

**BEFORE THE UNITED STATES DEPARTMENT OF AGRICULTURE
PETITION FOR EMERGENCY RULEMAKING**

**ANIMAL LEGAL DEFENSE FUND,
ANIMAL EQUALITY, ANIMAL OUTLOOK,
ANIMAL PLACE, ASSOCIATION OF
IRRITATED RESIDENTS, CENTER FOR
BIOLOGICAL DIVERSITY, COMPASSION IN
WORLD FARMING USA, FARM FORWARD,
FARM SANCTUARY, THE HUMANE LEAGUE,
JOHNS HOPKINS CENTER FOR A LIVABLE
FUTURE, MERCY FOR ANIMALS, PEOPLE FOR
THE ETHICAL TREATMENT OF ANIMALS, WORLD
ANIMAL PROTECTION, and WOODSTOCK FARM
SANCTUARY,**

Petitioners.

Docket No. _____

Filed With:

SONNY PERDUE

in his official capacity as Secretary,
United States Department of Agriculture.



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EMERGENCY RULEMAKING PETITION

I. INTRODUCTION

For the first time in history, the animal agriculture industry is mass-killing healthy farmed animals not in slaughterhouses, but in the concentrated animal feeding operations (CAFOs) where they are confined for the duration of their short lives. To protect its profit margins, the industry is using exceptionally cruel methods to carry out these mass-killings: ventilation shutdown and water-based foam. The United States Department of Agriculture (USDA) has the power—and the responsibility—to act.

The undersigned organizations petition USDA—pursuant to the First Amendment¹ and the Administrative Procedure Act (APA)²—to address COVID-19 related “depopulation”³ by **(1)** preventing USDA COVID-19 relief funds, resources, and/or any other forms of support from facilitating or compensating for the costs of animal “depopulation” by ventilation shutdown or water-based foam; **(2)** withhold all USDA COVID-19 relief funds, resources, and/or any other forms of support from integrators, processors, and meatpackers that order or permit “depopulation” by ventilation shutdown or water-based foam; **(3)** create affirmative and enforceable “depopulation” standards—at least as protective as the American Veterinary Medical Association Guidelines for the Euthanasia of Animals—and condition USDA COVID-19 relief funds, resources, and/or any other forms of support on compliance with those standards; and **(4)** establish an online database of recipients of USDA COVID-19 relief funds, resources, and/or any other forms of support.⁴

¹ U.S. CONST. Amend. I. The right to “petition for a redress [of] grievances [is] among the most precious of the liberties safeguarded by the Bill of Rights.” *United Mine Workers v. Ill. State Bar Assn*, 389 U.S. 217 (1967).

² 5 U.S.C. § 553(e) (2018).

³ In the context of COVID-19, “depopulation” is an animal agriculture industry euphemism for mass extermination of an entire flock or herd of healthy animals—who are no longer profitable to the industry—by methods that include ventilation shutdown and water-based foam. See Matthew Scully, *The Human Cost of ‘Culling’ Livestock and ‘Depopulating’ Farms*, NAT. REV. (May 7, 2020), <https://www.nationalreview.com/2020/05/coronavirus-pandemic-human-cost-of-culling-livestock-depopulating-farms/>. For clarity’s sake, Petitioners use “depopulation” as defined by the American Veterinary Medicine Association and adopted by USDA and other government actors. Nonetheless, Petitioners by no means condone the use of such euphemisms to obscure the reality of and reasons for these unprecedented mass exterminations of healthy animals in CAFOs.

⁴ This Petition follows the emergency petition regarding disposal practices, which the Center for Biological Diversity, Earthjustice, Natural Resources Defense Council, and several Petitioners filed on June 29, 2020.

II. PETITIONERS

The **Animal Legal Defense Fund** (ALDF) is a national nonprofit membership organization based in California with over 300,000 members and supporters nationwide. ALDF's mission is to protect the lives and advance the interests of animals through the legal system. Advocating for effective oversight and regulation of the animal agriculture industry across the United States is one of ALDF's central goals, which it achieves by filing lawsuits, administrative comments, and rulemaking petitions to increase legal protections for animals; supporting strong animal protection legislation; and fighting against legislation, like state "ag gag" laws, that is harmful to animals and communities surrounding CAFOs. Through these efforts, ALDF seeks to ensure transparency in the CAFO system, which is paramount to its ability to protect farmed animals and ALDF members from CAFOs' immensely harmful effects.

Animal Equality is a nonprofit farmed animal protection organization with offices in eight countries, including the United States. Animal Equality works with individuals and institutions both public and private to build towards a world where all animals are protected and respected. The organization advances this goal through investigations, corporate campaigns, consumer education, and legislative and judicial actions.

Animal Outlook (formerly Compassion Over Killing) is a non-profit, tax-exempt 501(c)3 organization whose mission is to change the world for animals. Animal Outlook works to challenge the status quo of animal agribusiness, expose the truth, deliver justice, revolutionize food systems, and empower others to stand up for animals by leaving them off their plates. In furtherance of its mission, Animal Outlook advocates against government policies that encourage or allow cruelty to farmed animals, conducts public education on the realities of industrialized animal agriculture, coordinates public campaigns to encourage the adoption of vegan diets, and conducts undercover investigations to expose cruelty at industrialized factory farms.

Founded in 1989, **Animal Place** is one of the oldest and largest sanctuaries for farmed animals in the United States. Animal Place is a sanctuary and animal rights organization promoting the complete protection of farmed animals. Animal Place has two facilities: a 600-acre sanctuary in Grass Valley, CA that serves as an education center and permanent safe haven for farmed animals, and a 12-acre Rescue and Adoption Center in Petaluma, CA. The Rescue and Adoption Center provides a temporary home for adoptable farmed animals, with a special emphasis on chickens from the egg industry. Animal Place has saved over 31,000 lives through rescue and adoption work. Animal Place strives to create meaningful change for farmed animals through advocacy and education. Thousands of visitors flock to the sanctuary each year to learn more about animals and the industries

they were rescued from. Animal Place has been recognized by Great Nonprofits as a top-rated organization for the past five years. Animal Place's work can be followed at Animalplace.org and on social media platforms [Facebook](#), [Instagram](#), [Twitter](#) and [YouTube](#).

The **Association of Irrigated Residents (AIR)** is a nonprofit, public interest organization based in California with members in Kern, Tulare, Kings, Fresno, and Stanislaus Counties. AIR formed in 2001 to advocate for clean air and environmental justice in the San Joaquin Valley.

The **Center for Biological Diversity (Center)** is a nonprofit environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center has more than 1.7 million members and online activists committed to the protection and restoration of endangered species and wild places. For 26 years, the Center has worked to protect imperiled plants and wildlife, open space, air and water quality, and overall quality of life for people and animals from toxic threats such as industrial agriculture.

Compassion in World Farming USA is a global farmed animal protection organization that campaigns peacefully to end factory farming and replace it with a food system that is compassionate, fair, and sustainable for all. Compassion USA engages with the world's leading food companies to create and adopt meaningful animal welfare policies, while tracking progress against those commitments to ensure compliance. By inspiring change through prestigious awards, educating increasingly concerned consumers on food and farming practices, and supporting meaningful public policy, Compassion USA works tirelessly towards a better future for animals, people, and the planet. Visit www.ciwf.com to learn more.

Farm Forward, founded in 2007 as the first organization exclusively dedicated to ending factory farming, implements innovative strategies to promote conscientious food choices, reduce farmed animal suffering, and advance sustainable agriculture.

Farm Sanctuary is a 501(c)(3) nonprofit organization with 1.2 million members and constituents nationwide. Founded in 1986, Farm Sanctuary works to combat the abuses of animal agriculture, advocate for institutional reforms, and encourage a new understanding of farm animals through education and public awareness. The organization provides lifelong care for rescued farm animals at sanctuary locations in New York and California, and advocates for the protection of farm animals and the promotion of a just and compassionate food system through ballot initiatives, state and federal legislation, litigation, petitions for agency rulemaking, and corporate and consumer outreach.

The **Humane League** is a nonprofit animal protection organization working to end the abuse of animals raised for food. With nearly 300,000 supporters across the United States, The Humane League works with food companies to create and implement animal welfare policies to reduce animal suffering, works to enact legislation to reduce animal suffering, and works to educate the public about farm animal issues.

The **Johns Hopkins Center for a Livable Future** (CLF) is based at the Bloomberg School of Public Health in Johns Hopkins University's Department of Environmental Health and Engineering. CLF does research, education and advocacy at the intersection of food production, public health and the environment. Since 1996, the Center has had a primary focus on the impact of large-scale animal operations on public health and the environment. A report, by the Pew Commission on Industrial Farm Animal Production, *Putting Meat on the Table: Industrial Farm Animal Production in the United States*, found that industrial food animal operations represent an unacceptable level of threat to public health and the environment and depress economic activity in the communities where those operations are located. CLF was the principal investigator for the Pew Commission, and growing concerns since the release of this report in 2008 motivated CLF to lead a moratorium resolution effort approved last year by the American Public Health Association to limit the expansion of existing operations or the establishment of new operations until public health concerns are addressed.

Mercy for Animals, Inc. (MFA) is a tax-exempt 501(c)(3) nonprofit organization whose mission is to construct a compassionate food system by reducing suffering and ending the exploitation of animals for food.

People for the Ethical Treatment of Animals, Inc. (PETA) is a non-profit organization dedicated to protecting animals from abuse, neglect, and cruelty. PETA focuses its advocacy on the areas in which the largest numbers of animals suffer the most intensely for the longest periods of time, which includes those used in the food industry.

World Animal Protection has moved the world to protect animals for more than 50 years. World Animal Protection works to give animals a better life. The organization's activities include working with companies to ensure high standards of welfare for the animals in their care; working with governments and other stakeholders to prevent wild animals being cruelly traded, trapped or killed; and saving the lives of animals and the livelihoods of the people who depend on them in disaster situations. World Animal Protection influences decision-makers to put animal welfare on the global agenda and inspires people to change animals' lives for the better. More information on World Animal Protection can be found at: <http://www.worldanimalprotection.us/>.

Woodstock Farm Sanctuary is a leading farmed animal sanctuary and advocacy nonprofit based in Upstate New York. Woodstock Sanctuary rescues farmed animals and gives them care and sanctuary, connects animals with people to advance veganism, and advocates for animal rights in alliance with other social justice movements.

III. SPECIFIC AND DETAILED REQUEST FOR AGENCY ACTION

Petitioners request that USDA take the following actions to address COVID-19 related “depopulation.”

- A. Immediately initiate an emergency rulemaking and, within seven days, publish an interim final rule—effective immediately—that:
 - 1. Prevents USDA COVID-19 relief funds, resources, and/or any other forms of support (whether provided directly, or as disbursed through third parties, including state or local entities) from facilitating or compensating for the costs of “depopulating” farmed animals by ventilation shutdown, as defined below, or water-based foam.
 - 2. Withholds all USDA COVID-19 relief funds, resources, and/or any other forms of support (whether provided directly, or as disbursed through third parties, including state or local entities) from integrators, processors, and meatpackers that order or permit the “depopulation” of farmed animals by ventilation shutdown, as defined below, or water-based foam.
- B. Within ninety days, initiate a notice and comment rulemaking process to create affirmative and enforceable “depopulation” standards—at least as protective as the American Veterinary Medical Association Guidelines for the Euthanasia of Animals (AVMA Euthanasia Guidelines)⁵—and condition USDA COVID-19 relief funds, resources, and/or any other forms of support, including to integrators, processors, and meatpackers that order or permit “depopulation,” on compliance with those standards.
- C. Immediately create and publish an electronically searchable and sortable online database of animal agriculture industry recipients of USDA COVID-19 relief funds, resources, and/or any other forms of support (whether provided directly, or as disbursed through third

⁵ AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE EUTHANASIA OF ANIMALS: 2020 EDITION 110 (2020), <https://www.avma.org/sites/default/files/2020-01/2020-Euthanasia-Final-1-17-20.pdf>.

parties, including state or local entities) that have engaged in, ordered, or permitted “depopulation.” Data shall be published on the database as quickly as possible or within three business days of receipt, whichever is earlier. The information provided in the database for each recipient shall include, but shall not be limited to:

1. The name of the recipient and the name(s) of the owner of the farmed animals, the integrator, the processor, and/or the meatpacker (if applicable and/or if different from the recipient),
2. The date and location of “depopulation,”
3. The total number, species, breed, and intended product of “depopulated” farmed animals,
4. The date(s) of “depopulation” (and if “depopulation” happened over multiple days or weeks, the number of farmed animals “depopulated” per day),
5. The “depopulation” and disposal method(s) utilized,
6. The costs of “depopulation” and disposal,
7. A detailed summary of all USDA COVID-19 relief funds, resources, and/or other support provided (whether provided directly, or as disbursed through third parties including state or local entities), including form of relief, amount of relief, any indemnification payments, subsidies, advice, assets of the National Veterinary Stockpile, and/or any other assistance provided to the recipient.

D. Relevant definitions are as follows.

1. “Ventilation shutdown” means sealing the building in which farmed animals are confined, shutting the inlets, and turning off the fans. The farmed animals’ body heat raises the temperature in the building until they die from hyperthermia and hypoxia.⁶ This definition also includes ventilation shutdown plus, which involves the use of additional heat sources or CO₂.⁷

⁶ See Open Letter from AVMA Member Veterinarians 1 (AVMA Members Letter), <https://news.vin.com/apputil/image/handler.ashx?docid=9705967> (last visited Aug. 24, 2020); AM. VETERINARY MED. ASS’N, AVMA GUIDELINES FOR THE DEPOPULATION OF ANIMALS: 2019 EDITION 45 (2019) (AVMA Depopulation Guidelines), <https://www.avma.org/sites/default/files/resources/AVMA-Guidelines-for-the-Depopulation-of-Animals.pdf>.

⁷ See AVMA Members Letter, *supra* note 6, at 1.

2. “Water-based foam” means pumping foam into a building housing farmed animals in order to suffocate and drown them.⁸

IV. BACKGROUND

A. Industrial Animal Agriculture

Since the end of World War II, large corporations have overtaken and vertically integrated⁹ animal agriculture in the United States.¹⁰ Today, a small handful of corporations produce more than 60% of all “poultry” products in the United States.¹¹ Moreover, four multinational corporations—Tyson Foods, Cargill, JBS S.A., and Smithfield Foods—control 85% of cow slaughtering and processing, and only three of those—Tyson, JBS, and Smithfield—also control 63% of pig slaughtering and processing.¹²

⁸ Letter from Representative Lloyd Doggett et al. to Secretary Sonny Perdue (Doggett Letter), <https://doggett.house.gov/sites/doggett.house.gov/files/2020.5.4%20Doggett%20to%20Perdue%20%20Prevent%20Inhumane%20Killings%20of%20Farm%20Animals.pdf> (last visited Aug. 24, 2020).

⁹ Vertical integration is “birth-(or egg-)to-plate corporate control” of all aspects of production and marketing. John M. Crespi & Tina L. Saitone, *Are Cattle Markets the Last Frontier? Vertical Coordination in Animal-Based Procurement Markets*, 10 ANNUAL REVIEWS 207, 208 (2018) (Attach. 1).

¹⁰ Though the industry attempts to paint itself as a collection of small family farms, nothing could be further from the truth. *See id.* For example, U.S.-based Smithfield Foods is wholly owned by the Chinese corporation WH Group—the largest pig meat processor and producer in the world—which reported \$1.378 billion in profits in 2019. *China’s WH Group, world’s top pork processor, reports profit jump*, REUTERS (Mar. 24, 2020), <https://www.reuters.com/article/us-china-whgroup/chinas-wh-group-worlds-top-pork-processor-reports-profit-jump-idUSKBN21B175>.

¹¹ Leah Douglas & Christopher Leonard, *Is the US chicken industry cheating its farmers? Leaked documents reveal remarkable power US poultry industry holds over farmers struggling to stay afloat on thin margins*, THE GUARDIAN (Aug. 2, 2019), <https://www.theguardian.com/environment/2019/aug/03/is-the-us-chicken-industry-cheating-its-farmers>; *see* JAMES M. MACDONALD, CONG. RESEARCH SERV., ECON. INFO. BULLETIN NUMBER 126, TECHNOLOGY, ORGANIZATION, AND FINANCIAL PERFORMANCE IN U.S. BROILER PRODUCTION (2014), https://www.ers.usda.gov/webdocs/publications/43869/48159_eib126.pdf?v=41809.

¹² Letter from Senator Josh Hawley & Senator Tammy Baldwin to Federal Trade Commission (FTC) Chairman Joseph Simons et al. 1 (Apr. 29, 2020), <https://www.hawley.senate.gov/sites/default/files/2020-04/FTC-Letter-Meatpacking-6b-Study.pdf> (requesting that the FTC “investigate the growing concentration in the meatpacking and processing industry, and any anticompetitive behavior resulting from this concentration”); *see* Philip H. Howard, *Corporate Concentration in Global*

These corporations have erected a vast, industrial infrastructure that includes CAFOs and slaughterhouses. CAFOs are industrial-scale agricultural facilities that keep hundreds to thousands of animals in cruel, high-density confinement.¹³ Some CAFOs are owned by large corporations, but most are owned by “contract growers” who raise corporate-owned animals until they are large enough to be taken to the slaughterhouse.¹⁴

Corporate integrators exercise “comprehensive control” over contract growers via “contractual mandates and restrictions, management agreements, operating procedures, oversight, inspections, and market controls.”¹⁵ Corporate integrator control is so comprehensive that it “overc[omes] practically all of the [contract growers] ability to operate their businesses independent of [corporate] integrator mandates.”¹⁶ For example, corporate integrators control the details of:

- Facility construction, including “detailed construction specifications,” “site grading, equipment, signage, and other attributes”¹⁷
- Facility “lighting, heating, ventilation, and cooling”¹⁸
- Animal and facility inspections, including “where and how to walk through the [facilities], the frequency and timing of inspections, and how to record the results.”¹⁹
- Animal feeding and watering.²⁰
- Animal culling²¹ and “depopulation.”²²

Meat Processing: The Role of Feed and Finance Subsidies, in GLOBAL MEAT: SOCIAL AND ENVIRONMENTAL CONSEQUENCES OF THE EXPANDING MEAT INDUSTRY 31 (Bill Winders and Elizabeth Ransom eds., 2019); USDA GRAIN INSPECTION, PACKERS AND STOCKYARDS ADMIN., 2016 ANN. REP., https://www.gipsa.usda.gov/psp/publication/ar/2016_psp_annual_report.pdf.

¹³ CARRIE HRIBAR, NAT’L ASSOC. OF LOCAL BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACTS ON COMMUNITIES 1 (2010), CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf.

¹⁴ EVALUATION OF SBA 7(A) LOANS MADE TO POULTRY FARMERS 7, SBA OFFICE OF THE INSPECTOR GENERAL (2018), <https://www.sba.gov/sites/default/files/oig/SBA-OIG-Report-18-13.pdf>.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² See Tyler Whitley, *Op-ed: Don’t Blame Farmers Who Have to Euthanize Their Animals. Blame the Companies They Work For.*, CIVIL EATS (Apr. 30., 2020),

B. COVID-19 Shuttters Slaughterhouses

COVID-19, which is a zoonotic disease caused by human exploitation of nonhuman animals,²³ has incapacitated the United States. More than 5.6 million Americans have been diagnosed with the virus, and 175,651 have died.²⁴ The spread of the virus was slowed for a brief period of time in late May and early June, but infections and deaths have spiked again following state efforts to reopen.²⁵ It is expected that the pandemic will continue into the winter.²⁶

<https://civileats.com/2020/04/30/op-ed-dont-blame-farmers-who-have-to-euthanize-their-animals-blame-the-companies-they-work-for/> (“So what happens if the company’s processing plant is shut down? The reality is that farmers don’t have to option sell the animals anywhere else. If the company tells them to euthanize an entire flock of the bird it owns on the spot, farmers have no choice but to comply—even as consumers clamber over empty shelves in the supermarkets, farmers are forced to depopulate.”); *see also Hog depopulation plans move from drawing board to reality*, PROAG (May 19, 2020), <https://www.proag.com/news/hog-depopulation-plans-move-from-drawing-board-to-reality/>; *Egg demand shifted, and 61,000 Minnesota chickens were euthanized*, STARTRIBUNE (Apr. 21, 2020), <https://www.startribune.com/egg-demand-shifted-and-61-000-minnesota-chickens-were-euthanized/569817312/>; Sophia Schmidt, *As chicken producer ‘depopulates,’ other companies forced to adapt to shifting demand*, DELAWARE PUB. MEDIA (Apr. 16, 2020), <https://www.delawarepublic.org/post/chicken-producer-depopulates-other-companies-forced-adapt-shifting-demand>.

²³ ANIMAL LEGAL DEFENSE FUND, COVID-19 AND ANIMALS: RETHINKING OUR RELATIONSHIP WITH ANIMALS TO REDUCE THE LIKELIHOOD OF THE NEXT GLOBAL PANDEMIC 9, (June 2020), <https://aldf.org/wp-content/uploads/2020/06/White-Paper-COVID-19-and-Animals.pdf> (“A variety of factors contributed to the development and spread of COVID-19 and aggravate humanity’s risk from further zoonotic diseases The common thread binding all risk factors, however, is our exploitation of both animals and the natural environment we share with them.”).

²⁴ *Cases in the U.S.*, CENTERS FOR DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html> (data as of Aug. 24, 2020).

²⁵ Lauren Leatherby, *After the Recent Surge in Coronavirus Cases, Deaths Are Now Rising Too* (July 17, 2020), <https://www.nytimes.com/interactive/2020/07/17/us/coronavirus-deaths.html>; Christina Maxouris & Holly Yan, *1,000 people died of Covid-19 in 1 day. Now the US is on track to hit 1 million new cases in 2 weeks*, CNN (July 22, 2020), <https://www.cnn.com/2020/07/22/health/us-coronavirus-wednesday/index.html>.

²⁶ Katie Hunt, *Pandemic’s perfect storm: Uptick in cases this winter may be more serious than the initial outbreak*, CNN (July 14, 2020), <https://www.cnn.com/2020/07/13/health/winter-coronavirus-flu-wellness/index.html>.

Slaughterhouses and meatpacking plants are hotspots for COVID-19 outbreaks due to unsanitary and cramped working conditions. To date, 491 facilities across the country have reported COVID-19 cases.²⁷ At least 41,167 workers have tested positive for COVID-19, and 193 of those workers have died.²⁸ Federal inspectors with USDA’s Food Safety and Inspection Service (FSIS) have also become ill and died of COVID-19 due to exposure in the slaughterhouses.²⁹ Last spring, hundreds of FSIS field employees were absent from work due to a COVID-19 diagnosis or exposure.³⁰ At least four inspectors infected with the virus have died.³¹ As a result, slaughterhouses have been forced to shutter and slow processing rates, resulting in a back-up of millions of animals in CAFOs.³²

²⁷ Leah Douglas, *Mapping Covid-19 outbreaks in the food system*, FOOD & ENV’T REPORTING NETWORK (April 22, 2020), <https://thefern.org/2020/04/mapping-covid-19-in-meat-and-food-processing-plants/> (data as of Aug. 21, 2020).

²⁸ *Id.* The accuracy of these figures, however, is not guaranteed—as Senator Elizabeth Warren recently highlighted, the animal agriculture industry has acted to suppress data regarding the true number of sick workers. See Elizabeth Rembert & Mike Dorning, *World’s Top Pork Producer Goes on Defensive Over Virus Response*, BLOOMBERG (Aug. 3, 2020), <https://www.bloomberg.com/news/articles/2020-08-03/world-s-top-pork-producer-goes-on-defensive-over-virus-response> (discussing Senator Warren’s statement that “[a]n estimated 2,000+ workers at [Smithfield Foods] facilities have become sick with COVID-19. Some have died. Smithfield took [the Occupational Safety and Health Administration] to court to keep data on their biggest outbreak private.”).

²⁹ Eric Schlosser, *Why We’re Killing the People Who Feed Us*, THE ATLANTIC (May 12, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/essentials-meatpacking-coronavirus/611437/>.

³⁰ Greg Cima, *Slaughter Delays Lead to Depopulation*, J. OF THE AM. VETERINARY MED. ASS’N (June 15, 2020), <https://www.avma.org/javma-news/2020-06-15/slaughter-delays-lead-depopulation>; Mike Dorning, *Fourth USDA Inspector Dies From Virus Amid Meat Plant Outbreaks*, BLOOMBERG (May 13, 2020), <https://www.bloomberg.com/news/articles/2020-05-14/fourth-usda-inspector-dies-from-virus-amid-meat-plant-outbreaks>. There is no updated data available, though Congress has directed FSIS to publish such data on its website. Megan U. Boyanton, *Coronavirus Data on Food Inspectors Overdue, House Democrats Say*, BLOOMBERG (July 28, 2020), <https://about.bgov.com/news/coronavirus-data-on-food-inspectors-overdue-house-democrats-say/>.

³¹ Dorning, *supra* note 30; see Moyanton, *supra* note 30.

³² See, e.g., *Pandemic Disrupts Processing Capacity, Drives Slaughter Numbers Down*, AM. FARM BUREAU FED. (Apr. 28, 2020), <https://www.fb.org/market-intel/pandemic-disrupts-processing-capacity-drives-slaughter-numbers-down>; Cima, *supra* note 30 (noting that, “[b]y May 8, at least 30 slaughter and processing plants had closed at some point because of COVID-19 outbreaks, affecting 45,000 workers and reducing [pig] slaughter capacity 40% and [cow] slaughter capacity 25%”).

This backup of animals is problematic because the industry’s business model leaves no room to accommodate slaughter delays. For example, the pig industry uses a “just-in-time” business model to maximize profits, which means that new baby animals arrive at CAFOs just in time to replace those who have reached slaughter weight³³ and are being trucked to the slaughterhouse.³⁴

Adding further urgency is the fact that the industry selectively breeds and heavily medicates animals to grow to slaughter weight as quickly as possible. For example, chickens are bred “to grow so fast that they reach slaughter weight in just [forty-seven] days.”³⁵ They often lose their ability to walk because they grow so large and so fast that they collapse under their own weight.³⁶ Then, “[d]ay by day, their organs and muscles break down.”³⁷ Moreover, many other farmed animals languishing in CAFOs—particularly pigs—eventually grow so large that they cannot “fit within [slaughterhouse] equipment”³⁸ Simply put, because the industry’s business model is designed to maximize corporate profits at the expense

³³ Animals who reach slaughter weight are also babies. For example, a domestic pig’s natural lifespan is up to ten years. *See, e.g.*, K. Kris Hirst, *Domestic Pig Facts*, *Scientific Name: Sus scrofa domestica*, THOUGHT CO. (July 30, 2019), <https://www.thoughtco.com/domestic-pig-4693647>. But industrially farmed pigs are slaughtered when they are only about six months old. *Life Cycle of a Market Pig*, PORK CHECKOFF, <https://www.pork.org/facts/pig-farming/life-cycle-of-a-market-pig/> (last visited Aug. 24, 2020).

³⁴ *See* Letter from Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice, to Martin M. Toto, National Pork Producers Council 3 (May 15, 2020) (DOJ Letter), <https://www.justice.gov/opa/press-release/file/1276971/download> (quoting Letter from Martin M. Toto, National Pork Producers Council, to Makan Delrahim, Assistant Attorney General for Antitrust, U.S. Dep’t of Justice 4 (May 8, 2020) (NPPC Letter), <https://www.justice.gov/atr/page/file/1276976/download>); *see* Letter from Governor Reynolds et al. to Vice President Pence et al. (Apr. 27, 2020) (Reynolds Letter), <https://www.grassley.senate.gov/sites/default/files/Iowa%20group-2020-covid-pork-letter-1.pdf>.

³⁵ Leah Garcés, *As slaughterhouses shut down across the country, animals are at risk of on farm mass slaughter*, THE HILL (Apr. 28, 2020), <https://thehill.com/opinion/energy-environment/494999-as-slaughterhouses-shut-down-across-the-country-animals-are-at>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ NPPC Letter, *supra* note 34, at 4.

of all else, it lacks the flexibility to manage the backup of animals caused by shuttered slaughterhouses.³⁹

This problem is unlikely to end soon. Slaughterhouses are already backed up for months,⁴⁰ and current corporate and government policies—which emphasize forcing workers to stay on slaughter lines while also speeding up those slaughter lines⁴¹—make it even *more* likely that the virus will continue to rage in

³⁹ See Scully, *supra* note 3 (“The system has its own unbending schedules and logic. No sheltering in place for factory-farmed pigs, cows, chickens, and other creatures when yet more troubles appear. When they can’t die on a kill line, because a slaughterhouse has closed, that just means they have to die somewhere else to get out of the way—even if, as in this case, they’re all bound for landfills, blast furnaces, or burial pits. . . . [W]ith the merest pause the meat system convulses with ‘backlog,’ requiring travails for which producers expect our sympathy”).

⁴⁰ See, e.g., *Hog Farmers Urgently Need Congressional Action to Weather Crisis*, NPPC (July 20, 2020), <https://nppc.org/hog-farmers-urgently-need-congressional-action-to-weather-crisis/> (“Roughly two million hogs are still backed up on farms and this is likely to cause more pigs to be [depopulated] to prevent suffering due to overcrowding. If COVID prompts additional plant disruptions – a real possibility – the number of hogs backed-up on farms will swell precipitously.” (internal quotation marks omitted)); *Slaughterhouses Backed Up for Months*, 69 NEWS WFMZ-TV (July 4, 2020), https://www.wfmz.com/news/cnn/us-national/mi-covid-slaughterhouses-backed-up-for-months/video_9c151a11-3579-5d23-bcc6-cd72d743ade0.html; Angeline McCall, *Slaughterhouses backed up for months due to COVID-19*, FOX 17 (July 3, 2020), <https://www.fox17online.com/news/slaughterhouses-backed-up-for-months-due-to-covid-19>; Jennifer Shike, *Hogs and Pigs Report: Uncertainty Remains with Record-Large Inventory*, FARM JOURNAL’S PORK (June 25, 2020), <https://www.porkbusiness.com/article/hogs-and-pigs-report-uncertainty-remains-record-large-inventory>; see also Cima, *supra* note 30 (citing USDA Agricultural Marketing Service data from May 9, 2020, to explain that “cattle slaughter that week was down 32% from a year earlier, and swine slaughter declined 24%,” and USDA Economic Research Service analysis on May 18 to explain that “[p]ork production fell 11% [and] beef production fell 21% . . . when looking at federally inspected production in April compared with a year earlier”); Dylan Matthews, *The closure of meatpacking plants will lead to the overcrowding of animals. The implications are horrible.*, VOX (May 4, 2020), <https://www.vox.com/2020/5/4/21243636/meat-packing-plant-supply-chain-animals-killed>.

⁴¹ See Letter from Senator Cory Booker et al. to Senator Mitch McConnell & Senator Charles Schumer 1 (May 28, 2020), <https://www.booker.senate.gov/imo/media/doc/Line%20Speed%20Letter%20to%20Leadership%20FINAL.pdf> (“As you consider additional legislative priorities addressing the COVID-19 pandemic, we urge you to include a directive to [USDA FSIS] to halt higher-speed slaughter and processing systems for poultry, swine, and cattle. Directing USDA FSIS to

slaughterhouses, leading to further shutdowns.⁴² Thus, it is imperative that USDA act now—not only to react to ongoing “depopulations,” but to prepare for those that are likely to occur for the foreseeable future.

C. “Depopulation”

The animal agriculture industry typically kills animals in slaughterhouses (not in CAFOs), and slaughterhouses are legally required to adhere to certain practices that, in theory, should minimize animal cruelty. But now, the industry is killing animals in CAFOs at volumes and with methods that “radically deviate from

retract previously granted approvals and suspend future approvals for plants to operate at line speeds higher than regulatory maximums and to suspend implementation of the New Swine Inspections System (NSIS), which allows facilities to operate without any line speed restrictions, will improve worker and inspector safety, help safeguard animal welfare, and better protect consumers.”).

⁴² In April alone, FSIS approved fifteen line-speed waiver requests from large poultry plants, allowing those facilities to accelerate their processing lines by twenty-five percent. NAT’L EMPLOYMENT L. PROJECT, USDA ALLOWS POULTRY PLANTS TO RAISE LINE SPEEDS, EXACERBATING RISK OF COVID-19 OUTBREAK AND INJURY 1 (June 2020), <https://s27147.pcdn.co/wp-content/uploads/Policy-Brief-USDA-Poultry-Line-Speed-Increases-Exacerbate-COVID-19-Risk.pdf>. More than half of those plants have already experienced COVID-19 outbreaks, with one plant reporting a COVID-related worker fatality and one plant closing shortly after receiving its waiver due to spread of the virus. *Id.* At the same time, FSIS continues to roll out its new inspection system for pig slaughter plants, which—among other things—entirely removes line speed caps, resulting in a rough average of 1,300 pigs killed per hour, and moves responsibilities previously held by federal inspectors to plant employees. See Mike Hughlett & Adam Belz, *Coronavirus Hit Meat Plants Just as Workers Were Being Asked to Speed Up*, STARTRIBUNE (May 25, 2020), <https://www.startribune.com/coronavirus-hit-meat-plants-just-as-workers-were-being-asked-to-speed-up/570758212/>; Letter from A Better Balance et al. to Speaker Nancy Pelosi et al. (May 4, 2020), https://www.foodandwaterwatch.org/sites/default/files/20.05.04_21_groups_urge_congress_to_direct_usda_to_stop_higher-speed_slaughter.pdf (requesting that Congress implement a moratorium on the higher line-speed slaughter and processing of chickens, turkeys, pigs, and cows).

the normal slaughterhouse process”⁴³ These “depopulations”—and others related to COVID-19⁴⁴—are now commonplace and widespread.⁴⁵

“Depopulation” is a euphemism for mass animal killing.⁴⁶ USDA’s Animal and Plant Health Inspection Service (APHIS) defines it as “a method by which large numbers of animals must be destroyed quickly and efficiently with as much consideration given to the welfare of the animals as practicable.”⁴⁷ Likewise, the AVMA Depopulation Guidelines define it as “the rapid destruction of a population of animals in response to urgent circumstances with as much consideration given to the welfare of the animals as practicable.”⁴⁸ As explained in the AVMA Euthanasia Guidelines, “depopulation” is distinct from euthanasia, which is ending an animal’s life “in a way that minimizes or eliminates pain and distress.”⁴⁹ Unlike euthanized animals, each “depopulated” animal risks suffering while dying.

In late April 2020, John Tyson—the chair of the board of directors for Tyson Foods—took out full page ads in at least the New York Times, Washington Post,

⁴³ Glenn Greenwald, *Hidden Video and Whistleblower Reveal Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, THE INTERCEPT (May 29, 2020), <https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/>.

⁴⁴ In addition to “depopulations” related to shuttered slaughterhouses, the industry is also “depopulating” egg-laying hens because the market for breaker eggs—which depends heavily on the foodservice industry—has crashed. *See, e.g.*, Megan Poinski, *How coronavirus scrambled eggs*, FOOD DIVE (June 15, 2020), <https://www.fooddive.com/news/how-coronavirus-scrambled-eggs/579253/>; Tom Polansek & P.J. Huffstutter, *Piglets aborted, chickens gassed as pandemic slams meat sector*, REUTERS (Apr. 27, 2020), <https://www.reuters.com/article/us-health-coronavirus-livestock-insight/piglets-aborted-chickens-gassed-as-pandemic-slams-meat-sector-idUSKCN2292YS>.

⁴⁵ Greenwald, *supra* note 43.

⁴⁶ *See* Scully, *supra* note 3.

⁴⁷ APHIS, FOREIGN ANIMAL DISEASE PREPAREDNESS AND RESPONSE PLAN (FAD PREP)/NATIONAL ANIMAL HEALTH EMERGENCY MANAGEMENT SYSTEM (NAHEMS) GUIDELINES 1 (Aug. 2015), https://www.aphis.usda.gov/animal_health/emergency_management/downloads/nahems_guidelines/mass_depop_euthan.pdf.

⁴⁸ AVMA Depopulation Guidelines, *supra* note 6, at 4.

⁴⁹ AVMA Euthanasia Guidelines, *supra* note 5, at 110; *see id.* at 6 (“Euthanasia is derived from the Greek terms *eu* meaning good and *thanatos* meaning death. . . . A good death is tantamount to the humane termination of an animal’s life.”); *see id.* at 64 (“While some [depopulation methods] might meet the criteria for euthanasia . . . others will not”); *id.* at 110 (defining euthanasia as “[a] method of killing that minimizes pain, distress, and anxiety experienced by the animal prior to loss of

and Arkansas Democrat-Gazette to warn that “millions of animals—chickens, pigs and [cows]—will be depopulated because of the closure of our processing facilities.”⁵⁰ The industry is making good on this threat—industrially farmed animals across the country have been (and continue to be) “depopulated” by the millions.⁵¹ This is despite the fact that the large corporations that typically own the animals are fully capable of paying for their care—or at least their humane euthanasia.⁵²

1. Animal Impacts

There is currently no way for members of the public to know exactly how many animals the industry has “depopulated.” But it is estimated that more than

consciousness, and causes rapid loss of consciousness followed by cardiac or respiratory arrest and death.”).

⁵⁰ Nathan Borney, *Tyson Chairman Warns of ‘Meat Shortages’ as Industry Faces Scrutiny for Worker Safety During Coronavirus*, USA TODAY (Apr. 27, 2020), <https://www.usatoday.com/story/money/2020/04/27/tyson-meat-shortages-coronavirus-covid-19/3034748001/>; see Whitley, *supra* note 22 (“Rather than acknowledge the need for reform, and in an effort to shift blame, Tyson Foods recently took out full-page ads in several major newspapers claiming that ‘the food supply chain is breaking’ because of plant closures. But as the architects of this devastation, Tyson Foods has profited in the billions for the last three years in a row, while spending millions on federal lobbying to maintain the status quo of a fragile food system that values corporate profits over people, land, and animals.”).

⁵¹ See, e.g., Greenwald, *supra* note 43; Scully, *supra* note 3; Tammy Grubb, *Coronavirus outbreaks at processors force NC farmers to start killing 1.5M chickens*, THE NEWS & OBSERVER (May 23, 2020), <https://www.newsobserver.com/news/business/article242944156.html>; *2 million chickens being killed because processing plants are short-staffed*, THE DENVER CHANNEL (Apr. 27, 2020), <https://www.thedenverchannel.com/news/national/coronavirus/2-million-chickens-being-killed-because-processing-plants-are-short-staffed>.

⁵² See *infra* notes 74 and 75 and accompanying text.

ten million chickens have already been killed,⁵³ and the industry has admitted that more than ten million pigs could be killed by September.⁵⁴

Water-based foam and ventilation shutdown are especially cruel “depopulation” methods. With water-based foam, as depicted below,⁵⁵ the foam covers the animals and blocks their airways, which is “extremely stressful”⁵⁶ and is “equivalent to death by drowning or suffocation.”⁵⁷ Unlike nitrogen foam, which kills animals “within seconds,”⁵⁸ water-based foam leaves animals fully conscious

⁵³ Sophie Kevany, *Millions of US farm animals to be culled by suffocation, drowning and shooting*, THE GUARDIAN (May 19, 2020), <https://www.theguardian.com/environment/2020/may/19/millions-of-us-farm-animals-to-be-culled-by-suffocation-drowning-and-shooting-coronavirus?fbclid=IwAR0l44gqUoLWzxVv-O5r1Uwm8sQAmWqQy8dFKaJTE1ikR8Y2vpgS0-VHhFc>; see Roy Graber, *1.5 million North Carolina chickens depopulated*, WATTAGNET (May 27, 2020), <https://www.wattagnet.com/articles/40406-5-million-north-carolina-chickens-depopulated?v=preview>.

⁵⁴ Audrey Conklin, *Coronavirus May Force Hog Farmers to Kill 10M Pigs by September*, FOX BUSINESS (May 17, 2020), <https://www.foxbusiness.com/markets/farmers-euthanize-10-million-pigs-coronavirus>; see NPPC Letter, *supra* note 34; DOJ Letter, *supra* note 34; Reynolds Letter, *supra* note 34.

⁵⁵ USDA & CAL. DEPT OF FOOD AND AGRIC., AVIAN INFLUENZA IN CALIFORNIA HIGH-PATH H5N8 20, <https://animalagriculture.org/Resources/Documents/Conf%20-%20Symp/Conferences/2015%20Annual%20Conference/Speaker%20Presentations/AHEM/AHEM-Velez-HAPI.pdf> (last visited Aug. 24, 2020).

⁵⁶ Letter from Alesia Soltanpanah, Executive Director, World Animal Protection U.S. to Dr. Janet D. Donlin, Executive Vice President and CEO, AVMA 2 (Apr. 22, 2020) (WAP Letter), https://static1.squarespace.com/static/5eea3a11030a99078f9344f9t/5ef2095f6457de797a50d403/1592920415662/WAP_Letter_to_AVMA_April_22_2020.pdf.

⁵⁷ A. B. M. Raj et al., *Novel method for killing poultry in houses with dry foam created using nitrogen*, 162 VETERINARY RECORD 722, 722 (2008), https://www.researchgate.net/publication/5334833_Novel_method_for_killing_poultry_in_houses_with_dry_foam_created_using_nitrogen (comparing different forms of foam and noting that water-based foam raises significant animal welfare concerns and is therefore unlikely to be considered an acceptable method of “depopulation” in Europe).

⁵⁸ *Id.*

as they suffocate and drown, and it can take more than ten minutes for animals to die.⁵⁹



With ventilation shutdown, “[t]he animals die of hyperthermia, usually suffering from heat stress. The process is distressing and painful, and it can take hours for animals to die.”⁶⁰ Sometimes, even after many hours, animals continue to suffer and roast but still do not die.⁶¹ Animals who survive ventilation shutdown are then killed via a second “depopulation” method—e.g., shooting them in the head with a bolt gun.⁶²

The details of one instance of “depopulation” have become very public. An employee of Iowa Select Farms—a billion dollar corporation, the largest pig producer in Iowa,⁶³ and the fourth largest pig producer in the United States⁶⁴—

⁵⁹ WAP Letter, *supra* note 56.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *See infra* note 72 and accompanying text.

⁶³ AVMA Members Letter, *supra* note 6, at 1.

⁶⁴ Betsy Freese, *Iowa Select Farms expanding finishing capacity after supply chain disaster*, SUCCESSFUL FARMING (June 11, 2020),

recently revealed that, in mid-May, the enterprise used ventilation shutdown plus⁶⁵ to “depopulate” thousands of pigs “agonizingly and over the course of many hours.”⁶⁶ First, Iowa Select Farms sealed off airways into the warehouse in which it confined the pigs.⁶⁷ Second, Iowa Select Farms shot steam into the warehouse to intensify the heat and humidity.⁶⁸ Finally, Iowa Select Farms left the pigs trapped in the warehouse to suffocate and roast to death overnight.⁶⁹

This “depopulation” was captured on video,⁷⁰ and “the recordings . . . include audio of the piercing cries of pigs as they succumb.”⁷¹ The video also reveals that some pigs survived this ordeal, but the next morning, Iowa Select Farms forced workers to enter the warehouse and walk among the bodies to shoot those survivors with bolt guns.⁷² However, because these workers did not “perform a thorough exam, many pigs likely remain[ed] conscious when bulldozers remove[d] their bodies” and put them in dumpsters.⁷³

Though Iowa Select Farms has the resources to care for these animals—or at least to humanely euthanize them—it chose instead to use ventilation shutdown and “prioritize[] profits over animal welfare.”⁷⁴ As explained in an open letter from AVMA members concerning this incident:

The decision to implement [ventilation shutdown] was not made under emergent time constraints. The corporation spent over a month planning this tragedy, retrofitting the barn to close off the ventilation, and preparing workers for this gruesome task—who may suffer mental health consequences for having to partake in this practice. As most veterinarians are aware, less cruel options exist but apparently were deemed too expensive and inconvenient. .

<https://www.agriculture.com/livestock/pork-powerhouses/iowa-select-farms-expanding-finishing-capacity-after-supply-chain>.

⁶⁵ See *supra* section III(D)(1) (defining ventilation shutdown plus).

⁶⁶ Greenwald, *supra* note 43.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See *Hidden Video Reveals Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic*, THE INTERCEPT YOUTUBE CHANNEL (May 29, 2020), <https://www.youtube.com/watch?v=UhavFP9f6b4>. The photo on the cover of this Petition depicts a still of the video.

⁷¹ Greenwald, *supra* note 43.

⁷² *Id.*

⁷³ AVMA Members Letter, *supra* note 6, at 1.

⁷⁴ *Id.*

. . . While there may be valid arguments that large populations of animals may need to be destroyed due to suffering from infectious disease—such as African Swine Fever—these pigs were not suffering, nor did they have an infectious disease that needed to be controlled. Killing them in this horrific way was unnecessary”⁷⁵

2. Human Impacts

Even animal agriculture industry representatives describe the “depopulation” of millions of animals as “grim.”⁷⁶ As APHIS has acknowledged, “[p]sychological hazards arise” for impacted workers and communities.⁷⁷

The Iowa Select Farms whistleblower described their “anguish . . . and how they were pushed over the limits of their conscience by witnessing the unparalleled horrors of their employer’s use of ventilation shutdowns.”⁷⁸ This individual is not a “coastal animal rights activist”—instead, they are “someone who has been around farming, including industrial agriculture, for their entire life.”⁷⁹ Their anguish speaks volumes, as does their willingness to speak out against “an industry that has long provided them and much of their community with employment.”⁸⁰

And the Iowa Select Farms whistleblower is not alone in their distress. “Even when standard industrial methods of slaughter are used, factory farm work has

⁷⁵ *Id.* at 1–2; *see also* Greenwald, *supra* note 43 (“The whistleblower explained the process: ‘They shut the pit pans off, shut the ventilation fans off, and heat up the building. That’s what the plan is. It’s horrific as it is. It was first used on test cull sows: those were first given the [ventilation shutdown] treatment. The first day they shut off all the fans and turned the heat up and the hottest they could get the building was 120 degrees. After four to five hours, none of the animals were dead. There was an attempt to induce steam into the building, along with the heat and the ventilation shutdown, and that is how they ultimately perfected their [ventilation shutdown] operation. Every time they’ve been euthanizing the animals, it’s been a test in a sense. Piglets were killed off in a barn with gas generators.’”).

⁷⁶ Scully, *supra* note 3.

⁷⁷ *See* USDA, CARCASS MANAGEMENT DURING A MASS ANIMAL HEALTH EMERGENCY FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT—DECEMBER 2015 97 (Dec. 2015) (EIS), https://www.aphis.usda.gov/stakeholders/downloads/2015/eis_carcass_management.pdf.

⁷⁸ Greenwald, *supra* note 43.

⁷⁹ *Id.*

⁸⁰ *Id.*

been demonstrated to entail serious mental health harms for workers.”⁸¹ This is compounded by the socioeconomic position of these workers, who often have no choice but to work in industrial animal agriculture if they want to stay in their communities.⁸²

Corporate orders to “depopulate” animals will also worsen the mental health of contract growers, many of whom are already struggling. The expansion of industrial animal agriculture is destroying independent farms and “extracting wealth and power from [rural] communities.”⁸³ As a result, “[m]illions of farm families have been forced off their land and thousands of small farming communities have withered or died.”⁸⁴ As described above, large corporations now dominate animal agriculture, and they exercise comprehensive control over the contract growers who raise the corporate-owned animals.⁸⁵ Thus, in addition to watching their communities decline, contract growers are subject to harsh, one-sided contracts with corporate integrators, which strip them of all autonomy and trap them as “serfs on their own land”⁸⁶ and “sharecroppers” in a cycle of debt.⁸⁷

These conditions cause contract growers to experience disproportionately high rates of depression and suicide. “Farmers are among the most likely to die by suicide, compared to other occupations, according to a January study by the Centers

⁸¹ *Id.* (citing C. E. Fraser et al., *Farming and mental health problems and mental illness*, 51 INT’L J. OF SOCIAL PSYCHIATRY 340 (2005), <https://pubmed.ncbi.nlm.nih.gov/16400909/>).

⁸² *See id.* (“[The whistleblower] wanted to put their name and face on these denunciations. Ultimately, however, the[y] decided that they could not subject themselves and their family to the almost-certain extreme repercussions of denouncing an industry of unparalleled power in their state, as well as risking their employment in the middle of a job-killing pandemic.”).

⁸³ Chris McGreal, *How America’s food giants swallowed the family farms*, THE GUARDIAN (Mar. 9, 2019), <https://www.theguardian.com/environment/2019/mar/09/american-food-giants-swallow-the-family-farms-iowa>.

⁸⁴ John Ikerd, *The Economics of CAFOs & Sustainable Alternatives* (2009), <http://web.missouri.edu/ikerdj/papers/Fairfield%20IA%20%20Economics%20of%20CAFOs.htm>.

⁸⁵ *See supra* section IV.A.

⁸⁶ Loka Ashwood et al., *Where’s the Farmer? Limiting Liability in Midwestern Industrial Hog Production*, 79 RURAL SOCIOLOGY 2, 3 (2014), <http://lokaashwood.com/wp-content/uploads/Ashwood-Diamond-and-Thu-2014-Wheres-the-Farmer-.pdf>.

⁸⁷ Annie Lowrey, *The Rise of the Zombie Small Businesses, What your chicken dinner says about wage stagnation, income inequality, and economic sclerosis in the United States*, THE ATLANTIC (Sep. 4, 2018), <https://www.theatlantic.com/ideas/archive/2018/09/whose-farm-is-this-anyway/569227/>; *see* SBA, *supra* note 14.

for Disease Control and Prevention. The study also found that suicide rates overall had increased by 40% in less than two decades.”⁸⁸ As USDA has acknowledged,⁸⁹ being forced to engage in “depopulation” significantly impacts mental health.⁹⁰ Contract growers should not be forced to use the cruelest methods available to “depopulate” animals, worsening the ongoing mental health crisis in rural communities.

3. Environmental Impacts

As detailed in the emergency petition regarding disposal practices,⁹¹ “depopulating” and disposing of whole flocks or herds of animals can also cause significant environmental harm—the severity of which can be exacerbated by the chosen method of depopulation. As APHIS previously acknowledged in the Environmental Impact Statement regarding “the environmental effects associated with various carcass management alternatives,”⁹² “if animals must be euthanized . . . the euthanasia method (e.g., lead bullets, drugs) must be considered . . . to ensure any potential additional environmental impacts from such actions are minimized.”⁹³

⁸⁸ Katie Wedell et al., *Seeds of Despair: Hundreds of Farmers are Dying by Suicide*, FLATLAND (Mar. 16, 2020), <https://www.flatlandkc.org/news-issues/seeds-of-despair-hundreds-of-farmers-are-dying-by-suicide/> (citing CORA PETERSON ET AL., SUICIDE RATES BY INDUSTRY AND OCCUPATION — NATIONAL VIOLENT DEATH REPORTING SYSTEM, 32 STATES, 2016, CENTERS FOR DISEASE CONTROL AND PREVENTION (Jan. 24, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6903a1.htm?s_cid=mm6903a1_e&deliveryName=USCDC_921-DM17737); see RURAL ADVANCEMENT FOUND. INT’L, VIEWERS GUIDE, UNDER CONTRACT, FARMERS AND THE FINE PRINT (2016), https://www.rafiusa.org/undercontractfilm/wp-content/uploads/2017/01/Under_Contract_Viewers-Guide_2017_ReducedFileSize.pdf.

⁸⁹ USDA, HIGH PATHOGENICITY AVIAN INFLUENZA CONTROL IN COMMERCIAL POULTRY OPERATIONS – A NATIONAL APPROACH, ENVIRONMENTAL ASSESSMENT 31–32 (July 2015), https://www.aphis.usda.gov/stakeholders/downloads/2015/hpai_ea.pdf (discussing psychological impacts of “depopulation” and noting that “sights and odors from a large number of carcasses can be emotionally upsetting to humans because human sympathies and compassion are invoked” and that “[f]armers and their families could suffer psychologically”).

⁹⁰ See, e.g., Hazumu Kadowaki et al., *Analysis of factors associated with hesitation to restart farming after depopulation of animals due to 2010 foot-and-mouth disease epidemic in Japan*, 78 J. VET. MED. SCI. 1251 (2016), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5053925/> (“Culling of livestock during an epidemic causes a psychological impact on farmers, because such events are traumatic and emotionally shattering.”).

⁹¹ See *supra* note 4.

⁹² EIS, *supra* note 77, at v.

⁹³ *Id.* at 3.

APHIS further acknowledged that “[i]mproper carcass management extends the potential for additional livestock deaths, ongoing environmental cleanups, public controversy, and the potential for future legal liability.”⁹⁴

For example, if animals are shot with lead bullets and then buried in unlined pits, the lead can migrate into the soil and contaminate nearby water and plants, putting people and wildlife at risk.⁹⁵ “Open-air burning can [further] release lead as an air pollutant, and metals in the ash after burning may leach into soils. These carcass management options may, in turn, put humans and other animals at risk.”⁹⁶ “Other animals” in this context includes surrounding farmed animals, who may experience neurological and other health problems as a result of lead exposure, and wildlife.⁹⁷ As it relates to human health, experts agree that there is no safe level of exposure to lead.⁹⁸

Ventilation shutdown and water-based foam also have potential negative environmental consequences. Ventilation shutdown “may result in elevated levels of ammonia” that poison the air and endanger the humans—including workers—and animals who breathe it.⁹⁹ Water-based foam requires vast amounts of water,¹⁰⁰ which can be particularly problematic in water-scare areas. In sum, when USDA supplies the funding and support for (or otherwise facilitates) “depopulation” and disposal in CAFOs, it is statutorily obligated to consider the resulting environmental impacts.

⁹⁴ *Id.* at 3–4.

⁹⁵ *See, e.g.*, CTR. FOR BIOLOGICAL DIVERSITY ET AL., PETITION TO THE ENVIRONMENTAL PROTECTION AGENCY TO BAN LEAD SHOT, BULLETS, AND FISHING SINKERS UNDER THE TOXIC SUBSTANCES CONTROL ACT 8 (2010), https://www.biologicaldiversity.org/campaigns/get_the_lead_out/pdfs/Final_TSCA_lead_ban_petition_8-3-10.pdf; EIS, *supra* note 77, at 123–24.

⁹⁶ EIS, *supra* note 77, at 124.

⁹⁷ *Id.* at 124–25.

⁹⁸ *See, e.g.*, AM. ACADEMY OF PEDIATRICS, LEAD EXPOSURE IN CHILDREN (2016), <https://www.aap.org/en-us/advocacy-and-policy/aap-health-initiatives/lead-exposure/Pages/Lead-Exposure-in-Children.aspx#:~:text=There%20is%20no%20safe%20level,Prevention%20recommends%20evaluation%20and%20intervention.>

⁹⁹ USDA APHIS, HIGH PATHOGENICITY AVIAN INFLUENZA CONTROL IN COMMERCIAL POULTRY OPERATIONS – A NATIONAL APPROACH: FINAL ENVIRONMENTAL ASSESSMENT 32 (Dec. 2015).

¹⁰⁰ CTR. FOR FOOD SEC. AND PUB. HEALTH, IOWA STATE UNIV. COLL. OF VETERINARY MED., WATER BASED-FOAM DEPOPULATION: FOR POULTRY DURING ANIMAL HEALTH EMERGENCIES 1, http://www.cfsph.iastate.edu/Emergency-Response/Just-in-Time/15-Euthanasia_Water-based-Foam-For-Poultry-Depopulation_HANDOUT.pdf (last visited Aug. 24, 2020).

D. AVMA Guidelines and APHIS Policy

The AVMA Euthanasia Guidelines do not permit the use of ventilation shutdown or water-based foam.¹⁰¹ Likewise, neither the World Organisation for Animal Health (also known as OIE) nor the European Food Safety Authority (EFSA) accept the use of ventilation shutdown or water-based foam.¹⁰²

Even the AVMA Depopulation Guidelines and APHIS policy—created with dangerous disease outbreaks in mind—advise against ventilation shutdown, and they also advise against water-based foam for certain species in certain housing systems. These methods are considered too inhumane, even in the context of the various other “depopulation” methods the AVMA Depopulation Guidelines allow, including:

- Carbon dioxide (gassing),
- Cervical dislocation,
- Compressed air foam (suffocation),
- Decapitation,
- Electrocuting,
- Exsanguination (bleeding out),
- Manual blunt force trauma (e.g., slamming small animals’ heads on a hard surface),
- Mechanically assisted cervical dislocation,
- Sodium nitrite (poison).¹⁰³

The AVMA Depopulation Guidelines organize these methods into categories of “preferred,” “permitted in constrained circumstances,” and “not recommended.”¹⁰⁴ “[Preferred] methods are given highest priority and should be utilized preferentially when emergency response plans are developed and when circumstances allow

¹⁰¹ AVMA Euthanasia Guidelines, *supra* note 5, at 111–12.

¹⁰² See, e.g., EFSA, KILLING FOR PURPOSES OTHER THAN SLAUGHTER: POULTRY (Nov. 13, 2019), <https://efsa.onlinelibrary.wiley.com/doi/10.2903/j.efsa.2019.5850> (“Ventilation shutdown should not be used as a killing method . . .”); OIE, KILLING OF ANIMALS FOR DISEASE CONTROL PURPOSES (June 28, 2019), https://www.oie.int/fileadmin/Home/eng/Health_standards/tahc/current/chapitre_aw_killing.pdf; EFSA Panel on Animal Health and Welfare, *Killing for purposes other than slaughter: poultry*, 17 EFSA J. e05850 (2019), <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2019.5850>.

¹⁰³ AVMA Depopulation Guidelines, *supra* note 6, at 87–88. The AVMA Euthanasia Guidelines also allow for some of these methods, but only if they are used under certain conditions. AVMA Euthanasia Guidelines, *supra* note 5, at 111.

¹⁰⁴ *Id.*

reasonable implementation during emergencies[.]”¹⁰⁵ They “often correspond to techniques outlined in the [AVMA Euthanasia Guidelines], with adjustments as necessary for *constrained time periods* and large populations of animals.”¹⁰⁶

Methods that are “permitted in constrained circumstances” “are permitted only when the circumstances of the emergency are deemed to constrain the ability to reasonably implement a preferred method.”¹⁰⁷ Examples of “potential constraints include . . . disease risk, human safety, depopulation efficiency, deployable resources, equipment, animal access, disruption of infrastructure, and disease transmission risk.”¹⁰⁸

Methods that are “not recommended” should only be considered as a last resort when neither preferred methods nor methods permitted in constrained circumstances are available, “and when the risk of doing nothing is deemed likely to result in more animal suffering than that associated with the proposed depopulation method.”¹⁰⁹ Examples of such extreme circumstances include “structural collapse or compromise of buildings housing animals, largescale radiologic events, complete inability to safely access animals for a prolonged period of time, or any circumstance that poses a severe threat to human life or animal populations.”¹¹⁰ Economic considerations and protecting corporate profit are not among the situations in which the AVMA allows for methods of last resort.

1. Ventilation Shutdown

Ventilation shutdown “was designed to be used only in severe life-threatening infectious or zoonotic disease outbreaks. It was never intended as a cost-saving method of depopulation.”¹¹¹ The AVMA Depopulation Guidelines state that ventilation shutdown is not recommended for chickens, turkeys, ducks, or pigs, and that it should only be used as a “last resort.”¹¹² The AVMA Depopulation Guidelines further advise that ventilation shutdown plus is permitted for chickens, turkeys, ducks, and pigs only in constrained circumstances because it is neither humane nor sufficiently effective.¹¹³ The guidelines note that “a case study involving [pigs] that

¹⁰⁵ *Id.* at 86.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Ventilation shutdown is one of the most brutal, painful methods of animal depopulation*, VETERINARIANS AGAINST VENTILATION SHUTDOWN, <https://www.vavsd.org/about> (last visited Aug. 24, 2020).

¹¹² AVMA Depopulation Guidelines, *supra* note 6, at 61.

¹¹³ *Id.* at 45, 61–62.

experienced a ventilation failure event showed that 100% mortality was not achieved within that particular barn design, *even after [sixteen] hours*. Failure to achieve 100% mortality in depopulation is unacceptable.”¹¹⁴ Indeed, this concern has been borne out recently at Iowa Select Farms.

Many AVMA member veterinarians are demanding that AVMA remove ventilation shutdown from its Depopulation Guidelines, citing animal welfare concerns and ethical issues with permitting it.¹¹⁵ Even the American Association of Swine Veterinarians—which receives “ample financial support” from the industry—recommends against using ventilation shutdown, including ventilation shutdown plus, if other options are available.¹¹⁶

Current APHIS policy, centered around animal disease outbreaks, reflects the view that ventilation shutdown is a last resort.¹¹⁷ In the context of highly pathogenic avian influenza (HPAI), APHIS policy states that ventilation shutdown—including ventilation shutdown plus—should only be used “after a full consideration of the epidemiologic threat posed concludes that no other method can achieve a sufficiently timely measure of assurance that the virus will not spread.”¹¹⁸ When dealing with a dangerous animal disease, such as highly pathogenic avian influenza, which spreads rapidly, APHIS policy sets a goal of “depopulating” flocks within twenty-four hours.¹¹⁹ The USDA HPAI Response Guide reaffirms that

¹¹⁴ *Id.* at 45 (emphasis added)

¹¹⁵ AVMA Members Letter, *supra* note 6; *see* Veterinarians against Ventilation Shutdown, *supra* note 111.

¹¹⁶ Greenwald, *supra* note 43; *see* AM. ASS’N OF SWINE VETERINARIANS, RECOMMENDATIONS FOR THE DEPOPULATION OF SWINE 13 (June 9, 2020), https://static1.squarespace.com/static/5eea3a11030a99078f9344f9/t/5ef3e45e7302c407f054259e/1593042015603/depopulation_recommendations.pdf.

¹¹⁷ Despite this, USDA acknowledges that “[t]he need to control and eradicate HPAI . . . makes [ventilation shutdown] a necessary Alternative.” APHIS, HPAI OUTBREAK 2014-2015, VENTILATION SHUTDOWN EVIDENCE & POLICY 2 (Sep. 18, 2015), https://www.aphis.usda.gov/animal_health/emergency_management/downloads/hpai/ventilationshutdownpolicy.pdf. Indeed, ventilation shutdown is a common depopulation method used by animal agriculture enterprises and is facilitated by USDA when responding to HPAI outbreaks. *See id.* (“the use of [ventilation shutdown] will be handled on a premises by premises basis, with close coordination and collaboration by State and APHIS officials”); Kaleigh Rogers, *Why Nearly Half a Million Sick Chickens and Turkeys Were Suffocated this Week*, VICE (Jan. 23, 2016), https://www.vice.com/en_us/article/8q8nb4/why-nearly-half-a-million-sick-chickens-and-turkeys-were-suffocated-this-week.

¹¹⁸ APHIS, *supra* note 117; *see id.* at 4 (APHIS decision tree intended to help determine when ventilation shutdown is unavoidable).

¹¹⁹ *See id.* at 1.

“[ventilation shutdown] is the last option that will be considered when selecting a depopulation method.”¹²⁰

2. Water-Based Foam

The AVMA Depopulation Guidelines include water-based foam as a “preferred method” for “floor reared, confined [chickens, turkeys, and ducks], including aviary-style housing.”¹²¹ For “[o]utdoor access” chickens, turkeys, and ducks, the guidelines advise that water-based foam is permitted only in constrained circumstances.¹²² For “cage-housed” chickens, turkeys, and ducks, water-based foam is not recommended.¹²³ APHIS policy permits the use of water-based foam to stamp out animal disease.¹²⁴ As with ventilation shutdown, there are many ongoing efforts to remove water-based foam from the AVMA Depopulation Guidelines due to animal welfare concerns.¹²⁵

V. ARGUMENTS IN SUPPORT OF THE REQUESTED ACTION

A. USDA has authority to grant this Petition.

1. USDA is responsible for protecting and improving human and animal health and quality of life.

Congress established USDA, in relevant part, “to acquire and to diffuse among the people of the United States useful information on subjects connected with agriculture.”¹²⁶ Within USDA, there are several agencies that are specifically responsible for animal health and humane treatment. FSIS enforces the Humane Methods of Slaughter Act,¹²⁷ which “requires the proper treatment and humane

¹²⁰ USDA, HIGHLY PATHOGENIC AVIAN INFLUENZA RESPONSE PLAN, THE RED BOOK (May 2017), https://www.aphis.usda.gov/animal_health/emergency_management/downloads/hpai_response_plan.pdf.

¹²¹ AVMA Depopulation Guidelines, *supra* note 6, at 87.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ APHIS, *supra* note 120, at 5-44.

¹²⁵ *See, e.g.*, WAP Letter, *supra* note 56; Statement on COVID-19-Related Depopulation of Farm Animals, ASPCA (May 4, 2020), <https://www.aspc.org/about-us/press-releases/statement-covid-19-related-depopulation-farm-animals>; *see also Animal Welfare Advocates Criticize Proposal Allowing Killing of Animals by Live Burial, Baking*, ASPCA (Apr. 13, 2017), <https://www.aspc.org/about-us/press-releases/animal-welfare-advocates-criticize-proposal-allowing-killing-animals-live>.

¹²⁶ 7 U.S.C. § 2201 (2018).

¹²⁷ 7 U.S.C. §§ 1901–1907 (2018).

handling of all food animals slaughtered in USDA inspected slaughter plants.”¹²⁸ APHIS works “to provide leadership in ensuring the health and care of animals[.]”¹²⁹ In pursuing this mission, “APHIS works in a variety of ways to protect and improve the health of our nation’s animals[.]”¹³⁰ Veterinary Services (VS), an APHIS program, works to “improve[] the health . . . and quality of life for animals and [humans].”¹³¹ One VS objective is to “[b]alance the interests of animal agriculture, consumers, animal welfare, public health, and the environment.”¹³²

APHIS also fulfills an important role in managing emergencies that involve animals. For example, the Animal Health Protection Act authorizes APHIS to take remedial actions, including destruction and disposal, with respect to any animal entering the country or moving through interstate commerce who “may carry, may have carried, or may have been affected with or exposed to any pest or disease of livestock.”¹³³ This authority is particularly broad during “extraordinary emergenc[ies].”¹³⁴ APHIS has interpreted its authority to encompass carcass management during any national emergency that impacts animals, including one arising from a natural disaster.¹³⁵ In addressing such an emergency—including emergencies that APHIS determines require depopulation to stamp out animal

¹²⁸ *Humane Methods of Slaughter Act*, USDA, <https://www.nal.usda.gov/awic/humane-methods-slaughter-act> (last visited Aug. 24, 2020); see § 1902 (describing the two alternative humane methods of slaughter, the first of which requires that “animals are rendered insensible to pain” in a way “that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut” and the second requiring that “the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries”).

¹²⁹ Notice of Request for Extension of Approval of an Information Collection; Environmental Monitoring, 85 Fed. Reg. 31,135, 31,135 (May 22, 2020), <https://www.federalregister.gov/documents/2020/05/22/2020-11076/notice-of-request-for-extension-of-approval-of-an-information-collection-environmental-monitoring>.

¹³⁰ *Mission*, USDA APHIS (June 2, 2020), https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/program-overview/SA_About_VS.

¹³¹ *Id.*

¹³² USDA APHIS VS, VETERINARY SERVICES: A NEW PERSPECTIVE 8, https://www.aphis.usda.gov/animal_health/downloads/vs_new_perspective.pdf (last visited Aug. 24, 2020) (“The eradication of a disease agent is no longer the sole priority of a potential response. As we respond to incidents, we will take into account the interests and perspectives of consumers, local communities, animal welfare, business, commerce, and the environment. . . . [VS will use] the best practices and technology to ensure the welfare of animals”).

¹³³ 7 U.S.C. § 8306(a)(1) (2018).

¹³⁴ § 8306(b)(1).

¹³⁵ See EIS, *supra* note 77, at 4; see also *id.* at 30.

disease as quickly as possible—APHIS specifies that “as much consideration [should be] given to the welfare of the animals as practicable.”¹³⁶

2. USDA is responsible for implementing the CARES Act.

In addition to USDA’s long-standing authority to protect and improve human and animal health and quality of life, Congress recently provided USDA explicit authority to oversee “depopulation” during the COVID-19 pandemic. In late March 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (CARES Act).¹³⁷ Among other things, the CARES Act appropriated \$9.5 billion to USDA “to prevent, prepare for, and respond to coronavirus by providing support for agricultural producers impacted by coronavirus, . . . including livestock producers[.]”¹³⁸ The CARES Act also appropriated \$55 million to APHIS “to prevent, prepare for, and respond to coronavirus”¹³⁹

Soon after, USDA declared that it is “leading the federal response [to the COVID-19 pandemic] by working in coordination with the Vice President’s Task Force, the CDC, OSHA, Department of Labor, industry, state and local governments, and others across the federal family to mitigate the impacts of COVID-19 on producers.”¹⁴⁰ USDA acknowledges that it is assisting animal agriculture enterprises by “implementing the [CARES] Act.”¹⁴¹

3. USDA has recognized its own authority to grant this Petition, as evidenced by its ongoing support, facilitation, and supervision of “depopulation” activities.

USDA directly governs “depopulation” in several ways. On April 24, 2020, APHIS established the National Incident Coordination Center (NICC) to, among other things:

¹³⁶ APHIS, *supra* note 47, at 1.

¹³⁷ Pub. L. No. 116-136, 134 Stat. 281 (2020).

¹³⁸ *Id.* at 505.

¹³⁹ *Id.* at 506.

¹⁴⁰ *USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures*, USDA APHIS (May 13, 2020), https://www.aphis.usda.gov/aphis/newsroom/stakeholder-info/sa_by_date/sa2020/sa-04/meat-processing-coordination-center.

¹⁴¹ *Coronavirus and USDA Assistance for Farmers*, USDA, https://www.farmers.gov/coronavirus?utm_source=nrcsreferral&utm_medium=spotlight&utm_campaign=0501eamaswine (last visited Aug. 24, 2020).

- “[P]rovide direct support to producers whose animals cannot move to market as a result of processing plant closures due to COVID-19;”¹⁴²
- “[A]dvise and assist on [animal] depopulation and disposal methods,”¹⁴³ and
- “[M]obilize and deploy assets of the National Veterinary Stockpile as needed and secure the services of contractors that can supply additional equipment, personnel, and services, much as it did during the large-scale Highly Pathogenic Avian Influenza emergency in 2015,”¹⁴⁴ including captive bolt guns and cartridges and chutes and trailers.¹⁴⁵

APHIS recently confirmed that it is providing bolt guns to facilitate “depopulation” efforts.¹⁴⁶ In addition to APHIS’s activities, USDA’s Natural Resources Conservation Service (NRCS) “is offering financial and technical assistance to livestock producers for animal mortality disposal resulting from impacts of the COVID-19 pandemic.”¹⁴⁷ Moreover, as depicted below, an APHIS official and an NRCS official recently collaborated with industry groups to provide a webinar—presented via PowerPoint in graphic detail—on exactly how to “depopulate” pigs and dispose of their bodies.¹⁴⁸

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *APHIS Livestock Coordination Center*, USDA APHIS (June 2, 2020), <https://www.aphis.usda.gov/aphis/ourfocus/animalhealth/livestock-coordination-center/livestock-coordination-center>.

¹⁴⁶ Letter from Kevin Shea, APHIS Administrator, to Alexis Andiman, Earthjustice Staff Attorney 2 (July 21, 2020) (“APHIS did provide bolt guns”) (Attach. 2).

¹⁴⁷ USDA, EMERGENCY LIVESTOCK MORTALITY, FUNDING AVAILABLE TO HELP WITH SAFE DISPOSAL OF LIVESTOCK (Apr. 2020), https://www.bah.state.mn.us/media/EQIP-Livestock-Mortality-Initiative-fact-sheet-4_2020.pdf (inviting animal agriculture enterprises to apply for assistance through the Environmental Quality Incentives Program); Coronavirus and USDA Assistance for Farmers, *supra* note 141.

¹⁴⁸ PORK CHECKOFF, PLANNING FOR EMERGENCY DEPOPULATION AND DISPOSAL (Apr. 26, 2020), <https://library.pork.org/media/?mediaId=F7549893-1D5E-42BD-879981850085984B>.

Speakers



Bill Even
CEO
National Pork Board



Kevin Norton
Associate Chief
USDA - NRCS



Dr. Dave Pyburn
Chief Veterinarian
National Pork Board



Mark Rice
Extension Specialist
Retired
North Carolina
State University



Lori Miller
Environmental
Engineer
USDA - APHIS



Large Scale – dumpsters, grain trucks, dump trucks or larger chambers or pits



Grinder Trials

- ❖ Alternating scoops of tissue and carbon worked best
- ❖ Covering carcasses with carbon also helped with visual and odor aspects, and aided mixing
- ❖ Composting whole pigs takes up to a year if lance abdomens; composting ground pigs takes less than a month.
- ❖ Above ground burial with whole pigs up to a year if lance abdomens; less than 6 months ground



Euthanasia Options

The American Veterinary Medical Association lists possible depopulation methods in three categories (AVMA, 2019):

Preferred	Permitted in Constrained Circumstances	Not Recommended
Gunshot	Ventilation shutdown plus	None listed
Nonpenetrating captive bolt	Sodium nitrite	
Penetrating captive bolt	Compounded or nonpharmaceutical-grade injectable anesthetics and euthanasia agents	
Electrocution		
Manual blunt force trauma		
Movement to slaughter		
Carbon dioxide		
Anesthetic overdose		



4. DOJ has recognized and is relying upon USDA's authority to grant this Petition.

The U.S. Department of Justice (DOJ), which has authority to interpret federal law as it pertains to federal agency authority, has also acknowledged that USDA has been charged with—and is already engaged in—supervising, facilitating,

and supporting the animal agriculture industry’s “depopulation” activities. In particular, DOJ is relying on USDA to supervise “depopulation.” On May 8, 2020, the National Pork Producers Council (NPPC) wrote to DOJ requesting a “Business Review Letter” to confirm that industry coordination to “depopulate” and dispose of an estimated 700,000 pigs per week would not violate antitrust laws.¹⁴⁹ As detailed in the letter, “a coordinated industry and governmental response is necessary to ethically and efficiently euthanize as few [pigs] as possible” because “farmers generally lack the knowledge, equipment, and facilities needed to humanely euthanize large numbers of animals, and then dispose of them in a manner that mitigates the environmental impact.”¹⁵⁰ The letter specifically states that the industry is relying on governmental support “to ensure the humane treatment of” pigs, and that the industry “will require education and guidance regarding methods, protocols, equipment, and processes to humanely euthanize an unprecedented and unexpected number of unmarketable [pigs].”¹⁵¹

On May 15, 2020, DOJ responded to NPPC’s letter and granted its request.¹⁵² First, DOJ explained that “it will not challenge conduct aimed at addressing COVID-19 if it is (i) compelled by an agreement with a federal agency or a clearly defined federal government policy and (ii) supervised by a federal agency.”¹⁵³ Second, DOJ concluded that, since the enterprises in question are “working with APHIS’s NICC,” the proposed conduct “fits within th[e] two-part framework.”¹⁵⁴ DOJ noted that, though the enterprises “may not have a formal agreement with APHIS’s NICC, they will be acting at [its] direction in the context of a clearly defined federal program and in furtherance of that program.”¹⁵⁵ Moreover, their actions will be “at the direction and supervision of the USDA.”¹⁵⁶ Specifically, “APHIS’s NICC will work with farmers and packers to facilitate [pig] depopulation,” including by “tell[ing] those producers where they should take . . . [pigs] to be depopulated.”¹⁵⁷ DOJ concluded that, “based on [NPPC’s] representations, most of this conduct will occur at the direction and under the supervision and coordination of the USDA—a government agency—and therefore should not raise concerns under the antitrust laws.”¹⁵⁸

¹⁴⁹ NPPC Letter, *supra* note 34, at 1, 3.

¹⁵⁰ *Id.* at 3, 4.

¹⁵¹ *Id.*

¹⁵² DOJ Letter, *supra* note 34.

¹⁵³ *Id.* at 4.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* (internal quotation marks omitted).

¹⁵⁶ *Id.* (internal quotation marks omitted).

¹⁵⁷ *Id.* at 3, 4.

¹⁵⁸ *Id.* at 1.

For all of these reasons, USDA’s legal authority to grant this Petition is well-established, and any contention to the contrary would necessarily render its ongoing entanglement with “depopulation” ultra vires agency action subject to judicial review under the APA.

B. USDA should grant this Petition.

1. There is a uniquely urgent need for the requested rules and database.

Animal and human health and quality of life are suffering. As previously discussed,¹⁵⁹ millions of farmed animals have already been cruelly “depopulated”—including approximately 700,000 pigs *per week*,¹⁶⁰ and millions more are likely to follow. Moreover, the consequences of allowing profit-driven and expedient “depopulation” decisions to continue unchecked is a major threat to the vitality—and even viability—of rural communities.¹⁶¹ Industrial animal agriculture has already dealt a great deal of damage to rural communities, and their residents should not be forced to commit acts of mass cruelty against farmed animals for their livelihoods.¹⁶² USDA—the agency committed to the “quality of life of people living in the rural nonmetropolitan regions of the Nation”¹⁶³—is the appropriate agency to act.

2. Granting this Petition is consistent with USDA’s mission and commitments.

The requested rules and database are consistent with FSIS’s role of ensuring that farmed animals are killed humanely.¹⁶⁴ They are also consistent with APHIS’s current policies and commitments to “provid[ing] leadership in ensuring the health and care of animals” and “protect[ing] and improv[ing] the health . . . and quality of life for animals and [humans].”¹⁶⁵ They will dovetail with APHIS’s asserted authority to supervise, facilitate, fund, and support the animal agriculture industry’s “depopulation” activities during the COVID-19 pandemic, which APHIS has already been exercising for months.¹⁶⁶

¹⁵⁹ See *supra* section IV.C.1.

¹⁶⁰ See NPPC Letter, *supra* note 34, at 1, 3.

¹⁶¹ See *supra* section IV.C.2.

¹⁶² See *id.*

¹⁶³ 7 U.S.C. § 2204 (2020).

¹⁶⁴ See *supra* section V.A.1.

¹⁶⁵ See *supra* notes 129–132.

¹⁶⁶ See USDA APHIS Establishing Coordination Center to Assist Producers Affected by Meat Processing Plant Closures, *supra* note 140; APHIS Livestock

The creation of a database of recipients of USDA COVID-19 funds, resources, and/or other forms of support will also provide the public with prompt notice of and information regarding incidents of depopulation, and, more generally, will allow the public to monitor USDA’s stewardship of billions of federal tax dollars. Moreover, Petitioners and members of the media have requested and intend to continue requesting records related to recipients of USDA COVID-19 funds, resources, and/or other forms of support—therefore, these records will be frequently requested. Proactively publishing these records online is consistent not only with USDA’s information-sharing mission,¹⁶⁷ but also with e-FOIA rules regarding frequently requested records.¹⁶⁸

3. Granting this Petition is consistent with the minimum federal supervision necessary to ensure that industry “depopulation” efforts do not violate antitrust laws.

A handful of powerful corporations dominate animal agriculture worldwide,¹⁶⁹ and the consolidation of power in the industry has long raised concerns, including in the context of the COVID-19 pandemic.¹⁷⁰ By enacting the requested rule, USDA will provide supervision necessary to prevent violations of antitrust laws, while also improving and protecting the health and quality of life of animals and humans alike. As discussed above, DOJ has indicated that it is relying on USDA to provide this supervision.

4. The requested rules and database are necessary to ensure government accountability.

Government accountability is crucial for public trust. It fosters public faith in the government and its institutions, which is foundational to democracy. The

Coordination Center, *supra* note 145; DOJ Letter, *supra* note 34; NPPC Letter, *supra* note 34.

¹⁶⁷ FSIS, for example, acts to fulfill USDA’s information sharing mission by providing a public directory of regulated entities. *Meat, Poultry and Egg Product Inspection Directory*, USDA FSIS, <https://www.fsis.usda.gov/wps/portal/fsis/topics/inspection/mpi-directory> (last visited Aug. 24, 2020) (“listing of establishments that produce meat, poultry, and/or egg products regulated by FSIS”).

¹⁶⁸ 5 U.S.C. § 552(a)(2)(D) (2018).

¹⁶⁹ See *supra* Section IV.A.

¹⁷⁰ See, e.g., David McLaughlin, *DOJ Subpoenas Meatpackers*, FARMPROGRESS (June 5, 2020), <https://www.farmprogress.com/business/doj-subpoenas-meatpackers>; Alex Gangitano, *Bipartisan Pair of Senators Request Antitrust Probe into Meatpacking Industry*, THE HILL (Apr. 29, 2020), <https://thehill.com/homenews/senate/495197-hawley-baldwin-request-antitrust-investigation-into-meatpacking-industry>.

government must not only create platforms for the public to acquire information about government actions, but also respond to and fulfill these requests in a meaningful way that provides the public with the information to which it is entitled.

Veterinary Services has itself acknowledged that it has a duty to its stakeholders and customers because of how “animal health affects their communities, families, and everyday lives.”¹⁷¹ As a result, VS seeks to “[e]ngage stakeholders to build trust and productive working relationships,” which requires that the government fulfill its duties and that the public have access to information to verify this.¹⁷² Furthermore, information dissemination is mentioned as a priority for VS to reach this objective of building public trust.¹⁷³

Government accountability is also necessary to protect animal and human health and quality of life, both of which—as described above¹⁷⁴—are critical components of public health. The government is uniquely equipped to assess and manage threats to health and quality of life that originate from animal agriculture, and to assist the public in becoming aware of and responding to these threats. The quality of life of residents of rural regions—especially those who are employed in animal agriculture and their families—depends on the government’s willingness to fulfill its duties to monitor animal agriculture and address the ways in which it threatens animal and human health and quality of life.

5. Under these unprecedented circumstances, there is good cause to publish the requested interim final rule within seven days and make it effective immediately.

Petitioners have requested that USDA immediately initiate an emergency rulemaking and, within seven days, publish an interim final rule—effective immediately—that prevents USDA COVID-19 relief funds, resources, and/or any other forms of support from facilitating or compensating for the “depopulation” of farmed animals by ventilation shutdown or water-based foam, and that withholds all USDA COVID-19 relief funds, resources, and/or any other forms of support from integrators, processors, and meatpackers that order or permit the “depopulation” of farmed animals by ventilation shutdown or water-based foam. The uniquely urgent—and unprecedented—circumstances at hand are good cause to publish the requested interim final rule within seven days and make it effective immediately.

Notice and comment may be waived “when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules

¹⁷¹ See USDA APHIS VS, *supra* note 132, at i.

¹⁷² See *id.* at 2.

¹⁷³ See *id.* at 8.

¹⁷⁴ See *supra* sections IV.C.1–2.

issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.”¹⁷⁵ The good cause exception “excuses notice and comment in emergency situations, where delay could result in serious harm.”¹⁷⁶ Notice and comment is “impractical” in those situations “when an agency finds that due and timely execution of its functions would be impeded by the notice otherwise required [by section 553],” such as when a rule “must be put in place immediately.”¹⁷⁷

Here, there is good cause to waive notice and comment. USDA is facilitating ongoing, widespread “depopulation,” which is the result of a global pandemic, and which is causing severe harm to the health and quality of life of animals and humans alike.¹⁷⁸ Moreover, there is virtually no publicly available information or details about ongoing, widespread “depopulations.” Given the unique urgency of these unprecedented circumstances, it is impracticable to delay publishing the requested rule in order to solicit comment. Instead, USDA should solicit public comment at the same time it publishes the requested rule and then amend the rule as appropriate in response to comments. Providing advance notice and comment serves an important purpose, but given the extraordinary circumstances here, delaying issuance of the rule would be harmful. Public comment may generate additional suggestions that USDA can incorporate into an amended rule to better protect animals and humans.

USDA also has good cause to make this rule effective immediately upon publication.¹⁷⁹ While the standards for good cause under section 553(b) and 553(d) are not identical,¹⁸⁰ they are related inquiries.¹⁸¹ Due to the worsening coronavirus

¹⁷⁵ 5 U.S.C. § 553(b)(B) (2018).

¹⁷⁶ *Chamber of Commerce v. SEC*, 443 F.3d 890, 908 (D.C. Cir. 2006) (citations omitted); *see also Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 & n.2 (9th Cir. 1992) (“Emergencies, though not the only situations constituting good cause, are the most common.”).

¹⁷⁷ *Util. Solid Waste Activities Grp. v. EPA*, 236 F.3d 749, 754 (D.C. Cir. 2001) (quoting U.S. Dep’t of Justice, *Attorney General’s Manual on the Administrative Procedure Act* 30-31 (1947)); *see also Nat’l Nutritional Foods Ass’n v. Kennedy*, 572 F.2d 377, 385 (2d Cir. 1978).

¹⁷⁸ *See Schneider v. Chertoff*, 450 F.3d 944, 949 & n.4 (9th Cir. 2006) (observing that the court “do[es] not doubt the necessity of immediate implementation” of a rule serving an “immediate public health need”).

¹⁷⁹ *See* 5 U.S.C. § 553(d)(3) (2018).

¹⁸⁰ *See Am. Fed’n of Gov’t Emp., AFL-CIO v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981).

¹⁸¹ *See U.S. v. Gavrilovic*, 551 F.2d 1099, 1104 (8th Cir. 1977) (surveying the APA’s legislative history and finding “[l]egitimate grounds” for an immediate effective date to include “urgency of conditions coupled with demonstrated and

pandemic, the “just-in-time” operations of the animal agriculture industry, and the resulting ongoing “depopulation” of animals via unnecessarily cruel methods, this rule must become effective immediately.

Finally, we request that USDA respond to this Petition promptly, as the APA requires.¹⁸² The requested rules and database would impose a trivial burden or inconvenience on regulated enterprises, and would provide helpful guidance to reconcile the confusing patchwork of agency guidance at the state and federal level. Under these circumstances, seven days is a reasonable amount of time for USDA to resolve this Petition.

VI. CONCLUSION

For the foregoing reasons, USDA has the power—and the responsibility—to grant this Petition.

Respectfully submitted,



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unavoidable limitations of time,” and that an agency’s primary consideration is the “convenience or necessity of the people affected”) (citations and internal quotation marks omitted); *see also Schneider*, 450 F.3d at 949 & n.4.

¹⁸² 5 U.S.C. § 555(b) (2018).

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CC: Honorable Phyllis K. Fong, Inspector General, USDA

ENCLOSURES