



February 14, 2023

Michael Regan  
Administrator  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, N.W.  
Washington, D.C. 20460

*Via regulations.gov*

**Re: Prevention of Significant Deterioration and Nonattainment New Source Review: Reconsideration of Fugitive Emissions Rule; 87 FR 62322 (Docket ID No. EPA-HQ-OAR-2004-0014)**

Dear Administrator Regan:

Thank you for the opportunity to comment on the Reconsideration of the Fugitive Emissions Rule. The undersigned groups and organizations wish to respectfully submit these comments in response to the Environmental Protection Agency's (EPA's) request for comments relating to the reconsideration of the Fugitive Emissions Rule (the "Rule"). Commenters represent several organizations whose missions are to protect and promote a healthful environment for those living and working in the agricultural industry, including all living beings, both human and nonhuman animals.

The animal agriculture industry is one of the major emitters of chemicals and air pollution in the United States because of the sheer size, operating practices, and demand of the industry. The Fugitive Emissions Rule has been a significant roadblock to getting the agricultural industry's emissions under control and has indirectly increased health and safety risks in communities surrounding animal agriculture operations. The Fugitive Emissions Rule has notably contributed to the struggle to fully regulate and account for nearly all emissions and other air pollutants from the agricultural sector. Thus, the Fugitive Emissions Rule seems to frustrate the overall purpose and intention of the Clean Air Act ("CAA" or the "Act") and should be repealed to make regulation of emissions across all industries, including the animal agriculture sector, practical and manageable.

We are deeply appreciative of the opportunity to thoroughly reconsider the Fugitive

Emissions Rule and respectfully urge EPA to repeal the Rule. Repealing the Rule would make managing air pollution under the Act far more comprehensive and effective. In this comment, we will briefly address the following points:

1. The Fugitive Emissions Rule essentially exempts animal agriculture operations from scrutiny and thereby frustrates the purpose of the Clean Air Act.
2. The Fugitive Emissions Rule exacerbates the harms caused by emissions at animal agriculture operations.
3. Industrial animal agriculture operations should undergo New Source Review.

**I. The Clean Air Act’s purpose of improving air quality is thwarted by the Fugitive Emissions Rule, which effectively shields the agricultural industry, one of the largest sources of pollutants, from the Act’s requirements.**

The Clean Air Act is one of the most ambitious pieces of environmental legislation ever passed in the United States with a goal “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population.”<sup>1</sup> Former EPA Administrator Lisa Jackson remarked “[t]he total benefits of the Clean Air Act amount to more than 40 times the costs of regulation. For every dollar we have spent, we get more than \$40 of benefits in return.”<sup>2</sup> The CAA has made strides in mitigating air pollution, led to the growth of technology, and saved thousands of people from premature death, cancer, and other chronic illness.<sup>3</sup> Yet, the Fugitive Emissions Rule has limited EPA and implementing States to achieving the goals set out in the CAA by shielding certain industries from its reach. The industries exempted in the Fugitive Emissions Rule are not chosen based on volume of pollutants or severity of their impact, but rather on how these deadly substances are emitted.

Major animal agriculture operations, frequently called Animal Feeding Operations (AFOs), have benefitted significantly from the near complete exemption for the agricultural industry in the Fugitive Emissions Rule. An AFO is defined as a facility where animals are confined for at least 45 days in a 12-month period without any crop or

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<sup>1</sup> 42 U.S.C. § 7401(b)(1).

<sup>2</sup> *A Success Story, With Many Chapters Still to Come*, EARTHJUSTICE, <https://earthjustice.org/features/campaigns/a-success-story-with-many-chapters-still-to-come#:~:text=The%20Clean%20Air%20Act%20has,illness%20in%20children%20were%20prevented> (last visited Feb. 10, 2023).

<sup>3</sup> *Progress Cleaning the Air and Improving People’s Health*, EPA, <https://www.epa.gov/clean-air-act-overview/progress-cleaning-air-and-improving-peoples-health> (last visited Feb. 10, 2023).

vegetative growth within the boundaries of the facility.<sup>4</sup> Some AFOs are better characterized as Concentrated Animal Feeding Operations (CAFOs) due to their massive size and highly dense animal population.<sup>5</sup> CAFOs can range from small to large in size, with some facilities holding millions of animals.<sup>6</sup>

The dominance of CAFOs in the American agricultural landscape cannot be overstated. Although the total number of operations have decreased in recent years, the number of animals per facility has exponentially increased.<sup>7</sup> For example, although Iowa experienced a 25% drop in the number of egg production facilities from 2012 to 2017, the average size of these operations grew about 50%.<sup>8</sup> This means that agricultural animals and all of the husbandry practices that accompany them in these operations, both of which contribute a massive amount of emissions annually, are confined to very small areas. The concentration of animals, their waste, and the chemicals and emissions that result are all densely packed into and around these AFOs and CAFOs which makes these operations very difficult places to live and work. Some can even prove deadly.<sup>9</sup>

Still because of the Fugitive Emissions Rule exempts emissions that “could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening,” significant releases of emissions from animal agricultural operations escape CAA obligations.<sup>10</sup> Since AFOs are not listed in the categories of sources in 40 C.F.R. 52.21(b)(1)(iii), many of them can claim the majority of their emissions are fugitive and evade otherwise applicable CAA regulations. EPA’s notice for public comment identifies “[e]xamples of fugitive emissions [that] include windblown dust from surface mines and volatile organic compounds (VOCs) emitted from leaking pipes and fittings at petroleum

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<sup>4</sup> *Animal Feeding Operations (AFOs)*, ENVTL PROT. AGENCY, <https://www.epa.gov/npdes/animal-feeding-operations-afos> (last visited Feb. 10, 2023).

<sup>5</sup> *Id.*

<sup>6</sup>Regulatory Definitions of Large CAFOs, Medium CAFO, and Small CAFOs, EPA [https://www.epa.gov/sites/default/files/2015-08/documents/sector\\_table.pdf](https://www.epa.gov/sites/default/files/2015-08/documents/sector_table.pdf); *see also The Growing Movement to Stop CAFOs*, STRAY DOG INST. (Dec. 2021), <https://straydoginstitute.org/the-growing-movement-to-stop-cafos/> (last visited Feb. 10, 2023).

<sup>7</sup> *Id.*

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

<sup>9</sup> For example, a 2020 study shows that air pollution from agriculture already leads to 17,900 U.S. deaths per year. Nina G. G. Domingo et al., *Air quality-related health damages of food*, PROCEEDINGS OF THE NAT’L ACAD. OF SCIENCES, Vol. 118:20 (May 2021), <https://www.pnas.org/content/118/20/e2013637118>.

<sup>10</sup> 40 C.F.R. 52.21(b)(20); 73 Fed. Reg. 77882 (“The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of 302(j) of the Act.”).

refineries.”<sup>11</sup> Further examples adopted by the animal agriculture industry and, at times the EPA, have included emissions from waste lagoons and open feedlots, effectively excluding those types of AFO emissions from applicable CAA requirements.<sup>12</sup> Notably in its GHG Tailoring Rule, the EPA characterizes emissions from animal manure management systems as fugitive – finding that animal agriculture operations would not likely be subject to CAA permitting.<sup>13</sup> Since open feedlots and lagoons are some of the dominant sources of emissions from this industry, the Rule has acted to exempt most agricultural operations from many provisions of the Act and has eviscerated states' and localities' ability to address air quality problems emanating from agricultural operations.<sup>14</sup>

The Fugitive Emissions Rule has created a situation where certain industries are given a “pass” to degrade air quality while others are subject to regulations aimed at improving net air quality.<sup>15</sup> By creating a functional exemption for entire industries, successful implementation of CAA regulations and policies is at best incomplete – despite no evidence that such an exemption is warranted. The Fugitive Emissions Rule prevents the EPA from being able to oversee much of the agricultural industry’s emissions, one of the largest polluters in the United States.<sup>16</sup> The Rule essentially allows the animal agriculture industry, one of the most profitable in the nation, to self-regulate and set its own standards.<sup>17</sup> Under the current rules, a CAFO can claim that 90% of its emissions are

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<sup>11</sup> 87 Fed. Reg. 62,325

<sup>12</sup> See, e.g., William Wehrum, *Consideration of Fugitive in Open-Air Cattle Operations*, EPA (Nov. 2, 2006), <https://www.epa.gov/sites/default/files/2015-08/documents/cowdust.pdf> (“EPA generally presumes that air emissions from cattle loading and unloading, cattle feed lots, retention basins, roadways, and feed loading operations are fugitive emissions that do not count when determining major source status for construction and operating permitting.”)

<sup>13</sup> See Env’t Protection Agency, *Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule*, 75 Fed. Reg. 31,514 (June 3, 2010), <https://www.govinfo.gov/content/pkg/FR-2010-06-03/pdf/2010-11974.pdf#>.

<sup>14</sup> See Lloyd L. Eagan (President of State and Territorial Air Pollution Program Administrators) and Ellen Garvey (President of Association of Local Air Pollution Control Officials), letter to Christine Todd Whitman (EPA Administrator) (April 7, 2003), available [https://www.4cleanair.org/wp-content/uploads/2021/01/LettertoWhitman\\_0.pdf](https://www.4cleanair.org/wp-content/uploads/2021/01/LettertoWhitman_0.pdf).

<sup>15</sup> See Danielle Diamond, Loka Ashwood, et. al., *Agricultural Exceptionalism, Environmental Injustice, and U. S. Right-to-Farm Laws*, 52 ELR 10726 (2022) (discussing the history of “right-to-farm laws” and the culture of agricultural exceptionalism).

<sup>16</sup> See 40 C.F.R. 70.2; *Air Quality Issues and Animal Agriculture: A Primer*, CRS (June 6, 2016); Susanne E. Bauer, Kostas Tsigaridis, and Ron Miller, *Significant atmospheric aerosol pollution caused by world food cultivation*, GEOPHYS. RES. LETT., 43, 5394– 5400 (2016).

<sup>17</sup> Mariel Kusano, *Rewarding Bad Behavior: EPA’s Regime of Self-Regulation*, 12 HASTINGS ENV’T L. J. 167 (2006).

fugitive and point to the massive lagoons and fertilizer plants that cover their land. Emissions from the lagoons, open feedlots, stock yards, and other sources are still entering the atmosphere and the air of surrounding communities, creating unsafe, unpleasant, and even unlivable environments.

Noticeably few cases explicitly invoke the Fugitive Emissions Rule. This could be because the Rule is so well-understood and all-encompassing as it relates to the animal agriculture industry that few plaintiffs are willing to take a chance on challenging the Rule's rationale or application. When an entity functionally exempted by the Rule does face a challenge in court however, the Fugitive Emissions Rule cuts any further inquiry short. For example, in *Global Community Monitor v. Mammoth Pacific, L.P.*, a facility that fell under the Rule was emitting VOCs as a result of unsealed joints on certain equipment.<sup>18</sup> The case involved a California rule equivalent to the Fugitive Emissions Rule, but there were no specific definitions of "fugitive emissions" under the relevant California provision.<sup>19</sup> The court determined that the complimentary rule "should be interpreted in a manner consistent with other federal law regarding fugitive emissions."<sup>20</sup> The court continued to apply the federal Fugitive Emissions Rule, and affirmatively stated that, "under federal law, fugitive emissions from a stationary source are not included in determining whether the source is a 'major stationary source' (unless the source belongs in one of 28 listed categories)."<sup>21</sup> Consistent with the federal Rule, the court determined that the power plant in *Global Community Monitor* was indeed not a major source, and therefore the Act was not applicable to the plant as the fugitive emissions would not have been calculated.<sup>22</sup>

Like the power plant in this case, many AFOs and CAFOs are effectually exempted from having to consider fugitive emissions when determining whether the operation is a major source. The result would have been similar if an AFO was involved in this case, the Fugitive Emissions Rule would have immediately saved the operation from having to account for fugitive emissions despite their proven toxicity or substantiality. Consequently, the Fugitive Emissions Rule undermines the purpose of the Clean Air Act by allowing harmful pollutants to be emitted into the air unregulated, leading to countless health and environmental injuries.

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<sup>18</sup> See *Global Cmty. Monitor v. Mammoth Pac., L.P.*, 81 ERC (BNA) 1058, 1 (E.D. Cal. 2015).

<sup>19</sup> *Id.* at 9.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 12; see 40 CFR 70.2.

## II. The Fugitive Emissions Rule has led to drastically increased health and safety risks in and around industrial agricultural operations and in communities unable to bear the resulting increasing air pollution.

The production of animals for food emits mass amounts of volatile organic compounds (VOCs), ammonia hydrogen sulfide, and other dangerous substances and pollutants.<sup>23</sup> Many of these emissions come from animal excrement, animal exhalation, and other processes ubiquitous in the industrial animal agriculture industry. Of those emissions associated with AFOs and CAFOs ammonia, hydrogen, and particulate matter pose particular risks to human and animal health. Volatile Organic Compounds, methane, and nitrogen oxides pose health risks too, but are greater threats to the environment and air quality.<sup>24</sup> Each is associated with harmful environmental impacts and health risks. Considering that all these substances are known to occur in AFOs and CAFOs in massive volumes together clearly demands that EPA be able to at least start regulating these operations under the CAA. The following is a list of common pollutants emitted by AFOs:

### A. Volatile Organic Compounds (VOCs)

AFOs notoriously produce volatile organic compounds (VOCs) and emit them into the atmosphere given the sheer volume of animals raised and other practices associated with large-scale animal agriculture.<sup>25</sup> VOCs are emitted through animal excrement, animal exhalation, lagoons, storage piles and silos, and feed mixtures.<sup>26</sup> Along with the unpleasant smell, VOCs pose a number of very serious health risks to those suffering deteriorating air quality as a result of the presence of these substances.<sup>27</sup> Such health risks include increased likelihood of developing respiratory illness, asthma and bronchitis, and even cardiorespiratory mortality in cases of prolonged and highly concentrated exposure.<sup>28</sup> On a much more immediately noticeable level, VOCs frequently irritate the eyes, nose, throat, and skin.<sup>29</sup> VOCs also contribute to the creation

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<sup>23</sup> Nicholas J. Hoover, *Can't You Smell That Smell? Clean Air Act Fixes for Factory Farm Pollution*, 6 Stan. J. Animal L. & Pol'y 1 (2013).

<sup>24</sup> *Id.* at 8.

<sup>25</sup> Bin Yuan, Matthew M. Coggon, et al., *Emissions of Volatile Organic Compounds (VOCs) from Concentrated Animal Feeding Operations (CAFOs): Chemical Compositions and Separations of Sources*, 17 ATMOS. CHEM. PHYS. 4945, 4945-46 (2017).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 4945; see also Josh Emden & Luke Murphy, Report: "Lethal but Legal: The Health Impact of Air Pollution," INSTITUTE FOR PUB. POL'Y RSCH. 2018 (identifying health risks related to the presence of VOCs).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*; see also Claudia Copeland, Cong. Research Serv., LIBRARY OF CONG., "Air Quality Issues and Animal Agriculture: A Primer" (2005).

of ozone, one of the six criteria pollutants in the Act's National Ambient Air Quality Standards (NAAQS) program.<sup>30</sup>

## B. Methane

Methane poses a similar risk to those living and working around major agricultural operations and CAFOs. While its effects on human health are generally secondary, methane is a significant contributor to climate change and the formation of tropospheric ozone as a greenhouse gas (GHG) pollutant.<sup>31</sup> Studies have revealed that methane is both one of the fastest growing GHGs in Earth's atmosphere and eighty-six times more potent a global warming agent than carbon dioxide.<sup>32</sup> Its presence can also exaggerate the impact of carbon dioxide, tropospheric ozone, and other substances on trapping heat.<sup>33</sup> Increased methane emissions also lead to elevated levels of tropospheric ozone air pollution, cutting nearly one million lives short as a result of heart disease, respiratory illness, and lung and respiratory tissue damage every year.<sup>34</sup>

## C. Ammonia

Another substance generated in massive volumes by AFOs and CAFOs in the course of producing animals for food is ammonia. Similar to previously mentioned substances, ammonia causes respiratory disease, reduced lung function, irritation in the eyes, nose, and throats of those exposed regularly. It can even cause long-term health issues like Chronic Obstructive Pulmonary Disease (COPD), and forms of lung cancer.<sup>35</sup> Ammonia is not only dangerous on its own, but these emissions also contribute significantly to the global formation of fine particulate matter (PM<sub>2.5</sub>) which the U.S. estimates contributes 30% of the global volume.<sup>36</sup> Big agricultural operations play no small part in this. A recent study noted that 81% of global ammonia emissions

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<sup>30</sup> See Reviewing National Ambient Air Quality Standards (NAAQS): Scientific and Technical Information, EPA, <https://www.epa.gov/naaqs> (last visited Feb. 10, 2023).

<sup>31</sup> Johnathan Lovvorn, *Climate Change Beyond Environmentalism Part II: Near-Term Climate Mitigation in a Post-Regulatory Era*, 30 GEO. ENV'T'L L. R. 203, 212 (2018).

<sup>32</sup> *Id.*; CLIMATE AND CLEAN AIR COALITION, *Methane*, <https://www.ccacoalition.org/es/slcp/methane> (last visited Feb. 10, 2023).

<sup>33</sup> Lovvorn, *supra* note 32; see also CLIMATE AND CLEAN AIR COALITION, *supra* note 33.

<sup>34</sup> CLIMATE AND CLEAN AIR COALITION, *supra* note 33.

<sup>35</sup> Katie E. Wyer, David B. Kelleghan, et al., *Ammonia emissions from agriculture and their contribution to fine particulate matter: A review of implications for human health*, 323 J. ENV'T'L MANAGEMENT 1, 1 (2022).

<sup>36</sup> *Id.*

are the result of the agricultural industry.<sup>37</sup>

#### **D. Hydrogen Sulfide**

Like ammonia, hydrogen sulfide (H<sub>2</sub>S) is a colorless gas produced “during the degradation of liquid manure stored in anaerobic conditions within agricultural livestock operations,” which notoriously smells like rotting eggs.<sup>38</sup> It is highly flammable and considered “cyanide-like.”<sup>39</sup> While H<sub>2</sub>S certainly poses an environmental threat, it also can have impacts on respiratory health and comfort in humans and animals.<sup>40</sup> In fact, hydrogen sulfide is considered one of the most “deadly, dangerous, and plentiful” emissions associated with CAFOs.<sup>41</sup> Prolonged or repeated exposure to H<sub>2</sub>S can cause farm workers and nearby residents to experience dizziness, nausea, impaired balance, vomiting, and respiratory discomfort.<sup>42</sup> Workers, and sometimes even livestock animals, at these facilities are at the greatest risk, as one study showed that 86% of agricultural workers and immediate neighbors showed signs of serious nervous system impairment.<sup>43</sup> As mentioned, animals are also susceptible to the effects of H<sub>2</sub>S, which causes many livestock deaths.<sup>44</sup> Clearly, high concentrations of H<sub>2</sub>S are not only dangerous for workers and neighboring communities, but for the agricultural industry in its entirety.

#### **E. Particulate Matter (PM<sub>10</sub>)**

Particulate Matter (PM<sub>10</sub>), another airborne pollutant made up of a series of chemicals, has a negative impact on air quality and human health as well.<sup>45</sup> Even short-term exposure to PM<sub>10</sub> is associated with worsening respiratory illness, asthma, or COPD, and, and long-term exposure can result in

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<sup>37</sup> *Id.*

<sup>38</sup> Justene Guarrasi, Catherine Trask, & Shelley Kirychuk, *A Systemic Review of Occupational Exposure to Hydrogen Sulfide in Livestock Operations*, J. AGROMEDICINE 225, 226 (2015).

<sup>39</sup> Hoover at 19, *supra* note 24.

<sup>40</sup> *Id.* At 6-7.

<sup>41</sup> *Id.* at 17.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 19-20.

<sup>44</sup> Letter from Neil J. Carman, SIERRA CLUB, to Lisa Jackson, Administrator, ENV'TL PROT. AGENCY (Mar. 30, 2009) <http://www.earthworksaction.org/files/publications/H2SLetterToEPA.pdf>.

<sup>45</sup> CALIFORNIA AIR RESOURCES BOARD, “Inhalable Particulate Matter and Health (PM<sub>2.5</sub> and PM<sub>10</sub>),” <https://ww2.arb.ca.gov/resources/inhalable-particulate-matter-and-health> (last visited Feb. 10, 2023).



respiratory mortality in extreme cases, studies report.<sup>46</sup> Children's respiratory development has also been stunted or otherwise negatively impacted if they live in close proximity to AFOs or CAFOs known to emit PM<sub>10</sub>.<sup>47</sup>

Given these harmful emissions are so prevalent at AFOs, for many people living in the shadow of one life has become unbearable because of the constant presence of these substances. Residents living near an egg CAFO in Arizona describe the burning stench as impossible to get rid of, invading their neighborhoods and homes.<sup>48</sup> In North Carolina, residents must wear masks when they walk outside their homes to avoid being overwhelmed by odors emanating from nearby operations.<sup>49</sup> In Kewaunee County, Wisconsin, the Department of Revenue estimates that houses located near CAFOs have recently sold for 8-13% less than their property value due to acrid smells.<sup>50</sup> National studies have shown that close proximity to CAFOs can cause headaches, lung impairment, cardiovascular illnesses, high blood pressure, and premature death as a result of the effects of the substances above.<sup>51</sup> A 2020 study attributed 15,900 annual deaths in the United States to decreased air quality caused by animal agriculture.<sup>52</sup> The health and environmental risks of leaving AFOs and CAFOs unregulated are clearly too dangerous to leave the industry largely immune to CAA regulation.

**III. AFOs and CAFOs must be subject to New Source Review as there is no evidence that exclusion is appropriate. This is consistent with the purpose of the CAA and a natural result of studies and technological developments making monitoring and controlling fugitive emissions feasible.**

EPA's role in mitigating degraded air quality and pollution can certainly be defined by the future of the Fugitive Emissions Rule and the changes that follow. New major

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<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Casey Kuhn, *Arizona Residents Challenge Local, National Regulations on Industrial Farm Emissions*, KJZZ (Dec. 22, 2017), <https://kjzz.org/content/583947/arizona-residents-challenge-local-national-regulations-industrial-farm-emissions> (last visited Feb. 10, 2023).

<sup>49</sup> Wendee Nicole, *CAFOs and Environmental Justice: The Case of North Carolina*, NAT'L LIBRARY OF MEDICINE (June 1, 2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3672924/>.

<sup>50</sup> Kally Leidig, *The Effect of CAFOs on Neighboring House and Land Values*, MIDWEST ENV'TL ADVOCATES (Spring 2020), <https://midwestadvocates.org/the-effect-of-cafos-on-neighboring-house-and-land-values> (last visited Feb. 10, 2023).

<sup>51</sup> Stray Dog Inst., *supra* note 6.

<sup>52</sup> Nina G. G. Domingo et al., *Air quality-related health damages of food*, PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES, Vol. 118:20 (May 2021), <https://www.pnas.org/content/118/20/e2013637118>.

sources of pollutants from industries that are not specifically included in the categories of sources under 40 C.F.R. 52.21(b)(1)(iii) but that *do* exceed emission thresholds to trigger CAA regulations and existing operations of the like that make changes must not be allowed to escape New Source Review (NSR). This suggestion is hardly revolutionary. AFOs and CAFOs that have the potential to cause emissions of criteria pollutants that could trigger or exceed CAA regulatory thresholds should have to consider fugitive emissions in calculating their total emissions volume and “major source” or “change” status.<sup>53</sup>

Given the scale of the agricultural industry in the United States, excluding these sources from NSR has an enormous negative impact and would be an arbitrary decision. In just nine years after the 2008 Rule, the percentage of CAFOs operating in the United States grew by 7.66%.<sup>54</sup> By the end of 2021, the percentage of CAFOs had risen by 14.55% with 21,237 CAFOs reported by EPA Regions.<sup>55</sup> Clearly, large-scale animal agriculture has significantly increased since the Fugitive Emissions Rule’s implementation.<sup>56</sup> Many of these new AFOs and CAFOs should not be able to continue to discount significant portions of their emissions and avoid shifting to the best available control technology (BACT) that NSR and the CAA require.

For EPA to fulfill its responsibilities under the CAA, it must focus attention on the industrial livestock industry and stop stalling by relying on outdated and ineffective compromises. In 2005, EPA entered into an Animal Feeding Operations Consent Agreement and Final Order requiring participating AFOs to assist with what was then a new National Air Emissions Monitoring Study (NAEMS).<sup>57</sup> The CAFOs that participated in the study were the only ones that were given limited “immunity” from federal enforcement of certain environmental regulations. While that study was meant to gather data to have more consistent information with which to regulate the industry in the future, the Agreement was never intended to exempt all CAFOs from CAA regulation.<sup>58</sup>

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<sup>53</sup> Reconsideration of Fugitive Emissions Rule, 87 Fed. Reg. 62322, 62326 (Oct. 14, 2022).

<sup>54</sup> “NPDES CAFO Permitting Status Report—National Summary, Endyear 2017”, EPA (Dec. 31, 2017), available at <https://www.epa.gov/npdes/npdes-cafo-regulations-implementation-status-reports> (last visited Feb. 10, 2023).

<sup>55</sup> “NPDES CAFO Permitting Status Report: National Summary, Endyear 2021, completed 7/20/22” EPA (July 20, 2022), available at <https://www.epa.gov/system/files/documents/2022-07/CAFO%20Status%20Report%202021.pdf>.

<sup>56</sup> *See id.*

<sup>57</sup> Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958-01 (2005).

<sup>58</sup> Michael Janofsky, “EPA Offers an Amnesty if Big Farms Are Monitored,” N.Y. TIMES, (Jan. 22, 2005) <https://www.nytimes.com/2005/01/22/politics/epa-offers-an-amnesty-if-big-farms-are-monitored.html> (last visited Feb. 10, 2023).

Despite the fact that EPA has not finalized air emissions methodologies resulting from that study, EPA and the industry have data and air testing methodologies that make it possible to determine if a CAFO could potentially trigger air emission thresholds and therefore NSR and regulation under the CAA.<sup>59</sup> In short, EPA has the authority, responsibility, and ability to mandate compliance of CAFOs that could currently be exceeding air emission thresholds or that may in the future. This is exceptionally important given that since the NAEMS study was initiated there has been significant growth in the industry and an explosion of new AFOs and CAFOs across the country. The process of meeting regulatory expectations in this industry is achievable and would lead to better implementation of the CAA in its entirety.

Requiring the inclusion of fugitive emissions when calculating preconstruction estimations and “major modifications” for CAFOs would facilitate a gradual shift in the agriculture industry toward CAA compliance. The fact that some CAFOs entered into the 2005 Consent Agreement and participated in the NAEMS study and were therefore given some immunity from enforcement for violations of the CAA, does not mean that all CAFOs in the U.S. today are exempt from New Source Review. It is noteworthy that many of the entities that would now need to undergo NSR and implement the BACT are already operating at such a large scale that upgrading the facilities would not disrupt the entire industry, especially if EPA were to implement the CAA evenhandedly and regulate all CAFOs equally, including those that should have their fugitive emissions accounted for. An instantaneous mass market for that BACT would also likely lower the cost of implementing that technology if the entire industry falls under the scope of the Act at the same time, making the transition that much more feasible.

The CAA’s purpose would be totally defeated if one of the largest emitting industries was left out of the reach of regulations for no reason other than its emissions’ fugitive classification. There is absolutely no indication that fugitive emissions from CAFOs are somehow less dangerous or impactful than non-fugitive emissions. Likewise, the utility and success of the CAA’s provisions relies on the ability of the law to regulate all emissions – especially those contributing significantly to ozone buildup, human and animal health risks, and climate change broadly.<sup>60</sup>

Prior to the 2008 Rule, in 2004, EPA entered a consent decree with Buckeye Egg

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<sup>59</sup> *Id.*; see generally Jodie Foster & Rob Brenner, “Clean Air and Technology Innovation: Working Concepts for Promoting Clean Technology Innovation Under the Clean Air Act,” Duke Univ. Nicholas Institute for Environmental Policy Solutions Report, NI R 13-05 (June 2013).

<sup>60</sup> See Hoover, *supra* note 24, at 3-5 (discussing the history and background of the Clean Air Act).

Farms, at the time one of the largest egg production facilities in the country.<sup>61</sup> Buckeye entered the consent decree due to claims by the Department of Justice and EPA alleging that the Buckeye facilities had not received proper CAA permits.<sup>62</sup> During litigation, EPA conducted preliminary testing at three sites, and found that particulate matter emissions were well over the regulated limit; one site was emitting 700 annual tons of particulate matter, while another was emitting over 800 annual tons of ammonia.<sup>63</sup>

Prior to this, EPA entered a consent decree with Premium Standard Farms, at the time the second-largest pork producer in the country.<sup>64</sup> Like Buckeye, Premium had not applied for proper CAA permits, and was sued by a citizen action group and EPA.<sup>65</sup> As a result of the consent decree, EPA ordered Premium to conduct regular testing at their sites to prevent further air contamination.<sup>66</sup>

Both of these examples ended with the facilities decreasing their air emissions through new and safer technologies. These examples show that testing *is* possible and can prevent widespread harm. Had these businesses been allowed to expand without control, they may have had even more disastrous health effects on neighboring communities.

In summary, the Fugitive Emissions Rule has reached the point where it does more harm than good for anyone with regards to CAFOs. Those enforcing the CAA, whether the Agency or a citizen trying to bring their own suit, have been handcuffed by the Rule's unsupported exemptions for certain industries like animal agriculture. Farm workers, community members, and the farmed animals are put in danger on a daily basis because of the totally unchecked emissions from AFOs and CAFOs. The Rule has simply swelled to the point of frustrating the very purpose of the Clean Air Act which cannot continue if EPA is charged with accounting for all net emissions and air quality in the United States.

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<sup>61</sup> U.S. Dep't of Justice, Press Release, *Ohio's Largest Egg Producer Agrees to Dramatic Air Pollution Reductions From Three Giant Facilities* (Feb. 23, 2004), [https://www.justice.gov/archive/opa/pr/2004/February/04\\_enrd\\_105.htm](https://www.justice.gov/archive/opa/pr/2004/February/04_enrd_105.htm) (last visited Feb. 10, 2023).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Citizens Legal Env'tl. Action Net. v. Premium Standard Farms, Inc.*, Consent Decree, Case no. 97-6073-CV-SJ-6 (West. Dist. of Missouri, 2001), <https://www.epa.gov/sites/default/files/documents/psfcd.pdf>.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

Thank you for your careful consideration.

Sincerely,

Animal Legal Defense Fund

ASPCA (American Society for the Prevention of Cruelty to Animals)

Buffalo River Watershed Alliance

Center for Biological Diversity

Robeson County Cooperative for Sustainable Development

Socially Responsible Agriculture Project

Mac Legerton

Fredrick Ole Ikayo