NO. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR A WRIT OF MANDAMUS TO COMPEL UNREASONABLY DELAYED ACTION BY THE ENVIRONMENTAL PROTECTION AGENCY

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INTRODUCTION

Concentrated animal feeding operation (CAFO) pollution devastates waterways across the country, jeopardizing human health and the environment in the process. Congress has expressly directed the United States Environmental Protection Agency (EPA or the Agency) to regulate CAFO pollution under the Clean Water Act. But decades later, EPA's lax regulation of the industry's pollution has failed to protect the nation's waters or the communities that rely on these essential resources. To remedy this failure, in 2017 dozens of groups (Petitioners) petitioned EPA to strengthen its regulatory approach to CAFOs, recommending specific actions the Agency should take to ensure that all discharging facilities are subject to Clean Water Act permits, and that those permits are sufficiently protective of water quality.

It has been well over five years since Petitioners filed the Petition, yet EPA has failed to respond. This delay necessitates a writ of mandamus under the well-known "*TRAC*" factors. EPA's unjustified failure to act exceeds any rule of reason, particularly in light of the Clean Water Act timetables established to continually strengthen oversight of CAFO pollution. Critically, EPA's delay is perpetuating the ongoing harm that unchecked CAFO water pollution inflicts on Petitioners, their members, and communities across the country. Given the magnitude of the health and environmental threats, competing priorities do not justify further delay. Finally, EPA's repeated refusal to regulate CAFO pollution demonstrates it likely will not

act of its own accord. EPA has violated its duty to timely respond to the Petition, and its egregious delay warrants this Court's intervention.

RELIEF SOUGHT

Petitioners Food & Water Watch, Center for Food Safety, Dakota Rural Action, Dodge County Concerned Citizens, the Environmental Integrity Project, Helping Others Maintain Environmental Standards, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Kewaunee CARES, Midwest Environmental Advocates, and North Carolina Environmental Justice Network[1] request that this Court issue a writ of mandamus compelling EPA to take a final, reviewable action in response to their March 8, 2017 *Petition to Revise the Clean Water Act Regulations for Concentrated Animal Feeding Operations* by approving or denying it in writing. Petitioners ask the Court to order EPA to respond within 90 days and to retain jurisdiction to ensure a complete response.

ISSUE PRESENTED

Whether EPA's failure to respond to the Petition for more than five years is

[1] Petitioners have contemporaneously filed a Motion for Leave to File Standing Declarations, appending 16 declarations thereto (Exhibits 1–16) that establish Petitioners' standing in this case. *See Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997) (considering affidavits to prove standing because "petitioners had no reason to include facts sufficient to establish standing as a part of the administrative record"). Petitioners also file the Declaration of Emily Miller, attaching documents received from EPA through the Freedom of Information Act.

arbitrary, capricious, and contrary to the Administrative Procedure Act, 5 U.S.C. § 555(b), which requires federal agencies to conclude matters presented to them "within a reasonable time."

STATEMENT OF JURISDICTION

The All Writs Act, 28 U.S.C. § 1651(a), authorizes the courts of appeals to issue "all writs necessary or appropriate in aid of their respective jurisdictions," including writs of mandamus ordering agencies to take final actions in the event of unreasonable delay. *See In re A Cmty. Voice,* 878 F.3d 779, 783 (9th Cir. 2017). In such cases, when a court "would have jurisdiction to review a final rule" then it also has jurisdiction to determine whether an agency's delay with respect to that final action is unreasonable. *Cmty. Voice*, 878 F.3d at 783 (citing *Telecomms. Res. & Action Ctr. v. FCC* (*TRAC)*, 750 F.2d 70, 75 (D.C. Cir. 1984) ("Where a statute commits review of agency action to the Court of Appeals, any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals.")).

In this case, section 509 of the Clean Water Act, 33 U.S.C. § 1369(b)(1), commits review of a final rule on CAFOs to the courts of appeals. Section 509 grants courts of appeals exclusive jurisdiction over any determination EPA makes "in approving or promulgating any effluent limitation" and in "issuing or denying any [National Pollutant Discharge Elimination System (NPDES)] permit." 33 U.S.C. §

1369(b)(1)(E)–(F). These provisions empower appellate courts to review effluent limitations guidelines promulgated by EPA, *see E.I. Du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 136–137 (1977), as well as any "rules that regulate the underlying NPDES permitting procedures." *NRDC v. EPA*, 966 F.2d 1292, 1296–97 (9th Cir. 1992). Here, the Petition requests EPA overhaul its Clean Water Act regulation of CAFOs by revising the rules underlying CAFO permitting procedures and strengthening applicable effluent limitations guidelines. *See* Appendix at APP018. Any final action EPA undertakes in response to the Petition is therefore subject to direct Circuit Court review. *See, e.g., Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490 (2d Cir. 2005); *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 747 (5th Cir. 2011) (both challenging EPA CAFO rules directly in the Circuit Court).

Venue is appropriate in the Ninth Circuit if any petitioner "transacts business which is directly affected by [the at-issue] action" within the Circuit. 33 U.S.C. § 1369(b)(1). For purposes of section 509 review, an entity "transacts business" where the challenged action will have a "significant effect" on a petitioner's business. *See Tenneco Oil Co. v. EPA*, 592 F.2d 897, 899 (5th Cir. 1979); *Peabody Coal Co. v. EPA*, 522 F.2d 1152, 1153 (8th Cir. 1975). The Ninth Circuit is the appropriate venue here because Petitioners Food & Water Watch and Center for Food Safety maintain offices and conduct significant advocacy work to strengthen regulation of CAFO

water pollution in the Circuit, including in California, Oregon, Washington, Idaho, and Hawaii. Hauter Decl. ¶¶ 12–13; Kimbrell Decl. ¶¶ 7–8.

Accordingly, a writ of mandamus is the only adequate remedy available to Petitioners and this matter is properly before this Court. *See In re Cal. Power Exch. Corp.*, 245 F.3d 1110, 1120 (9th Cir. 2001) (holding mandamus is appropriate where plaintiffs have no other adequate remedy).

FACTUAL AND LEGAL BACKGROUND

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

Animal production has changed dramatically over the last several decades, with facilities growing far larger and more geographically concentrated. As a result, industrial-scale CAFOs that house thousands—or even millions—of animals at a time have become the dominant method of livestock production. APP009, 70. And as CAFOs and entire livestock sectors have increasingly concentrated in certain watersheds, so too have the vast quantities of waste these facilities generate. APP010. As of 2003, EPA estimated CAFOs generate approximately 300 million tons of manure every year, more than three times the amount of raw sewage waste generated by the entire United States population. NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7176, 7176

& 7180 (Feb. 12, 2003). Since then, EPA data show the industry has grown by nearly *40 percent*, with a commensurate increase in waste production.[2]

This industrialization of livestock production has led to widespread water pollution. Agriculture is now the nation's leading contributor to water quality impairments in rivers and lakes, with manure responsible for a significant share of that pollution. APP010–11, 98–99, 101. Twenty-nine states have identified animal feeding operations as contributing to these impairments, and states with high concentrations of CAFOs "experience on average 20 to 30 serious water quality problems per year as a result of manure management problems." APP011, 81.

Decades of research make clear that standard CAFO practices are driving this water pollution crisis. CAFOs store millions of gallons of untreated manure and wastewater in open pits or lagoons, then ultimately dispose of that waste by spreading it onto cropland. NPDES CAFO Reporting Rule, 76 Fed. Reg. 65,431, 65,433–34 (Oct. 21, 2011); 40 C.F.R. § 412.4. Thus, pollution-laden CAFO waste enters surface waters through two major pathways—CAFO production areas and

[2] *See NPDES CAFO Permitting Status Report: National Summary, Endyear 2021*, EPA (July 20, 2022), https://www.epa.gov/system/files/documents/2022-07/CAFO%20Status%20Report%202021.pdf. This publicly-available report on EPA's website is subject to judicial notice. *See, e.g.*, *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (allowing judicial notice of information made publicly available through a government website). Where Petitioners ask this Court take judicial notice, we have provided a hyperlink to the government document at issue.

land application fields.[3] Spills, runoff, leaks, and other discharges may occur from numerous parts of a CAFO production area, such as through leaching or overflowing manure lagoons, feed storage areas, and mortality management areas. APP011. Hundreds of documented overflows and failures of manure storage systems have resulted in massive pollution discharges and toxic stream conditions in numerous states, in addition to discharges from manure lagoons to groundwater that then flows into surface waters. APP011, 78, 103–41; Eayrs Decl. ¶ 15 (describing her local river as a "cesspool of manure runoff"); Duhn Decl. ¶ 19 (discussing the "foul-smelling layer of film" that develops on lake surfaces due to CAFO waste); Masri Decl. ¶ 6 (discussing catastrophic lagoon breaches); Utesch Decl. ¶¶ 6–7, 13 (recounting excessive ground and surface water contamination due to lagoon discharges).

CAFO discharges also occur due to excessive application of waste to cropland or under conditions that lead to runoff, such as on frozen, saturated, or sloped ground, or when crops are not in place to uptake nutrients. APP012. EPA has determined that "in many areas, manure is applied in excess of crop needs," Miller Decl. ¶ 6, Ex. E at 14, and that "appropriate nutrient management practices are not

[3] The CAFO production area is the part of the facility "that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." 40 C.F.R. § 122.23(b)(8) (2012). The CAFO land application area is land under the control of the CAFO operator "to which manure, litter or process wastewater from the production area is or may be applied." *Id.* § 122.23(b)(3).

followed for 92 percent of manured acres." Miller Decl. ¶ 7, Ex. F at 7. CAFO waste production often far surpasses land available for disposal, and this insufficient farmland cannot utilize all the manure nutrients applied. The excess is therefore susceptible to runoff. APP069. Compounding the problem, many manure application fields contain direct conduits to waterways, such as tile lines, ditches, or sinkholes, which carry improperly applied manure directly to surface waters. APP012. Utesch Decl. ¶ 11 (describing use of tile drains resulting in discharges).

Nutrients are key pollutants of concern in CAFO waste due to their impacts on aquatic ecosystems and public health. Excess nutrients can generate algal blooms that produce toxins harmful to animals, aquatic life, and humans who come into contact with them, and cause hypoxic "dead zones," such as those that occur annually in the Gulf of Mexico and the Chesapeake Bay. APP013, 76; Gibart Decl. ¶ 20 (describing "dead fish that pile up on the shoreline"); Utesch Decl. ¶ 13 (lamenting the decline of brookie populations "decimated [by] contaminated runoff"). Nitrates from CAFO waste can also contaminate drinking water sources, which can be particularly dangerous for infants at risk of debilitating birth defects and fatal nitrate poisoning. APP081. *See* Gibart Decl. ¶ 19 (recounting severe illness and hospitalization of seven-month-old infant following CAFO nitrate exposure); Utesch Decl. ¶ 9 (same); Gillespie Decl. ¶ 10 (describing doctor instructing children to hold their noses and mouths while bathing in CAFO-contaminated well water);

Espey Decl. ¶ 15 (discussing Iowa's costly nitrate treatment systems to address polluted drinking water sources). Excess nitrates are also associated with miscarriages and increased risk of certain cancers. APP081.

Moreover, CAFO waste contains dangerous pollutants that have no value to crops even under optimal conditions, such as pathogens, antibiotics, artificial growth hormones, heavy metals, and pesticides. 76 Fed. Reg. at 65,433–34. EPA has found that "[m]ore than 150 pathogens found in livestock manure are associated with risks to humans, including the six human pathogens that account for more than 90% of food and waterborne diseases." 68 Fed. Reg. at 7236. These pathogens, including *E. coli*, *Salmonella*, and *Giardia*, can cause severe gastrointestinal illness, skin rashes, bacterial infections, and even death. APP012, 83–84; Gillespie Decl. ¶¶ 8–9 (contracting near fatal blood infection due to exposure); Duhn Decl. ¶ 20 (developing a painful skin rash after kayaking in CAFO-contaminated waters).

Feed additives used to promote animal growth, including medically important antibiotics, heavy metals, and hormones, are excreted in animal waste and can similarly wreak havoc on public health and the environment. EPA has found that 80 to 90 percent of administered antibiotics and heavy metals added to feed end up in animal waste, as do large quantities of natural and synthetic hormones. APP013–14. When disposed of, this waste can cause antibiotic-resistant bacteria to proliferate in waterways and result in hormone-induced damage to endocrine and reproductive

systems of aquatic species and humans. *Id.* *See also* Utesch Decl. ¶ 12 (discussing child who contracted antibiotic-resistant bacterial infection after swimming in CAFO-contaminated waters, requiring partial removal of kneecap).

EPA acknowledges that CAFO pollution disproportionately impacts certain communities.[4] Researchers have found that large CAFOs are disproportionately sited in low-income communities and communities of color, APP014, 143–4, and an EPA analysis identified areas at risk of disproportional impacts from virtually every CAFO livestock sector: the Delmarva Peninsula (broiler chicken operations); the Iowa-Minnesota border, (hog, egg layer, and beef feedlot operations); the Carolina lowlands, (hog, broiler, and turkey operations); and the California central valley, (dairy operations). These regions have both large numbers of CAFOs and large minority and low-income populations. APP014–15, 147. *See also* Masri Decl. ¶¶ 13–14 (explaining the burdens faced by communities near CAFO operations).

II. EPA's Attempts to Regulate CAFO Pollution Under the Clean Water Act Have Proven Ineffective

A. The Clean Water Act and NPDES Permits

"[A] cornerstone of the federal effort to protect the environment," *Waterkeeper All., Inc.*, 399 F.3d at 490, the Clean Water Act prohibits the "discharge

[4] *EPA Legal Tools to Advance Environmental Justice* [hereinafter EPA Environmental Justice Report], EPA 1, 75 (May 2022), https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf#page=88.

of any pollutant" from any "point source" to navigable waters "except in compliance with law." 33 U.S.C. §§ 1311, 1362. The main way to achieve compliance with the Act's discharge prohibition is by obtaining and complying with an NPDES permit, which controls pollution through effluent limitations that restrict discharges of pollutants. 33 U.S.C. §§ 1311(a), 1342.

Permit limitations operate by identifying specific technologies capable of controlling a pollutant and setting numeric or narrative effluent limitations based on that demonstrated capability. In this manner, the Act was designed to ratchet up water quality protections as pollution control technology advances, improving water quality over time through more stringent controls. *Id.* § 1311(b)(2)(A) (requiring the "best available technology economically achievable" for many pollutants); *NRDC v. EPA*, 808 F.3d 556, 563–64 (2d Cir. 2015) ("Congress designed [these standards] to be technology-forcing, meaning it should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution."). These technology-based limitations are typically expressed numerically, but when "numeric effluent limitations are infeasible," a permit may instead require "[b]est management practices (BMPs) to control or abate the discharge of pollutants." 40 C.F.R. § 122.44(k)(3). Best management practices may also function as a point source's primary pollutant control technology and may be required where "reasonably necessary to achieve effluent limits and standards." *Id*. § 122.44(k)(4).

NPDES permits must also require both representative effluent monitoring and reporting of monitoring results. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. §§ 122.44(i)(1) & (2). Such monitoring conditions are necessary to verify compliance with effluent limitations and to facilitate permit enforcement. *Food & Water Watch v. EPA*, 20 F.4th 506, 515–16 (9th Cir. 2021). Pollutant-specific effluent limits, practices or technologies capable of achieving those limits, and monitoring to establish compliance with those limits, thereby work together to reduce pollution.

B. Regulation of CAFOs Under the Clean Water Act

CAFO pollution discharges are "point source" discharges subject to the Clean Water Act's general prohibition on unpermitted discharges. 33 U.S.C. § 1362(14). Congress' decision to expressly include CAFOs in the definition of point source demonstrates an unambiguous intent to regulate discharges of pollutants from CAFOs through the imposition of progressively more protective pollution standards.

EPA's regulations previously required CAFOs that proposed to discharge due to their design, construction, operation, or maintenance to apply for NPDES permits. Revised NPDES Permit Regulation and Effluent Limitations Guidelines for CAFOs in Response to the Waterkeeper Decision, 73 Fed. Reg. 70,418, 70,423, 70,469 (Nov. 20, 2008). However, following the Fifth Circuit's decision in 2011, *Nat'l Pork Producers Council*, 635 F.3d at 751, EPA removed this provision. NPDES Permit Regulation for CAFOs: Removal of Vacated Elements in Response to 2011 Court

Decision, 77 Fed. Reg. 44,494, 44,494–95 (July 30, 2012). As a result, EPA only requires CAFOs to seek NPDES permit coverage if they admit they discharge.

EPA has established effluent limitations for both CAFO production and land application area discharges. EPA prohibits CAFO production area discharges, aside from wastewater overflows caused by extreme precipitation events. *See* 40 C.F.R. § 412.31(a)(1)(i). EPA also requires CAFOs that land apply waste to "minimiz[e] nitrogen and phosphorus movement to surface waters." 40 C.F.R. § 412.4(c)(1). CAFOs must implement a Nutrient Management Plan that contains "best management practices necessary to meet . . . [these] applicable effluent limitations." *Id*. § 122.42(e)(1).

Unlike most industries, EPA has not required permitted CAFOs to monitor their pollution to demonstrate compliance with effluent limitations. *See Food & Water Watch*, 20 F.4th at 518 (finding EPA CAFO permit lacked required discharge monitoring provisions). Moreover, EPA's current rules exempt many land application-related discharges from regulation as "agricultural stormwater," which the Clean Water Act excludes from the definition of a point source. 33 U.S.C. § 1362(14). Under EPA's broad interpretation of this exemption, as long as point source CAFOs apply waste in accordance with Nutrient Management Plans, any land application discharges associated with precipitation are considered nonpoint source pollution exempt from permitting requirements. 40 C.F.R. § 122.23(e).

C. EPA Acknowledges that its CAFO Regulations Do Not Adequately Address Public Health and Environmental Impacts

More than a decade ago, EPA conceded that "despite more than 35 years of regulating CAFOs, reports of water quality impacts from large animal feeding operations persist." 76 Fed. Reg. at 65,433. This regulatory failure can be attributed to two critical flaws in the Agency's CAFO program: (1) the majority of CAFOs discharge, yet evade permit coverage; and (2) even CAFOs that do have NPDES permits are subject to requirements that do not effectively control their discharges.

EPA acknowledges that its CAFO regulations are inadequate. The Agency admits that "[m]any CAFOs are not regulated and continue to discharge without NPDES permits" in violation of the Clean Water Act, because its "regulations contain definitions, thresholds and limitations that make it difficult to compel permit coverage." EPA Environmental Justice Report, *supra* note 4, at 75. The Agency further acknowledges that "while many waters are affected by pollutants from CAFOs, many CAFOs often claim that they do not discharge, and EPA and state permitting agencies lack the resources to regularly inspect these facilities to assess these claims." *Id*.; *see also* Espey Decl. ¶ 8–9. Indeed, although EPA estimates that 75 percent of all CAFOs discharge as a result of their standard operational profiles, only 30 percent of even the largest CAFOs are currently permitted. Miller Decl. ¶ 7, Ex. F, at 10, 12. In other words, more than 9,600 unpermitted Large CAFOs across

the country are illegally discharging pollution with no regulatory oversight.[5] Moreover, this trend of inadequate permit coverage has only worsened under EPA's current rules. Between 2011 and 2021, the estimated number of permitted Large CAFOs decreased by 14.5 percent, while the overall number of Large CAFOs *increased* by 18 percent.[6]

Further, EPA concedes that even when CAFOs are subject to EPA's own pollution standards, those standards fail to effectively "limit the discharge of pollutants under certain circumstances" and do not allow EPA to "enforce requirements even when discharges have been established." EPA Environmental Justice Report, *supra* note 4, at 75. For starters, EPA's CAFO effluent limitations only apply to the largest of operations, 68 Fed. Reg. at 7208, and only focus on nutrients and pathogens, failing to address antibiotics, metals, hormones, and more. 40 C.F.R. § 412.2(j)–(k); 73 Fed. Reg. at 70,463.

The applicable effluent limitations also fall short of effectively regulating even nutrient and pathogen pollution. As EPA is fully aware, there are many

[5] EPA estimates there are approximately 21,237 Large CAFOs, 6,266 of which have NPDES permits. *NPDES CAFO Permitting Status Report*, *supra* note 2. If approximately 75 percent (15,928) of CAFOs discharge, an additional 9,662 unpermitted Large CAFOs should be covered under the NPDES program.

[6] *Compare NPDES CAFO Regulations Implementation Status – National Summary, Endyear 2011*, EPA (Dec. 31, 2011), https://www.epa.gov/sites/default/files/2015-08/documents/npdes_cafo_rule_implementation_status_-_national_summary_endyear_2011_0.pdf *with NPDES CAFO Permitting Status Report*, *supra* note 2.

instances in which CAFOs should be using more protective practices than what the Agency currently requires due to a high risk of runoff. Rather than prohibiting these practices, EPA instead urges states to do so themselves. APP091–93 ("strongly encourag[ing] states to prohibit" numerous high-risk application practices). Yet the Agency knows that many state permitting agencies are themselves prohibited from exceeding EPA's minimum requirements. *See, e.g.*, Iowa Code Section 459.311(2) ("any rules adopted pursuant to this [manure control] subsection shall be no more stringent than requirements under the [Clean Water Act]"); North Carolina Statute Section 150B-19.3 (prohibiting state agencies from adopting "a rule for the protection of the environment or natural resources that imposes a more restrictive standard, limitation, or requirement than those imposed by federal law or rule").

Another known problem is that the Agency's Nutrient Management Plan manure application requirements "are agronomic rather than water-quality based," Miller Decl., Ex. E at 14, meaning they are designed to ensure that farms maximize crop yields, rather than prevent discharges to waterways. EPA incorrectly assumes that this agronomic approach will enable operations to minimize nutrient loss and comply with effluent limitations. APP046–49. But research has demonstrated that "just having a [Nutrient Management Plan] does not reduce excess nutrient application nor does it guarantee improvements in water quality." APP096. Moreover, when CAFOs do over-apply waste to cropland, there are no monitoring

requirements to capture the discharge, *see supra* at Section II.B, and regardless, EPA's current rules allow operators to easily write off discharges as exempt agricultural stormwater. APP027–28. These deficiencies in EPA's approach have resulted in both a largely-unregulated CAFO industry and CAFO permits, where they exist, that fail to adequately protect water quality.

EPA acknowledges that many of the specific recommendations in the Petition would improve its broken CAFO program and better protect impacted communities. The Agency believes it could "improve the effectiveness of the CAFO regulations" by redefining the term CAFO to be more inclusive, limiting the agricultural stormwater exemption, mandating additional best management practices for production and land application areas, and requiring discharge monitoring. EPA Environmental Justice Report, *supra* note 4, at 75. The Petition urges EPA to adopt these measures and more. APP026–31, 35–36, 38–62.

D. EPA has Consistently Refused to Make Necessary Updates to CAFO Regulations Absent Court Intervention

Although CAFOs are major and largely unregulated sources of water pollution, EPA has consistently failed to make any improvements to its CAFO rules unless compelled by legal action. In 2003, only in response to a lawsuit did the Agency issue its first-ever update to its 1970s CAFO regulations. *See Waterkeeper All., Inc.*, 399 F.3d at 494 n.12. In 2011, it took a court-approved settlement agreement to spur an initial effort to gather a basic inventory of the CAFO industry.

NRDC v. EPA, No. 09-60510 Settlement Agreement at 2–4 (May 25, 2010); 76 Fed. Reg. 65,431. *But see* 77 Fed. Reg. 42,679 (withdrawing the proposal rather than finalizing the rule, leaving the Agency without comprehensive CAFO information to this day).[7] This Court recently halted EPA's longtime failure to require CAFO discharge monitoring after environmental petitioners sued the Agency for its illegal practice. *Food & Water Watch*, 20 F.4th 506. And it took yet another lawsuit for EPA to reconsider its reliance on nonexistent CAFO monitoring data to evaluate whether to update its CAFO effluent limitations guidelines. *Food & Water Watch v. EPA*, No. 21-71084, EPA Mot. For Voluntary Remand (9th Cir. Jan 7, 2022) (ECF 19-1). In sum, EPA simply does not act to address CAFOs under the Clean Water Act without significant prodding and court intervention.

III. EPA Has Failed to Respond for More Than Five Years to Petitioners' Petition for Rulemaking

On March 8, 2017, thirty-two public interest organizations petitioned EPA to revise its inadequate Clean Water Act regulations for CAFOs. APP002–62. The Petition not only laid out the well-known water quality and human health impacts of the CAFO industry, but also highlighted the regulatory inadequacies that allow excessive and unregulated CAFO pollution to persist. APP009–18. The Petition

[7] EPA has opted to collect state data rather than conducting its own CAFO inventory, despite its own finding that state data are "inconsistent and inaccurate and do not provide EPA with the reliable data it needs to identify and inspect permitted CAFOs nationwide." 76 Fed. Reg. at 65,435.

raised numerous legal and factual arguments in support of accomplishing two overarching goals: (1) ensuring that all discharging CAFOs obtain NPDES permits—including by narrowing EPA's interpretation of agricultural stormwater and establishing a presumption that certain CAFOs discharge; and (2) strengthening NPDES permits to ensure adequate protection of water quality. APP018–62.

More than five years have passed since the Petition filing, and Petitioners have received no response. Yet it appears EPA has been prepared to respond for nearly half that time. According to EPA records obtained through Freedom of Information Act (FOIA) requests, in July 2018 EPA began creating and circulating Petition briefing documents containing the Agency's analysis of the Petition requests. Miller Decl. ¶ 8, Ex. G. By 2019, EPA was already fully aware of its significant delay and became concerned about the possibility of Petitioners filing this action. Miller Decl. ¶ 9, Ex. H at 1 ("I keep waiting for the notice of intent to sue us from FWW et. al. since it has now been more than two years since they filed the petition."). The Agency's consideration came to a head in 2020, when records show that EPA was preparing its formal response to the Petition. Miller Decl. ¶ 10, Ex. I at 2. However, EPA then opted not to publish its answer, even though it was clearly poised to do so. Miller Decl. ¶ 11, Ex. J. Following this postponement, FOIA records show that EPA staff was "beginning to like the FWW petition more and more." Miller Decl. ¶ 13, Ex. K at 1. But EPA's delay—and CAFO pollution—continue.

ARGUMENT

I. Petitioners Have Standing to Pursue a Writ of Mandamus Compelling EPA to Act

An organization has standing if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs., Inc. (TOC)*, 528 U.S. 167, 181 (2000). Ensuring that EPA responds to the Petition, and in turn addresses the CAFO pollution crisis threatening waterways and communities across the country, is clearly germane to Petitioners' purposes as organizations focused on water protection and/or environmental justice. Alschuler Decl. ¶¶ 4–6; D. Eayrs Decl. ¶¶ 4–7; Espey Decl. ¶¶ 4–8; Gibart Decl. ¶¶ 4–7, 10; Hauter Decl. ¶¶ 4–8, 12–13; James Decl. ¶¶ 4–6, 11–12; Kimbrell Decl. ¶¶ 4–9, 11; Lilliston Decl. ¶¶ 3–5, 7–8; Masri Decl. ¶¶ 4–7; Russ Decl. ¶¶ 4–7, 12; Utesch Decl. ¶¶ 4–7. Indeed, Petitioners have dedicated significant time and resources to addressing unregulated and underregulated CAFO water pollution, working to improve state CAFO NPDES programs, and holding EPA accountable to its Clean Water Act obligations. *Id.* Moreover, individual members' participation is not required for, nor would it aid, the proper resolution of this case. *See W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011).

Petitioners' members also have standing to sue in their own right for their procedural injuries. Ordinarily, individuals have standing when they suffer an "injury in fact" that is fairly traceable to the challenged conduct and capable of redress by a favorable decision from the court. *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014). However, a "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 572 n.7 (1992). That is, Petitioners' members need only show that following the procedure in question "could protect their interest." *Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1228 (9th Cir. 2008).

Petitioners' members satisfy this test because EPA violated an Administrative Procedure Act requirement, 5 U.S.C. § 555(b), that is clearly intended to protect citizens' interests by ensuring agencies are not allowed to ignore concerns raised by the public. Petitioners' members have concrete interests "by virtue of their geographic proximity and use of" waterways affected by CAFO pollution. *Citizens for Better Forestry v. USDA*, 341 F.3d 961, 971 (9th Cir. 2003); *see also* Duhn Decl. ¶¶ 2, 9, 19–22; S. Eayrs Decl. ¶¶ 5–7; Gillespie Decl. ¶¶ 7–9; Kimbirauskas Decl. ¶¶ 11–18; Mendoza Decl. ¶¶ 6, 14, 16; Utesch Decl. ¶¶ 12–16. Based on concerns about pollution from both permitted and unpermitted CAFOs in the waters they live near and extensively use, as well as documented water quality degradation from

pollutants associated with CAFOs, they have curtailed their use of specific waterbodies, limited their recreational activities within certain waterways, and enjoyed those activities less. Duhn Decl. ¶¶ 12, 19–22; S. Eayrs Decl. ¶¶ 14–15; Gillespie Decl. ¶ 12; Kimbirauskas Decl. ¶¶ 11, 15–18; Mendoza Decl. ¶¶ 14, 16; Utesch Decl. ¶¶ 12–16.

Finally, continued delay is reasonably likely to threaten Petitioners' members' interests. As discussed above, EPA's inadequate CAFO program has led to severe water pollution across the nation and in the specific waterways Petitioners' members use and enjoy. Duhn Decl. ¶¶ 24–26; S. Eayrs Decl. ¶¶ 16–17; Gillespie Decl. ¶¶ 13–14; Kimbirauskas Decl. ¶¶ 19–21, 12; Mendoza Decl. ¶¶ 17–18, 12; Utesch Decl. ¶¶ 16–18; *see also W. Watersheds Project*, 632 F.3d at 485–86 (finding standing for procedural injury where group established "geographical nexus" between members' interests and agency action). Because EPA's response to the Petition "could protect" these members' interests by revising the CAFO rules, or at least enabling Petitioners to challenge an unlawful Petition denial, Petitioners have standing to pursue a writ of mandamus here.

II. EPA's Delay is Sufficiently Egregious to Warrant this Court's Intervention

For more than five years, EPA has shirked its duty under the Administrative Procedure Act by failing to respond to the Petition urging it to strengthen its inadequate CAFO regulations. EPA's egregious delay has prejudiced Petitioners,

their members, and the public at large by forestalling much-needed regulatory action to combat the significant and growing public health and environmental harms caused by CAFO water pollution. Accordingly, Petitioners are entitled to a writ of mandamus compelling EPA to respond. *In re NRDC*, 956 F.3d 1134, 1138 (9th Cir. 2020) (explaining that mandamus is warranted "when an agency's delay is egregious") (internal quotations omitted).

This Court has adopted the D.C. Circuit's six-factor test to evaluate claims of unreasonable delay, established in *Telecommunications Research & Action Center v. FCC (TRAC)*. 750 F.2d at 80. *See, e.g.*, *NRDC*, 956 F.3d at 1138–39 (applying the *TRAC* test). Under this test, courts consider: (1) whether the delay comports with the "rule of reason"; (2) whether Congress has indicated a timeframe it considers appropriate for the action at issue; (3) the extent to which delay could harm human health and welfare; (4) the effect expediting would have on competing agency priorities; (5) the nature and scope of interests prejudiced by delay; and (6) that agency impropriety is not required for an unreasonable delay finding. *TRAC*, 750 F.2d at 80.

Here, the *TRAC* factors weigh in favor of granting mandamus relief. EPA's five-year delay is unreasonable, especially in light of the Clean Water Act's clear mandate to regulate CAFO pollution according to relevant statutory timelines for strengthening pollution standards. Moreover, EPA acknowledges that CAFOs and

the dangerous wastes they produce pose a serious threat to human health, thereby prejudicing the frontline communities in which these operations are disproportionately sited, and whom the Agency claims to prioritize.

A. EPA Has a Clear Duty to Respond to the Petition

The Administrative Procedure Act requires an agency to "conclude a matter presented to it" "within a reasonable time." 5 U.S.C. § 555(b); *Cmty. Voice*, 878 F.3d at 784. This includes administrative petitions that are "requests for discretionary action." *In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 418 (D.C. Cir. 2004). Thus, EPA must make a "final ruling" on the Petition—a "formal action to grant or deny it"—that is subject to judicial review, *In re Pesticide Action Network N. Am.*, 798 F.3d 809, 813 (9th Cir. 2015), and it must do so "within a reasonable time." 5 U.S.C. § 555(b).

B. *TRAC* Factors One & Two: EPA's Five-Year Delay Defies the Rule of Reason and Relevant Clean Water Act Timetables

EPA's failure to answer the CAFO Petition plainly violates the rule of reason. The first *TRAC* factor—whether the agency's delay is reasonable—is the "most important factor in the analysis," *Cmty. Voice*, 878 F.3d at 786, and along with factor two, requires inquiry into "whether the agency's response time complies with an existing specified schedule and whether it is governed by an identifiable rationale." *Ctr. for Sci. in the Pub. Interest v. FDA*, 74 F. Supp. 3d 295, 300 (D.D.C. 2014).

Although there is no rigid timetable for answering petitions, the Ninth Circuit has repeatedly concluded that "a reasonable time for agency actions is typically counted in weeks or months, not years." *NRDC*, 956 F.3d at 1139; *Cmty. Voice*, 878 F.3d at 787. Indeed, this Court has routinely held years-long delays to be unreasonable. *See, e.g.*, *NRDC*, 956 F.3d at 1136 (three years); *Cmty. Voice*, 878 F.3d at 787 (eight years); *Pesticide Action Network*, 798 F.3d at 811 (eight years). This Court has also looked to "the more developed law of the District of Columbia," which has found a six-year delay is "nothing less than egregious," *NRDC*, 956 F.3d at 1139 (quoting *Am. Rivers & Idaho Rivers United*, 372 F.3d at 419), and that a "five year delay smacks of unreasonableness on its face." *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 113 (D.D.C. 2003).

Here, EPA's more than five-year delay has stretched the "rule of reason" beyond its limits. The Agency has provided no justification for its delay, nor has it provided Petitioners a concrete timeline for its response. Furthermore, FOIA documents show that EPA has been seemingly prepared to answer the Petition for at least two years, yet has failed to do so. Miller Decl. ¶¶ 10–11, Ex. I–J. Without *any* identifiable rationale governing its continued failure to act, this delay "smacks of unreasonableness on its face." *Fund for Animals*, 294 F. Supp. 2d at 113.

EPA's delay is especially egregious given the Clean Water Act's clear mandate to regulate CAFO pollution with NPDES permits, and the relevant statutory

timetables that Congress provided for the review and revision of NPDES regulations. *See, e.g.*, 33 U.S.C. §§ 1314(b) (requiring EPA to review effluent limitations guidelines for each industry sector, including CAFOs, "at least annually" and revise, if appropriate), 1314(m) (requiring EPA to publish a plan every two years that "establish[es] a schedule for the annual review and revision of promulgated effluent guidelines"), 1342(b)(1)(B) (requiring permitting agencies to establish fixed terms for NPDES permits not to exceed five years). The Petition seeks changes to the same regulations and permits that EPA is already mandated to review and revise on a shorter timeline than its delay to date. This Court has found similar delays unreasonable in the context of far less specific Congressional mandates. *See*, *e.g.*, *Cmty. Voice*, 878 F.3d at 787 ("eliminate [lead poisoning] expeditiously"). EPA's more than five-year delay has therefore extended beyond any rule of reason.

C. *TRAC* Factors Three & Five: EPA's Delay Is Unreasonable Given the Health and Welfare Concerns Prejudiced by the Delay

Because CAFO pollution poses a clear threat to human health but remains largely unregulated, the third and fifth *TRAC* factors—impacts to human health and welfare, and the interests prejudiced by the delay—weigh heavily in favor of Petitioners. "When the public health may be at stake, the agency must move expeditiously to consider and resolve the issues before it." *Pub. Citizen Health Res. Grp. v. Comm'r, FDA*, 740 F.2d 21, 34 (D.C. Cir. 1985). The Ninth Circuit has consistently granted mandamus relief where EPA has delayed action raising human

health concerns—especially children's health—and has itself acknowledged the unmitigated public health risk. *See, e.g.*, *Cmty. Voice*, 878 F.3d at 787 (finding EPA unreasonably delayed updating lead-based paint standards for eight years given the "clear threat to human welfare" and EPA's own acknowledgment that lead poisoning was a significant health threat to children and "the current standards are insufficient"); *NRDC*, 956 F.3d at 1136 (ordering EPA to respond to a petition to end the use of a dangerous pesticide in household pet products after three years of delay where EPA acknowledged the widespread and serious risk it posed to the neurodevelopmental health of children).

Here, EPA has likewise acknowledged the indisputable human health risks attributable to CAFO discharges. Inadequately regulated CAFO pollution presents a serious health risk to neighboring and downstream communities whose drinking water and recreational waterways are contaminated with nitrates, pathogens, and other dangerous pollutants. *See supra* Section I. This is particularly the case for infants who are at risk of birth defects and nitrate poisoning when exposed to contaminated drinking water. APP081; Gibart Decl. ¶ 19 (infant nitrate poisoning incident). But older children and adults also face substantial, even life-threatening health risks. APP081, 84; Gillespie Decl. ¶¶ 8–9 (near-fatal blood infection); Utesch Decl. ¶ 12 (frequent infections and gastrointestinal diseases in community); Duhn Decl. ¶ 20 (severe skin rash). Just as in *NRDC* and *Cmty. Voice*, EPA has

acknowledged these widespread CAFO health risks, as well as the heightened threat to infants. *Supra* at Section I.

Moreover, the Agency has conceded that its CAFO regulations fail to remedy the problem. EPA plainly admits that after decades of its current regulatory approach, thousands of CAFOs are discharging without NPDES permits, Miller Decl. ¶ 7, Ex. F at 5, 10, 12, and CAFO pollution continues to devastate waterways. 76 Fed. Reg. at 65,433. So much so, in fact, that CAFOs are one of the leading known sources of water pollution across the country. APP010–11. Because health risks associated with CAFO discharges are a serious, undisputed concern raised by the Petition, and "EPA itself has acknowledged . . . that the current standards are insufficient," EPA's delay in responding to the Petition is patently unreasonable, and seriously prejudices those communities that suffer constant exposure to this unmitigated threat. *NRDC*, 956 F.3d at 1141–2.

D. *TRAC* Factor Four: EPA's Delay Is Unreasonable Because No Competing Priorities Justify its Delay

Where, as here, EPA has offered "no acceptable justification for the considerable human health interests prejudiced by the delay," courts have given little weight to the Agency's competing regulatory priorities—the fourth *TRAC* factor—— even when such priorities also impact human health. *See, e.g.*, *NRDC*, 956 F.3d at 1141. As such, "[e]ven assuming that EPA has numerous competing priorities under

the fourth factor" the clear balance of the *TRAC* factors nevertheless favors issuance of a writ. *Id.* at 1142 (quoting *Cmty. Voice*, 878 F.3d at 787).

This conclusion is especially warranted here because FOIA records demonstrate that EPA has already dedicated significant time to answering the Petition. As explained above, EPA has completed a thorough analysis of the Petition's merits and appears poised to act on it. Thus, the Petition is a priority that has already outcompeted many others for agency time. Further, EPA has repeatedly counted the issues raised by the Petition amongst its top priorities. For fourteen years, it ranked "preventing animal waste from contaminating surface and ground water" as a national priority. Miller Decl. ¶¶ 6, 13, Ex. F at 3, Ex. L at 2–3.

EPA is also subject to an environmental justice Executive Order mandating the Agency prioritize clean water access and polluter accountability in disproportionately-impacted communities "where the Federal Government has failed to meet that commitment in the past," which undoubtedly includes communities plagued by CAFO pollution. Exec. Order No. 13,990, 86 Fed. Reg. 7037 (Jan. 20, 2021). Because answering the Petition would advance these priorities, EPA's delay in doing so is unreasonable.

E. *TRAC* Factor Six: EPA's History of Resisting Needed Action on CAFOs Absent Court Intervention Further Warrants Mandamus

Finally, EPA's long practice of refusing to regulate CAFOs without legal action underscores the need for the Court's intervention in this case. While the Court

need not find any impropriety in the Agency's delay to find it unreasonable, *TRAC*, 750 F.2d at 80, any such impropriety can further demonstrate the need for mandamus. In *NRDC*, this Court found EPA's delay in answering a petition "all the more glaring" when it has "taken the action of [petitioner] or a court to prompt any movement by the EPA." *NRDC*, 956 F.3d at 1139–40. This petition for writ of mandamus is far from the only time that legal action has been necessary to force EPA to fulfill its statutory obligations under the Clean Water Act for CAFOs. *See supra* at Section II.D. Against a decades-long backdrop of the Agency refusing to regulate the CAFO industry as the Clean Water Act requires, only relenting when compelled by litigation, EPA's five-year delay in answering the Petition is "all the more glaring," further warranting the Court's intervention.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant a writ of mandamus compelling EPA to answer the Petition within 90 days, and retain jurisdiction to ensure EPA's response is complete.

Dated this 7th day of October 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this petition for writ of mandamus complies with the length limitations of Fed. R. App. P. 21(d) and Ninth Circuit Rule 21-2(c), because, excluding the parts listed by Fed. R. App. P. 21(a)(2)(C) and 32(f), it does not exceed 30 pages or 7,800 words.

Dated this 7th day of October, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 7, 2022. I certify that this is an original petition or other original proceeding and therefore I cannot directly serve it via the Appellate Electronic Filing system.

Dated this 7th day of October, 2022.

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STATEMENT OF RELATED CASES

The undersigned counsel of record for Petitioners is aware of no pending related cases.

Dated this 7th day of October, 2022.

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RULE 26.1 DISCLOSURE STATEMENT

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

Dated this 7th day of October, 2022.

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