

**PETITION FOR RULEMAKING**

**PURSUANT TO THE ADMINISTRATIVE PROCEDURE ACT,  
5 U.S.C. § 553(e),  
UNITED STATES DEPARTMENT OF AGRICULTURE  
REGULATION, 7 C.F.R. § 1.28, &  
FOOD SAFETY AND INSPECTION SERVICE REGULATIONS,  
9 C.F.R. §§ 392.1–392.9,**

**TO THE U.S. DEPARTMENT OF AGRICULTURE,  
FOOD SAFETY AND INSPECTION SERVICE, &  
COUNCIL ON ENVIRONMENTAL QUALITY**

**FOR PROMULGATION OF A RULE RESCINDING THE  
CATEGORICAL EXCLUSION OF THE FOOD SAFETY AND  
INSPECTION SERVICE UNDER THE NATIONAL  
ENVIRONMENTAL POLICY ACT**

**June 20, 2024**

**SUBMITTED BY:**

**THE CENTER FOR BIOLOGICAL DIVERSITY, THE HUMANE  
SOCIETY OF THE UNITED STATES, & THE HUMANE  
SOCIETY LEGISLATIVE FUND**

# NOTICE OF PETITION FOR RULEMAKING

Via Electronic Mail and Certified Mail/Return Receipt Requested (with Literature Cited)

June 20, 2024

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## **Re: Petition for Rulemaking to Eliminate FSIS from USDA’s List of Agencies Categorically Excluded from NEPA’s EA and EIS Requirements**

Dear Secretary Vilsack, FSIS Docket Clerk, and Chair Mallory,

Pursuant to the First Amendment of the U.S. Constitution,<sup>1</sup> 5 U.S.C. § 553(e),<sup>2</sup> 7 C.F.R. § 1.28,<sup>3</sup> and 9 C.F.R. §§ 392.1–392.9,<sup>4</sup> the Center for Biological Diversity, the Humane Society of the United States, and the Humane Society Legislative Fund (together Petitioners) hereby petition for

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<sup>1</sup> U.S. CONST. Amend. I; *see also United Mine Workers v. Ill. State Bar Ass’n*, 389 U.S. 217, 222 (1967) (“[T]he right[] to . . . petition for a redress [of] grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights.”).

<sup>2</sup> 5 U.S.C. § 553(e) (“Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.”).

<sup>3</sup> 7 C.F.R. § 1.28 (“Petitions by interested persons in accordance with 5 U.S.C. § 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule. All such petitions will be given prompt consideration and petitioners will be notified promptly of the disposition made of their petitions.”).

<sup>4</sup> 9 C.F.R. §§ 392.1–392.9 (containing “provisions governing the submission of petitions for rulemaking to the Food Safety and Inspection Service (FSIS)”).

issuance of a rule rescinding the U.S. Department of Agriculture (USDA), Food Safety and Inspection Service’s (FSIS) categorical exclusion (CE) from Environmental Assessment (EA) and Environmental Impact Statement (EIS) requirements under the National Environmental Policy Act (NEPA). *See* 7 C.F.R. § 1b.4(b)(6).

Petitioners request this amendment to bring USDA into alignment with its obligations under NEPA and to help ensure that FSIS finally conducts appropriate environmental reviews of its agency actions, including as they relate to significant effects on endangered and threatened species and their habitats. NEPA remains a critically important law to facilitate objective analysis of the potential environmental consequences of proposed actions and feasible alternatives. It is also often the only opportunity for meaningful government transparency and public involvement related to the environmental implications of those actions. Given the critical role NEPA review plays in agency decisionmaking, USDA and the Council on Environmental Quality (CEQ) cannot continue to allow an entire agency that produces industry-wide rulemakings with significant environmental effects to completely sidestep its NEPA obligations.

This Petition is especially timely given the CEQ’s recent promulgation of new implementing regulations. In this new rule, the CEQ mandates the review of categorical exclusions (CEs) and encourages agencies to start with their oldest CEs. National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35574 (May 1, 2024) (to be codified at 40 C.F.R. § 1507.3(c)(9)). USDA’s CE of FSIS is among its oldest.

Petitioners are “interested person[s]” under 5 U.S.C. § 553(e) (APA requirements), 7 C.F.R. § 1.28 (USDA requirements), and 9 C.F.R. § 392.5 (FSIS requirements) and seek issuance and amendment of certain existing rules to make them consistent with American values, science, and with all relevant legal authorities and policies.<sup>5</sup>

Respectfully submitted,

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<sup>5</sup> Under 5 U.S.C. § 553(e), “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” Petitioners are “interested person[s]” under 5 U.S.C. § 551(2), which defines “person” as “an individual, partnership, corporation, association, or public or private organization other than an agency.” 7 C.F.R. § 1.28 states: “Petitions by interested persons in accordance with 5 U.S.C. § 553(e) for the issuance, amendment or repeal of a rule may be filed with the official that issued or is authorized to issue the rule.” 9 C.F.R. § 392.5(a) states: “Any interested person may file a petition with FSIS. For purposes of this part, an ‘interested person’ is any individual, partnership, corporation, association, or public or private organization.”

*on behalf of*

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# PETITION FOR RULEMAKING

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## I. INTRODUCTION

The Food Safety and Inspection Service (FSIS) is an agency housed within the United States Department of Agriculture (USDA).<sup>6</sup> It is responsible for inspecting and regulating meat, poultry, and egg processing to ensure those products are safe for consumption.<sup>7</sup> Many of FSIS's actions, including regulating slaughterhouse operations, have significant impacts on the environment.

The National Environmental Policy Act (NEPA) requires agencies of the United States federal government to evaluate and consider the environmental impacts of proposed actions before deciding what action to take.<sup>8</sup> Congress enacted NEPA to ensure that federal agencies (1) take a “hard look” at the environmental impacts of their decisions, and (2) disclose and allow for public comment on such environmental impacts.<sup>9</sup> This is often the only opportunity for meaningful government transparency and public involvement related to the environmental implications of agency actions.

Federal agencies comply with NEPA by preparing “a detailed statement” in the form of an Environmental Impact Statements (EIS) or Environmental Assessment (EA) on all “major Federal actions significantly affecting the quality of the human environment.”<sup>10</sup> For actions known to have no significant effect on the environment, an agency may issue a categorical exclusion (CE) to exclude those activities from further environmental review.<sup>11</sup>

In 1983, less than two years after FSIS was established,<sup>12</sup> USDA promulgated a final rulemaking categorically excluding FSIS, as well as several other of its agencies,<sup>13</sup> from certain NEPA requirements.<sup>14</sup> USDA based that decision on a flawed determination that those agencies do not take actions that would have a significant impact on the environment. On the contrary, some of these agencies, including FSIS, do regularly take major Federal actions that cause significant

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<sup>6</sup> 9 C.F.R. § 300.1.

<sup>7</sup> *Id.* § 300.2; *see also* *About FSIS*, USDA, FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/about-fsis> (last visited Jun. 14, 2024).

<sup>8</sup> 42 U.S.C. § 4321 *et seq.*

<sup>9</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349, 350 (1989).

<sup>10</sup> 42 U.S.C. § 4332(2)(C).

<sup>11</sup> *Id.* § 4336e (2023).

<sup>12</sup> *Reorganization of Department*, USDA Secretary's Memorandum 1000-1 (June 17, 1981).

<sup>13</sup> *See* 48 Fed. Reg. 11403 (Mar. 18, 1983) (listing (1) Agricultural Cooperative Services, (2) Agricultural Marketing Service, (3) Extension Service, (4) Economic Research Service (5) Federal Crop Insurance Corporation, (6) Federal Grain Inspection Service, (7) Food and Nutrition Service, (8) Food Safety and Inspection Service, (9) Foreign Agricultural Service, (10) Office of Transportation, (11) Packers and Stockyards Administration, (12) Statistical Reporting Service, (13) Office of the General Counsel, (14) Office of the Inspector General, (15) National Agricultural Library); 7 C.F.R. § 1b.4.

<sup>14</sup> In requesting this action, Petitioners do not concede that any of the other agencies or units listed in this regulation are properly categorically excluded under NEPA. As discussed *infra* in Part VIII.A, there is in fact no statutory authority for USDA to exempt *an* entire agency from NEPA's EIS and EA requirements. Under CEQ guidance, agencies may only exclude *actions* from EIS and EA requirements, not entire agencies. As a result, Petitioners ask that all USDA agencies be removed from this list of categorically excluded agencies. This Petition, however, is focused specifically on USDA's unlawful exclusion of FSIS from NEPA's EIS and EA requirements, and that is the primary action that Petitioners seek here.

environmental impacts. Yet, pursuant to this rule, categorically excluded agencies such as FSIS do not need to prepare EAs or EISs absent a finding by the agency head that extraordinary circumstances are involved—a determination that *no* FSIS or USDA head has ever reached despite the frequent significant effects of the agency’s actions.<sup>15</sup>

Federal agencies are bound by the Council on Environmental Quality’s (CEQ) regulations that implement the requirements of NEPA.<sup>16</sup> The CEQ regulations implementing NEPA state that “[a]gencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA] and the [CEQ] regulations.”<sup>17</sup> The CEQ mandates review of CEs every 10 years and encourages expedited review of older CEs.<sup>18</sup> The time to review the FSIS CE has long since lapsed.

USDA does not have the authority under NEPA or pursuant to the CEQ regulations to create a CE for entire agencies responsible for multiple categories of actions that do or may significantly affect the human environment.<sup>19</sup> CEs are reserved for agency actions that have had no significant environmental impact in the past and will likely not have a significant impact in the future.<sup>20</sup> As detailed further below, FSIS’s industry-wide rulemaking actions certainly do not fit this definition in word or intent. The agency therefore should not continue to be shielded from NEPA review though USDA’s CE protections.

Accordingly, USDA’s CE of FSIS is in excess of statutory authority, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the obligations of NEPA and must be rescinded. Factors that make this action arbitrary and capricious are further discussed *infra* in Parts VIII.B-C. Agencies’ decisions to designate new categorical exclusions are reviewable under the Administrative Procedures Act (APA) and are also periodically reviewed by the CEQ.<sup>21</sup>

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<sup>15</sup> In response to a request for “records of or relating to an Environmental Assessment (EA) and/or Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) conducted by the FSIS or USDA regarding the FSIS,” USDA stated that “all FSIS actions are categorically excluded from preparation of an EA or EIS unless the Agency head determines that a particular action may have a significant environmental effect. Therefore, FSIS has no responsive records.” Final Response for Freedom of Information Act (FOIA) Request No. 2023-FSIS-00166-F (May 9, 2023); *see also* 40 C.F.R. § 6.204 (2024).

<sup>16</sup> 42 U.S.C. § 4342; 40 C.F.R. § 1500.3(a).

<sup>17</sup> 40 C.F.R. § 1500.6 (2024).

<sup>18</sup> *See infra* note 121.

<sup>19</sup> As discussed *infra* in Parts V.B.1 and VIII.A, federal agencies only have the authority to designate categorical exclusions for categories of actions under NEPA and relevant CEQ guidance. *See* 89 Fed. Reg. 35442, 35573-74 (to be codified at 40 C.F.R. § 1507.3); *see also* Nancy H. Sutley, *Guidance: Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act*, COUNCIL ON ENV’T QUALITY (Nov. 23, 2010), [https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA\\_CE\\_Guidance\\_Nov232010.pdf](https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf).

<sup>20</sup> Sutley, *supra* note 19, at 3-5.

<sup>21</sup> *Id.* at 15-17.

Accordingly, pursuant to the First Amendment of the U.S. Constitution,<sup>22</sup> the APA,<sup>23</sup> and USDA and FSIS regulations on petitions,<sup>24</sup> the Center for Biological Diversity, the Humane Society of the United States, and the Humane Society Legislative Fund petition the CEQ and USDA to 1) review USDA's CE for FSIS, 2) remove FSIS from the list of USDA agencies and agency units deemed categorically excluded from the obligations of NEPA's EA and EIS requirements at 7 C.F.R. § 1b.4, and 3) mandate that FSIS fully complies with its obligations under NEPA.

This Petition is particularly timely given the CEQ's recent issuance of new implementing regulations, effective July 1, 2024, in which the CEQ directs agencies to develop procedures to implement the regulations that include a review of CEs and urges agencies to begin with their oldest ones.<sup>25</sup> Notably, USDA's CE for FSIS is among its earliest.<sup>26</sup> We therefore request this amendment to duly bring USDA into alignment with its obligations under NEPA and to help ensure that FSIS conducts appropriate environmental reviews of its agency actions, including as they relate to significant effects on endangered and threatened species and their habitats—something that it has neglected to do since its establishment in 1981.

## II. PETITIONERS

**The Center for Biological Diversity** (the Center) is a non-profit, public interest environmental organization dedicated to the protection of species and their habitats through science, policy, and environmental law.<sup>27</sup> The Center has over 1.7 million members and supporters.<sup>28</sup> The Center believes that the welfare of human beings is deeply linked to nature—to the existence in our world of a vast diversity of wildlife and plants. Because diversity has intrinsic value, and because its loss impoverishes society, the Center works to secure a future for all species, great and small, hovering on the brink of extinction.

The Center has engaged with FSIS in a variety of capacities over the years and continues to challenge the agency's actions as they relate to environmental, public, and worker health issues in the slaughterhouses it regulates—including as it relates to FSIS's failure to comply with NEPA in promulgating regulations about the rate at which animals can be slaughtered and processed in slaughterhouses.<sup>29</sup> The Center has filed a number of Freedom of Information Act (FOIA) requests

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<sup>22</sup> U.S. CONST. Amend. I; *see also United Mine Workers v. Ill. State Bar Ass'n*, 389 U.S. 217, 222 (1967) (“[T]he right[] to . . . petition for a redress [of] grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights.”).

<sup>23</sup> 5 U.S.C. § 553(e).

<sup>24</sup> 7 C.F.R. § 1.28; 9 C.F.R. §§ 392.1–392.9.

<sup>25</sup> National Environmental Policy Act Implementing Regulations Revisions Phase 2, 89 Fed. Reg. 35442, 35573-74 (May 1, 2024) (to be codified at 40 C.F.R. § 1507.3(c)(9)).

<sup>26</sup> *See supra* notes 12-13 (FSIS was established in 1981; final rule categorically excluding FSIS promulgated in 1983).

<sup>27</sup> *See* CTR. FOR BIOLOGICAL DIVERSITY, “Our Mission,” <https://www.biologicaldiversity.org/about/> (last visited Oct. 30, 2023).

<sup>28</sup> CTR. FOR BIOLOGICAL DIVERSITY, “Membership FAQ,” <https://www.biologicaldiversity.org/support/membership/> (last visited Oct. 30, 2023).

<sup>29</sup> *See Farm Sanctuary v. USDA*, 545 F.Supp. 3d 50 (W.D.N.Y. 2021) (the Center joining Farm Sanctuary and other animal welfare and environmental organizations in challenging USDA and FSIS actions under NEPA, the FMIA, the HMSA, and the APA).



with FSIS related to environmental and animal law issues, including as they relate to FSIS's activities under NEPA and the Endangered Species Act.<sup>30</sup> The Center has also authored and joined other organizations on comments in response to FSIS practices and proposed regulatory changes, has filed lawsuits against FSIS for its failure to comply with NEPA and other laws, and has submitted amicus briefs in support of lawsuits filed against FSIS related to the agency's practices and procedures.<sup>31</sup> The Center has frequently met with USDA and FSIS in various administrative and legal capacities. Each of these actions have significant impacts on the Center's resources and the projects it can take on as a non-profit organization.

**The Humane Society of the United States (HSUS)** is a national nonprofit animal protection organization headquartered in Washington, D.C., with millions of members and constituents. The HSUS's mission is to reduce animal suffering and create meaningful societal change by actively advocating against animal cruelty, working to enforce existing laws, promoting sensible public policies, and educating the public about animal issues.<sup>32</sup>

Specifically, with its mission to reduce suffering for all animals, HSUS endeavors to raise awareness about farm animal confinement, raising, and slaughter practices through its farm animal welfare campaign. This campaign actively advocates to regulate such farm animal practices through efforts with administrative agencies, Congress, state legislatures, and the courts. It also engages in advocacy to bring awareness to, and combat, the environmental impact of farm animal production and slaughter practices. HSUS's farm animal welfare campaign is strongly committed to educating the public about pollution and public health threats from industrialized animal agriculture.

Because of HSUS's and its members' interest in the impacts the slaughter process has on animal welfare, human health and safety, and the environment, HSUS has consistently been involved in FSIS's development of regulations regarding slaughterhouses, including its regulation of the slaughter line speeds at such facilities. For example, HSUS submitted comments during FSIS's New Poultry Inspection System (NPIS) rulemaking process, including comments criticizing the

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<sup>30</sup> See e.g., *supra* note 15; "Exhibit 1 Spreadsheet Produced by USDA FSIS on May 1, 2019 in response to FOIA-2018-00213," CTR. FOR BIOLOGICAL DIVERSITY, (Feb. 18, 2020) [https://www.biologicaldiversity.org/programs/environmental\\_health/pdfs/Slaughter-Line\\_speed-Exhibit\\_plants-to-convert.pdf](https://www.biologicaldiversity.org/programs/environmental_health/pdfs/Slaughter-Line_speed-Exhibit_plants-to-convert.pdf); Compl. at 1-3, *Ctr. for Biological Diversity v. USDA*, No. 20-cv-00764 (D.D.C. Mar. 18, 2020) (in response to denial of FOIA request materials).

<sup>31</sup> See e.g., Br. for Food & Water Watch & Ctr. for Biological Diversity as *Amicus Curiae* Supp. Aff., *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015), *aff'd in part, rev'd in part sub nom. Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) (the Center urging affirmation of decision invalidating an Idaho law that threatens public health by prohibiting investigations with a proven track record of uncovering illegal and dangerous factory farming and slaughter practices, where government agencies, such as FSIS, have repeatedly failed); Compl., *Ctr. for Biological Diversity v. USDA & FSIS*, No. 20-cv-00764 (D.D.C. Mar. 18, 2020); *Farm Sanctuary v. USDA*, 545 F.Supp. 3d 50 (W.D.N.Y. 2021) (the Center joining Farm Sanctuary and other animal welfare and environmental organizations in challenging USDA and FSIS actions under NEPA, the FMIA, the HMSA, and the APA).

<sup>32</sup> THE HUMANE SOC'Y OF THE U.S., "Our Mission," <https://www.humanesociety.org/our-mission> (last visited Jun. 16, 2024).

agency's original proposal to increase line speed maximums to 175 birds per minute (bpm).<sup>33</sup> HSUS also submitted comments opposing an industry-driven petition that asked FSIS to create a waiver program to allow chicken slaughterhouses to operate without any restriction on line speed,<sup>34</sup> and submitted comments in response to a 2018 FSIS proposed rule that would, among other things, revoke the maximum line speed at which pig slaughterhouses can operate, instead allowing such facilities to set their own line speeds.<sup>35</sup> In 2020, HSUS and other animal welfare organizations challenged USDA's poultry line speed rule.<sup>36</sup> The case was ultimately dismissed with leave to amend.

**The Humane Society Legislative Fund (HSLF)** is a social welfare organization incorporated under section 501(c)(4) of the Internal Revenue Code and formed in 2004 as a separate lobbying affiliate of the HSUS.<sup>37</sup> HSLF works to pass animal protection laws at the state and federal levels. HSLF works to ensure that animals have a voice before lawmakers by advocating for measures to eliminate animal cruelty and suffering and by educating the public on animal protection issues. Among other issues, HSLF advocates to ensure that all animals raised for food are treated humanely with minimum standards of care.

### III. STATEMENT OF ACTION REQUESTED

Pursuant to 9 C.F.R. § 392.5, Petitioners request that USDA take the following action:

- Issue a rule eliminating the categorical exclusion for FSIS in 7 C.F.R. § 1b.4.

Specifically, Petitioners request that FSIS amend 7 C.F.R. § 1b.4 as represented in strike-through as follows:

- (a) The USDA agencies and agency units listed in paragraph (b) of this section conduct programs and activities that have been found to have no individual or cumulative effect on the human environment. The USDA agencies and agency units listed in paragraph (b) of this section are excluded from the requirements of preparing procedures to implement NEPA. Actions of USDA agencies and agency units listed in paragraph (b) of this section are categorically excluded from the preparation of an EA or EIS unless the agency head determines that an action may have a significant environmental effect.

- (b) (1) Agricultural Marketing Service

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<sup>33</sup> THE HUMANE SOC'Y OF THE U.S., *Comment re Modernization of Poultry Slaughter Inspection Rule*, Dkt. No. FSIS-2011-0012 (May 29, 2012), <https://www.regulations.gov/comment/FSIS-2011-0012-2223>.

<sup>34</sup> HUMANE SOC'Y OF U.S. et al., *Comments in Opposition to Petition No. 17-05 Submitted by National Chicken Council* (Sept. 20, 2017), [www.fsis.usda.gov/sites/default/files/media\\_file/2020-07/Comment-In-Petition17-05.pdf](http://www.fsis.usda.gov/sites/default/files/media_file/2020-07/Comment-In-Petition17-05.pdf).

<sup>35</sup> HUMANE SOC'Y OF U.S., *Comment re Modernization of Swine Slaughter Inspection*, Dkt. No. FSIS-2026-0017-0001 (May 2, 2018), <https://www.regulations.gov/comment/FSIS-2016-0017-82179>.

<sup>36</sup> *Humane Soc'y of U.S. v. Perdue*, No. 20-CV-01395-LB, 2024 WL 736729, at \*6 (N.D. Cal. Feb. 22, 2024).

<sup>37</sup> THE HUMANE SOC'Y LEGIS. FUND, "About Us," [www.hslf.org/about-us](http://www.hslf.org/about-us) (last visited Jun. 15, 2024).

- (2) Economic Research Service
- (3) [Reserved by 76 FR 4802]
- (4) Federal ~~Corp~~ Crop Insurance Corporation
- (5) Food and Consumer Service
- ~~(6) Food Safety and Inspection Service~~
- ~~(7)~~ (6) Foreign Agricultural Service
- ~~(8)~~ (7) Grain Inspection, Packers and Stockyards Administration<sup>38</sup>
- ~~(9)~~ (8) National Agricultural Library
- ~~(10)~~ (9) National Agricultural Statistics Service
- ~~(11)~~ (10) Office of the General Counsel
- ~~(12)~~ (11) Office of the Inspector General

#### IV. FACTUAL BACKGROUND

FSIS is an agency of USDA<sup>39</sup> that was established by the Secretary of Agriculture in 1981.<sup>40</sup> FSIS is responsible for inspecting and regulating meat, poultry, and egg processing to ensure those products are safe for consumption under the Federal Meat Inspection Act (FMIA), the Poultry Products Inspection Act (PPIA), the Egg Products Inspection Act (EPIA), the Humane Methods of Slaughter Act (HMSA), and the Agricultural Marketing Act.<sup>41</sup> Under this authority, FSIS inspects slaughterhouses, meat, poultry, and egg processors, and other food processors whose products contain meat as an ingredient.

To that end, FSIS is responsible for inspecting and regulating several aspects of meat, poultry, and egg processing operations at approximately 800 federally inspected livestock slaughterhouses across the United States.<sup>42</sup> For example, FSIS is responsible for:

- promulgating regulations about the rate at which animals can be slaughtered and processed,<sup>43</sup>

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<sup>38</sup> FSIS should also amend this language to conform with 83 Fed. Reg. 61309, which eliminated the Grain Inspection, Packers and Stockyards Administration (GIPSA).

<sup>39</sup> 9 C.F.R. § 300.1.

<sup>40</sup> See 5 U.S.C. § 301; Reorganization Plan No. 2 of 1953 (5 U.S.C. app.).

<sup>41</sup> 9 C.F.R. § 300.2; see also *About FSIS*, USDA, FOOD SAFETY & INSPECTION SERV., <https://www.fsis.usda.gov/about-fsis> (last visited Jun. 12, 2024); 21 U.S.C. §§ 601 *et seq.*; 21 U.S.C. §§ 453 *et seq.*; 21 U.S.C. §§ 1031 *et seq.*; 7 U.S.C. §§ 1901 *et seq.*; 7 U.S.C. §§ 1621 *et seq.*

<sup>42</sup> 9 C.F.R. § 300.6; see also NAT'L AGRIC. STAT. SERV., U.S. DEPT' OF AGRIC., *Livestock Slaughter 2019 Summary* 66 (Apr. 2020) (“There are approximately 800 livestock slaughter plants in the United States operating under Federal Inspection and about 1,900 Non-Federally Inspected (State-inspected or custom-exempt) slaughter plants.”).

<sup>43</sup> See, e.g., Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,300 (Oct. 1, 2019) (codified at 9 C.F.R. pts. 301, 309, 310) (revoking maximum slaughter line speeds for pig slaughterhouse facilities).

- inspecting the transport of animals at ports-of-entry<sup>44</sup> and from trucks and trains into slaughter facilities to ensure animals are handled humanely and in compliance with the HMSA;<sup>45</sup>
- inspecting slaughterhouse equipment to ensure it is sanitary, safe, and functional for slaughterhouse employees;<sup>46</sup>
- issuing recalls for adulterated meat, poultry, and egg products;<sup>47</sup>
- preventing contamination in regulated meat, poultry, and egg products;<sup>48</sup>
- promulgating “regulatory control actions,” “withholding actions,” and “suspensions;”<sup>49</sup>
- ensuring facilities comply with the National Laboratory Accreditation Program, which governs laboratories that detect pesticide residue in meat and poultry products;<sup>50</sup>
- issuing public health alerts for misbranding, contamination, and unreported allergens in products;<sup>51</sup>
- suspending (in whole or in part) slaughterhouse operations until facilities follow FSIS and other federal health and safety standards;<sup>52</sup> and
- reviewing products and product labels and issuing pre-market approval and labeling for most meat and poultry products.<sup>53</sup>

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<sup>44</sup> FOOD SAFETY INSPECTION SERV., *Quarterly Enforcement Reports: II. Port-of-Entry Reinspection* (last updated Aug. 25, 2023), <https://www.fsis.usda.gov/inspection/regulatory-enforcement/quarterly-enforcement-reports>.

<sup>45</sup> See, e.g., Ariel Thompson, *Notice of Suspension*, USDA (Mar. 29, 2022), [https://www.fsis.usda.gov/sites/default/files/media\\_file/2022-04/M19511-NOS-03292022.pdf](https://www.fsis.usda.gov/sites/default/files/media_file/2022-04/M19511-NOS-03292022.pdf) (notifying a slaughterhouse operation that they failed to handle animals humanely and therefore FSIS was suspending assigning inspectors for slaughter operations at that facility until it achieves compliance).

<sup>46</sup> FOOD SAFETY INSPECTION SERV., *Quarterly Enforcement Reports: V. Administrative Action*, (last updated May 24, 2024), <https://www.fsis.usda.gov/inspection/regulatory-enforcement/quarterly-enforcement-reports>; see also FOOD SAFETY INSPECTION SERV., *Slaughter Inspection 101* (last updated Apr. 10, 2024), <https://www.fsis.usda.gov/food-safety/safe-food-handling-and-preparation/food-safety-basics/slaughter-inspection-101>.

<sup>47</sup> See, e.g., FOOD SAFETY & INSPECTION SERV., *Boyd Specialties, LLC Recalls Jerky Products Due to Possible Listeria Contamination* (Mar. 4, 2022), <https://www.fsis.usda.gov/recalls-alerts/boyd-specialties-llc-recalls-jerky-products-due-possible-listeria-contamination>.

<sup>48</sup> *About FSIS*, *supra* note 7.

<sup>49</sup> See *Quarterly Enforcement Reports: V. Administrative Actions*, *supra* note 46 (“A regulatory control action is the retention of a product, rejection of equipment, or refusal to allow the processing of a specified product. A withholding action is the refusal to allow the marks of inspection on products. A suspension action is the interruption of the assignment of FSIS employees in all, or part, of an establishment.”).

<sup>50</sup> 9 C.F.R. § 300.2(b)(7).

<sup>51</sup> See, e.g., FOOD SAFETY & INSPECTION SERV., *FSIS Issues Public Health Alert for Chicken Salad Products Containing FDA-Regulated Dressing that has been Recalled due to Foreign Material Contamination*, PHA-03102022-01 (Mar. 10, 2022), <https://www.fsis.usda.gov/recalls-alerts/fsis-issues-public-health-alert-chicken-salad-products-containing-fda-regulated>; FOOD SAFETY INSPECTION SERV., *FSIS Issues Public Health Alert for Ready-To-Eat Salad Containing Meat and Poultry Products Due to Misbranding and Undeclared Allergens*, PHA-03232022-01 (Mar. 23, 2022), <https://www.fsis.usda.gov/recalls-alerts/fsis-issues-public-health-alert-ready-eat-salad-containing-meat-and-poultry-products>.

<sup>52</sup> See *Quarterly Enforcement Reports: V. Administrative Actions*, *supra* note 46.

<sup>53</sup> 21 C.F.R. § 317.4.

FSIS must also inspect every animal carcass intended for food sale within the U.S.; without FSIS inspection “[s]laughter facilities cannot conduct slaughter operations.”<sup>54</sup> FSIS had a budget of nearly \$1.5 billion for 2023.<sup>55</sup>

## V. LEGAL BACKGROUND

### A. National Environmental Policy Act (NEPA)

NEPA is the United States’ bedrock law concerning informed decision making around impacts to the environment from the actions of the federal government. Congress enacted NEPA in 1970 upon “recognizing the profound impact of man’s activity on the interrelations of all components of the natural environment.”<sup>56</sup> In particular, Congress identified “the profound influences of population growth, high-density urbanization, industrial expansion, [and] resource exploitation” by humans on the natural environment,<sup>57</sup> and passed NEPA so “that each person [c]ould enjoy a healthful environment[,] and [acknowledged] that each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>58</sup> In so doing, Congress “recogniz[ed] further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man.”<sup>59</sup>

Through NEPA, Congress has declared it “the continuing policy of the Federal Government” to:

use all practicable means and measures . . . in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.<sup>60</sup>

Congress directs federal agencies to carry out the policies set forth in NEPA “to the fullest extent possible.”<sup>61</sup> NEPA requires federal agencies to consider environmental impacts and concerns prior to taking actions that may have a significant effect on the human environment. “NEPA seeks to prevent damage to the environment by focusing government attention on the environmental effects of proposed agency action.”<sup>62</sup>

In addition to its substantive provisions, NEPA also created the CEQ to investigate and report on the state of the environment, recommend policies to the President, issue regulations and guidance to agencies on implementing NEPA, and review federal programs to determine whether they are

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<sup>54</sup> 21 U.S.C. § 604; *Slaughter Inspection 101*, *supra* note 46.

<sup>55</sup> See USDA FY 2023 Budget Summary, USDA 1, 65-8 (2022), <https://www.usda.gov/sites/default/files/documents/2023-usda-budget-summary.pdf>.

<sup>56</sup> 42 U.S.C. § 4331(a).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* § 4331(c).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* § 4331(a).

<sup>61</sup> *Id.* § 4332.

<sup>62</sup> *Red Wolf Coal. v. U.S. Fish & Wildlife Serv.*, 346 F. Supp. 3d 802, 813 (E.D.N.C. 2018).



furthering NEPA’s goals.<sup>63</sup> As the CEQ recently stated, NEPA “codifies the common-sense and fundamental idea of ‘look before you leap’ to guide agency decision making, particularly in complex and consequential areas, because conducting sound environmental analysis before actions are taken reduces conflict and waste in the long run by avoiding unnecessary harms and uninformed decisions.”<sup>64</sup>

In pursuit of these goals, NEPA applies to all agencies of the federal government, not just “environmental” agencies.<sup>65</sup> In further emphasis of this obligation, President George W. Bush issued an Executive Order in 2004 to ensure that USDA, along with several other specifically listed federal agencies, “implement laws relating to the environment and natural resources in a manner that promotes cooperative conservation.”<sup>66</sup> USDA, as with every other federal agency, “shall” carry out its functions and activities in a way that:

- (i) facilitates cooperative conservation;
- (ii) takes appropriate account of and respects the interests of persons with ownership or other legally recognized interests in land and other natural resources;
- (iii) properly accommodates local participation in Federal decision-making; and
- (iv) provides that the programs, projects, and activities are consistent with protecting public health and safety.<sup>67</sup>

NEPA requires all branches of the federal government—and the agencies thereof—to consider the environmental impacts for all “major Federal actions significantly affecting the quality of the human environment.”<sup>68</sup>

### *I. Major Federal Actions*

NEPA defines “major Federal action” as “an action that the agency carrying out such action determines is subject to substantial Federal control and responsibility.”<sup>69</sup> The regulations further clarify that “major Federal action” may include “[g]ranting authorizations, including permits,

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<sup>63</sup> See generally 42 U.S.C. § 4344; Major Laurent R. Hourcle, *USAF, The New Council on Environmental Quality Regulations: The Tiger's New Teeth*, 21 A.F. L. REV. 450, 450 (1979) (explaining that the CEQ “was created by . . . [NEPA] to act as the principal advisor to the President on environmental matters.”).

<sup>64</sup> 87 Fed. Reg. 23453, 23454 (Apr. 20, 2022).

<sup>65</sup> Margot J. Pollans & Matthew F. Watson, *FDA as Food System Steward*, 46 HARV. ENV’T L. REV. 1, 6 (2022) (“Many non-environmental agencies have regulatory portfolios with significant environmental consequences. NEPA recognizes this concern and creates a procedural mechanism in response.”).

<sup>66</sup> 69 Fed. Reg. 52989, Exec. Order No. 13352, 2004 WL 3247339 (Pres.) (providing a definition of *cooperative conservation* as: “actions that relate to use, enhancement, and enjoyment of natural resources, protection of the environment, or both, and that involve collaborative activity among Federal, State, local, and tribal governments, private for-profit and nonprofit institutions, other nongovernmental entities and individuals”).

<sup>67</sup> *Id.*

<sup>68</sup> 42 U.S.C. § 4332(2)(C); see also *What Is the National Environmental Policy Act?*, U.S. ENV’T PROT. AGENCY, <https://www.epa.gov/nepa/what-national-environmental-policy-act> (last visited Oct. 30, 2023).

<sup>69</sup> 42 U.S.C. § 4336e(10)(A); see also 89 Fed. Reg. 35442, 35575-76 (to be codified at 40 C.F.R. § 1508.1(w)).

licenses, right-of-way, or other authorizations”; “[a]doption of official policy, such as rules, regulations, and interpretations”; “[a]doption of formal plans”; and “[a]doption of programs.”<sup>70</sup> Major Federal actions also include the “[a]pproval of or carrying out specific agency projects” and “[p]roviding more than a minimal amount of financial assistance, including through grants, cooperative agreements, loans, loan guarantees, or other forms of financial assistance, where the agency has . . . sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity for which the agency is providing the financial assistance.”<sup>71</sup> As NEPA caselaw has further explained: “‘major Federal action’ . . . [concerns] two factors: (1) the amount and nature of [the agency’s] funding, and (2) the extent of [the agency’s] involvement [with] and control [of the action].”<sup>72</sup>

Congress recently clarified that the term “major Federal action” does not include:

- (i) a non-Federal action--
  - (I) with no or minimal Federal funding; or
  - (II) with no or minimal Federal involvement where a Federal agency cannot control the outcome of the project;
- (ii) funding assistance solely in the form of general revenue sharing funds which do not provide Federal agency compliance or enforcement responsibility over the subsequent use of such funds;
- (iii) loans, loan guarantees, or other forms of financial assistance where a Federal agency does not exercise sufficient control and responsibility over the subsequent use of such financial assistance or the effect of the action;
- (iv) business loan guarantees provided by the Small Business Administration pursuant to section 7(a) or (b) and of the Small Business Act ([15] U.S.C. 636(a)), or title V of the Small Business Investment Act of 1958 (15 U.S.C. 695 et seq.);
- (v) bringing judicial or administrative civil or criminal enforcement actions;
- (vi) extraterritorial activities or decisions, which means agency activities or decisions with effects located entirely outside of the jurisdiction of the United States; or
- (vii) activities or decisions that are non-discretionary and made in accordance with the agency's statutory authority.<sup>73</sup>

An important factor that indicates whether an agency’s action is major is the extent of its environmental impacts. Generally, if an agency action has a significant environmental impact, then it is a major Federal action for the purposes of NEPA.<sup>74</sup> For all such “major Federal actions,” the agency must conduct an environmental review.<sup>75</sup>

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<sup>70</sup> 89 Fed. Reg. 35442, 35576 (to be codified at 40 C.F.R. § 1508.1(w)(1)(i)-(iv)).

<sup>71</sup> *Id.* § 1508.1(w)(1)(v)-(vi).

<sup>72</sup> *Sancho v. U.S. Dep't of Energy*, 578 F. Supp. 2d 1258, 1266 (D. Haw. 2008), *aff'd*, 392 F. App'x 610 (9th Cir. 2010).

<sup>73</sup> 42 U.S.C. § 4336e(10)(B).

<sup>74</sup> *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1100 (9th Cir. 2011).

<sup>75</sup> 42 U.S.C. § 4332.

## 2. *Environmental Impact Statements and Environmental Assessments*

When considering the environmental impacts of a major Federal agency action, agencies “shall” conduct a detailed statement known as an Environmental Impact Statement (EIS).<sup>76</sup> In an EIS, the agency must thoroughly evaluate the potential environmental impacts of a proposed agency action, including reasonably foreseeable direct, indirect, and cumulative effects as well as possible, less environmentally harmful, alternative actions.<sup>77</sup> Agencies may first prepare an Environmental Assessment (EA) to determine whether an action “may” have significant impacts, necessitating an EIS.<sup>78</sup> “An [EA] is a rough-cut, low-budget environmental impact statement designed to show whether a full-fledged environmental impact statement . . . is necessary.”<sup>79</sup> “[EAs] are conducted to determine whether the effect of a proposed action warrants further investigation.”<sup>80</sup>

If an agency’s EA concludes that an EIS is unnecessary, agencies must detail the reasons why the impacts are insignificant in a “finding of no significant impact” (FONSI).<sup>81</sup> EISs and EAs are intended to ascertain 1) the environmental impact of a project before it takes place and 2) whether any alternatives, such as non-action, exist to prevent any significant governmental impact on the environment.<sup>82</sup> “[These] NEPA procedures . . . require agencies to take a ‘hard look’ at the environmental consequences of the proposed action.”<sup>83</sup>

The factors that determine whether an action will have a significant environmental effect include: “the characteristics of the geographic area, such as proximity to unique or sensitive resources or communities with environmental justice concerns. Depending on the scope of the action, agencies should consider the potential global, national, regional, and local contexts as well as the duration,

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<sup>76</sup> *Id.*

<sup>77</sup> NEPA defines EIS as:

a detailed statement . . . on—

- (i) reasonably foreseeable environmental effects of the proposed agency action;
- (ii) any reasonably foreseeable adverse environmental effects which cannot be avoided should the proposal be implemented;
- (iii) a reasonable range of alternatives to the proposed agency action, including an analysis of any negative environmental impacts of not implementing the proposed agency action in the case of a no action alternative, that are technically and economically feasible, and meet the purpose and need of the proposal;
- (iv) the relationship between local short-term uses of man’s environment and the maintenance and enhancement of long-term productivity; and
- (v) any irreversible and irretrievable commitments of Federal resources which would be involved in the proposed agency action should it be implemented.

42 U.S.C. §§ 4336e(6), 4332(2)(C).

<sup>78</sup> *Id.* § 4336(b)(2); *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730–31 (9th Cir. 2001) (explaining that “the agency must first prepare an Environmental Assessment (EA) to determine whether the action will have a significant effect on the environment”).

<sup>79</sup> *Cronin v. U.S. Dep’t of Agric.*, 919 F.2d 439, 443 (7th Cir. 1990).

<sup>80</sup> Locke Liddell, Sapp LLP, 12 No. 11 Tex. Env’tl. Compliance Update 6 (2004); *see also* Ray Vaughan, 38 Am. Jur. Proof of Facts 3d 547 (1996).

<sup>81</sup> 89 Fed. Reg. 35442, 35575 (to be codified at 40 C.F.R. § 1508.1(q)).

<sup>82</sup> 42 U.S.C. § 4332.

<sup>83</sup> *Utahns for Better Transp. v. U.S. Dep’t of Transp.*, 305 F.3d 1152, 1163 (10th Cir. 2002), as modified on reh’g, 319 F.3d 1207 (10th Cir. 2003).



including short-and long-term effects.”<sup>84</sup> Agencies must also consider: “[t]he degree to which the action may adversely affect public health and safety”; [w]hether the action may violate relevant Federal, State, Tribal, or local laws or other requirements or be inconsistent with Federal, State, Tribal, or local policies designed for the protection of the environment”; “[t]he degree to which the potential effects on the human environment are highly uncertain”; “[t]he degree to which the action may adversely affect an endangered or threatened species or its habitat, including habitat that has been determined to be critical under the Endangered Species Act of 1973”; and “[t]he degree to which the action may adversely affect communities with environmental justice concerns.”<sup>85</sup>

NEPA requires that an agency consider the direct, indirect, and cumulative impacts of its proposed projects.<sup>86</sup> Direct impacts are “caused by the action and occur at the same time and place.”<sup>87</sup> Indirect impacts are “caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable,” including “growth inducing effects,” and “related effects on the air and water and other natural systems, including ecosystems.”<sup>88</sup>

Cumulative effects “are effects on the environment that result from the incremental effects of the action when added to the effects of other past, present, and reasonably foreseeable actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions.”<sup>89</sup> “Cumulative effects can result from actions with individually minor but collectively significant effects taking place over a period of time.”<sup>90</sup>

“Effects [also] include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health,” and “may also include those resulting from actions which may have both beneficial and adverse effects, even if on balance the agency believes that the effects will be beneficial.”<sup>91</sup>

Additionally, under NEPA, “[a]t minimum,” agencies “must discuss closely related or ‘connected’ actions in [an EIS for a particular action].”<sup>92</sup> Failure to consider and discuss these “connected” actions in a given EIS for a particular action is referred to as “segmentation.”<sup>93</sup> “The rule against segmentation prevents agencies from evading their responsibilities under NEPA by artificially dividing a federal action into smaller components so the action would no longer be considered ‘major,’ or so that no significant environmental impacts would be detected (thus avoiding the need to prepare an EIS).”<sup>94</sup>

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<sup>84</sup> 89 Fed. Reg. 35442, 35557 (to be codified at 40 C.F.R. § 1501.3(d)(1)).

<sup>85</sup> *Id.* § 1501.3(d)(2)(i)-(viii).

<sup>86</sup> 42 U.S.C. § 4332(2)(C); 89 Fed. Reg. 35442, 35575 (to be codified at 40 C.F.R. § 1508.1(i)); *see WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 63–64 (D.D.C. 2019).

<sup>87</sup> 89 Fed. Reg. 35442, 35575 (to be codified at 40 C.F.R. § 1508.1(i)(1)).

<sup>88</sup> *Id.* § 1508.1(i)(2).

<sup>89</sup> *Id.* § 1508.1(i)(3).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* § 1508.1(i)(4).

<sup>92</sup> *Oak Ridge Env't'l Peace Alliance*, 412 F. Supp. 3d at 805.

<sup>93</sup> *Id.* (internal citations omitted); *see also* 89 Fed. Reg. 35442, 35556 (to be codified at 40 C.F.R. § 1501.3(b)).

<sup>94</sup> *Oak Ridge Env't'l Peace Alliance*, 412 F. Supp. 3d at 805 (internal citations omitted).

“NEPA . . . does not mandate particular results.”<sup>95</sup> Rather, NEPA requires federal agencies to consider environmental impacts of proposed actions as part of agencies’ decision-making processes.<sup>96</sup> “If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency [can still decide] that other values outweigh the environmental costs.”<sup>97</sup> That said, NEPA’s procedures “are almost certain to affect the agency’s substantive decision.”<sup>98</sup> While some have described NEPA as a “purely procedural statute,” the CEQ recently disagreed, explaining that the “CEQ considers that language to be an inappropriately narrow view of NEPA’s purpose and ignores the fact that Congress established the NEPA process for the purpose of promoting informed decision making and improved environmental outcomes.”<sup>99</sup>

Public input and review are essential under NEPA. EAs and EISs serve as mechanisms for gathering and disclosing information to the public about a given agency project and the effects that it will likely have on the environment.<sup>100</sup> “[An] agency must draft an EIS [or EA], notice it for public comment, respond to the comments, and then make an ultimate decision.”<sup>101</sup>

## B. Categorical Exclusions

### 1. *Categorical Exclusions under NEPA*

“The use of categorical exclusions began in 1978, when the CEQ authorized agencies to reduce paperwork by using categorical exclusions to define *categories of actions* that are exempt from environmental impact statement preparation requirements because they do not have significant environmental effects, individually or cumulatively.”<sup>102</sup> The aim of CEs is, *when appropriate*, to reduce paperwork and delays by streamlining a process for actions unlikely to have significant environmental impacts.<sup>103</sup> “When appropriately established and applied, categorical exclusions expedite the environmental review process for proposals that normally do not require additional analysis and documentation in an EA or an EIS.”<sup>104</sup>

The CEQ later supplemented its CE regulations in a separate guidance document that further clarified and defined CEs for federal agencies.<sup>105</sup> “Section 1507 of the CEQ regulations directs federal agencies . . . to identify *those actions* which experience has indicated will not have a

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<sup>95</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989).

<sup>96</sup> See 89 Fed. Reg. 35442, 35556 (to be codified at 40 C.F.R. § 1501.1).

<sup>97</sup> *Methow Valley Citizens Council*, 490 U.S. at 350.

<sup>98</sup> *Id.*

<sup>99</sup> 89 Fed. Reg. 35442, 35449 (May 1, 2024).

<sup>100</sup> 42 U.S.C. § 4332(J) (“[A]ll agencies of the Federal Government shall— . . . make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment. . .”).

<sup>101</sup> *Mountain Communities for Fire Safety v. Elliott*, 25 F.4th 667, 674 (9th Cir. 2022).

<sup>102</sup> See Daniel Mandelker et al., *Categorical exclusions: NEPA Law and Litig.* § 7:15 (2023); 43 Fed. Reg. 55,977 (Nov. 29, 1978) (emphasis added).

<sup>103</sup> 75 Fed. Reg. 75628, 75628.

<sup>104</sup> *Id.*

<sup>105</sup> Kevin H. Moriarty, *Circumventing the National Environmental Policy Act: Agency Abuse of the Categorical Exclusion*, 79 N.Y.U. L. REV. 2312, 2322 (2004) (citing 48 Fed. Reg. 34263, 34264 (codified at 40 C.F.R. pt. 1500 (2023))).

significant environmental effect and to categorically exclude them from NEPA review.”<sup>106</sup> In 1983, the CEQ encouraged agencies to re-examine their categorical exclusions noting that “the Council [wa]s concerned about . . . the use of detailed lists of specific activities for categorical exclusions . . . and . . . excessive documentation.”<sup>107</sup> The CEQ continues to require review of CEs on an ongoing and regular basis.<sup>108</sup>

To maintain a balance between efficiency and thorough environmental consideration, the CEQ recommended that agencies identify and adopt defined “types of actions” that were generally understood not to cause significant environmental effects, thus allowing for a more adaptable and informed approach to assessing the environmental impact of different projects.<sup>109</sup> However, the rulemaking went on to confirm that CEs are for “categories of actions which do not individually or cumulatively have a significant effect on the human environment.”<sup>110</sup>

Importantly, the CEQ also instructs agencies to only allow CEs for these types of actions “unless extraordinary circumstances exist that make application of the categorical exclusion inappropriate.”<sup>111</sup> Consequently, the implementing agency must have a process for identifying and evaluating extraordinary circumstances and describe how the agency will consider extraordinary circumstances.<sup>112</sup> Extraordinary circumstances are “factors or circumstances that indicate a normally categorically excluded action may have a significant effect. Examples of extraordinary circumstances include potential substantial effects on sensitive environmental resources, potential substantial disproportionate and adverse effects on communities with environmental justice concerns, potential substantial effects associated with climate change, and potential substantial effects on historic properties or cultural resources.”<sup>113</sup>

The CEQ does not allow CEs to be expanded beyond categories of “actions.” While NEPA authorizes programmatic environmental review, there is no option for a programmatic CE.<sup>114</sup> The term “programmatic environmental document” means “an environmental impact statement or environmental assessment analyzing all or some of the environmental effects of a policy, program, plan, or group of related actions.”<sup>115</sup> Programmatic assessments are thus only allowed in the context of an EIS or EA evaluating the environmental impacts of a particular program or group of actions.

In more recent guidance developed for federal agency use, the CEQ stated that “[w]hen agencies identify categories of activities that do not normally have the potential for individually or cumulatively significant impacts, they may establish a categorical exclusion for those

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<sup>106</sup> 48 Fed. Reg. 34263 (July 28, 1983) (emphasis added).

<sup>107</sup> *Id.*

<sup>108</sup> *See infra* note 121.

<sup>109</sup> *Id.* at 34265.

<sup>110</sup> *Comm. for Idaho’s High Desert v. Collinge*, 148 F. Supp. 2d 1097, 1101 (D. Idaho 2001); *accord Alaska Ctr. For Env’t v. U.S. Forest Serv.*, 189 F.3d 851, 857 (9th Cir. 1999).

<sup>111</sup> 89 Fed. Reg. 35442, 35557 (to be codified at 40 C.F.R. § 1501.4(a)).

<sup>112</sup> *Id.* at 35574 (to be codified at 40 C.F.R. § 1507.3(c)(8)-(9)).

<sup>113</sup> *Id.* at 35575 (to be codified at 40 C.F.R. § 1508.1(o)).

<sup>114</sup> 42 U.S.C. § 4336b.

<sup>115</sup> *Id.* § 4336e(11).

activities.”<sup>116</sup> For example, a payroll office might be authorized to use a CE for many of its activities as payroll is a category of actions that has not previously had and is unlikely to have a significant effect on the human environment.<sup>117</sup>

When determining whether a category of action has a significant effect on the human environment, the CEQ clarifies that “the consideration of the potential cumulative impacts of proposed actions is an important and integral aspect of the NEPA process. The guidance makes it clear that both individual and cumulative impacts must be considered when establishing categorical exclusions.”<sup>118</sup> Agencies are required to consider whether a CE is truly appropriate and to prepare appropriate environmental impact assessments and statements where needed.<sup>119</sup>

In addition to evaluating the individual application of a CE, the CEQ guidance also notes that CEs may not be permanent:

CEQ believes it is extremely important to review the [CEs] already established by the Federal agencies. The fact that an agency’s [CEs] were established years ago is all the more reason to review them to ensure that changes in technology, operations, agency missions, and the environment do not call into question the continued use of these [CEs]. . . . The guidance states that the review should focus on [CEs] that no longer reflect current environmental circumstances or an agency’s policies, procedures, programs, or mission.<sup>120</sup>

The CEQ specifies that CE reviews should be conducted at least every 10 years.<sup>121</sup>

The CEQ’s guidance also calls for public involvement and transparency of CEs to the public.<sup>122</sup> The CEQ states that public involvement “is a key policy goal of NEPA and the CEQ regulations.”<sup>123</sup> The reasonably foreseeable impacts and even the “perceived environmental effects of the proposed category of actions are a factor that an agency should consider when it decides whether there is a need for public involvement in determining whether to apply a categorical exclusion.”<sup>124</sup>

Congress recently added a statutory definition of “[c]ategorical exclusion” to NEPA defining the term as “a category of actions that a Federal agency has determined normally does not significantly affect the quality of the human environment within the meaning of section [42 U.S.C. §

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<sup>116</sup> 75 Fed. Reg. 75628, 75628.

<sup>117</sup> See 89 Fed. Reg. 35442, 35557, 35574 (to be codified at 40 C.F.R. §§ 1507.3(c)(8), 1501.4(b)(3)); see also Sutley, *supra* note 19.

<sup>118</sup> 75 Fed. Reg. 75628, 75630.

<sup>119</sup> *Id.* at 75630.

<sup>120</sup> *Id.* at 75630.

<sup>121</sup> 89 Fed. Reg. 35442, 35574 (to be codified at 40 C.F.R. § 1507.3(c)(9)); see also, 75 Fed. Reg. 75628, 75630 (formerly indicating CE “reviews should be conducted at least every seven years”).

<sup>122</sup> 75 Fed. Reg. 75628, 75628.

<sup>123</sup> *Id.* at 75629.

<sup>124</sup> *Id.*

4332(2)(C)].”<sup>125</sup> Section 4332(2)(C) outlines the requirements for a detailed statement, in the form of an EIS, for major Federal actions significantly affecting the quality of the human environment. It mandates that such statements include analyses of the environmental effects, alternatives to the action, short-term uses versus long-term productivity, and resource commitments.<sup>126</sup> As such, CEs represent a subset of actions predetermined to fall outside the EIS requirement due to the actions’ minimal environmental impacts.

Substantively both the CEQ’s and new statutory definitions are the same, and the purpose behind allowing CEs remains consistent. CEs remain only available to identified “categor[ies] of actions” that are determined to not “significantly affect the quality of the human environment.”<sup>127</sup>

## 2. *USDA’s Categorical Exclusion of FSIS*

In 1983, USDA promulgated a final rule outlining its own agency policies for compliance with NEPA.<sup>128</sup> USDA created categorical exclusions for a wide range of activities:

- (1) Policy development, planning and implementation which relate to routine activities, such as personnel, organizational changes, or similar administrative functions;
- (2) Activities which deal solely with the funding of programs, such as program budget proposals, disbursements, and transfer or reprogramming of funds;
- (3) Inventories, research activities, and studies, such as resource inventories and routine data collection when such actions are clearly limited in context and intensity;
- (4) Educational and informational programs and activities;
- (5) Civil and criminal law enforcement and investigative activities;
- (6) Activities which are advisory and consultative to other agencies and public and private entities, such as legal counseling and representation; and
- (7) Activities related to trade representation and market development activities abroad.<sup>129</sup>

USDA additionally categorically excluded entire agencies, including FSIS.<sup>130</sup> Notably, these CEs were finalized on March 18, 1983, four months before the CEQ issued its updated CE guidance on July 28, 1983—the first major update by the CEQ since the establishment of CEs in 1978; the FSIS CE has not been substantively amended since.<sup>131</sup>

In neither its final rule nor the proposed rule on its “[e]xclusion of agencies” did USDA expound upon or explain how it reached its finding that FSIS carries out programs and activities that it

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<sup>125</sup> 42 U.S.C. § 4336e (2023).

<sup>126</sup> *Id.* § 4332(2)(C).

<sup>127</sup> *Compare* 42 U.S.C. § 4336e (2023) *with* 75 Fed. Reg. 75628, 75631.

<sup>128</sup> 48 Fed. Reg. 11403 (Mar. 18, 1983).

<sup>129</sup> *Id.* at 11404 (7 C.F.R. § 1b.3).

<sup>130</sup> *Id.* (7 C.F.R. § 1b.4) (titled: “Exclusion of agencies”).

<sup>131</sup> *See supra* notes 106, 128.

deemed to have no environmental impacts, and to, therefore, be subject to categorical exclusion from NEPA’s detailed statement requirements.<sup>132</sup>

The rule does qualify, however, that “[a]ctions of [FSIS] are categorically excluded from the preparation of an EA or EIS *unless* the agency head determines that an action may have a significant environmental effect.”<sup>133</sup> Elsewhere in USDA’s NEPA regulations, provisions assert that “[a]ll policies and programs of the various USDA agencies shall be planned, developed, and implemented so as to achieve the goals and to follow the procedures declared by NEPA in order to assure responsible stewardship of the environment for present and future generations,”<sup>134</sup> and that “[a]gencies shall continue to scrutinize their activities to determine continued eligibility for categorical exclusion.”<sup>135</sup>

## VI. TIMELINESS OF THE PETITION IN LIGHT OF NEW CEQ REGULATIONS

This petition to review USDA’s CE of FSIS is presented at a critical time due to recent regulatory developments by the CEQ. The new CEQ regulations, enacted to ensure that agencies fully integrate environmental considerations into their decision-making processes, require all agencies to “develop or revise, as necessary, proposed procedures to implement the regulations” by July 1, 2025.<sup>136</sup> Additionally, these regulations mandate a thorough review of existing CEs and specifically direct agencies to prioritize the examination of their oldest CEs.<sup>137</sup>

The CE in question for FSIS was finalized on March 18, 1983, making it one of the earliest CEs established by USDA—established less than two years after FSIS itself was formed.<sup>138</sup> This CE predates significant CEQ guidance on the development and application of CEs.<sup>139</sup> Since its inception, the FSIS CE has not undergone substantive modifications, despite numerous changes in environmental policy and the increased understanding of the environmental impacts of its actions over the decades.<sup>140</sup>

Given these factors, the review of the FSIS CE is not only a requirement under the new CEQ regulations but also a necessary step to ensure that USDA’s environmental policies align with current standards and practices. The examination of this CE is an opportunity to reflect modern environmental considerations and to enhance the effectiveness and compliance of USDA’s environmental procedures. Thus, the urgency and relevance of this petition are underscored by the new regulatory context, making it a timely and essential request to USDA.

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<sup>132</sup> *Id.*; 47 Fed. Reg. 42364 (1982).

<sup>133</sup> 7 C.F.R. § 1b.4(a) (emphasis added).

<sup>134</sup> 7 C.F.R. § 1b.2(a) (stating USDA policy generally regarding NEPA).

<sup>135</sup> 48 Fed. Reg. 11403 (discussing 7 C.F.R. § 1b.3(c) Categorical exclusions).

<sup>136</sup> 89 Fed. Reg. 35442, 35573 (to be codified at 40 C.F.R. § 1507.3(b)).

<sup>137</sup> *Id.* at 35574 (to be codified at 40 C.F.R. § 1507.3(c)(9)).

<sup>138</sup> *See supra* notes 12, 128.

<sup>139</sup> *See supra* note 106.

<sup>140</sup> 7 C.F.R. § 1b.4 (last modified in 2011 by 76 Fed. Reg. 4802 to remove and reserve paragraph (b)(3) with one prior amendment made in 1995 by 60 Fed. Reg. 66479 making “only minor nonsubstantive amendments to the regulations in order to update and correct incorrect references, remove gender-specific references, remove unnecessary provisions, and clarify existing regulations”).

## **VII. LACK OF SUBSTANTIATION IN USDA’S RULEMAKING FOR THE FSIS CATEGORICAL EXCLUSION NECESSITATES REVIEW**

This petition raises significant concerns regarding the adequacy of USDA’s rulemaking process that established the FSIS CE. Unlike robust processes adopted by other agencies, USDA did not substantiate its decision to implement the FSIS CE with adequate record evidence.<sup>141</sup>

For example, when the U.S. Department of Energy (DOE) recently established CEs, it evaluated environmental assessments prepared both internally and externally by other federal agencies, reviewed existing CEs, and analyzed categorical exclusion determinations, technical reports, applicable regulatory requirements, industry practices, and other publicly available information.<sup>142</sup> This compilation of data was summarized in the preamble to the notice of proposed rulemaking and detailed in a Technical Support Document released concurrently with the rulemaking notice.<sup>143</sup> Furthermore, DOE engaged the public by providing opportunities for review and comment on the proposed changes. After reviewing public feedback, DOE updated the Technical Support Document, revised the proposed CEs, and prepared detailed responses to public comments.

In stark contrast, USDA’s establishment of the FSIS CE lacks evidentiary support. When the CE was created on March 18, 1983, USDA did not provide a substantiated record comparable to DOE’s methodology.<sup>144</sup> There was no evaluation of environmental impacts, nor was there an accompanying support document detailing the basis of the CE.<sup>145</sup> This shortfall in the rulemaking process undermines the credibility and validity of the FSIS CE, suggesting that the agency has not adequately considered the environmental impacts of FSIS activities.

Given these discrepancies, it is imperative for USDA to revisit the FSIS CE with a rulemaking approach that aligns with current best practices, similar to those taken by DOE, and that restricts its CEs by removing agencies like FSIS that take actions that significantly affect the environment. Such an effort would not only address the deficiencies in the original rulemaking process but also enhance the transparency, accountability, and environmental stewardship of USDA’s regulatory portfolio.

## **VIII. USDA’S CATEGORICAL EXCLUSION OF FSIS VIOLATES NEPA**

USDA’s categorical exclusion of FSIS from NEPA’s detailed environmental statement requirements cannot be justified under NEPA and violates NEPA itself. Given the expansive reach of FSIS’s actions and authority, especially in relation to slaughterhouse operations, it is without reason or justification to continue relying on the legal fiction that FSIS programs and activities

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<sup>141</sup> See *supra* note 128 (initial rulemaking issuing conclusory statement that FSIS has “been found to have no individual or cumulative effect on the human environment”); see also 47 Fed. Reg. 42364 (Sept. 27, 1982) (proposed rule also stating, with no substantiation that FSIS has “been found to have no individual or cumulative effect on the human environment”).

<sup>142</sup> *National Environmental Policy Act Implementing Procedures*, No. DOE-HQ-2023-0063, DEP’T OF ENERGY (Nov. 16, 2023), <https://www.regulations.gov/docket/DOE-HQ-2023-0063>.

<sup>143</sup> 88 Fed. Reg. 78681 (Nov. 16, 2023).

<sup>144</sup> See *supra* note 130.

<sup>145</sup> See *supra* note 131.

have no significant impact on the environment and should, therefore, be categorically excluded from NEPA's EA and EIS requirements.

Accordingly, USDA's FSIS CE is ultra vires, in excess of statutory authority, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law and must be rescinded.

A. USDA Lacks Authority to Categorically Exclude FSIS Under NEPA

“When an agency acts beyond the scope of authority conferred to it by statute, its actions are invalid and ultra vires.”<sup>146</sup> An agency action is also ultra vires when the agency “patently misconstrue[s] [a] statute, disregard[s] a specific and unambiguous statutory directive, or violate[s] a specific command of [a] statute.”<sup>147</sup> As such, administrative policymaking “inconsistent with a statutory mandate or that frustrate[s] the congressional policy underlying a statute” is unlawful.<sup>148</sup>

Congress grants authority to agencies to act through statutes. “[F]or agencies charged with administering congressional statutes, [b]oth their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is ultra vires.”<sup>149</sup> Indeed, “the question—whether framed as an incorrect application of agency authority or an assertion of authority not conferred—is always whether the agency has gone beyond what Congress has permitted it to do,”<sup>150</sup> which is the case here.

Since its introduction in the seventies, “[t]he categorical exclusion was seen as a subset of projects having negligible environmental impact.”<sup>151</sup> As such, NEPA only grants the authority to create a CE for individual actions or categories of actions that do not have a significant effect on the human environment.<sup>152</sup> Issuing a CE for an entire agency goes well beyond NEPA's statutory text and skirts Congress' intent to have agencies examine the environmental repercussions of their major actions “to the fullest extent possible.”<sup>153</sup>

Even further, through its recent NEPA amendments, Congress chose *not to* authorize the creation of CEs for entire agencies. “Congressional intent is discerned primarily from the statutory text,” in this case, NEPA.<sup>154</sup> If Congress wanted to allow CEs to be applicable to entire agencies, then it would have included language in the controlling statute stating so. Congress did not write and has not amended NEPA to allow CEs to cover whole agencies. Rather, when Congress recently

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<sup>146</sup> *Armstrong v. Sec'y of Energy & Env't Affs.*, 189 N.E.3d 1212, 1217 (Mass. 2022); *see also City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 297 (2013) (when “agencies charged with administering congressional statutes . . . act beyond their jurisdiction, what they do is ultra vires”).

<sup>147</sup> *Fed. Express Corp. v. U. S. Dep't of Com.*, 39 F.4th 756, 762-63 (D.C. Cir. 2022) (quoting *Fed. Express Corp. v. U.S. Dep't of Com.*, 486 F.Supp. 3d 69, 81 (D.D.C. 2020)).

<sup>148</sup> *NLRB v. Brown*, 380 U.S. 278, 291 (1965); *see also Schneider v. Chertoff*, 450 F.3d 944, 952 (9th Cir. 2006). Such ultra vires acts also violate the Administrative Procedure Act. 5 U.S.C. § 706(2)(A), (C).

<sup>149</sup> *City of Arlington*, 569 U.S. at 297 (2013).

<sup>150</sup> *Id.* at 297-98.

<sup>151</sup> Moriarty, *supra* note 105.

<sup>152</sup> *See Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 756-58 (2004).

<sup>153</sup> 42 U.S.C. § 4332.

<sup>154</sup> *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014).



amended NEPA, it defined “categorical exclusion” as “a *category of actions* that a Federal agency has determined normally does not significantly affect the quality of the human environment.”<sup>155</sup> Congress, thus, intends CEs to only be used for specific types of actions, not entire agencies.

FSIS, as an agency, engages in many categories of actions that encompass a range of regulatory, inspection, enforcement, and public health functions to ensure the safety and quality of meat, poultry, and egg products.<sup>156</sup> These categories of actions are involved in the oversight and operations of animal transport, slaughter, and processing. For example, “the Federal Meat Inspection Act, the Poultry Products Inspection Act, and the Egg Products Inspection Act, as well as . . . the Humane Methods of Slaughter Act” authorize FSIS to oversee and regulate the slaughter and processing of animals into human-grade food and other animal products.<sup>157</sup> The scope of FSIS’s responsibility is immense and growing as the meatpacking industry continues to consolidate and as the consumption of animal products in the U.S. continues to rise to new heights.<sup>158</sup>

But USDA has failed to issue a CE for any *categories* of actions in which FSIS engages, relying instead on its blanket CE across the entire agency. USDA has, however, shown its understanding of and ability to create CEs related to categories of actions. Indeed, USDA’s list of activities that are categorically excluded include administrative functions, research activities, educational programs, advisory activities, data collection, and law enforcement investigations.<sup>159</sup> FSIS activities go well beyond the enumerated list of categorically excluded activities.

While some USDA CEs are reasonable for administrative efficiency, such as those related to routine personnel and ministerial administrative functions,<sup>160</sup> the wholesale exclusion of FSIS does not fit within the same category. Indeed, USDA’s CE of FSIS is not equivalent to personnel changes and routine administrative activities, especially given the current understanding of the environmental impacts of the animal agriculture industry that FSIS regulates, as further discussed *infra* in Part VIII.C.

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<sup>155</sup> 42 U.S.C. § 4336e(1) (2023) (emphasis added).

<sup>156</sup> See *supra* notes 43-55 and accompanying text.

<sup>157</sup> *About FSIS*, *supra* note 7.

<sup>158</sup> *USDA FY 2024 Budget Summary*, USDA 1, 67 (2023) <https://www.usda.gov/sites/default/files/documents/2024-usda-budget-summary.pdf>; Bernard Shire, *Trial by Fire*, MEAT + POULTRY (Sept. 16, 2020), <https://www.meatpoultry.com/articles/23722-trial-by-fire> (“FSIS operates under a budget of “over \$1 billion”); *LIVESTOCK SLAUGHTER 2019 SUMMARY* 4, NAT’L AGRIC. STAT. SERV., U.S. DEPT’ OF AGRIC. (Apr. 2020) (Under the title: “Record High Red Meat, Beef, and Pork Production in 2019,” the report specifically provides the number of cattle, calves, pigs, sheep and lamb, and other animals slaughtered for “red meat production” and “beef production” in the United States during 2019); see also *Livestock Slaughter Annual Summary*, USDA (last updated Apr. 24, 2024), <https://usda.library.cornell.edu/concern/publications/r207tp32d>.

<sup>159</sup> National Environmental Policy Act (NEPA) Policies and Procedures: Categorical exclusions, 48 Fed. Reg. 11403, 11404 (Mar. 18, 1983) (7 C.F.R. § 1b.3).

<sup>160</sup> For example, one of the categories of actions that have been excluded from NEPA’s EA and EIS requirements is: “Policy development, planning and implementation which relate to routine activities, such as personnel, organizational changes, or similar administrative functions.” 7 C.F.R. § 1b.3(a)(1).

Examples from other agencies further highlight that USDA lacks the requisite authority to establish a CE for FSIS. These instances illustrate how agencies must rigorously substantiate their decisions to employ CEs as part of their NEPA procedures and only categorically exclude “categories of actions” as appropriate. DOE, for example, recently added a CE for certain energy storage systems and revised a CE for upgrading and rebuilding powerlines.<sup>161</sup> In doing so, DOE explained that “[t]o establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience, normally does not require further environmental review.”<sup>162</sup> Moreover, DOE established a record to support its CE by evaluating EAs, technical reports, industry practices, and other information.<sup>163</sup> DOE summarized its findings in a Technical Support Document that it made available for public review with its proposed rule.<sup>164</sup> This recent example highlights the reasoned rulemaking standards expected in the establishment and revision of CEs and emphasizes that CEs are to be established only for categories of actions, not entire agencies.

The CEQ’s regulations and guidance do not beg a different result. NEPA delegated power to the CEQ to help implement NEPA.<sup>165</sup> In exercising that authority, the CEQ does not grant an agency the option to categorically exclude an entire agency from further environmental review. Instead, as the CEQ explains, “agencies could categorically exclude *actions* from detailed review where the agency has found in its agency NEPA procedures that the *action* normally would not have significant effects.”<sup>166</sup> Similarly, CEQ’s guidance regarding NEPA implementation repeatedly refers to only *actions* that may be categorically exempt, not entire agencies.<sup>167</sup>

Because there is no statutory or regulatory authority to exclude entire agencies from NEPA’s EIS and EA requirements, USDA erred in issuing its CE for FSIS.<sup>168</sup> Since USDA does not have the

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<sup>161</sup> National Environmental Policy Act Implementing Procedures, 89 Fed. Reg. 34074 (Apr. 30, 2024) (to be codified at 10 C.F.R. pt. 1021).

<sup>162</sup> *Id.* at 34075.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*; *see also* National Environmental Policy Act Implementing Procedures, 88 Fed. Reg. 78681 (Nov. 16, 2023).

<sup>165</sup> *See* 42 U.S.C. § 4344.

<sup>166</sup> 85 Fed. Reg. 43,304, 43,322 (emphasis added); *see also* 89 Fed. Reg. 35442, 35574-75 (to be codified at 40 C.F.R. § 1508.1(e)) (defining “[c]ategorical exclusion” as “a *category of actions* that an agency has determined . . . normally does not have a significant effect on the human environment”) (emphasis added).

<sup>167</sup> 89 Fed. Reg. 35442, 35557-58 (to be codified at 40 C.F.R. § 1501.4); *see also* *National Environmental Policy Act Implementing Regulations Revision Phase 2 Final Rule Response to Comments* 250, Dkt. ID: CEQ–2023–0003, CEQ (Apr. 2024), <https://www.regulations.gov/document/CEQ-2023-0003-82042> (explaining that “section 111(1) of NEPA indicates that it is the ‘*category of actions*’ that the agency has determined normally would not result in significant effects to the environment, not an individual action to which the CE would apply. Accordingly, an agency establishing a CE must consider the effects that would result from the entire set of actions to which the CE will apply, rather than considering the effects of each individual application in isolation.” (citing 42 U.S.C. § 4336e(1)) (emphasis added by CEQ); *see* discussion *supra* Part V.B.1.

<sup>168</sup> *See supra* note 14 and accompanying text (discussing that the other agencies or units listed in this regulation are similarly not properly categorically excluded under NEPA).

statutory authority to create CEs for whole agencies, its CE of FSIS is ultra vires, in violation of NEPA, and must be rescinded.<sup>169</sup>

B. FSIS’s Failure to Comply with the Existing Regulation and Evaluate the Extraordinary Circumstances Around Its Actions Is Additionally Unlawful.

Even within the current regulatory structure in which FSIS is categorically excluded, FSIS’s repeated failure to comply with NEPA requirements to conduct a reasoned examination of whether its actions would have significant environmental impact is additionally ultra vires and violates the APA.<sup>170</sup> “Where an agency commits an act that violates its . . . regulations, that act is ultra vires, meaning that it is [invalid].”<sup>171</sup> Likewise, an agency acts unlawfully when it acts arbitrarily, in excess of its authority or by abusing its discretion.<sup>172</sup> USDA’s CE of FSIS incorporates, albeit inadequately and incompletely, CEQ’s regulations, which state that the preparation of an EA or EIS is unnecessary *only if* the agency determines that an action will not have a significant impact on the human environment. FSIS continuously flaunts this requirement, has no meaningful process in place for identifying and accounting for extraordinary circumstances, and perpetually ignores the environmental implications of its actions. Its actions are therefore ultra vires, in excess of statutory limits, arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

A CE can only be issued after “the agency . . . evaluate[s] the action for extraordinary circumstances in which a normally excluded action may have a significant effect.”<sup>173</sup> “[E]s may only be applied when extraordinary circumstances do not exist,”<sup>174</sup> unless “the proposed action does not in fact have the potential to result in significant effects notwithstanding the extraordinary circumstance, or the agency modifies the action to avoid the potential to result in significant effects.”<sup>175</sup> An agency may only lawfully use a CE if it has considered the relevant evidence and explained its decision that there are no extraordinary circumstances.<sup>176</sup> Put another way, “[e]ven if a [CE] applies to a given action, the agency has an additional obligation to ‘evaluate the action for

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<sup>169</sup> *Ultra Vires*, BLACK’S LAW DICTIONARY (6th pocket ed. 2021) (defining ultra vires as when an agency acts beyond the scope of its authority).

<sup>170</sup> *Changji Esquel Textile Co. v. Raimondo*, 40 F.4th 716, 725 (D.C. Cir. 2022 (“assuming that ultra vires review extends to some regulatory claims”); *Apter v. Dep’t of Health & Hum. Servs.*, 80 F.4th 579, 587 (5th Cir. 2023) (Plaintiffs “can use the APA assert their ultra vires claims as a non-statutory cause of action against the Officials and against the Agencies”); 5 U.S.C. § 706.

<sup>171</sup> *In re Certificate of Need Application for the Mem’l Hosp. of Salem Cnty.*, 235 A.3d 213, 221 (N.J. Super. Ct. App. Div. 2020); *see also Morrar v. U.S.*, No. 219-CV-00833, 2019 WL 2715618, at \*5 (E.D. Cal. June 28, 2019) (finding merit in ultra vires claim against USDA Food & Nutrition Service for violation of an internal USDA regulation); *Louisiana v. U.S. Env’t Prot. Agency*, No. 2:23-CV-00692, 2024 WL 250798, at \*30 (W.D. La. Jan. 23, 2024) (finding extra-regulatory requirements reviewable as ultra vires).

<sup>172</sup> 5 U.S.C. § 706.

<sup>173</sup> 89 Fed. Reg. 35442, 35557 (to be codified at 40 C.F.R. § 1501.4(b)).

<sup>174</sup> Megan J. Anderson, *The Energy Policy Act and Its Categorical Exclusions: What Happened to the Extraordinary Circumstance Exception?*, 28 J. LAND RESOURCES & ENVT’L. L. 119, 128 (2008).

<sup>175</sup> 89 Fed. Reg. 35442, 35557 (to be codified at 40 C.F.R. § 1501.4(b)(1)).

<sup>176</sup> *Earth Island Inst. v. Muldoon*, 82 F.4th 624, 632-33 (9th Cir. 2023) (quoting 40 C.F.R. § 1501.4(b)); *see also Friends of the Inyo v. U.S. Forest Serv.*, No. 23-15492, 2024 WL 2281568, at \*2 (9th Cir. May 21, 2024).

extraordinary circumstances in which a normally excluded action may have a significant effect.’ If a [CE] cannot be applied, the agency must prepare an EA or EIS.”<sup>177</sup> NEPA and the CEQ regulations implementing NEPA place the responsibility for evaluating the environmental impact of an action proposed by a federal agency on the agency that proposes the action.<sup>178</sup>

Agencies must evaluate multiple factors to determine if there are extraordinary circumstances:

Extraordinary circumstances include, but are not limited to, actions that may: (a) Have significant impacts on such natural resources and unique geographic characteristics as historic or cultural resources; park, recreation or refuge lands; wilderness areas; wild or scenic rivers; national natural landmarks . . . and other ecologically significant or critical areas; (b) Have highly controversial environmental effects or involve unresolved conflicts concerning alternative uses of available resources; or (c) Have a direct relationship to other actions with individually insignificant but cumulatively significant environmental effects.<sup>179</sup>

Finding that there are no extraordinary circumstances requires an evaluation and analysis of these factors. Only once that assessment is complete can a CE be lawfully used. “Ultimately, ‘any notion that USDA may avoid NEPA review simply by *failing* even to consider whether a normally excluded action may have a significant environmental impact flies in the face of the CEQ regulations,’ as well as USDA’s own NEPA regulations.”<sup>180</sup>

Furthermore, for any CE to be lawfully invoked, “agencies should focus on ensuring that the adopting agency has a process in place to ensure that it identifies and accounts for any extraordinary circumstances.”<sup>181</sup> This requirement is explicitly outlined in the CEQ’s revised regulation § 1501.4(e)(3), which mandates that adopting agencies must describe in their public notifications the processes they will employ to evaluate such extraordinary circumstances. USDA does not have a clearly articulated process by which to assess extraordinary circumstances in its regulations that govern categorical exclusions for FSIS, and, in fact, does not even mention the term “extraordinary circumstances” in its regulations. Instead, the regulation merely states: “Actions of [FSIS] are categorically excluded from the preparation of an EA or EIS unless the agency head determines that an action may have a significant environmental effect.”<sup>182</sup> This statement clearly does not provide a detailed procedure by which FSIS identifies and evaluates extraordinary circumstances, thus failing to meet the specificity and rigor the CEQ and NEPA requires. The absence of a specific, detailed process within USDA’s regulations for identifying

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<sup>177</sup> *Pub. Emps. for Env’t Resp. v. Nat’l Park Serv.*, 605 F. Supp. 3d 28, 56 (D.D.C. 2022), *appeal dismissed*, No. 22-5205, 2022 WL 4086993 (D.C. Cir. Sept. 2, 2022) (internal citations omitted).

<sup>178</sup> See 42 U.S.C. § 4332(2)(C); see also 40 C.F.R. § 1501.2.

<sup>179</sup> 19C Am. Jur. Pl. & Pr. Forms Pollution Control § 23 (2024); see also 89 Fed. Reg. 35442, 35575 (to be codified at 40 C.F.R. § 1508.1(o)) (defining extraordinary circumstances).

<sup>180</sup> *Humane Soc’y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C. 2007) (internal citations omitted).

<sup>181</sup> *National Environmental Policy Act Implementing Regulations Revision Phase 2 Final Rule Response to Comments* 287, Dkt. ID: CEQ-2023-0003, CEQ (Apr. 2024), <https://www.regulations.gov/document/CEQ-2023-0003-82042>.

<sup>182</sup> 7 C.F.R. § 1b.4(a).

and accounting for extraordinary circumstances undermines the agency's compliance with NEPA's procedural requirements as reinforced by recent CEQ updates.

In contrast, DOE has established a detailed process for applying categorical exclusions, which includes an explicit consideration of extraordinary circumstances. DOE's procedures require a systematic review to determine if any conditions exist that might cause an otherwise excluded action to have a significant environmental impact.<sup>183</sup> This process ensures that each potential categorical exclusion is evaluated against a set of criteria designed to capture any extraordinary circumstances, thereby adhering to NEPA and the CEQ's requirements.

The U.S. Environmental Protection Agency (EPA), in another example, requires all CEs to be supported by "a statement explaining why no extraordinary circumstances apply to the proposed action."<sup>184</sup> Similarly, the Food and Drug Administration (FDA)'s regulations explain that an extraordinary circumstance is present where an agency action poses "potential for serious harm to the environment; [or] . . . [the potential to] adversely affect a species or the critical habitat of a species. . . ."<sup>185</sup> Comparatively, USDA's CE passively states that FSIS actions are "categorically excluded from the preparation of an EA or EIS unless the agency head determines that an action may have a significant environmental effect."<sup>186</sup>

In practice, FSIS's activities also illustrate that the agency does not effectively consider the environmental impacts of its actions or reasonably evaluate extraordinary circumstances. Indeed, according to records requested by the Center through the Freedom of Information Act, FSIS has never reached a determination of significant environmental effect under NEPA, despite that FSIS routinely takes actions that have significant effects on the environment, as discussed *infra* in section VIII.C.<sup>187</sup> That FSIS has failed to prepare an EA or EIS related to *any* of its actions over the past 40 years illustrates the extent to which the environmental effects of FSIS's actions are not being considered and raises significant concerns about the sufficiency of USDA's NEPA regulations.<sup>188</sup>

But even further, when FSIS speaks on the application of its CE, it only ever issues boilerplate, conclusory statements that do not include any supporting analysis, studies, or records and that do not consider extraordinary circumstances. These statements merely "document adoption of the categorical exclusion," but go no further in providing reasoned analysis.<sup>189</sup> For example, in a memorandum "[a]nalyzing [a]pplication of the FSIS [CE] to Poultry Line Speed Waiver Request[s]," FSIS states it "does not anticipate that a granting a waiver . . . to operate under the [New Poultry Inspection System] at line speeds of up to 175 bpm may have any significant

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<sup>183</sup> See generally National Environmental Policy Act Implementing Procedures, 89 Fed. Reg. 34074 (Apr. 30, 2024).

<sup>184</sup> 40 C.F.R. § 6.204(a)(1) (2009).

<sup>185</sup> 21 C.F.R. § 25.21(a-b) (1997).

<sup>186</sup> 7 C.F.R. § 1b.4(a).

<sup>187</sup> See *supra* note 15.

<sup>188</sup> 89 Fed. Reg. 35442, 35557 (to be codified at 40 C.F.R. § 1501.4(b)).

<sup>189</sup> 42 U.S.C. § 4336c(4).

individual or cumulative effects on the environment.”<sup>190</sup> Almost the exact same language is used in memoranda “[a]nalyzing [a]pplication of the FSIS [CE] to Swine Line Speed Time-Limited Trial Request[s],” where FSIS states it “does not anticipate that a granting a waiver . . . to operate under the [New Swine Slaughter Inspection System] at line speeds of up to” an undisclosed number of pigs per hour, “would have any significant effects on the environment.”<sup>191</sup> Similarly, in FSIS’s memorandum “[a]nalyzing [a]pplication of the FSIS [CE] to Modernization of Swine Slaughter Inspection,” FSIS stated that “[t]he [a]gency does not anticipate that the proposed action would have any significant individual or cumulative effects on the environment.”<sup>192</sup> None of these memos mention or evaluate extraordinary circumstances nor do they apply a process and support by record evidence its conclusions. Further, the agency relies on the same language regardless of whether it is approving individual actions or issuing nationwide rules. Moreover, there was no public inspection of or input on these determinations, which were only made available to the Center in response to requests made pursuant to the Freedom of Information Act<sup>193</sup> or through completing the administrative record after the agency was sued.<sup>194</sup> “An agency satisfies NEPA if it applies its categorical exclusions and determines that neither an EA nor an EIS is required, so long as the application of the exclusions to the facts of the particular action is not arbitrary and capricious;” FSIS is not living up to that standard.<sup>195</sup>

“[I]n the cases courts have found the invocation of a categorical exclusion to be [unlawful], it is usually because the agency produced *no* NEPA documentation whatsoever, [] only provided its justification for the categorical exclusion after making its determination,” or supported its decision with a conclusory and unsupported extraordinary circumstances analysis.<sup>196</sup> For example, in *Sherwood v. TVA*, the Tennessee Valley Authority (TVA), an agency responsible for delivering electric power across seven Southeastern states, relied on its CE regulations to conduct actions that removed tall trees from the easement properties of plaintiffs.<sup>197</sup> TVA claimed that the tree clearing was considered “routine maintenance” and aligned with its vegetation maintenance policies and CE regulations.<sup>198</sup> However, the court disagreed with TVA, finding that the administrative record was insufficient to determine “whether TVA ha[d] taken a ‘hard look’ at the environmental consequences of the *alterations* made to its vegetation maintenance policies.”<sup>199</sup>

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<sup>190</sup> *Memorandum Analyzing Application of the FSIS Categorical Exclusion to Poultry Line Speed Waiver Request of Gerber Poultry, Inc.* 2, FSIS (Oct. 5, 2018).

<sup>191</sup> *See, e.g., Memorandum Analyzing Application of the FSIS Categorical Exclusion to Swine Line Speed Time-Limited Trial Request of Clemens Food Group, LLC*, M791 2, FSIS (Mar. 4, 2022), <https://tinyurl.com/482z8j4d>; *Memorandum Analyzing Application of the FSIS Categorical Exclusion to Swine Line Speed Time-Limited Trial Request of Quality Pork Processors*, M 1620 2, FSIS (Mar. 7, 2022), <https://tinyurl.com/482z8j4d>.

<sup>192</sup> Carmen M. Rottenberg, *Memorandum Analyzing Application of the FSIS Categorical Exclusion to Modernization of Swine Slaughter Inspection*, FSIS (Sept. 4, 2019).

<sup>193</sup> *See* CTR. FOR BIOLOGICAL DIVERSITY, *FOIA Public Document Search*, <https://tinyurl.com/bdtw7nt8> (last visited Jun. 15, 2024).

<sup>194</sup> *Farm Sanctuary, v. U.S. Dep’t of Agric.*, No. 6:19-cv-6910, 2022 WL 4095724 (W.D.N.Y. 2022).

<sup>195</sup> *California v. Norton*, 311 F.3d 1162, 1176 (9th Cir. 2002) (citing *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1456-57 (9th Cir. 1996)).

<sup>196</sup> *Oak Ridge Env’t Peace All. v. Perry*, 412 F. Supp. 3d 786, 845–46 (E.D. Tenn. 2019).

<sup>197</sup> *Sherwood v. Tenn. Valley Auth.*, 590 Fed. Appx. 451, 458 (6th Cir. 2014).

<sup>198</sup> *Id.* (citing *Sherwood v. Tenn. Valley Auth.*, 956 F. Supp. 2d 856, 866-67 (E.D. Tenn.)).

<sup>199</sup> *Id.* at 460 (emphasis original).



In contrast, in *Sierra Club v. U.S. Forest Service (USFS)*, the Sixth Circuit found that the USFS used its CE appropriately when it granted a renewed permit to an oil pipeline after finding that USFS made a supported and reasoned conclusion that renewing the permit did not alter the environmental status quo.<sup>200</sup> To support its conclusion, USFS conducted a biological assessment before issuing the renewal permit and involved experts like a biologist and a botanist evaluating the potential impact on the environment, including an endangered songbird in the area.<sup>201</sup> USFS also “promulgated its intent to apply [a] CE[], accepted public comments, and responded to the comments that it received.”<sup>202</sup>

Taken together: not even “a ‘categorically excluded’ agency may [] ignore NEPA entirely.”<sup>203</sup> “Where there is substantial evidence in the record that exceptions to the categorical exclusion may apply, the agency must at the very least explain why the action does not fall within one of the exceptions.”<sup>204</sup> FSIS has never issued such a reasoned explanation or otherwise complied with its obligation to reasonably evaluate the extraordinary circumstances around its actions before taking the action. FSIS’s failure to comply with this regulatory requirement is ultra vires, in excess of statutory limits, arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

C. Because FSIS Regularly Takes Actions That Have Significant Effects on the Environment, It Is Unjustifiable for the Entire Agency to Be Subject to a CE.

As the CEQ has explained, “[c]ategorical exclusions are not exemptions or waivers of NEPA review; they are simply one type of NEPA review. To establish a categorical exclusion, agencies determine whether a proposed activity is one that, on the basis of past experience [and a developed record], normally does not require further environmental review.”<sup>205</sup> To make sure that an agency’s CE meet these objectives, remain current to an agency’s activities, remain consistent with the goals and requirements of NEPA, and are appropriately tailored, the CEQ has made clear that all agencies “shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of [NEPA].”<sup>206</sup> Even

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<sup>200</sup> *Sierra Club v. U.S. Forest Serv.*, 828 F.3d 402, 409 (6th Cir. 2016); 36 C.F.R. § 220.6(e)(15).

<sup>201</sup> *Id.* at 406.

<sup>202</sup> *Id.* at 411.

<sup>203</sup> *Humane Soc’y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 32 (D.D.C. 2007). The court in this case did not consider the issue of an “as applied” challenge to 7 C.F.R. § 1b.4 itself because it was not explicitly raised by Plaintiffs in their complaint. Plaintiffs did, however, state in their Opposition that “[a]t least as applied to the facts of this case, a NEPA implementing regulation that would, in effect, immunize an entire agency’s programs from NEPA review, as well as from any judicial review as to whether NEPA analysis should be conducted in a particular case, is patently ‘arbitrary, capricious, an abuse of discretion, or not in accordance with the law.’” *Id.* at 36 (internal citations omitted). Again, Plaintiffs in this case only raised this issue in their Opposition, so the court did not consider it; however, the court did determine “that Defendants’ interpretation of 7 C.F.R. § 1b.4 as permitting the FSIS to never consider whether its actions have environmental impacts is arbitrary and capricious.” *Id.*

<sup>204</sup> *California v. Norton*, 311 F.3d 1162, 1177 (9th Cir. 2002) (citing 49 Fed. Reg. at 21439 and *Jones v. Gordon*, 792 F.2d 821 (9th Cir. 1986)).

<sup>205</sup> Sutley, *supra* note 19, at 1, 2.

<sup>206</sup> 40 C.F.R. § 1500.6 (emphasis added).

USDA’s own CE regulation asserts, albeit not in its regulation excluding agencies, that it “shall continue to scrutinize their activities to determine continued eligibility for categorical exclusion.”<sup>207</sup>

These review and verification requirements are especially important in situations like this where: (1) the nature of the animal agriculture industry that FSIS affects through its slaughterhouse regulations has significantly changed since 1983 when USDA issued its CE for FSIS and (2) changes in practices and consolidation of the industries FSIS oversees have led to a dramatic increase in environmental pollution, significant land use changes, and other cultural and environmental effects—matters of substantial public concern and controversy.<sup>208</sup> Yet, while such increases in environmental pollution and harms to the human environment are reasonably foreseeable results of actions taken by FSIS, none of its actions have been subject to a lawful NEPA review due to USDA’s long-standing CE for FSIS. Thus, given that FSIS engages in major Federal actions that have a significant impact on the environment, as further established *infra*, continuing to exempt FSIS from NEPA’s environmental review mandate is arbitrary and capricious, an abuse of discretion, and a violation of NEPA.

### 1. Many FSIS Actions Are Major Federal Actions Requiring NEPA Review.

FSIS is responsible for many major Federal actions that significantly affect the environment. In ensuring the safety of American meat, poultry, and egg products, FSIS has a wide purview.<sup>209</sup> Essentially, FSIS acts as the gatekeeper for all slaughterhouse operations. As FSIS explains, “[s]laughter facilities cannot conduct slaughter operations if FSIS inspection personnel are not present. Only federally inspected establishments can produce products that are destined to enter interstate commerce or for export to foreign countries.”<sup>210</sup> This means that FSIS must approve and provide inspection for a slaughter facility before it can process and sell meat. Without FSIS’s initial

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<sup>207</sup> 7 C.F.R. § 1b.3(c) (emphasis added); 7 C.F.R. § 1b.4.

<sup>208</sup> See, e.g., *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1028 (D.C. Cir 2007) (explaining that animal feeding operations or “AFOs emit a number of pollutants” that when released “in sufficient quantities may be required to report them” to the EPA); *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 977–84 (4th Cir. 2020) (Wilkinson, J., concurring) (explaining “the full harms that the unreformed practices of hog farming are inflicting” including diminished air quality, increased risk of viral and bacterial infection, compromised water quality, and other serious ecological risks); Jedediah Purdy, *The New Culture of Rural America*, THE AM. PROSPECT (Nov. 15, 2001), <https://prospect.org/features/new-culture-rural-america/> (“The poultry industry has become notorious for the low pay and dangerous work conditions of the employees who manhandle the birds, and for stream-killing pollution. In the early 1990s, new technology made the same kind of confinement possible for hogs [as with poultry] . . . . Market structure drives the new agriculture nearly as much as technology. The top six pork processors slaughter three-quarters of the country’s hogs, up from one-third in 1989, and they want a steady supply of cheap pigs whose quality they can control. The top four beef processors control 80 percent of their industry.”); Omanjana Goswami & Stacy Woods, *Waste Deep: How Tyson Foods Pollutes US Waterways and Which States Bear the Brunt*, UNION OF CONCERNED SCIENTISTS (Apr. 30, 2024), <https://www.ucsusa.org/resources/waste-deep>; Laura Fox, *The Intersectionality of Environmental Injustice, Other Societal Harms, and Farmed Animal Welfare*, ENV’T. JUS. 101, 103-07 (2024), <http://doi.org/10.1089/env.2021.0125>.

<sup>209</sup> See *supra* notes 43-55.

<sup>210</sup> *Slaughter Inspection 101*, *supra* note 46.



grant of inspection, slaughter facilities cannot operate. This crucial role of FSIS is evident in the case where Congress refused to appropriate funds for FSIS inspection of horse meat processors, resulting in the closure of those operations.<sup>211</sup>

Once operations are approved by FSIS for inspection, the agency can engage in several other actions that impact the operations of those facilities. Suspension and regulatory actions are two of the more wide-reaching tools that FSIS has at its disposal. FSIS may undertake a suspension action when:

[P]roducts have been produced under insanitary conditions or when the establishment has shipped adulterated or misbranded products. FSIS may also take a suspension action for inhumane handling or slaughtering of livestock, intimidation of FSIS inspection officials, violations of a regulatory control action, or other reasons as described in the Rules of Practice.

When there is an imminent threat to public health or safety, such as the shipment of adulterated product, FSIS takes immediate enforcement action. In other situations, FSIS provides the establishment prior notification of intended enforcement action and the opportunity to demonstrate or achieve compliance. This is called a Notice of Intended Enforcement (NOIE). FSIS also may place a suspension action in abeyance if an establishment presents and puts into effect corrective and preventive actions. In appropriate situations, FSIS also may defer an enforcement decision based on corrections submitted by the establishment. FSIS monitors and verifies an establishment's implementation of corrective and preventive actions and takes follow-up action if needed to protect public health.<sup>212</sup>

FSIS regulatory control actions, withholding actions, and suspensions can lead to partial or complete cessation of slaughterhouse operations. The agency-initiated actions include “slowing or stopping of lines” and “refus[ing] to allow the processing of specifically identified product,” which “may affect all product in the establishment or product produced by a particular process.”<sup>213</sup>

Each of these actions exude substantial federal control and responsibility, making them major Federal actions.<sup>214</sup> FSIS's permitting, granting, and providing financial assistance also constitute major Federal actions “where the agency has . . . sufficient control and responsibility over the subsequent use of the financial assistance or the effects of the activity.”<sup>215</sup>

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<sup>211</sup> *Is Horse Meat Slaughtered or Sold in the United States?*, USDA (Apr. 3, 2021), <https://ask.usda.gov/s/article/Is-Horse-meat-slaughtered-or-sold-in-the-US> (explaining that “[t]here are no [USDA] inspected horse slaughter plants in the United States at this time [because FSIS] is barred under the 2016 Consolidated Appropriations Act from spending funds to perform ante-mortem inspection of horses intended for human consumption”).

<sup>212</sup> See *Quarterly Enforcement Reports: V. Administrative Actions*, *supra* note 46.

<sup>213</sup> 9 C.F.R. § 500.1(a)–(c) (defining each action).

<sup>214</sup> 42 U.S.C. § 4336e(10)(A); see also 89 Fed. Reg. 35442, 35576 (to be codified at 40 C.F.R. § 1508.1(w)).

<sup>215</sup> See *supra* note 71.

One particularly illustrative example of FSIS’s major Federal actions involves its decisions to increase slaughter line speeds. The speed at which animals may be slaughtered determines the number of animals that can be slaughtered each year. As the U.S. Senate Committee on Agriculture, Nutrition, and Forestry recently noted, “[a]bsent a permanent . . . extension of the current [line speed increases], . . . processors will have to reduce their operational capacity, which reduces demand for hogs [and] disrupts the supply chain for U.S. hog farmers and processors.”<sup>216</sup>

Indeed, FSIS repeatedly justifies its actions to increase slaughter line speeds on the basis that they would increase production of the underlying animal products and increase industry profits.<sup>217</sup> A slaughterhouse that increases its line speed can kill more animals in the same amount of time. For instance, “a single [poultry] facility that increases the speed of just one of its lines from 140 bpm to 175 bpm and continues to operate that line for 40 hours a week would be able to kill an additional 84,000 chickens each week and more than 4.3 million additional chickens in a year.”<sup>218</sup> When FSIS proposed increasing slaughter line speeds for chickens from 140 to 175 bpm, it justified the proposal by stating that the move would lead to “increased sales of domestic and exported products” by approximately \$200 million each year.<sup>219</sup> This statement alone should have triggered review of the proposal as a major Federal action subject NEPA.

In USDA’s NEPA policy and procedure rulemaking that originally created the FSIS CE, USDA stated that “[t]his final rule . . . has been classified as nonmajor [and] will not have [a]n annual effect on the economy of \$100 million or more . . . .”<sup>220</sup> Given FSIS’s own statement that increased slaughter line speeds would increase domestic and exported meat, poultry, and egg product sales by nearly \$200 million per year, this action falls well over the economic effect threshold and therefore should have been considered a major rulemaking.<sup>221</sup>

Not only does the economic impact of a proposed federal action influence whether it is a major Federal action for NEPA purposes (see discussion *supra* in Part V.A.1), a rule classified as “major” is subject to more severe scrutiny by Congress. The Government Accountability Office is required to write a report on any major rule and the agency’s compliance with procedural processes in making that rule within 15 days and present that report to the jurisdiction’s House and Senate committees.<sup>222</sup> FSIS did not engage in either process.

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<sup>216</sup> *USDA Inaction on New Swine Inspection System Fails U.S. Farmers and Pork Processors*, U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Nov. 17, 2023), <https://www.agriculture.senate.gov/newsroom/minority-blog/usda-inaction-on-new-swine-inspection-system-fails-us-farmers-and-pork-processors>.

<sup>217</sup> Dani Replogle & Delcianna J. Winders, *Accelerating Catastrophe: Slaughter Line Speeds and the Environment*, 51 ENVTL. L. 1277, 1282-83 (2021).

<sup>218</sup> Compl., *Humane Soc’y of the U.S. v. USDA*, No. 20-CV-01395, 2020 WL 7021992 at ¶ 161 (May 18, 2020 N.D. Cal.).

<sup>219</sup> Modernization of Poultry Slaughter Inspection, 77 Fed. Reg. 4,408, 4,438.

<sup>220</sup> 48 Fed. Reg. 11403 (1983).

<sup>221</sup> A “major rule” is defined in the Congressional Review Act as: “any rule that the Administrator of the Office of Information and Regulatory Affairs [OIRA] of the Office of Management and Budget [OMB] finds has resulted in or is likely to result in—(A) an annual effect on the economy of \$100,000,000 or more . . . .” 5 U.S.C. § 804(2).

<sup>222</sup> *The Congressional Review Act: Determining Which “Rules” Must Be Submitted to Congress 2*, CONGR. RSCH. SERV. (last updated Mar. 6, 2019), <https://sgp.fas.org/crs/misc/R45248.pdf>.

Even if FSIS had no other responsibilities other than to regulate the speed at which animals may be slaughtered, that responsibility alone has such a pervasive impact on the economy, including by USDA's metric, and on the environment that FSIS's responsibility for it clearly illustrates the agency is responsible for major Federal actions that significantly impacts the environment. These major Federal actions include approving slaughterhouse operations for inspection and increasing line speeds at pig, chicken, turkey, and cattle slaughterhouses, each action having environmental consequences, as discussed *infra*. Yet these actions have avoided the rigorous environmental review required by NEPA.

With respect to pig slaughter, FSIS created the New Swine Inspection System (NSIS), which removed line speed restrictions from pig slaughterhouses allowing processors to increase slaughter rates beyond the standard 1,106 hogs per hour and delegated federal inspector duties to facility employees.<sup>223</sup> NSIS was approved for industry-wide adoption in 2019, but in 2021, a federal court in Minnesota blocked the portion of the law that increased line speeds.<sup>224</sup> Nevertheless, USDA has been testing higher line speed limits on a "limited" basis to measure the impacts of increased line speeds on worker safety.<sup>225</sup> Importantly, in promulgating the 2019 rule, FSIS did not fulfill its obligations under NEPA. Despite significant foreseeable effects on public health and the environment, at both the slaughterhouse and animal production level, the USDA did not prepare an EIS or even an EA prior to finalizing the 2019 rule. Instead, the agency perfunctorily declared that the rule change was "categorically excluded" from any NEPA review on the grounds that FSIS has been categorically excluded as an agency by USDA regulations.<sup>226</sup>

Similarly, with respect to chicken slaughter, FSIS's line speed increase would allow chicken slaughterhouses to increase their line speeds from 140 bpm to 175 bpm.<sup>227</sup> Contrary to its economic analysis<sup>228</sup> and failing to take a hard look at the proposal's impacts, FSIS stated that "granting waivers to allow additional . . . establishments to operate at up to 175 bpm is not expected to affect the number of birds slaughtered or result in more waste, more water use, or require more fossil fuels to transport the birds from farm to slaughterhouse."<sup>229</sup> In support of this sweeping conclusion, FSIS further concluded that "any environmental effects of the slaughter establishment's operations are not the result of a major federal action by FSIS" because "FSIS Inspection Program Personnel do not have any authority or control over the day-to-day operations of the slaughter plant."<sup>230</sup>

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<sup>223</sup> Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52300, 52300 (Oct. 1, 2019) (codified at 9 C.F.R. pt. 301, 309, 310).

<sup>224</sup> *United Food & Com. Workers Union, Loc. No. 663 v. U.S. Dep't of Agric.*, 532 F. Supp. 3d 741, 782 (D. Minn. 2021).

<sup>225</sup> Constituent Update - March 3, 2023, FSIS (2023), <https://www.fsis.usda.gov/news-events/news-press-releases/special-alert-constituent-update-november-28-2023>.

<sup>226</sup> 84 Fed. Reg. at 52,317 (invoking 7 C.F.R. § 1b.4); *see also supra* note 192.

<sup>227</sup> Replogle & Winders, *supra* note 217, at 1281.

<sup>228</sup> *See supra* notes 217-21 and accompanying discussion.

<sup>229</sup> Replogle & Winders, *supra* note 217, at 1282.

<sup>230</sup> *Memorandum Analyzing Application of the FSIS Categorical Exclusion to Poultry Line Speed Waiver Request of Gerber Poultry, Inc. 2*, FSIS (Oct. 5, 2018).

FSIS further asserts that “[e]xpected sales of poultry products to consumers will determine the total number of birds that the poultry establishment slaughters, not the maximum line speed that it operates under” and, as such, “granting a waiver . . . is not expected to affect the number of birds slaughtered or result in more waste, more water use, or require more fossil fuels to transport the birds from farm to slaughterhouse.”<sup>231</sup> No analysis accompanied or supplemented these sweeping, conclusory remarks.

FSIS’s reasoning is flawed in several material ways. First, FSIS’s approach of not conducting any analysis of the direct, indirect, and cumulative effects of increasing slaughter line speeds contradicts NEPA’s hard look mandate. In *Friends of the Earth, Inc. v. U.S. Army Corps of Engineers*, the court highlighted the issue with superficial assessments that do not truly analyze cumulative impacts. The case criticized the Corps for merely reciting historical developments and making unsubstantiated conclusions about minimal impacts.<sup>232</sup> Similarly, FSIS has failed to provide an actual analysis of how increasing speeds from 140 to 175 birds per minute, for example, does not significantly impact the environment.<sup>233</sup>

Further, FSIS’s conclusion is based on a flawed argument. FSIS concluded that its action does not have any significant impact on the environment because, according to the agency, it does not control the day-to-day operations of the slaughter plant. This position disregards the premise that FSIS’s approval of a waiver to increase line speeds is the instigating action that could potentially cause additional environmental impacts.

By stating that FSIS does not control the day-to-day operations, the agency ignores the potential impact of its own authorizing action and places the totality of environmental responsibility on the slaughter plant’s operations. This is wrong. “[W]hen an agency serves effectively as a ‘gatekeeper’ for private action,” as FSIS does regarding slaughterhouse operations, “that agency can no longer be said to have ‘no ability to prevent a certain effect.’”<sup>234</sup> Thus, FSIS’s reasoning dodges the issue rather than addressing the effects “reasonably foreseeable” from its actions, as NEPA demands. Furthermore, FSIS’s position is contradicted by its own economic analysis used to support the rule, which acknowledged that the acceleration of slaughter line speeds would boost the production of animal products and enhance profitability within the industry.<sup>235</sup>

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<sup>231</sup> *Id.* at 3; accord 83 Fed. Reg. 49048, 49058.

<sup>232</sup> *Friends of the Earth, Inc. v. U.S. Army Corps of Eng'rs*, 109 F.Supp.2d 30, 42 (D.D.C.2000) (noting that the Corps “dedicated nine or ten pages of each EA to cumulative impacts” but that “[t]here is no actual analysis” as the EAs “merely recite the history of development along the Mississippi coast and then conclude that the cumulative direct impacts ‘have been minimal’”).

<sup>233</sup> See *Env't Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1190 (N.D. Cal. 2004) (“conclusory statements of reasons supporting [agency]’s finding is clearly at odds with NEPA’s mandate” (quoting *Yolano–Donnelly Tenant Ass’n v. Cisneros*, No. S–86–846 MLS PAN, 1996 U.S. Dist. LEXIS 22778, at \*42–43 (E.D. Cal. Mar. 8, 1996))).

<sup>234</sup> *Humane Soc’y of U.S. v. Johanns*, 520 F. Supp. 2d 8, 25 (D.D.C. 2007) (citing *Wyo. Outdoor Council Powder River Basin Resources Council v. U.S. Army Corps of Eng'rs*, 351 F.Supp.2d 1232, 1242 (D.Wyo.2005)).

<sup>235</sup> Replogle & Winders, *supra* note 217, at 1282–83.

Further, as it relates to cattle slaughter, FSIS has considered reducing the number of governmental inspectors present on the slaughterhouse line for post-mortem sorting activities.<sup>236</sup> Privatizing this governmental inspection function creates conflicts of interest and concerns regarding worker safety, animal handling, food safety, and transparency.<sup>237</sup> Each of these issues has potential environmental consequences that should trigger environmental review under NEPA.

For instance, federal inspectors play a crucial role in identifying diseased or contaminated animals, preventing them from entering the food supply.<sup>238</sup> The consequent reduced trained oversight alarmingly raises the risk of contaminated meat reaching consumers.<sup>239</sup> This situation not only poses a public health risk but also threatens to significantly affect the environment by creating food waste, which will release methane emissions once in landfill through the increased need for recalls. Disposal of contaminated products can lead to further environmental contamination.<sup>240</sup>

Federal inspectors are also part of an intentional system designed to maintain transparency and adherence to regulations by slaughterhouse facilities.<sup>241</sup> Their reduced presence foreseeably leads to a lack of accountability and lower compliance with environmental regulations, especially those related to waste disposal, water usage, and emissions from slaughterhouses. Therefore, it is foreseeable that this decrease in compliance would lead to increased pollution and environmental degradation. Considering these impacts, the reduction of federal inspectors in slaughterhouses and the privatization of this critical function are major Federal actions that could have significant environmental consequences, warranting a comprehensive review under NEPA.

## 2. *FSIS Actions Have Reasonably Foreseeable Significant Environmental Effects.*

NEPA is premised on, and relies upon, the review of reasonably foreseeable direct, indirect, and cumulative impacts.<sup>242</sup> “Reasonably foreseeable means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.”<sup>243</sup> Direct, indirect, and cumulative environmental impacts are recognized as effects that must be considered and

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<sup>236</sup> Letter from Tyson Foods, Inc. to Dr. Bryan Trout, USDA/FSIS 1 (Mar. 11, 2019); *see also* Lazarus, *infra* note 237, at 945.

<sup>237</sup> *Am. Horse Prot. Ass’n v. Veneman*, No. 01-00028 (HHK), 2002 WL 34471909, at \*4 (D.D.C. July 9, 2002); *see also* Regina Lazarus, Note, *The Beef with Slaughtering the Slaughterhouse Inspector*, 73 RUTGERS UNIV. LAW REV. 943 (Spring 2021), [https://rutgerslawreview.com/wp-content/uploads/2021/11/08\\_Lazarus\\_Website.pdf](https://rutgerslawreview.com/wp-content/uploads/2021/11/08_Lazarus_Website.pdf).

<sup>238</sup> *See, e.g., Inspection*, FSIS, <https://www.fsis.usda.gov/inspection> (last visited Jun. 9, 2024) (“The safety and integrity of meat, poultry and egg products is ensured through FSIS inspection services.”).

<sup>239</sup> Pls’ Mem. Supp. Summ. J., *Farm Sanctuary, v. U.S. Dep’t of Agric.*, No. 6:19-cv-6910, 2023 WL 3431351 (Mar. 17, 2023 W.D.N.Y.) (“FSIS inspector explains that under HIMP, ‘contamination such as hair, toenails, cystic kidneys, and bladder stems has increased’”).

<sup>240</sup> *The Environmental Impacts of Slaughterhouses: Fact Sheet*, CTR. FOR BIOLOGICAL DIVERSITY, [https://biologicaldiversity.org/programs/population\\_and\\_sustainability/pdfs/slaughterhouse\\_factsheet.pdf](https://biologicaldiversity.org/programs/population_and_sustainability/pdfs/slaughterhouse_factsheet.pdf).

<sup>241</sup> *See, e.g., Quarterly Enforcement Reports*, FSIS, <https://www.fsis.usda.gov/inspection/regulatory-enforcement/quarterly-enforcement-reports> (last visited Jun. 10, 2024).

<sup>242</sup> *Humane Soc’y. of U.S. v. Johanns*, 520 F. Supp. 2d 8, 22 (D.D.C. 2007); *see also* 42 U.S.C. §§ 4332(2)(C), 4335(b).

<sup>243</sup> 89 Fed. Reg. 35442, 35576 (to be codified at 40 C.F.R. § 1508.1(aa)).

disclosed by agencies prior to taking action.<sup>244</sup> The analyses of these effects are important given that they reveal and define the universe of alternatives available to the agency that avoid environmental effects and reflect the goals of NEPA.<sup>245</sup>

As a result, FSIS must, under NEPA, consider those effects “reasonably foreseeable” from its actions. Yet, FSIS consistently fails to make these considerations when taking major Federal actions. For example, FSIS acts under its CE when it issues its approvals to inspect slaughterhouses even though without FSIS approval the slaughterhouse operations would not run and none of the associated environmental harms discussed *infra* would occur.<sup>246</sup>

As another example, when assessing whether to increase slaughter line speeds or remove federal inspectors at slaughterhouses, FSIS maintains that its CE excludes it from the requirement to prepare an EA or EIS for those proposed actions and thus from considering the reasonably foreseeable impacts of these actions.<sup>247</sup> Such actions, as demonstrated, however, have enormous environmental impacts and are illustrative of FSIS’s disregard for its obligations under NEPA.

a) *FSIS’s Slaughter Line Speed Rules Drive Increased Resource Intensity and Pollution, Significantly Affecting the Human Environment and Harming Wildlife*

The plainly foreseeable outcome of FSIS allowing for increases in production at slaughterhouses is intensified environmental impacts—such actions escalate the energy consumption, waste generation, and overall environmental impact associated with meat and poultry production. Indeed, FSIS acknowledged the potential for more waste production and disposal due to increased line speeds.<sup>248</sup>

FSIS’s regulation of slaughter line speeds directly affects the number of animals slaughtered, which in turn determines the scale of animal raising, transportation, and water and energy used for processing. The number of animals slaughtered each year determines how many animals will be raised for slaughter each year; how many animals will need to be transported to slaughter; how much energy will be needed to run the machinery that slaughters and processes animals; how much waste is produced from that slaughter processing; and the environmental impacts from each of those components of the animal slaughter process.<sup>249</sup>

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<sup>244</sup> 87 Fed. Reg. 23453 (effective April 20, 2022).

<sup>245</sup> 89 Fed. Reg. 35442, 35563 (to be codified at 40 C.F.R. § 1502.1(b) (“effects and shall inform decision makers and the public of reasonable alternatives”); *Id.* at 35565 (to be codified at 40 C.F.R. § 1502.14)).

<sup>246</sup> *Apply for Grant of Inspection*, FSIS (last updated Jan. 24, 2023), <https://www.fsis.usda.gov/inspection/apply-grant-inspection>.

<sup>247</sup> Replogle & Winders, *supra* note 217, at 1281.

<sup>248</sup> 77 Fed. Reg. at 4,451 (Slaughterhouses “may choose to increase the number of birds that they slaughter, which could result in an increase in the number of condemned carcasses and parts that must be disposed of.”). In addition to the environmental impacts, slaughter line speeds are “directly linked to worker safety.” Kimberly Kindy, *Inspector General Wants to Know If USDA Concealed Worker Safety Data*, Wash. Post (June 25, 2019) (quoting U.S. Senator Richard J. Durbin (Ill.)).

<sup>249</sup> Replogle & Winders, *supra* note 217, at 1286.



Consequently, the increased environmental impacts of slaughterhouses regulated by FSIS are reasonably understood to stem from FSIS actions and decisions. FSIS activities regarding these slaughterhouse operations have profound and multifaceted implications for the environment, human health, animal welfare, and biodiversity, necessitating a detailed statement under NEPA.<sup>250</sup> As such, even if the FSIS rules increasing line speeds could be covered by the general terms of a CE, “extraordinary circumstances” exist that require the preparation of an EIS or EA.<sup>251</sup> The agency was sued on this issue, but the court did not reach a decision on that claim.<sup>252</sup>

The process of slaughtering and processing animals is resource-intensive, involving stages from holding live animals to initial processing. Slaughterhouses generally are responsible for the following activities: “(1) receiving and holding of live animals for slaughter[], (2) stunning prior to slaughter, (3) slaughter (bleeding), and (4) initial processing of animals.”<sup>253</sup> All of these processes require significant resources and energy, and produce considerable waste, such as blood, fat, wastewater, and fecal matter, that must be disposed of.<sup>254</sup> This waste contributes to water and air pollution, affecting local ecosystems and communities.

Slaughterhouses use tremendous amounts of water in their processes for animal hydration, to generate energy for operation, and in various chemicals for sanitation.<sup>255</sup> Poultry slaughterhouses use approximately 1.46 million gallons per day, before increases to line speeds.<sup>256</sup> All this water must drain somewhere, and as it does it picks up all the pollutants from the slaughter process, like “blood, feathers, viscera, soft tissue, bone, fat, urine, and fecal matter.”<sup>257</sup> Urine and fecal matter often contain additional bacteria that come along for the ride in the wastewater.<sup>258</sup> Wastewater also contains disinfectant chemicals, nitrogen, phosphorus, pesticides, and animal drugs.<sup>259</sup>

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<sup>250</sup> See 89 Fed. Reg. 35442, 35557, 35575 (to be codified at 40 C.F.R. §§ 1501.3(d)(2)(iv), (vi), 1508.1(i).

<sup>251</sup> *Id.* at 35557-58 (to be codified at 40 C.F.R. § 1501.4).

<sup>252</sup> *Farm Sanctuary v. U.S. Dep’t of Agric.*, No. 6:19-CV-06910 EAW, 2023 WL 8602134 (W.D.N.Y. Dec. 12, 2023).

<sup>253</sup> U.S. Env’t Prot. Agency, *Technical Development Document for the Final Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category* (40 C.F.R. 432), EPA-821-R-04-011, 4-2 (2004).

<sup>254</sup> Senorpe Asem-Hiablie et al., *A Life Cycle Assessment of the Environmental Impacts of a Beef System in the USA*, 24 LIFE CYCLE ASSESS. FOR AGRIC. 441 (May 30, 2018), <https://link.springer.com/article/10.1007/s11367-018-1464-6>; Ciro Fernando Bustillo-Lecompte & Mehrab Mehrvar, *Slaughterhouse Wastewater Characteristics, Treatment, and Management in the Meat Processing Industry: A Review on Trends and Advances*, 161 J. OF ENVI. MGMT. (Sept. 15, 2015) 287, <https://www.sciencedirect.com/science/article/abs/pii/S0301479715301535?via%3Dihub>; Charles A. Taylor et al., *Livestock Plants and COVID-19 Transmission*, 117 PROCEEDINGS NAT’L ACAD. SCI. U.S. 31706, 31707 (Dec. 15, 2020), <https://www.pnas.org/doi/10.1073/pnas.2010115117> (“To preserve meat after slaughter, processing areas are maintained at 0 to 12° C (44)”).

<sup>255</sup> Replogle & Winders, *supra* note 217, at 1286; see also Sarah Rehkamp et al., *Tracking the U.S. Domestic Food Supply Chain’s Freshwater Use Over Time* 8, USDA ECON. RESEARCH SERV. (Jul. 2021), [www.ers.usda.gov/webdocs/publications/101625/err-288.pdf?v=3741.1](http://www.ers.usda.gov/webdocs/publications/101625/err-288.pdf?v=3741.1) (“In terms of water impacts, animal (except poultry) slaughtering, rendering, and processing was the dominant sector in terms of water withdrawals—contributing 15.4 percent of water withdrawals across the food manufacturing sectors”).

<sup>256</sup> Replogle & Winders, *supra* note 217, at 1287.

<sup>257</sup> *Id.* at 1288.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.*

“Meat processing plants typically dispose of wastewater by releasing it to streams, rivers, and lakes (usually after some treatment), diverting it to municipal wastewater treatment plants, and spraying it on pasture or cropland where it can infiltrate groundwater and runoff into surface waters.”<sup>260</sup> This waste often enters bodies of water, thereby contaminating them having a significant impact on the environment. “Untreated wastewater from meat processing typically contains high levels of oxygen-demanding substances (like blood, fat, urine, and feces), suspended solids, ammonia, nitrogen, phosphorus, oil and grease, fecal bacteria, and pathogens.”<sup>261</sup> Such substances “drive excess algae growth, create low oxygen dead zones that suffocate fish and other aquatic life, and turn waterways into bacteria-laden public health hazards.”<sup>262</sup> These algal blooms can deplete the oxygen in the water, killing fish and other aquatic life.<sup>263</sup>

The waste generated in slaughterhouses is a major source of pollution. As discussed, slaughterhouses produce a tremendous amount of waste. For perspective, just one slaughterhouse in Oklahoma—Seaboard Farms—“produces as much sewage as the city of Philadelphia.”<sup>264</sup> The sewage that Seaboard Farms produces “sits in open-air lagoons, some as large as 14 acres and as deep as 25 feet. Neighbors complain of intolerable stench, and everybody worries about water pollution.”<sup>265</sup> “Meat and poultry plants discharge many contaminants that can harm drinking water systems such as nitrate, nitrite, and fecal coliform, as well as byproducts of the disinfection process, such as chlorine.”<sup>266</sup>

“The primary pollutants associated with [meat product processing] wastes are nutrients (particularly nitrogen and phosphorus), organic matter, solids, and pathogens. EPA identified 30 pollutants of concern for the meat processing segment of the industry and 27 pollutants of concern for the poultry processing segment of the industry.”<sup>267</sup> Moreover, the solid waste, including toxic sludges, further exacerbates the environmental burden. Slaughterhouses produce solid waste that contains “bacteria, viruses, prions, fungi, yeasts, and associated microbial toxins.”<sup>268</sup>

Additionally, slaughterhouse waste pollutes the air with harmful toxins and climate-change-inducing greenhouse gases. Air toxins generated by slaughter processes include Carbon monoxide (CO), Sulphur dioxide (SO<sub>2</sub>), Nitrogen dioxide (NO<sub>2</sub>), Volatile Organic Compounds (VOC), and Particulate Matter (PM).<sup>269</sup> Moreover, slaughterhouse processes, including the boiling of fat,

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<sup>260</sup> *Water Pollution from Slaughterhouses: Three Quarters of U.S. Meat Processing Plants that Discharge into Waterways Violated their Permits, 2016-2018* 9, ENVT’L INTEGRITY PROJECT (Oct. 11, 2018).

<sup>261</sup> *Id.* at 8.

<sup>262</sup> *Id.*

<sup>263</sup> *Id.* at 15.

<sup>264</sup> Purdy, *supra* note 208.

<sup>265</sup> *Id.*

<sup>266</sup> ENVT’L INTEGRITY PROJECT, *supra* note 260, at 10.

<sup>267</sup> U.S. Env’t Prot. Agency, *Economic and Environmental Benefits Analysis of the Final Meat and Poultry Products Rule*, EPA-821-R-04-010, 7-1 (2004).

<sup>268</sup> Replogle & Winders, *supra* note 217, at 1290.

<sup>269</sup> Ebenezer Leke Odekanle et al., *Air emissions and health risk assessment around abattoir facility, HELIYON* (Jul. 12, 2020), <https://doi.org/10.1016/j.heliyon.2020.e04365>.



bones, and flesh, contributes to the spread of bad odor, causing and exacerbating the health problems of those living nearby.<sup>270</sup>

“Slaughterhouses . . . create large amounts of . . . air pollution that . . . cause serious health problems and contribute to climate change.”<sup>271</sup> “Slaughterhouses use significant amounts of energy, resulting in greenhouse gas emissions that contribute to climate change. Most people are familiar with carbon dioxide as a greenhouse gas, but the gases nitrous oxide and methane are far more potent. Nitrous oxide and methane have warming potential 300 and 100 times more than carbon dioxide, respectively.<sup>272</sup> Slaughterhouses emit greenhouse gases, such as nitrous oxide and methane, during the course of their operations.<sup>273</sup>

Beyond the emissions generated at the facilities themselves, trucks that transport animals to slaughter also emit greenhouse gases, and manure emits nitrous oxide and methane.<sup>274</sup> These transportation related emissions are foreseen to increase with faster line speeds as more animals are needed to be brought to the facilities for processing.<sup>275</sup>

In addition to the significant environmental impacts that FSIS actions have on the environment via their regulation and oversight of slaughterhouses, those actions have indirect and cumulative impacts on the environment from industrialized animal feeding operations (AFOs) and concentrated animal feeding operations (CAFOs) that FSIS must also consider—including from those operations that increase in size and intensity as a result of FSIS’s actions as they relate to slaughterhouses.<sup>276</sup> The individual and cumulative effects of FSIS’s actions significantly impact the environment, especially when considering the vast scale of operations typical of CAFOs. The

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<sup>270</sup> Abha Lakshmi Singh et al., *Environmental and Health Impacts from Slaughter Houses Located on the City Outskirts: A Case Study*, 6 J. OF ENVT’L PROTECTION 566, 574 (May 2014), <https://www.scirp.org/journal/PaperInformation?PaperID=46296>.

<sup>271</sup> Delcianna J. Winders & Elan Abrell, *Slaughterhouse Workers, Animals, and the Environment*, 23 HEALTH HUMAN RIGHTS 21, 24-25 (Dec. 23, 2021) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8694297/>.

<sup>272</sup> Timothy J. Griggs et al., *Nitrous Oxide Emissions are Enhanced in a Warmer and Wetter World*, 114 PROC. NAT’L ACAD. SCIS. U.S. 12081, 12081 (2017) [https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5692531/#:~:text=Nitrous%20oxide%20\(N2O,importance%20for%20stratospheric%20ozone%20depletion](https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5692531/#:~:text=Nitrous%20oxide%20(N2O,importance%20for%20stratospheric%20ozone%20depletion); Andrew Moseman & Jessika Trancik, *Why Do We Compare Methane to Carbon Dioxide Over a 100-year Timeframe? Are We Underrating the Importance of Methane Emissions?*, MIT CLIMATE PORTAL (June 28, 2021), <https://climate.mit.edu/ask-mit/why-do-we-compare-methane-carbon-dioxide-over-100-year-timeframe-are-we-underrating>.

<sup>273</sup> Replogle & Winders, *supra* note 217, at 1291.

<sup>274</sup> *Id.* at 1291.

<sup>275</sup> *Id.* 1291-92.

<sup>276</sup> “[F]aster line speeds mean, definitionally, that the number of birds being raised (usually in brutal conditions) for slaughter can increase, and the number going through (also brutal) slaughter procedures can also increase.” Dylan Matthews, *Biden’s Latest Executive Action Is a Win for Chickens and Meatpacking Workers*, VOX (Jan. 26, 2021), <https://www.vox.com/future-perfect/2021/1/26/22250391/joe-biden-animals-line-speeds-chicken>.

environmental, human, and animal welfare concerns associated with these operations are precisely the reasonably foreseeable effects that NEPA demands be assessed.<sup>277</sup>

FSIS's line speed regulations have reasonably foreseeable impacts on animal production, for example. The number of animals slaughtered each year determines how many animals will be raised for slaughter in that year.<sup>278</sup> The resulting higher number of animals leads to more waste production, greater water use, and increased fossil fuel consumption for transportation.

FSIS failed to examine its indirect and cumulative effects, especially considering the modern shift to industrialized agriculture to produce animals for slaughter. Historically, animal farming was conducted on a smaller, more sustainable scale. However, with the advent of industrialized agriculture, large numbers of animals are now raised in confinement structures, such as CAFOs.<sup>279</sup> These crowded conditions not only raise ethical concerns about animal welfare but also cause considerable environmental degradation.<sup>280</sup> The paradigm shift in animal agriculture has drastically increased the environmental footprint of meat production.<sup>281</sup>

Today, most animals raised to be slaughtered at FSIS inspected facilities are raised in CAFOs or AFOs.<sup>282</sup> Herein lies one of the fundamental problems with the FSIS CE. Even if USDA's CE of FSIS had been in harmony with NEPA and the CEQ guidelines, animal agriculture has changed so drastically since USDA promulgated the CE in 1983 that the CE can no longer be justified in the current state of animal agriculture in the U.S.

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<sup>277</sup> See, e.g., *WildEarth Guardians v. Zinke*, 368 F. Supp. 3d 41, 73 (D.D.C. 2019) (finding “[d]ownstream use of oil and gas, and the resulting GHG emissions, are thus reasonably foreseeable effects of oil and gas leasing”); *Env't Prot. Info. Ctr. v. Blackwell*, 389 F. Supp. 2d 1174, 1188 (N.D. Cal. 2004) (finding “that the [agency] failed to take a hard look at the cumulative effects of the DA Timber Sale and reasonably foreseeable future timber sales”); *Ctr. for Biological Diversity v. U.S. Forest Serv.*, 444 F. Supp. 3d 832, 852 (S.D. Ohio 2020) (finding “the environmental impacts of leasing the land for fracking, as a whole, were reasonably foreseeable”); *Eagle Cnty., Colo. v. Surface Transp. Bd.*, 82 F.4th 1152, 1180 (D.C. Cir. 2023) (finding agency “cannot avoid its responsibility under NEPA to identify and describe the environmental effects of increased oil drilling and refining on the ground that it lacks authority to prevent, control, or mitigate those developments”).

<sup>278</sup> *Replogle & Winders*, *supra* note 217 at 1286 (“because slaughter does not occur in a vacuum, increased capacity and more concentrated production at slaughterhouses will necessarily intensify environmental harms from concentrated animal feeding operations (CAFOs)”).

<sup>279</sup> *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 978–79 (4th Cir. 2020) (“Once, most hogs were raised on ‘smaller, pasture-based hog farms.’ Now, the paradigm has shifted: ‘large numbers of hogs, often many thousands’ crowd together in each of the many cramped ‘confinement structures’ that comprise the typical hog CAFO.”).

<sup>280</sup> See Lise R. Montefiore, et al., *Reconstructing the Historical Expansion of Industrial Swine Production from Landsat Imagery*, 12 SCI REP. 1736 (Feb. 2, 2022). <https://doi.org/10.1038/s41598-022-05789-5>.

<sup>281</sup> Rolf Halden & Kellogg Schwab, *Environmental Impact of Industrial Farm Animal Production*, PEW COMM'N OF INDUSTRIAL FARM ANIMAL PRODUCTION, <https://law.lclark.edu/live/files/6699-environmental-impact-of-industrial-farm-animal> (last visited Jun. 18, 2024).

<sup>282</sup> Lindsay Walton & Kristen Jaiven, *Regulating CAFOs for the Well-Being of Farm Animals, Consumers, and the Environment*, 50 Env'tl. L. Rep. 10485 (2020) (“Approximately 99% of meat and other animal products in the United States are from factory farms, and the number of concentrated animal feeding operations (CAFOs) continues to grow.”).

Raising large numbers of animals for slaughter generates enormous amounts of waste and other pollution streams that contaminate the environment and harm communities and wildlife. Industrially farmed animals in the U.S. produce millions of tons of manure each year—between 3 to 20 times more manure than generated by humans.<sup>283</sup> But, unlike human waste, which is processed in sewage treatment plants, there is no standardized treatment for livestock waste.

Consequently, pollutants from animal waste enter the air, seep into groundwater, and run off into surface waters. The runoff from animal waste and agricultural practices has polluted nearly one-third of rivers in the U.S., carrying pathogens, nutrients, and other contaminants that degrade water quality.<sup>284</sup> This pollution not only affects aquatic ecosystems but also poses risks to public health and community well-being.

CAFOs also emit various harmful pollutants into the air, including ammonia, hydrogen sulfide, particulate matter, and volatile organic compounds.<sup>285</sup> The release of these types of chemicals into the air causes respiratory illness, irritation to the eyes, nose, and throat, anxiety, depression, memory loss, and heart disease.<sup>286</sup> CAFOs are also notable contributors to greenhouse gas emissions, releasing methane and nitrous oxide—potent contributors to climate change, accounting for approximately 16.5% of global greenhouse gas emissions.<sup>287</sup>

The poultry industry significantly contributes to Carbon Dioxide-equivalent (CO<sub>2</sub>e) emissions, mainly through fossil fuel usage.<sup>288</sup> This includes electricity purchases, propane in stationary combustion units like furnaces and incinerators, and diesel in vehicles and machinery such as

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<sup>283</sup> Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities* 2, NAT'L ASSOC. OF LOCAL BOARDS OF HEALTH (2010), <https://stacks.cdc.gov/view/cdc/59792>.

<sup>284</sup> *Water Resources Mission Area, Agric. Contaminants*, U.S. GEOLOGICAL SURV. (Mar. 1, 2019), <https://www.usgs.gov/mission-areas/water-resources/science/agricultural-contaminants> (finding that nearly 94% of all water samples taken were contaminated by at least one pesticide); see also George Monbiot, *Think Dairy Farming is Benign? Our Rivers Tell a Different Story*, THE GUARDIAN (Oct. 5, 2015), <https://www.theguardian.com/environment/2015/oct/05/think-dairy-farming-is-benign-our-rivers-tell-a-different-story>; Paul Bland & Jessica Culpepper, *Congress, Follow Cal.'s Lead: Keep Manure Out of Drinking Water*, THE HILL (May 10, 2017), <https://thehill.com/blogs/pundits-blog/energy-environment/332751-congress-follow-californias-lead-keep-manure-out-of>.

<sup>285</sup> *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1029 (D.C. Cir 2007) (considering AFO compliance with the Comprehensive Environmental Response Compensation, and Liability Act (CERCLA), the Emergency Planning and Community Right-to-Know Act (EPCRA), and the Clean Air Act (CAA), rather than NEPA, the court nonetheless clearly stated that “[i]n the course of their operations, AFOs emit a number of pollutants regulated by the [CAA, CERCLA, and EPCRA]” and that these pollutants “emanate from animal housing structures and areas used to store and treat manure”).

<sup>286</sup> *McKiver*, 980 F.3d at 979–80.

<sup>287</sup> Richard Twine, *Emissions from Animal Agric.-16.5% Is the New Minimum Figure*, MDPI (Jun. 2, 2021), <https://www.mdpi.com/2071-1050/13/11/6276>; see also *Food Emissions*, CGIAR CTRS. AND RSCH. PROGRAMS, <https://ccafs.cgiar.org/bigfacts/> (last visited Dec 13, 2023); Silje Kristiansen, et al., *Animal Agric. and Climate Change in the US and UK Elite Media: Volume, Responsibilities, Causes and Sols.* 15 ENV'T COMMUN. 153 (2021); *Livestock's Long Shadow: Env't Issues and Options*, THE LIVESTOCK, ENV'T, AND DEV. INITIATIVE (2006), <https://www.fao.org/3/a0701e/a0701e.pdf>.

<sup>288</sup> Claudia S. Dunkley, *Global Warming: How Does It Relate to Poultry?*, UGA EXTENSION BULLETIN 1382, 3 (July 2014).

trucks, tractors, and generators on the farm.<sup>289</sup> Additionally, the lifecycle of animal feed plays a role in carbon emissions. As animals consume feed, the carbon is distributed into their biomass (resulting in meat and eggs), exhaled CO<sub>2</sub>, and carbon-rich manure. Beyond fossil fuel emissions, handling and storing manure on poultry farms also releases potent greenhouse gases like nitrous oxide and methane.<sup>290</sup>

The resource intensity of large-scale animal agriculture further compounds its environmental impact. The industry is a significant water consumer, with growing crops for animal feed accounting for nearly 60% of water usage in the U.S.<sup>291</sup> The water-intensive nature of cattle feed crops alone constitutes 23 percent of national water usage.<sup>292</sup> As the industry scales up production to meet the demands of faster slaughter line speeds, this water usage and the associated strain on resources are expected to increase.

The pollution from CAFOs tends to be proportional to their size: “the more animals it houses, the more it pollutes.”<sup>293</sup> Thus, larger operations pose a greater threat to the environment and human health. For example, at one industrial pig operation where around 15,000 pigs were maintained, “153,000 pounds of feces and urine” were generated daily, leading to significant environmental and health concerns for the surrounding community.<sup>294</sup>

As CAFOs continue to increase the number of animals they raise to meet the demand created by increased line speeds, the pollution and health hazards they produce will also increase. FSIS’s increase to line speeds is increasing significant, negative impacts on the human environment. As CAFOs expand to accommodate increased production demands, the subsequent rise in animal waste, resource consumption, pollution, and health risks will escalate the already significant negative impacts on the environment and human health. As such, FSIS actions must undergo the detailed statement requirements of NEPA.

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> Sarah Rehkamp et al., *Tracking the U.S. Domestic Food Supply Chain’s Freshwater Use Over Time* 8, USDA ECON. RESEARCH SERV. (Jul. 2021), [www.ers.usda.gov/webdocs/publications/101625/err-288.pdf?v=3741.1](http://www.ers.usda.gov/webdocs/publications/101625/err-288.pdf?v=3741.1); Sarah Rehkamp & Patrick Canning, *Measuring Embodied Blue Water in American Diets: An EIO Supply Chain Approach*, 147 ECOLOGICAL ECON. 179 (May 2018), <https://www.sciencedirect.com/science/article/abs/pii/S092180091730455X>.

<sup>292</sup> Daina Bray, *The Climate Problem of Animal Agriculture: What Can Law, Technology, and We Do About It?*, SCI TECH LAWYER (Dec. 14, 2023), [https://www.americanbar.org/groups/science\\_technology/publications/scitech\\_lawyer/2024/fall/climate-problem-animal-agriculture/](https://www.americanbar.org/groups/science_technology/publications/scitech_lawyer/2024/fall/climate-problem-animal-agriculture/).

<sup>293</sup> *Ass’n of Irrigated Residents*, *supra* note 285, at 1029.

<sup>294</sup> *McKiver v. Murphy-Brown, LLC*, 980 F.3d 937, 947 (4th Cir. 2020); *see also Complaint Under Title VI of the Civil Rights Act of 1964*, 42 U.S.C. 2000d, 40 C.F.R. Part 7, EARTHJUSTICE (Sept. 3, 2014); *Complaint under Title VI of the Civil Rights Act of 1964*, 42 U.S.C. § 2000d, regarding the North Carolina Department of Environmental Quality’s Issuance of Permit Nos. AWI310035, AWI301139, AWI230466, and AWS820005, S. ENVI. LAW CTR (Sept. 27, 2021).

b) *FSIS's Slaughter Regulations Increase Public Health Risks, Requiring NEPA Review*

Slaughterhouses also affect the human environment by posing health risks to humans—risks that are often disproportionately borne by low wealth communities and communities of color.<sup>295</sup> The health risks associated with increased line speeds to slaughterhouse workers were made very apparent during the COVID-19 pandemic.<sup>296</sup> With workers operating in crowded conditions, the increased pace at which they had to get animals on the slaughter line exacerbated the physical injuries and illness risks they face. These heightened risks translated to greater vulnerabilities to the general population as with greater potential for environmental violations and the potential spread of infectious zoonotic disease.<sup>297</sup>

We are seeing the emergence of yet another zoonotic disease, avian influenza or “bird flu,” that has the potential to become the next global outbreak.<sup>298</sup> While government officials are currently optimistic that the risk to humans is low, that could change as the virus spreads among more animals, increasing the opportunity for infecting more humans.<sup>299</sup> New species are becoming infected at an alarming rate and the virus is likely to continue to grow in virulence.<sup>300</sup> The risks

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<sup>295</sup> See, e.g., EPA, Preliminary Effluent Guidelines Program Plan 15, EPA-821-R-21-003 (Sept. 2021), [https://www.epa.gov/system/files/documents/2021-09/ow-prelim-elg-plan-15\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/ow-prelim-elg-plan-15_508.pdf) (“EPA conducted screening analyses of areas with [Meat and Poultry Products Point Source Category (MPP facilities), which includes slaughter and rendering plants] and found 74% of MPP facilities that directly discharge wastewater to surface waters are within one mile of census block groups with demographic or environmental characteristics of concern. This indicates that such facilities may be disproportionately impacting communities of concern.”).

<sup>296</sup> See Ctr for Biological Diversity et al., *Petition for Emergency Rulemaking*, USDA (Aug. 11, 2020), [www.biologicaldiversity.org/programs/environmental\\_health/pdfs/2020-06-28-APHIS-Petition.pdf](http://www.biologicaldiversity.org/programs/environmental_health/pdfs/2020-06-28-APHIS-Petition.pdf).

<sup>297</sup> Zoe Novic, *Too Fast, Too Furious: Slaughterhouse Line Speeds In The Era Of Covid-19*, Yale Univ. School of Public Health (Jan. 2021), <https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=2077&context=ysphtdl>.

<sup>298</sup> See, e.g., *Highly Pathogenic Avian Influenza A (H5N1) Virus Infection Reported in a Person in the U.S.*, CTR. FOR DISEASE CONTROL AND PREVENTION (Apr. 1, 2024), <https://www.cdc.gov/media/releases/2024/p0401-avian-flu.html>; *Avian Influenza A (H5N2) – Mexico*, WORLD HEALTH ORG. (Jun. 5, 2024), <https://www.who.int/emergencies/disease-outbreak-news/item/2024-DON520>; Ctr. For Biological Diversity et al., *Avian Influenza in Dairy Farming Communities and the Need for Improved Human Transmission Countermeasures, Including Increased Testing; Proactive Testing in Non-Dairy Farm Communities; Testing of Livestock, Milk, and Farm Waste and Wastewater; and Data Transparency*, CTR. FOR DISEASE CONTROL AND PREVENTION (May 23, 2024), [https://biologicaldiversity.org/programs/environmental\\_health/pdfs/2024-05-23-Community%20CDC-HPAI-Letter.pdf](https://biologicaldiversity.org/programs/environmental_health/pdfs/2024-05-23-Community%20CDC-HPAI-Letter.pdf)

<sup>299</sup> Patrick Boyle, *How Worried Should We Be About Avian Flu? Academic Experts Weigh In*, ASSOC. OF AM. MED. COLLEGES (May 15, 2024), <https://www.aamc.org/news/how-worried-should-we-be-about-avian-flu-academic-experts-weigh>.

<sup>300</sup> Brenda Goodman, *Bird Flu Is Rampant in Animals. Humans Ignore It At Our Own Peril*, CNN (Jun. 11, 2024), <https://amp.cnn.com/cnn/2024/06/11/health/bird-flu-animals-humans>; Stephanie Pappas, *'Increased Evidence That We Should Be Alert': H5N1 Bird Flu Is Adapting To Mammals In 'New Ways'*, LIVE SCI. (Jun. 5, 2024), <https://www.livescience.com/health/viruses-infections-disease/increased-evidence-that-we-should-be-alert-h5n1-bird-flu-is-adapting-to-mammals-in-new-ways>; *H5N1: International Failures and*



are compounded by climate change, which is worsening the spread of disease.<sup>301</sup> H5N1, a highly pathogenic avian influenza virus, has even been detected by FSIS in meat and dairy.<sup>302</sup> CAFO and slaughterhouse workers who regularly interact with animals are at heightened risk for contracting zoonoses. Yet, surveillance and testing for the virus has been and continues to be extremely low, even among farm and slaughterhouse workers.<sup>303</sup>

Poorly regulated slaughterhouses have a greater potential to spread disease amongst human beings, affecting workers, nearby communities, and, ultimately, the broader population, which is also put at risk through the distribution of contaminated meat and poultry. Zoonotic infections include anthrax, rabies, ringworm, salmonella, and tuberculosis.<sup>304</sup> While humans with greater exposure to animals have increased risk of contracting zoonotic infections, these diseases can spread to people who never go into a slaughterhouse.<sup>305</sup> The Centers for Disease Control and Prevention (CDC) explained: “Farm animals can become infected with anthrax when they ingest spores in contaminated soil, plants, or water. People get infected by having contact with sick or dead animals or eating meat contaminated with spores.”<sup>306</sup>

It is not always obvious when an animal has contacted the bacteria, and the animals will often die before showing symptoms.<sup>307</sup> FSIS ante- and post- mortem inspections to identify sick animals and contaminated meat are hindered by faster slaughter line speeds as inspections are rushed. The agency is also concerned about their inspectors’ health and safety. For instance, the agency requires that companies seeking a line speed waiver submit a request that “[p]rovides support on how the

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*Uncomfortable Truths*, THE LANCET (Jun. 8, 2024), [https://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(24\)01184-X/fulltext](https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(24)01184-X/fulltext).

<sup>301</sup> Kiley Price, *Bird Flu Is Picking Its Way Across the Animal Kingdom—and Climate Change Could Be Making it Worse*, INSIDE CLIMATE NEWS (Apr. 2, 2024), <https://insideclimatenews.org/news/02042024/todays-climate-bird-flu-migration-disease/>; Nadine Yehya, *Experts Warn Climate Change Will Fuel Spread of Infectious Diseases*, UC DAVIS HEALTH (Mar. 20, 2024), <https://health.ucdavis.edu/news/headlines/experts-warn-climate-change-will-fuel-spread-of-infectious-diseases-/2024/03> (citing Matthew Phillips et al., *Infectious Diseases in a Changing Climate*, JAMA (Mar. 20, 2024), <https://jamanetwork.com/journals/jama/article-abstract/2816446>).

<sup>302</sup> Emily Anthes & Dani Blum, *Bird Flu Virus Found in Beef Tissue*, N.Y. TIMES (May 24, 2024), <https://www.nytimes.com/2024/05/24/health/bird-flu-beef.html>; Franziska Kaiser et al., *Inactivation of Avian Influenza A(H5N1) Virus in Raw Milk at 63°C and 72°C*, NEW ENGLAND J. OF MED. (Jun. 14, 2024), <https://www.nejm.org/doi/full/10.1056/NEJMc2405488>.

<sup>303</sup> Henry Miller, *We Risk a Pandemic if We Don't Do More to Monitor Spread of H5N1 Avian Flu*, Am. Council on Sci. & Health (Jun. 4, 2024), <https://www.acsh.org/news/2024/06/04/we-risk-pandemic-if-we-dont-do-more-monitor-spread-h5n1-avian-flu-17868>; Raj Panjabi, *We Are Not Safe from Bird Flu Until We Protect Farmworkers*, Time Mag. (Jun. 13, 2024), <https://time.com/6987552/bird-flu-farm-workers/>.

<sup>304</sup> Kevin D. Pelzer & Nancy Currin., *Zoonotic Diseases of Cattle* 4 (2009) [https://www.wyandotte.k-state.edu/program\\_areas/4-h/zoommeetings/documents/ZoonoticDiseases.pdf](https://www.wyandotte.k-state.edu/program_areas/4-h/zoommeetings/documents/ZoonoticDiseases.pdf).

<sup>305</sup> CJ McDaniel et al., *Humans and Cattle: A Review of Bovine Zoonoses*, 14 VECTOR BORNE ZOONOTIC DISEASES 1, 4 (2014) <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3880910/>.

<sup>306</sup> *Farm Animals*, CTRS FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/healthy-pets/about/farm-animals.html> (last visited Jun. 15, 2024).

<sup>307</sup> *Id.*

increased line speed will not negatively impact FSIS employee safety nor interfere with inspection procedures (e.g., information about safety protocols or line configuration).”<sup>308</sup>

Part of FSIS’s regulation of slaughterhouses involves its determinations of antibiotic use and the labeling of adulterants. FSIS does not require manufacturers to label animal products as “drug-free,” and it has denied requests to do so.<sup>309</sup> FSIS will allow these labels, but only on a case-by-case approval basis.<sup>310</sup> Through these activities, FSIS lets producers pump animals full of antibiotics without informing the public of the potential risks of these antibiotics. When animals that are raised for food are given drugs such as antibiotics, it increases the likelihood of antibiotic resistant strains of bacteria, typically, Salmonella and E. coli, especially as line speeds increase causing more food safety and animal handling violations to occur.<sup>311</sup>

FSIS recently decided to target adulterants in animal food products given the significant number of human Salmonella infections each year.<sup>312</sup> Animal food products are considered adulterated when they contain harmful substances, unapproved additives, or are otherwise unfit for consumption due to contamination, disease, or poor packaging.<sup>313</sup> FSIS has previously listed E. coli in “ground beef” to be an adulterant, but it currently does not consider E. coli and Salmonella in other “beef cuts” or chickens to be an adulterant.<sup>314</sup> The way FSIS labels and manages adulterated foods can significantly impact human health, as inadequate labeling and oversight can lead to the spread of foodborne illnesses and antibiotic-resistant infections.

The close confinement of animals in CAFOs facilitates the spread of diseases, some of which can be transmitted to humans.<sup>315</sup> As CAFOs expand in either size or number to accommodate faster

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<sup>308</sup> *FSIS’ Criteria for Consideration of Waiver Requests from Young Chicken Slaughter Establishments to Operate at Line Speeds Up to 175 Birds Per Minute*, FSIS (Feb. 23, 2018), <https://www.fsis.usda.gov/news-events/news-press-releases/constituent-update-february-23-2018-0>.

<sup>309</sup> Bruce Friedrich & Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 *Animal L.* 103, 156 (2015).

<sup>310</sup> Food Safety and Inspection Service, *A Guide to Federal Food Labeling Requirements for Meat, Poultry, and Egg Products*, U.S. Department of Agriculture (Aug. 2007), [https://www.fsis.usda.gov/sites/default/files/import/Labeling\\_Requirements\\_Guide.pdf](https://www.fsis.usda.gov/sites/default/files/import/Labeling_Requirements_Guide.pdf).

<sup>311</sup> Friedrich & Wilson, *supra* note 309, at 155-56; USDA OIG, FSIS, *Inspection and Enforcement Activities at Swine Slaughter Plants* at 18-19, Audit Report No. 24601-0001-41 (May 2013), <https://usdoig.oversight.gov/sites/default/files/reports/2022-03/24601-0001-41.pdf> (plants in the pilot program “may have a higher potential for food safety risks”; three of the ten plants with the most food safety violations were part of the pilot program, and that the slaughterhouse with the single highest rate of violations—nearly fifty percent more than the plant with the second highest number—was in the pilot program; facilities such as this one “have less assurance of food safety than a traditional plant); Mauer Decl. ¶ 18, *Farm Sanctuary v. U.S. Dep’t of Agric.*, No. 6:19CV06910 (W.D.N.Y. 2019) (“Noncompliance records (NRs) for zero tolerance standards, including those for fecal contamination, increased at [facility] under HIMP”).

<sup>312</sup> Jana Caracciolo, *The Adulterating Foodborne Pathogens: Meat, Poultry, and Some Egg Products*, THE NAT’L AGRIC. LAW CTR (Nov. 2, 2022), <https://nationalaglawcenter.org/the-adulterating-foodborne-pathogens-meat-poultry-and-some-egg-products/>.

<sup>313</sup> *Id.*; 21 U.S.C. §§ 453(g), 601(m), 1033(a).

<sup>314</sup> Caracciolo, *supra* note 312.

<sup>315</sup> *McKiver*, 980 F.3d at 980.

line speeds, the risk of disease transmission increases. Indeed, most new and emerging human diseases come from animal populations.<sup>316</sup> Among these viruses, influenza viruses are the most dangerous. Outbreaks like the H1N1 swine flu in 2009 have highlighted the risks associated with zoonotic diseases, causing nearly 12,500 deaths and 275,000 hospitalizations in the U.S.<sup>317</sup> Also as has been made evident through the ongoing COVID-19 pandemic, there are severe and far-reaching consequences to health issues that are transmissible from animals to humans.

Moreover, the widespread use of antibiotics in these facilities to promote animal growth and prevent disease in CAFOs leads to the development of antibiotic-resistant bacteria, posing a grave threat to public health beyond the immediate community.<sup>318</sup> These resistant strains are transmitted to humans through the environment, direct contact, or consumption of contaminated meat, leading to serious illnesses and fatalities.<sup>319</sup> Annually, about 400,000 people contract antibiotic-resistant infections, causing approximately 23,000 deaths and significant financial losses in the U.S.<sup>320</sup> Additionally, many meat products exceed USDA's bacteria allowance levels, contributing to further disease spread and health issues.<sup>321</sup> As antibiotic resistance grows, it threatens to become a leading cause of death and could make treating even common illnesses increasingly challenging.

The threats of zoonoses and antibiotic resistance are exacerbated by FSIS's decision to increase line speeds in slaughterhouses by increasing animal density and stress, reducing the quality of animal care and oversight, raising the potential for meat contamination, and exacerbating the environmental impact of animal waste, which create conditions that are ripe for the emergence and spread of zoonotic diseases and antibiotic-resistant bacteria, posing significant health risks to humans and animals alike.

Thus, the environmental harms associated with FSIS's regulation of slaughterhouses are extensive and complex, encompassing increased resource consumption, pollution, ecosystem degradation, and public health risks. The industrial scale of these operations, driven partly by regulations like those of FSIS concerning slaughter line speeds, amplifies these impacts. As the state of industrialized animal agriculture continues to evolve, it is imperative that regulatory bodies like FSIS are held accountable for the environmental repercussions of their actions and policies.

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<sup>316</sup> Jenny L. Mace & Andrew Knight, *Influenza Risks Arising from Mixed Intensive Pig and Poultry Farms, with a Spotlight on the United Kingdom*, VET. SCI. (Dec. 21, 2023), <https://doi.org/10.3389/fvets.2023.1310303>.

<sup>317</sup> *McKiver*, 980 F.3d at 980; see also Sundar S. Shrestha et al., *Estimating the Burden of 2009 Pandemic Influenza A (H1N1) in the United States (April 2009-April 2010)*, 52 CLIN. INF. DIS. S75-82 (2011) (H1N1 is transmissible between pigs and humans, and the 2009 H1N1 pandemic sickened 60.8 million Americans, killing 12,469 people).

<sup>318</sup> Jessica Williams-Nguyen et al., *Antibiotics and Antibiotic Resistance in Agroecosystems: State of the Sci.*, 45. J. Env't. Qual. 394 (2016).

<sup>319</sup> Nicholas Skandalis et al., *Env't Spread of Antibiotic Resistance*, 10 ANTIBIOTICS (BASEL), (May 27, 2021), <https://pubmed.ncbi.nlm.nih.gov/34071771/>.

<sup>320</sup> William D. Cohan, *Antibiotics in Meat Could Be Damaging Our Guts*, N.Y. TIMES (May 25, 2018), <https://www.nytimes.com/2018/05/25/opinion/sunday/meat-antibiotics-organic-farming.html>.

<sup>321</sup> Susannah Savage & Andrew Wasley, *Superbug-Infected Chicken is Being Sold All Over the U.S.*, VICE (Mar. 16, 2022), <https://www.vice.com/en/article/5dg49z/antibiotic-resistant-salmonella-campylobacter-chicken>.



Ensuring comprehensive evaluation, consideration, and disclosure of environmental impacts is obligated by NEPA.

c) *FSIS Actions Have Significant Environmental Justice Impacts*

Consistent with Executive Orders, the proper scope of analysis that NEPA requires includes analysis of effects on communities with environmental justice concerns.<sup>322</sup> Pursuant to NEPA, the impacts to the human environment that must be assessed are broad. As noted above, “[e]ffects include . . . aesthetic, historic, cultural, economic, social, or health, such as disproportionate and adverse effects on communities with environmental justice concerns, whether direct, indirect, or cumulative” and agencies must carry out the policies set forth in NEPA “to the fullest extent possible.”<sup>323</sup> The repercussions of industrialized animal agriculture caused by FSIS’s actions are a matter of environmental justice and must be assessed under NEPA.

Recent CEQ regulations further mandate consideration of impacts on communities with environmental justice concerns defined as:

the just treatment and meaningful involvement of all people, regardless of income, race, color, national origin, Tribal affiliation, or disability, in agency decision making and other Federal activities that affect human health and the environment so that people: (1) Are fully protected from disproportionate and adverse human health and environmental effects (including risks) and hazards, including those related to climate change, the cumulative impacts of environmental and other burdens, and the legacy of racism or other structural or systemic barriers; and (2) Have equitable access to a healthy, sustainable, and resilient environment in which to live, play, work, learn, grow, worship, and engage in cultural and subsistence practices.<sup>324</sup>

The dangers of slaughterhouse conditions—regulated by FSIS—disproportionately impact people of color. The “overwhelming[.]” majority of slaughterhouse workers are people of color, and many are immigrants or refugees.<sup>325</sup> Conditions at animal processing plants are reported as crowded and overburdened.<sup>326</sup> The conditions at slaughterhouses and the impacts that they have on their

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<sup>322</sup> See, e.g., Exec. Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (Jan. 20, 2021); Exec. Order 12898, *Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations* (Feb. 11, 1994).

<sup>323</sup> 89 Fed. Reg. 35442, 35575 (to be codified at 40 C.F.R. § 1508.1(i)(4)); 42 U.S.C. § 4332.

<sup>324</sup> *Id.* (to be codified at 40 C.F.R. § 1508.1 (m), (i)).

<sup>325</sup> Angela Stuesse & Nathan T. Dollar, *Who Are America’s Meat and Poultry Workers?*, ECON. POL’Y INST.: WORKING ECON. BLOG (Sept. 24, 2020), <https://www.epi.org/blog/meat-and-poultry-worker-demographics/>.

<sup>326</sup> Michael Corkery & David Yaffe-Bellany, *Meat Plant Closures Mean Pigs Are Gassed or Shot Instead*, N.Y. TIMES (May 14, 2020), <https://www.nytimes.com/2020/05/14/business/coronavirus-farmers-killing-pigs.html>; Luigi Faucitano, *Preslaughter Handling Practices and Their Effects on Animal Welfare and Pork Quality*, 96 J. ANIM. SCI. 728, 733, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6140870/pdf/skx064.pdf>.

surrounding communities are therefore a significant environmental justice concern, given the disproportionate number of people of color who are responsible for working in slaughterhouses.

The harms associated with CAFOs and slaughterhouse pollution are also often disproportionately inflicted upon communities of color and marginalized communities. Neighboring communities suffer from noise, odor, and decreased air and water quality due to the operation of these facilities. “Nearby residents may also suffer from aggravated rates of high blood pressure, depression, and infant mortality.”<sup>327</sup> The death and disposal of animals raised in these conditions further exacerbate the health risks and environmental burden.<sup>328</sup>

“[A]nimal welfare and human welfare . . . are . . . integrally connected.”<sup>329</sup> The conditions in CAFOs are not only detrimental to the animals raised in them but also to the humans working within and living around these facilities. Workers at CAFOs are exposed to toxic air and stressful conditions, leading to significant health issues.<sup>330</sup> “Industrial hog operations are disproportionately concentrated in communities of color” and “that African Americans, Latinos, and Native Americans are 1.54, 1.39, and 2.18 times (respectively) more likely than whites to live within three miles of one or more operations.”<sup>331</sup> “It is well-established—almost to the point of judicial notice—that environmental harms are visited disproportionately upon . . . minority populations and poor communities.”<sup>332</sup>

Consequently, FSIS actions, especially in relation to slaughterhouse regulation, have numerous reasonably foreseeable, potentially significant impacts on the human environment that FSIS has never disclosed, and that cannot be categorically excluded. FSIS is directly responsible for the negative impacts on the human environment from the slaughterhouse chain in its regulation of slaughterhouse line speeds. These impacts must be assessed pursuant to NEPA’s detailed statement requirements.

## IX. CONCLUSION

NEPA remains a critically important law to facilitate objective analysis of the reasonably foreseeable environmental consequences of proposed actions and feasible alternatives. It is also often the only opportunity for meaningful government transparency and public involvement related to the environmental implications of those actions.

USDA’s decision to categorically exclude FSIS from completing an EIS or EA prior to taking major Federal agency actions violates NEPA and the Act’s overall mandate of ensuring that

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<sup>327</sup> *McKiver*, 980 F.3d at 979–80.

<sup>328</sup> *Id.* at 947 (discussing how “hog carcasses pending pickup were stored in “dead boxes,” dumpsters placed in open fields on the Kinlaw Farms property. Hog carcasses would pile up and rot in these dumpsters in open fields until collection of the carcasses was scheduled. These dead boxes attracted dozens of buzzards and flies that would accumulate around the dead boxes and frequent . . . neighboring properties.”).

<sup>329</sup> *Id.* at 978–79; *see also* Fox, *supra* note 208.

<sup>330</sup> FM. Mitloehner & MS. Calvo, *Worker Health and Safety in Concentrated Animal Feeding Operations*, J. AGRIC. SAF. HEALTH (Apr., 2008) <https://pubmed.ncbi.nlm.nih.gov/18524283/>.

<sup>331</sup> *McKiver*, 980 F.3d at 982–83 (internal citations and quotations omitted).

<sup>332</sup> *Id.* at 982–83.

government action is transparent, informed, and not harmful to the environment. Because USDA's CE of FSIS is unlawful, Petitioners request that USDA initiate the process to regulatorily rescind its CE of FSIS by proposing a rule as soon as possible and no later than 90 days after receipt of this petition. Should FSIS conduct any revision process pursuant to 40 CFR 1507.3(b) (effective July 1, 2024), it should take into consideration the issues raised in this petition. In the meantime, FSIS must consider the reasonably foreseeable environmental impacts of its actions, especially its actions approving slaughter operations for FSIS inspection and regulating slaughter line speeds, and FSIS must initiate a review of any such prior and ongoing actions.

Respectfully submitted on June 20, 2024,

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