UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IOWA CITIZENS FOR COMMUNITY IMPROVEMENT 2001 Forest Avenue Des Moines, Iowa 50311, ANIMAL LEGAL DEFENSE FUND 525 East Cotati Avenue Cotati, California 94931, ASSOCIATION OF IRRITATED RESIDENTS 29389 Fresno Avenue Shafter, California 93263, INSTITUTE FOR AGRICULTURE AND TRADE POLICY 2105 First Avenue South Minneapolis, Minnesota 55404, WATERKEEPER ALLIANCE, INC. 180 Maiden Lane, Suite 603 New York, New York 10038, and WATERKEEPERS CHESAPEAKE P.O. Box 11075 Takoma Park, Maryland 20913, *Plaintiffs*, v. COUNCIL ON ENVIRONMENTAL QUALITY 1650 Pennsylvania Avenue NW Washington, D.C. 20502, MARY NEUMAYR, Chairperson, Council on Environmental Quality 1650 Pennsylvania Avenue NW Washington, D.C. 20502, *Defendants*.	Civ. Action No. 20-cv-2715

COMPLAINT

1. This is an action for declaratory judgment and injunctive relief, challenging provisions of Defendant Council on Environmental Quality's ("CEQ") Final Rule, 85 Fed. Reg. 43304 (July 16, 2020), that explicitly or effectively exempt federal funding of concentrated animal feeding operations and slaughterhouses from National Environmental Policy Act ("NEPA") review.

2. Concentrated animal feeding operations ("CAFOs") are facilities that confine massive numbers of animals for the purposes of producing meat, dairy, and egg products. A single CAFO can confine in one location up to thousands of cows, thousands of pigs, tens of thousands of turkeys, or millions of chickens. To put these sizes in perspective, a 200-cow dairy CAFO generates around the same amount of sewage waste as a 96,000-person city.

3. CAFOs are often owned, run, or controlled by large corporations. In each major livestock sector, a handful of corporations control more than half of all livestock production.

4. CAFOs and the slaughterhouses they supply (collectively, "the CAFO industry"), which continue to expand throughout the United States, cause and exacerbate 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. They also harm quality of life and depress property values of those living in close proximity to these facilities.

5. The CAFO industry typically propagates in a concentrated fashion. A new slaughterhouse inserts itself into a community and, in short order, new CAFOs will sprout up and existing CAFOs will expand to supply animals for the slaughterhouse. The concentration of

CAFO industry facilities in small geographic areas intensifies their effects on certain communities, watersheds, and ecosystems.

6. The federal government, through various lending programs administered by the Farm Service Agency ("FSA"), Small Business Administration ("SBA"), U.S. Department of Housing and Urban Development, and others, financially supports the CAFO industry.

7. Until CEQ's 2020 Final Rule, federal agencies had to comply with NEPA to assess the impact of federal funding for the CAFO industry. NEPA analyses—which would take place *before* loans or loan guarantees were approved—serve two key purposes in the CAFO industry context. First, they can provide a governmental record of the harms emanating from industrial animal feeding operations and slaughterhouses, which have long been established as having serious effects on communities and the environment. Second, they provide 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 authorizes the use of public money. Before the Final Rule, community advocates were able to seek judicial review to redress their injuries when federal agencies failed to afford them the rights to which they are entitled under NEPA and the Administrative Procedure Act ("APA").

8. CEQ's new regulations both explicitly and effectively remove that process of analysis, notice, and feedback for the CAFO industry. Rather than presuming that CAFOs warrant a NEPA analysis, as CEQ did under its previous regulations, it now assumes these facilities have no environmental impact and exempts them entirely from NEPA. CEQ has also improperly cabined the scope, depth, and substance of NEPA review of CAFO- and slaughterhouse-related decisions in ways that ignore the CAFO industry's most substantial

impacts and undermine the NEPA review process. CEQ further attempts to restrict judicial review so that local residents are forced to endure the destruction of their communities without any legal redress under NEPA.

9. CEQ's decision to give yet another free pass to this industry violates both NEPA and the APA. CEQ acted arbitrarily and capriciously, contrary to law, and not in accordance with law in enacting the Final Rule. Further, the Final Rule exceeds CEQ's statutory authority.

10. Plaintiffs request that the Court declare illegal, vacate, and issue an injunction requiring Defendants to withdraw, the portions of the rule that unlawfully restrict NEPA review of federal funding for the CAFO industry. Such relief will ensure the proper analysis of, public notice of, and input on the currently uninhibited and nontransparent flow of federal funds to the CAFO industry.

JURISDICTION AND VENUE

11. 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).

12. 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

13. 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 undertaking 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 against 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. CCI members also alter their life choices—including whether to kayak and swim in certain water bodies—based on their knowledge of the existence and operation of nearby CAFOs. They obtain this information and attempt to influence CAFO funding decisions through the FSA and SBA NEPA review processes. In short, 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 and SBA provide in the course of preparing NEPA environmental review documents for new or expanding CAFOs in Iowa has become ever more important to CCI's mission and members.

14. 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 and slaughterhouse 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 and slaughterhouses. Through these efforts, ALDF seeks to ensure transparency in the CAFO industry, which is paramount to its ability to protect farmed animals and ALDF members from the CAFO industry's immensely harmful effects. ALDF conducts this work on behalf of itself and more than 300,000 members and supporters throughout the United States, many of whom live near, recreate near, and closely monitor CAFOs and slaughterhouses in their communities.

15. Plaintiff **Association of Irritated 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 (Fresno, Kern, Kings, Stanislaus, and Tulare Counties) on behalf of its several dozen members, who primarily reside in the Valley's under-resourced communities. AIR's members include people with difficulty breathing who are susceptible to air pollution in the Valley, especially particulate matter and ammonia released by dairy and chicken CAFOs. AIR has participated in the 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. In addition, AIR has pushed for stronger regulations on CAFOs to reduce air pollutant emissions. 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 permits. 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 also continually monitors local CAFO operations for compliance with pertinent local, state, and federal rules. It has never passed on the chance to submit comments on either individual CAFO permit applications in the Valley or larger, programmatic actions regarding CAFOs.

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. IATP also seeks to halt, or at least influence, the subsidization of new CAFO industry facilities by submitting comments during the NEPA environmental review process. In the past,

IATP has commented on Environmental Assessments for Minnesota CAFOs on its own behalf.

17. Plaintiff **Waterkeeper Alliance, Inc**. ("Waterkeeper Alliance") is a not-for-profit corporation headquartered in New York, New York. Waterkeeper Alliance is a global movement of on-the-water advocates who patrol and protect over 2.7 million square miles of rivers, streams, and coastlines in North and South America, Europe, Australia, Asia, and Africa. Waterkeeper Alliance seeks to protect water quality in every major watershed around the world, and to restore and maintain all waterways as drinkable, fishable, and swimmable consistent with the goals of the federal Clean Water Act and other laws. Waterkeeper Alliance works toward this vision through direct advocacy and through the grassroots advocacy of its members and affiliate organizations, which Waterkeeper Alliance connects and supports to provide a voice for waterways and their communities worldwide. Waterkeeper Alliance routinely comments on proposed federal and state regulations and permits affecting regulated pollution sources; advocates to federal, state, and local officials; and conducts educational outreach, training, and coordinated advocacy efforts with and for its members. Additionally, Waterkeeper has engaged in key litigation and other education, outreach, and advocacy related to the CAFO industry as part of its "Pure Farms, Pure Waters" campaign for many years. For example, Waterkeeper has participated in major litigation involving federal regulation of CAFOs, including as a party in litigation challenging both of EPA's most recent major revisions to its CAFO regulations.

18. Plaintiff **Waterkeepers Chesapeake** is a 501(c)(3) nonprofit watershed advocacy organization headquartered in Takoma Park, Maryland. It operates as a coalition of 17 independent Waterkeeper programs working throughout the Chesapeake and Delmarva Coastal Bays Watersheds. The coalition actively works to protect and improve the health of the Chesapeake Bay and the waterways in the region, including Maryland's Eastern Shore—the

predominate location of chicken CAFOs in the state. Waterkeepers Chesapeake aims to amplify the voices of the individual Waterkeeper groups and their members and to work together on campaigns to stop pollution throughout the region that affects the Chesapeake, including pollution released from the many "broiler" chicken houses and other CAFOs that dot the mid-Atlantic region. Its efforts include keeping its Waterkeeper programs' members and communities informed about environmental issues that affect them, including the construction of new or expansion of existing CAFOs and slaughterhouses in the watershed. To that end, Waterkeepers Chesapeake posts on its website information about algal blooms, waterborne illnesses, and nutrient pollution, as well as new CAFOs and slaughterhouses in the region and their impacts on local waterbodies—particularly impaired waterbodies. Waterkeepers Chesapeake posts this information publicly and disseminates the information to its coalition's members so that they can attend hearings and submit public comments on proposals or permits that affect or concern them. Waterkeepers Chesapeake further encourages and assists its members in participating in these public processes and joins member organizations in opposing new CAFO industry construction and expansion in their watersheds. Waterkeepers Chesapeake also works to improve state and federal regulation of the CAFO industry through legislative, regulatory, and permitting efforts and by assisting with studies on the environmental impacts of CAFOs. Waterkeepers Chesapeake established and leads the "Fair Farms Movement" to bring together sustainable farmers, consumers, and businesses to provide an alternative to the industrial agriculture system.

19. Plaintiff organizations rely on the public notice and information generated during NEPA review to carry out their missions. For several Plaintiffs, public notice and access to environmental information are an important 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 and slaughterhouses. 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.

20. As just some examples, Iowa Citizens for Community Improvement, Association of Irritated Residents, and Waterkeepers Chesapeake use information generated through NEPA review when they advocate on behalf of their members and local communities (as well as allow members advocate for themselves) before government decision-makers at the federal, state, and local levels. Plaintiffs also gather the information arising from NEPA review and distribute it to their members so that the members may make better decisions about where they live, recreate, and work; the NEPA-generated 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 or slaughterhouse. For example, Plaintiff Waterkeepers Chesapeake uses 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. Plaintiff Animal Legal Defense Fund likewise utilizes information about the environmental impacts of CAFOs and slaughterhouses to protect their individual members

and advance their members' and organizational interests through legal advocacy.

21. To protect their interests in the continued administration of NEPA across the federal government, Plaintiffs submitted comments on CEQ's Advanced Notice of Proposed Rulemaking and Notice of Proposed Rulemaking opposing CEQ's desired and potential changes. Plaintiffs' comments on the Proposed Rule included concerns focused specifically on CEQ's proposal to exempt all federal funding for the CAFO industry from NEPA review and the other proposed changes discussed herein that will especially harm communities affected by the CAFO industry.

22. As a result of Defendants' actions, Plaintiffs and their members and supporters have been and will continue to be injured by CEQ's Final Rule, which deprives them of information that federal law gives them the right to know. NEPA requires agencies to provide public notice of NEPA-related hearings, public meetings, and the availability of environmental documents so as to inform those persons who may be interested or affected. By carving out the public's access to this information in the context of federal funding for the CAFO industry, CEQ hinders Plaintiffs' abilities 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.

23. CEQ's action further injures Plaintiffs by depriving them of notice of new and expanding CAFOs and slaughterhouses. 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 or slaughterhouse is being developed. Were CEQ to continue requiring notice of proposed funding for individual CAFOs and slaughterhouses, Plaintiffs and

their members would use that information in advocacy to protect their members, their members' communities, and the environment, and would submit public comments when necessary.

24. Members of each membership-based Plaintiff organization are also harmed by CEQ's decision to exempt or otherwise relax the standards applicable to federal funding of the CAFO industry from NEPA review. They reside, recreate, or own businesses or property in localities in which federal agencies have approved and provided federal funding—and continue to approve and provide federal funding—for the development, creation, and expansion of CAFOs and slaughterhouses. The intrusion of the CAFO industry into the members' communities has had pervasive and persistent deleterious effects. Plaintiffs' members are deeply concerned about the operation and expansion of the CAFO industry in their communities and are harmed by the effects it has on their economic vitality, air quality, water quality and quantity, community health, and animal and ecosystem health.

25. These injuries are actual, concrete, and irreparable. Plaintiffs and their members and supporters will continue to suffer harm as a result of CEQ's action unless and until this Court provides the relief requested in this Complaint. An order vacating the illegal provisions of CEQ's rules and mandating compliance with the APA and NEPA by a date certain would redress Plaintiffs' injuries. Such relief would restore requirements that force FSA, SBA, and other agencies that subsidize the CAFO industry to provide Plaintiffs and their members the information and participation opportunities needed to protect themselves from CAFO industry effects, as well as meaningful agency and judicial review of agency decisions supporting the CAFO industry.

26. Defendant **Council on Environmental Quality** ("CEQ") is an executive agency within the Office of the President. CEQ is the federal agency responsible for overseeing NEPA

implementation and compliance across the federal government.

27. Defendant **Mary B. Neumayr** is the Chairperson of CEQ and is sued in her official capacity. As the Chairperson, she has the responsibility of ensuring that CEQ acts in accordance with applicable laws and regulations, and she is ultimately responsible for the promulgation of CEQ's revised NEPA regulations.

LEGAL AND FACTUAL BACKGROUND

I. The National Environmental Policy Act Mandates that CEQ Promulgate Regulations Prioritizing and Promoting the Protection of the Environment.

28. 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.

29. NEPA created a national policy of environmental consideration and conservation across the federal government. Its language is clear: Congress, recognizing "the profound impact of man's activity on . . . the natural environment," as well as "the critical importance of restoring and maintaining environmental quality," intended for the federal government to "use all practicable means and measures, including financial and technical assistance," to ensure that people and the natural environment can "exist in productive harmony." *Id.* § 4331(a). "[T]o carry out the policy set forth in [NEPA]," Congress made explicit that "it is the continuing responsibility of the Federal Government" to, among other things: act as trustee of the environment for future generations, avoid environmental degradation, and preserve a diverse environment. *Id.* § 4331(b)(1), (3), (4). Congress also recognized that "each person should enjoy a healthful environment." *Id.* § 4331(c).

30. These principles—as encapsulated in the declared policy of the legislative branch of the United States government—must underlie all government actions under NEPA. Indeed,

Congress expressly "authorizes and directs that, to the fullest extent possible . . . the policies, *regulations*, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]." *Id*. § 4332 (emphasis added).

31. NEPA's requirements are "supplementary" to agencies' own authority to consider and protect the environment. *Id*. § 4335.

32. NEPA created CEQ specifically to, among other things, "formulate and recommend national policies to promote the improvement of the quality of the environment." *Id*. § 4342; *see also id.* § 4344(4).

33. The FSA Handbook for "Environmental Quality Programs" states that all federal agencies, including FSA, must comply with and implement both NEPA and CEQ's regulations. *See* FSA Handbook 1-EQ (rev. 3) Amend. 1 at ¶ 2C.

34. NEPA applies to "major federal actions significantly affecting the human environment." 42 U.S.C. § 4332(2)(C).

35. The agency proposing such action must make a "detailed statement" on the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the proposed action," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.* § 4332(2)(C)(i)-(v).

36. Prior to making such statement, the responsible official "shall" consult with "any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved." *Id.* § 4332(2)(C). "[T]he comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available . . . to the public . . . and shall accompany the

proposal though the existing agency review processes." *Id.*

37. Agencies must perform NEPA's environmental review *before* undertaking any proposed action. *See id*.

38. NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action. *See id*.

II. CEQ's Prior NEPA Regulations Constitute Four Decades of Environmental Policy Reflecting NEPA's Mandate and Promoting Responsible Environmental Review by Federal Agencies.

39. CEQ promulgates regulations implementing NEPA, which are binding on all agencies. *See* 40 C.F.R. §§ 1500-1508.

40. CEQ first promulgated regulations under NEPA in 1978. These regulations have provided the uniform standard for NEPA compliance across all agencies of the federal government for over 40 years, and they form the basis for judicial opinions that now constitute bedrock environmental law.

41. Prior to the issuance of the Final Rule at issue here, CEQ regulations provided, among other requirements:

a. All "[a]gencies shall . . . [m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures." *Id*. § 1506.6(a) (2019).

b. Specifically, agencies had to "[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." *Id*. § 1506.6(b) (2019).

c. The scope of NEPA review included consideration of direct, indirect, and cumulative effects on "ecological . . . aesthetic, historic, cultural, economic,

social, or health" interests. *Id*. § 1508.8 (2019).

d. When determining if an action was "[s]ignifican[t]" for purposes of NEPA, review required "considerations of both context and intensity[.]" *Id*. § 1508.27 (2019). Because significance "varies with the setting of the proposed action," "context" included consideration of "society as a whole," an "affected region," and "the locality," as well as "affected interests." *Id*. § 1508.27(a) (2019). The "intensity" prong of the significance analysis related to "the severity of the impact." *Id*. § 1508.27(b) (2019). "Intensity" factors included, among others: 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 would be "controversial"; the degree to which effects on the human environment were "highly uncertain or involve unique or unknown risks"; whether the action was "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*.

e. An agency could create categorical exclusions for its own actions, but only if it established 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. *Id*. § 1508.4 (2019). Agencies had to develop "specific criteria for and identification of" actions that qualify as

categorical exclusions. *Id*. § 1507.3(b) (2019).

f. Agency-created procedures for establishing categorical exclusions must provide for extraordinary circumstances, such that even if the agency demonstrated an exclusion is generally warranted, when applying the exclusion it had to determine whether there were "extraordinary circumstances in which a normally excluded action may have a significant environmental effect." *Id*. § 1508.4 (2019).

42. CEQ also issued guidance further explaining how an agency should establish categorical exclusions. *See* Nov. 23, 2010 CEQ Memorandum for Heads of Federal Departments and Agencies re: Establishing, Applying, and Revising Categorical Exclusions under NEPA, 75 Fed. Reg. 75,628, 75,631-38 (Dec. 6, 2010). 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 75,633.

43. CEQ's environmental protection mission demonstrates Congress intended for its regulations to provide a backstop to agencies' own regulations. Agencies like FSA and SBA are animated by missions that may lead them to inadequately implement NEPA—hence, CEQ exists to center the environment in the decision-making processes of agencies that may otherwise not include it within their scope. For instance, FSA recently took the position that its financial support of medium-sized CAFOs near a waterway would not trigger environmental review because the agency no longer considers pollution and other effects in waterways an "extraordinary circumstance" that is an exception to a categorical exclusion. *See* 7 C.F.R.

§ 799.33. CEQ's previous regulations and guidance, which set a floor for environmental review, protected against situations like this, in which other agencies weaken their implementation of NEPA.

III. Plaintiffs Raised Substantial Concerns During Each Stage of CEQ's NEPA Rulemaking.

44. On June 20, 2018, CEQ issued an Advanced Notice of Proposed Rulemaking to introduce its intention to overhaul its administration of NEPA across the federal government. Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act, 83 Fed. Reg. 28,591 (Jun. 20, 2018).

45. Plaintiffs submitted comments on this proposal outlining the ways in which CEQ's desired and potential changes would violate both NEPA and the APA. These comments argued that CEQ should not seek to revise its NEPA regulations, and provided extensive examples of how CEQ could achieve its stated goals of promoting NEPA review efficiency, aiding public participation, and improving environmental review through more thorough implementation of existing regulations.

46. CEQ then issued a Notice of Proposed Rulemaking on January 10, 2019, outlining its desired regulatory changes. Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 1684 (Jan. 10, 2020).

47. Plaintiffs again submitted several sets of comments outlining the ways in which CEQ's desired and proposed changes would violate both NEPA and the APA.

48. One set of Plaintiffs' comments explained how—among other procedural and substantive deficiencies—the Proposed Rule violates NEPA by exempting federal funding, including FSA and SBA loans and loan guarantees, which spawn and enlarge CAFOs that otherwise would not exist or expand. The comments detailed how the CAFO industry

significantly affects air quality, water quantity and quality, and spur climate change. The comments also explained the role of FSA and SBA funding in fueling the expansion of the CAFO industry nationwide.

49. Plaintiffs also submitted comments raising concerns that CEQ's rulemaking process failed to adequately engage the public in the process and violated CEQ's regulations, along with NEPA and APA statutory mandates.

50. Plaintiffs additionally submitted comments focusing on the environmental justice impacts of CEQ's proposed revisions, which demonstrated how CEQ's numerous proposed provisions limiting the scope of NEPA review would disproportionately impact vulnerable and overburdened communities. The comments outlined how the proposed rule's limits on public participation and its removal of agency obligations to respond to comments would disproportionately affect environmental justice communities. Furthermore, the comments highlighted how CEQ's proposal to allow agencies to set bonds would disproportionately deter environmental justice communities from seeking judicial review of decisions that impact them.

IV. CEQ's Final Rule Radically Reverses and Weakens Environmental Review Requirements in Contravention of NEPA and Established Environmental Policy.

51. It took just six months for CEQ to undo 40 years of NEPA regulation: CEQ issued the Final Rule on July 16, 2020. Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 Fed. Reg. 43,304 (Jul. 16, 2020). The Final Rule adopted much of the Proposed Rule's sweeping changes to over four decades of CEQ policy under NEPA. Under the pretense of streamlining and updating NEPA compliance, CEQ's Final Rule makes immense alterations to NEPA requirements across the federal government.

52. Whereas previously CEQ applied NEPA to all major federal actions significantly affecting the human environment, the Final Rule expressly insulates federal funding of the

CAFO industry from NEPA review. The Final Rule redefines "major Federal action" in a manner that expressly excludes "Loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of such assistance (for example, action does not include farm ownership and operating loan guarantees by the FSA pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697g)." 40 C.F.R. § 1508.1(q)(1)(vii) (2020).

53. The federal government provides vast amounts of loan funding to CAFOs and slaughterhouses across the country. Without this public money, hundreds, if not thousands, fewer CAFOs would be constructed or expanded each year. There is a direct causal relationship between federal funding, the resulting CAFOs, and the environmental harms caused by the CAFOs: the federal government's decision to provide funding to a new or expanding project determines whether or not the CAFO is built or expanded.

54. With respect to loan guarantees, for example, FSA states that applicants are not eligible to receive one unless they are otherwise unable to obtain a loan without an FSA guarantee. *See* 7 C.F.R. § 762.120(h)(1). "Without the guarantees, there would[] be[] no loans. Without the loans, no farm." *Buffalo River Watershed All. v. Dep't of Agric.*, No. 4:13-CV-450-DPM, 2014 WL 6837005, at *2 (E.D. Ark. Dec. 2, 2014).

55. FSA has also recently explained that if a lender violates one of FSA's regulations, the agency will not pay the loss claim to the lender in the event of a liquidation. *See* Decl. of Associate Administrator Steven Peterson ¶ 8, Dkt. No. 75-2, *Wild Virginia v. CEQ*, No. 3:20-cv-00045 (W.D. Va.). Under current FSA regulations, the lender and the recipient of a loan associated with an FSA loan guarantee must first work with FSA to complete an Environmental

Assessment before receiving a loan for the construction or major expansion of a large CAFO. 7 C.F.R. § 799.41(9). That Environmental Assessment, in turn, must include "potential mitigation measures that FSA will require, if needed." *Id.* § 799.42(a)(8). If the lender issues a loan without imposing the environmental protection "mitigation measures" that FSA requires, then FSA will not pay the loss claim.

56. This influence of federal funding, including government-backed loan guarantees, means that individual projects and the CAFO lending program are subject to federal control and responsibility for purposes of establishing significance of a major federal action. *See* ***Buffalo River Watershed All.***, No. 4:13-CV-450-DPM, 2014 WL 6837005, at *2; *see also Food & Water Watch*, 325 F. Supp. 3d 39, 54–55 (D.D.C. 2018).

57. Loan guarantees also constitute ongoing federal action subject to NEPA review. *See Food & Water Watch*, 325 F. Supp. 3d at 49–52 (holding that FSA's involvement in a project is ongoing through the life of the loan guarantee).

58. The money flowing from the federal government through its lending agencies into the CAFO industry is enormous. For example, an FSA-prepared spreadsheet of all the loan guarantees it approved in 2010 and 2011 includes hundreds of guaranteed loans to contract growers associated with corporate CAFO integrators.[1]

59. Specific state experiences further show the pervasiveness of federal government financial support for individual projects within the CAFO industry. Records provided by FSA in response to a Freedom of Information Act request show that in just the two years between

[1] A corporate integrator is a company in the CAFO industry that controls a "vertically integrated" structure, where the large corporation owns the animals throughout their lives, and controls nearly every aspect of the production process, including slaughter—while also maintaining it is not responsible for animal manure and all of its effects.

August 2016 and August 2018, 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 building new or expanding existing dairy, chicken, turkey, pig, veal calf, or puppy CAFOs; building new manure management structures; and purchasing livestock. Other records from FSA show that between August 2016 and December 2017, FSA supplied loans to at least 100 medium CAFOs in Arkansas, dozens of medium CAFOs in New York, and more than ten medium CAFOs in both Iowa and Kansas.[2]

60. CEQ's responses to comments in the Final Rule fail to acknowledge or address these facts, which several Plaintiffs raised in their comments. Indeed, CEQ's decision to forge ahead with this exemption for a singular industry—among all the myriad actions, across sectors, to which NEPA applies—demonstrates its desire to displace the judiciary as the final arbiter of NEPA's application to the CAFO industry, specifically.

61. CEQ further limits the application of NEPA to the CAFO industry through:

a. Redefining of "major Federal action" to, in addition to the above, omit instances of agency failures to act. *See* 40 C.F.R. § 1508.1.

b. Removal of the definition of "significantly," thereby leaving it up to agency interpretation. *See* 85 Fed. Reg. 43,351 (codified at 40 C.F.R. § 1501.3(b)).

c. Allowance for federal agencies to waive NEPA review where an agency determines that another agency's review processes—whether or not under

[2] 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). A "large CAFO" confines more animals than the higher bounds of the range of animals for medium CAFOs.

NEPA or pertaining to environmental effects—satisfy the agency's own NEPA requirements. *See id*. §§ 1500.5(j), 1506.3, 1507.3(e)(5).

d. Removal of mandatory language regarding when programmatic Environmental Impact Statements are required, making them discretionary. *See id*. § 1502.4(b).

e. Allowance for agencies to apply categorical exclusions regardless of whether extraordinary circumstances exist. *See id*. § 1501.4(b)(1).

62. The Final Rule also turns four decades of NEPA policy on its head by making CEQ regulations the ceiling rather than the floor of environmental protection. Rather than simply "supplement[ing] agencies' own procedures," as NEPA itself requires, 42 U.S.C. § 4335, the Final Rule prohibits agencies from promulgating stricter standards for NEPA compliance, *see id*. § 1507.3(b). Agencies with expertise over their own subject matter and processes thus do not have the flexibility to implement their own regulations to effectively apply NEPA to their own actions.

63. Where CEQ's Final Rule does allow for NEPA review, it improperly cabins its scope, depth, and substance in ways that ignore the CAFO industry's most substantial impacts and undermine the NEPA review process. For example, the Final Rule:

a. Lowers the standard for "reasonably foreseeable" effects to that of a reasonable person (rather than an expert agency), such that an agency must only consider those that are "sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision." *See id*. § 1508.1(aa).

b. Replaces "possible" with "practicable" throughout the regulatory scheme,

allowing agencies to consider such factors as cost, time required, and technical and economic feasibility when deciding how and whether to comply with NEPA. *See id.* §§ 1500.2, 1501.2, 1501.5, 1501.7, 1501.8, 1501.9, 1502.5, 1502.9, 1502.11, 1505.2, 1506.2, 1506.4.

c. Substantially limits "reasonable alternatives" to exclude those that are not within the lead agency's jurisdiction, while also preventing other agencies with relevant jurisdiction from weighing in on alternatives. The Final Rule also excludes those alternatives that are "infeasible, ineffective, or inconsistent with the purpose and need for agency action." *Id.* § 1508.1(z); *see* 85 Fed. Reg. 43,325 & n.86.

d. Similarly cabins the scope of "purpose and need" to reflect those of the applicant, such that the entire NEPA review is designed to further the applicant's goals rather than balance them against the needs and goals of NEPA and the public. *See id.* §§ 1502.13, 1502.14, 1508.1(z).

e. Significantly limits the scope of effects considered by eliminating "cumulative" and "indirect" effects, and requiring that effects have a "reasonably close causal relationship" to the proposed action, which excludes effects that are "remote in time and space" or "the product of a lengthy causal chain." *See id.* § 1508.1(g).

64. CEQ's Final Rule also completely undermines NEPA's and the APA's crucial functions of public notice and participation, which are essential to Plaintiffs and their members' abilities to protect themselves from the CAFO industry's proliferation. For example, the Final Rule:

a. Only requires that the public be "informed" of agency decisions, rather than given participatory rights. It makes responding to comments discretionary, and allows agencies to respond to public comments generally, without detailed explanation or citations, including by only summarizing them rather than assessing and considering them. *See id.* §§ 1503.4(a), 1502.17.

b. Lowers the burden on agencies so that they do not need to complete "new scientific and technical research" during the Environmental Impact Statement process. *See id.* § 1502.23.

c. Shifts responsibility onto members of the public to provide specific and technical comments on agency proposals. *See id.* § 1503.3.

d. Removes requirements to engage in a scoping process for Environmental Assessments, allows agencies to solicit public comment on incomplete Environmental Impact Statements, limits public comment periods to 30 days, and removes requirements to make available Environmental Impact Statements before public hearings. *See id.* §§ 1502.9, 1501.9(a), 1506.11.

65. NEPA's notice and participation requirements serve crucial functions in the context of federal funding of the CAFO industry because public notice of the facilities provides neighbors with information about CAFOs being built or expanded in their communities, and their impacts, that the neighbors cannot obtain elsewhere. In some cases, comprehensive information on CAFO proliferation is unavailable to the public because federal agencies do not even have it. For example, not even EPA, the main agency tasked with regulating the CAFO industry, knows where and how many CAFOs exist nationwide.

66. Public notice of federal funding for the CAFO industry also provides critical

transparency into how the federal government fuels the proliferation of CAFOs. This notice afforded by NEPA review allows neighboring residents and other members of the affected public to influence government decisions to provide financing to the CAFOs. Many local residents and their advocates, such as Plaintiffs, utilize comment periods to voice opposition to new facilities and their harmful practices.

67. Without the transparency provided by NEPA review, many impacted members of the public would not even be aware that federally-funded CAFO expansion is happening in their communities, and being made possible by public funds. Under CEQ's new regulations, federal funding for CAFOs and slaughterhouses will flow into Plaintiffs' communities without the communities ever being able to weigh in.

68. Lack of public notice will directly advance the expansion of the CAFO industry in rural America. FSA has already demonstrated how it uses lack of public notice to its advantage. For example, it used a lack of public opposition to a medium-sized turkey CAFO in Indiana to justify its decision to approve lending for the facility, even though no notice had been given to the public. Indeed, in approving the facility without offering public notice, an FSA official wrote, "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 sale."

69. The result is that CEQ's Final Rule leaves communities without any information about incoming or expanding CAFOs—let alone opportunities to provide input and opposition—before FSA makes decisions that bring major industrial operations near their homes and construction begins.

70. Finally, the Final Rule unlawfully restricts the Court's authority to conduct

judicial review in ways that will deprive Plaintiffs of the core NEPA protections emanating from judicial oversight, as well as deprive the judiciary of its role in ensuring lawful agency action. The Final Rule does so by, for example:

a. Providing that any comments, information, or analysis not timely raised during a NEPA process are deemed unexhausted and forfeited. 40 C.F.R. § 1503.3(b).

b. Creating a presumption of validity to agency actions by allowing agencies to self-certify that they have complied with NEPA, and purporting to export this presumption into judicial review by providing that such certification "is entitled to a presumption that the agency has adequately considered the submitted alternatives, information, and analyses . . . in reaching its decision." 85 Fed. Reg. 43,314; *see also* 40 C.F.R. § 1505.2(b).

c. Redefining final agency action for purposes of judicial review to exclude agency inaction. *E.g.*, *compare* 40 C.F.R. § 1508.18 (2019) *with* 40 C.F.R. § 1502.4.

d. Stating CEQ's "intention" that regulatory violations are not a basis for injunctive relief, and that a harmless error standard should apply to such violations. *Id*. § 1500.3(d).

71. Judicial review of NEPA compliance in the CAFO industry, and specifically the equitable relief it provides, is one of the most powerful—if not the only—tools of redress available to communities directly affected by CAFOs and slaughterhouses. *See Food & Water Watch*, 325 F. Supp. 3d at 54–55; *Buffalo River*, 2014 WL 6837005, at *2. Without meaningful judicial review enjoining unlawful action before its harms become irreversible, NEPA cannot be

effectuated as Congress intended.

72. If CEQ succeeds in eviscerating NEPA's provisions for public notice and participation, robust agency consideration of environmental impacts, and meaningful judicial review, then small farmers, the communities within which they live, and environmental, animal, and public health advocates will neither learn about nor be able to participate in a full environmental review process for an incoming or expanding federally funded CAFO or slaughterhouse until after construction or expansion has begun—at which point it can be almost impossible to challenge regardless of its impacts because extensive financial assets have already been invested in the project. A new or expanded facility's risks to rural drinking water supplies, air quality, confined and wild animals, and public health and safety will go unnoticed and without adequate consideration until it is simply too late.

73. In sum, CEQ's Final Rule provides the CAFO industry a special exemption to NEPA both explicitly and in effect. This industry exemption hamstrings the public and the judiciary, serving only to support industrial animal production and to obscure the federal government's role in abetting CAFO industry expansion, to the detriment of rural communities.

CLAIMS FOR RELIEF

Count 1: Violation of NEPA and the APA (Unlawfully Exempting Financial Assistance to the CAFO Industry)

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

75. NEPA requires agencies to perform environmental review for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

76. NEPA requires that any agency proposing such action make a "detailed statement" on the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the

proposed action," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.* § 4332(2)(C)(i)-(v).

77. NEPA further expressly "directs that, to the fullest extent possible . . . the policies, *regulations*, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in [NEPA]." *Id.* § 4332 (emphasis added).

78. NEPA also requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action. *Id.* § 4332(2)(C).

79. FSA, SBA, and other federal agency approvals for financial assistance to the CAFO industry are "major Federal actions."

80. These agencies can and do control whether borrowers can finance new and expanded facilities in the CAFO industry; their decisions to provide funding to a new or expanding project determines whether or not the facility is built or expanded. Individual projects are thus subject to continuous Federal control and responsibility. Decisions to fund individual projects result in massive financial assistance to the CAFO industry nationwide, making the industry's continued existence impossible without federal funding. *See Food & Water Watch*, 325 F. Supp. at 54–55.

81. Federal agencies also can and have influenced the environmental consequences of CAFO industry projects by, for example, incorporating mitigation measures and other requirements into their NEPA review of financial assistance.

82. The Final Rule categorically removes FSA, SBA, and other federal agency financial assistance to the CAFO industry from environmental review under NEPA. 40 C.F.R. § 1508.1(q)(1)(vii).

83. CEQ's decision to exempt these programs from the definition of "major Federal action," and therefore NEPA compliance, departs from its long-standing policy; conflicts with the plain language and judicial interpretations of NEPA; fails to consider important aspects of the problem, provide a rational connection between the facts found and the choice made, or offer an explanation that comports with the evidence before CEQ; and exceeds CEQ's delegated statutory authority to administer NEPA.

84. The Final Rule deprives Plaintiffs of their rights under both NEPA and the APA.

85. Accordingly, CEQ's Final Rule is arbitrary and capricious; an abuse of discretion; not in accordance with the APA, NEPA, or implementing regulations; and in excess of statutory jurisdiction, in violation of the APA, *see* 5 U.S.C. § 706(2), and NEPA, 42 U.S.C. § 4332.

Count 2: Violation of NEPA and the APA
(Unlawfully Restricting NEPA Review)

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

87. NEPA requires agencies to perform environmental review for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

88. NEPA requires that any agency proposing such action must make a "detailed statement" on the "environmental impact of the proposed action," "any adverse environmental effects which cannot be avoided should the proposal be implemented," "alternatives to the proposed action," and "any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented." *Id.* § 4332(2)(C)(i)-(v).

89. NEPA requires not merely public notice, but public participation in the evaluation of the environmental consequences of a major federal action. *Id.* § 4332(2)(C).

90. NEPA's requirements are "supplementary" to agencies' own authority to consider and protect the environment. *Id*. § 4335.

91. CEQ's Final Rule limits the application of NEPA to the CAFO industry by, for example, omitting instances of agency failures to act from the definition of "major Federal action" and removing considerations of an action's significance, 40 C.F.R. § 1508.1; allowing federal agencies to waive NEPA review entirely, *id*. §§ 1500.5(j), 1506.3, 1507.3(e)(5); making programmatic Environmental Impact Statements discretionary where they were previously mandatory, *id*. § 1502.4(b); and allowing agencies to apply categorical exclusions regardless of whether extraordinary circumstances exist, *id*. § 1501.4(b)(1).

92. The Final Rule further prohibits agencies from promulgating stricter standards for NEPA compliance, *id*. § 1507.3(b), displacing them rather than simply supplementing them.

93. Where CEQ's Final Rule does allow for NEPA review, it improperly cabins its scope, depth, and substance in ways that ignore the CAFO industry's most substantial impacts and undermine the NEPA review process. For example, it lowers the standard for "reasonably foreseeable" effects, *id*. § 1508.1(aa); replaces "possible" with "practicable" throughout the regulatory scheme; substantially limits "reasonable alternatives," *id*. § 1508.1(z); cabins the scope of "purpose and need," *id*. §§ 1502.13, 1502.14, 1508.1(z); and eliminates "cumulative" and "indirect" effects, requiring instead that effects have a "reasonably close causal relationship" to the proposed action, *id*. § 1508.1(g).

94. CEQ's Final Rule also undermines NEPA's crucial functions of public notice and participation and reduces them to mere formalities, *e.g.*, *id*. §§ 1501.9(a), 1502.9, 1502.17, 1502.23, 1503.4(a), 1506.11, while also shifting agencies' burdens to the public, *id*. § 1503.3.

95. Finally, the Final Rule unlawfully restricts the Court's authority to conduct judicial review and fashion appropriate relief. *E.g.*, *id*. §§ 1500.3(d), 1502.4, 1503.3(b), 1505.2(b).

96. Individually and together, these changes depart from CEQ's long-standing policy; conflict with the plain language and judicial interpretations of NEPA; fail to consider important aspects of the problem, provide a rational connection between the facts found and the choice made, or offer an explanation that comports with the evidence before CEQ; and exceed CEQ's delegated statutory authority to administer NEPA.

97. The Final Rule deprives Plaintiffs of their rights under both NEPA and the APA.

98. Accordingly, CEQ's Final Rule is arbitrary and capricious; an abuse of discretion; not in accordance with the APA, NEPA, or implementing regulations; and in excess of statutory jurisdiction, in violation of the APA, *see* 5 U.S.C. § 706(2), and NEPA, 42 U.S.C. § 4332.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs request this Court enter an Order:

1) Declaring that Defendants have violated NEPA and the APA by issuing a Final Rule that is arbitrary and capricious, an abuse of discretion, contrary to and not in accordance with the APA and the statutory purpose and language of NEPA, and in excess of statutory jurisdiction;

2) Holding unlawful and setting aside unlawful provisions of the Final Rule, reinstating the provisions in effect prior to the enactment of the Final Rule;

3) Enjoining implementation and enforcement of such provisions of the Final Rule;

4) 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

5) Providing for such other relief as the Court deems just and appropriate.

Respectfully submitted this 23rd day of September, 2020.

/s/ Cristina Stella

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