KNRC Kansas Natural Resource Coalition
Bringing Voice and Environmental Decision-making to Local Government

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U.S. Environmental Protection Agency
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Washington, DC 20460

RE: **Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, Docket No. EPA–HQ– OW–2021–0736**

March 25th, 2024,

The Kansas Natural Resource Coalition (KNRC) is providing the following comments on the proposed Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category proposed rule as published in the *Federal Register* at 89 FR 4474, Docket ID Number EPA–HQ–OW–2021–0376; FRL–08885–OW.

KNRC functions as an instrumentality of thirty Kansas boards of county commissioners primarily located in central and western Kansas. KNRC sponsors, promotes, and engages in meaningful government-to-government participation between its member counties and federal and/or state executive branch agencies during administrative policymaking and actions.[1] KNRC's member boards of county commissioners have material interests in agriculture-related activities including how meat and poultry production facilities are regulated.

This letter is also joined by the following entities

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[1] Through adoption of land use, conservation, and coordination plans into local land use ordinances, KNRC has established a government-to-government prerogative with Kansas Department of Agriculture as an instrumentality of its member county governments. This limited governmental prerogative, long recognized by state law, the departments of Interior, Agriculture and in the public record, distinguishes KNRC from the public, environmental groups, or associations for purposes of meaningful participation in public policy activities, accessing Kansas Department of Agriculture data and science, and promoting collective positions by Kansas county governments.

1. Proposed Rule

The Environmental Protection Agency (EPA or the Agency) is proposing a rule to revise the technology-based effluent limitations guidelines and standards (ELGs) for the meat and poultry products (MPP) point source category.

The Meat and Poultry Products (MPP) Effluent Guidelines and Standards at 40 CFR Part 432 covers wastewater directly discharged by slaughterhouses, further processors, independent renderers, and poultry processors. EPA initially promulgated the MPP ELGs in 1974 and amended the regulation in 2004. It currently applies only to direct dischargers (those that discharge directly to a water of the United States), and only to about 155 of the 5,055 MPP facilities in the industry. Section 3.2 of EPA's Benefit Cost Analysis states that "*EPA estimates the regulatory options potentially affect 3,879 MPP facilities*." The history of EPA's regulation of MPP effluent guidelines and standards has never extended beyond direct discharge facilities. The proposed rule seeks to significantly expand EPA regulatory reach.

According to the Environmental Assessment (EA) "*Option 1 is EPA's preferred option and builds on the existing ELGs by adding new limits for large direct and indirect dischargers*." This option would include "*new conventional pollution limits (pretreatment standards) for large indirect dischargers.*" Option 2 would "*add TN and TP limits for indirect discharging processors*." And Option 3 would "*apply the more stringent TN and TP limits and conventional limits to more direct and indirect discharging facilities by adjusting the existing rule production thresholds*."[2]

2. Summary

In proposing to regulate indirect discharge facilities, this rulemaking improperly departs from constitutional and statutory authority and would significantly alter the balance between state and federal powers.[3] In the Clean Water Act (CWA) Congress codified explicit policy to preserve the States' primary authority over land and water use.[4] In *Sackett v Environmental Protection Agency et al*, the Supreme Court stated that an overly broad interpretation of the CWA's reach would impinge on this authority. [5]

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[2] EA for Proposed Revisions to the Meat and Poultry Products ELGs 1: Introduction

[3] Executive Order 13132 was issued to guarantee the division of governmental responsibilities between the national government and the States intended by the Framers of the Constitution, ensuring that the principles of federalism established by the Framers guide the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act. Section 1 of this order defines 'Policies that have federalism implications' and refers to: "*Regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government*."

[4] "In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder." *Bond v. United States*, 572 U. S. 844, 854 (2014). "Among those retained powers is the power of a State to "order the processes of its own governance." *Alden v. Maine*, 527 U. S. 706, 752 (1999); *SWANCC*, 531 U. S., at 174; accord, *Rapanos*, 547 U. S., at 738 (plurality opinion)." - *Sacket v. EPA* 598 U. S. ____ (2023).

[5] "*Regulation of land and water use lies at the core of traditional state authority. See, e.g., SWANCC, 531 U. S., at 174 (citing Hess v. Port Authority Trans-Hudson Corporation, 513 U. S. 30, 44 (1994)); Tarrant Regional Water Dist. v. Herrmann, 569 U. S. 614, 631 (2013). An overly broad interpretation of the CWA's reach would impinge on this authority.*" - *Sacket v. EPA* 598 U. S. ____ (2023)71.

We find that the proposed Environmental Protection Agency (EPA) Effluent Guidelines pose significant unassessed impacts on the meat and poultry processing (MPP) industry and the associated domestic livestock industry. Government at every level should strive to foster a regulatory environment which protects and enhances competition and allows entry into the market. Here, EPA failed to consider the cumulative regulatory impacts of this rule in conjunction with multiple other regulatory actions through various Federal departments and agencies pursuant to executive climate policy significantly impacting producers and consumers of meat products.

The EPA proposal gives priority to environmental justice goals and projects the monetized benefits at $90 million a year. The benefit numbers are hypothetically projected by modeling water quality improvements in five regional basins, with the results extrapolated and applied nationally. The *Federal Register* notice at 88 FR 4474 emphasizes environmental justice benefits and ecological benefits, but the EPA's jurisdiction under the CWA is not based on ecological importance or "environmental justice".[6]

3. Key issues:

- The regulation of land and water use are reserved and recognized throughout United States law as primarily within state jurisdiction consistent with Article IV Sec. 4 of the U.S. Constitution.[7]
- Federal agencies governing by executive edict are systemically resulting in statutory obligations being ignored by agencies resulting in greater regulatory burdens and unfunded mandates on small entities than necessitated by statute.[8]
- EPAs addition of 657 documents to the docket on January 23, 2024, directly violates national policy at 33 U.S.C. § 1251(f) of the Clean Water Act.
- EPA MPP ELGs regulations which seek to regulate indirect discharge facilities is illegitimate based on Constitutional and Statutory grounds.
- The proposed rule poses significant federalism implications which have not been thoroughly addressed.

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[6] ". . . the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority. See *Rapanos*, 547 U. S., at 756 (plurality opinion)." - *Sacket v. EPA* 598 U. S. (2023); "Finally, the EPA's various policy arguments about the ecological consequences of a narrower definition of "adjacent" are rejected." *Sacket v. EPA* 598 U.S. (2023). Pg. 25–27.

[7] *Printz v. United States*, 521 U.S. 898 (1997) - "It is incontestable that the Constitution established a system of "dual sovereignty."" *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991); *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained "a residuary and inviolable sovereignty," The Federalist No. 39, at 245 (J. Madison). "This is reflected throughout the Constitution's text," *Lane County v. Oregon*, 7 Wall. 71, 76 (1869), *Texas v. White*, 7 Wall. 700, 725 (1869); "What destroys the dissent's Necessary and Proper Clause argument, however, is not the Tenth Amendment but the Necessary and Proper Clause itself. When a "La[w] . . . for carrying into Execution" the Commerce Clause violates the principle of state sovereignty reflected in the various constitutional provisions we mentioned earlier, supra, at 19-20, it is not a "La[w] . . . proper for carrying into Execution the Commerce Clause," and is thus, in the words of The Federalist, "merely [an] ac[t] of usurpation" which "deserve[s] to be treated as such." The Federalist No. 33, at 204 (A. Hamilton). See Lawson & Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L. J. 267, 297-326, 330-333 (1993).

[8] 5 USC 601 note Sec. 202 findings (5).

- EPA's use of racial metrics, when evaluating matters of environmental justice, is both alien to America's civil rights tradition and incompatible with federal law.[9] EPA has no authority to impose environmental justice criteria or regulate based on ecological importance.[10]

- EPA has failed to adequately address the potential impacts of further consolidation of an already massively centralized industry which will remove alternatives to both consumers (especially lower income) and to producers.

4. **EPA has not been delegated authority to regulate indirect discharges from MPP facilities**.

   - ***The Clean Water Act explicitly preserves States' primary authority over land and water use at 33 U.S.C. §1251(b):***

> *"**(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States***
>
> *It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities of States to prevent, reduce, and eliminate pollution, to plan the development and use … of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. …"*

Further, the statute declares that it is the policy of the Congress that EPA enter formal consultation with the States in respect to the Administrator's exercise of delegated authorities conveyed through CWA mandates. Here, Congress intends that the States, in the exercise of their above primary responsibilities, enter into formal consultation with the Administrator whenever the Administrator engages in the exercise of any of the authorities delegated to the EPA under the provisions of the chapter.

Congress also specifically invokes the Tenth Amendment reservation of powers to the States, prohibits Federal preemption of the States' roles, powers, and authorities in respect to mandates of the Clean Water Act. Congress also withholds delegation of authority to the executive branch agencies, including EPA, to regulate nonpoint source effluent from entities such as businesses in the meat and poultry producer sector. This interpretation has been reinforced by the U.S. Supreme Court:

> "*Particularly given the CWA's express policy to "preserve" the States' "primary" authority over land and water use, §1251(b), this Court has required a clear statement from Congress when determining the scope of "the waters of the United States." SWANCC, 531 U. S., at 174; accord, Rapanos, 547 U. S., at 738 (plurality opinion)*." - *Sacket v. EPA* 598 U. S. ____ (2023)

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[9] *Louisiana v. EPA* 2:23-CV-00692 - *"The public interest here is that governmental agencies abide by its laws, and treat all of its citizens equally, without considering race. . ."*

[10] "*... the CWA does not define the EPA's jurisdiction based on ecological importance, and we cannot redraw the Act's allocation of authority. See Rapanos, 547 U. S., at 756 (plurality opinion).*" - *Sacket v. EPA* 598 U. S. ____ (2023).

… and:

> "*The Clean Water Act anticipates a partnership between the States and the Federal Government*." *Arkansas v. Oklahoma,* 503 U.S. 91, 101 (1992).

The nature of this partnership clearly places the EPA in a role that is supportive of the States' exercise of their protected primary responsibilities defined above.[11] The States are to manage the construction grant program and the Federal government role is to support and aid research, to provide Federal technical services, and to provide financial aid to State and interstate agencies and to local governments as mandate at 33 U.S.C. § 1251(b):

> *… It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.*

By ensuring that each State's role, power, and authority over planning the development and use of land and water resources and protection of water quality, Congress deliberately chose to withhold delegation of authority to the executive branch to develop a one-size-fits-all regulatory framework under the Clean Water Act. This not only protects the States' Tenth Amendment reserved powers but also ensures a robust nationwide continually improving research, development, and implementation process to prevent and reduce pollution that responds to local conditions and results in prototyping of emerging best practices.

33 U.S.C. § 1251(d) mandates that:

> *Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.*

The mandates and provisions recognizing, preserving, and protecting State and local government prerogatives from 33 U.S.C. § 1251 (b), (f), and (g) discussed in this section are examples of such express provisions conditioning the Administrator's role, power, and authority under the chapter.

At 33 U.S.C. § 1251(f) Congress mandated that:

> *It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the*

[11] Unfunded Mandates Reform Act of 1995. 2 USC 1501. *"The purposes of this Act are— (1) to strengthen the partnership between the Federal Government and State, local, and tribal governments; (2) to end the imposition, in the absence of full consideration by Congress, of Federal mandates on State, local, and tribal governments without adequate Federal funding, in a manner that may displace other essential State, local, and tribal governmental priorities;"*

> *best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.*

Congress stated that it is the national policy to drastically reduce the amount of paperwork and interagency decision procedures at the Federal level consequent to the implementation of the chapter using the non-discretionary term "shall" in statute. This means that EPA has no option but to rely upon the individual States and their political subdivisions to adopt and implement their own mandates for development and use of the States' land and water resources and protection of those resources. This is intended to keep programs and decision-making at the most local level possible consistent with the principles of federalism.

At *89 FR 4474* EPA has already demonstrated that, if adopted as proposed, the rule would violate 33 U.S.C. § 1251(f). Submittals requesting that the public comment period for the proposed rulemaking be extended on the basis of copious documentation further demonstrate that EPA's proposal exceeds the agency's congressionally delegated authorities for its proposal.[12,13]

At 33 U.S.C. § 1251(g), Authority of States over water, Congress mandated that:

> *It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.*

Here, Congress specifically withholds authority for EPA to interfere with State prerogatives in respect of the States' authority over water rights and water quantities.

Congress also confines EPA here to the role of cooperating with the States and local agencies in the development of comprehensive solutions for pollution control, further emphasizing that these are Tenth Amendment reserved actions that EPA is responsible for supporting, not controlling.

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[12] "*Next, 657 documents were added to the docket on January 23, 2024. Many are marked as confidential business information. Hence, the only way to understand what they contain is to file a Freedom of Information Act request and force EPA to defend the claim of CBI. That process will take in excess of 60 days, let alone the time to analyze the information that may be received in the future …. In sum, this rulemaking significantly exceeds the length and complexity of the average federal rulemaking proposal and warrants longer than the "minimum" 60-day comment period set forth in the Executive Orders cited above. In fact, after further analysis of the Proposed MPP ELGs, the various comprehensive development documents related thereto, and the size and complexity of the docket, the Coalition believes that a significant extension is warranted. The Coalition requests at least a 90-day comment period extension*." - Coalition of Meat and Poultry Products manufacturers, RE: *Request to Extend the Comment Deadline for the Proposed Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category*; Docket No. EPA-HQ-OW-2021-0736. (February 5, 2024).

[13] U.S. Chamber of Commerce, RE: *Request to Extend the Comment Deadline for the Proposed Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category*; Docket No. EPA-HQ-OW-2021-0736. (February 12, 2024)

33 U.S.C. § 1251(g) here also mandates that EPA is to work directly with local agencies (local governments) as government entities that are to be afforded consideration as government-to-government equals as political subdivisions of the States.[14]

- ***Sackett v. EPA*** **clearly defined WOTUS limiting EPA's regulatory reach while preserving state sovereignty over internal affairs.**

The arguments posed in the Federalist Papers to persuade the original states to ratify the Constitution explicitly stated that the powers delegated to the Federal government are few and defined, while those that remain to the States are numerous and indefinite.[15]

> "*In our federal system, the National Government possesses only limited powers; the States and the people retain the remainder*." *Bond v. United States,* 572 U. S. 844, 854 (2014). "*Among those retained powers is the power of a State to "order the processes of its own governance.*" *Alden v. Maine*, 527 U. S. 706, 752 (1999).

The fact that under the U.S. Constitution the advantage is to be on the side of the several States is also exemplified in the coordination and consultation mandates of Federal statutory law. Furthermore, this federalism principle is expressed in Executive Order 13132 of August 4th, 1999, which explicitly calls for deference to State or local governments regarding uncertainty concerning constitutional or statutory authority of the Federal government. Section 2(i) of the order states:

> "*The national government should be deferential to the States when taking action that affects the policymaking discretion of the States and should act only with the greatest caution where State or local governments have identified uncertainties regarding the constitutional or statutory authority of the national government*."

This Executive Order was issued to guarantee the division of governmental authorities between the national government and the States intended by the framers of the Constitution, ensuring that the principles of federalism established by them constrain the executive departments and agencies in the formulation and implementation of policies, and to further the policies of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. § 1501 et seq.). Section 1 of this order defines 'Policies that have federalism implications' and refers to:

> "*Regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on the States, on the relationship between the national government and the States,*

[14] "Much of the Constitution is concerned with setting forth the form of our government, and the courts have traditionally invalidated measures deviating from that form. The result may appear `formalistic' in a given case to partisans of the measure at issue, because such measures are typically the product of the era's perceived necessity. But the Constitution protects us from our own best intentions: It divides power among sovereigns and among branches of government precisely so that we may resist the temptation to concentrate power in one location as an expedient solution to the crisis of the day." - *New York v. United States*, 505 U.S. 144 (1992).

[15] Madison, J. Federalist No. 46.

or on the distribution of power and responsibilities among the various levels of government."[16]

The current MPP ELG rule contemplates extending the EPA's regulatory reach to indirect discharges from certain MPP point sources. There are problems with this approach because of the statutory limits of the CWA, as determined by:

First, reserved and primary authority of states over lands and waters;

Second, what constitutes navigable waters or waters of the United States (WOTUS); and

Third, what constitutes a point source category subject to EPA's rulemaking under the CWA?

First: primary land and water use authority is explicitly reserved by the Constitution to the individual States.

Congress does not have the authority to delegate regulatory powers to the executive departments that would reach into the hearts and corners of our States and local government that subject their laws and policies to a foreign and powerful influence. As demonstrated above we understand that Congress recognized the constitutional limits on its own reach into the reserved powers of the individual States. Congress itself has no enumerated power under the Constitution to intrude into reserved State roles, powers, or authorities, which are therefore non-delegable to the EPA or other executive branch entities.[17]

"*Regulation of land and water use lies at the core of traditional state authority. See, e.g., SWANCC, 531 U. S., at 174 (citing Hess v. Port Authority Trans-Hudson Corporation, 513 U. S. 30, 44 (1994)); Tarrant Regional Water Dist. v. Herrmann, 569 U. S. 614, 631 (2013). An overly broad interpretation of the CWA's reach would impinge on this authority.*" - *Sackett v. EPA* 598 U. S. ____ (2023)

Justices Thomas and Gorsuch filed a concurrence in the *Sackett* decision which sheds light on the historical context of State sovereignty and authority over their waters.

"*Prior to Independence, the Crown possessed sovereignty over navigable waters in the Colonies, sometimes held in trust by colonial authorities …*"[18] *Upon Independence, this sovereignty was transferred to each of the 13 fully sovereign States*. See *Martin v. Lessee of Waddell*, 16 Pet. 367,

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[16] A. Dan Tarlock, *Biodiversity Federalism*, 54 Md. L. Rev. 1315 (1995). "The national government must rely on powers, primarily land-use controls and water-rights administration, that are traditionally and firmly lodged within state and local governments." http://digitalcommons.law.umaryland.edu/mlr/vol54/iss4/7.

[17] *Sacket v. EPA* 598 U. S. ____ (2023) (THOMAS, J., concurring) - "But, critically, the statutory terms "navigable waters," "navigable waters of the United States," and "waters of the United States" were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce. The CWA was enacted, and must be understood, against that key backdrop."

[18] See R. Adler, *The Ancient Mariner of Constitutional Law: The Historical, Yet Declining Role of Navigability*, 90 Wash. U. L. Rev. 1643, 1656–1659 (2013); R. Walston, *The Federal Commerce and Navigation Powers: Solid Waste Agency of Northern Cook County's Undecided Constitutional Issue*, 42 Santa Clara L. Rev. 699, 721 (2002) (Walston).

> 410 (1842)" "*Thus, today, States enjoy primary sovereignty over their waters, including navigable waters—stemming either from their status as independent sovereigns following Independence, ibid., or their later admission to the Union on an equal footing with the original States*," see *Lessee of Pollard v. Hagan*, 3 How. 212, 230 (1845)[19]

The other limiting factor that the Court pointed to with respect to EPA's reach under the CWA is the primary responsibility and right of individual states to manage and address land and water resources.

> "*Finally, it is also instructive that the CWA expressly "protect[s] the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution" and "to plan the development and use . . . of land and water resources." §1251(b). It is hard to see how the States' role in regulating water resources would remain "primary" if the EPA had jurisdiction over anything defined by the presence of water*." See *County of Maui v. Hawaii Wildlife Fund*, 590 U. S. ___, ___ (2020) (slip op., at 7); Rapanos, 547 U. S., at 737 (plurality opinion).[20]

"The Supreme Court "*require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property*."" - *United States Forest Service v. Cowpasture River Preservation Assn*., 590 U. S. 140 S.Ct. 1837,15-1584 (2020) (slip op., at 15–16)

Second: what constitutes the Waters of The United States (WOTUS)?

The *Sackett* case provides clarity in defining WOTUS and what constitutes navigable waters of the United States, specifically rejecting EPA's claim of broad sweeping authority under the CWA. The Court stated that the "*meaning of "waters of the United States" under the EPA's interpretation remains "hopelessly indeterminate.*"" *Sackett*, 566 U. S., at 133 (ALITO, J., concurring); accord, Hawkes Co., 578 U. S., at 602 (opinion of Kennedy, J.).

The Supreme Court in *S.D. Warren Co. v. Maine Bd. of Envtl. Protection*, 547 U.S. 370, 380–81 (2006) explained:

> "*[T]he National Pollutant Discharge Elimination System [requires] a permit for the 'discharge of any pollutant' into the navigable waters of the United States, 33 U.S.C. § 1342(a). The triggering statutory term here is not the word 'discharge' alone, but 'discharge of a pollutant,' a phrase made narrower by its specific definition requiring an 'addition' of a pollutant to the water*."

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[19] M. Starr, *Navigable Waters of the United States—State and National Control*, 35 Harv. L. Rev. 154, 169–170 (1921).

[20] "*Finally, it is difficult to see how the States' "responsibilities and rights" in regulating water resources would remain "primary" if the EPA had such broad jurisdiction*. §1251(b). Pp. 14–18." *Sacket v. EPA* 598 U. S. ____ (2023).

Likewise, several circuit courts have held that the scope of the EPA's authority under the CWA is strictly limited to the discharge of pollutants into navigable waters.[21] So the question remains, what constitutes navigable waters or WOTUS?[22]

The Supreme Court clarified this stating,

> "*In sum, we hold that the CWA extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters. Rapanos,* 547 U. S., at 742, 755 (plurality opinion) (emphasis deleted); see supra, at 22."[23]

The EPA has interpreted WOTUS in such an indeterminate fashion allowing *adjacent wetlands* to include ephemeral puddles or streams on crop land for example. The Supreme Court rejected such broad interpretation stating,

> "*Instead, the reference to adjacent wetlands in §1344(g)(1) must be harmonized with "the waters of the United States," which is the operative term that defines the CWA's reach. Because the "adjacent" wetlands in §1344(g)(1) are "includ[ed]" within "waters of the United States," these wetlands must qualify as "waters of the United States" in their own right, i.e., be indistinguishably part of a body of water that itself constitutes "waters" under the CWA*."

… and that,

> "*To determine when a wetland is part of adjacent "waters of the United States," the Court agrees with the Rapanos plurality that the use of "waters" in §1362(7) may be fairly read to include only wetlands that are "indistinguishable from waters of the United States." This occurs only when wetlands have "a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands." 547 U. S., at 742*."

… and conclusively Justice Thomas in his concurrence with Gorsuch joining states:

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[21] *Nat'l Pork Producers Council v. Envtl. Prot. Agency*, No. 08-61093 (5th Cir. 2008).

[22] *Sacket v. EPA* 598 U. S. ____ (2023) (THOMAS, J., concurring) "And the Court correctly holds that the term "waters" reaches "'only those relatively permanent, standing or continuously flowing bodies of water "'forming geographic[al] features'" that are described in ordinary parlance as "streams, oceans, rivers, and lakes."'" Ante, at 14 (quoting Rapanos v. United States, 547 U. S. 715, 739 (2006) (plurality opinion)); "But, critically, the statutory terms "navigable waters," "navigable waters of the United States," and "waters of the United States" were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce."

[23] "*But what wetlands does the CWA regulate? Section 1344(g)(1) cannot answer that question alone because it is not the operative provision that defines the Act's reach. See Riverside Bayview, 474 U. S., at 138, n. 11. Instead, we must harmonize the reference to adjacent wetlands in §1344(g)(1) with "the waters of the United States," §1362(7), which is the actual term we are tasked with interpreting. The formulation discussed above tells us how: because the adjacent wetlands in §1344(g)(1) are "includ[ed]" within "the waters of the United States," these wetlands must qualify as "waters of the United States" in their own right. In other words, they must be indistinguishably part of a body of water that itself constitutes "waters" under the CWA. See supra, at 14.*"

> "*But, critically, the statutory terms "navigable waters," "navigable waters of the United States," and "waters of the United States" were still understood as invoking only Congress' authority over waters that are, were, or could be used as highways of interstate or foreign commerce. The CWA was enacted, and must be understood, against that key backdrop.*" *Sacket v. EPA* 598 U. S. ____ (2023) (THOMAS, J., concurring)

Third: what constitutes a point source discharge subject to EPA regulation?[24]

The EPA's issuance of guidance through the first decade of the 21st century directed its reach well beyond the statutory authorities delegated to the EPA. A multi-federal-circuit[25] court decision wherein the petitioners were granted in part provides some clarity which relates to EPA's currently proposed rulemaking. The 5th Circuit issued the multi-circuit decision vacating provisions of a 2008 EPA rule that required concentrated animal feeding operations (CAFOs) proposing to discharge to apply for an NPDES permit.

Over 30 years ago, in the notable case *Natural Resources Defense Council, Inc. v. Environmental Protection Agency*, 859 F.2d 156 (D.C. Cir. 1988), the court explained that the CWA:

> "… *does not empower the agency to regulate point sources themselves; rather, EPA's jurisdiction under the operative statute is limited to regulating the discharge of pollutants*."

The Court signified that it is clear that the CWA only allows EPA to regulate the discharge of pollutants. In *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*[26] the Second Circuit in examining the text of the CWA noted:

> "*(1) 33 U.S.C. § 1311(a) of the CWA "provides . . . [that] the discharge of any pollutant by any person shall be unlawful," (2) section 1311(e) of the CWA provides that "[e]ffluent limitations . . . shall be applied to all point sources of discharge of pollutants," and (3) section 1342 of the Act gives NPDES authorities the power to issue permits authorizing the discharge of any pollutant or combination of pollutants." Waterkeeper,* 399 F.3d at 504.

Accordingly, the Second Circuit concluded that,

> "… *in the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory*

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[24] See *Nat'l Pork Producers Council v. Envtl. Prot. Agency*, No. 08-61093 (5th Cir. 2011) where these cases are discussed and the multi-circuit decision clarified that if there is no discharge, there is no point source.

[25] Subsequently, the Farm Petitioners jointly with the Poultry Petitioners filed petitions for review of the 2008 Rule with this court and the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. - The "Farm Petitioners" are the National Pork Producers Council, American Farm Bureau Federation, United Egg Producers, North Carolina Pork Council, National Milk Producers Federation, Dairy Business Association, Inc., Oklahoma Pork Council, National Chicken Council, and U.S. Poultry & Egg Association. The "Poultry Petitioners" are the National Chicken Council, and U.S. Poultry & Egg Association. Although these parties are also "Farm Petitioners," the arguments made in the Poultry Petitioners' brief apply only to them and not the other Farm Petitioners.

[26] *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005).

violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." Id. at 505.

The Second Circuit's decision is clear: without a discharge, the EPA has no authority and there can be no duty to apply for a permit.[27]

"*The Second Circuit explained that the plain language of the CWA "gives the EPA jurisdiction to regulate and control only actual discharges—not potential discharges, and certainly not point sources themselves." Id. at 505.*"

"*These cases leave no doubt that there must be an actual discharge into navigable waters to trigger the CWA's requirements and the EPA's authority. Accordingly, the EPA's authority is limited to the regulation of Concentrated Animal Feeding Operations (CAFOs) that discharge. Any attempt to do otherwise exceeds the EPA's statutory authority. Accordingly, we conclude that the EPA's requirement that CAFOs that "propose" to discharge apply for an NPDES permit is ultra vires and cannot be upheld*."[28]

In the present case if EPA can impose pretreatment systems to indirect discharge facilities, the limiting line which draws EPAs regulatory reach under the CWA is the discretion of the presidents' appointed officials, not Constitutional limitations and Congressional law.[29] This is a growing concern as this is not an isolated issue within executive branch departments and agencies.

5. EPA uses novel metrics and methodologies to inform its economic analysis for this proposal and fails to account for its cumulative regulatory impacts.

The American legal scholar Roscoe Pound in his work "The Rise of the Servile State and its Consequences" states:

"*Clear enough from American as well as from English experience, that the zeal of administrative agencies to achieve the immediate end they see before them leads them to see their function out of focus and to assume that constitutional limitations and guaranteed individual rights must give*

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[27] *Waterkeeper Alliance, Inc. v. Environmental Protection Agency*, 399 F.3d 486 (2d Cir. 2005)

[28] *Nat'l Pork Producers Council v. Envtl. Prot. Agency*, No. 08-61093 (5th Cir. 2011); "Relevant here, the definition of point source excludes "agricultural stormwater discharges." Id. § 1362(14). This occurs, for example, when rainwater comes in contact with manure and flows into navigable waters. See, e.g., *Fishermen Against Destruction of Env't, Inc. v. Closter Farms, Inc.*, 300 F.3d 1294, 1297 (11th Cir. 2002) (citing Concerned Area Residents for the Env't v. Southview Farm, 34 F.3d 114, 121 (2d Cir. 1994) (holding that "agricultural stormwater discharge" exemption applies to any "discharges [that] were the result of precipitation")).

[29] "*There is no undefined residuum of power*," said President William Howard Taft, "*which the president can exercise because it seems to him to be in the public interest . . . His jurisdiction must be justified or vindicated by the affirmative constitutional or statutory provisions, or it does not exist.*" - William Howard Taft, Our Chief Magistrate and His Powers 138-45 (1916), quoted and cited in James L. Hirsen, Government by Decree 7 (1999); ". . .When an agency claims to have found a previously "unheralded power," its assertion generally warrants "a measure of skepticism." Utility Air, 573 U. S., at 324."

way before their zealous efforts to achieve what they see as a paramount purpose of government."

- ***EPA is arbitrarily using ecological services, environmental justice criteria, and artificial intelligence to monetize projected benefits.***

The Agency justifies this proposal partly on the grounds of "environmental justice," a term which the EPA defines as,

> "*…the fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies*."

"Fair treatment" is defined such that:

> "*…no group of people should bear a disproportionate burden of environmental harms and risks, including those resulting from the negative environmental consequences of industrial, governmental, and commercial operations or programs and policies.*"[30]

EPA asserts that these principles require a novel regulatory framework for MPP plants since low income and minority communities are disproportionately impacted by the effluent they produce. This position has several major flaws:

> *First*, the Agency has failed to establish that MPP facilities which engage in indirect discharge disproportionately affect low income and minority populations;[31]
>
> *Second*, the Agency's policy proposal carries an underappreciated economic and environmental price. Ironically, that price will be disproportionately paid by the very people about whom the Agency purports to be concerned; and
>
> *Third*, the Agency's use of racial metrics in its analysis is both beyond the scope of its statutory authority and its legislative mandate and is precluded by Title VI of the Civil Rights Act of 1964.

The Agency states in the *Federal Register* notice that it:

> "*… conducted screening analyses of areas with MPP facilities and found 82% of MPP facilities that directly discharge wastewater to waters of the U.S. are within one mile of census block groups with demographic or environmental characteristics of concern*." (88 FR 4481).

EPA then uses its findings to suggest that "*revised wastewater regulations may benefit these communities*." That the Agency would present demographic data on those who live near direct discharge MPP plants is a problem since they consider alternatives that regulate indirect discharges.

The Agency later notes that it,

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[30] Environmental Justice-Related Terms as Defined Across the PSC Agencies. May 13, 2013.

[31] Was the MPP facility placed into an existing community, or did the community grow around the MPP?

> "… *conducted a literature review to identify studies, data, and research describing the environmental and human health impacts of MPP facilities on low-income individuals and racial/ethnic minorities, focusing primarily on facility discharges of pollutants to water*." (88 FR 4512)

These studies indicate:

> "… *that MPP facilities are often located in rural areas with multiple large facilities in the same county or region, and that half of the communities surrounding slaughterhouses in the U.S. contain at least 30 percent of residents living below the poverty line, which is over twice the national average*."

However, the literature cited to support this contention exclusively concerns direct discharge facilities. Meanwhile, the Agency recounted its:

> "… *demographic analysis of communities served by public water systems looked at communities (PWSs) either with a source water intake within 25 miles downstream of an MPP wastewater outfall (direct PWS) or buying water from a direct PWS (buying PWS)*." (FR pg. 4513)

Why this information would be relevant to a proposal pertaining to indirect discharge facilities remains unexplained.

EPA fails to demonstrate that effluent from indirect discharge MPP facilities disproportionately impacts low income or minority communities. However, these communities will be harmed by rising meat prices, something the Agency has given insufficient consideration to. That meat will become less affordable is not in dispute, as EPA concedes as much in chapter 6.4 of its RIA by acknowledging how additional compliance costs will be passed on to consumers. Even if these new expenses prove to be relatively modest, the novel precedent of regulating indirect discharges from MPP plants will open the door to more stringent rulemakings with ever greater costs. Meanwhile, chapter 6.5 does little to address how consumers will be affected by the industry consolidation that these compliance costs will encourage.

- ***Entry barriers into the MPP industry increase costs and availability of animal protein to the economically disadvantaged.***

The benefit cost analysis states:

> "*The EPA assumed an inelastic supply of MPP, meaning that the regulatory options do not affect the quantity of goods sold by the industry*."

This is despite the RIA admitting that:

> "*Barriers to entry protect incumbent firms and restrict competition in a market, they can contribute to the existence of monopolies and oligopolies or give incumbent firms large amounts of market power.*"

It further notes that:

> "*Since 2000, establishment exit rates have exceeded entry rates in the MPP industry," something which "is consistent with the data that shows the overall*

decline in the number of establishments in the MPP industry." "*… low entry rate, along with the declining number of total MPP-related establishments, may indicate that consolidation has been taking place in the industry.*"

The Agency goes on to observe that:

"*Both the entry and exit rates are lower for the MPP industry than the overall U.S. average" and this "could be an indication that there are barriers to entry in the MPP industry*."

That the Agency's proposal would make such barriers more formidable and thus accelerate industry consolidation is later confirmed, with the degree of acceleration depending on which regulatory option is pursued.

The end result of such consolidation would be reduced competition among suppliers and higher meat prices for consumers, something which has serious health ramifications.[32] The Department of Health and Human Services' Office of Disease Prevention and Health Promotion (ODPHP) stressed the importance of dietary protein in a 2021 article, which noted that, "*eating enough protein helps prevent the loss of lean muscle mass*" among the elderly before stressing how "*older adults often eat too little protein*." Nor are such concerns limited to seniors, as the ODPHP also emphasizes the need for children to consume sufficient protein and points out that their protein needs increase over time.

Although plant-based protein sources are available, research suggests that these are often inferior to protein derived from animals. A 2004 paper published by the *Journal of Sports Science & Medicine* stated that:

"*… [a]nimal sources provide a complete source of protein (i.e. containing all essential amino acids), whereas vegetable sources generally lack one or more of the essential amino acids.*"[33,34]

EPA has failed to adequately address the potential impacts of further consolidation of an already massively centralized industry which will remove alternatives to both consumers (especially lower income) and to producers. A significant proportion of the global population already falls short of the minimum nutritional adequate food basket driven in part by high costs for protein. As stated in a publication of April 2023:

"*Independent of whether a protein (and nutrients) gap exists or not, in 2017 a minimum nutritional adequate food basket was financially out of reach for three billion people in the world, or 37% of the total population. This percentage is likely*

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[32] Johnston, B., DeSmet, S., Leroy, F., Mente, A., and Stanton, A. Non-communicable disease risk associated with red and processed meat consumption—magnitude, certainty, and contextuality of risk? *Animal Frontiers*, Volume 13, Issue 2, April 2023. Pages 19–27. https://doi.org/10.1093/af/vfac095.

[33] The Dublin Declaration of Scientists on the Societal Role of Livestock. *Animal Frontiers*, Volume 13, Issue 2, April 2023, Page 10. https://doi.org/10.1093/af/vfad013.

[34] Leroy, F., Smith, N.W., Adesogan, A.T., Beal, T., Iannotti, L., Moughan, P.J., and Mann, N. The role of meat in the human diet: evolutionary aspects and nutritional value. *Animal Frontiers*, Volume 13, Issue 2, April 2023, Pages 11–18. https://doi.org/10.1093/af/vfac093; Ederer, P. and Leroy, F. - The societal role of meat—what the science says. *Animal Frontiers*, Volume 13, Issue 2, April 2023, Pages 3 8. https://doi.org/10.1093/af/vfac098.

> *to have risen by 2022. The situation is mostly driven by the high costs for protein and other nutrient rich foods.*"

… and that:

> "*The quantity and affordability gap calls for an expansion of production of all protein and nutrient-dense sources, including from animals such as meats, dairy, eggs, and fish, and at more affordable prices to the final consumer*."[35]

While making quality protein more expensive hurts those of every background, the harm will be most acutely felt by low income and minority populations. This is evident from figures provided by the U.S. Census Bureau, which revealed that in 2022, the percentage of African Americans, Latinos, and Native Americans living in poverty was 17.1%, 16.9%, and 25%, respectively. Those totals are between double and triple the poverty rates seen among non-Hispanic whites and Asians. It is obvious then that just as poverty is unevenly distributed, so too will be the damage inflicted by escalating meat costs as animal protein becomes less available to those who can already least afford it.

Nor is the harm limited to Americans, for while the agency is quick to cite global concerns surrounding climate change as justification for its proposal, the damage wrought by rising world meat prices is left unaddressed. Further, EPA assumes that the availability of meat from foreign sources will remain unchanged; this assumption is curious given how the European Commission announced late last year that it expects growing regulatory burdens to negatively impact both livestock and feed production.

All of this suggests that even if one were to accept that environmental justice principles should guide Agency rulemaking, this proposal runs contrary to those principles. But more fundamentally, the Agency's use of racial metrics is both beyond the scope of its legislative mandate and precluded by Title VI of the Civil Rights Act of 1964.

That point was made clear last year by Western District of Louisiana Judge James D. Cain Jr. In *Louisiana v. EPA 2:23-CV-00692,* where he ruled that neither the Agency nor the Department of Justice may impose "*any disparate-impact-based requirements against the State or any State agency*" in civil rights cases under Title VI of the Civil Rights Act.

> "*Where an action would have a disparate impact, a decision-maker is often compelled to act intentionally on the basis of racial considerations to avoid the disparate impact … thus disparate impact regulations require decision makers 'to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes*," Cain pointed out.

… and that:

> "*The public interest here is that governmental agencies abide by its laws, and treat all of its citizens equally, without considering race,"*

… concluding:

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[35] Ederer, P., Baltenweck, I., Blignaut, J.N., Moretti, C., Tarawali, S. Affordability of meat for global consumers and the need to sustain investment capacity for livestock farmers**.** *Animal Frontiers*, Volume 13, Issue 2, April 2023. Pages 45–60. https://doi.org/10.1093/af/vfad004

"To be sure, if a decision maker has to consider race, to decide, it has indeed participated in racism."

While that holding may not directly concern the issue at hand, it does illustrate how EPA's use of racial metrics when evaluating matters of environmental justice is both alien to America's civil rights tradition and incompatible with federal law.

- ***EPA use of artificial intelligence (AI) in its justification for the proposed rulemaking***

Federal agencies are among early adopters of artificial intelligence (AI) technologies. In the context of the proposed rulemaking, AI would assist in building models and rapidly processing large datasets at landscape and watershed scales. AI systems are not, however, without their risks and their results must not be uncritically accepted in justification for policy development. The President signed Executive Order 14110, *Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence* on October 30, 2023. It acknowledges the ubiquity of AI tools and directs agencies to adopt them ***with safeguards in place***.

For purposes of E.O. 14110, these scoping comments, and the proposed actions, the definition of "artificial intelligence" is found at 15 U.S.C. § 6401(3):

"***§ 6401. Definitions***

In this chapter: …

(3) Artificial intelligence

The term "artificial intelligence means a machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments. Artificial intelligence systems use machine and human-based inputs to–

(A) perceive real and artificial environments;

(B) abstract such perceptions into models through analysis in an automated manner; and

(C) use model inference to formulate options for information or action."

To the extent that information developed for the proposed rulemaking was generated through the use of systems qualifying as AI, and particularly those AI systems capable of machine learning (applications of AI characterized by providing systems the ability to automatically learn and improve on the basis of data or experience, without being explicitly programmed). We expect EPA to disclose whether the information was developed with the assistance of AI systems and whether or not those systems are capable of machine learning.

While we realize that the mandates of E.O. 14110 have not been in place long enough for EPA to be fully compliant with, the agency is already well aware of the limitations of AI tools at their present level of maturity, and that robust risk management approaches to controlling for AI hallucination, AI bias, and other problematic AI artifacts are essential to ensure even the most minimal level of scientific integrity. We are concerned that the application of AI by executive agencies in their rule making process lack quality control procedures. NEPAs interdisciplinary approach to scientific information contemplates a

human based assessment process for evaluating economic, environmental, and other criteria to understand costs and benefits.

If EPA used AI in developing the information for review, how did EPA assess for adverse AI outcomes in the context of its use to justify the proposed rulemaking. We do not believe AI meets Information Quality Act standards, and any agency that would seek to use AI assisted information needs to prove compliance in the use of such programs.

- ***EPA Impacts Analysis fails to address cumulative regulatory impacts on the meat products industry.***[36]

  An Environmental Assessment (EA) is inadequate for assessing the direct and indirect cumulative regulatory impacts of this proposal on the domestic livestock industry. An EA which includes alternatives that would extend EPA's regulatory reach to indirect discharges of MPP facilities poses far more extensive impacts on the industry as a whole than addressed by the agency through its EA. An agency claiming a before unheralded regulatory authority that affects the balance of power between State and Federal governments while creating barriers for entry into the market is of great significance.[37]

  There are mounting pressures within government programs, regulations, and policies, in conjunction with international and domestic financial uncertainty to force market transitions away from fossil fuel-based energy sources and traditional agricultural practices. This is evidenced by a recent letter[38] issued by twelve state agriculture commissioners to six large banks asking for information regarding their involvement in the Net-Zero Banking Alliance and if and how the United Nations Environmental Program (UNEP) played a role in guiding and reviewing their climate targets for the agriculture sector. The letter addresses the impacts of such an alliance to accomplish extensive greenhouse gas (GHG) reductions on the American farming and livestock industries stating:

  > "*Due to the potential impacts to agriculture, we are seeking more information regarding what appear to be troubling environmental commitments by your banks that target our farmers, ranchers, and agriculture producers, with grave consequences for consumers and that undermine the security of our food supply.*"

  … and that:

  > "*Implementing these commitments would have severe consequences for American farmers—including cutting America's beef and livestock consumption in half,*[39]

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36 2024-02-07-Net-Zero-Climate-Control-Policies-Will-Fail-the-Farm-policy-report.pdf (buckeyeinstitute.org)

37 "...We presume that 'Congress intends to make major policy decisions itself, not leave those decisions to agencies.'" *United States Telecom Assn. v. FCC,* 855 F. 3d 381, 419 (CADC 2017); . . .it is unlikely that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" Ante, at 18–20 (quoting Utility Air, 573 U. S., at 324).

38 Joint_Ag_Officials_NZBA_Letter_FINAL.pdf (carolinajournal.com). January 29, 2024.

39 Ceres, The Investor Guide to Climate Transition Plans in the U.S. Food Sector. (May 2022), ("[G]lobal per capita meat consumption must be reduced to around 1.5 burgers per person per week by 2050 to align with a 1.5°C scenario."); Richard Waite et al., 6 Pressing Questions About Beef and Climate Change, Answered, World Resources Intitute. (Mar. 7, 2022), ("1.5 burgers per person per week [is] about half of current U.S. levels").

switching to inefficient electric farm equipment,[40] *and moving away from the nitrogen fertilizer necessary for American agriculture to thrive.*[41] *We are deeply troubled that your banks have given the UN Environment Programme (UNEP) authority to "review" and "monitor" your banks' climate targets for "consistency" with UN criteria, especially given the UNEP's leading role in inciting Sri Lanka to adopt its disastrous fertilizer ban."*[42]

On February 7, 2024, the Buckeye Institutes Economic Research Center published *NET-ZERO CLIMATE-CONTROL POLICIES WILL FAIL THE FARM*[43] which was a report based on a model corn farm intended to assess the true costs that American farms and households will likely pay for the present administrations net-zero policies and objectives. The executive summary states:

"*Federal policymakers are pursuing expensive climate-control and emissions policies that have largely failed in Europe—and the American farm and household will be required to pay for them.*"

… and that:

"*… the Biden administration used executive power to restrict oil and natural gas supply, make chemical feedstocks more expensive to buy and produce, and enlisted the Securities Exchange Commission (SEC) to require new "environmental, social, governance" or ESG reports to track carbon emissions from farm to table. These federal initiatives and requirements will prove expensive and economically destructive here—just as they have been in Europe …*"

"*Complying with net-zero emissions policies and corporate ESG reporting requirements will increase prices of farm inputs, the costs of which will ultimately be passed onto consumers at grocery stores and restaurants.*[44] *Farmers will see costs rise by at least 34 percent.*"

As pointed out, we do not have to speculate on the impacts these policies will have on agricultural producers. The EU is an increasingly volatile case example to consider if we are to look to other countries to understand the full extent to which such policies*:*

"… systematically pursued, are liable to impose restrictions on the farmer and turn him into the most regimented and supervised of all producers."[45]

The failure of executive departments and agencies to take into consideration the cumulative regulatory impacts of their actions on the private investment-backed expectations of the

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40 McKinsey & Co., Agriculture and Climate Change, (2020), see Eleanor McCrary, Fact Check: False Claim that John Deere Is Rolling Out All-Electric Combines, Large Tractors, USA TODAY (Sept. 29, 2022), (explaining infeasibility).

41 Climate Action 100+. Global Sector Strategies: Recommended Investor Expectations for Food and Beverage , 27–28 (2021)

42 UN Environment Programme, Finance Initiative (UNEP FI). Principles for Responsible Banking.

43 Trevor W. Lewis and M. Ankith Reddy, NET-ZERO CLIMATE-CONTROL POLICIES WILL FAIL THE FARM, Economic Research Center at the Buckeye Institute February 7, 2024

44 Joner, Emily and Toman, Michael A. *Agricultural Greenhouse Gas Emissions 101*. Resources for the Future, September 8, 2023.

45 Hayek, F.A. (2011). *The Constitution of Liberty: The Definitive Edition*. Chapter 23 *Agriculture and Natural Resources*, p. 484-487. University of Chicago Press.

American people is subject to review by the courts under the Administrative Procedure Act (APA) (5 U.S.C. § 500 et seq.) The EPA MPP Affluent guidelines is one of many rules which seek to further regulate the agriculture industry.

There is already an overly centralized meat packing industry. The proposed EPA rulemaking will further constrict the bottleneck of the major packers, disrupting potential for a competitive marketplace, restricting alternatives to the consumer, and increasing leverage to manipulate producers to meet unrealistic standards. This inevitably creates increased costs wherein the surviving businesses pass those costs to the consumer, effectively imposing a hidden regulatory tax.

6. Conclusion

There is no pathway for EPA to regulate indirect discharge facilities without illegitimately intruding into State and local government prerogatives, reaching beyond the navigable waters of the U.S., and establishing "point sources" where none exist under the CWA.

We suggest that more broadly distributing smaller MPP facilities throughout the United States would better serve livestock and poultry producers at more localized levels. Smaller distributed MPP facilities would result in smaller footprint discharges, the vast majority of which would not be discharging directly to waters of the United States. A decentralized MPP industry could be more readily specialized and tailored to satisfy local market demand while producing products in demand more generally and accomplish sustained yield of meat protein to the American people and the world.

We are also concerned about the cumulative regulatory impacts on the domestic livestock industry by this EPA rule and an associated whole-of-government whole-of-economy climate agenda being implemented through virtually every executive department. These rules and regulations pose unassessed impacts on our natural resource industries with highly speculative projected benefits.

Based on the contents herein, we call on the EPA to withdraw this rule as it claims a before unheralded power without a clear statement of law or rationale.

Sincerely,

KNRC Executive Director
Tracey Barton