoff from land application areas is excluded from permitting only if CAFO farmers apply manure, litter, or process wastewater using sound agricultural practices.

The director of an approved state NPDES permitting program—or an EPA Regional Administrator in States that do not have an approved permitting program—is responsible for establishing technical standards to ensure appropriate agricultural utilization of nutrients. *See* 73 Fed. Reg. at 70,435. Such standards "specify the method or methods for determining whether land application rates are to be based on nitrogen or phosphorus, or whether existing nutrient loads in the soil preclude

land application, and also address the form, source, amount, timing, and method of application on each field to achieve realistic production goals while minimizing movement of nitrogen and phosphorus to surface waters." *Id.*

With an eye toward the requirement in 40 C.F.R. § 122.42(e)(1)(viii) to establish protocols to land apply manure in accordance with site-specific practices that ensure appropriate agricultural utilization of nutrients, EPA promulgated two alternative approaches for determining appropriate rates of application: (i) the linear approach, which expresses "field-specific maximum rates of application in terms of the amount of nitrogen and phosphorus from manure, litter, and process wastewater allowed to be applied;" and (ii) the narrative rate approach, which expresses "the field-specific rate of application as a narrative rate prescribing how to calculate the amount of manure, litter, and process wastewater allowed to be applied." 73 Fed. Reg. at 70,444; *see also* 40 C.F.R. § 122.42(e)(5)(i)-(ii).

Under either approach, developing appropriate land application rates is a complex, field-specific endeavor. CAFOs "must identify the crops to be planted and the planned crop rotations, or other uses, and the nitrogen and phosphorus needs of these crops or other uses." 73 Fed. Reg. at 70,445. Farmers must then "identify the realistic yield expected from the crop or crops planted in the field, in order to calculate the proper amount of nutrients to apply." *Id.* Typically, state land grant universities provide recommendations on how to calculate the nutrient needs for a

given crop, as well as the per acre realistic yield goal for that crop. *See id.* And because a CAFO operator can often plant more than one crop on a particular field in a given year, "the plant available amount of nitrogen and phosphorus needs to be calculated with reference to the nutrient needs of all the crops to be planted on such field in a given year in order to be accurate," and the operator must also account for other field uses, such as pasture or cover crops. *See id.*

The development of appropriate site-specific nutrient management practices also requires a field-specific assessment of the potential for nitrogen and phosphorus transport from each field. *See id.* The purpose of that assessment is to determine whether nitrogen or phosphorus is the "appropriate limiting nutrient for developing land application rates, *i.e.*, whether phosphorus or nitrogen limits the amount of manure, litter, or process wastewater that can be applied and the degree to which the limiting nutrient restricts land application, or whether land application is to be avoided altogether." *Id.* In fields where phosphorus is the limiting nutrient, this requires consideration of the annual phosphorus removal rate for each crop or other field use. *See id.* In fields where nitrogen is the limiting nutrient, this requires consideration of the total amount of plant available nitrogen for each crop from residual nitrogen already in the field (from prior applications of manure or chemical fertilizer and from other sources such as crop residue or nitrogen-fixing legumes) and from further additions of nitrogen (from fertilizer, manure, or biosolids). *See id.*

EPA has characterized the site-specific nutrient management practices that a CAFO must develop as "preconditions for determining whether the agricultural stormwater exemption applies for discharges from land application areas under the CAFO's control." *Id.* at 70,437. Any CAFOs whose land application activities are not in compliance with these rigorous requirements are subject to enforcement by EPA, state regulators, and citizen plaintiffs. *See id.* at 70,437 & 70,457; *see also* 33 U.S.C. §§ 1319 & 1365.

The Clean Water Act's remedial scheme imposes "substantial criminal and civil penalties for discharging any pollutant into waters covered by the Act without a permit[.]" *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 594 (2016). Consequently, livestock operations carry the risk of criminal fines and imprisonment for even *negligent* violations of EPA's current CAFO regulations. *See* 33 U.S.C. § 1319(c). Civil penalties can be as much as $66,712 per day per violation. *See* 40 C.F.R. § 19.4; *see also* 88 Fed. Reg. 89,309, 89,312 (Dec. 27, 2023). "[T]he consequences [] even for inadvertent violations can be crushing." *Hawkes Co.*, 578 U.S. at 602-03 (Kennedy, J., concurring) (citation omitted).

D. Petition for Rulemaking and EPA's Denial

As detailed in EPA's Brief, several organizations, including Petitioners, filed a petition for rulemaking regarding the CAFO regulations, which EPA denied. *See* EPA Br. 9-14.

SUMMARY OF THE ARGUMENT

Petitioners' request to upend EPA's CAFO regulatory program is meritless. The Court should deny their petition for review.

I. Rather than challenge EPA's denial of the specific requests in their petition for rulemaking, Petitioners levy a broadside attack on EPA's CAFO program generally. Longstanding precedent forecloses this sort of programmatic challenge. Furthermore, Petitioners' grievances stem from the very structure of the CWA itself, and thus requires appeal to Congress in the first instance.

II. Petitioners obscure the appropriate standard for reviewing EPA's denial of a petition for rulemaking. While Petitioners present this case as an ordinary arbitrary-and-capricious challenge, judicial review of petition denials is extremely limited and highly deferential, as agencies approach the height of their discretion when deciding whether to expend limited resources on regulatory change not compelled by statute. EPA exercised its discretion reasonably here and sufficiently explained its reasoning. Moreover, no radical change in factual circumstances lessens the deference that EPA's decision deserves.

III. Petitioners wrongly assert that EPA's CAFO program undermines its duties under the CWA and that EPA erred by focusing its limited resources on improving implementation and further study of the issues identified, instead of revising its regulations.

A. EPA's CAFO program aligns with the relevant CWA provisions governing discharges from point sources. EPA's regulations generally prohibit discharges from CAFO production areas, and any permitting exclusions for agricultural stormwater discharges from CAFOs flow directly from the statute.

B Petitioners' principal request that EPA compel additional CAFOs to obtain permits through regulatory reform invites EPA to defy both precedent and the statute. EPA's petition denial rationally explains why the reform Petitioners seek does not differ meaningfully from prior attempts to expand the universe of permitted CAFOs that two courts of appeals rejected. Petitioners' mischaracterizations of the record transparently attempt to propel the Court into upending EPA's program, but not only are Petitioners' attacks misplaced, they cannot justify an attempt by EPA to exceed its statutory authority by regulating point sources divorced from discharges.

C. Petitioners' call for EPA to reverse its longstanding interpretation of the agricultural stormwater exclusion for CAFO land application runoff runs headlong into the statute, Congress's intent, and a prior court decision upholding EPA's interpretation. In denying the petition for rulemaking on this issue, EPA reasonably declined to revisit its interpretation and opted instead to focus on implementation and enforcement of its stringent CAFO regulations. Petitioners' claims that EPA has created a permitting loophole rely on speculation and factual

distortions. Nor can Petitioners point to any radical changes in EPA's factual assumptions that would require EPA to abandon its interpretation.

STANDARD OF REVIEW

Intervenors agree with EPA's statement of the Standard of Review.

ARGUMENT

I. This Court Should Reject Petitioners' Improper Programmatic Challenge to EPA's CAFO Program.

As EPA explained, Petitioners have forfeited all but one of their arguments related to their prior requests for EPA to revise specific provisions in the existing CAFO regulations by failing to explain why EPA's denials of those specific requests was arbitrary and capricious. *See* EPA Br. 20-22. Instead, Petitioners now focus on arguing generally that EPA has unlawfully declined to reform the CAFO program. In Petitioners' own words, they ask this Court to review EPA's refusals to "update the CAFO program," Pet. Br. 27, and they repeatedly attack EPA for avoiding "regulatory reform" without much specificity as to what those reforms should be. *Id.* at 22, 31-33, 38.

This Court should reject Petitioners' attempt to mount an impermissible programmatic attack on EPA's CAFO program dressed up as a challenge to the denial of a rulemaking petition. "It is axiomatic that . . . [the APA's] limitation on judicial review precludes broad programmatic attack[s], whether couched as a challenge to an agency's action or failure to act." *Whitewater Draw Nat. Res.*

Conservation Dist. v. Mayorkas, 5 F.4th 997, 1012 (9th Cir. 2021) (finding no judicial review available for challenge to "continuing operations" and list of actions taken to "implement these programs") (internal quotation marks and citation omitted). Petitioners "cannot seek *wholesale* improvement of this program by court decree, rather than in the offices of the Department or the halls of Congress, where programmatic improvements are normally made." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990).

Contrary to Petitioners' claim, EPA's CAFO program is no "regulatory failure", nor has EPA "created a permitting loophole" allowing CAFOs that otherwise would be subject to NPDES permit requirements to operate unregulated. Pet. Br. 16 & 52. As in any other industry, the CWA regulates discharges of pollutants from point sources, *subject to certain statutory exclusions and exemptions*, including agricultural stormwater. And, as explained herein, the CWA is a cooperative federalism scheme that envisions a robust role for state regulators to determine any additional regulation that may be necessary given local circumstances. Petitioners' dislike of the CWA's broader scheme, or of the particular exclusion Congress created for agricultural stormwater, does not render it a "permitting loophole" of *EPA's* creation. As both the *Waterkeeper* and *NPPC* courts recognized, "[t]o the extent that policy considerations do warrant changing the statutory scheme, such considerations address themselves to Congress, not to the

courts." *Waterkeeper*, 399 F.3d at 505 (internal quotation marks and citation omitted); *NPPC*, 635 F.3d at 753 (quoting same).[10]

II. Petitioners Largely Ignore the Appropriate Standard of Review.

Petitioners gloss over the highly deferential standard by which courts review an agency's decision not to initiate a rulemaking. *See* Pet. Br. 25-26. Petitioners' reliance on garden-variety arbitrary and capricious case law outside of the petition-denial context is misguided.[11]

As this Court previously clarified, "[w]hen an agency refuses to exercise its discretion to promulgate proposed regulations, the Court's review 'is extremely limited and highly deferential.'" *Compassion Over Killing v. FDA*, 849 F.3d 849, 854 (9th Cir. 2017) (quoting *Mass. v. EPA*, 549 U.S. 497, 527-28 (2007) (internal

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[10] For the same reason, the economic and market policy considerations raised by the amicus brief of Dr. John Ikerd, *et al.*, are also best directed at Congress.

[11] *See, e.g.*, *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 67 F.4th 1027 (9th Cir. 2023) (reviewing order approving mining project); *City & Cnty. of S.F. v. EPA*, 75 F.4th 1074 (9th Cir. 2023) (reviewing order denying review of NPDES permit); *Nat'l Wildlife Fed'n v. EPA*, 286 F.3d 554 (D.C. Cir. 2002) (reviewing proposed regulations); *Sierra Club v. Bosworth*, 510 F.3d 1016 (9th Cir. 2007) (reviewing establishment of NEPA categorical exclusion); *League of Wilderness Defs. / Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002) (reviewing challenge to aerial pesticide spraying project); *Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46, 57 (D.C. Cir. 2015) (reviewing methodology for setting fixed loss thresholds for outlier payments); *Butte Cnty., Ca. v. Hogen*, 613 F.3d 190 (D.C. Cir. 2010) (reviewing approval of tribal gaming ordinance).

quotation marks omitted)); *accord Defs. of Wildlife v. Gutierrez*, 532 F.3d 913, 921 (D.C. Cir. 2008) (an agency's decision not to initiate rulemaking proceedings is *at the high end of the range of deference*, and only in the "rarest and most compelling" circumstances will a court overturn an agency's judgment in this regard).

In conducting its extremely limited and highly deferential review, the only question before this Court is whether EPA reasonably explained and sufficiently grounded in the record its decision not to initiate a rulemaking to overhaul the CAFO program. *See Mass. v. EPA*, 549 U.S. at 533. EPA appropriately exercised its broad discretion to consider resource constraints, to balance competing statutory considerations, and to otherwise determine the "manner, timing, content, and coordination of its regulations[.]" *Id.*; *see also id.* at 527 ("an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities").

The CWA authorizes the EPA Administrator to issue rules as "necessary to carry out his functions under this chapter." 33 U.S.C. § 1361(a). This leaves EPA broad discretion to choose "between proceeding by general rule or by individual, ad hoc litigation." *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947). EPA's decision to focus on enforcement rather than overhaul its CAFO program rules is well within EPA's discretion and entitled to great deference. *See Compassion Over Killing*, 849 F.3d at 855-56 ("FTC also reasonably denied Plaintiffs' rulemaking petition based

on its discretion to combat any potentially misleading egg labeling through ad hoc enforcement proceedings."). Equally important, EPA acted reasonably by declining to pursue regulatory reforms that likely would exceed EPA's authority to promulgate. *See id.* at 854 (not arbitrary and capricious for agency to deny rulemaking petition where proposed rule was for labeling of product outside agency's labeling jurisdiction).

As explained in EPA's denial, the current CAFO rules are plenty stringent. *See* ER-226–27 (citing 40 C.F.R. § 122.23(e), (h); *id*. § 122.42(e)). Any problems with implementation and enforcement are for EPA (or States and citizen plaintiffs) to tackle, and this Court owes a high level of deference to EPA's reasonable explanations of why updating the CAFO program was neither appropriate nor necessary now. *See O'Keeffe's, Inc. v. U.S. Consumer Prod. Safety Comm'n*, 92 F.3d 940, 944 (9th Cir. 1996) (agency did not act arbitrarily or capriciously in determining that an amendment to the regulations was not appropriate or necessary); *see also WildEarth Guardians v. EPA*, 751 F.3d 649, 655 (D.C. Cir. 2014) (deferring to agency's determination of its priorities).

The few cases Petitioners cite that involve an agency's refusal to promulgate rules are inapposite. One case involved an absence of any explanation by the agency. *See Am. Lung Ass'n v. EPA*, 134 F.3d 388, 392 (D.C. Cir. 1998) (insufficient record for judicial review because administrator gave no real explanation for conclusion

that peak SO_2 bursts present no health hazard). Another involved a clear statutory directive to promulgate standards after making certain findings. *See Mass v. EPA*, 549 U.S. at 533 ("Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.") (citing 42 U.S.C. § 7521(a)(1)). Neither situation exists here.

Similarly, Petitioners mistakenly rely on *American Horse Protection Association, Inc. v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987), claiming that EPA's petition denial failed to account for a "radical change in its factual premises." *See* Pet. Br. 60, 62. Not only is that untrue here for the reasons explained below in Part III.C.3, but also the court's ultimate conclusion in *American Horse* turned on the agency's cursory analysis. The court admonished the agency for providing only "two conclusory sentences" with "no articulation of the factual and policy bases for the decision." 812 F.2d at 6 (cleaned up). By contrast, here, when EPA denied the petition for rulemaking, it provided a fulsome explanation for why it was neither legally nor factually compelled to change course. *See* EPA Br. 11-14.

Last, Petitioners discuss *In re A Community Voice*, 878 F.3d 779, 786 (9th Cir. 2017), at length (Pet. Br. 29-31), but that case arose out of the *grant* of a petition for rulemaking that EPA subsequently delayed acting on for eight years. It also

involved a clear statutory framework to prevent childhood lead poisoning on an ongoing basis, which included "Congress['s] specific[] demand[] [for] the creation of a task force that would be instructed to advise EPA and HUD as to 'revising ... regulations ... issued by [HUD] and other Federal agencies relating to lead-based paint poisoning prevention.'" *Id.* at 784 (citing 42 U.S.C. § 4852a(a), (c)(5)). Petitioners offer no equivalent statutory directive requiring that EPA regularly amend its CAFO rules. As noted above, the CWA authorizes the EPA Administrator to issue rules as "necessary to carry out his functions under this chapter," 33 U.S.C. § 1361(a), leaving wide latitude to determine when issuing such a rule is necessary—as opposed to taking another approach, such as enforcement or implementation.

As detailed more fully in the following sections, Petitioners cannot overcome the highly deferential standard applicable to review of EPA's petition denial. Thus, this Court should affirm EPA's decision.

III. EPA Reasonably and Correctly Declined to Overhaul the Existing CAFO Program.

In arguing that EPA's CAFO program undermines its statutory obligations and that EPA arbitrarily refused to update the program in favor of focusing on improving implementation and further study, Petitioners effectively fault EPA for failing to do two things: (i) revise the CAFO regulations to somehow compel additional CAFOs to obtain permits; and (ii) eliminate the agricultural stormwater exclusion for CAFO land application runoff. None of Petitioners' arguments has

merit. For starters, EPA's CAFO program is fully consistent with the CWA. Moreover, EPA's refusal to revise its sufficiently stringent regulations and to instead focus on effective implementation and enforcement of those regulations is reasonable and consistent with nationally applicable rulings on virtually the same issues by the Second and Fifth Circuits. EPA was well within its authority to deny Petitioners' requests to overhaul the CAFO regulations and, in doing so, satisfied the minimal requirements of rationality courts apply when reviewing an agency's decision not to initiate a rulemaking.[12]

A. EPA's CAFO Program and Petition Denial Align with the Statute.

Contrary to Petitioners' characterizations, EPA has not deviated from its responsibility to administer the CWA, *see* Pet. Br. 27-30, or "neglect[ed] its statutory duty to regulate an entire point source category[.]" *Id.* at 31-32. Consistent with the CWA and this Court's precedents interpreting the Act that Petitioners rely on, EPA *does* regulate actual discharges from CAFO production areas, and any CAFOs that do not have NPDES permits must be "zero discharge" facilities or risk "substantial criminal and civil penalties for discharging any pollutant into waters covered by the

[12] EPA's brief thoroughly addresses Petitioners' contentions and explains why the petition denial was not arbitrary and capricious. *See* EPA Br. at 19-49. Intervenors therefore support, and do not duplicate here, EPA's arguments regarding such issues as the propriety of the CAFO detailed study (*id.* at 32-35), the Federal Advisory Committee Act and the Stakeholder Subcommittee (*id.* at 27-28 & 36-39), and environmental justice (*id.* at 45-49).

Act without a permit[.]" *Hawkes Co.*, 578 U.S. at 594. *See supra* Statement of the Case, Part C (discussing current CAFO regulations). Additionally, EPA has consistently interpreted the term "concentrated animal feeding operation" in 33 U.S.C. § 1362(14), which Congress left to EPA to define, *not* to encompass land application areas and thus, precipitation-related discharges from CAFO land application areas are excluded from permitting as "agricultural stormwater discharges" so long as CAFO farmers land apply manure, litter, and process wastewater using sound agricultural practices. *See supra* Statement of the Case, Part B.1-2 (discussing agricultural stormwater exclusion). And much like CAFOs that improperly discharge without a permit, CAFOs that incorrectly invoke the agricultural stormwater exclusion run could be subject to "crushing" penalties even for "inadvertent violations[.]" *Hawkes Co.*, 578 U.S. at 602 (Kennedy, J., concurring).

Petitioners' reliance on *Northern Plains Resource Council* is particularly misplaced, as EPA has not created any permitting exemptions for CAFOs that are unmoored from the statute. *See* Pet. Br. 28 (quoting *N. Plains Res. Council v. Fid. Expl. & Dev. Co.*, 325 F.3d 1155, 1164 (9th Cir. 2003)). Unlike the failed attempt in that case to exempt discharges of produced water pumped from coal bed methane extraction sites from permitting, the only exclusion from permitting in EPA's CAFO

program (for "agricultural stormwater discharges") comes straight from the statute. *See infra* Part III.C.1.

To be sure, EPA's CAFO program has, at times, deviated from the statute, but not how Petitioners suggest. Of particular relevance here, EPA has twice attempted to enact the sort of "reform" that Petitioners effectively advocate here: revisions to the CAFO regulations to mandate somehow that all (or most) CAFOs obtain CWA permits. In both instances, courts of appeals had little difficulty concluding that EPA's regulations were contrary to the CWA's plain text. *See infra* Part III.B.

B. Courts of Appeals Have Twice Rejected Prior Attempts to Expand the Universe of Permitted CAFOs Based on Presumptions and Estimates.

Petitioners contend that one of the "critical flaws in the Agency's CAFO program" is that "the majority of CAFOs discharge yet evade permit coverage[.]" Pet. Br. 16-17. Petitioners further claim that EPA unlawfully declined to "make lasting improvements through the regulatory process" despite having been "provided with a roadmap for how to do so[.]" *Id.* at 31. Although Petitioners' brief fails to explain precisely what improvements EPA should have made, their underlying petition for rulemaking purported to address their belief that most CAFOs are improperly discharging without permits by asking EPA to "[e]stablish an evidentiary presumption that CAFOs with certain characteristics discharge." *Id.* at 20-21.

The "roadmap" that Petitioners propose is not viable, which is why EPA appropriately rejected it. As EPA's denial explained, Petitioners' proposed solution is substantively indistinguishable from what two different Courts of Appeals rejected when vacating prior EPA attempts to force more CAFOs to obtain permits. The Second Circuit rejected EPA's original "duty to apply" provision in 2005, and the Fifth Circuit rejected a modified "duty to apply" provision in 2011. Because both decisions were consolidated by the Judicial Panel on Multi-District Litigation, they had and continue to have a nationwide effect. *See* 28 U.S.C. § 2112(a)(3); *Georgia*, 46 F.4th at 1304-05.

There is no legally significant daylight between these nationally applicable decisions and Petitioners' proposed regulatory reform. Mindful of those cases, EPA's petition denial provided an adequate and reasonable explanation that its resources were best focused on implementing and enforcing its existing CWA obligations—which generally mandate zero discharges from CAFO production areas—rather than on fashioning and defending another rule that would eventually be found *ultra vires* by the courts.

1. The CWA Does Not Authorize a Presumption Based on the Potential to Discharge.

The Second Circuit already addressed EPA's attempt to regulate CAFOs by imposing a "duty to apply" in *Waterkeeper*, 399 F.3d at 505. In 2003, EPA promulgated a rule on CAFOs that included, among other things, a requirement that

"[a]ll CAFO owners or operators must . . . either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit." 68 Fed. Reg. at 7266-67. This "'duty to apply' provision [was] based on the presumption that every CAFO has a potential to discharge." *Id.* at 7202. On a challenge to that aspect of the rule, the Second Circuit agreed that this attempt to regulate CAFOs through a blanket duty violated the CWA's plain text.

By its terms, the "Clean Water Act authorizes the EPA to regulate, through the NPDES permitting system, *only the discharge of pollutants*." *Waterkeeper*, 399 F.3d at 504 (emphasis added). It does not authorize the EPA to regulate point sources in and of themselves; unless there is an actual discharge there is "no statutory obligation of point sources to comply with EPA regulations for point source discharges . . . [nor] to seek or obtain an NPDES permit in the first instance." *Id.* at 505. As such, the *potential* to discharge is no basis to require a CAFO to obtain a permit. About this, "Congress left little room for doubt[.]" *Id.* at 504.

2. The CWA Does Not Authorize a Presumption Based on a CAFO's Design or Operational Profile.

Petitioners' brief cites only obliquely to *NPPC* without addressing its holding, and there is no mystery why: that case squarely forecloses Petitioners' argument that EPA can establish a presumption of discharge under circumstances like the case at bar. In *NPPC*, the Fifth Circuit built upon the foundation laid by the Second Circuit

in *Waterkeeper* to conclude that EPA's second attempt to expand the universe of permitted CAFOs fared no better.

The rule at issue in *NPPC* was EPA's response to *Waterkeeper*. In the 2008 CAFO Rule, EPA merely changed its "duty to apply" requirement from a "potential to discharge" scheme to a "propose to discharge" scheme. To be clear, "propose to discharge" in the 2008 Rule did not mean an *intent* or desire to actually discharge, but was based on the characteristics of a CAFO itself: "the EPA's definition of a CAFO that 'proposes' to discharge is a CAFO designed, constructed, operated, and maintained in a manner such that the CAFO will discharge … regardless of whether the operator wants to discharge[.]" *NPPC*, 635 F.3d at 750. Emphasizing, as the Second Circuit did in *Waterkeeper*, that the scope of EPA's authority under the CWA is "strictly limited to the discharge of pollutants", the Fifth Circuit found no legal distinction between the "potential to discharge" presumption and the "propose to discharge" presumption. *Id.* at 750-51. Under either presumption, the EPA was impermissibly seeking to regulate a point source (*i.e.*, a CAFO) in lieu of an actual discharge. *See id.*

3. EPA's Petition Denial Reasonably Explains Why Any Effort to Revise Existing Regulations with a Presumption Would Be Legally Infirm.

To the extent Petitioners try to push for an evidentiary presumption here, such a rule would meet the same fate as the presumption that the *NPPC* court invalidated.

Both presumptions attempt to avoid the CWA's unequivocal requirement of an "actual discharge" for a permit to be required; both fail under the plain text of the statute. As EPA explained in its petition denial: "It is difficult to distinguish between the petition's request that EPA establish a rebuttable presumption that CAFOs with certain characteristics actually discharge . . . and the approach EPA used in the 2008 Rule, requiring facilities to obtain permits if they are designed, constructed, operated, and maintained such that a discharge will occur, which the Fifth Circuit Court of Appeals vacated." ER-223.

Against the backdrop of two nationally applicable court decisions rejecting EPA's prior attempts to widen the scope of its permitting by imposing a presumptive duty on certain CAFOs, EPA wisely concluded that its limited resources are better devoted not to another ill-fated rule revision but rather to addressing improper and unpermitted discharges—actual discharges—through enforcement. The CWA broadly prohibits the "discharge of any pollutant" from a point source unless in compliance with a permit, 33 U.S.C. § 1311(a), and that prohibition is enforceable by EPA, states, and citizen plaintiffs. *See, e.g.*, 33 U.S.C. §§ 1342(h), 1365. Accordingly, EPA's conclusion that this would be a more effective direction is reasonable.

4. This Court Should Not Upend EPA's Denial Based on Petitioners' Mischaracterizations of Record Evidence.

Throughout Petitioners' arguments concerning EPA's "wholesale denial" and refusal to institute regulatory reforms, Petitioners claim that EPA has ignored extensive evidence, including the Agency's own prior findings, concerning CAFO pollution and the need for reform. *See* Pet. Br. 27-35. In so doing, Petitioners repeatedly distort record evidence.

First, Petitioners insist that EPA "admits" thousands of CAFOs are illegally discharging without permits. *See id.* at 28. This assertion is based on Petitioners' mischaracterization of the 2008 Rule that "EPA estimate[d] at least 75 percent of CAFOs discharge non-agricultural stormwater pollution." *See id.* at 17 & 55 (quoting 73 Fed. Reg. at 70,469). What EPA actually did in that rule was estimate what percentage of CAFOs would need to apply for a permit under the extra-statutory "propose to discharge" standard that the *NPPC* court vacated because it was not the equivalent of an actual discharge. Thus, contrary to Petitioners' repeated insistence, EPA has never "admitted" or quantified what percentage of CAFOs *actually discharge* pollutants into navigable waters improperly without a permit. Furthermore, as EPA explained, that estimate is based on "conservative categorical assumptions about the likelihood of a discharge based on broad operational profiles and do[es] not account for more subtle stratifications within specific operational categories." 73 Fed. Reg. at 70,469. EPA arrived at that gross overestimate in the

face of record evidence that the vast majority of CAFOs do not discharge. *See* SER-13–18 (summarizing analysis of several years' worth of state release and discharge reports for CAFOs and EPA's own conclusions on the lack of a potential for discharges from closed animal production and waste management systems).

Second, Petitioners suggest that when EPA proposed an information collection rule in 2011, it was seeking the same information it now proposes to study "only to promptly withdraw it a year later, finding existing sources of information to be adequate." Pet. Br. at 32. To the contrary, EPA sufficiently explained its need for additional information. Petitioners misstate the rationale for withdrawing the rule. The 2011 proposed rule also sought comment on three alternatives EPA was already considering: "Collecting data from existing sources, requiring states to submit the information to the EPA, and expanding the EPA's network of compliance assistance and outreach tools." 77 Fed. Reg. 42,679, 42,680 (July 20, 2012). The comments received from individuals, states, and state associations noted that "it would be too burdensome for CAFOs to comply with the proposed rule" and that "states already hav[e] the information the EPA was seeking by virtue of existing CAFO programs at the state and local level." *Id.* at 42,681.

In the interim EPA had established another way of collecting information: "In July 2012, the EPA also established a Memorandum of Understanding (MOU) with the Association of the Clean Water Administrators (ACWA) that specifically will

assist the Agency in collecting information about CAFOs. ACWA is an independent, nonpartisan, non-profit corporation of state and interstate water program managers." *Id.* Finally, Petitioners' characterization of "existing sources of information" implies that EPA no longer sought new information. In fact, EPA opted to pursue the more efficient approach of collecting CAFO information from state authorities and ACWA to determine gaps in that information and determine next steps: "Collecting existing information, evaluating it, and compiling it in one format will better inform the Agency of what additional information may be needed and the best way to collect that information, if necessary." *Id.* at 42,682. EPA also identified its other tools for gathering information that did not require promulgating a new rule: "To fill in information gaps, the Agency may use existing tools, such as site visits and individual information collection requests." *Id.* In short, EPA did not abandon its prior efforts to study issues relating to regulation of CAFOs, and it is not simply rehashing those efforts now.[13]

[13] For these reasons, Judge Millett's (non-precedential) dissent in *Multicultural Media Telecom & Internet Council v. FCC*, 873 F.3d 932, 941 (D.C. Cir. 2017), finds no factual analogy here. EPA's incremental and phased approach to gathering data before acting here is hardly the "blanket rejection" criticized there. *Contra id.* at 940.

Third, Petitioners claim that 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.'" Pet. Br. 29 (quoting ER-138). Note that the cited document fails to substantiate the claim that many CAFOs are improperly discharging. If discharges were indeed so rampant, EPA has all the tools it needs to enforce against violations, as do States and citizen plaintiffs. In any event, Petitioners omit critical context from that document explaining why EPA laments that it is difficult to compel permit coverage: it is "because successive court decisions have severely limited EPA's ability to require CAFOs to obtain an NPDES permit." ER-138. The Agency wisely recognized that it would be perilous to promulgate any presumptions or duties to apply and that it should instead "explore its authority to improve the effectiveness of the CAFO regulations in a number of ways," ER-138, which in fact EPA is now doing in lieu of adopting Petitioners' proposed reforms.

Finally, Petitioners contend that "EPA also concedes it has not required permitted CAFOs to use adequate pollution control technology," Pet. Br. 28, and that EPA "is further aware the primary land application control technology it has relied on for decades is 'insufficient' and outdated." *Id.* at 29 (citations omitted). The record belies these assertions. At most, EPA has acknowledged that it seeks "to make an informed, reasoned decision regarding the effectiveness of the existing ELG and

whether emerging alternatives to existing requirements may be technologically available and economically achievable and may better protect water quality." ER-218.

C. EPA Reasonably Declined to Reinterpret the Scope of the Agricultural Stormwater Exclusion.

Petitioners' other attempt to overhaul EPA's CAFO program focuses on EPA's longstanding interpretation of the statutory exclusion of "agricultural stormwater discharges" from the definition of "point source" in 33 U.S.C. § 1362(14). Petitioners assert that it was arbitrary and capricious for EPA to refuse to revisit that exclusion, and they claim that EPA's current interpretation (codified at 40 C.F.R. § 122.23(e)): (i) undermines Congress's intent and ignores relevant legislative and regulatory history, Pet. Br. 47-52; (ii) creates a permitting loophole, which no longer makes sense in the absence of a requirement for all large CAFOs to apply for permits, *id.* at 52-59; and (iii) relies on incorrect factual assumptions about the efficacy of nutrient management practices, *id.* at 59-62. None of these contentions withstands scrutiny. EPA correctly rejected the call to conclude "that no CAFO-related discharges can ever constitute agricultural stormwater." *Id.* at 47.

1. EPA's Interpretation Is Consistent with the Statute and Congress's Intent.

EPA's brief details how the Second Circuit affirmed the Agency's interpretation of the agricultural stormwater exemption in the face of a challenge by

environmental organizations. *See* EPA Br. 50-52. That court analyzed the statute's text, legislative history, and circuit precedent in concluding that EPA's interpretation "comports [] with Congress' intent in enacting the agricultural stormwater exemption." *Waterkeeper*, 399 F.3d at 507-08. The *Waterkeeper* court underscored that, "*like the Clean Water Act itself*, the CAFO Rule seeks to remove liability for agriculture-related discharges primarily caused by nature, while maintaining liability for other discharges." *Id.* at 508-09 (emphasis added). Thus, "where a CAFO has taken steps to ensure appropriate agricultural utilization of the nutrients in manure, litter, and process wastewater, it should not be held accountable for any discharge that is primarily the result of 'precipitation.'" *Id.* at 509. Petitioners seek to evade that nationally applicable decision by insisting that the Second Circuit engaged in only a limited review of legislative history and that the "full history" shows that EPA's interpretation is unreasonable and contrary to Congress's intent. Petitioners are wrong on both counts.[14]

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[14] In evaluating Petitioners' arguments concerning Congress's intent, this Court can consider arguments concerning the Act's structure and legislative history regardless of whether EPA invoked such grounds in its decision. *See Ry. Labor Execs. Ass'n v. ICC*, 784 F.2d 959, 969 (9th Cir. 1986) ("Generally, a reviewing court may only judge the propriety of an agency decision on the grounds invoked by the agency. . . . However, the court is not so bound when, as here, the issue in dispute is the interpretation of a federal statute.").

Petitioners' lone citation to legislative history is a statement by Senator Dole preceding the 1972 Act, which Petitioners believe demonstrates that Congress sought to control all precipitation runoff from CAFOs through permitting. Pet. Br. 48. As the Second Circuit explained in *Waterkeeper*, Petitioners' reliance on that statement is misplaced: "Senator Dole did not at all suggest that the Act aimed, in fact, to regulate precipitation runoff. His statement about precipitation runoff was merely part of a larger discussion about the general environmental threat posed by animal and poultry waste." 399 F.3d at 508 n.23. Nowhere in Senator Dole's discussion of animal waste did he espouse Petitioners' view that precipitation runoff from land application areas under the control of CAFOs requires a point source permit.

Next, nothing in EPA's regulatory history supports Petitioners' claim that, in 1987, Congress "ratified" an EPA interpretation of "agricultural stormwater discharge" that excludes "any CAFO-related discharges," presumably including runoff from land application areas associated with CAFOs. *See* Pet. Br. 49-51. Petitioners correctly note that throughout EPA's history of excluding agricultural runoff from point source permitting requirements, the Agency did not extend that exclusion to discharges from CAFOs, as defined elsewhere in EPA's regulations. *E.g.*, 45 Fed. Reg. 33,290, 33,442 (May 19, 1980). What Petitioners leave out, however, is that before 2003, EPA had not considered discharges from land

application areas to constitute discharges from CAFOs.[15] Nothing in the regulatory history that Petitioners rely on suggests otherwise. Thus, to the extent Congress ratified anything in 1987, it ratified EPA's omission of land application areas from CAFO point source permitting.

Regardless of whether the definition of a CAFO encompasses land application areas, *see* 40 C.F.R. § 122.23(b), EPA has not interpreted the CWA as categorically excluding land applications from CWA regulation. Quite the contrary, as EPA's regulations make clear, 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[.]" 40 C.F.R. § 122.23(e) (emphasis added); *accord Waterkeeper*, 399 F.3d at 508 ("[W]hile the Rule holds CAFOs liable for most land application discharges, it prevents CAFOs from being held liable for

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[15] Although EPA had initially proposed in 2001 to depart from its longstanding interpretation by amending the definition of AFO to encompass land application areas, EPA made clear in that proposal that "it has not previously defined CAFOs to include the land application area." 66 Fed. Reg. at 3008; *accord* EPA, Draft Guidance Manual and Example NPDES Permit for Concentrated Animal Feeding Operations, at 2-2 (1999) ("[L]and application areas, which are outside the area of confined animals, do not fall geographically within the regulatory definition of an AFO."), https://nepis.epa.gov/Exe/ZyPDF.cgi/P10059U0.PDF?Dockey=P10059U0.PDF.

'precipitation-related discharge[s]' where 'manure, litter or process wastewater has [otherwise] been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization.'") (citing 40 C.F.R. § 122.23(e)).

Other provisions of the statute further illustrate why Petitioners' claim that a narrower interpretation of the agricultural stormwater exclusion would better conform to Congress's intent is meritless. For instance, the text and legislative history of Section 208 list "runoff from manure disposal areas" among the "nonpoint sources of pollution" to be addressed by states and area-wide waste management agencies. 33 U.S.C. § 1288(b)(2)(F); S. Rep. No. 92-414, at 39 (1971); *see also* S. Rep. No. 95-370, at 37 ("Nonpoint source pollution from animal wastes, fertilizers, pesticides, and eroded soil is difficult to control because of the diffuse nature of the problem and is growing in magnitude."). Congress repeatedly acknowledged the significance of agricultural nonpoint sources of pollution, including runoff carrying land applied animal wastes, but it generally intended for states to address these through nonpoint source pollution control plans, *not* point source permits.

Similarly, Congress added Section 319, 33 U.S.C. § 1329, to the CWA in 1987 to further direct and assist the State's efforts to address nonpoint source pollution, and the legislative history for that provision lists among its objectives "controlling agricultural runoff" and "improved management of animal wastes and

feedlots." S. Rep. No. 98-282, at 1 (1983). If, as Petitioners suggest, "the terms 'agricultural stormwater' and 'concentrated animal feeding operation' are most logically read as being mutually exclusive," the provisions addressing such runoff in sections 208 and 319 would make little sense. EPA's interpretation thus is the more sensible construction of the statute, as it comports with these provisions that reflect Congress's intent that stormwater runoff from land application areas should be left to state control.

Finally, CWA Section 405 demonstrates that, where it intended to, Congress knew how to regulate land application of pollutants generated by a point source, to control runoff from the receiving lands into navigable waters. As enacted in 1972, that section prohibited, except in accordance with a permit from EPA, the "disposal of sewage sludge resulting from the operation of a treatment works . . . (including the removal of in-place sewage sludge from one location and its deposit at another location)" if it would "result in any pollutant from such sewage sludge entering the navigable waters[.]" 33 U.S.C. § 1345(a). Congress strengthened Section 405 in 1987 by mandating the development of technical requirements and standards for sewage sludge use and disposal, including land application, and it authorized EPA to implement those standards through the NPDES permit program. *See* 33 U.S.C. § 1345(d). Among other requirements, sewage sludge must be applied to agricultural

lands at a "rate that is equal to or less than the agronomic rate" as specified in an NPDES permit. 40 C.F.R. § 503.14(d).

The inclusion of specific language in Section 405 authorizing EPA to regulate the land disposal of domestic sewage sludge demonstrates that Congress knew how to authorize point source regulation of land application activities. The absence of a comparably clear provision for point source regulation of land application of CAFO manure is noteworthy. "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Salinas v. U.S. R.R. Ret. Bd.*, 592 U.S. 188, 196 (2021) (internal quotation marks and citation omitted). EPA's current interpretation of the agricultural stormwater exclusion fits neatly within Congress's disparate treatment of land application activities.

Because EPA's interpretation of the agricultural stormwater exclusion comports with Congress's intent, EPA's denial of Petitioners' request to reinterpret the agricultural stormwater discharges exclusion was reasonable.

2. EPA's Agricultural Stormwater Exclusion Does Not Allow CAFOs to Evade Regulation.

Petitioners advance three principal arguments in claiming that EPA's interpretation of the agricultural stormwater exclusion allows CAFOs to evade regulation. *First*, Petitioners contend the exclusion cannot survive without a mandate

that all large CAFOs apply for permits, because EPA would not have promulgated a standalone exclusion based on its prior regulatory experience with CAFOs. *See* Pet. Br. 53-55. *Second*, Petitioners argue that the standalone exclusion has become a "permitting loophole." *See id.* at 55-57. *Third*, Petitioners claim EPA's existing regulations are too "minimal" and that it is too difficult to verify compliance. *See id.* at 57-58. None of these has any merit.

Petitioners' first argument rests entirely on speculation that EPA would not have adopted a standalone agricultural stormwater exclusion without the now defunct "duty to apply" requirement in the 2003 Rule. *See* Pet. Br. 54-55. Based on that speculation, Petitioners assert that EPA has arbitrarily refused to revisit the exclusion. *See id.* at 55. But there is no point in speculating about what EPA would have done without universal permit coverage. On remand following *Waterkeeper*, EPA reasonably concluded that the agricultural stormwater exclusion *could* function on its own. Specifically, when EPA promulgated the CAFO Rule, it acknowledged that "the existing regulations could be construed as applying only to Large CAFOs with NPDES permits" and that "a CAFO with no discharges other than precipitation-related discharges from its land application areas would not be considered to 'discharge' if it applies manure, litter, or process wastewater to land under its control in accordance with nutrient management practices that ensure appropriate agricultural utilization of the nutrients[.]" 73 Fed. Reg. at 70,434-35. EPA thus

promulgated "new provisions [to] clarify how the agricultural stormwater exemption applies to Large CAFOs *that do not have an NPDES permit*." *Id*. (emphasis added). Contrary to Petitioners' claims, there is no reason to doubt that EPA would have promulgated the agricultural stormwater exclusion without a requirement that all Large CAFOs must apply for permits. EPA did exactly that in 2008.

Second, Petitioners claim the agricultural stormwater exclusion has become a "permitting loophole" because most CAFOs are exploiting it, but Petitioners distort the facts. *See* Pet. Br. 54-57. For instance, Petitioners claim that appropriate nutrient management practices are not followed for 92% of manured acres. *See id.* at 54 n.11 (citing ER-89); *see also* Br. of Amici Curiae Drs. Keeve Nachman, Silvia Secchi, and Jennifer Jay at 5. But that compares apples to oranges. The 92% estimate appears to come from a USDA report analyzing all cultivated cropland in a particular region, as opposed to CAFO land application areas. *Compare* ER-89 *with* ER-117 (citing USDA, 2012 *Assessment of the Effects of Conservation Practices on Cultivated Cropland in the Upper Mississippi River Basin*).[16] More importantly, USDA was *not* evaluating whether CAFOs were land applying in accordance with the nutrient management requirements applicable to agricultural stormwater under EPA's CAFO

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[16] This report is not cited in Petitioners' 2017 petition nor is it in the administrative record, but it is *available at* https://www.nrcs.usda.gov/publications/ceap-crop-2010-Upper-MRB-full.pdf.

Rule, *see* 40 C.F.R. § 122.42(e); rather, USDA was analyzing what percentage of all farmers (not just CAFOs) land applying either commercial fertilizer or manure were achieving the highest USDA-defined conservation treatment levels for nitrogen and phosphorus. USDA Report at 31-33. Accordingly, USDA's estimate proves nothing about whether CAFO farmers are "exploiting" the agricultural stormwater exclusion as Petitioners claim.

Similarly, Petitioners' claim that even EPA estimates at least 75 percent of CAFOs are improperly discharging misses the mark. *See supra* Part III.B.4. EPA's estimate was not focused on whether CAFOs were improperly invoking the agricultural stormwater exclusion, but instead focused on what percentage of CAFOs met the defunct "propose to discharge" from production areas standard that the Fifth Circuit invalidated as contrary to the CWA. *See* 73 Fed. Reg. at 70,469. And again, EPA arrived at that number after making overly conservative assumptions in the face of record evidence to the contrary. *Compare* Pet. Br. 55 *with supra* Part III.B.4 (refuting reliance on EPA's estimate).

Finally, Petitioners claim that the requirements that CAFOs must satisfy to avail themselves of the agricultural stormwater exclusion are too "problematic to properly implement" and thus, it was arbitrary for EPA to deny their petition and focus on implementation and enforcement. *See* Pet. Br. 57-59 (quoting EPA's characterization of the *pre-2003* regulations). As detailed in EPA's denial,

Petitioners' attempts to paint the current regulations as imposing "minimal requirements" for a CAFO to invoke the agricultural stormwater exclusion ignores just how extensive those requirements are for both permitted and unpermitted CAFOs. *See* ER-226-27 (detailing specified elements in 40 C.F.R. § 122.42(e) for demonstrating land application at appropriate rates). Consequently, Petitioners' suggestion that CAFOs can simply "claim" the agricultural stormwater exclusion by "doing nothing" distorts reality. *See* Pet. Br. 57-58. Failure to comply with the requirements in 40 C.F.R. §§ 122.23(e) and 122.42(e) carries the risk of significant penalties of nearly $67,000 per violation per day. *See* 33 U.S.C. § 1319; *see also* 88 Fed. Reg. at 89,312 (2024 civil monetary penalty inflation adjustment rule).

Petitioners' fundamental criticism appears to be that EPA's regulations give CAFOs too much discretion to determine whether runoff from land application areas meets the requirements for the agricultural stormwater exclusion or whether a permit is needed. But as EPA previously recognized, the owner or operator of *any* point source under the Clean Water Act has discretion "to determine whether or not to apply for a permit in the first instance," *see* 73 Fed. Reg. at 70,425, and if the determination turns out to be incorrect, that owner or operator is subject to enforcement by EPA, state regulators, or citizen plaintiffs. Here, EPA's CAFO regulations impose stringent requirements: generally, zero discharges from the production area, and discharges of nutrients from applied manure or process

wastewater from land application areas are generally subject to permitting *unless* they satisfy the detailed nutrient management requirements for the agricultural stormwater discharge exclusion to apply. 40 C.F.R. § 122.23(e). Any CAFO would be foolish to baselessly invoke the agricultural stormwater discharge exclusion given the substantial penalties in play.

3. Petitioners Have Not Demonstrated Any Radical Change in Facts Underpinning EPA's Agricultural Stormwater Exclusion.

As EPA correctly explains, Petitioners' claim that EPA's current interpretation of the agricultural stormwater exclusion rests on incorrect facts lacks merit. *See* EPA Br. 57-59. Intervenors write separately to emphasize that EPA's interpretation of the agricultural stormwater exclusion does not depend on improvements in water quality or minimizing pollution and that Petitioners' record citations do not illustrate any radical change in the factual findings that EPA made in promulgating the current agricultural stormwater exclusion in 2003.

Petitioners claim that EPA's petition denial runs contrary to record evidence demonstrating nutrient management plans are designed to "maximize crop growth rather than protect water quality[.]" *See* Pet. Br. 59 (citing ER-89, ER-115). But the applicability of the agricultural stormwater exclusion has never hinged on whether manure application rates are "water quality-based." ER-115. Rather, the exclusion depends on whether manure 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[.]" 40 C.F.R. § 122.23(e)(1). In both the rule and its petition denial, EPA fully "recognize[d] that even when the manure, litter, or process wastewater is land applied in accordance with practices designed to ensure appropriate agricultural utilization of nutrients, *some runoff of nutrients may occur during rainfall events*[.]" 68 Fed. Reg. at 7197-98 (emphasis added); *accord* ER-225. EPA nevertheless decided the exclusion should apply.

Petitioners further claim that the record is "replete with evidence undermining EPA's assumption regarding the efficacy of NMPs," Pet. Br. 60, but Petitioners' record citations do not undermine EPA's current interpretation of the agricultural stormwater exclusion. Petitioners first quote from a study that posits that "just having a NMP does not reduce excess nutrient application, nor does it guarantee improvements in water quality." *Id.* (quoting ER-277). Regarding the first finding, the author of that study was making the unremarkable point that farmers must actually *implement* their nutrient management plans, rather than merely having such plans. ER-277. That finding is fully consistent with the factual premises underpinning EPA's current interpretation: under existing regulations, any CAFO that fails to follow site-specific nutrient management practices to ensure appropriate agricultural utilization of nutrients in land applied manure would *not* qualify for the agricultural stormwater exclusion. *See* 40 C.F.R. § 122.23(e). Nor does that author's

second finding demonstrate any fundamental change in EPA's factual assumptions. As noted above, the applicability of the agricultural stormwater exclusion has never depended on improving water quality.

Petitioners also claim that a passage from a different rulemaking petition provides numerous examples of studies showing that, "even at recommended rates, land application leads to the addition of more nutrients than plants can take up and soil can retain[.]" Pet. Br. 60-61 (quoting ER-184). But again, nothing in that passage—or the studies cited therein—undermines the factual foundation for EPA's current interpretation of the agricultural stormwater exclusion. EPA has always recognized that *some* runoff of nutrients could occur following rain events even where nutrients are applied in compliance with 40 C.F.R. § 122.23(e); such runoff would still qualify as agricultural stormwater discharges. *See* 68 Fed. Reg. at 7197-98. Furthermore, to the extent that passage relies on studies that long pre-date EPA's 2003 Rule, those studies shed no light on whether land application in accordance with the current requirements for invoking the agricultural stormwater exclusion minimizes runoff.

Additionally, Petitioners state (Pet. Br. 61) that EPA's own studies have undercut factual assumptions underpinning the agricultural stormwater exclusion, but the only study that Petitioners cite to (at ER-282-87) "has not been subjected to Agency review and therefore does not necessarily reflect the views of the Agency,

and no official endorsement should be inferred." SER-7 (emphasis added). Moreover, the goal of that study was to test a premise that the author mistakenly attributed to EPA's regulations. Contrary to that author's view, the agricultural stormwater exclusion does not rely on a "tacit assumption" that all nutrients are retained or taken up in the root zone. ER-282. Again, in promulgating the exclusion, EPA was fully aware that even when manure is land applied pursuant to practices designed to ensure appropriate agricultural utilization of nutrients, some runoff of nutrients derived from the manure following rain events would still occur. *See* 68 Fed. Reg. at 7197-98.

Finally, Petitioners' reliance on cases concerning an agency's refusal to update its regulations despite fundamental changes in factual premises previously considered by the agency is misplaced. As explained above (Part II), EPA's thorough and well-reasoned petition denial here is readily distinguishable from the "two conclusory sentences" that lacked any "articulation of the factual and policy bases for the decision" that the D.C. Circuit found lacking in *American Horse*. 812 F.2d at 6 (internal quotation marks and citation omitted). *Environmental Health Trust v. FCC* is distinguishable on the same grounds, as the D.C. Circuit found the agency's explanation there "practically identical" to that in *American Horse*. 9 F.4th 893, 905 (D.C. Cir. 2021). Nor does *Flyers Rights Education Fund, Inc. v. FAA* help Petitioners here. *See* 864 F.3d 738 (D.C. Cir. 2017). In that case, the D.C. Circuit

explained that an agency's resort to "off-point studies and undisclosed tests using unknown parameters" failed to justify its decision. *Id.* at 741. Whatever the merits of the D.C. Circuit's exhortation about "[a]gency reasoning … adapt[ing] as the critical facts change," *id.* at 745, an agency may only adapt so far as the law allows. And here, EPA well explained why Petitioners' requests fall outside those bounds. In sum, these out-of-circuit cases do not undermine EPA's decision here.

For these reasons, Petitioners have not shown that EPA's current interpretation of the agricultural stormwater exclusion relies on incorrect facts or that EPA's petition denial is arbitrary and capricious.

CONCLUSION

The Court should deny the Petition for Review.

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Respectfully submitted,

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FOR THE NINTH CIRCUIT

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

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