March 25, 2024

TO: Environmental Protection Agency

FROM: Office of the Attorney General of Kansas and Arkansas

RE: Notice of Proposed Rulemaking: "Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category"

File No.: EPA-HQ-OW-2021-0736

The Attorneys General for the States of Kansas, Arkansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, West Virginia, and Wyoming submit the following public comment to the Environmental Protection Agency (EPA) in response to its request for comments on the proposed rule entitled "*Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category"* 89 Fed Reg. 4474 (January 23, 2024).

I. Introduction

EPA effluent regulations traditionally only regulate direct wastewater discharges into the waters of the United States by slaughterhouses, further processors, independent renderers, and poultry processors. *See generally* 40 CFR Part 432. As the proposed rule acknowledges, EPA currently regulates only 171 of the 5055 meat and poultry product facilities in the United States. 89 Fed. Reg. 4475. This new proposed rule would regulate *indirect* discharges from these facilities; that would expand the regulation to some 3879 facilities. *Id.* at 4486. This proposed rule is not only costly but also unlawful. EPA should withdraw it.

II. The proposed rule's pretreatment standards exceed EPA's statutory authority under the Clean Water Act.

EPA's proposal to federally regulate meat-processing facilities that indirectly discharge wastewater exceeds the authority conferred upon the agency by the Clean Water Act. EPA currently imposes effluent limitations on the 171 meat-processing facilities that directly discharge wastewater into receiving streams. But EPA now proposes—for the first time—to sweep into its regulatory orbit an additional 3708 indirect-discharging facilities. 89 Fed. Reg.

4481. These are facilities that discharge water through sanitary sewers or municipal sewage treatment plants known as publicly owned treatment works (POTWs) that already treat wastewater by removing nutrients and other pollutants. The proposed rule would impose nationwide "pretreatment" standards on indirect-discharging facilities.

Tellingly, EPA has never before claimed such sweeping authority to regulate indirect discharges. That history combined with "the breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion," render dubious EPA's suggestion now "that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (quotation and citation omitted).

The Clean Water Act authorizes EPA to impose pretreatment standards where a facility discharges "any pollutant" that "interferes with, passes through," or is "incompatible with" a POTW. 33 U.S.C. § 1317(b)(1); *see id.* §§ 1317(c), 1314(g). But EPA has not established that the facilities it newly seeks to regulate cause such problems. Rather, the proposed rule merely hypothesizes that "indirect discharges *may* cause passthrough or interference," 89 Fed. Reg. 4482 (emphasis added), and that "many POTWs *may* not be removing" nutrients. *Id.* at 4480 (emphasis added). EPA lacks data to show whether passthrough or interference ever occurs—and if so, whether and how often it is a problem. Absent evidence that such a problem exists, the proposed rule is unnecessary, and EPA cannot justify the massive compliance costs associated with its proposal. So EPA should withdraw the proposed rule.

Indeed, the proposed rule actually concedes that in many cases such regulation is not necessary because some "POTWs [are] *not* experiencing passthrough and interference." 89 Fed. Reg. at 4487 (emphasis added). Accordingly, the proposed rule contemplates allowing local authorities to "waive these pretreatment standards," even if only for "large indirect dischargers," while they "continu[e] to prevent passthrough and interference." 89 Fed. Reg. at 4487. But allowing such waivers cannot save the proposed rule because the Clean Water Act allows EPA to subject meat-processing facilities to pretreatment standards *only* where there is interference or passthrough to begin with. 33 U.S.C. § 1317(b)(1). And against the backdrop of (at best) no data or (at worst) data that show the exact opposite, EPA cannot meet that standard. "Agencies have only those powers given to them by Congress, and enabling legislation is generally not an open book to which the agency [may] add pages and change the plot line." *West Virginia*, 597 U.S. at 723. Because the proposed rule exceeds EPA's authority under the Clean Water Act, EPA should withdraw it.

III. The proposed rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

The proposed rule should be withdrawn because it grossly underestimates the burdens of compliance, conflicts with federal efforts to strengthen food supply chains, relies on a flawed analysis and non-peer-reviewed advocacy pieces, and fails to consider obvious federalism implications.

The proposed rule grossly underestimates the burdens of complying with the proposed rule, failing to come to terms with what it acknowledges are "supply chain issues preventing

facilities from installing the treatment technologies," 89 Fed. Reg. 4493, and with the ongoing "operation and maintenance costs for the new treatment technologies[,] includ[ing] labor costs." *Id.* at 4502. The proposed rule claims that "facilities incurring costs below one percent of revenue are unlikely to face economic impacts." *Id.* at 4498. But the cost-to-revenue analysis focuses on facility revenue (as opposed to profits), ignoring that one percent of revenue is a disproportionate part of net profits for low-margin meat processing facilities, and particularly for independent processors who serve small farmers.

This is odd, considering that the Biden Administration has especially sought to promote such independent processors. *See* Press Release, The White House, Fact Sheet: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain (Jan. 3, 2022) [hereinafter Action Plan], *available at* https://www.whitehouse.gov/briefing-room/statements-releases/2022/01/03/fact-sheet-the-biden-harris-action-plan-for-a-fairer-more-competitive-and-more-resilient-meat-and-poultry-supply-chain/; U.S. Dep't of Agric., Meat and Poultry Processing Expansion Program, https://www.rd.usda.gov/programs-services/business-programs/meat-and-poultry-processing-expansion-program. Imposing heavier burdens on meat processors plainly conflicts with "the Administration's priority to expand and diversify the meat and poultry industries." 89 Fed. Reg. 4492; *see id*. n. 16 (citing Action Plan, *supra*). The current administration has recognized the urgency of fostering resiliency in the meat-processing industry, noting that when adverse circumstances "shutter a plant, many ranchers have no other place to take their animals," thus aggravating a "key bottleneck in the food supply chain." Action Plan, *supra*. Indeed, the fragility of this portion of the American economy was painfully revealed during the COVID-19 pandemic, as the "meat supply chain struggled," and former President Trump had to resort to the Defense Production Act to keep meat-processing facilities open. Exec. Order No. 13,917, 3 C.F.R. 335–37 (2021); Dalton Whitehead & Yuan H. Brad Kim, *The Impact of COVID 19 on the Meat Supply Chain in the USA: A Review*, 42 Food Science of Animal Resources 762 (2022), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9478983/.

Relying on incomplete, "extrapolated" data, EPA determined that the proposed rule would drive out of business between sixteen and fifty-three meat-processing facilities. 88 Fed. Reg. 4499. Given EPA's already unrealistic revenue analysis, this likely underestimates the true number of plant closures. What happens when another pandemic or other shock to the meat supply chain occurs? Further, full-blown plant closures are only one part of the proposed rule's adverse consequences. EPA admits that other facilities, "[r]ather than close," would "reduce facility production levels" or abandon hopes "to expand production" to "avoid[] compliance costs." *Id.* The proposed rule notes, but fails to grapple with, the fact that reductions "by enough facilities could have a measurable effect on industry production." *Id.* In so doing it neglects to address not only the heavy financial burdens on the industry as a whole but also those disproportionately affecting families "in rural areas," *id.* at 4521, of our States that depend on jobs that will be lost as a result of shuttered or throttled plants. *See generally* Whitehead & Kim, *supra* ("[W]hen big production facilities would shut down all of the surrounding area would struggle."). EPA's unsupported assertion that "[e]ventually new and expanding existing facilities will take on much of the remaining production that would have occurred at the closed facilities," 88 Fed. Reg. 4502, is hopeful speculation at best.

Far from "expand[ing] and diversify[ing]" the meat-processing industry, *id.* at 4492, the proposed rule would exacerbate supply-chain issues and further raise already record-high meat costs. *See generally* Lawrence Richard, *Chicken Prices Hit Record Highs Under Biden Admin. as U.S. Inflation Keeps Beef, Pork out of Reach*, Fox Bus. (Oct. 5, 2023), https://www.foxbusiness.com/markets/chicken-prices-hit-record-highs-biden-administration-us-inflation-keep-beef-pork-reach ("Chicken prices at grocery stores across the country have hit record highs, and prices are expected to remain high as inflation-weary shoppers have opted to buy chicken over still-pricier beef and pork alternatives."). Federal statistics show that inflation, especially for meat and poultry, remains elevated. U.S. Bureau of Labor Statistics, Consumer Price Index Summary (March 12, 2024), https://www.bls.gov/news.release/cpi.nr0.htm; *see also* Christopher Rugaber, *U.S. Inflation Up Again in February in Latest Sign that Price Pressures Remain Elevated*, AP News (March 12, 2024), https://apnews.com/article/inflation-prices-rates-economy-biden-federal-reserve-4ac316b6a435ef44c370ce7686da67c0. Even beyond the consumer grocery market, such costs are likely to hurt the restaurant industry as well, which is already struggling with historically high costs across the board. Brooke DiPalma, *Inflation: Cost of Eating Out Continues to Rise, a Potential Hit to Restaurant Chains*, Yahoo News (Feb. 13, 2024), https://finance.yahoo.com/news/inflation-cost-of-eating-out-continues-to-rise-a-potential-hit-to-restaurant-chains-151138331.html. And that, in turn, will inevitably impact employment rates in the service sector.

Next, EPA asserts that what it calls a "national review" of nutrient discharges indicates that the meat-processing industry "is capable of achieving effluent limitations well below the current 2004 regulations." 89 Fed. Reg. 4480. But that broad conclusion about the meat-processing industry as a whole is based on a narrow set of information gleaned from an undisclosed set of facilities that discharge "high amounts of nutrients" that are located in only two out of EPA's 10 regions. *Id.* EPA provides no basis for claiming that its conclusions are generalizable over time to all types of meat-processing facilities.

The proposed rule's analytical problems are compounded by its reliance on dubious sources. One source cited by EPA for "environmental and human health impacts of [meat-processing] facilities on low-income individuals and racial/ethnic minorities" is the website of the law firm that sued the agency on behalf of radical environmentalist groups in the *Cape Fear River Watch* litigation (discussed below). *See* 89 Fed. Reg. 4512 n.43, 4521 n.60 (citing K. Burkhart, et al., *Water Pollution from Slaughterhouses*, The Environmental Integrity Project (2018), https://earthjustice.org/). That lightly footnoted report is a self-published advocacy piece that was neither intended nor submitted for peer review. *See* Burkhart, et. al., *supra*.

The proposed rule also fails to grapple with obvious federalism concerns. EPA's required federalism analysis is just two sentences long. *See* 89 Fed. Reg. 4529. That's not an analysis. And what little EPA does say simply (and implausibly) denies that the proposed rule has any "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." *Id.* This categorical denial fails to consider the proposed rule's obvious adverse federalism implications.

First, the proposed rule has substantial direct effects on the States, not least because it "contains a federal mandate" under the Unfunded Mandates Reform Act, 2 U.S.C. § 1531–71, that would require "State, local, and Tribal governments," among others, to spend "$100 million or more" to comply. 89 Fed. Reg. 4520.

Second, the proposed rule unquestionably affects the distribution of power between the States and the federal government. States often play a substantial role in regulating water quality, with many facilities "currently . . . subject to . . . local limits." 89 Fed. Reg. 4482. Local and State regulators have the mandate and discretion to impose appropriate water-quality standards based on the characteristics of specific facilities and receiving streams. *See, e.g.*, Ark. Code Ann. § 8-4-203 (State Division of Environmental Quality is "charged with the power and duty to issue, continue in effect, revoke, modify, or deny permits, under such conditions as it may prescribe."); *see id.* § 8-4-206 (recognizing power under the Clean Water Act). But the proposed rule would eliminate that discretion. It would supplant State and local authority by irrationally requiring effluent limits even where a facility creates no problems. The State of Arkansas, for example, estimates that it has at least 14 permits that would be directly impacted by the proposed rule. And the State of Kansas estimates it could impact also impact a number of facilities. Because it cuts States out of the process, the proposed rule improperly strips them of their proper role in our federal system.

Because EPA "has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem," and "offered an explanation for its decision that runs counter to the evidence," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), the proposed rule is arbitrary and capricious, an abuse of discretion, and otherwise not in accordance with law.

IV. EPA is attempting to regulate a matter at the outer limits of Congress' Commerce Clause authority without clear authorization.

Even if this rule were not part of a corrosive sue and settle, it would still be unlawful. As a starting point, the Clean Water Act is not a blank check for EPA to regulate all water; that is a function normally reserved to states. In *Solid Waste Agency of Northern Cook County v. Army Corps of Engineers*, 531 U.S. 159 (2001), the court was skeptical that even *Congress* had the authority under the Commerce Clause to regulate an abandoned sand and gravel pit under the Clean Water Act. *Id.* at 173–74. Because such authority was at the outer limits of what Congress would be authorized to do the court expected a clear statement from Congress that an agency was authorized to do this under the statute (which was not the case). *Id.* Ultimately, it was States who were authorized to regulate such matters. *Id.*

The Court's jurisprudence on the limits of EPA's authority under the Clean Water Act was detailed further in *Rapanos v. United States*, 547 U.S. 715 (2006). There, the Court held that "*only* those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters." *Id.* at 742 (plurality opinion). These cases did not stop EPA from asserting overly broad authority under the Clean Water Act and it had to be reigned in again in *Sackett v. EPA*, 598 U.S. 651 (2023). The Court there noted that the "meaning of

'waters of the United States' under EPA's interpretation remains 'hopelessly indeterminate.'" *Id.* at 681 (internal citations omitted). The Court ultimately held that the Act extends to only those "wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right," so that they are "indistinguishable" from those waters. *Id.* at 684.

Through this proposed rule, EPA is yet again overreaching. The only authority EPA has over effluents under the Clean Water Act is the limited power to regulate pollutant discharges into the waters of the United States. "In the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance." *Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 505 (2d Cir. 2005). In short, there is no authority for EPA under the Clean Water Act to regulate indirect discharges from meatpacking and poultry facilities because at that point there is no direct discharge of a pollutant into navigable waters. If that were the case they would be reaching into the outer limits of what even Congress is allowed to regulate under the Commerce Clause and infringing on an area of regulation left to the states.[1] Without a clear statement from Congress, EPA cannot do this. Yet as it has done over and over again, EPA attempts to stretch the limits of what it's allowed to do and harm many businesses in the process. This must stop.

V. The genesis of this proposed rule is a settlement agreement that raises serious concerns.

It is important to note that this proposed rule did not occur organically through EPA. Instead, it came as part of a consent decree between EPA and radical environmental groups that sued the agency in *Cape Fear River Watch v. EPA*, 1:22-cv-03809-BAH (D.D.C.). Rather than vigorously defend the case in court, EPA choose to settle the matter just over four months after suit was filed. *Id.* at Dkt. 24.

Multiple judges have expressed concerns about the current administration's use of this dubious process to override the normal procedures for notice and comment under the APA. Settlement should not be used "to circumvent the usual and important requirement, under the Administrative Procedure Act, that a regulation originally promulgated using notice and comment . . . may only be repealed through notice and comment." *Arizona v. City & Cty. of S.F.*, 596 U.S. 763, 765 (2022) (Roberts, C.J., concurring).

In another case in the Ninth Circuit, one judge observed, "it's hard to avoid any impression other than that the administration is snatching defeat from the jaws of victory—purposely avoiding an ultimate win that would eventually come later this year, whether from this court or from the Supreme Court." *E. Bay Sanctuary Covenant v. Biden*, No. 23-16032, 2024 WL 725502, at *3 (9th Cir. Feb. 21, 2024) (VanDyke, J., dissenting). "[B]y colluding with the

[1] Cases like *County of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020), are inapplicable here. That case involved indirect discharges for groundwater. This case involves wastewater discharges from meat processing plants that go through treatment at a sewage plant prior to potentially being discharged into a navigable water.

plaintiffs," sue-and-settle lets the executive "set the policy it actually wants . . . , all while publicly blaming the result—cloaked as it is in the language of a judicial 'settlement'—on the courts." *Id.* at *5.

This type of issue appears to be what's at play here for three reasons. First, EPA could have just issued a proposed rule on its own accord rather than making it part of a settlement agreement. Second, by doing the proposed rulemaking in this manner, it is questionable whether EPA can comply with the consent judgment if it withdraws the proposed rule. If it cannot do so, it would make notice and comment meaningless because no matter what the comments reveal, EPA would violate the consent judgment if it doesn't push through the rule. Finally, it appears that EPA is relying primarily on data put together by the groups that were suing them to come up with this rule. Ryan McCarthy, *Industry Groups Navigate EPA's Latest Wastewater Guidelines*, Meat + Poultry (March 15, 2024), https://www.meatpoultry.com/articles/29910-industry-groups-navigate-epas-latest-wastewater-guidelines.

This practice not only puts forward poor policy but also harms the integrity of our judicial system. This administration must stop abusing the legal system in order to achieve results it otherwise cannot get. A good place to start would be with this rule. For the reasons noted above, it is a harmful rule that should not exist even if the correct legal procedures were followed. EPA should do the right thing and withdraw the rule.

VI. Conclusion

For the reasons noted above EPA should withdraw this proposed rule.

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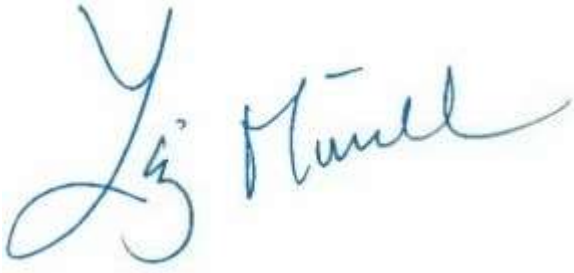

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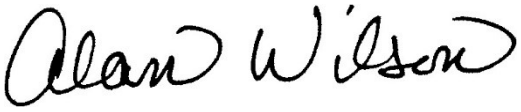

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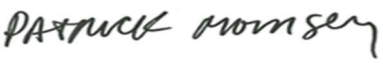

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