

No. 23-2146

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

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY,

Respondent,

and

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

Intervenor-Respondents.

**MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE
ENVIRONMENTAL JUSTICE PROPONENTS IN SUPPORT OF
PETITIONERS FOOD & WATER WATCH, ET AL.**

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Pursuant to Federal Rules of Appellate Procedure 27 and 29, Environmental Justice Community Action Network; Rural Empowerment Association for Community Help; the North Carolina, Georgia, Alabama, California-Hawaii, and Alaska-Oregon-Washington Area State Conferences of the National Association for the Advancement of Colored People; the National Association for the Advancement of Colored People; North Carolina Poor People’s Campaign; Southern Coalition for Social Justice; La Asociación de Gente Unida por el Agua (AGUA Coalition); Socially Responsible Agriculture Project; Leadership Counsel for Justice and Accountability; Clean Water Action; CleanAIRE NC; Black Warrior Riverkeeper; Alabama Rivers Alliance; Cape Fear River Watch; Winyah Rivers Alliance; Sound Rivers; Waterkeepers Carolina; Coastal Carolina Riverwatch; and the Board of Lucas County Commissioners, Lucas County, Ohio hereby move for leave to file a brief as Amici Curiae in support of Petitioners’ request that the Court vacate and remand Respondent’s denial of Petitioners’ Petition to Revise the Clean Water Act Regulations for Concentrated Animal Feeding Operations (“Petition”).

Petitioners and Respondent have consented to the filing of this Brief. Intervenor-Respondent reserves their position pending review of the motion. A copy of the Proposed Brief is attached to this motion.

MOVANTS’ INTERESTS

The movants include non-profit, public interest organizations dedicated to,

among other goals, pursuing clean water and a healthy environment for all members of their communities. In addition, the movants include the Board of Commissioners of Lucas County, which is the governing body of a county in northwestern Ohio on the banks of Lake Erie, which works to protect water quality for all its residents. The Board of Commissioners of Lucas County and the organizations listed above are collectively referred to as *amici*.

Amici have members who live, work, fish, and recreate near concentrated animal feeding operations (“CAFOs”) and are harmed by the U.S. Environmental Protection Agency (“EPA”)’s failure to adequately regulate CAFOs to prevent water pollution. *Amici* use legal actions, citizen science, grassroots campaigns, and legislative and regulatory advocacy to pursue their environmental justice and environmental protection goals. Several *amici* have submitted complaints to EPA under Title VI of the Civil Rights Act of 1964, been involved in state litigation to advance environmental justice, and submitted comments or otherwise petitioned EPA to update its regulations for CAFOs. Because *amici* have members who live, work, fish, and recreate near CAFOs and advocate for environmental protections that preserve water quality, protect human health, and mitigate environmental injustice in their communities, *amici* have an interest in seeing that federal agencies adhere to federal laws and administrative directives that further those goals.

Consequently, *amici* are well qualified and can draw upon their members’

and residents' experiences living in communities with CAFOs and their expertise in water quality and civil rights laws to inform the Court about the public health and environmental justice implications of this case.

REASONS WHY AN AMICUS BRIEF WILL ASSIST THE COURT

An amicus brief is proper when an entity that is not a party to the case “has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” *E.g., Cmty. Ass’n for Restoration of the Env’t (CARE) v. DeRuyter Bros. Dairy*, 54 F. Supp. 2d 974, 975 (E.D. Wash. 1999) (citing *Miller-Wohl Co., Inc. v. Comm’r of Labor and Indus.*, 694 F.2d 203, 204 (9th Cir. 1982)). In this case, *amici* will fulfill the “classic role of amicus curiae by assisting in a case of general public interest, . . . supplementing the efforts of counsel, and drawing the court’s attention to law that might otherwise escape consideration,” *Funbus Sys., Inc. v. State of Cal. Pub. Utils. Comm’n*, 801 F.2d 1120, 1125 (9th Cir. 1986) (citing *Miller-Wohl Co., Inc.*, 694 F.2d at 204), and by “presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties’ briefs,” *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003) (Posner, J., chambers opinion).

Amici respectfully suggest that the attached Brief may assist the Court in rendering a decision on the issues in this matter. *Amici* file this brief to illustrate how EPA’s failure to adequately regulate CAFOs and its denial of Petitioners’

Petition disproportionately affects Black, Latino, and Indigenous; low-wealth; and rural communities across the country. The Brief does this by providing first-hand accounts of residents living in close proximity to CAFOs and highlighting decades of public health and environmental research that substantiate these experiences and underscore how underregulated CAFOs disproportionately harm already overburdened communities. In addition, the attached Brief supplements the efforts of Petitioners' counsel by highlighting how EPA's actions run afoul of the many executive and administrative directives requiring the agency to address environmental injustice in its programs.

In light of the above information, *amici* respectfully request that this Court grant leave to file a brief as *Amici Curiae* in this matter.

DATED: March 4, 2024

Respectfully submitted,

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COMMUNITY IMPROVEMENT, KEWAUNEE CARES, LAND
STEWARDSHIP PROJECT, MIDWEST ENVIRONMENTAL
ADVOCATES, and NORTH CAROLINA ENVIRONMENTAL
JUSTICE NETWORK,
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NATIONAL PORK PRODUCERS COUNCIL, AMERICAN FARM
BUREAU FEDERATION, U.S. POULTRY & EGG ASSOCIATION,
and UNITED EGG PRODUCERS,
Intervenor-Respondents.

**PROPOSED AMICUS BRIEF OF ENVIRONMENTAL JUSTICE
PROponents IN SUPPORT OF PETITIONERS FOOD & WATER
WATCH, ET AL.**

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DISCLOSURE STATEMENT

Environmental Justice Community Action Network (EJCAN) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in EJCAN.

Rural Empowerment Association for Community Help (REACH) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in REACH.

The North Carolina State Conference of the National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

The Alabama State Conference of the National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

The Georgia State Conference of the National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

The California-Hawaii State Conference of the National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

The Alaska-Oregon-Washington Area State Conference of the National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

The National Association for the Advancement of Colored People is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the organization.

North Carolina Poor People's Campaign (NCPPC) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in NCPPC.

Southern Coalition for Social Justice (SCSJ) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in SCSJ.

La Asociación de Gente Unida por el Agua (AGUA Coalition) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in the coalition.

Socially Responsible Agriculture Project (SRAP) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in SRAP.

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Waterkeepers Carolina is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in Waterkeepers Carolina.

Coastal Carolina River Watch (CCRW) is a non-profit organization with no parent corporation. No publicly held corporation holds a 10% or greater ownership interest in CCRW.

DATED: March 4, 2024

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IDENTITY AND INTERESTS OF *AMICI*¹

Environmental Justice Community Action Network; Rural Empowerment Association for Community Help; the North Carolina, Georgia, Alabama, California-Hawaii, and Alaska-Oregon-Washington Area State Conferences of the National Association for the Advancement of Colored People; the National Association for the Advancement of Colored People; North Carolina Poor People's Campaign; Southern Coalition for Social Justice; La Asociación de Gente Unida por el Agua (AGUA Coalition); Socially Responsible Agriculture Project; Leadership Counsel for Justice and Accountability; Clean Water Action; CleanAIRE NC; Black Warrior Riverkeeper; Alabama Rivers Alliance; Cape Fear River Watch; Winyah Rivers Alliance; Sound Rivers; Waterkeepers Carolina; and Coastal Carolina Riverwatch are non-profit organizations that advocate for environmental protections to ensure clean water for all in their communities.

The Board of Commissioners of Lucas County is the governing body of a county in northwestern Ohio on the banks of Lake Erie, which works to protect water quality for all its residents. Lucas County and the environmental organizations listed above are collectively referred to as *amici*.

¹ No party or its counsel, or any other person, other than *amici* and their counsel, authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

Amici have members who live near concentrated animal feeding operations (CAFOs) and are harmed by the U.S. Environmental Protection Agency's ("EPA") failure to adequately regulate CAFOs to prevent water pollution. Because *amici* advocate for environmental protections that preserve water quality and prevent environmental injustice in their communities, *amici* have an interest in seeing that federal agencies adhere to federal laws that further those goals.

Amici submit this brief to highlight the environmental justice ramifications of EPA's denial of Petitioners' Petition to Revise the Clean Water Act Regulations for Concentrated Animal Feeding Operations ("Petition") and consequent failure to adequately regulate CAFOs. Inadequate regulation of CAFOs harms water quality nationwide and disproportionately affects rural, low-wealth communities, and communities of color that are already overburdened by pollution. EPA's denial of the Petition harms *amici*'s interests by permitting pollution in their respective watersheds and perpetuating environmental injustices.

Respondent and Petitioners have consented to the filing of this brief. Intervenor-Respondent reserves their position pending review of the motion. *Amici* support Petitioners' request that the Court vacate and remand EPA's denial of the Petition.

INTRODUCTION AND BACKGROUND

For decades, EPA has known that the primitive waste management systems used by CAFOs—and endorsed by current EPA regulations—degrade waterways, contaminate groundwater, poison the air, and destroy quality of life for nearby families, a disproportionate share of whom are Black, Latino, Indigenous, and/or low-wealth. Despite this knowledge, EPA has failed to adequately regulate CAFOs as a significant source of water pollution.

Each year, we learn more about the devastating impacts CAFOs have on their neighbors. In the last five years alone, researchers have linked CAFOs to bacterial spikes in drinking water wells during warm weather²; increased rates of gastrointestinal illness³; significantly increased illness and all-cause mortality⁴; and thousands of premature deaths annually due to particulate pollution driven by ammonia emissions.⁵

² Jacob Hochard et al., *Air Temperature Spikes Increase Bacteria Presence in Drinking Water Wells Downstream of Hog Lagoons*, 876 *Sci. Total Env't* 161426 (2023), <https://perma.cc/7H82-GAJP>.

³ Arbor J. L. Quist et al., *Exposure to Industrial Hog Operations and Gastrointestinal Illness in North Carolina, USA*, 830 *Sci. of the Total Env't* 154823 (2022).

⁴ Julia Kravchenko et al., *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations*, 79(5) *N.C. Med. J.* 278 (Sept. 1, 2018), <https://perma.cc/PN4N-FNXP>.

⁵ Nina G. G. Domingo et al., *Air Quality Related Health Damages of Food*, 118 *PNAS* 1 (2021), <https://perma.cc/23J9-UHKS> (finding that, of 17,900 deaths

Faced with this evidence and yet another opportunity to address the problem, EPA failed to take meaningful action, at the cost of America’s most overburdened communities. “It is well-established—almost to the point of judicial notice—that environmental harms are visited disproportionately upon the dispossessed,” in particular “minority populations and poor communities.” *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 982 (4th Cir. 2020) (Wilkinson, J., concurring). CAFO pollution is no exception.

The Clean Water Act mandates that EPA manage CAFO pollution and provides a powerful set of tools that enables it to do so. EPA is likewise empowered by Executive Orders and agency directives to remedy CAFOs’ disproportionate impact on already overburdened communities. EPA has long recognized that more effective regulations could ameliorate many of the environmental and health harms caused by CAFOs, but has continued to rely on weak, ineffectual rules that fall far short of its mandate to control water pollution and address environmental injustices.

EPA’s denial of the Petition was arbitrary and capricious. The Court should vacate EPA’s decision and remand to the agency for further consideration.

annually resulting from United States agriculture, ammonia emissions primarily from livestock waste and fertilizer application were responsible for 12,400 deaths).

ARGUMENT

I. CAFOs Disproportionately Harm Already Overburdened Communities.

A. CAFOs Produce Massive Quantities of Waste.

Over the last seventy years, livestock and poultry operations have grown in size but shrunk in number and have become increasingly concentrated in just a few regions. These operations produce tremendous amounts of manure and other waste. For example, North Carolina's chickens create about 2.5 billion pounds of manure annually—more waste than that produced by 75% of the state's human population (7.5 million).⁶ The state's hog operations, concentrated in southeastern North Carolina, produce an estimated 10 billion gallons of waste each year,⁷ which would fill approximately 15,000 Olympic-size swimming pools.⁸ The extreme density of CAFOs in a region or watershed can lead to production of significantly more

⁶ Adam Wagner, *Chickens Produce Billions of Pounds of Waste in NC. No One Tracks Where It Goes*, News & Observer (last updated Dec. 8, 2023), <https://perma.cc/GA2L-RALS>; see also Gavin Off, *With Little Oversight, NC Poultry Farms Raise 1 Billion Birds a Year. Who Pays the Cost?*, News & Observer (last updated Dec. 8, 2023), <https://perma.cc/63FJ-HP77>.

⁷ Soren Rundquist & Don Carr, *Under the Radar: New Data Reveals N.C. Regulators Ignored Decade-Long Explosion of Poultry CAFOs* 3, Env't Working Grp. (2019), <https://perma.cc/97MC-KNAV>.

⁸ *Id.* at 5.

waste than can be beneficially utilized as fertilizer⁹ and ultimately pollutes the nation's groundwater and surface waterways.

CAFOs poorly manage this waste. Many hog and dairy operations employ what the industry calls the “lagoon and sprayfield system”: Feces and urine from thousands of animals collect on the floors of confinement barns and is flushed into open-air, football-field sized and often unlined cesspits—called lagoons—for storage. Biological processes turn the lagoons bright pink and emit gases that create noxious odors and contribute to climate change. Nutrient-, bacteria-, and heavy metal-laden solid waste forms a thick layer of sludge at the bottom of the lagoon. To keep the lagoons from overflowing, the liquified manure is sprayed across nearby fields using high-pressure sprayers. Still, lagoons often flood, spill, and seep into nearby surface waters and groundwater.¹⁰

Dry litter poultry operations confine thousands of birds in barns lined with sawdust or other bedding, which combines with excrement, feathers, and other waste. This mixture is often stored in large outdoor piles, where it can be transported into nearby waters by rain or wind and emit ammonia.

⁹ EPA, *Literature Review of Contaminants in Livestock and Poultry Manure and Implications for Water Quality* at v (2013), <https://perma.cc/VE72-7FDU> (hereinafter “Contaminants Literature Review”).

¹⁰ See JoAnn Burkholder et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115 *Env't Health Persps.* 308 (2007), <https://perma.cc/YR6G-NZ8L> (documenting the pathways that CAFO pollution reaches waterways).

B. CAFOs Harm Human Health, Community Cohesion, and Rural Economies.

As EPA has long recognized, CAFOs pollute the nation's waterways and groundwater. *See, e.g.*, National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines and Standards for Concentrated Animal Feeding Operations, 66 Fed. Reg. 2960, 2962 (Jan. 12, 2001). This occurs through many different avenues: runoff, spills, erosion, seepage from lagoons and sprayfields, atmospheric deposition of ammonia, and via groundwater.¹¹ Contact with CAFO-contaminated water can make people extremely sick.

Proximity to CAFOs is highly correlated with various adverse health outcomes. Those living closer to hog CAFOs have higher rates of mortality from

¹¹ *See* 66 Fed. Reg. at 2962 (discussing contamination through spills, erosion, runoff, and via ground water); Brandon Lewis et al., *Modeling and Analysis of Air Pollution and Environmental Justice: The Case for North Carolina's Hog Concentrated Animal Feeding Operations*, 131(8) *Env't Health Persps.* 87018, 87018-1 (2023), <https://perma.cc/QM2K-BS5G> (discussing lagoon spills, runoff, and atmospheric dispersion of ammonia from CAFOs); *see also* Katherine L. Martin et al., *Terra Incognita: The Unknown Risks to Environmental Quality Posed by the Spatial Distribution and Abundance of Concentrated Animal Feeding Operations*, 642 *Sci. of the Total Env't* 887 (2018) (finding that, in North Carolina, more than half of CAFOs are in flood-prone Coastal Plain and 19% are located within 100 meters of nearest stream).

all causes, as well as heightened rates of infant mortality and more hospital admissions for low-weight infants.¹²

Living near underregulated CAFOs is also deeply disruptive to quality of life. One Iowa resident put it succinctly: “I feel like my neighbors and I are being run over, and the agencies that are supposed to protect our health and our resources are not doing anything to stop it.”¹³ Scientific research and firsthand accounts bear this out.

1. Poisoned drinking water

CAFOs pollute groundwater and endanger people who rely on drinking water wells by exposing them to pollutants in animal waste. Waterborne pathogens present in CAFO waste—for instance, *E. coli*, *Giardia*, norovirus, *Listeria*, and *Salmonella*¹⁴—can cause acute gastrointestinal illness, which can be fatal for those in vulnerable groups, like children, the elderly, and others with weakened immune systems.¹⁵ A recent study conducted in Kewaunee County, Wisconsin, linked

¹² Kravchenko, *supra* note 4, at 284; *see also* Virginia T. Guidry et al., *Connecting Environmental Justice and Community Health*, 79(5) N.C. Med. J. 324 (2018), <https://perma.cc/FX96-SVQJ>.

¹³ Earthjustice et al., *Petition to Adopt a Rebuttable Presumption that Large CAFOs Using Wet Manure Management Systems Actually Discharge Pollutants Under the CWA*, Exhibit 8 ¶ 14 (Oct. 2022), ER-139 (hereinafter “Earthjustice Petition”).

¹⁴ Contaminants Literature Review, *supra* note 9, at 18–19.

¹⁵ 66 Fed. Reg. at 2983.

contamination of drinking water wells by pathogens from dairy CAFOs to 230 cases of gastrointestinal illness annually.¹⁶

CAFO waste can also contaminate waterways and groundwater with nitrates,¹⁷ and drinking water with high nitrate levels is particularly dangerous for pregnant people and infants. When used for mixing infant formula, water with high nitrate levels is associated with blue-baby syndrome—a potentially fatal condition affecting red blood cells¹⁸—in infants under six months of age.¹⁹ Low blood oxygen due to nitrate poisoning has also been linked to birth defects, miscarriages, and general poor health.²⁰ Nitrates in drinking water have also been linked to increased incidence of certain cancers.²¹

¹⁶ Tucker Burch, *Quantitative Microbial Risk Assessment for Contaminated Private Wells in the Fractured Dolomite Aquifer of Kewaunee County, Wisconsin*, 129(6) *Env't Health Persps.* 067003-1 (2021), <https://perma.cc/5XSR-EMF5>.

¹⁷ Michael Mallin, *Industrial Swine and Poultry Pollution Causes Chronic Nutrient and Fecal Microbial Stream Pollution*, 226 *Water, Air, & Soil Pollution* 407 (2015), <https://perma.cc/K994-ZE67>; Stephen L. Harden, *Surface-Water Quality in Agricultural Watersheds of the North Carolina Coastal Plain Associated with Concentrated Animal Feeding Operations*, U.S. Geol. Survey (2015), <https://perma.cc/EK3L-4BQZ>.

¹⁸ Lynda Knobloch, *Blue Babies and Nitrate-Contaminated Well Water*, 108 *Env't Health Persps.* 675 (2000), <https://perma.cc/S4UV-MY8J>.

¹⁹ Burkholder, *supra* note 10, at 310.

²⁰ 66 Fed. Reg. at 2983.

²¹ Alexis Temkin et al., *Exposure-based assessment and economic valuation of adverse birth outcomes and cancer risk due to nitrate in United States drinking water*, 176 *Env't Research* 1 (2019), <https://perma.cc/C7PH-KFFL>.

CAFOs are located in predominantly rural communities that rely heavily on private wells for drinking water. In North Carolina, for example, almost half of all hog CAFOs are located in areas where more than 85% of households rely on private wells; these areas also have larger Black, Latino, and Indigenous populations.²² Indeed, a community's racial composition is the strongest determinant of its access to clean water in the state.²³ This pattern reoccurs across the country—for example, 90% of households in the majority-Latino San Joaquin Valley of California rely on private drinking water wells.²⁴ Forty percent of private drinking water wells in the San Joaquin Valley's Tulare County exceeded federal drinking water standards for nitrates,²⁵ likely due in part to numerous dairy operations.²⁶

²² See Steve Wing, *Environmental Injustice in North Carolina's Hog Industry*, 108 *Env't Health Persps.* 225, 228 (2000), <https://perma.cc/AK6K-Y6AD>.

²³ Antonia Sohns, *Differential Exposure to Drinking Water Contaminants in North Carolina: Evidence From Structural Topic Modeling and Water Quality Data*, 336 *J. Env't Mgmt.* 117600 at 2 (2023), <https://perma.cc/PJL7-PYW8>.

²⁴ Carolina Balazs et al., *Social Disparities in Nitrate-Contaminated Drinking Water in California's San Joaquin Valley*, 119 *Env't Health Persps.* 1272–78 (Sept. 2011), <https://perma.cc/9S53-K4T2>; Water Found., *Groundwater Management and Safe Drinking Water in the San Joaquin Valley: Analysis of Critically Over-drafted Basins' Groundwater Sustainability Plans* 5 (June 2020), <https://perma.cc/4Z5X-YUUL>.

²⁵ Cal. State Water Res. Control Bd., *Groundwater Ambient Monitoring and Assessment: Domestic Well Project Groundwater Quality Data Report TULARE County Focus Area 19* (July 2016), <https://perma.cc/82HR-VLHW>.

²⁶ Aaron Smith, *Where are California's Dairy Cows?*, U.C. Davis Dep't of Ag. and Res. Economics (2024) (noting that 90% of California's dairy cows are in the San

Unsurprisingly, many who live near CAFOs worry about their drinking water. For Mt. Zion African Methodist Episcopal Zion Church in Sampson County, North Carolina, the second highest hog-producing county in the country, these concerns were realized when CAFO pollution caused dangerously high nitrate levels in the church's well water:

After receiving the last notice [of high nitrate levels in groundwater] . . . I learned that high nitrate levels in drinking water was an issue commonly caused by animal waste I did not have to look far for the culprit; our church is located next to a hog farm. Church members have seen the field adjacent to our church being sprayed with hog waste. . . . [T]o fix our shallow well, our small church was forced to spend \$3,834.85 and dig 225 feet for a new well. Our only fault was being too close to a hog farm.²⁷

Another Sampson County resident who lives roughly a half-mile from a hog CAFO shares similar concerns about her drinking water:

I also worry about what the hog waste does to the water near my home. I'm worried about my well water. . . . I drink my tap water

Joaquin Valley on farms with more than 500 head, with Tulare County housing roughly a third of those animals), <https://perma.cc/N4AA-Q65C>.

²⁷ Jimmy Melvin, *Minister: Hog Operations Have Harmed Sampson-Duplin Church, but NC Legislators Have Turned Deaf Ear*, Fayetteville Observer (June 25, 2021), <https://perma.cc/38B6-JJN5>.

when I'm at home. If my water was contaminated by the pollution from the farm, I would have to find a way to do something else for our water.²⁸

Residents of the predominantly Black community of Cedar Grove, Tennessee—where the number of industrial poultry operations has recently increased—are also concerned about their drinking water. One resident asks, “What’s going to happen to my grandchildren drinking our well water?”²⁹ Another resident is concerned about the proximity of the poultry operations to the city’s drinking water supply: “I am concerned that chicken litter spread over our landscapes will run into our streams, rivers and lakes and pollute our water supply.”³⁰ Despite the serious risk that CAFOs pose to communities that rely on groundwater, current EPA regulations allow these poultry facilities to operate largely unregulated.

²⁸ Pet’rs. Br. in Supp. Mot. Par. S. J., Ex. 33, Aff. of Evangeline Williams ¶ 6, *Env’t Justice Comm. Action Network v. N.C. Dep’t of Env’t Quality*, No. 21 EHR 02068, 02069, 02070, 02071 (consolidated) (N.C. Admin. Ct. July 27, 2021), <https://perma.cc/FZU3-GCYM>.

²⁹ Anita Wadhvani, *In West Tennessee, Black Farmers Take On Tyson Foods*, Ky. Lantern (Dec. 27, 2022), <https://perma.cc/57Y9-KYQR>.

³⁰ Exhibit 25, Decl. of Thomas Gorden ¶ 18, *Concerned Citizens of W. Tenn. v. U.S. Dep’t of Ag.*, No. 1:22-cv-01274, 2024 WL 313647 (W.D. Tenn. Apr. 6, 2023), ECF No. 57-29.

2. Contaminated fish

Consuming fish caught in water contaminated by animal waste can also make people sick, including with acute gastrointestinal illness.³¹ Many communities of color, rural communities, and Indigenous people rely on subsistence fishing at higher rates than the general population.³² In 2002, the National Environmental Justice Advisory Council recommended that EPA adopt rules governing CAFOs to better protect communities who “depend on healthy aquatic ecosystems and the fish, aquatic plants, and wildlife that these ecosystems support.”³³ EPA has failed to do so, with consequences across the country.

One lifelong resident of Duplin County, North Carolina—a rural area with a substantial Black and low-income population—has at least thirty CAFOs within three miles of his home.³⁴ Living near CAFOs has changed his life:

I have not been fishing near my home in over a decade. I stopped fishing after I began to catch fish with open sores. I believe these

³¹ See EPA, *Consumable Fish and Shellfish*, <https://perma.cc/KK78-ZJCC> (last visited Feb. 28, 2024).

³² Nat’l Env’t Justice Advisory Council, *Fish Consumption and Environmental Justice* 2–10, EPA (2002), <https://perma.cc/PA66-ABA9> (hereinafter “Fish Consumption Report”); see also Off. of Env’t Pol’y & Compliance, *Environmental Justice and Subsistence: A Virtual Exhibit*, U.S. Dep’t of Interior (last visited Feb. 21, 2024), <https://storymaps.arcgis.com/stories/5f5e8702b70844e18a840551efdfc468>.

³³ Fish Consumption Report, *supra* note 32, at 2; see also *id.* at 154.

³⁴ Earthjustice Petition, *supra* note 13, Exhibit 11 ¶ 4.

sores are caused by bacteria and other pollution from CAFOs, and I do not think that fish with open sores are safe to eat. . . . Duplin County is a rural community; hunting and fishing are a way of life, and most people do not have extra income to spare. By forcing people to buy fish at the store, instead of fishing in the creeks and streams near their homes, CAFOs are harming our recreational interests and our economic interests, too.³⁵

The pollution from poultry CAFOs is also deeply disruptive for members of the Lumbee Tribe in Robeson County, North Carolina. As Dr. Ryan Emanuel, an environmental scientist and member of the Lumbee Tribe, describes: the Lumbee people “respect and honor the [Lumbee] river, and they spend time in and around its waters for work, recreation, and worship. In doing so, the people and the river have each infused the other with identity to the extent that both share the same name.”³⁶ Increasing pollution from CAFOs has led to “the loss of traditional agricultural and subsistence practices . . . and Lumbees’ ability to interact with [the] river and wetlands.”³⁷

³⁵ *Id.* ¶ 10.

³⁶ Ryan Emanuel, *Water in the Lumbee World: A River and Its People in a Time of Change*, 24 *Env’t Hist.* 29 (2019), <https://perma.cc/6ZMX-PLE6>.

³⁷ *Id.* at 43.

3. *Unsafe recreation*

People who live near CAFOs also express well-founded concerns about recreating in polluted waters. Contact with CAFO waste-contaminated water during swimming, boating, or other recreational activities can cause serious illness, including skin, eye, and ear infections.³⁸

For another Sampson County resident, CAFO pollution has changed his relationship with the waterbodies he once loved:

I remember getting off the school bus, getting the okay from mom, making a beeline for the river with my brother, and jumping in. . . .

Now I don't run to the water after a rain. I know there are higher levels of fecal matter after it rains because of the runoff from farms. It certainly makes you think twice about going in the water.³⁹

4. *Dirty air and disrupted ways of life*

CAFOs pollute the air. Living near hog CAFOs is associated with airborne exposure to ammonia, hydrogen sulfide, and other contaminants, which causes noxious odors and has been linked to respiratory and cardiovascular problems and

³⁸ Burkholder, *supra* note 10, at 310.

³⁹ Pet'rs. Br. in Supp. Mot. Par. S. J., Ex. 34, Aff. of Lee Little ¶¶ 5, 11, *Env't Justice Comm. Action Network v. N.C. Dep't of Env't Quality*, No. 21 EHR 02068, 02069, 02070, 02071 (consolidated) (N.C. Admin. Ct. July 27, 2021), <https://perma.cc/2MYR-5Q4G>.

premature mortality.⁴⁰ Ammonia emissions can also exacerbate water pollution: airborne ammonia deposits on land and water within a 60-mile radius of the source, adding yet more pollution to waterways and groundwater.⁴¹

Air pollution and odors from CAFOs have fundamentally altered everyday life: many residents of Duplin County, North Carolina, have “given up some of the most cherished aspects of rural life, like gardening, drying clothes on a line, hosting cookouts, and spending time outdoors.”⁴²

Given the toll that CAFO pollution exacts on physical health, it is no surprise that living near a CAFO is also associated with negative mental health outcomes.⁴³

5. *Economic distress*

Finally, CAFOs hurt local economies, disproportionately harming the rural, low-wealth communities of color where CAFOs are often sited.⁴⁴ CAFOs shift the

⁴⁰See Wing, *supra* note 22, at 225, 231; Occupational Safety & Health Admin., *Hydrogen Sulfide*, U.S. Dep’t of Labor, <https://perma.cc/PT7M-8WNG> (last visited Feb. 15, 2024); Agency for Toxic Substances & Disease Registry, *Ammonia – Public Health Statement*, <https://perma.cc/KD6K-36GM> (last visited Feb. 15, 2024); Lewis, *supra* note 11, at 087018-1 to 2.

⁴¹ Memorandum from Michael Mallin, Univ. of N.C. Wilmington, to N.C. Div. of Water Res. & N.C. Env’t Mgmt. Comm’n, *Comment on the Proposed Reclassification of the Lower Cape Fear River and Estuary to Class Sc-Swamp (Sw) Classification* at a-106 (Feb. 9, 2015), <https://perma.cc/JUL7-PL3Q>.

⁴² Earthjustice Petition, *supra* note 13, Exhibit 11 ¶ 14.

⁴³ Kelley J. Donham et al., *Community Health and Socioeconomic Issues Surrounding Concentrated Animal Feeding Operations*, 115 *Env’t Health Persps.* 318 (2007), <https://perma.cc/H9SN-QGAT>.

costs of operation to their neighbors, who are forced to endure the consequences of pollution⁴⁵; in turn, the taxable value of nearby properties is diminished.⁴⁶ Indeed, a study from Iowa showed decreases in property value as high as 40% for properties near CAFOs.⁴⁷ These decreases in property value then lead to lower property taxes—and consequently, lower property tax revenue for the region.⁴⁸

People living near CAFOs deal with these economic realities every day. One west Tennessee resident in a predominantly Black community with many poultry CAFOs explained: “The industrial chicken facilities are playing a large part in my work as a real estate agent. Few people are interested in buying land near large-scale poultry operations, and those operations are driving property value down.”⁴⁹ Another resident said that the intense odors, loud sounds of industrial fans, and incessant truck traffic

⁴⁴ See Wing, *supra* note 22, at 225.

⁴⁵ Doug Gurian-Sherman, *CAFOs Uncovered: The Untold Costs of Confined Animal Feeding Operations* 41, Union of Concerned Scientists (Apr. 2008), <https://perma.cc/7HHA-PU2D>.

⁴⁶ See, e.g., William Weida, *The Evidence for Property Devaluation Due to Proximity to CAFOs* 5 (Jan. 21, 2002), <https://perma.cc/6W2U-8LC6> (summarizing studies quantifying reductions in property value for homeowners living near CAFOs).

⁴⁷ *Id.* (citing Dooho Park et al., *Rural Communities and Animal Feeding Operations*, Colo. State Univ. Dep’t of Agric. & Res. Econ. (1988)).

⁴⁸ *Id.* at 6.

⁴⁹ Exhibit 20, Decl. of Brenda Scott ¶ 23, *Concerned Citizens of W. Tenn. v. U.S. Dep’t of Ag.*, No. 1:22-cv-01274, 2024 WL 313647 (W. D. Tenn. Apr. 6, 2023), ECF No. 57-24.

“ruined our previously quiet rural community and severely harmed our property values.”⁵⁰

Local governments and taxpayers are also saddled with the cost of cleaning up CAFO pollution: the City of Toledo, Ohio, had to spend \$400 million of taxpayer money to upgrade its water utilities after 400,000 customers lost access to clean water due to a likely CAFO pollution-induced toxic algal bloom in Lake Erie.⁵¹

C. CAFOs Disproportionately Harm Communities of Color, Low-Wealth Communities, and Other Overburdened Groups.

Across the country, CAFO pollution disproportionately affects Black, Latino, and Indigenous communities, communities with limited English proficiency, and low-wealth communities—communities already overburdened by pollution.

1. *Discriminatory siting*

CAFOs are disproportionately sited in already overburdened communities. For example, in North Carolina, the average majority-Black rural neighborhood is

⁵⁰ *Id.* Exhibit 23, Decl. of Necothia Anderson ¶ 10, ECF No. 57-27.

⁵¹ See Off. of Inspector Gen., *EPA Needs an Agencywide Strategic Action Plan to Address Harmful Algal Blooms 2*, EPA (2021), <https://perma.cc/Z3SR-KVE9>; Donald Carr, Env’t Working Grp., *Manure from Unregulated Factory Farms Fuels Lake Erie’s Toxic Algae Blooms* (2019), <https://perma.cc/439W-9S55>.

four times closer to hog CAFOs than a majority-white rural neighborhood.⁵² Hog CAFOs are disproportionately located in the state’s Black belt, where the agricultural economy was built on the labor of enslaved people,⁵³ in communities with higher levels of poverty and higher proportions of Black, Latino, and Indigenous people.⁵⁴ And because these areas *already* have the highest rates of disease and the least access to medical care, CAFOs compound the disproportionate harm.⁵⁵

Likewise, in California’s Central Valley, which houses 80% of the dairy cows in the nation’s leading dairy-producing state,⁵⁶ CAFOs are disproportionately located in low-income communities and communities with higher proportions of

⁵² *The Demographics of Rural North Carolina Neighborhoods Predict How Close People Live to an Industrial Hog Operation*, S. Env’t L. Ctr. (2021), https://selcva.sharepoint.com/sites/ProjectMatters/WaterQuality/CAFO%20Work%20Group/Communications/Graphics/SELC%20Demographics_Hogs_0522_Final.jpg?csf=1&web=1&e=ZHQpwf&cid=099db65d-49c4-4ded-8454-b6f6d7f637cd (referencing U.S. Census Bureau, *2010 Decennial Census* (2010), <https://perma.cc/XZJ9-S7J5>).

⁵³ Wing, *supra* note 22, at 225.

⁵⁴ *Id.* at 229 (North Carolina); Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, 121 *Env’t Health Persps.* A182, A184 (2013), <https://perma.cc/EH7F-F4PM> (discussing communities of color in eastern NC); Steve Wing & Jill Johnston, *Industrial Hog Operations in North Carolina Disproportionately Impact African-Americans, Hispanics and American Indians* 1, Univ. of N.C. Chapel Hill (2014), <https://perma.cc/YC8W-UD42>; *see also* Earthjustice Petition, *supra* note 13, at 53.

⁵⁵ Wing, *supra* note 22, at 229.

⁵⁶ Jason Sisney & Justin Garosi, *Milk Is California’s Top Farm Commodity*, Legis. Analyst’s Off. (2014), <https://perma.cc/3XSF-BFC5>.

people of color:⁵⁷ Hispanic residents are 1.54 times more likely to live within three miles of a large dairy CAFO than non-Hispanic residents in the Central Valley.⁵⁸ In both California’s Central Valley and North Carolina, census tracts with higher poverty rates have a larger percentage of their population living within 3 miles of a large CAFO.⁵⁹ This pattern reoccurs in Delaware, Mississippi, and Maryland, where poultry CAFOs also tend to be disproportionately located near low-income communities and communities of color.⁶⁰

Exposure to CAFO pollution also varies based on a community’s geographic isolation. Rural residents tend to be older and have worse existing health conditions, while also having more limited access to medical care.⁶¹ Within rural communities, certain groups, including Indigenous communities and pregnant

⁵⁷ Arbor J.L. Quist et al., *Disparities of industrial animal operations in California, Iowa, and North Carolina* 1, <https://perma.cc/V2AX-6M4D>, also at Earthjustice Petition, *supra* note 13, Exhibit 5 (hereinafter “Quist Exhibit”); *see also* Earthjustice Petition, *supra* note 13, at 53.

⁵⁸ *See* Quist Exhibit, *supra* note 57, at 1.

⁵⁹ *See id.* at Table 5, Fig. 9.

⁶⁰ Jonathan Hall et al., *Environmental Injustice and Industrial Chicken Farming in Maryland*, 18(21) *Int’l J. Env’t Research & Pub. Health* 9–10 (2021), <https://perma.cc/SZK8-NAX7>; Niya Khanjar et al., *Environmental Justice and the Mississippi Poultry Farming Industry*, 15(4) *Env’t Justice* 235, 235 (2022), <https://perma.cc/F89D-HS8J> (finding that census tracts in Mississippi featuring poultry CAFOs had higher percentages of people in poverty); Joseph Galarraga et al., *Environmental Injustice and Industrial Chicken Farming in Delaware*, 31(4) *New Solutions* 441, 441, 445 (2022), <https://perma.cc/NS8M-9VA7>.

⁶¹ U.S. Gov’t Accountability Off., *Why Health Care is Harder to Access in Rural America* (2023), <https://perma.cc/22AJ-5NY3>.

people, are especially likely to face obstacles in accessing care.⁶² In Iowa, the top hog-producing state in the nation,⁶³ 81% of people living in rural areas with the least access to medical and other resources live within 3 miles of a swine CAFO.⁶⁴ Similarly, in North Carolina, 99.9% of large swine CAFOs are located in very isolated census tracts.⁶⁵ When individuals in these communities experience negative health impacts from CAFOs, they likely have more difficulty accessing care.

2. *Cumulative pollution*

People living near CAFOs are often exposed to multiple harmful pollution sources.⁶⁶ For example, Sussex County, Delaware, is home to a significant population of Black, Hispanic, and Haitian people, some of whom have limited English proficiency.⁶⁷ In addition to experiencing nitrate

⁶² *Id.*

⁶³ Contaminants Literature Review, *supra* note 9, at 7.

⁶⁴ See Quist Exhibit, *supra* note 57, at 6; see also, generally, Margaret Carrel et al., *Pigs in Space: Determining the Environmental Justice Landscape of Swine Concentrated Animal Feeding Operations (CAFOs) in Iowa*, 13(9) Int'l J. Env't Research & Pub. Health (2016), <https://perma.cc/V4QJ-TSYB>.

⁶⁵ Quist Exhibit, *supra* note 57, at 6.

⁶⁶ *Id.*

⁶⁷ See Letter from Elisabeth A. Holmes, Socially Responsible Agriculture Project, to Lilian Dorka, U.S. Env't Prot. Agency 2, 6 (Dec. 22, 2022), <https://perma.cc/E3PV-KL5B> (hereinafter "DE Complaint").

contamination of drinking water wells by the poultry industry,⁶⁸ families in Sussex County also face pollution from superfund sites, industrial dischargers, brownfields, and chemical production facilities, as well as vehicle emissions from the high concentration of warehouses in the county.⁶⁹

Likewise, residents of Sampson County, North Carolina, are burdened with hazardous air pollutants and industrial toxin-contaminated surface and groundwater from the state's largest landfill.⁷⁰ Sampson County also houses a wood pellet facility, which has committed numerous air quality violations in addition to generating noise and unending traffic.⁷¹

In the San Joaquin Valley in California, almost 50% of the population is Hispanic or Latino.⁷² In addition to housing CAFOs and other agricultural operations that use large amounts of harmful pesticides, this region is crisscrossed by roads and freight lines, and contains refineries, manufacturing facilities, power plants, landfills, and other waste disposal sites, which dirty the air and contaminate

⁶⁸ Scott Goss & Maddy Lauria, *Poisoned wells found near Sussex chicken plant*, The News Journal (Nov. 30, 2017), <https://perma.cc/9TBF-VVLV>.

⁶⁹ See DE Complaint, *supra* note 67, at 7–8.

⁷⁰ Cameron Oglesby, *Waste, Race, and Place*, The Assembly (Jan. 19, 2024), <https://perma.cc/2VZQ-4G8L>.

⁷¹ Celeste Gracia, *Controversial wood pellet plant in Sampson County spurs debate over environmental injustice, economic benefits*, WUNC (Dec. 14, 2021), <https://perma.cc/WN9F-KJG3>.

⁷² Ganlin Huang, *Cumulative Environmental Vulnerability and Environmental Justice in California's San Joaquin Valley*, 9(5) Int'l J. Env't Research & Pub. Health 1593, 1595 (2012), <https://perma.cc/GF2H-5U4C>.

water resources.⁷³ The San Joaquin Valley has some of the worst air quality in the country.⁷⁴ As researchers have noted, there is “significant overlap between environmental hazards and social vulnerability” in the region.⁷⁵

D. The Livestock Industry Wields Immense Political Power and Uses That Power to Its Advantage.

CAFOs thrive by wielding substantial political power and exploiting this power to their advantage. In *McKiver v. Murphy-Brown*, Judge Wilkinson of the Fourth Circuit explained how for years, Smithfield Foods, a multinational corporation that owns and contracts with hundreds of hog CAFOs in North Carolina, created nuisance conditions for its neighbors—most of whom were “of modest means and minorities.” *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 978 (4th Cir. 2020) (Wilkinson, J., concurring). Smithfield “defended its practices against critics . . . and routinely opposed regulations that would require lagoon-and-sprayfield operations to curtail their effects on neighbors.” *Id.* at 948 (majority op.). Indeed, the court concluded that there was “no doubt” regarding the corporation’s “deliberate corporate policies and evidence that [the company] *knew* these policies had associated harms,” yet “persisted in practices it knew were reasonably likely to result in injury to neighboring properties.” *Id.* at 966–67.

⁷³ *Id.* at 1595–96.

⁷⁴ *Id.* at 1596.

⁷⁵ *Id.* at 1602.

Smithfield “knew about likely harms, denied their existence, and fought for them not to come to light.” *Id.* at 969.

These industries wield power in other states as well: Oregon’s legislature repeatedly opposed proposals to control pollution from dairy CAFOs⁷⁶; Iowa’s legislature passed laws aimed at silencing whistleblowers⁷⁷; Ohio’s legislature transferred CAFO permitting authority to the agricultural agency to avoid additional scrutiny⁷⁸; California’s Low Carbon Fuel Standard incentivized energy production on dairy CAFOs without considering increased harmful emissions associated with this process⁷⁹; and countless other states have enacted so-called “Right to Farm” laws limiting the nuisance remedy for neighbors adversely affected by CAFO pollution.⁸⁰

In his concurring opinion in *McKiver*, Judge Wilkinson put a finer point on the issue: “At the end of all this wreckage lies an uncomfortable truth: these

⁷⁶ Alex Baumhardt, *Environmental, public health groups want state to regulate air pollution from large dairies*, Or. Cap. Chron. (Aug. 30, 2022), <https://perma.cc/T64H-2PXQ>.

⁷⁷ Rox Laird, *Federal appeals court says Iowa’s ‘ag-gag’ laws don’t violate free speech*, Courthouse News Serv. (Jan. 8, 2024), <https://perma.cc/3MEP-2FRG>.

⁷⁸ Mike Ferner, *U.S. EPA Tells Ohio its Factory Farm Permits are Illegal*, Toledo City Paper (Dec. 15, 2022), <https://perma.cc/FU5J-V69Z>.

⁷⁹ Emma Foehringer, *California Has Provided Incentives for Methane Capture at Dairies, but the Program May Have ‘Unintended Consequences,’* Inside Climate News (Sept. 19, 2022), <https://perma.cc/DDJ5-38GQ>.

⁸⁰ One Rural, *Right-to-Farm Laws by State*, <https://perma.cc/5ZUK-VPH6> (last visited Feb. 29, 2024).

nuisance conditions were unlikely to have persisted for long—or even to have arisen at all—had the neighbors of Kinlaw Farms been wealthier or more politically powerful.” *McKiver*, 980 F.3d at 982 (Wilkinson, J., concurring). This observation rings true for CAFO pollution-impacted communities nationwide.

II. EPA Must Regulate CAFOs to Protect Water Quality and Further Environmental Justice.

A. EPA Has Long Been Aware of CAFOs’ Impacts on the Environment and on Overburdened Communities.

The record in this case lays bare EPA’s deep understanding that CAFOs are a leading cause of water pollution for our nation’s waterways, *see* 66 Fed. Reg. at 2972 (describing CAFOs as a “significant source of water pollution in the United States”), 2982–84 (cataloguing water quality and health impacts), National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7201 (Feb. 12, 2003) (documenting “numerous” unpermitted discharges); a significant contributor to adverse and disparate health outcomes, *see* 66 Fed. Reg. at 2976–79 (describing pollutants of concern in CAFO waste, threats posed to humans and the environment, and mechanisms of transport); and, importantly, that effective regulations could reduce harmful pollution from these facilities. In 2022, the agency acknowledged that, for example, narrowing the definition of the agricultural stormwater exemption and broadening the CAFO

definition would more effectively protect waterways.⁸¹ Further, EPA noted how existing regulations make it difficult to effectively regulate CAFOs even when discharges have been established and permits are required, acknowledging that CAFOs are underregulated due to deficiencies in EPA’s own regulations.⁸²

EPA also knows that communities of color and low-wealth communities are disproportionately impacted by CAFOs, recognizing the “growing body of literature” finding as much.⁸³ In 2017, EPA’s External Civil Rights Compliance Office investigated discriminatory impacts from North Carolina’s management of its CAFO program following a complaint under Title VI of the Civil Rights Act of 1964.⁸⁴ EPA consequently expressed “deep concern” about possible discriminatory impacts of North Carolina’s non-discharge permitting scheme.⁸⁵

Since then, communities have continued to catalogue the myriad ways that under-regulation of CAFOs disproportionately harms communities of color in violation of federal civil rights law. North Carolina community groups filed two additional civil rights complaints against North Carolina’s environmental agency

⁸¹ EPA, *EPA Legal Tools to Advance Environmental Justice* 75 (May 2022), <https://perma.cc/UEB3-PV33> (hereinafter “EPA EJ Report”).

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See 42 U.S.C. §§ 2000d *et seq.*; see also 40 C.F.R. Part 7.

⁸⁵ Letter from Lilian Dorka, U.S. Env’t Prot. Agency, to William G. Ross, Jr., Acting Secretary, N.C. Dep’t of Env’t Quality 1 (Jan. 12, 2017), <https://perma.cc/XY7D-8GCF>.

with EPA in 2021 and 2023, highlighting the discriminatory and disproportionate impact of CAFO waste-to-energy permits and poultry CAFOs, respectively, on communities of color.⁸⁶ Community groups in Delaware filed a Title VI complaint in 2022 against the Delaware agency responsible for environmental permitting, flagging the disparate harm that would befall communities of color from a proposed poultry waste digester and methane gas production facility.⁸⁷

EPA’s awareness of these problems is not in question, and EPA itself has identified CAFOs as an area in which regulatory changes could advance environmental justice.⁸⁸

B. The Clean Water Act Requires EPA to Protect Water Quality by Effectively Regulating CAFOs.

The Clean Water Act requires EPA to do more to address the well-established problem of water pollution from CAFOs. The sweeping objective of the Act is to “restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To that end, the Act provides that the discharge of any pollutant by any person from a point source into the waters of the

⁸⁶ Letter from Blakely Hildebrand, S. Env’t L. Ctr., to Michael Regan, Administrator, U.S. Env’t Prot. Agency (Sept. 27, 2021), <https://perma.cc/PU68-GDL7>; Letter from Blakely Hildebrand, S. Env’t L. Ctr., to Lilian Dorka, U.S. Env’t Prot. Agency (Dec. 22, 2022); Letter from Christophe Courchesne, Environmental Justice Clinic, Vermont Law School, to Office of External Civil Rights Compliance, EPA (Apr. 19, 2023), <https://perma.cc/YZ6S-2VJH>.

⁸⁷ DE Complaint, *supra* note 67.

⁸⁸ EPA EJ Report, *supra* note 81, at 75.

United States shall be unlawful except in compliance with a valid permit. 33 U.S.C. § 1311(a); 33 U.S.C. § 1362(12). Congress explicitly defined “point source” to include CAFOs. 33 U.S.C. § 1362(14). As the primary federal agency tasked with carrying out the Act, EPA must give effect to the statute’s clear mandates, including by stopping unpermitted discharges of pollutants by CAFOs.

Courts have delineated boundaries on the scope of regulation EPA may impose on CAFOs that have *not* been shown to discharge,⁸⁹ *see Waterkeeper All. v. EPA*, 399 F.3d 486, 506 (2d Cir. 2005) (finding EPA exceeded authority by “imposing, upon CAFOs, the obligation to seek an NPDES permit or otherwise demonstrate that they have no potential to discharge”), but nowhere have courts suggested that EPA was barred from regulating CAFOs that *actually* discharge. Nor could they; regulating the discharge of pollutants into the nation’s waters is EPA’s most fundamental responsibility under the Act. As EPA has acknowledged, most CAFOs discharge, while only a fraction hold permits authorizing them to do so. 66 Fed. Reg. at 2972.

The agricultural stormwater exemption, which has been broadly interpreted by EPA and widely exploited by CAFOs, allows CAFOs either to discharge pollutants and escape permitting requirements altogether, or to violate the “no

⁸⁹ *See EPA, Response Letter to 2017 Petition by Food & Water Watch, et al.* 3–4 (Aug. 15, 2023), ER-220.

discharge” mandate under a Clean Water Act permit. As described in the Petitioners’ brief, several states and EPA have failed to require CAFOs that are known to discharge to apply for a discharge permit under the Act, thanks to the broad definition of the exemption, lack of resources for enforcement, and overreliance on self-reporting of discharges. North Carolina, for instance, has issued discharge permits to only 10 of more than 1,200 hog CAFOs and inexplicably considers poultry CAFOs “permitt[ed] by regulation.” 15A N.C. Admin. Code 02T .1303. Moreover, even a permitted CAFO will not be held liable for a discharge polluting an adjacent stream during or after a rain event that is more severe than a 24-hour, 25-year event—a weather event that is increasing in intensity and frequency due to climate change in many regions with CAFOs⁹⁰—so long as the operation is adhering to nutrient management plans (“NMPs”). As outlined in Petitioners’ brief, EPA’s current regulations’ reliance on NMPs to ensure appropriate utilization of nutrients in manure and minimize precipitation-related discharges is based on scientifically unsound assumptions and rarely enforced. Relying so heavily on NMPs—and self-enforcement—to protect water quality falls far short of EPA’s obligations under the Act.

⁹⁰ Kenneth Kunkel et al., *2020: North Carolina Climate Science Report*, North Carolina Institute for Climate Studies, at 7 (2020), <https://perma.cc/NWQ4-35PH>.

EPA's failure to uphold its responsibilities under the Act harms communities across the country. EPA must adhere to its statutory mandate to protect the nation's waterways by ensuring that unpermitted discharges from CAFOs do not fall under the agricultural stormwater exemption. This approach is consistent with Congress's intent, legislative history, and the most natural reading of the Act. EPA itself has recognized that this precise change to the agency's interpretation of the agricultural stormwater exemption would improve the effectiveness of the CAFO regulations, ultimately advancing environmental justice.⁹¹

C. EPA Has an Obligation to Regulate CAFOs to Minimize Environmental Injustice.

In addition to its obligation to control water pollution from CAFOs pursuant to the Act, multiple Executive Orders and agency directives impose on EPA affirmative obligations to further environmental justice. Executive Order 12,898, adopted in 1994, directs federal agencies to identify and address disproportionately high and adverse health or environmental effects of their work on minority and low-income populations. Exec. Order No. 12,898, 59 Fed. Reg. 7629, 7630 (Feb. 16, 1994). The Biden Administration reaffirmed its commitment to this goal in April 2023, again directing agencies to address disproportionate negative impacts

⁹¹ EPA EJ Report, *supra* note 81, at 75.

of their activities on communities with environmental justice concerns. Exec. Order 14,096, 88 Fed. Reg. at 25251, 25253 (Apr. 21, 2023).

Executive Order 14,008 further instructs agencies to “make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities.” Exec. Order 14,008, 86 Fed. Reg. 7619, 7629 (Feb. 1, 2021).

Further, in 2021, Administrator Regan issued guidance directing EPA to “identify ways to ensure that the country’s environmental laws—and the policies implemented under them—deliver benefits to all individuals and communities” and to take “immediate and affirmative steps to incorporate environmental justice considerations into their work.”⁹²

Despite knowing of the disproportionate harms that CAFOs inflict on these communities, EPA has declined to revise its regulations to remedy these disparities. The human and environmental costs of maintaining the status quo are staggering, and the law requires EPA to change course.

EPA’s failure to grant the Petition was arbitrary and capricious because it violated the Clean Water Act, undermined the agency’s environmental justice

⁹² Email from Michael Regan, Administrator, U.S. Env’t Prot. Agency, to EPA Employees (Apr. 7, 2021), <https://perma.cc/JY83-B3BU>.

priorities, and fell short of executive mandates. The Court should require EPA to revise its regulations to ameliorate the harmful impacts of CAFOs and mitigate the disparate harms to overburdened communities.

CONCLUSION

For these and other reasons articulated by Petitioners, the Court should vacate EPA's denial and remand to the Agency for further consideration.

DATED: March 4, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2024 I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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DATED: March 4, 2024

Respectfully Submitted,

s/ Blakely E. Hildebrand

CERTIFICATE OF COMPLIANCE

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

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