

**GREENING EGGS AND HAM:  
USING THE NATIONAL ENVIRONMENTAL POLICY ACT  
TO ASSESS ANIMAL-AGRICULTURAL POLLUTION FROM  
THE NATIONAL SCHOOL LUNCH PROGRAM**

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#### ABBREVIATIONS

<b>AFO</b>	Animal Feeding Operation
<b>APA</b>	Administrative Procedure Act
<b>AMS</b>	United States Department of Agriculture Agricultural Marketing Service
<b>CAA</b>	Clean Air Act
<b>CAFO</b>	Concentrated Animal Feeding Operation
<b>CERCLA</b>	Comprehensive Environmental Response, Compensation, & Liability Act
<b>CEQ</b>	Council on Environmental Quality
<b>CWA</b>	Clean Water Act
<b>DOI</b>	Department of Interior
<b>EA</b>	Environmental Assessment
<b>EIS</b>	Environmental Impact Statement
<b>EPA</b>	Environmental Protection Agency
<b>EPCRA</b>	Emergency Planning and Community Right-to- Know Act
<b>FNS</b>	United States Department of Agriculture Food & Nutrition Service
<b>FONSI</b>	Finding of No Significant Impact
<b>FSA</b>	United States Department of Agriculture Farm Service
<b>FY</b>	Federal Fiscal Year
<b>GHG</b>	Greenhouse Gas
<b>NAAQS</b>	National Ambient Air Quality Standards
<b>NEPA</b>	National Environmental Policy Act
<b>NPDES</b>	National Pollutant Discharge Elimination System
<b>NSLP</b>	National School Lunch Program
<b>USDA</b>	United States Department of Agriculture
<b>USDA Foods</b>	Entitlement or Commodity Foods

## INTRODUCTION

Walk through the halls of an elementary school and you will find pictures of cows and pigs dancing across alphabet walls, red barns decorating proudly displayed student art, and kindergartners squealing “e-i-e-i-o.” Educators use *Charlotte’s Web* to introduce children to the world around them—to learn about life cycles, season changes, sounds, and emotions. But, for most American students, their only real contact with a farm will occur in the cafeteria, where the food served comes from a place that little resembles the clover fields of children’s books.

Large agricultural operations, commonly referred to as “factory farms,” dominate domestic food production.<sup>1</sup> To produce meat, dairy, and eggs, industrial livestock operations, or concentrated animal feeding operations (CAFOs), pack hundreds, if not thousands, of animals into crowded areas to maximize yield.<sup>2</sup> In the factory-farming model, there are no smiling cows, no pigs foraging across the barn-dotted fields. There is an astounding amount of waste accompanied by an alarming amount of pollution.<sup>3</sup>

Animals confined to smaller feeding areas produce too much waste for too small a space.<sup>4</sup> To mitigate the effects of constant excrement exposure and to force faster development, CAFO operators pump animals with antibiotics and hormones.<sup>5</sup> Extensive drainage systems, often exposed, ensure that CAFO debris—a “mixture of feces, urine, bedding, hair, and occasionally animal carcasses”—flows from animal confinements into

1. FARM ANIMAL INV. RISK & RETURN, FACTORY FARMING: ASSESSING INVESTMENT RISKS 4 (2016), [http://www.fairr.org/wp-content/uploads/FAIRR\\_Report\\_Factory\\_Farming\\_Assessing\\_Investment\\_Risks.pdf](http://www.fairr.org/wp-content/uploads/FAIRR_Report_Factory_Farming_Assessing_Investment_Risks.pdf) [<https://perma.cc/RWP6-HGQ8>].

2. See 40 C.F.R. § 122.23(b)(1)–(2) (2017) (defining CAFO and also defining an animal feeding operation (AFO) as any facility where animals are “stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and . . . [c]rops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility”); see also 40 C.F.R. § 122.23(b)(4) (2017) (qualifying an AFO as a CAFO when the facility houses more than a specified number of certain animals).

3. ARE LARGE EQUINE COMMUNITIES CAFOs?, EQUINE ECO GREEN, <http://www.equineecogreenus.com/environmental-library.html> [<https://perma.cc/FU4L-YHUV>] (last visited Feb. 15, 2018).

4. See *id.* (“[CAFOs] are facilities where large numbers of poultry, swine, cattle or other animal types are confined within a much smaller area than traditional pasture operations. The concentration of the wastes from these animals increases the potential to impact air, water, and land quality.”).

5. See GEOFFREY BECKER, CONG. RESEARCH SERV., R40739, ANTIBIOTIC USE IN AGRICULTURE: BACKGROUND AND LEGISLATION 3–5 (2010) (observing “that approximately 83% of feedlots administered at least one antibiotic for disease prevention or growth promotion . . . [and] that 24.6 million pounds of antibiotics were used for nontherapeutic purposes in food animals annually.”); RENEE JOHNSON, CONG. RESEARCH SERV., R40449, THE U.S.–EU BEEF HORMONE DISPUTE 1–2 (2015) (“In large U.S. commercial feedlots, [hormone] use approaches 100%.”)

adjacent manure “lagoons.”<sup>6</sup> As these manure lagoons fill, CAFO operators spray or apply the untreated waste onto nearby fields, spreading fecal matter, chemical residue, and antibiotic particles into the surrounding air and waterways.<sup>7</sup>

Environmental justice and public health advocates have tried to address the harms industrial animal agriculture creates through a variety of legal means, including the Clean Water Act (CWA), Clean Air Act (CAA), and nuisance claims.<sup>8</sup> So far, success has been limited. Federal environmental laws inadequately address agricultural pollution.<sup>9</sup> State laws provide only patchwork protections.<sup>10</sup> And, many legislatures have responded to successful nuisance claims by passing measures that limit tort claims against agricultural operators.<sup>11</sup>

Mounting scientific evidence linking factory farms to a host of human health harms demonstrates the need for immediate, comprehensive action.<sup>12</sup> To address the harms inherent in industrial animal agriculture, advocates need to consider creative courses of action. This paper proposes using the National Environmental Policy Act (NEPA) as a tool for change.

NEPA requires federal agencies to examine the environmental effects of any major agency action.<sup>13</sup> To mitigate the damage industrial animal agriculture causes, advocates should petition the United States Department of Agriculture (USDA) Food and Nutrition Service (FNS) to complete an environmental impact statement (EIS) for the National School Lunch

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6. Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1509 (2005).

7. CARRIE HRIBAR, NAT’L ASS’N OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 2–3 (2010), [http://www.cdc.gov/nceh/ehs/docs/understanding\\_cafos\\_nalboh.pdf](http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf) [https://perma.cc/UT27-VA3X].

8. See discussion *infra* Part II.

9. See J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 265 (2000) (“[F]arms are virtually unregulated by the expansive body of environmental law that has developed in the United States in the past 30 years.”).

10. See, e.g., 30 TEX. ADMIN. CODE § 321.43(b) (2017) (requiring all animal feeding operations regardless of size to obtain an air quality permit). *But cf.* TEX. AGRIC. CODE § 251.001 (2018) (declaring it Texas policy to limit “the circumstances under which agricultural operations may be regulated or considered to be a nuisance.”).

11. See, e.g., OKLA. STAT. tit. 2, § 20-56 (2017) (stating that an AFO licensed under and complying with the state’s Concentrated Animal Feeding Operations Act shall not be deemed a nuisance); see also TEX. AGRIC. CODE § 251.004(b) (explaining that a person bringing a nuisance action against an agricultural operation that has existed for more than a year will be liable for the defendant’s attorney’s fees).

12. See, e.g., U.S. GOV’T ACCOUNTABILITY OFF., GAO-08-944, CONCENTRATED ANIMAL FEEDING OPERATIONS: EPA NEEDS MORE INFORMATION AND A CLEARLY DEFINED STRATEGY TO PROTECT AIR AND WATER QUALITY FROM POLLUTANTS OF CONTROL 23 (2008) [hereinafter GAO-08-944] (explaining that between 2002 and 2008, more than 15 government-sponsored or peer-reviewed studies directly linked animal wastes to health or environmental impacts and 12 studies established indirect links).

13. 42 U.S.C. § 4332(2)(c) (2012).

Program (NSLP). The NSLP costs more than \$13 billion annually and is the most expensive federal nutrition program for direct government food purchases.<sup>14</sup> Alternatively, advocates could challenge USDA's decision to forgo NEPA review for the NSLP under the Administrative Procedure Act (APA).<sup>15</sup>

The USDA spends a significant portion of the federal budget to purchase commodities from industrial-agricultural sources for several federal food programs, thereby underwriting the cost of environmental and human health harms.<sup>16</sup> By petitioning the USDA to complete an EIS for the NSLP, advocates could compel the Agency to assess the environmental impact of its purchases. Such an assessment would not only fill the existing information gap on the breadth and depth of CAFO pollution,<sup>17</sup> but could also have an important shaming effect on the industry. As the largest purchaser of industrially produced domestic food, the federal government has an unmatched ability to demand industry change—to produce animal products in a more sustainable, humane manner.<sup>18</sup>

By challenging the USDA's decision to forgo NEPA review under the APA, courts could find the Agency's decision “arbitrary, capricious, an

14. See, e.g., RANDY ALISON AUSSENBERG, CONG. RESEARCH SERV., R43783, SCHOOL MEALS PROGRAMS AND OTHER USDA CHILD NUTRITION PROGRAMS: A PRIMER 5–6 tbl.1 (2016) [hereinafter SCHOOL MEALS] (compiling expenditure information for federal child nutrition programs); see also CONG. BUDGET OFFICE, CHILD NUTRITION PROGRAMS: SPENDING AND POLICY OPTIONS 3 (2015) (indicating that the Supplemental Nutrition Assistance Program (SNAP) is the largest food program, but participants, rather than the federal government, select and purchase food items).

15. Jennifer Hoffpauir, Note, *The Environmental Impact of Commodity Subsidies: NEPA and the Farm Bill*, 20 FORDHAM ENVTL. L. REV. 233, 233 (2009) (arguing that the USDA should prepare an EIS for the farm bill's commodity payment programs); see, e.g., Carry Lowry La Seur & Adam D.K. Abelkop, *Forty Years After NEPA's Enactment, It Is Time for a Comprehensive Farm Bill Environmental Impact Statement*, 4 HARV. L. & POL'Y REV. 201–02 (2010) (arguing that the USDA should prepare an EIS for the farm bill's policies focused on corn overproduction and ethanol subsidies); see also MARY JANE ANGELO, JASON J. CZARNEZKI, & WILLIAM S. EUBANKS II, FOOD, AGRICULTURE, AND ENVIRONMENTAL LAW 207, 211–12 (2013) (discussing NEPA review of farm bill legislation and individual farm bill programs as well as the potential to use NEPA for other statutory processes).

16. See, e.g., FOOD AND NUTRITION SERV., 2017 EXPLANATORY NOTES 32–63–32–65 (2017) [hereinafter EXPLANATORY NOTES], <https://www.obpa.usda.gov/32fns2017notes.pdf> [<https://perma.cc/5S8R-WHGZ>] (explaining that in FY 2015, the USDA spent roughly \$1.5 billion on commodities for the school lunch program); see also Wayne Pacelle, *Taxpayers Are Funding a Factory Farm Horror Show*, DODO (Jan. 21, 2015), <https://www.thedodo.com/us-meat-animal-research-center-945442976.html> [<https://perma.cc/3KUC-ATE9>] (commenting on the billions of dollars per year the government spends on subsidizing factory farms).

17. See GAO-08-944, *supra* note 12, at 4 (“To assess the progress that EPA and the states have made in regulating and controlling the air emissions of, and in developing protocols to measure, air pollutants from CAFOs, we reviewed relevant documents and interviewed EPA officials, as well as officials responsible for an ongoing national air emissions monitoring study. . . . No federal agency collects accurate and consistent data on the number, size, and location of CAFOs.”).

18. Exec. Order No. 13,693, 3 C.F.R. § 281 (2015).

abuse of discretion, or otherwise not in accordance with law.”<sup>19</sup> Advocates could potentially use the APA to set an important legal precedent for federal food programs.

Using the NSLP as an example, this paper explains how an advocate could challenge CAFO pollution under NEPA. Part I provides necessary background information. It outlines the NSLP structure and details the environmental and human health harms of factory farming. Part II describes applicable environmental regulations and explains why traditional environmental tools fail to regulate factory-farm pollution effectively. Part III introduces NEPA procedures within the context of the NSLP and explains why the USDA should complete an EIS for the NSLP procurement. Part IV argues that advocates should challenge the USDA’s inaction and outlines a litigation strategy.

## I. THE NATIONAL SCHOOL LUNCH PROGRAM AND ANIMAL FACTORY POLLUTION

The USDA’s mission is to “provide leadership on food, agriculture, natural resources, rural development, nutrition, and related issues based on public policy, the best available science, and effective management.”<sup>20</sup> But, animal-agricultural practices that create uncontainable quantities of manure do not protect natural resources or efficiently manage waste. By purchasing factory-farm products for the NSLP, the USDA supports practices that jeopardize future agricultural interests, natural resources, and rural communities. Subsection A describes the extent to which the federal government subsidizes industrial agriculture and outlines how the NSLP works. Subsection B catalogs the environmental and human health harms that factory farming causes.

### *A. The National School Lunch Program Spends Billions of Dollars on Food from Factory Farms*

The federal government acquires billions of dollars’ worth of food each year.<sup>21</sup> Various agencies supply countless public facilities including

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19. Administrative Procedure Act, 5 U.S.C. § 706 (2012).

20. *About the U.S. Department of Agriculture*, U.S. DEP’T AGRIC., <https://www.usda.gov/our-agency/about-usda> [<https://perma.cc/8MFF-QT4D>] (last visited Feb. 15, 2018).

21. See MAGGIE GOSSELIN, BEYOND THE USDA: HOW OTHER GOVERNMENT AGENCIES CAN SUPPORT A HEALTHIER, MORE SUSTAINABLE FOOD SYSTEM 9 (Ben Lilliston ed., 2010), [https://www.iatp.org/sites/default/files/258\\_2\\_107172.pdf](https://www.iatp.org/sites/default/files/258_2_107172.pdf) [<https://perma.cc/W75C-7FFS>] (explaining how the Department of Defense purchases more than \$4.5 billion of food annually).

hospitals, schools, childcare and senior centers, federal prisons, and employee cafeterias with what is purportedly healthy, nutritious food.<sup>22</sup> With a budget that exceeds \$13 billion, the NSLP is the most expensive nutrition program used by government agencies to directly purchase food.<sup>23</sup> The NSLP aims to supply healthy, but low-cost food to school-age children and to support the agricultural industry by increasing demand for agricultural commodities.<sup>24</sup> “Since its inception in 1946, the NSLP has served over 224 billion lunches in the U.S.”<sup>25</sup> In fiscal year (FY) 2016, the NSLP served a whopping 30.3 million eligible children much-needed school lunches.<sup>26</sup>

The NSLP provides school districts and independent schools with cash subsidies and USDA Foods—often called “commodity” or “entitlement” foods—for each meal they serve.<sup>27</sup> Cash subsidies allow school districts and independent schools to purchase products that comply with federal regulations requiring schools to offer milk and meat (or a suitable meat alternative) daily.<sup>28</sup> Entitlement foods are offered to lunch providers to encourage domestic consumption of farm products and remove market surplus.<sup>29</sup> Entitlement foods typically make up about 15% to 20% of school-lunch products.<sup>30</sup>

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22. See, e.g., U.S. GOV'T ACCOUNTABILITY OFF., GAO/RCED-00-173R, FOOD AND COMMODITIES: FEDERAL PURCHASES AND MAJOR REGULATIONS THAT POTENTIALLY AFFECT PRICES PAID 6–14 (2000) (providing information about federal agencies' food purchases for a variety of different programs).

23. SCHOOL MEALS, *supra* note 14, at 5 tbl.1.

24. Richard B. Russell National School Lunch Act, 42 U.S.C. § 1751 (2012).

25. TRAVIS A. SMITH, “BILLIONS AND BILLIONS SERVED” HETEROGENEOUS EFFECTS OF FOOD SOURCE ON CHILD DIETARY QUALITY 2 n.1 (2013), [https://ageconsearch.umn.edu/bitstream/151212/2/Smith\\_ChildFoodSource\\_AAEA2013.pdf](https://ageconsearch.umn.edu/bitstream/151212/2/Smith_ChildFoodSource_AAEA2013.pdf) [<https://perma.cc/8TSS8-FFVX>]; see generally *The National School Lunch Program*, U.S. DEP'T AGRIC. (Nov. 2017), <https://fns-prod.azureedge.net/sites/default/files/cn/NSLPFactSheet.pdf> [<https://perma.cc/G6HR-WN29>].

26. RANDY ALISON AUSSENBERG & KIRSTEN J. COLELLO, CONG. RESEARCH SERV., R42353, DOMESTIC FOOD ASSISTANCE: SUMMARY OF PROGRAMS 13 (2017); *National School Lunch Program*, *supra* note 25.

27. See 42 U.S.C. § 1753(a)–(b)(1) (requiring the USDA to make food-assistance payments to each state and enabling the USDA to use its appropriations to provide agricultural commodities); see also JIM MONKE, CONG. RESEARCH SERV., RL34081, FARM AND FOOD SUPPORT UNDER USDA'S SECTION 32 PROGRAM 4 (2016) (defining the terms “commodity” and “entitlement” foods).

28. 42 U.S.C. § 1753(a); see 7 C.F.R. § 210.10(b) (2017) (describing the meal requirements for school lunches).

29. 7 U.S.C. § 612c-1.

30. U.S. DEP'T OF AGRIC., USDA FOODS IN THE NATIONAL SCHOOL LUNCH PROGRAM 4 (2016), [https://dpi.wi.gov/sites/default/files/imce/school-nutrition/pdf/nslp\\_white\\_paper.pdf](https://dpi.wi.gov/sites/default/files/imce/school-nutrition/pdf/nslp_white_paper.pdf).

The FNS “[h]as overall responsibility for school-meals programs.”<sup>31</sup> Federal regulations direct the FNS to reimburse providers for meals served, offer technical assistance, and evaluate state NSLP administration.<sup>32</sup> To supply states with commodities, the FNS determines which foods are available for purchase, publishes an annual list of these foods, tracks entitlements, takes orders, monitors distribution, and provides policy guidance.<sup>33</sup> The FNS works with the Agricultural Marketing Service (AMS) and Farm Service Agency (FSA) to devise its annual purchase plan.<sup>34</sup> On behalf of the FNS, the AMS issues solicitations and purchases commodities, including animal products.<sup>35</sup> The FSA then “administers the purchase contracts and pays the vendors.”<sup>36</sup>

In FY 2015, the FNS distributed nearly \$12 billion to states and purchased \$1.5 billion in agricultural commodities for the NSLP.<sup>37</sup> Animal products constituted nearly \$940 million of the \$1.5 billion the FNS spent on commodities; animal product purchases for the NSLP exceeded \$859 million—equivalent to 55% of NSLP commodity costs.<sup>38</sup>

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31. SCHOOL MEALS, *supra* note 14, at 9 fig.1; *see also* 7 C.F.R. § 210.3(a) (2017) (establishing the FNS as the administrator of the NSLP).

32. 7 C.F.R. § 210.4(b)(1) (2017); 7 C.F.R. § 210.18(b)(4) (2017); 7 C.F.R. § 210.19(a) (2017).

33. FOOD AND NUTRITION SERV., U.S. DEP’T OF AGRIC., USDA FOODS IN THE NATIONAL SCHOOL LUNCH PROGRAM WHITE PAPER 4 (2016).

34. MONKE, *supra* note 27, at 4.

35. *Purchase Programs: Solicitations and Awards*, U.S. DEP’T AGRIC., <https://www.ams.usda.gov/selling-food/solicitations> [<https://perma.cc/FP7S-7YEV>] (last visited Feb. 15, 2018).

36. MONKE, *supra* note 27, at 4.

37. EXPLANATORY NOTES, *supra* note 16, at 32-12, 32-23; *see, e.g.*, MONKE, *supra* note 27, at 1-2 (explaining that Section 32 funds, authorized by 7 U.S.C. § 612c, transferred \$8.4 billion directly to the FNS for child nutrition programs, \$40 million for the Fresh Fruit and Vegetable Program, and another \$465 million for school food commodities to support the NSLP).

38. *See* EXPLANATORY NOTES, *supra* note 16, at 32-63-32-65 (estimating values based on calculations from the tables, the total commodity cost of animal food products—beef, chicken, eggs, ham, pork, turkey, cheese, milk, and yogurt—for FY 2015 was \$940 million, of which the NSLP purchases constituted 91%, equaling \$859 million).



FY 2015 Entitlement Commodities:  
Quantity and Value of Animal Food Products<sup>39</sup>

Commodities	Pounds	Dollars
Beef	105,637,200	\$331,745,757
Chicken	216,675,700	\$237,474,679
Egg	5,865,420	\$9,057,263
Ham	7,839,600	\$13,723,594
Pork	16,343,860	\$19,821,247
Turkey	41,003,000	\$66,862,998
Cheese	141,468,510	\$259,857,378
Milk	266,999	\$159,242
Yogurt	805,158	\$1,055,753
<b>Total for CNR</b>	<b>536 million lbs.</b>	<b>\$940 million</b>
<b>Total for NSLP (91%)</b>	<b>490 million lbs.</b>	<b>\$859 million</b>

Most of these foods are from industrial-agricultural operations—factory farms produce over 99% of the animals Americans eat.<sup>40</sup>

*B. Industrial Animal Agriculture Threatens Environmental and Human Health*

The United States agricultural industry raises more than 9 billion animals each year: more than 8.5 billion broiler chickens, 340 million laying hens, 270 million turkeys, 116 million pigs, 35 million beef cattle, and 9 million dairy cows.<sup>41</sup> To accommodate the massive number of food-producing animals and to minimize costs, factory-farm operators crowd animals into feeding facilities.<sup>42</sup> Over 9 billion animals eating, breeding, birthing, and defecating in limited quarters create a huge waste problem.<sup>43</sup>

39. *Id.*

40. *Farm Animals Need Our Help*, ASPCA, <https://www.aspc.org/fight-cruelty/farm-animal-cruelty/what-factory-farm> [<https://perma.cc/5223-V4VC>] (last visited Feb. 15, 2018).

41. HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE CHICKEN INDUSTRY 1 (2013); HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE MEAT, EGG, AND DAIRY INDUSTRIES 1–3 (2009).

42. Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 325–26 (2007).

43. *Factory Farming and the Environment*, FARM SANCTUARY, <https://www.farmsanctuary.org/learn/factory-farming/factory-farming-and-the-environment/> [<https://perma.cc/56UL-9B58>] (last visited Feb. 15, 2018).

The manure contains “nitrogen and phosphorus, pathogens such as *E. coli*, growth hormones, antibiotics, chemicals used as additives to the manure or to clean equipment, animal blood, silage leachate from corn feed, or copper sulfate used in footbaths for cows.”<sup>44</sup> Large farms can produce more waste than some cities: “For example, a very large hog farm, with as many as 800,000 hogs, generates more than 1.6 million tons of manure annually—more than one and a half times the sanitary waste produced by the about 1.5 million residents of Philadelphia, Pennsylvania in 1 year.”<sup>45</sup>

The Environmental Protection Agency (EPA) does not require sewage treatment plants to treat animal waste.<sup>46</sup> Instead, the over 500 million tons of manure produced annually pour into manure lagoons that contaminate air and waterways and contribute to the spread of antibiotic-resistant bacteria and foodborne illness.<sup>47</sup> Current manure-management methods contribute to water pollution.<sup>48</sup> According to EPA, agriculture is a “top source[] of impairment” in rivers and streams.<sup>49</sup> Improper land application and faulty manure-lagoon containment systems spoil ground and surface waters, threatening the health of drinking water and aquatic ecosystems.<sup>50</sup>

Groundwater pollution occurs when CAFO operators improperly apply manure to land causing leaching or runoff, or when faulty containment systems leak.<sup>51</sup> Groundwater pollution is a very serious problem—about

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44. HRIBAR, *supra* note 7, at 2.

45. GAO-08-944, *supra* note 12, at 5.

46. See National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations, 68 Fed. Reg. 7176, 7176, 7180–85, 7196–97 (Feb. 12, 2003) (codified at 40 C.F.R. pt. 9, 122, 123, & 412) (requiring CAFO operators to develop nutrient management plans using the best available technology that is economically achievable but not to the same levels as human waste treatment facilities).

47. See *Waterkeeper All., Inc. v. Env'tl. Prot. Agency*, 399 F.3d 486, 493, 519 (2d Cir. 2005) (finding that CAFOs generate about 500 million tons of animal manure each year and that the EPA acknowledges that the manure contains pathogens and microorganisms that pose a potential risk to human health and the environment); 68 Fed. Reg. at 7180 (“USDA estimates that operations that confine livestock and poultry animals generate about 500 million tons of manure annually (as excreted.”)); see also HRIBAR, *supra* note 7, at 2 (stating that large animal farms can produce more than 1.6 million tons of manure waste annually and that in total livestock animals produce “as much as 1.2–1.37 billion tons of waste” each year).

48. HRIBAR, *supra* note 7, at 3–4.

49. ENVTL. PROT. AGENCY, EPA 841-R-08-001, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS 1 (2009), [https://www.epa.gov/sites/production/files/2015-09/documents/2009\\_01\\_22\\_305b\\_2004report\\_2004\\_305breport.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/2009_01_22_305b_2004report_2004_305breport.pdf) [<https://perma.cc/7EAQ-D6H4>].

50. See GAO-08-944, *supra* note 12, at 9 (“[I]f improperly managed, manure and wastewater from animal feeding operations can adversely impact water quality through surface runoff and erosion, direct discharges to surface water, spills and other dry-weather discharges, and leaching into the soil and groundwater. Excess nutrients in water can result in or contribute to low levels of oxygen in the water and toxic algae blooms, which can be harmful to aquatic life.”).

51. HRIBAR, *supra* note 7, at 3.

50% of the U.S. population relies on groundwater for drinking water.<sup>52</sup> Surface water pollution occurs when heavy storms cause manure lagoons to overflow, drainage systems to spill into bodies of water, surface water to pass through farming areas, or soil to erode.<sup>53</sup> Phosphorus and nitrogen flush into waterways, leading to degraded water that is unable to sustain aquatic life.<sup>54</sup> Hormones found in CAFO waste may diminish fish fertility.<sup>55</sup> Fecal bacteria and pathogens can restrict recreational swimming and reduce seafood consumption.<sup>56</sup>

Manure-treatment methods also pollute airways.<sup>57</sup> CAFOs are responsible for “[n]early three-quarters of the nation’s ammonia” emissions.<sup>58</sup> Facility ventilation systems discharge pollutants and other respiratory irritants.<sup>59</sup> Manure applied to land generates atmospheric ammonia and nitrous oxide—potent greenhouse gases—as well as particulate matter.<sup>60</sup> Manure that remains in lagoons breaks down anaerobically, discharging methane—another significant greenhouse gas.<sup>61</sup> Additionally, the increased use of emission-intensive liquid manure systems is partly responsible for the 64% increase in methane and nitrous emissions from 1990 to 2015.<sup>62</sup> In total, agricultural emissions account for 10% of U.S. greenhouse gas production.<sup>63</sup>

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52. *Pesticides in Groundwater*, U.S. GEOLOGICAL SURV., <https://water.usgs.gov/edu/pesticidesgw.html> [<https://perma.cc/H2KK-BGM8>] (last modified Dec. 2, 2016).

53. HRIBAR, *supra* note 7, at 4.

54. GAO-08-944, *supra* note 12, at 24 (“[T]hree . . . studies found water bodies impaired by higher nitrogen and phosphorus levels from manure runoff from animal feeding operations.”).

55. *See id.* (“Two . . . studies found that hormones from these discharges caused a significant decline in the fertility of female fish in nearby water bodies.”).

56. *See* RONALD L. OHREL, JR. & KATHLEEN M. REGISTER, ENVTL. PROT. AGENCY & THE OCEAN CONSERVANCY, VOLUNTARY ESTUARY MONITORING MANUAL 17-1 (2006), [https://www.epa.gov/sites/production/files/2015-09/documents/2009\\_03\\_13\\_estuaries\\_monitor\\_chap17.pdf](https://www.epa.gov/sites/production/files/2015-09/documents/2009_03_13_estuaries_monitor_chap17.pdf) [<https://perma.cc/5EZF-GEXA>] (explaining that fecal contamination can make water unsafe by spreading pathogens).

57. *See* GAO-08-944, *supra* note 12, at 66–70, 73 (noting different studies that illuminate how manure-treatment methods can pollute the air).

58. *CAFOs Ordered to Report Hazardous Pollution*, WATERKEEPER ALLIANCE (Apr. 11, 2017), <http://waterkeeper.org/cafos-ordered-to-report-hazardous-pollution/> [<https://perma.cc/49BF-PE99>].

59. *Id.*; HRIBAR, *supra* note 7, at 5.

60. DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOS UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS 4, 25, 54 (2008).

61. HRIBAR, *supra* note 7, at 7.

62. ENVTL. PROT. AGENCY, EPA 430-P-17-001, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990–2015 5-9–5-10 (2017), [https://www.epa.gov/sites/production/files/2017-02/documents/2017\\_complete\\_report.pdf](https://www.epa.gov/sites/production/files/2017-02/documents/2017_complete_report.pdf) [<https://perma.cc/RL29-V6Q2>].

63. *Agriculture and Climate Change*, U.S. DEP’T AGRIC. ECONOMIC RESEARCH SERV., <https://www.ers.usda.gov/topics/natural-resources-environment/climate-change/agriculture-and-climate-change/> [<https://perma.cc/N3DK-3C3V>] (last updated Oct. 14, 2016).

Human health and community well-being suffer as a result of water and air pollution from factory farms. Polluted waterways spread nitrates, which scientists have linked to blue baby syndrome, birth defects, miscarriages, and stomach and esophageal cancers.<sup>64</sup> Poor air quality contributes to increased rates of asthma and chronic lung disease.<sup>65</sup> Individuals exposed to ammonia emissions suffer acute and chronic health conditions, including: chemical burns to the eyes, nose, throat, and chest; headaches; and chronic lung disease.<sup>66</sup>

The human health harms do not end there. An estimated 80% of antibiotics in the United States are used on animals, typically for preventative, rather than therapeutic, purposes.<sup>67</sup> CAFO operators rely heavily on hormones and antibiotics to accelerate animal growth and to stave off disease in the overcrowded facilities.<sup>68</sup> Bacteria in animals fed antibiotics may become resistant to those antibiotics, thus, making those antibiotics less effective in treating human diseases.<sup>69</sup>

CAFOs also increase the risks from consuming meat, poultry, fish, and dairy products. Humans are now more likely to consume meat, poultry, fish, and dairy products in which environmental contaminants, such as arsenic and nitrate, accumulate.<sup>70</sup> For this and other reasons, foodborne illnesses have become more dangerous and difficult to treat.<sup>71</sup>

CAFO pollutants not only pose greater risks associated with individual health, but also threaten public welfare as a whole. Neighbors of CAFOs report that their communities may be “overrun with the raunchy, rotten-egg smell of hog manure for days at a time” or overpopulated by insects.<sup>72</sup>

64. HRIBAR, *supra* note 7, at 4.

65. *Id.* at 6.

66. *Id.*

67. See U.S. DEP’T HEALTH AND HUMAN SERV., FOOD AND DRUG ADMIN., 2009 SUMMARY REPORT ON ANTIMICROBIALS SOLD OR DISTRIBUTED FOR USE IN FOOD-PRODUCING ANIMALS 10 (2014) (distinguishing differences in the circumstances in which antimicrobial drugs are used in human and veterinary medicine); Ralph Loglisci, *New FDA Numbers Reveal Food Animals Consume Lion’s Share of Antibiotics*, CTR. FOR A LIVABLE FUTURE (Dec. 23, 2010), <http://www.livablefutureblog.com/2010/12/new-fda-numbers-reveal-food-animals-consume-lion%E2%80%99s-share-of-antibiotics> [<https://perma.cc/GJX9-LJKG>] (“[In 2009] . . . almost 80% [of antibiotics] were reserved for livestock and poultry.”).

68. BECKER, *supra* note 5, at 3–5; JOHNSON, *supra* note 5, at 1.

69. See BECKER, *supra* note 5, at 7–8 (stating that increased antimicrobial use has led to resistant microorganisms that could compromise public health).

70. See ENVTL. PROT. AGENCY, 240-R-13-001, AMERICA’S CHILDREN AND THE ENVIRONMENT 85 (3d ed. 2013) (stating that contaminants accumulate in animals and are often found in meat and dairy products).

71. GURIAN-SHERMAN, *supra* note 60, at 62 (“[A]ntibiotic-resistant strains [of food-borne bacteria] that develop due to CAFO practices may increase hospital costs and suffering compared with non-resistant strains.”).

72. Bridget Huber, *Law and Odor: How to Take Down a Terrible-Smelling Hog Farm*, MOTHER JONES (May–June 2014), <http://www.motherjones.com/environment/2014/04/terrible-smell->

People living adjacent to factory farms cannot host cook-outs, sit on their porches at sunset, or even open their windows to enjoy a cool breeze on a spring day. Consequently, homeowners report a decrease in real estate value, and local governments report a subsequent decline in tax revenue.<sup>73</sup>

## II. FEDERAL AND STATE LAWS HAVE MADE CHALLENGING ANIMAL-AGRICULTURAL POLLUTION DIFFICULT

Despite the environmental harms factory farms produce, legal means to address industrial-agricultural pollution are limited. Compared to other industries, agriculture enjoys significant freedom from environmental regulation.<sup>74</sup> Farm groups lobbied Congress to omit farms and ranches from many federal regulations, arguing that policing individual crop and livestock operations poses too great an administrative burden.<sup>75</sup> Environmental laws and regulations either expressly exempt farming from regulatory control or impose limited permitting requirements on only the largest agricultural polluters.<sup>76</sup>

Though agriculture ranks among the top sources of pollution in this country, the USDA has played a limited role addressing agricultural pollution. The Agency's mitigation efforts largely involve educational outreach, as well as voluntary technical and financial assistance.<sup>77</sup> Instead, the Agency should use all tools available to it to address animal-factory

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hog-farms-lawsuits [<https://perma.cc/8HW3-4ZMV>]; SUSAN STEEVES & RALPH WILLIAMS, CONTAINED ANIMAL FEEDING OPERATIONS—INSECT CONSIDERATIONS 1 (2007), <https://www.extension.purdue.edu/extmedia/ID/cafo/ID-353.pdf> [<https://perma.cc/56GM-CFA5>].

73. HAMED MUBARAK ET AL., THE IMPACTS OF ANIMAL FEEDING OPERATIONS ON RURAL LAND VALUES 2 (1999); HRIBAR, *supra* note 7, at 11.

74. See CLAUDIA COPELAND, CONG. RESEARCH SERV., RL31851, ANIMAL WASTE AND WATER QUALITY: EPA REGULATION OF CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 1 (2010) (“Some laws specifically exempt agriculture from regulatory provisions, and some are structured in such a way that farms escape most, if not all, of the regulatory impact.”).

75. MEGAN STUBBS, CONG. RESEARCH SERV., R41622, ENVIRONMENTAL REGULATION AND AGRICULTURE 1 (2014).

76. See Robin Bravender, *EPA Issues Final ‘Tailoring’ Rule for Greenhouse Gas Emissions*, N.Y. TIMES (May 13, 2010), <http://www.nytimes.com/gwire/2010/05/13/13greenwire-epa-issues-final-tailoring-rule-for-greenhouse-32021.html> [<https://perma.cc/39WN-5FZ9?type=image>] (noting that the 2010 Greenhouse Gas Emissions Tailoring Rule excluded over six million sources—including agricultural facilities—which would otherwise have had to obtain greenhouse gas permits); see also RUHL, *supra* note 9, at 293 (“Some laws, while not expressly exempting or even mentioning farms, are structured in such a way that farms escape most if not all of the regulatory impact. Other laws expressly exempt farms from regulatory programs that would otherwise clearly apply to them.”). *But see* Util. Air Reg. Grp. v. Env'tl. Prot. Agency., 134 S. Ct. 2427, 2449 (2014) (determining that EPA did not have the authority to require permitting for stationary sources subject to the already limited Prevention of Significant Deterioration permitting requirements).

77. See *e.g.*, 7 U.S.C. §§ 5401–5405 (2012) (providing for an Agricultural Council on Environmental Quality that is responsible for recommending and coordinating policies, as well as developing plans, but does not have enforcement authority.)

pollution. The following subsections make a case for the USDA to assess the NSLP procurement under NEPA because traditional environmental measures such as the CWA, CAA, and state nuisance law fail to effectively curb animal-agricultural pollution.

*A. Environmental Laws Fail to Protect Water Quality from Industrial-Agricultural Pollution*

The goal of the CWA is to prevent pollutant discharge into waterways.<sup>78</sup> To control the flow of pollutants into waterways, the CWA establishes a National Pollution Discharge Elimination System (NPDES).<sup>79</sup> The CWA also authorizes citizens to sue individuals who violate CWA effluent standards or limitations, as well as EPA and state administrative orders.<sup>80</sup> But, this framework does little to curb animal-factory pollution. Current laws and regulations exclude a majority of animal-factory activities from meeting NPDES permitting requirements, and citizens can sue animal factories only in a limited number of circumstances.<sup>81</sup>

When Congress wrote the CWA and its first set of regulations in the 1970s, the agricultural sector looked very different than it does now.<sup>82</sup> In the past 40 years, animal producers embraced larger production facilities.<sup>83</sup> Since the 1950s, the number of animal operations decreased by 80%, but livestock production has more than doubled.<sup>84</sup>

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78. Federal Water Pollution Control Amendments of 1972, 33 U.S.C. § 1251(a) (2012).

79. *Clean Water Act (CWA) and Federal Facilities*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/enforcement/clean-water-act-cwa-and-federal-facilities> [<https://perma.cc/7CGQ-D5AC>] (last updated Jan. 29, 2018).

80. 33 U.S.C. § 1365.

81. *See, e.g.,* Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 115, 121–23 (2d Cir. 1994) (determining that an animal feeding lot operation was a point source not subject to any agricultural exemption). *Compare Animal Feeding Operations*, U.S. DEP'T AGRIC., NAT. RESOURCES CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/plantsanimals/livestock/afo/> [<https://perma.cc/A5D6-36B6>] (last visited Feb. 16, 2018) (indicating that there are approximately 450,000 AFOs in the United States), *with* ENVTL. PROT. AGENCY, NPDES CAFO PERMITTING STATUS REPORT -- NATIONAL SUMMARY (2016), [https://www.epa.gov/sites/production/files/2017-04/documents/tracksum\\_endyear2016\\_v2.pdf](https://www.epa.gov/sites/production/files/2017-04/documents/tracksum_endyear2016_v2.pdf) [<https://perma.cc/L3AG-NT8V>] (indicating that only about 19,500 AFOs meet the size threshold to be regulated under the CWA). *Compare* 40 C.F.R. § 122.2 (2017) (including “concentrated animal feeding operations” in the definition of “point source” subject to regulation under the CWA), *with* 40 C.F.R. § 122.23(b)(2) (excluding AFOs below certain size thresholds from the definition of “concentrated animal feeding operation” under the CWA).

82. *See* ENVTL. PROT. AGENCY, EPA 820-R-13-002, LITERATURE REVIEW OF CONTAMINANTS IN LIVESTOCK AND POULTRY MANURE AND IMPLICATIONS FOR WATER QUALITY 5 (2013) (indicating that livestock and poultry production has changed significantly since the 1960s).

83. PEW COMM'N ON INDUS. FARM ANIMAL PROD., PEW CHARITABLE TRUSTS & JOHNS HOPKINS BLOOMBERG SCHOOL OF PUB. HEALTH, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA vii, 3, 5–6 (2008).

84. ENVTL. PROT. AGENCY, *supra* note 82, at v.

The CWA and its regulations have not kept pace with the significant changes in the agricultural sector—namely, the intensification of animal production.<sup>85</sup> As is, the CWA focuses on controlling wastewater discharge from manufacturing facilities, sewage treatment plants, and similar industrial “point sources.”<sup>86</sup> Section 1362 states that a point source is:

any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural storm water discharges and return flows from irrigated agriculture.<sup>87</sup>

NPDES requires permits for these point sources.<sup>88</sup> But, under the point source definition, only a small number of animal factories need permits.<sup>89</sup> CAFOs, as CWA regulations define them, are only the largest animal feeding operations (AFOs).<sup>90</sup> The regulations consider the number and kind of animals confined, and occasionally, other circumstances.<sup>91</sup> For example, the EPA considers an AFO a CAFO when there are more than 700 mature cows, 10,000 sheep, or 125,000 chickens.<sup>92</sup>

The EPA may consider facilities with fewer animals as CAFOs when the operations are discharging pollutants directly into waters or through man-made systems.<sup>93</sup> But, under section 1362, the EPA may not require a

85. See COPELAND, *supra* note 74, at 1 (“[These regulations] have not been amended to reflect significant structural and technological changes in some components of the animal agriculture industry that have occurred, particularly during the last three decades. In addition, manure and waste-handling and disposal problems from intensive animal production have begun to receive attention as these facilities increase in size and the effects of these problems reach beyond the industry to affect others in nearby communities.”).

86. See 33 U.S.C. § 1362(6) (2012) (defining pollutants covered by the CWA).

87. *Id.* § 1362(14).

88. See *Clean Water Act Section 404 and Agriculture*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/cwa-404/clean-water-act-section-404-and-agriculture> [<https://perma.cc/G3LZ-4PJJ>] (last updated Nov. 20, 2017) (stating that it is illegal to release fill material into waters of the U.S. without a permit unless an exemption applies). Compare 33 U.S.C. § 1311(a) (making pollutant discharges illegal except in compliance with the law), with 33 U.S.C. § 1342(a) (enabling the EPA to issue NPDES permits).

89. See 33 U.S.C. § 1362(14) (defining point source); see also COPELAND, *supra* note 74, at 5 (“Most agricultural activities are considered to be nonpoint sources, since they do not discharge wastes from clearly identifiable pipes, outfalls, or similar ‘point’ conveyances. Nonpoint sources are not subject to the permit, compliance, and enforcement regime that applies to point sources.”).

90. 40 C.F.R. § 122.23(b)(1) (2017).

91. *Id.* § 122.23(b)(4).

92. *Id.*

93. *Id.* § 122.23(b)(6).

permit from smaller operators that discharge agricultural storm water and return flow.<sup>94</sup>

Runoff from nonpoint sources now represents a larger share of water pollution problems.<sup>95</sup> And, NPDES does not necessarily prohibit permitted point sources from discharging pollutants.<sup>96</sup> With a permit, a CAFO operator can discharge byproducts into waterways and apply manure, litter, and process wastewater to surrounding land.<sup>97</sup> Limiting CWA regulations to only certain large facilities and certain activities means that most water pollution from animal agriculture will go unchecked.

### *B. Environmental Laws Fail to Protect Air Quality from Industrial-Agricultural Pollution*

The EPA has the authority to regulate CAFO air emissions under the CAA; Emergency Planning and Community Right-to-Know Act (EPCRA); and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA).<sup>98</sup>

The CAA aims “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”<sup>99</sup> To achieve these goals, the CAA directs the EPA to set health-based standards for ambient air quality, deadlines for state and local compliance, emission controls for hazardous air pollutants, and national emission standards for common or large sources of air pollution.<sup>100</sup>

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94. 33 U.S.C. § 1362(14); ENVTL. PROT. AGENCY, EPA 833-R-10-006, IMPLEMENTATION GUIDANCE ON CAFO REGULATIONS CAFOs THAT DISCHARGE OR ARE PROPOSING TO DISCHARGE 2 (2010), [https://www3.epa.gov/npdes/pubs/cafo\\_implementation\\_guidance.pdf](https://www3.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf) [<https://perma.cc/CX54-FJAZ>].

95. See, e.g., COPELAND, *supra* note 74, at 5 (“As point source pollution has been brought under regulation, uncontrolled discharges in the form of runoff from ‘nonpoint sources’ have become not only greater in absolute terms, but also proportionally a larger share of remaining water pollution problems.”).

96. See 33 U.S.C. § 1342(a) (detailing the NPDES permitting framework); see also *Clean Water Act Section 404 and Agriculture*, *supra* note 88 (stating that there is an exemption for discharges of fill materials from normal farming and ranching activities).

97. 40 C.F.R. § 122.23(e).

98. *Agriculture: Laws and Regulations That Apply to Your Agricultural Operation by Farm Activity*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/agriculture/agriculture-laws-and-regulations-apply-your-agricultural-operation-farm-activity> [<https://perma.cc/8UMX-PRTA>] (last updated Nov. 28, 2017).

99. 42 U.S.C. § 7401(b)(1).

100. See generally JAMES E. MCCARTHY ET AL., CONG. RESEARCH SERV., RL30853, CLEAN AIR ACT: A SUMMARY OF THE ACT AND ITS MAJOR REQUIREMENTS (2013), (describing the regulatory requirements set out for the EPA to achieve the regulatory goals); 42 U.S.C. § 7401 (providing the findings that demonstrate the purpose and goal of the Clean Air Act).



Section 7409 directs the EPA to establish National Ambient Air Quality Standards (NAAQS) for air pollutants that endanger public health or welfare.<sup>101</sup> States are responsible for adopting a plan to implement, maintain, and enforce these standards, while polluters are responsible for obtaining a permit for emissions that exceed a threshold amount specified for each NAAQS pollutant.<sup>102</sup>

The EPA has established NAAQS for six air pollutants, only one of which CAFOs produce.<sup>103</sup> NAAQS exist for particulate matter, but these standards can exclude agricultural pollutants.<sup>104</sup> Recent changes to NAAQS set stricter limits for “fine” particulate matter but did not strengthen air quality standards for “coarse” particulate matter<sup>105</sup>—the more common byproduct of agricultural activities.<sup>106</sup> Additionally, the EPA has not established an air quality standard for ammonia, the most common CAFO pollutant.<sup>107</sup>

Though the CAA does not regulate ammonia pollution from CAFOs, EPCRA and CERCLA may soon require livestock producers to report pollutant discharge, including ammonia.<sup>108</sup> Recently, the court in *Waterkeeper Alliance v. Environmental Protection Agency* vacated a

101. 42 U.S.C. § 7409(b).

102. *Id.* § 7410(a)(1)–(2)(L).

103. ENVTL. PROT. AGENCY, CRITERIA AIR POLLUTANTS 1 (3d ed. 2017) [https://www.epa.gov/sites/production/files/2017-07/documents/ace3\\_criteria\\_air\\_pollutants\\_updated\\_live\\_file.pdf](https://www.epa.gov/sites/production/files/2017-07/documents/ace3_criteria_air_pollutants_updated_live_file.pdf) [<https://perma.cc/8PV7-G4ZT>]; HRIBAR, *supra* note 7, at 6.

104. *See NAAQS Table*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/criteria-air-pollutants/naaqs-table> [<https://perma.cc/ZB6Y-8MWD>] (last updated Dec. 20, 2016) (listing the six criteria pollutants regulated under NAAQS: sulfur dioxide, carbon monoxide, lead, nitrogen dioxide, ozone, and particulate matter); NAT’L RESEARCH COUNCIL, AIR EMISSIONS FROM ANIMAL FEEDING OPERATIONS 4–5 (2003) (indicating that CAFOs also emit ammonia, nitrous oxide, methane, volatile organic compounds, hydrogen sulfide, and odors).

105. National Primary & Secondary Ambient Air Quality Standards, 40 C.F.R. pt. 50, apps. L, O (2016) (explaining “fine” particulate matter has a diameter under 2.5 micrometers, while “coarse” particulate matter measures between 2.5 and 10 micrometers in diameter and explaining the relationship of these determinations to NAAQS); *see also* ROBERT ESWORTHY, CONG. RESEARCH SERV., R42934, AIR QUALITY: EPA’S 2013 CHANGES TO THE PARTICULATE MATTER (PM) STANDARD 2 (2015) (“[T]he final rule did not modify the standards for inhalable ‘coarse’ particles larger than 2.5 but smaller than 10 microns.”).

106. Roger D. Peng et al., *Coarse Particulate Matter Air Pollution and Hospital Admissions for Cardiovascular and Respiratory Diseases Among Medicare Patients*, 299 JAMA 2172, 2172–73 (2008).

107. *See NAAQS Table*, *supra* note 104 (indicating that NAAQS does not include ammonia); *see also* HRIBAR, *supra* note 7, at 5 (“The most typical pollutants found in air surrounding CAFOs are ammonia, hydrogen sulfide, methane, and particulate matter, all of which have varying human health risks.”).

108. *CERCLA and EPCRA Reporting Requirements for Air Releases of Hazardous Substances from Animal Waste at Farms*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/epcra/cercla-and-epcra-reporting-requirements-air-releases-hazardous-substances-animal-waste-farms> [<https://perma.cc/GJ3D-KJXE>] (last updated Feb. 13, 2018).

federal rule that had exempted CAFOs from reporting certain hazardous wastes under EPCRA and CERCLA.<sup>109</sup> The existing rule required other industries to report releases of ammonia and hydrogen sulfide, both found in livestock manure, but determined these reporting requirements “unnecessary” for CAFO operators.<sup>110</sup>

*C. State Nuisance Laws Also Thwart Environmentalists’ Attempts to Address Factory-Farming Pollution*

As an alternative to environmental law challenges, some property owners and citizens’ groups have brought nuisance claims against CAFO operators.<sup>111</sup> Private nuisance laws allow individuals to sue when CAFO odors deprive these landowners of the use and enjoyment of their property.<sup>112</sup> Public nuisance laws allow the government to sue on behalf of a community to quell pollution or odor issues.<sup>113</sup>

But, seldom do nuisance cases stop CAFO pollution.<sup>114</sup> State laws rarely afford private citizens standing to bring a public nuisance claim, meaning that only public officials may sue for injunctive relief.<sup>115</sup> Local officials rarely bring public nuisance claims, fearing adverse economic consequences.<sup>116</sup>

An individual may instead bring a private nuisance claim for monetary relief. Large settlements and jury awards can deter CAFO pollution to some degree, but many legislatures passed laws to deter private nuisance

109. *Waterkeeper All. v. Env'tl. Prot. Agency*, 853 F.3d 527, 530 (D.C. Cir. 2017).

110. *Id.*

111. *See, e.g., Ryan Teel, Not in My Neighborhood: The Fight Against Large-Scale Animal Feeding Operations in Rural Iowa, Preemptive Tactics, and the Doctrine of Anticipatory Nuisance*, 55 *DRAKE L. REV.* 497, 501 (2007) (touting traditional nuisance law as a weapon to prevent the development of animal feeding operations).

112. *See, e.g., Hanes v. Cont'l Grain Co.*, 58 S.W.3d 1, 5 (Mo. Ct. App. 2001) (holding private citizens may sue a hog farm operator claiming odor, flies, and contaminated water impaired their use and enjoyment of their properties).

113. *See Vanessa Zborek, “Yes, in Your Backyard!” Model Legislative Efforts to Prevent Communities from Excluding CAFOs*, 51 *WAKE FOREST J.L. & POL'Y* 147, 166 (2015) (“The public nuisance doctrine prevents land use that would impair a right generally held by the public.”).

114. *See, e.g., Serena M. Williams, CAFOs as Neighbors: An Analysis of Kentucky Nuisance Law and Agricultural Operations*, *SUSTAIN*, Fall–Winter 2002, at 14, 14 (discussing a case in which the court did not cease operations causing the nuisance).

115. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 *MICH. L.J.* 471, 485 n.45 (1970); *see also* Denise E. Antolini, *Modernizing Public Nuisance: Solving the Paradox of the Special Injury Rule*, 28 *ECOL. L.Q.* 755, 760–61 (2001) (explaining that individuals typically do not have standing to sue for public nuisance unless the individual has suffered a “special injury”).

116. *See, e.g., Huber, supra* note 72 (explaining that after Missouri neighbors won an \$11.5 million judgment against a Smithfield hog operation, the company threatened to leave the state).

claims.<sup>117</sup> Some capped available damages in farm nuisance suits, limiting the deterrent effect of such claims.<sup>118</sup> Others passed more comprehensive “Right to Farm” acts, limiting nuisance cases outright.<sup>119</sup> For example, Wyoming’s Right to Farm Act states:

a farm or ranch operation shall not be found to be a public or private nuisance by reason of that operation if that farm or ranch operation: (i) Conforms to generally accepted agricultural management practices; and (ii) Existed before a change in the land use adjacent to the farm or ranch land and the farm or ranch operation would not have been a nuisance before the change in land use or occupancy occurred.<sup>120</sup>

In other cases, state law awards costs and fees to agricultural operations defending in a nuisance suit.<sup>121</sup> By limiting an individual’s right to bring nuisance suits, state legislatures stripped the public of an important legal tool to address CAFO pollution. Where substantive environmental laws fail to adequately address factory-farm pollution, and nuisance laws do not allow individuals to prevent the proliferation of CAFO pollution, advocates need to consider an alternative course of action—a NEPA challenge.

### III. THE USDA SHOULD COMPLETE AN ENVIRONMENTAL IMPACT STATEMENT TO DETERMINE THE EXTENT OF ANIMAL-FARM POLLUTION THAT THE NATIONAL SCHOOL LUNCH PROGRAM CAUSES

NEPA formalizes national environmental policy, recognizing the federal government’s obligation to protect natural resources.<sup>122</sup> The statute

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117. See Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1706–07 (1998) (explaining that Right to Farm acts, which are designed to protect agricultural operators from common-law nuisance liability, exist in some form in all 50 states).

118. See, e.g., MO. REV. STAT. § 537.295 (2016) (excluding nuisance claims for agricultural operations except when negligence or improper operation causes the nuisance); see also Brent Martin, *Gov. Nixon Signs Farm Nuisance Lawsuit Bill, After Vetoing Initial Bill*, MISSOURINET (May 11, 2011), <http://www.missourinet.com/2011/05/11/gov-nixon-signs-farm-nuisance-lawsuit-bill-after-vetoing-initial-bill-audio/> [<https://perma.cc/3YWQ-4AK8>] (explaining that the state legislature limited farm nuisance suits in rural communities to protect agricultural operations).

119. See Amy Lavine, *Right to Farm Laws*, in 4 AM. LAW ZONING § 33:5 (5th ed.) (explaining that statutes in Iowa, Tennessee, and Wyoming give agricultural operations that comply with applicable laws and regulations an irrebuttable presumption that a nuisance does not exist).

120. WYO. STAT. ANN. § 11-44-103 (2017).

121. See TEX. AGRIC. CODE ANN. § 251.004(b) (2018) (explaining that a person bringing a nuisance action against an agricultural operation that existed for more than a year will be liable for the attorney’s fees of the defendant).

122. National Environmental Policy Act of 1969, 42 U.S.C. § 4331 (2012).

asserts that “each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”<sup>123</sup> To preserve the natural environment “without degradation, risk to health or safety, or other undesirable and unintended consequences,” NEPA commits federal and state beneficiaries “to use all practicable means and measures.”<sup>124</sup>

Applying NEPA to the NSLP’s purchases from CAFOs is one way that the USDA could commit to preserving our natural environment. Advocates could petition the USDA to complete an EIS for the NSLP or, alternatively, challenge the USDA’s decision not to complete one under the APA. Quantifying the environmental effects of school food procurement would create a record of animal-factory pollution for future actions and could pressure industry and the USDA to change their respective production and procurement practices.

First, according to NEPA, agencies must determine whether an agency action qualifies for a categorical exclusion from NEPA review; next, whether the action merits an environmental assessment (EA) or a finding of no significant impact (FONSI); and finally, whether the action warrants an EIS.<sup>125</sup>

*A. The USDA Regulations Do Not Categorically Exempt the National School Lunch Program from NEPA Review*

Neither the activities supporting nor the agency overseeing the NSLP qualify for a categorical exclusion under the USDA regulations.<sup>126</sup> As a food provision program, the NSLP activities are broader than those activities that the USDA regulations list.<sup>127</sup> The USDA regulations exclude only administrative, funding, research, education, legal, and market-development activities from NEPA.<sup>128</sup> To administer the NSLP, the FNS establishes nutritional standards for meals, offers technical assistance and

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123. *Id.* § 4331(c).

124. *Id.* § 4331(a), (b)(3).

125. *See National Environmental Policy Act Review Process*, ENVTL. PROTECTION AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> [https://perma.cc/94JR-AL2H] (last updated Jan. 24, 2017) (describing the different steps an agency may need to take under NEPA).

126. *See* 7 C.F.R. § 1b.3–1b.4 (2017) (listing the activities and agencies that are excluded from preparing an EA and EIS under the USDA regulations).

127. *See* 40 C.F.R. § 1500.5 (allowing “categorical exclusions” for actions that do not have a “significant effect” on the environment); 40 C.F.R. § 1507.3(a) (requiring agencies to adopt procedures consistent with the regulations); 7 C.F.R. § 1b.3 (listing activities that are categorically excluded from preparing an EA or EIS).

128. 7 C.F.R. § 1b.3.

training to meet these standards, reimburses states for each meal served, and provides USDA Foods.<sup>129</sup> To supply USDA Foods, the FNS determines which foods are available for purchase, selects and publishes an annual list, tracks state entitlements, takes orders, monitors distribution, and provides policy guidance.<sup>130</sup>

Not only do the NSLP activities not qualify for a categorical exemption, neither do the agencies that oversee the program.<sup>131</sup> The USDA regulations omit the FNS from the list of USDA agencies whose actions “have no individual or cumulative effect on the human environment.”<sup>132</sup> The USDA regulations do list the FSA and AMS—the USDA agencies that contract for and purchase commodities on behalf of the FNS—as qualifying for categorical exclusions.<sup>133</sup> But, the FSA and AMS are acting as agents of the FNS, which “has overall responsibility for school-meals programs” and is not exempt from NEPA review.<sup>134</sup> The Council on Environmental Quality (CEQ) regulations specify that for actions involving more than one agency, the government may determine lead and cooperating agencies.<sup>135</sup> For the purposes of the NSLP, the FNS would likely be the lead agency, and regulations would require the FSA and AMS, as cooperating agencies, to assist the FNS in complying with NEPA.<sup>136</sup>

One USDA regulation also requires agencies to “scrutinize their activities to determine continued eligibility for categorical exclusion.”<sup>137</sup> *Humane Society of the United States v. Johanns* interpreted this regulation, determining that the USDA has a responsibility to consider whether categorical exclusions issued decades before are valid in light of emerging evidence.<sup>138</sup> The court held that “failing even to consider whether a normally excluded action may have a significant environmental impact flies

129. 42 U.S.C. §§ 1751, 1753, 1769b-1.

130. FOOD AND NUTRITION SERV., *supra* note 33, at 4.

131. *See* 7 C.F.R. § 1b.4 (listing agencies that are excluded from preparing an EA or EIS).

132. *Id.*

133. *Id.*

134. SCHOOL MEALS, *supra* note 14, at 9 fig.1 (indicating that FNS “[h]as overall responsibility for school-meals programs”); *see also* FOOD AND NUTRITION SERV., *supra* note 33, at 4 (“AMS serves as the primary purchasing agent for USDA Foods.”); 42 U.S.C. § 4332 (indicating that NEPA applies to all federal agencies); FARM SERV. AGENCY, U.S. DEP’T OF AGRIC., DAIRY PRODUCT PRICE SUPPORT PROGRAM (DPPSP) FACT SHEET 1 (2011) (“FSA purchases and delivers processed commodities under various domestic food distribution programs, such as the National School Lunch Program.”).

135. 40 C.F.R. § 1501.5–6.

136. *See id.* (stating that if multiple agencies are involved in the same action or directly related actions subject to NEPA, they must work together to prepare an EIS and they have discretion to decide which agencies are the lead agencies and which agencies are the cooperating agencies in preparing the EIS).

137. 7 C.F.R. § 1.b3(c).

138. *Humane Soc’y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 34 (D.D.C. 2007).

in the face of the CEQ regulations . . . as well as USDA’s own NEPA regulations.”<sup>139</sup>

First authorized in 1946, the NSLP predates the widespread adoption of the factory farm—since the 1950s, livestock production has more than doubled, while the number of operations has fallen by 80%.<sup>140</sup> Evidence of animal-factory pollution in air and waterways continues to emerge, thus bolstering the need for NEPA review.<sup>141</sup>

*B. The USDA Should Complete an Environmental Assessment and an Environmental Impact Statement for the National School Lunch Program*

Because the NSLP activities and agencies do not qualify for a categorical exclusion, the FNS should prepare an EA. The EA should list the reason for purchasing animal-agricultural products from factory farms, possible procurement alternatives, the wide-sweeping environmental harms, and the authorities consulted.<sup>142</sup> Given the well-documented environmental impacts of factory farming, the EA findings should prompt the USDA to prepare an EIS, rather than a FONSI.

Agencies must complete an EIS for all “major Federal actions significantly affecting the quality of the human environment.”<sup>143</sup> The CEQ regulations specify that major federal actions include “[a]doption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive,” as is the case with the NSLP.<sup>144</sup> In terms of cost, the NSLP is significant—the program has an annual budget of over \$13 billion.<sup>145</sup> A huge portion of the NSLP cash subsidies and approximately \$859 million in commodities support animal agriculture.<sup>146</sup>

In *Hanly v. Kleindienst*, the court held that the CEQ guidelines weigh in favor of a formal EIS when actions are “highly controversial” or cause

139. *Id.*

140. ENVTL. PROT. AGENCY, *supra* note 82, at v.

141. *See* Teel, *supra* note 111, at 504–06 (stating that recent studies detail the impacts of AFOs on air and waterways).

142. *See* 40 C.F.R. § 1501.3–4 (describing when agencies must prepare an EA and an EIS); *see also* *National Environmental Policy Act Review Process*, *supra* note 125 (listing the requirements for an EA).

143. 42 U.S.C. § 4332(2)(c) (2012); *see also* 40 C.F.R. § 1502.4(a)–(b) (describing when major federal actions require an EIS).

144. 40 C.F.R. § 1508.18(b)(3).

145. SCHOOL MEALS, *supra* note 14, at 5 tbl.1.

146. U.S. DEP’T OF AGRIC., 2017 USDA BUDGET EXPLANATORY NOTES FOR COMMITTEE ON APPROPRIATIONS: FOOD AND NUTRITION SERVICE 32-63–32-65 (2017).

“cumulative harm.”<sup>147</sup> The effects of factory farming are both controversial and cumulative. Numerous studies have linked factory farms—like those the USDA relies on—to diminished air and water conditions, heightened greenhouse gas emissions, and poorer community health.<sup>148</sup>

To document these harms, the USDA will need to evaluate environmental impacts and possible programmatic alternatives. The USDA can choose to complete a programmatic EIS rather than a generic EIS.<sup>149</sup> A programmatic EIS considers cumulative impacts, focuses on policy-level alternatives, and emphasizes comprehensive mitigation measures.<sup>150</sup> Such an EIS would allow the USDA to analyze animal-agricultural pollution across the broad range of facilities, regions, and multi-project programs that the NSLP spans.

Conducting a NEPA review for the NSLP would yield multiple benefits. Because the EIS process involves a public comment period, concerned citizens and other agencies could provide meaningful feedback on NSLP procurement.<sup>151</sup> Citizens living near CAFOs have indispensable information concerning the social, economic, and environmental effects of factory farming on their communities. Schools that source sustainable animal-agricultural products could offer viable procurement alternatives. Moreover, agencies, such as the EPA, could provide further scientific support linking CAFOs to widespread environmental harms. While NEPA would not require the USDA to adopt the suggestions of public commenters, it would ensure the USDA better understood the social, economic, and environmental consequences of animal-agricultural procurement.<sup>152</sup> Additionally, the USDA would have to respond to the comments.<sup>153</sup> The record created would not only provide the public with more information on factory-farm pollution, but would also provide lawyers with material to inform future litigation.<sup>154</sup>

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147. See *Hanly v. Kleindienst*, 471 F.2d 823, 830–31 (2d Cir. 1972) (determining that the General Services Administration should have completed an EIS considering the cumulative effects of constructing a jail).

148. See, e.g., GAO-08-944, *supra* note 12, at 5–6 (providing a brief overview of CAFOs’ environmental and health impacts).

149. Final Guidance for Effective Use of Programmatic NEPA Reviews, 79 Fed. Reg. 76,986 (Dec. 23, 2014).

150. *Id.* at 76,986, 76,988–90.

151. *National Environmental Policy Act Review Process*, *supra* note 125.

152. See 40 C.F.R. § 1503.4 (2017) (requiring agencies preparing an EIS to assess, consider, and respond to comments).

153. *Id.* § 1503.4(a).

154. See *National Environmental Policy Act Review Process*, *supra* note 125 (“The EIS process ends with the issuance of [a] Record of Decision.”).

IV. ADVOCATES CAN CHALLENGE THE USDA'S FAILURE TO PRODUCE AN ENVIRONMENTAL IMPACT STATEMENT FOR THE NATIONAL SCHOOL LUNCH PROGRAM

As an alternative to petitioning the USDA to complete an EIS for the NSLP, advocates could challenge agency inaction under the APA. NEPA does not contain a citizen suit provision; so, advocates would need to argue that failure to conduct an EIS for the NSLP is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>155</sup> To bring such a claim, advocates will need to establish that a plaintiff has standing and that the USDA's particular action—or, in this case, inaction—is subject to judicial review.<sup>156</sup> The sections below outline NEPA standing requirements and consider how best to tackle USDA inaction.

*A. Choosing a Potential Plaintiff*

To establish standing, a plaintiff will have to demonstrate that she meets both Article III and APA standing requirements.<sup>157</sup> The most likely candidate to meet both constitutional and prudential standing requirements would live near a CAFO that produces USDA Foods and would experience air or water quality issues.

Two similarly named cases outline these standing requirements. *Lujan v. Defenders of Wildlife* involved a challenge to regulations that limited the applicability of the Endangered Species Act abroad.<sup>158</sup> The Court in *Defenders of Wildlife* determined that environmentalists did not suffer a concrete, discernible injury because of these regulations and outlined a test for constitutional standing.<sup>159</sup> For Article III standing, a plaintiff must establish: (1) injury in fact; (2) a causal connection between the injury and agency conduct; and (3) that the court can provide the plaintiff with relief.<sup>160</sup>

In *Lujan v. National Wildlife Federation*, the Court outlined APA standing requirements.<sup>161</sup> In this case, plaintiffs alleged that the Bureau of Land Management's review of orders that could affect their recreational use

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155. Administrative Procedure Act, 5 U.S.C. § 706 (2012).

156. *See id.* § 702 (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”).

157. U.S. CONST. art. III, § 2, cl. 1; 5 U.S.C. § 702.

158. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 555 (1992).

159. *Id.* at 560–61, 564.

160. *Id.* at 560–61.

161. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (quoting 5 U.S.C. § 702).



and aesthetic enjoyment of adjacent public lands had violated NEPA.<sup>162</sup> In its ruling, the Court determined that the plaintiffs had to demonstrate that their complaint fell within the “zone of interests” that the statute protects or that they were “adversely affected or aggrieved . . . within the meaning of a relevant statute” by a final agency action.<sup>163</sup> Using this test, the Court found that the plaintiffs’ interests in recreational use and aesthetic enjoyment were within the zone of interests that NEPA protects.<sup>164</sup> But, the Court concluded that the plaintiffs did not show they would be adversely affected.<sup>165</sup>

A plaintiff living near a CAFO that sells exclusively USDA Foods will have the best shot of establishing both constitutional and prudential standing. The harms she deals with—air and water pollution from factory farms—are precisely the kinds of injuries against which Congress intended NEPA to protect.<sup>166</sup>

### B. Choosing an Action to Challenge

Advocates would next need to establish that the USDA’s failure to prepare an EIS was an action subject to judicial review. The CEQ regulations authorize legal challenges when the “responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the [APA] or other applicable law as agency action.”<sup>167</sup> Often federal agency inaction will not trigger NEPA review, but courts have held in certain cases that an agency’s failure to act under NEPA for major federal actions is subject to judicial review.<sup>168</sup> For example, the court in *Center for Food Safety v. Johanns* held that the USDA violated NEPA when it issued permits for testing genetically engineered plant varieties without explaining why the agency did not prepare an EA or EIS.<sup>169</sup>

Two cases to which a court may turn to determine if the NSLP actions are reviewable are *Kleppe v. Sierra Club* and *Defenders of Wildlife v. Andrus*.<sup>170</sup> In *Kleppe*, Sierra Club argued that the Department of Interior

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162. *Id.* at 875.

163. *Id.* at 883 (internal quotations omitted).

164. *Id.* at 872.

165. *Id.* at 871–72.

166. *See* 42 U.S.C. § 4321 (2012) (“The purposes of this chapter are . . . to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man . . .”).

167. 40 C.F.R. § 1508.18 (2017).

168. *See* *Ctr. for Food Safety v. Johanns*, 451 F. Supp. 2d 1165, 1174, 1187 (D. Haw. 2006) (describing that a “final agency action” can include a “failure to act”).

169. *Id.* at 1171.

170. *Kleppe v. Sierra Club*, 427 U.S. 390, 412 (1976); *Def. of Wildlife v. Andrus*, 627 F.2d 1238, 1239–40 (D.C. Cir. 1980).

(DOI) should have completed a comprehensive EIS when issuing permits to a number of smaller, private coal mining companies.<sup>171</sup> The Court determined that the DOI plan involved many minor actions, and suggested that an EIS would be necessary only if a number of proposals with a cumulative effect—defined as “synergistic environmental impacts”—were pending before the agency.<sup>172</sup> In *Andrus*, the DOI refused requests to prepare an EIS for a state plan to control wolf populations.<sup>173</sup> In that case, the court held that the “agency has done nothing more than fail to prevent the other party’s action from occurring.”<sup>174</sup>

Both cases suggest that there must be a proposal for a major federal action, not merely a contemplated action.<sup>175</sup> With the NSLP, there is both clear federal control and concrete action. Distinguishable from the initiative in *Andrus*, the NSLP involves a federal, not state, program.<sup>176</sup> Unlike the DOI, the USDA does much more than merely allow the NSLP to occur. The Agency is ultimately responsible for all program activities, including the purchase of animal food products through cash subsidies to states and the FNS’s commodity purchases.<sup>177</sup>

In fact, the NSLP involves “systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive” and includes “continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies.”<sup>178</sup> For the NSLP, the USDA devises a national plan, distributes funds to states, purchases commodities, administers contracts, and pays vendors.<sup>179</sup>

Pursuant to *Kleppe*, advocates should contest a specific USDA action with a cumulative-effect argument. The USDA’s commodity purchase plan for the NSLP or subsequent commodity bid specifications are examples of actions that would have such a cumulative effect.<sup>180</sup> The annual purchase plan details available NSLP funds and outlines what foods the FNS will

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171. *Kleppe*, 427 U.S. at 412.

172. *Id.* at 410.

173. *Andrus*, 627 F.2d at 1240.

174. *Id.* at 1244.

175. *See Kleppe*, 427 U.S. at 394 (“[NEPA] requires that all federal agencies include a detailed statement of environmental consequences known as an environmental impact statement ‘in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.’”); *see also Andrus*, 627 F.2d at 1243 (noting Congress created NEPA to combat growing environmental problems by holding federal agencies accountable, forcing them to complete proposals for major federal actions).

176. *See Andrus*, 627 F.2d at 1240 (discussing an Alaskan state hunting program).

177. *The National School Lunch Program*, *supra* note 25.

178. 40 C.F.R. § 1508.18(a) (2017).

179. MONKE, *supra* note 27, at 4.

180. *Id.*

supply to states based on prior year purchases.<sup>181</sup> The USDA then issues bid specifications for products, which include numerous types of beef, chicken, cheese, etc.<sup>182</sup> In FY 2015, the FNS provided more than \$859 million in animal-agricultural products through the NSLP's commodity program.<sup>183</sup> These millions of dollars likely supported factory farms, bankrolling pollution from animal agriculture. By arguing that these annual actions trigger NEPA review, advocates may be able to force the USDA to assess the environmental consequences of its actions.

#### CONCLUSION

Industrial animal production externalizes the environmental and public health costs of resource-intensive agriculture. As the Agency responsible for both preserving our natural resources and feeding future generations, the USDA should be assessing to what degree its reliance on factory farms affects the environment. Large-scale agricultural production consumes considerable energy and water resources, poisons waterways, and emits toxic air particles. Processing animal food products and distributing them to far-flung locales contributes to carbon emissions and, consequently, climate change. By purchasing food from industrial polluters, the federal government underwrites the costs of this environmental degradation.

To address both the environmental havoc industrial agriculture wreaks and the misguided use of federal funds, food justice organizations should challenge existing federal food-procurement practices. Forcing the USDA to comply with NEPA's EIS requirement would be an important first step to help transform the broken agricultural system and protect the health of our most valuable national resource—future generations.

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181. *Id.*

182. *Id.*; see also EXPLANATORY NOTES, *supra* note 16, at 32-63–32-65 (listing the agricultural products that USDA purchased in 2015).

183. See EXPLANATORY NOTES, *supra* note 16, at 32-63–32-65 (listing the USDA's expenditures on individual animal agriculture products in 2015).