

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

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DAKOTA RURAL ACTION, )  
910 4th Street, Suite A )  
Brookings, South Dakota 57006, )  
) )  
INSTITUTE FOR AGRICULTURE )  
AND TRADE POLICY, )  
2105 First Avenue South )  
Minneapolis, Minnesota 55404, )  
) )  
IOWA CITIZENS FOR )  
COMMUNITY IMPROVEMENT, )  
2001 Forest Avenue )  
Des Moines, Iowa 50311, )  
) )  
CITIZENS ACTION COALITION )  
OF INDIANA, )  
1915 West 18th Street, Suite C )  
Indianapolis, Indiana 46202, )  
) )  
ASSOCIATION OF IRRITATED )  
RESIDENTS, )  
29389 Fresno Avenue )  
Shafter, California 93263, )  
) )  
WHITE RIVER WATERKEEPER, )  
P.O. Box 744 )  
Harrison, Arkansas 72602, )  
) )  
FOOD & WATER WATCH, )  
1616 P Street N.W., Suite 300 )  
Washington, D.C. 20036, and )  
) )  
ANIMAL LEGAL DEFENSE FUND, )  
525 East Cotati Avenue )  
Cotati, California 94931, )  
) )  
*Plaintiffs,* )  
) )  
v. )  
) )

Civ. Action No. 18-2852

UNITED STATES DEPARTMENT OF )  
 AGRICULTURE, )  
 1400 Independence Avenue S.W. )  
 Washington, D.C. 20250, )  
 )  
 SONNY PERDUE, SECRETARY, )  
 United States Department of Agriculture )  
 1400 Independence Avenue S.W. )  
 Washington, D.C. 20250, )  
 )  
 FARM SERVICE AGENCY, )  
 1400 Independence Avenue S.W. )  
 STOP 0506 )  
 Washington, D.C. 20250-0506, and )  
 )  
 RICHARD FORDYCE, )  
 ADMINISTRATOR, )  
 Farm Service Agency )  
 1400 Independence Avenue S.W. )  
 STOP 0506 )  
 Washington, D.C. 20250-0506, )  
 )  
*Defendants.* )  
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**COMPLAINT**

1. This is an action for declaratory judgment and injunctive relief, challenging Defendant United States Department of Agriculture (“USDA”) Farm Service Agency’s (“FSA”) 2016 rule, 81 Fed. Reg. 51274 (Aug. 3, 2016), categorically excluding FSA funding of medium-sized concentrated animal feeding operations (“CAFOs”) from National Environmental Policy Act (“NEPA”) review (“Medium CAFO CatEx”).

2. CAFOs are facilities that confine hundreds to thousands of cows, thousands of pigs, and/or tens of thousands of turkeys or chickens for the purposes of producing meat, dairy, and egg products. These facilities, which are becoming more pervasive throughout the United States, cause climate change and harm rural community and economic health, drinking water quality and quantity, air quality, endangered species, the confined animals themselves, and other

aspects of the human environment.

3. Prior to 2016, FSA performed environmental analyses under NEPA to assess the impact of government loans or loan guarantees to CAFOs that confined at least 350 dairy cows, 500 cattle, 1250 pigs, 27,500 turkeys, and 50,000 chickens.

4. These analyses—which took place *before* loans or loan guarantees were approved—served two important purposes. First, they provided a governmental check on the negative externalities of industrial animal feeding operations, which have long been established as having serious effects on communities and the environment. Second, the analyses provided neighbors, nearby farmers, and advocacy groups—like the Plaintiffs here—with notice of the planned development of new facilities or expansion of existing ones, as well as information about their risks, enabling the public to provide input and raise concerns *before* the federal government disbursed funds.

5. The 2016 rule’s Medium CAFO CatEx removed that process of analysis, notice, and feedback for CAFOs that confine as many as 699 dairy cows, 999 cattle, 2,499 pigs, 54,999 turkeys, and 124,999 chickens (“Medium CAFOs”).<sup>1</sup>

6. Rather than presuming that CAFOs of this size warrant a NEPA analysis, as FSA did under its previous regulations, FSA now assumes these facilities have no environmental impact and exempts them entirely from analysis under NEPA.

7. The facilities FSA has chosen to free from government and public scrutiny with

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<sup>1</sup> FSA currently defines “medium CAFO” by cross-referencing U.S. Environmental Protection Agency (“EPA”) Clean Water Act regulations. Thus, a “medium CAFO” is a facility that confines the following number of animals per species indoors for 45 days or more each year: 200 to 699 mature dairy cows, 300 to 999 cattle other than mature dairy cows, 750 to 2499 pigs over 55 pounds, 16,500 to 54,999 turkeys, and (at non-liquid manure management facilities) 37,500 to 124,999 chickens other than laying hens. 40 C.F.R. § 122.23(b)(6).

the Medium CAFO CatEx confine unnaturally large numbers of animals indoors in cramped, enclosed spaces year-round. This high-density, indoor confinement of large numbers of animals generates more waste—and causes more significant environmental impacts—than more natural, pasture-based operations where the number of animals correlates to the amount of available land and resources.

8. CAFOs are typically owned, run, or controlled by large corporations such as Perdue or JBS United. In each major livestock sector, just a handful of corporations controls more than half of all livestock production.

9. FSA now funds the construction and expansion of these corporations' production facilities without conducting any environmental review, nor providing any notice or opportunity to comment to neighboring communities and the public.

10. Small farmers, the communities within which they live and farm, and environmental, animal, and public health advocates now first learn about an incoming or expanding medium CAFO—and the risks it poses to rural drinking water supplies, air quality, confined and wild animals, and public health and safety—only once construction or expansion has begun, after federal funding decisions have been made and loans have been disbursed. Thus, providing medium CAFOs with this special exemption supports industrial animal production, to the detriment of rural communities.

11. FSA's decision to give a handout to industry by promulgating the Medium CAFO CatEx violates both NEPA and the Administrative Procedure Act ("APA"). FSA failed to supply a reasoned basis for its conclusion—which runs counter to the evidence—that loans to medium CAFOs do not significantly affect the human environment individually and cumulatively; instead, FSA relied solely on rationales proffered by the lending industry and industry trade

groups to make their work more profitable, none of which included factors that NEPA authorizes FSA to consider. The Medium CAFO CatEx is also contrary to NEPA's text and its implementing regulations, in that the categorical exclusion removes FSA's obligation to perform environmental review for funding actions that individually and cumulatively have a significant effect on the human environment. FSA also failed to substantiate the categorical exclusion to the Council on Environmental Quality ("CEQ"), as NEPA requires. FSA further violated the APA's procedural requirements by failing to properly notify members of the public about the exclusion, which deprived them of an opportunity to comment on the proposal.

12. Plaintiffs request that the Court declare illegal and issue an injunction requiring Defendants to withdraw the Medium CAFO CatEx. Such relief will ensure the proper analysis of, and public notice of and input on, the currently uninhibited and nontransparent flow of federal funds to build and expand medium CAFOs.

### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1361 (mandamus), 28 U.S.C. §§ 2201-02 (declaratory judgment and further relief), and the APA, 5 U.S.C. §§ 701-06 (declaratory and injunctive relief).

14. Venue is proper in this Court under 28 U.S.C. § 1391(e) because Defendants are federal agencies headquartered in the District of Columbia, and because the agency action that forms the basis of this Complaint took place in the District of Columbia.

### **PARTIES**

#### **Plaintiffs**

15. Plaintiff **Dakota Rural Action** ("DRA") is a membership-based grassroots, family agriculture and conservation group that organizes South Dakotans to protect their family

farmers and ranchers, natural resources, and unique way of life. Founded in South Dakota in 1987, DRA represents over 900 members, many of whom live, recreate, and own or farm land in close proximity to CAFOs in South Dakota. DRA has long advocated against federal policies that advantage corporate CAFO owners over sustainable livestock ranchers. Since the 1990s, DRA has organized citizens to protect their communities from unchecked and unregulated CAFO development in South Dakota. For example, DRA has overseen a statewide committee that actively works to stop the spread of CAFOs and other forms of potentially harmful industrial development in rural communities; its efforts are designed to mitigate the onslaught of poorly sited, environmentally hazardous projects coming to South Dakota. DRA also maintains a website to encourage and assist members of the public and county officials in fighting back against proposals that may affect or concern them; the website explains recent developments in the laws of South Dakota and how to participate in local permitting and approval processes regarding the development or expansion of CAFOs. DRA further hosts events such as the recent CAFO Dialogue Forum for elected or appointed officials across South Dakota. DRA develops such events to educate county commissioners and planning and zoning decision-makers on their ability and responsibility to thoroughly consider CAFO zoning applications. In 2014, DRA submitted comments on FSA's proposed rule through the National Sustainable Agriculture Coalition.

16. Plaintiff **Institute for Agriculture and Trade Policy** ("IATP") is a 501(c)(3) nonprofit organization headquartered in Minneapolis, Minnesota. Established in 1986, IATP works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm, and trade systems. IATP achieves its mission by, among other things, submitting administrative comments and petitions, authoring reports, advocating before Congress, and

directly educating the public through podcasts, webinars, and infographics in support of more democratic and economically just agricultural policies. IATP specifically focuses on combating climate change, holding corporations accountable for their greenhouse gas footprints, and protecting rural economies, independent family farmers, and ecosystems from the harms of industrial livestock facilities. For example, IATP has conducted research and analysis on the greenhouse gas emissions of the CAFO model of animal production, which it incorporated into its publicly-available reports, commentaries, and fact sheets. IATP has also worked to limit or eliminate the public subsidies and loans in proposed Farm Bills that support new or expanded CAFOs. In 2014, IATP submitted comments on FSA's proposed rule through the National Sustainable Agriculture Coalition. In the past IATP has also commented on Environmental Assessments for Minnesota CAFOs on its own behalf.

17. Plaintiff **Iowa Citizens for Community Improvement** ("CCI") is a membership-based, statewide Iowa nonprofit organization that works to enable Iowans from all walks of life—urban and rural, young and old, immigrants and lifelong Iowans—to make change in their communities by raising their voices and doing grassroots advocacy. CCI has approximately 5,100 dues-paying members around the state, in addition to another 17,000 supporters and activists who sign up to receive CCI emails, take action online, attend meetings, sign petitions, and engage in other forms of activism with and for CCI. Many of CCI's members live near, recreate near, and/or work at agricultural facilities. CCI's organizational priorities include fighting factory farms and protecting Iowa's clean water and environment, as well as advancing worker justice, racial justice, and immigrants' rights. CCI works to organize workers, and has specifically worked in the past to organize in pig production facilities. In carrying out its mission, CCI has inquired with FSA—including by visiting in person at FSA offices—about the

extent to which FSA guaranteed loans are used for medium- and large-sized CAFOs and how the public can stay informed about FSA proposals to supply guaranteed loans to CAFOs. At a time when the Iowa legislature has underfunded the Iowa Department of Natural Resources, resulting in insufficient staffing to investigate and respond to citizen complaints of manure spills or dumping, the notice and information that FSA provides in the course of preparing Environmental Assessments for new or expanding CAFOs in Iowa has become ever more important to CCI's mission.

18. Plaintiff **Citizens Action Coalition of Indiana** ("CAC") is a 501(c)(4) membership organization headquartered in Indianapolis, Indiana. Established in 1974, CAC works to initiate, facilitate, and coordinate citizen action directed to improving the quality of life of all inhabitants of Indiana. CAC encourages and assists principled citizen advocacy of public policies to preserve democracy, conserve natural resources, protect the environment, and provide affordable access to essential human services. CAC represents approximately 20,000 members throughout Indiana, some of whom live and recreate near, and are affected by CAFOs. CAC has advocated for four decades on behalf of Hoosiers on issues regarding energy policy, utility reform, health care, pollution prevention, and family farms. In order to protect citizens of Indiana, and with the goal of ensuring effective environmental regulation of factory farming within the state, CAC's activities include performing research, carrying out public education campaigns, organizing citizens, lobbying legislators, intervening in utility cases, and litigating when necessary. CAC also monitors zoning ordinances and local decisions that relate to CAFOs, and offers assistance to affected communities.

19. Plaintiff **Association of Irrigated Residents** ("AIR") is a membership-based California nonprofit corporation whose mission is to advocate for clean air and environmental



health in California's San Joaquin Valley (Kern, Kings, Tulare, Fresno, and Stanislaus Counties) on behalf of its several dozen members, who primarily reside in the Valley's under-resourced communities. AIR has participated in San Joaquin Valley Air Pollution Control District, California Air Resources Board, and U.S. Environmental Protection Agency ("EPA") proceedings to implement the Clean Air Act and improve air quality in the Valley. Since 2008, AIR has had a representative on the Environmental Justice Advisory Committee for California's greenhouse gas reduction plan. AIR members have also participated for many years on the Steering Committee for the Central Valley Air Quality Coalition and advocated for stronger regulations on CAFOs to reduce air pollutant emissions. AIR has also filed lawsuits to enforce the Clean Air Act, including California's State Implementation Plan; to compel EPA action on nonattainment area plans; and to seek judicial review of EPA actions regarding those plans. For example, in 2001, AIR successfully sued EPA to force the agency to disapprove California's Title V operating permit programs because California exempted agricultural equipment from clean air permitting. AIR then participated in the grassroots coalition that successfully passed a corresponding California law. When the San Joaquin Valley Air Pollution Control District refused to require new and modified confined animal facilities to obtain permits and purchase offsets, as required by its permitting rules that EPA approved as part of the State Implementation Plan, AIR filed three citizen suits to enforce it. AIR continually monitors local CAFO operations for compliance with pertinent local, state, and federal rules.

20. Plaintiff **White River Waterkeeper** is an Arkansas-based 501(c)(3) nonprofit organization that advocates for the White River, its watershed, and its communities. On behalf of its more than 100 individual members, including those who live, work, and recreate in waters in close proximity to CAFOs, White River Waterkeeper works to protect the public health and

natural resources of the White River watershed through advocacy, education, and research. Its efforts include keeping its members informed about environmental issues that affect them, including the construction of new or expansion of existing CAFOs in the White River watershed. To that end, White River Waterkeeper posts on its website information about algal blooms, waterborne illnesses, and nutrient pollution, as well as new CAFOs in the region and their impacts on local waterbodies—particularly impaired waterbodies. White River Waterkeeper posts this information publicly and disseminates the information to its members so that they can attend hearings and submit public comments on proposals that affect or concern them. White River Waterkeeper further encourages and assists its members in participating in these public processes. White River Waterkeeper also advocates on its own behalf for more stringent regulation of CAFOs and their impacts on water quality in the White River watershed and across Arkansas.

21. Plaintiff **Food & Water Watch** (“FWW”) is a national nonprofit corporation that champions healthy food and clean water for all by standing up to corporations that put profits before people and advocating for a democracy that improves people’s lives and protects the environment. FWW is headquartered in the District of Columbia, and has more than one million members and supporters nationwide, including individuals who live, work, and recreate in close proximity to CAFOs. Factory farming is one of FWW’s priority issues, and FWW is engaged in numerous campaigns to hold the CAFO industry accountable for its adverse impacts on rural communities and the environment and to hold the government accountable for the unchecked pollution and consolidation of the livestock industry. Through grassroots organizing, policy advocacy, research, communications, and litigation, FWW works to increase transparency about how factory farms operate, where they are located, and the pollutants they emit into communities

and waterways, as well as towards reducing that pollution and improving regulation of the CAFO industry. The information made public through the NEPA process is key to FWW's ability to carry out its work, including providing information to its members.

22. Plaintiff **Animal Legal Defense Fund** ("ALDF") is a national nonprofit organization founded in 1979 in Cotati, California. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. Advocating for effective oversight and regulation of CAFO development, expansion, and pollution across the United States is one of ALDF's central goals, which it achieves by filing lawsuits, administrative comments, and rulemaking petitions to increase legal protections for animals; by supporting strong animal protection legislation; and by fighting against legislation, like state "Ag Gag" laws, that is harmful to animals and communities surrounding CAFOs. Through these efforts, ALDF seeks to ensure transparency in the CAFO system, which is paramount to its ability to protect farmed animals and ALDF members from CAFOs' immensely harmful effects. ALDF conducts this work on behalf of itself and more than 235,000 members and supporters throughout the United States, many of whom live near, recreate near, and closely monitor CAFOs in their communities.

23. Each Plaintiff organization relies on the public notice and information generated during NEPA review to carry out its mission. Public notice and access to environmental information are often the only means of identifying opportunities to influence government actions and policies at the federal, state, and local levels to better protect Plaintiffs' members and their communities from incoming and expanding CAFOs. Individual members of Plaintiff organizations also personally rely on the public notice and information generated during NEPA review to inform, organize, advocate around, and protect themselves against the rampant expansion of the CAFO industry in their communities, and its associated negative effects.

24. As just some examples, Plaintiffs Dakota Rural Action, Iowa Citizens for Community Improvement, Citizens Action Coalition of Indiana, and Association of Irrigated Residents use information generated through NEPA review when they advocate on behalf of their members and local communities before government decision-makers at the federal, state, and local levels. This information is particularly key at the county level when advocating before planning commissions and boards of zoning appeals as they weigh whether to grant a variance or building permit to a new or expanding CAFO. Plaintiff White River Waterkeeper utilizes information from Environmental Assessments to evaluate nutrient management plans to better understand potential concerns associated with site specific locations and application rates, and to plan water quality monitoring initiatives to evaluate impacts of nutrient enrichment to nearby and downstream waterbodies. Plaintiff Institute for Agriculture and Trade Policy utilizes the information to inform its research and analysis on the greenhouse gas emissions of the CAFO model of animal production, and specifically to limit or eliminate public subsidies and loans through Farm Bills that support new or expanded CAFOs. Plaintiffs Food & Water Watch and the Animal Legal Defense Fund likewise utilize information about the environmental impacts of CAFOs to protect their individual members and advance their members' and organizational interests through legal advocacy.

25. As a result of Defendants' actions, Plaintiffs and their members and supporters have been and will continue to be injured by FSA's Medium CAFO CatEx, which deprives them of information that federal law gives them the right to know. Without access to this information, Plaintiffs are hindered in their ability to carry out their missions, to educate their members and the public, and to advocate for government policies that limit the public's exposure to the harmful effects of the expansion of the CAFO industry.

26. Individual members of each membership-based plaintiff organization are further harmed by inadequate NEPA review for medium CAFOs because they reside, recreate, or own businesses or property in localities in which FSA has approved—and continues to approve—the development or expansion of medium CAFOs. Plaintiffs' individual members are deeply concerned about the operation and expansion of CAFOs in their communities and the effects they have on their economic vitality, air quality, water quality and quantity, community health, and animal and ecosystem health.

27. In addition, FSA's failure to comply with mandatory rulemaking procedures harmed Plaintiffs and their members and supporters by depriving them of administrative processes integral to their ability to protect their interests. Had FSA provided adequate notice of its proposal to exempt medium CAFOs from NEPA, each Plaintiff organization and/or its individual members would have commented in opposition to the proposal.

28. The Medium CAFO CatEx further injures Plaintiffs by depriving them of notice of new and expanding CAFOs. Each Plaintiff organization relies on alerts from rural residents, particularly regarding the potential for increased water and air pollution, as the first indicators that a new CAFO is being developed. Were FSA to provide notice of proposed funding for individual medium CAFOs, Plaintiffs and their members would use that information in their advocacy and would submit public comments when necessary. Plaintiffs' participation in NEPA processes concerning FSA funding of individual medium CAFOs would build upon the action-forcing elements of NEPA to ensure the agency protects Plaintiffs, their members, and their members' communities.

29. These injuries are actual, concrete, and irreparable. Plaintiffs and their members and supporters will continue to suffer harm as a result of FSA's unlawful Medium CAFO CatEx

unless and until this Court provides the relief requested in this Complaint. An Order vacating the Medium CAFO CatEx and mandating compliance with the APA and NEPA by a date certain would redress Plaintiffs' injuries.

### **Defendants**

30. **United States Department of Agriculture** ("USDA") is an agency of the United States government. USDA is the federal agency responsible for overseeing federal rural development programs, including those administered by the Farm Service Agency. Its principal office is located at 1400 Independence Avenue S.W., Washington, D.C. 20250.

31. **Sonny Perdue** is the Secretary of USDA. In his official capacity, he has the responsibility of ensuring that USDA acts in accordance with applicable laws and regulations. His office is in Washington, D.C. Plaintiffs sue Secretary Perdue in his official capacity only.

32. **Farm Service Agency** ("FSA") is an agency of the United States government housed within USDA. FSA administers various payouts for agricultural purposes, including crop insurance, the Conservation Reserve Program, and loans for emergencies, operations, and farm ownership. Its principal office is located at 1400 Independence Avenue S.W., Washington, D.C. 20250. FSA promulgated the final agency action that Plaintiffs challenge in this Complaint: the final rule establishing the Medium CAFO CatEx. *See* 81 Fed. Reg. 51,274 (Aug. 3, 2016).

33. **Richard Fordyce** is the Administrator of FSA. In his official capacity, he holds the ultimate decision-making authority for FSA's actions. His office is in Washington, D.C. Plaintiffs sue Administrator Fordyce in his official capacity only.

### **LEGAL AND FACTUAL BACKGROUND**

#### **National Environmental Policy Act**

34. Congress enacted NEPA with the purpose to "promote efforts which will prevent

or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321.

35. NEPA applies to many types of federal actions, ranging from issuance of permits to approving loans and loan guarantees. In the case of “major federal actions significantly affecting the human environment,” the agency proposing such action must make a “detailed statement” on the “environmental impact of the proposed action.” 42 U.S.C. § 4332(2)(C).

36. The decision to provide federal funding support for a CAFO project constitutes a major federal action that triggers NEPA’s requirements. *See Food & Water Watch v. USDA*, 325 F. Supp. 3d 39 (D.D.C. 2018); *Buffalo River Watershed All. v. USDA*, No. 4:13-cv-450-DPM, 2014 WL 6837005 (E.D. Ark. Dec. 2, 2014).

37. Agencies must perform NEPA’s required environmental review *before* undertaking any proposed action. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

38. The Council on Environmental Quality (“CEQ”) has promulgated uniform regulations implementing NEPA, which are binding on all agencies. *See* 40 C.F.R. pts. 1500-1508.

39. CEQ regulations require that all “[a]gencies shall . . . [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a). Specifically, agencies must “[p]rovide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected.” 40 C.F.R. § 1506.6(b).

40. The scope of NEPA review includes consideration of direct, indirect, and cumulative effects on “ecological . . . aesthetic, historic, cultural, economic, social, or health”

interests. 40 C.F.R. § 1508.8.

41. CEQ regulations describe two forms of environmental review under NEPA: Environmental Assessments (“EA”) and Environmental Impact Statements (“EIS”). An Environmental Assessment is “a concise public document for which a Federal Agency is responsible,” and is used to assist an agency in determining whether a proposed activity will significantly affect the quality of the human environment. 40 C.F.R. § 1508.9. Where more significant environmental concerns are raised by the proposed action, an Environmental Impact Statement may be required. *Id.* § 1501.4.

42. According to CEQ regulations, determining whether an action is “[s]ignifican[t]” for purposes of preparing an EA or EIS requires “considerations of both context and intensity[.]” 40 C.F.R. § 1508.27. Because significance “varies with the setting of the proposed action,” “context” includes consideration of “society as a whole,” an “affected region,” and “the locality,” as well as “affected interests.” *Id.* § 1508.27(a). The “intensity” prong of the significance analysis relates to “the severity of the impact.” *Id.* § 1508.27(b). “Intensity” factors include, *inter alia*: the “degree to which the proposed action affects public health or safety”; “[u]nique characteristics of the geographic area” such as wetlands, wild and scenic rivers, or ecologically critical areas; the degree to which effects on the human environment will be “controversial”; the degree to which effects on the human environment are “highly uncertain or involve unique or unknown risks”; whether the action is “related to other actions with individually insignificant but cumulatively significant impacts”; how the action may affect “significant scientific, cultural, or historical resources”; how the action may adversely affect an endangered or threatened species or its critical habitat; and whether the action threatens a violation of federal, state or local environmental laws. *Id.*



43. As established by CEQ, the only circumstance in which an EA or EIS is not required for a major federal action is if a “categorical exclusion” from NEPA review applies. Agencies create such categorical exclusions for their own actions, but an agency may only create a categorical exclusion for a type of action if it establishes the “actions [] do not individually or cumulatively have a significant effect on the human environment and [] have been found to have no such effect in procedure adopted by” the agency. 40 C.F.R. § 1508.4. Agencies must develop “specific criteria for and identification of” actions that qualify as categorical exclusions. *Id.* § 1507.3(b).

44. CEQ further requires that agency-created procedures for establishing categorical exclusions must provide for extraordinary circumstances, such that even if the agency demonstrates an exclusion is generally warranted, when applying the exclusion it must determine whether there are “extraordinary circumstances in which a normally excluded action may have a significant environmental effect.” 40 C.F.R. § 1508.4.

45. Both CEQ and FSA regulations require FSA to “substantiate,” or “gather sufficient information to support[,] establishing a new or revised categorical exclusion.” *See* Nov. 23, 2010 CEQ Memorandum for Heads of Federal Departments and Agencies re: Establishing, Applying, and Revising Categorical Exclusions under NEPA (“CEQ Exclusion Memo”), 75 Fed. Reg. 75628, 75631-38 (Dec. 6, 2010); 7 C.F.R. § 799.34.

46. CEQ has also issued guidance further explaining how an agency should establish categorical exclusions. *See* CEQ Exclusion Memo, 75 Fed. Reg. at 75631-38. The guidance instructs agencies to “substantiate” their decisions in light of relevant evidence, stating that “[f]or actions that do not obviously lack significant effects, agencies must gather sufficient information to support establishing a new or revised categorical exclusion,” because “[s]ubstantiating a new

or revised categorical exclusion is basic to good decision-making. It serves as the agency's own administrative record of the underlying reasoning for the categorical exclusion." *Id.* at 75633.

47. An agency can substantiate a categorical exclusion through "monitoring and/or otherwise evaluating the effects of implemented actions that were analyzed in EAs," "impact demonstration projects," the judgment of the agency's "professional staff as well as outside experts," and "benchmarking, or drawing support, from private and public entities that have experience with the actions covered." *Id.* at 75633-34.

48. In short, an agency such as FSA must do "the heavy lifting when it create[s] the categorical exclusion." *Utah Envtl. Cong. v. Bosworth*, 443 F.3d 732, 750 (10th Cir. 2006). It must "conduct an extensive environmental analysis and determine that any project approved under a categorical exclusion would not produce a significant or cumulative effect on the environment in the absence of extraordinary circumstances." *Id.*

49. Agency actions taken pursuant to NEPA are judicially reviewable under the APA. 5 U.S.C. §§ 702, 704, 706.

### **Administrative Procedure Act**

50. The APA provides a private cause of action to any person "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702.

51. The APA requires that an agency conducting notice-and-comment rulemaking publish in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3).

52. Pursuant to the APA, a court must "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law” or “without observance of procedure required by law.” 5 U.S.C. § 706(2).

### **FSA’s Prior NEPA Regulations**

53. FSA reviews applications for federal loan assistance and decides whether to provide direct and guaranteed loans for a variety of agricultural activities, including for refinancing debt obligations, funding livestock purchases, creating and expanding CAFOs, and providing emergency loans to help agricultural producers recover from losses caused by drought, flooding, and similar disasters.

54. Prior to the 2016 rule, FSA regulations required the agency to conduct an EA before providing any type of “financial assistance” to a wide variety of CAFOs, including many loans and loan guarantees to medium CAFOs. *See* 7 C.F.R. §§ 1940.311-.312 (2015).

55. FSA had a two-tiered system for CAFO EAs, depending on both the size of the facility and its proximity to—and therefore potential impacts on—rural homes and local waterways. The first tier of actions, “Class I,” were “smaller scale approval actions,” requiring analysis “sufficient to determine whether the potential impacts are substantial and further analysis is necessary.” 7 C.F.R. § 1940.311 (2015). “Class II” actions “[we]re basically those which exceed the thresholds established for Class I actions and, consequently, ha[d] the potential for resulting in more varied and substantial environmental impacts.” *Id.* § 1940.312 (2015). “A more detailed environmental assessment [was], therefore, required for Class II actions in order to determine if the action require[d] an EIS.” *Id.*

56. With regard to CAFOs, FSA had to prepare a Class I EA for financial assistance for CAFOs holding more than: 500 slaughter steers and heifers; 350 mature dairy cows; 1,250 or more swine; 5,000 or more sheep; 27,500 or more turkeys; 15,000 or more laying hens or

broilers if the facility used liquid manure management; or 50,000 or more laying hens or broilers if the facility used non-liquid manure handling (dry litter). 7 C.F.R. § 1940.311(c)(8) (2015).

Where a CAFO in this size category could “potentially violate” state water quality standards or was “located near a town or collection of rural homes which could be impacted by the facility, particularly with respect to noise, odor, visual, or transportation impacts,” FSA was required to prepare a Class II EA. *Id.* §§ 1940.312(c)(10); 1940.311(c)(9) (2015). FSA also prepared a Class II EA for CAFOs containing more than double the minimum animal numbers that required a Class I EA. *See id.* § 1940.312(c)(9) (2015).<sup>2</sup> Thus, FSA considered both number of animals and potential environmental effects in deciding whether to conduct a Class I or Class II EA.

57. In accordance with 40 C.F.R. § 1506.6(b), FSA was required to provide notice to the public of both Class I and Class II EAs.

58. FSA revised and removed these requirements with its 2016 rule. 81 Fed. Reg. 51274 (Aug. 3, 2016).

59. As explained below, in the final rule FSA eliminated the Class I / II EA process for all medium CAFOs and replaced it with a categorical exclusion. The categorical exclusion substitutes the EA process with an internal agency checklist called an Environmental Screening Worksheet (“Worksheet”). The Worksheet purportedly serves as the review to determine whether extraordinary circumstances necessitate an EA for a given CAFO, but the Worksheet is insufficient and is not always employed. Of particular note, the Worksheet checklist, even when actually used, fails to provide public notice of the potential federal funding and fails to account

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<sup>2</sup> While FSA previously considered both number of animals and potential environmental effects in deciding whether to conduct a Class I or Class II EA, FSA now considers only the number of animals. As explained *supra* in footnote 1, the previous Class I numerical thresholds differ from the thresholds FSA now uses to delineate “medium” CAFOs.

for a variety of potentially significant CAFO harms. Nonetheless, FSA now uses this checklist as its default process to justify financial assistance to a medium CAFO, in lieu of NEPA review.

**FSA's 2014 Proposed Rule**

60. In September 2014, FSA issued a notice of proposed rulemaking to update its NEPA regulations. 79 Fed. Reg. 52239 (Sept. 3, 2014).

61. FSA's proposal explained that for many loan actions it would eliminate the Class I / Class II EA process described above, and would instead use the Worksheet checklist. *Id.* at 52241.

62. In the proposed rule, FSA did propose categorical exclusions for several programs but insisted it was not exempting CAFOs from EAs entirely. FSA stated that EAs would still be prepared for the "construction or expansion of a CAFO," without setting a minimum size threshold, and for "[r]efinancing of a newly constructed CAFO, including medium CAFOs . . . ." *Id.* at 52257.

63. FSA proposed to eliminate impacts on nearby residents and waterways as criteria for determining whether "extraordinary circumstances" exist that would trigger an EA. *Id.* at 52255-56.

64. FSA also proposed to define CAFOs according to EPA Clean Water Act regulations, and thereby use length of confinement, waste management practices, and number of animals, as a proxy for determining impact under NEPA. *See* 40 C.F.R. § 122.23(b)(6).

65. FSA's medium CAFO loan actions were not among the proposed categorical exclusions. *See* 79 Fed. Reg. at 52255-56.

66. In a public comment on the proposed rule, the National Sustainable Agriculture Coalition asked FSA to consider banning the funding of CAFOs "located in any type of

floodplain” because of CAFOs’ clear environmental impacts in those sensitive areas. The comment asked FSA, at minimum, to require preparation of EAs for such facilities. The comment also asked FSA to consider the cumulative impacts of funding multiple animal feeding operations within the same watershed and to consider requiring that the costs of environmental review be borne by the CAFO loan applicants.

67. Other commenters asked FSA to stop requiring EAs for all medium-sized CAFOs.

68. Even though FSA’s Class I / Class II approach had already required EAs for most CAFOs in EPA’s “medium” size range, FCS Financial, a farm credit entity in Missouri, opposed the proposed rule on the basis that it believed the rule would “substantially change the scope of when an EA is required and could result in a significant increase in the number of EAs that FSA must conduct each year.” The Missouri State FSA Office, the Missouri Soybean Association, the Missouri Securities and Exchange Commission, and twelve Missouri individuals commented, identically, claiming that requiring an EA for all medium CAFOs would differ from the Missouri Department of Natural Resources and EPA requirements.

#### **FSA’s 2016 Final Rule**

69. FSA promulgated its final rule revising its NEPA implementation regulations on August 3, 2016. *See* 81 Fed. Reg. 51274.

70. The agency left most of the proposed rule unchanged.

71. The final rule reiterated that FSA procedures for establishing categorical exclusions require the agency to “consider all relevant information, including” FSA documents, other agency documents concerning similar actions, results from demonstration or pilot projects, analyses from professional staff and other experts, and experiences of other parties. 7 C.F.R. § 799.34(a); 7 C.F.R. § 1940.217 (2015). The final rule also stated that FSA “will follow the

CEQ specified process for establishing Categorical Exclusions,” and “will maintain an administrative record that includes supporting information and findings used in establishing a categorical exclusion.” 7 C.F.R. § 799.34(c)-(d).

72. Yet, in the final rule FSA granted the request made by the Missouri lenders to weaken the NEPA review requirements for FSA lending to medium CAFOs, and created a categorical exclusion. Specifically, FSA stated that “EAs will only be required for large CAFOs; Worksheet review will be completed for small and medium CAFOs if there are no extraordinary circumstances involved in the proposed action.” 81 Fed. Reg. at 51281 (later codified at 7 C.F.R. § 799.41(9), (10)). The final rule, therefore, determined that FSA funding of new or expanding medium CAFOs was categorically excluded from NEPA review.

73. Despite FSA’s statement that it would use the Worksheet for loans to medium CAFOs, and that it would still determine whether extraordinary circumstances exist to trigger an EA, it left the final rule ambiguous as to which steps in the Worksheet must be carried out, as well as to what findings in the Worksheet would result in a finding of extraordinary circumstance and trigger the requirement to complete an EA.

74. Indeed, the final rule contained two separate types of categorical exclusions: one type that must merely be “recorded” on a Worksheet, and the other that “requir[es] review” with the Worksheet. *See* 81 Fed. Reg. at 51291-92, Subpt. D. The rule does not indicate which type medium CAFOs fall into. As a result, since August 3, 2016, some regional FSA officials have filled out the Worksheet checklist prior to funding medium CAFOs, while others simply note the project at the top and leave the Worksheet blank.

75. The agency did not provide notice or opportunity for public comment on the Medium CAFO CatEx, which appeared for the first time in the final rule.

76. Had FSA given notice of the Medium CAFO CatEx in the proposed rule, Plaintiffs would have opposed it.

77. FSA gave no explanation for its reversal from continuing to require EAs for many medium CAFOs in the proposed rule to determining medium CAFOs are categorically excluded in the final rule.

78. FSA also did not substantively respond to the National Sustainable Agriculture Coalition's comments, submitted on behalf of Plaintiffs Dakota Rural Action and Institute for Agriculture and Trade Policy, that FSA should analyze the cumulative impacts of animal feeding operations in watersheds, that increased environmental review must occur for all actions concerning animal feeding operations in floodplains, and that the costs of environmental review should be borne by those benefitting from FSA financing, rather than the public. In fact, FSA mischaracterized the National Sustainable Agriculture Coalition's comment as stating FSA should not alter the NEPA requirements at all. *See* 81 Fed. Reg. at 81280.

79. Even though the Worksheet purports that FSA will consider "negative reactions from the public related to the proposed action or similarly situated actions," the final rule does not require FSA to provide any public notice or an opportunity for public comment when it prepares Worksheets (or merely notes a project on a Worksheet) for categorically excluded medium CAFOs.

80. The final rule also codified FSA's proposal to eliminate impacts on nearby residents and local waterways from the definition of "extraordinary circumstances," which can supersede a categorical exclusion and trigger an EA. *See* 7 C.F.R. § 799.33 (defining "extraordinary circumstances"). Therefore, under the final rule, FSA is no longer required to consider proximity to residences or likelihood of contaminating waterways when assessing the



impacts of medium CAFOs.

**FSA's Failure to Substantiate the Final Rule to CEQ**

81. According to records obtained from CEQ, FSA began revising its NEPA implementation regulations as early as 2006. FSA and CEQ were in communication about FSA's development of the proposed rule, including its proposal to revise its categorical exclusions and categorical exclusion process.

82. In developing a new categorical exclusion, a federal agency provides CEQ materials to support a record showing that the class of actions in the categorical exclusion—either individually or cumulatively—normally do not have significant environmental effects. CEQ reviews the materials and responds to the agencies with questions or suggestions for revising the agency's proposal. Only after CEQ approves the materials as sufficient “substantiation” of the lack of significant environmental effects may the agency promulgate the categorical exclusion.

83. After years of communications about FSA's NEPA regulations, FSA gave CEQ an initial package of materials on January 31, 2013, to substantiate the categorical exclusions that FSA intended to include in its proposed rule. This package did not include any consideration of a categorical exclusion for funding of medium CAFOs.

84. CEQ commented on the substantiation and returned the package to FSA on February 8, 2013.

85. FSA gave a revised and final substantiation package to CEQ on August 5, 2013. That proposal still did not discuss a categorical exclusion for new or expanded medium CAFOs: FSA said that “[i]n particular . . . many types of loan activities that *do not involve new ground disturbance or extraordinary circumstances* are included as [Categorical] Exclusions in the

proposed rule.” Farm Service Agency, “Amending 7 CFR 799: Addition of New Categorical Exclusions, SUPPORTING DOCUMENTATION” at 8-9 (Aug. 2013) (emphasis added).

86. Because FSA had not yet proposed to categorically exclude the creation or expansion of medium CAFOs, the revised package contained no specific information to support such an exclusion.

87. CEQ cleared the proposed rule for publication on August 15, 2013.

88. Following public comment on the 2014 proposed rule, FSA provided CEQ with its final rule language—which, for the first time, included an exemption for medium CAFOs.

89. FSA did not include any materials in the final rule to substantiate its conclusion that loan activities involving the creation and expansion of medium CAFOs individually and cumulatively have no significant effect on the human environment.

90. On July 15, 2016, CEQ wrote a “conformance” letter accepting the categorical exclusions in the FSA final rule. CEQ took “no position on whether the actions to be excluded have the potential for having significant environmental impacts,” but rather “accepted [FSA’s] statement that its determination is based upon experience with these types of actions, review of past actions, benchmarking with other agency categorical exclusions, and professional expertise.”

91. Because none of the substantiation packages FSA submitted to CEQ contemplated a categorical exclusion for medium CAFOs, FSA never submitted any materials to CEQ to substantiate or support its conclusion that loan activities involving the creation and expansion of medium CAFOs individually and cumulatively have no significant effect on the human environment. Thus, FSA never substantiated the Medium CAFO CatEx.

**Practical Effects of the Medium CAFO CatEx on FSA Lending**

92. FSA provides vast amounts of loan funding to medium CAFOs across the country, without which hundreds, if not thousands, of medium CAFOs would not be constructed or expanded each year.

93. For example, records provided by FSA in response to a Freedom of Information Act (“FOIA”) request show that between August 3, 2016 and August 2018 (*i.e.*, since the 2016 rule established the Medium CAFO CatEx), FSA provided at least 130 direct loans over \$100,000 or guaranteed loans over \$300,000 to animal agriculture facilities in the state of Indiana alone. These loans were for activities such as, *inter alia*: building new or expanding existing dairy, chicken, turkey, pig, veal calf, or puppy barns; building new manure management structures; and purchasing livestock. For over 100 of those loans, FSA used a Worksheet rather than conducting a public participation process and completing an EA. None of the records produced showed that FSA prepared an EA for a medium CAFO.

94. Similarly, other FOIA records from FSA show that between August 3, 2016 and December 2017, FSA used Worksheets to supply loans to at least 100 medium CAFOs in Arkansas, dozens of medium CAFOs in New York, and more than 10 medium CAFOs in both Iowa and Kansas.

95. FSA’s final rule and its Medium CAFO CatEx mean that FSA no longer prepares EAs or Environmental Impact Statements for CAFOs confining as many as 2,499 pigs, 699 dairy cows, 54,999 turkeys, or 124,999 broiler chickens.

96. Illustrative actions for which FSA now uses Worksheets include loans for, *inter alia*: creation of two new broiler chicken houses at a CAFO in IZARD County, Arkansas; an expansion of a CAFO in Lawrence County, Indiana to confine 96,000 broiler chickens; an

expansion of a dairy CAFO to 699 cows in Franklin County, New York; the construction of a 2,200 pig “wean to finish” CAFO on existing pasture land next to a forest preserve in Noble County, Indiana; a new 40,000 turkey CAFO in Daviess County, Indiana, less than 1,000 feet from the South Fork Prairie Creek waterway; and a new 2,480 pig CAFO in Dubuque County, Iowa.

97. These facilities fall just under the threshold for a “large” CAFO, for which FSA still requires an EA. Prior to the 2016 rule, FSA loan approval for facilities of these sizes would also have triggered the EA and corresponding public notice and comment process.<sup>3</sup>

98. For example, FSA funding for an 110,000 broiler chicken facility using dry litter management would have required an EA prior to the August 3, 2016 Rule, but now is categorically excluded. *Compare* 7 C.F.R. § 1940.312(c)(9) (removed Aug. 3, 2016) *with id.* §§ 799.31-.32, .41 *and* 40 C.F.R. § 122.23(b)(4), (6). Similarly, FSA would have had to prepare an EA for funding a 2,000 pig CAFO prior to the final rule, but such funding is now also categorically excluded. *Id.*

### **Public Participation in the NEPA Process**

99. FSA Worksheets enable the distribution of these loans, backed by millions of federal taxpayer dollars, without any notice to the surrounding community or the public.

100. Public notice of these facilities is critical to neighboring residents because it provides them with information about CAFOs being built or expanded in their communities, and their impacts, that residents cannot obtain elsewhere. Not even EPA, the main agency tasked

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<sup>3</sup> FSA accepts public comments on its EAs concerning financing of CAFOs. *See* Oct. 10, 2018 Farm Service Agency Draft Environmental Assessment at 8-9, *available at* [https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/State-Offices/Arkansas/env-docs/draft\\_ea\\_garner\\_independco\\_20181010.pdf](https://www.fsa.usda.gov/Assets/USDA-FSA-Public/usdfiles/State-Offices/Arkansas/env-docs/draft_ea_garner_independco_20181010.pdf) (soliciting public comment on FSA financing of construction of 157,200 broiler CAFO in Independence County, AR).

with regulating the CAFO industry, knows where and how many CAFOs exist nationwide.<sup>4</sup>

101. Public notice of these facilities also allows neighboring residents and other members of the affected public to comment on and influence FSA's decision to provide financing to the CAFOs. *See* 40 C.F.R. § 1506.6. Many local residents and their advocates, such as Plaintiffs, utilize comment periods to voice opposition for new facilities, demonstrating the controversial nature of these funding actions.

102. Because the Worksheet only pays lip service to public notice, without actually requiring that the agency give notice, federal funding now occurs without the affected community ever able to weigh in.

103. In fact, in applying the public reaction assessment provision of the Worksheet, FSA has used a lack of public reaction to justify the use of the Worksheet instead of an EA—even though the internal Worksheet process itself precluded the public from learning about and voicing opposition to proposed medium CAFO financing.

104. For example, in employing the Worksheet, the FSA has used a lack of public opposition to a medium-sized turkey CAFO in Indiana to justify its decision to approve lending for the facility, despite the fact that no notice had been given to the public. Ironically, an FSA official wrote in the applicable Worksheet, “There has been no public reaction to FSA helping finance these existing turkey barns. If there would be, FSA could consider working with the applicant on a[n] alternative option of building barns elsewhere or finding another facility for

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<sup>4</sup> EPA recently estimated that approximately 63,000 “small- and medium-sized” CAFOs may exist. EPA Mot. Stay at 5, *Waterkeeper Alliance v. EPA*, No. 09-1017 (D.C. Cir. Jul. 17, 2017), Doc. #1684518. EPA has also estimated that CAFOs in the United States generate more than 500 million tons of manure nationally each year, three times the amount of raw waste that humans produce. *See* 68 Fed. Reg. 7176, 7179 (Feb. 12, 2003). That number has surely grown in the 15 years since EPA's estimate.

sale.” In a similar vein, in May 2018, a Worksheet for a new veal calf barn and lagoon in Indiana first acknowledged “negative reactions from the public related to the proposed action or similarly situated actions,” but then stated that there is “[n]o public comment period required for a facility this size.” FSA’s decision to exclude medium CAFOs from public comment renders meaningless FSA’s assessment of public reaction as part of filling out a Worksheet.

105. In addition, even medium CAFOs near a waterway or population center can no longer trigger an EA, according to FSA, because FSA no longer considers impacts on nearby residents or waterways as an “extraordinary circumstance” that triggers an exception to a categorical exclusion. *See* 7 C.F.R. § 799.33 (defining extraordinary circumstances). Even if the public received notice of a Worksheet for a funding project, FSA’s new limits on extraordinary circumstances result in FSA considering fewer impacts of medium CAFOs, overall.

106. The result is that FSA is leaving communities impacted by these operations without any information or opportunity to provide input and opposition to FSA before the agency makes loan decisions about major industrial operations near their homes.

#### **Community and Environmental Effects of FSA Funding of Medium CAFOs**

107. Medium CAFOs do, in fact, pose substantial risks to the environment and to public health by creating surface water, groundwater, and air pollution, as well as antimicrobial resistance problems. CAFOs also harm the quality of life and depress property values of those living and recreating in close proximity to the facilities. They can also harm public health for residents living nearby or downstream. Any one of these facts can and should warrant EAs or further environmental review.

108. Indeed, Courts have recognized that FSA-financed CAFOs have significant effects on the environment. In response to a lawsuit filed by local residents opposing FSA’s

inadequate NEPA review process for a 6,500-head pig CAFO in the Buffalo River watershed in Arkansas, the U.S. District Court for the Eastern District of Arkansas held that FSA and the Small Business Administration (“SBA”) violated both NEPA and the Endangered Species Act by approving guaranteed loans to the CAFO operator because it “arbitrarily determined that [the pig CAFO] would have no significant impact on the environment.” *See Buffalo River Watershed All.*, 2014 WL 6837005 at \*4. The court noted the fact that such facilities are permitted by state law does not substantiate the “generalized conclusion” that they will not have significant environmental effects. *Id.*

109. Further, FSA regularly funds several new and expanded medium CAFOs in small geographic areas and close proximity to each other, within months of each other. The concentration of medium (and other sized) CAFOs resulting from FSA’s lending practices in turn concentrates the human and environmental impacts of these operations in certain communities, watersheds, and ecosystems.

#### **Medium CAFO air pollution**

110. CAFOs, including medium CAFOs, are one of the largest sources of air pollution in the country.

111. Waste from pig and dairy CAFOs typically collects in liquid waste management systems. These systems are frequently open and uncovered and release gases into the ambient environment.

112. Moreover, CAFOs draw down the manure impoundments by spraying or otherwise applying the liquid waste onto nearby fields, causing additional emissions and causing particulates to drift around the surrounding communities for miles.

113. Dry waste from chicken and turkey CAFOs typically collects in large waste piles

prior to disposal on field. Emissions and particles from both the waste piles and application fields can be transported by wind onto neighboring properties.

114. Regardless of the method of managing and dispersing the waste, CAFO waste continually releases pollutants into the air.

115. In addition, CAFOs use large ventilation fans to emit pollutants out of confinement buildings. The ventilation is intended to remove dangerous gases that collect inside the buildings, which can—and do—sicken and kill confined animals and employees.

116. The number of animals at a CAFO is generally proportional to the air pollution it emits.

117. CAFOs emit more pollutants than traditional, small-scale farms because they confine animals and waste on a much larger scale.

118. CAFOs emit a variety of air pollutants, including ammonia, hydrogen sulfide, methane, nitrous oxide, volatile organic compounds, and particulate matter.

119. They also emit pathogens—including those that carry antimicrobial resistance—and particles of litter and manure, dust, feathers, and other allergens.

120. Such air pollution harms humans, animals, and the environment.

121. CAFO air pollution has been linked to climate change, the formation of haze, ozone, and fine particulate matter, and also contributes to land and water pollution through processes like deposition.

122. The U.S. Centers for Disease Control and Prevention consider airborne emissions from CAFOs to “constitute a public health problem.” Air emissions can cause serious and life-threatening health problems, and even death. The health problems include respiratory illnesses, irritation to the eyes, nose, and throat, anxiety and depression, memory loss, and heart disease.



The effects are amplified in vulnerable populations like children and the elderly. For example, one study found that children attending school one-half mile from a pig CAFO had significantly higher rates of physician-diagnosed asthma than children in schools located farther away.<sup>5</sup>

123. Ammonia is a leading CAFO air pollutant with health and environmental impacts. It is a caustic gas with a pungent odor that, at CAFOs, releases immediately as an animal evacuates their bowels, and again as animal waste decomposes. Exposure to ammonia can cause a range of adverse health effects, including nasal, throat, and eye irritation; burning of the respiratory tract, skin, and eyes; scarring; hemorrhaging of the gastrointestinal tract; and lethal airway blockage and respiratory insufficiency. According to a seminal study commonly referred to as the “Iowa Study,” at high concentrations, ammonia will bypass upper airways and directly affect the lungs, causing inflammation of lower lungs and pulmonary edema or swelling.<sup>6</sup>

124. Numerous studies show that many types of CAFOs can produce harmful concentrations of ammonia even beyond the CAFO’s property lines.<sup>7</sup>

125. Ammonia also contributes to nitrogen water pollution through deposition onto land and into waterways.<sup>8</sup> Nitrogen is one of the most harmful forms of water pollution across the nation, and is responsible for impairing numerous waterways. Nitrogen and other nutrients cause excessive algae growth, including harmful algae blooms containing toxins. And as the

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<sup>5</sup> See S.T. Sigurdarson & J.N. Kline, *School Proximity to Concentrated Animal Feeding Operations and Prevalence of Asthma in Students*, 129 *Chest* 1486, 1489 (2006).

<sup>6</sup> Iowa State Univ. & Univ. of Iowa Study Group, *Iowa Concentrated Animal Feeding Operations Air Quality Study, Final Report*, 6-7 (2002) (“Iowa Study”).

<sup>7</sup> See, e.g., *id.*; Williams, et al., *Airborne Cow Allergen, Ammonia and Particulate Matter at Homes Vary with Distance to Industrial Scale Dairy Operations: An Exposure Assessment*, 10 *Envtl. Health* 72 (2011); Schinasi, et al., *Air Pollution, Lung Function, and Physical Symptoms in Communities Near Concentrated Swine Feeding Operations*, *Epidemiology* 208, 214 (2011).

<sup>8</sup> U.S. Department of the Interior, U.S. Geological Survey, *Atmospheric Deposition Program of the U.S. Geological Survey: Fact Sheet FS-112-00 p. 1-6*, (December 2000) at 1.

algae dies, its decomposition depletes the waterway of the oxygen that fish and other aquatic organisms need to survive. The result is “dead zones” devoid of any aquatic life.<sup>9</sup>

126. Hydrogen sulfide, another product of CAFOs, is a flammable, poisonous asphyxiant that produces an odor similar to rotten eggs. Hydrogen sulfide can cause difficulty breathing, loss of consciousness, shock, pulmonary edema, coma, brain damage, and death. Survivors of hydrogen sulfide poisoning commonly have neuropsychiatric defects, some of which can be permanent.

127. Exposure to higher levels of hydrogen sulfide is immediately hazardous to human life and health. It can cause rapid loss of consciousness, then death, after one or two breaths. This has been referred to as the “slaughterhouse sledgehammer” effect.

128. Even at low concentrations, hydrogen sulfide causes strong odors in areas surrounding CAFOs.

129. The National Research Council has found hydrogen sulfide emissions from CAFOs to have a “significant” effect on the quality of human life.<sup>10</sup>

130. One study found that CAFOs in Minnesota caused exceedances of the state standard for hydrogen sulfide concentrations up to five miles away.<sup>11</sup>

131. CAFOs and CAFO waste disposal also release the powerful greenhouse gases methane and nitrous oxide. Methane and nitrous oxide—two of the six greenhouse gases that

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<sup>9</sup> *Id.* at 2.

<sup>10</sup> Nat’l Research Council, *Air Emissions from Animal Feeding Operations: Current Knowledge, Future Needs* (2003).

<sup>11</sup> R. Marks, Natural Res. Def. Council & Clean Water Network, *Cesspools of Shame, How Factory Farm Lagoons and Sprayfields Threaten Environmental and Public Health* (2001) (citing Minn. Pollution Control Agency, *Feedlot Air Quality Summary: Data Collection, Enforcement and Program Development* (1999)).

“together constitute the root cause” of climate change and its “resulting impacts on public health and welfare,” 74 Fed. Reg. 66517 (Dec. 15, 2009)—are 20 and 300 times more powerful than carbon dioxide at trapping heat in the atmosphere over a 100-year period, respectively.

132. EPA recently stated that U.S. greenhouse gas emissions from agriculture have grown by approximately 17% since 1990. The driver behind that increase has been the 68% rise in emissions from livestock manure.

133. Methane is produced by anaerobic decomposition of organic matter in biological systems and by the normal digestive process in ruminant animals.

134. Nitrous oxide is typically a product of a microbial process occurring in soils and fertilizer via decomposition of livestock manure and urine.

135. In 2006, industrial animal agriculture was responsible for emitting almost nine million tons of methane in the United States alone. Increases in methane emissions correlate to the consolidation of the CAFO industry, with EPA reporting a 34% increase in methane emissions from manure management between 1990 and 2006.<sup>12</sup>

136. Agricultural soil management activities, which include application of manure to the soil—particularly the application of liquid manure, as typically results from CAFOs’ use of manure lagoons—are the largest source of nitrous oxide emissions in the United States, producing approximately 72% of nitrous oxide emissions in 2006.

137. CAFOs are also a significant source of volatile organic compound (“VOC”) emissions. EPA defines VOCs as “any compound of carbon, excluding carbon monoxide, carbon

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<sup>12</sup> EPA, Report No. EPA-430-R-08-005, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2006* (2008). That increase has rapidly grown in recent years, to a 65% increase between 1990 and 2014. EPA, Report No. EPA-430-R-16-002, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2014*, at 5-9 (2016).

dioxide, carbonic acid, metallic carbides or carbonates, and ammonium carbonate, which participates in atmospheric photochemical reactions.” 40 C.F.R. § 51.100(s). CAFOs emit VOCs through feed decomposition, fresh waste, enteric processes, and manure decomposition. CAFOs emit as many as 165 VOCs; of these, 24 are odorous chemicals and 21 are listed as Hazardous Air Pollutants under the Clean Air Act. 42 U.S.C. § 7412(b). CAFO-emitted Hazardous Air Pollutants include benzene, formaldehyde, tetrachloroethylene, methanol, toluene, and xylene. Volatile organic compounds also react with other pollutants to form ground-level ozone, which causes a range of serious health effects.

138. Some VOCs are toxic to the nervous system in both humans and animals. Studies examining neurobehavioral issues among humans living near CAFOs have found increased rates of depression, anger, fatigue, and confusion.<sup>13</sup>

139. According to the Iowa Study, VOCs can also cause serious problems in animals, including delayed weaning, higher stress levels, and reduced growth and appetite. Other effects include deteriorated muscles, organs, and respiratory functioning, and increased morbidity and mortality.

140. CAFOs emit particulate matter—including particles of dry manure, bedding and feed materials, biological matter, and dusts—directly, and also do so indirectly through chemical reactions of “precursor” gases that CAFOs release into the atmosphere. Ammonia and hydrogen sulfide, as well as nitrous oxide and VOCs, are particulate matter precursors. Ammonia reacts with acidic compounds in the air to form small particles known as ammonium nitrate and ammonium sulfate aerosols. These fine particles have devastating effects on cardiovascular

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<sup>13</sup> E.g., S. Schiffman et al., *Quantification of Odors and Odorants from Swine Operations in North Carolina*, 1089 *Agric. & Forest Meteorology* 213 (2001).

systems. For example, in 2008, researchers estimated that over 1,000 deaths per year result from heightened levels of fine particulate matter in California's San Joaquin Valley air basin, where dairies are one of the largest sources of ammonia and volatile organic compounds.<sup>14</sup>

141. Indeed, CAFOs persistently cause National Ambient Air Quality Standards ("NAAQS") exceedances because of their releases of VOCs and particulate matter. For example, dairies chronically exceed ozone and fine particulate matter NAAQS in the San Joaquin Valley. By any estimate, "dairies are among the largest source of VOCs in the Valley, and these smog-forming VOC emissions have a significant adverse impact on efforts to achieve the health-based air quality standards."<sup>15</sup>

142. Haze from CAFOs also drastically reduces visibility, creates significant losses of public enjoyment of wildlife and wilderness areas, and harms tourism-dependent communities.

#### **Medium CAFO effects on surface and groundwater quality**

143. CAFOs are one of the largest sources of water pollution in the country.

144. EPA has found that "[a]gricultural operations, including CAFOs, now account for a significant share of the remaining water pollution problems in the United States."<sup>16</sup> Indeed, agriculture "is the leading contributor of pollutants to identified water quality impairments in the Nation's rivers and streams."<sup>17</sup> Twenty-nine states have recently made similar findings, identifying animal feeding operations as contributors to water quality impairment in EPA's 2009

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<sup>14</sup> J.V. Hall et al., *The Benefits of Meeting Federal CAA Standards in the South Coast & San Joaquin Valley Air Basins* (Nov. 2008).

<sup>15</sup> San Joaquin Valley Air Pollution Control District, *Air Pollution Control Officer's Determination of VOC Emission Factors for Dairies*, at 6 (Aug. 1, 2005).

<sup>16</sup> National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7176, 7181 (Feb. 12, 2003).

<sup>17</sup> *Id.*

National Water Quality Inventory.<sup>18</sup>

145. Medium CAFOs can produce the waste of a mid-sized city. For example, an average dairy cow produces more than 120 pounds of manure a day.<sup>19</sup> In contrast, the average four-person household produces one pound of sewage waste per day.<sup>20</sup> Thus, a 200-cow dairy CAFO generates around the same amount of waste as a 96,000-person city, and a 2,450-pig CAFO generates around the same amount of waste as a 50,000-person town.

146. Unlike concentrated human waste, which is handled by wastewater treatment plants that decompose and disinfect the waste to reduce its threat to water quality, CAFOs generally transfer animal waste into huge pits or basins, where they hold the manure until spreading it onto fields without much, if any, prior treatment.

147. CAFOs operate, and thus produce waste, throughout the year. Because crops do not grow throughout the year in many regions where CAFOs are prevalent, and waste applied to the ground when crops are not growing increases the risk of runoff, CAFOs must store waste for long periods of time. Unlined or inadequately-lined manure storage lagoons can contaminate communities' well water if the manure leaks through the soil into aquifers below.

148. When manure from these massive stockpiles is eventually applied to the ground or crops, it is usually sprayed or otherwise disposed onto land without barriers between fields and waterways. Runoff, drainage, or percolation from land application of manure can contaminate waters with pathogens, excessive nutrients, pharmaceuticals, heavy metals, and other pollutants, threatening the health of the aquatic ecosystem and members of the public who

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<sup>18</sup> 76 Fed. Reg. 65431, 65434 (Oct. 21, 2011).

<sup>19</sup> See *In re Application of Riverkeeper*, 75 N.Y.S. 3d 854, 859 n.5 (N.Y. Sup. Ct., Albany Co. 2018).

<sup>20</sup> See EPA, "Sewage Sludge Use and Disposal Rule – Fact Sheet" (Nov. 1992).

swim or recreate in the waterways. Thus, the CAFO system of manure disposal contaminates surface and ground waters used for drinking, recreation, and by imperiled species.

149. Geologic factors add to the risk of CAFO pollution of groundwater in certain areas of the country. For example, in places like Wisconsin, Arkansas, and southern Indiana, karst formations—*i.e.*, fractured limestone bedrock features—allow the direct infiltration of waste pollutants from the land surface down to the groundwater.

150. CAFOs can affect groundwater quality by increasing salinity and contributing such contaminants as pathogens, nitrates, pesticides, antibiotics and other pharmaceuticals, steroids, hormones, and dissolved organic carbon.

151. In some cases of private well contamination by CAFO waste, the tap water has run brown with a strong odor. In other cases, rural residents are unaware that their water is contaminated with unsafe levels of nitrates or other pollutants.

152. Nitrate contamination can also cause downstream communities to bear significant costs to treat municipal drinking water. *See Bd. of Water Works Trustees of City of Des Moines, Iowa v. Sac County Bd. of Supervisors*, 890 N.W.2d 50, 54 (Iowa 2017) (stating that the Des Moines Water Works spends approximately \$4,000-\$7,000 per day to treat water contaminated by agricultural nitrate pollution, and that the Water Works will need to invest \$260 million to design and construct a larger treatment facility before 2020 to ensure that water remains safe for human consumption).

153. Further, when manure pollutes surface water during winter and spring months, the contamination contributes to the creation and expansion of toxic blue-green algae blooms during the summer, which also impacts public water supplies. For example, in 2014, a blue-green algae bloom caused the City of Toledo, Ohio to order its residents not to use public water for drinking,

cooking or bathing.<sup>21</sup> Surface water pollution from CAFO waste has also led to algae blooms linked to major fish die-offs, significant decline of underwater plants, and odors and bacterial contamination that deter people from recreating on rivers, lakes, and other watercourses. Contaminated groundwater can also move laterally and enter rivers and streams to contaminate those surface waters.

### **Medium CAFO contribution to the development and spread of antibiotic resistance**

154. Medium CAFOs routinely provide continuous doses of antibiotics to every animal confined within the facility, regardless of whether the animal is sick. Routine antibiotics are supposed to be primarily used to prevent sickness due to crowded, stressful confinement conditions.

155. Continuous, herd-wide and flock-wide use of antibiotics at CAFOs leads to the development and spread of antibiotic-resistant bacteria; giving antibiotics to an entire group of animals at a facility in steady, low doses “strongly encourages” drug resistance, “especially when provided in feed or water, where they remain active and are widely dispersed.”<sup>22</sup> This resistance is then readily transmitted to surrounding bacteria.

156. Antimicrobial-resistant pathogens are capable of transferring to humans, and jump from manure, live animals, and animal carcasses at CAFOs to human populations via various environmental pathways. These pathways include: through the air as dust, up from the soil into edible crops, into groundwater and surface waterways, and through the food chain during

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<sup>21</sup> Carolyn L. McCarthy et al., Community Needs Assessment After Microcystin Toxin Contamination of a Municipal Water Supply – Lucas County, Ohio, September 2014, 65 *Morbidity & Mortality Weekly Report* 925 (2016), available at <https://www.cdc.gov/mmwr/volumes/65/wr/mm6535a1.htm>.

<sup>22</sup> Stuart B. Levy, *Multidrug Resistance—A Sign of the Times*, 338 *New Eng. J. of Med.* 1376, 1377 (1998); see also White House, National Action Plan for Combating Antibiotic-Resistant Bacteria 20 (2015).



slaughter processes.

157. Scientific research and government findings tie antibiotic use in the raising of food-producing animals to increased antimicrobial resistance in bacterial populations in animals, the environment, and humans.

158. Indeed, a recent study of veterans in rural Iowa found that the risk of antibiotic-resistant *Staphylococcus aureus* (a bacteria species) was 88% higher among veterans living within one mile of high-density pig CAFOs.<sup>23</sup>

159. Upon human exposure, the resistant bacteria can colonize the human gut and cause illnesses resistant to clinically important antibiotics.

160. Antimicrobial resistance extends to CAFOs of other kinds that FSA finances through the Worksheet process, too—including puppy mills that breed dogs for sale. For example, in September 2018, the CDC confirmed that an outbreak of *Campylobacter jejuni* infections that sickened 118 people between 2016 and 2018 originated at a national pet store chain based in Ohio. Outbreak isolates were resistant to *all* antibiotics commonly used to treat *Campylobacter* infections. Review of store records revealed that 95% of the puppies investigated (142 out of 149) received one or more courses of antibiotics, leading the CDC to conclude that puppies can be a source of multidrug-resistant *Campylobacter* infections in humans.<sup>24</sup>

161. Antibiotic-resistant bacteria are such a significant threat that the United Nations

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<sup>23</sup> See M. Carrell et al., *Residential Proximity to Large Numbers of Swine in Feeding Operations is Associated with Increased Risk of Methicillin-Resistant Staphylococcus Aureus Colonization at Time of Hospital Admission in Rural Iowa Veterans*, 35 *Infection Control & Hosp. Control Epidemiology* 190 (2014).

<sup>24</sup> Martha P. Montgomery, MD, et al., *Multidrug-Resistant Campylobacter jejuni Outbreak Linked to Puppy Exposure—United States, 2016-2018*, *Morbidity and Mortality Weekly Report* (Sept. 21, 2018), available at [https://www.cdc.gov/mmwr/volumes/67/wr/mm6737a3.htm?s\\_cid=mm6737a3\\_w](https://www.cdc.gov/mmwr/volumes/67/wr/mm6737a3.htm?s_cid=mm6737a3_w).

General Assembly, acting for only the fourth time on a public health issue and the first time since the Ebola outbreak in 2014, declared resistance a “most urgent global risk.”<sup>25</sup> In 2014, President Obama issued an Executive Order declaring, “Combating antibiotic resistant bacteria is a national security policy.” Exec. Order No. 13,676 (Sept. 18, 2014).

### **Medium CAFO consumption of surface and groundwater**

162. CAFOs, including medium CAFOs, are extremely water intensive. They can cause significant reductions in water supply, especially in drought areas, harming neighbors and their businesses.

163. For example, studies estimate a “finishing” pig consumes 3 to 5 gallons of water per day.<sup>26</sup> Thus, a 2,450 pig CAFO uses around 4,470,000 gallons of water per year. A dairy CAFO with 500 dairy cows uses an estimated 6,700,000 gallons of water per year. These estimates do not include water usage once the animals or animal products leave a CAFO’s boundaries for further water-intensive activities like slaughter and processing.

164. CAFO consumption of groundwater can cause the overdraft of aquifers. If groundwater levels decline, polluted groundwater or seawater can migrate or be drawn into areas that would otherwise not be affected by the polluted groundwater or seawater contamination. Overdraft also causes land subsidence, which can damage property and permanently reduce an area’s groundwater storage capacity.

165. Overconsumption of groundwater by CAFOs has particularly significant effects in drought-affected areas. For example, the concentration of CAFOs in California’s San Joaquin

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<sup>25</sup> Press Release, United Nations, High-Level Meeting on Antimicrobial Resistance (Sept. 21, 2016), *available at* <http://www.un.org/pga/71/2016/09/21/press-release-hl-meeting-onantimicrobial-resistance>.

<sup>26</sup> *See, e.g.*, Glen Almond, *How Much Water Do Pigs Need?*, *available at* [https://projects.ncsu.edu/project/swine\\_extension/healthyhogs/book1995/almond.htm](https://projects.ncsu.edu/project/swine_extension/healthyhogs/book1995/almond.htm).

Valley—which has suffered a drought for the past several years—has contributed to reduced availability of groundwater, a lower groundwater table, groundwater quality deterioration, and subsidence. Indeed, drought conditions are so severe that over at least the past six years, USDA has repeatedly provided emergency drought relief funding to agricultural producers in counties within the San Joaquin Valley. Yet during the same time period, FSA has also provided several loans to build and expand CAFOs, including medium CAFOs, in the San Joaquin Valley.

**Medium CAFO effects on endangered and sensitive species**

166. Medium CAFOs across the United States pose significant risks to endangered and threatened species and other sensitive wildlife and plants.

167. As described above, CAFOs release chemicals, toxic gases, hormones, heavy metals, pesticides, and pathogens into the environment. Once in the environment, these pollutants pose risks to endangered and other sensitive wildlife and ecosystems.

168. For one example, according to the manufacturer’s Material Safety Data Sheet, the growth-promoting and beta agonist animal drug ractopamine is moderately toxic to plants and slightly toxic to aquatic invertebrates.

169. CAFOs regularly provide ractopamine and other beta agonists to the animals they confine.

170. Ractopamine often passes through the animal given the drug and is released into the environment with the animal’s waste.

171. When FDA “adverse drug reports”—*i.e.*, complaints about ractopamine by the drug’s users to FDA, which identify the user’s location—are cross referenced with habitat data from the U.S. Fish and Wildlife Service, at least ninety-eight species of endangered aquatic invertebrates and plants have critical habitat in areas where ractopamine is used.

172. In addition, the spraying or other broadcasting of CAFO waste in areas near vernal (seasonal) pools can pollute these highly sensitive ecosystems with such contaminants as estrogens and cause alterations to the pools' dissolved oxygen, conductivity, and PH levels. In 1998, a CAFO waste spill in California's Merced National Wildlife Refuge killed endangered vernal pool fairy shrimp and tadpole shrimp.

173. Intensive confinement of animals also creates conditions for the spread and mutation of bacterial and viral pathogens, which can then infect endangered and other sensitive wild animals. For example, avian influenza from turkey and chicken CAFOs has spread to wild migratory bird populations.

#### **Medium CAFO effects on confined animals**

174. In addition to numerous threats to human health and the environment described above, medium CAFO practices, including the intensive confinement of animals in inhumane and unnatural ways and the collection of massive quantities of concentrated CAFO waste, also directly harm the animals living within the CAFO.

175. The practice of high density stocking of animals in medium CAFOs, and in trucks during transportation to and from CAFOs, increases the confined animals' own susceptibility to illness and disease; this also increases the chance for the confined animals' diseases to spread to wild animals and humans.

176. CAFO animals are also exposed to high concentrations of the many harmful air pollutants emitted from their waste. CAFOs must utilize fans to ventilate confinement buildings just to keep the emissions from killing the animals inside.

177. Because CAFOs confine and raise animals in unnatural ways, CAFO operators routinely perform unnatural and inhumane practices to make sure the animals survive to produce

dairy, eggs, and meat for human consumption, in conditions in which they would otherwise die or cut into the operator's bottom line.

178. For example, chicken and turkey CAFO producers mutilate the birds they keep by cutting off their beaks and toes—without anesthetic—so that birds jammed together do not kill or seriously wound each other.

179. Similarly, pig CAFO producers often cut off pigs' tails—without anesthetic—so that the cramped pigs do not bite others' tails and create infection.

180. CAFO producers also breed animals to grow to unnatural size at unnatural speeds, leading to heart and lung complications and painful leg injuries.

181. These are just some of the innumerable inhumane practices that underpin the system of extreme overcrowding on CAFOs.

182. Animals who are not raised in CAFOs generally are not subjected to such practices and have a better quality of life free from excessive suffering.

183. Medium CAFOs use these and other inhumane practices to enable them to raise animals in intensive confinement. Without these practices and their harmful impacts to CAFO animals, the concentration and disposal of massive quantities of waste by CAFOs, and resulting CAFO water and air pollution, would not be possible.

#### **Medium CAFO effects on environmental justice communities**

184. Environmental and public health harms from medium CAFOs are experienced most by the historically under-resourced communities that live adjacent to and nearby the CAFOs.

185. Studies by university and government researchers have found that low income and “minority” communities are more likely than white communities to live near CAFOs and

bear the brunt of the harmful environmental and public health effects of the industrial operations.<sup>27</sup>

186. In early 2017, EPA's External Civil Rights Compliance Office raised "deep concern" that African Americans, Latinxs, and Native Americans "have been subjected to discrimination as the result of North Carolina's operation of its Swine Waste General Permit program." EPA interviewed residents surrounding CAFOs and heard descriptions of "an overpowering stench, pests," a "loss of community" in which "young adults leave and do not return because of the odors, fear of health impacts from the air and drinking water," and "increases in cases and severity of asthma and other respiratory illnesses," among other pig CAFO effects. The residents reported that the effects have been compounded by an "increase in industrial poultry operations" in the same area.

187. A recent study published in the North Carolina Medical Journal supports EPA's investigation, concluding that "North Carolina communities located near pig CAFOs had higher all-cause and infant mortality, mortality due to anemia, kidney disease, tuberculosis, septicemia, and higher hospital admissions/ED visits of [low birth weight] infants."<sup>28</sup>

188. Similarly, a comparison of census demographic data throughout California and the distribution of dairy CAFOs found that the environmental costs of dairy production are imposed on a disproportionately poor, non-white, and non-English speaking population in the

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<sup>27</sup> See, e.g., Jan. 12, 2017 EPA Letter of Concern to N.C. DEQ 6-7 (citing Steve Wing et al., *Environmental Injustice in North Carolina's Hog Industry*, *Envtl. Health Perspectives* (Mar. 2000)).

<sup>28</sup> Kravchenko et al., *Mortality and Health Outcomes in North Carolina Communities Located in Close Proximity to Hog Concentrated Animal Feeding Operations*, 79 N.C. Med. J. 278 (Sept.-Oct. 2018), available at <http://m.ncmedicaljournal.com/content/79/5/278.full.pdf>.

San Joaquin Valley.<sup>29</sup>

189. The concentration of CAFOs near communities of color is not happenstance but rather a product of structural racism.

190. These communities often lack the political power with their state legislators to invoke state-based protections. For instance, in North Carolina, a group of approximately 400 residents living on what were previously slave plantations—areas that remain central to the state’s African-American communities, but where the state has permitted CAFOs to concentrate—brought common law nuisance suits against the corporate CAFO producer operating facilities in their community. After the first of those suits succeeded, with juries finding hundreds of millions of dollars of damages caused by the CAFOs to their neighbors, North Carolina’s legislature passed laws limiting the plaintiffs’ ability to bring suit.

#### **Medium CAFO funding effects on family farmers**

191. FSA’s funding of CAFOs, including medium CAFOs, does not merely harm communities and their environment, but also serves the interests of large, multinational corporations over those of individual, independent family farmers.

192. In the CAFO industry, “integrators” are large companies that contract with CAFO operators for growing services. Integrators often own the farmed animals and control slaughter and processing. The integrators typically supply their contract “growers” with recently born or hatched animals along with feed, medication, and contractually mandated growing protocols, and then return to claim the grown animals for slaughter. The growers merely contract with the

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<sup>29</sup> Chelsea MacMullan, *Dairy CAFOs in California’s San Joaquin Valley: Local Benefits and Costs* (May 2007), available at [http://www.humanesociety.org/assets/pdfs/farm/macmullan\\_apa-2007\\_final.pdf](http://www.humanesociety.org/assets/pdfs/farm/macmullan_apa-2007_final.pdf) (prepared as part of Goldman School of Public Policy Master of Public Policy degree, UC Berkeley).

integrators to grow animals so the integrators can later sell the animal's products. Integrators' control over livestock production through such contractual arrangements has increased rapidly in recent decades, and the vast majority of chickens and pigs raised for meat are now raised in this system, using contract CAFOs to grow the animals.

193. In this relationship, the growers become legally responsible for the animals' waste. They are also financially responsible for building and maintaining CAFO structures, although at specifications required by the integrators.

194. Like FSA, the SBA has historically provided funding support—through, *inter alia*, loan guarantees—to create and expand CAFOs.

195. According to a recent audit report by the SBA Office of Inspector General, CAFO chicken integrators control their contract growers to such a degree that SBA must regard growers as affiliates of the integrator, not independent small businesses. The audit report notes that integrators' requirements extend to “how [growers should] walk through [broiler chicken CAFO] houses, the frequency and timing of the inspections, and how to record the results,” as well as requirements for “broiler house lighting, heating, ventilation, and cooling, flock feeding, watering, and the culling of birds.” The integrators also require regular upgrades to the CAFO buildings and equipment to an ever-changing set of specifications.

196. As a result, the SBA Office of Inspector General audit report notes CAFO growers remain in a cycle of debt, and are often forced to seek funding from SBA to meet integrator requirements. As one news article on the report explains, “[SBA] is helping meatpacking firms with billions of dollars in annual revenues get taxpayer-backed small-business loans to build out their chicken production capacity,” and, as part of this system, the



contract growers “endure [a] kind of debt-driven serfdom.”<sup>30</sup>

197. Because SBA exists to support and protect small independent businesses, its Office of Inspector General’s audit report found that the broiler chicken integrators’ “comprehensive control over the growers” should preclude the growers—as corporate integrator affiliates—from receiving SBA services.

198. FSA similarly provides direct and guaranteed loans for the creation and expansion of broiler chicken CAFOs, and this financing similarly supports integrators rather than individual farmers.

199. Although the SBA Office of Inspector General audit report did not address funding other than SBA financing of broiler chicken CAFOs, corporate integrator control over growers in other farm animal sectors, particularly the pig sector, is substantially the same.

200. FSA documents, produced in response to FOIA requests for environmental materials associated with direct and guaranteed loans to CAFOs in several states, include numerous records demonstrating extreme levels of control by integrators. For instance, a March 2018 FSA funding approval of an expansion to create a 4,400 pig CAFO in Wells County, Indiana reveals that the CAFO was being built for and under the supervision of JBS United, a multinational corporate pig integrator. JBS United was so involved in the project that it was copied on the permit approval letter from the state Department of Environmental Management. Likewise, in an August 2016 Worksheet regarding a turkey CAFO in Martin County, Indiana, an FSA loan officer complained that Perdue—a corporate integrator for chickens and turkeys—was

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<sup>30</sup> Tom Philpott, *The Government’s Own Watchdog Says Massive Poultry Companies Are Exploiting Small Business Loans*, Mother Jones, Mar. 16, 2018, available at <https://www.motherjones.com/food/2018/03/government-watchdog-audit-poultry-small-business-loans-booker-trump-inspector-general-contract-chicken-farmer/>.

fronting the grower the costs of constructing a CAFO building, and then requiring the grower to seek loans from FSA for other costs, such as operating expenses.

201. Even if FSA funding of medium CAFO creation or expansion is sent to a grower who appears to be a “small farmer,” the federal funding likely benefits the corporate integrators.

202. This is particularly true for the CAFOs covered by the new Medium CAFO CatEx. Corporate integrators are the primary entities that engage in high volume slaughter. As noted above, FSA has used the Medium CAFO CatEx to fund the proliferation of medium CAFOs in small geographic areas near processing plants. The CAFOs are merely cogs in the integrators’ machines.

203. For example, between August 2016 and December 2017, FSA funded six medium CAFOs (including, *e.g.*, a new 26,700 hen breeding facility) in Benton County, nine medium CAFOs (including, *e.g.*, the purchase of a 48,000 hen breeding facility) in Washington County, seven medium CAFOs (including, *e.g.*, a new 28,000 pullets facility) in Madison County, and three medium CAFOs (including, *e.g.*, the purchase of a property with five broiler houses) in Carroll County, Arkansas. Springdale, a town located on the border of Benton and Washington counties and next to Madison and Carroll counties, hosts slaughter and processing plants owned and operated by the corporate integrators Tyson Foods and Cargill.

204. In essence, integrators are using contract growers to game the federal animal agriculture funding system. This leads to cumulatively significant impacts by increasing medium CAFO concentrations in certain communities and watersheds.

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## CLAIMS FOR RELIEF

### **Count 1: Violation of NEPA and the APA** **(Arbitrary and Capricious Medium CAFO CatEx)**

205. Plaintiffs re-allege each and every allegation contained in the preceding paragraphs.

206. NEPA requires agencies to perform environmental review for major federal actions that “significantly affect[] the quality of the human environment.” 40 U.S.C. § 4332(2)(C).

207. Categorical exclusions from NEPA review are only available for “actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have not such effect in procedure adopted by” the relevant agency. 40 C.F.R. § 1508.4.

208. FSA’s August 3, 2016 NEPA implementation rule categorically excludes financial assistance for the creation and the expansion of medium-sized CAFOs from NEPA review.

209. The activities covered by the Medium CAFO CatEx are not appropriate for a categorical exclusion because they have individual and/or cumulative significant effects.

210. The category of actions covered by the Medium CAFO CatEx also has a significant effect on the human environment in that the actions are highly controversial, because, *inter alia*, local residents and organizations like Plaintiffs oppose them.

211. The administrative record contains virtually no scientific documents or other relevant materials that support FSA’s conclusion that the effects of funding the creation and expansion of medium-sized CAFOs are not significant.

212. FSA had no basis for determining in the final rule that funding the creation and

expansion of individual medium CAFOs has no significant effect on the human environment.

FSA had no basis for reversing its previous position, in the proposed rule, that funding individual medium CAFOs *does* have a significant effect on the human environment.

213. FSA had no basis for determining in the final rule that the cumulative effect of all funding for the creation and expansion of medium-sized CAFOs across the country, and especially in areas concentrated with existing CAFOs or with sensitive populations or natural environments, is not significant. FSA had no basis for reversing its previous position, in the proposed rule, that funding of medium CAFOs cumulatively *does* have a significant effect on the human environment.

214. FSA did not explicitly justify the Medium CAFO CatEx in the final rule. It offered no reasoned basis for its decision to reverse its previous position and conclude that funding medium CAFOs, individually and cumulatively, does not have significant effects.

215. FSA's sole reason for creating the Medium CAFO CatEx was its desire to reduce the number of NEPA assessments to make it faster and easier for the industry to get loans, which is not one of the factors NEPA allows FSA to consider.

216. FSA failed to respond to, and therefore consider, evidence entered into the record that supported more thorough environmental review.

217. FSA therefore relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, acted without evidence, and offered an explanation for its decision that runs counter to the evidence before the agency.

218. FSA's August 3, 2016 NEPA implementation rule constitutes final, reviewable agency action.

219. Accordingly, FSA's promulgation of the Medium CAFO CatEx is arbitrary and

capricious, not in accordance with the APA, NEPA, or its implementing regulations, and in excess of statutory jurisdiction, *see* 5 U.S.C. § 706(2)(A), (C).

**Count 2: Violation of NEPA and the APA**  
**(Medium CAFO CatEx Contrary to Law and in Excess of Jurisdiction)**

220. Plaintiffs re-allege each and every allegation contained in the preceding paragraphs.

221. NEPA requires agencies to perform environmental review for major federal actions that “significantly affect[] the quality of the human environment.” 40 U.S.C. § 4332(2)(C).

222. Categorical exclusions from NEPA review are only available for “actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have not such effect in procedure adopted by” the relevant agency. 40 C.F.R. § 1508.4.

223. FSA decisions approving federal funding of medium-sized CAFOs individually and cumulatively have significant effects on the human environment, including, *inter alia*, impacts to a surrounding area’s air quality, water quantity and quality, endangered and sensitive species and ecosystems, under-resourced communities, and public health.

224. The Medium CAFO CatEx categorically removes FSA actions funding medium-sized CAFOs, both individually and cumulatively, from environmental review under NEPA.

225. FSA did not determine that funding of medium-sized CAFOs “have no such effect” on the human environment. *See* 40 C.F.R. § 1508.4.

226. Accordingly, FSA’s promulgation of the Medium CAFO CatEx is not in accordance with the APA, NEPA, or its implementing regulations, and is in excess of statutory jurisdiction, *see* 5 U.S.C. § 706(2)(A), (C).

**Count 3: Violation of NEPA and the APA**  
**(Failure to Substantiate Medium CAFO CatEx)**

227. Plaintiffs re-allege each and every allegation contained in the preceding paragraphs.

228. Both CEQ and FSA regulations require FSA to “substantiate,” or “gather sufficient information to support[,] establishing a new or revised categorical exclusion” during a NEPA review process. *See* 75 Fed. Reg. at 75631-38; 7 C.F.R. § 799.34.

229. FSA did not adequately gather and provide to CEQ information that substantiates its determination that FSA funding of medium-sized CAFOs “do[es] not individually or cumulatively have a significant effect on the human environment.” 40 C.F.R. § 1508.4.

230. FSA did not provide any additional “substantiation” information when it decided to create the Medium CAFO CatEx between its publication of the September 3, 2014 proposal and the August 3, 2016 final NEPA implementation rule. It therefore did not follow “procedure adopted by” FSA. *Id.*

231. Activities covered by the Medium CAFO CatEx could not be substantiated, and are thus not appropriate for a categorical exclusion, because they have individual and/or cumulative significant effects.

232. Accordingly, FSA’s promulgation of the Medium CAFO CatEx was contrary to NEPA, as well as the CEQ and FSA regulations that implement NEPA, and arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, *see* 5 U.S.C. § 706(2)(A).

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**Count 4: Violation of the APA**  
**(Failure to Follow the Procedural Rulemaking Requirements of the APA)**

233. Plaintiffs re-allege each and every allegation contained in the preceding paragraphs.

234. The APA requires federal agencies to provide public notice of, and an opportunity for public comment on, all legislative rules. *See* 5 U.S.C. § 553.

235. The Medium CAFO CatEx constitutes a legislative rule and a final agency action.

236. With the Medium CAFO CatEx, FSA substantively changed its NEPA requirements with respect to Medium CAFOs.

237. FSA failed to provide public notice of, or an opportunity for public comment on, the Medium CAFO CatEx.

238. FSA also failed to respond to public comments that supported more thorough environmental review.

239. Accordingly, FSA's promulgation of the Medium CAFO CatEx was arbitrary and capricious, an abuse of discretion, not in accordance with law, and enacted without observance of procedure required by law. *See* 5 U.S.C. § 706(2)(A), (D).

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiffs request this Court to find for Plaintiffs and to enter a judgment and order:

- a) Declaring the Medium CAFO CatEx null and void and in violation of the APA and NEPA;
- b) Vacating FSA's August 3, 2016 final rule implementing NEPA, 81 Fed. Reg. 51,274 (Aug. 3, 2016), to the extent it fails to comply with NEPA and the APA;

- c) Declaring all FSA funding approvals made pursuant to the Medium CAFO CatEx that are not yet completely implemented are null and void and in violation of the APA and NEPA;
- d) Enjoining FSA from undertaking, approving, or allowing any funding activity pursuant to the Medium CAFO CatEx;
- e) Awarding Plaintiffs their costs, expenses, and attorneys' fees under the Equal Access to Justice Act, 28 U.S.C. § 2412, and other applicable law; and
- f) Providing for such other relief as the Court deems just and appropriate.

Respectfully submitted this 5th day of December, 2018.

/s/ Daniel H. Waltz

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