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8 **UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

9
10 THE HUMANE SOCIETY OF THE
UNITED STATES,

11 Plaintiff,

12 v.

13 UNITED STATES DEPARTMENT OF
AGRICULTURE, ANIMAL AND
PLANT HEALTH INSPECTION
SERVICE, VETERINARY SERVICES,
14 KEVIN SHEA, BURKE HEALY,
MARK DAVIDSON,

15 Defendants.

Case No. _____

COMPLAINT

1 **INTRODUCTION**

2 1. Industrialized poultry facilities are ideally suited for influenza viruses to
3 multiply and mutate into catastrophically contagious and deadly forms. Avian
4 Influenza, commonly known as bird flu, is a virus with multiple strains that causes
5 varying degrees of clinical illness in chickens, other animals, and humans. Highly
6 pathogenic Avian Influenza (“HPAI”) is an “extremely infectious and fatal” form of
7 the virus that spreads rapidly within and between flocks or herds and can disastrously
8 affect humans.¹

9 2. Preventing both the creation and spread of highly infectious and lethal
10 disease is of paramount importance and should be a top priority for the federal
11 government. Nearly five years ago, Plaintiff, the Humane Society of the United
12 States (“HSUS”), asked the United States Department of Agriculture (“USDA” or
13 “the Agency”) to do just that—consider how its HPAI control plan can help prevent
14 the development and spread of highly pathogenic zoonotic diseases. HSUS requested
15 that animals raised for food or egg production be placed in cage-free low stocking
16 density environments, which would help slow the mutation and spread of diseases
17 like Avian Influenza. As HSUS proposed, the Agency could accomplish this by
18 conditioning the indemnification payments it makes to producers—for birds and eggs

19
20 ¹ USDA APHIS, HIGH PATHOGENICITY AVIAN INFLUENZA CONTROL IN
21 COMMERCIAL POULTRY OPERATIONS – A NATIONAL APPROACH:
22 ENVIRONMENTAL ASSESSMENT 5 (July 2015) [hereinafter July 2015 EA].

1 that must be destroyed during an outbreak response—on their adoption of safe and
2 effective management practices.

3 3. Instead, USDA decided to essentially subsidize the dangerous and cruel
4 confinement of billions of birds nationwide, despite being fully aware of the causal
5 connection between dense confinement and the frequency and severity of bird flu
6 outbreaks. The Agency’s “preferred alternative” plan permits the reimbursement of
7 taxpayer dollars to the same farms whose poultry confinement practices helped
8 incubate and spread disease in the first place, thereby allowing farms to maintain
9 inhumane practices that will inevitably cause the cycle of outbreak to begin again.

10 An outbreak response plan that indemnifies these industrialized animal operations, as
11 USDA’s plan does, illogically supports practices that threaten to expose every human
12 to more frequent and more life-threatening pandemics.

13 4. The “preferred alternative” plan also permits the killing and disposal of
14 birds using practices that are hazardous to the environment and public health,
15 including burying carcasses in unlined pits, burning them through open-air
16 incineration, and the mass deployment of ventilation shutdown (“VSD”), which
17 entails slowly suffocating and cooking the birds to death.

18 5. This action challenges Defendant USDA, Animal and Plant Health
19 Inspection Service (“APHIS”) Veterinary Services’ December 2015 Final
20 Environmental Assessment, *High Pathogenicity Avian Influenza Control in*
21

1 *Commercial Poultry Operations – A National Approach* (the “Final EA”),² which
2 adopts the “preferred alternative” plan but ignores the most logical alternative, and
3 associated Finding of No Significant Impact (“FONSI”), in which APHIS³ provides a
4 legally inadequate assessment of containment options in response to the outbreak of
5 an Avian Influenza strain affecting poultry throughout the United States, in violation
6 of the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321–4347; the
7 implementing Council on Environmental Quality (“CEQ”) regulations, 40 C.F.R. §§
8 1500–1508; and the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706.
9 Plaintiff seeks (i) a declaration that the Final EA and FONSI are contrary to law and
10 (ii) an order requiring APHIS to prepare an Environmental Impact Statement (“EIS”)
11 that satisfies the requirements of NEPA.

12 **JURISDICTION AND VENUE**

13 6. This Court has jurisdiction under 28 U.S.C. § 1331 and 5 U.S.C. 701, *et*
14 *seq.* because the United States is a defendant and Plaintiff’s claims arise under federal
15 law.

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19 ² USDA APHIS, HIGH PATHOGENICITY AVIAN INFLUENZA CONTROL IN
20 COMMERCIAL POULTRY OPERATIONS – A NATIONAL APPROACH: FINAL
21 ENVIRONMENTAL ASSESSMENT (Dec. 2015) [hereinafter Final EA].

20 ³ APHIS, as used throughout this Complaint, refers to Defendant United States
21 Department of Agriculture, Animal and Plant Health Inspection Service,
22 Veterinary Services.

1 7. Venue is proper under 28 U.S.C. § 1391(e)(1) because a substantial part
 2 of the Defendant Agency's violations of law occurred in this District, and injury to
 3 Plaintiff and its members occurred in this District. Moreover, Plaintiff maintains
 4 offices in this District.

5 **PARTIES**

6 8. Plaintiff HSUS is a nonprofit organization headquartered in Washington,
 7 D.C., with regional offices and several direct animal care facilities located throughout
 8 the country. HSUS's mission is to "prevent animal cruelty, exploitation and neglect
 9 and to protect wild habitats and the entire community of life."⁴ HSUS promotes
 10 humane and environmentally sustainable agriculture, which includes fighting to stop
 11 the abuse of farm animals, degradation of the environment, and detriment to human
 12 health that are associated with modern industrial agriculture systems. HSUS and its
 13 members commit their resources to improving the lives of chickens and birds, among
 14 many other animals, in concentrated animal feeding operations ("CAFOs"). HSUS
 15 has an organizational interest in receiving adequate information to educate its
 16 members regarding the animals, including chickens and other poultry, that they
 17 support through their membership, and how those animals are impacted by federal
 18 actions. HSUS has commented on these actions and expended significant resources

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 21 ⁴ *Our Mission*, HSUS, <https://www.humanesociety.org/our-policies#statement-2>.

1 on advocating for alternative approaches. HSUS also has significant experience in
2 challenging actions that harm animals under NEPA.

3 9. HSUS has millions of members and supporters, many of whom live,
4 work, and recreate in areas at risk of being impacted by the harms associated with the
5 mass deployment of VSD, unlined burial pits, open-air burning, and other dangerous
6 disposal and depopulation methods authorized by APHIS, including within this
7 District.⁵ HSUS members therefore have an aesthetic and recreational interest in
8 ensuring the areas where they live, work, hike, photograph, bird-watch, or swim are
9 not affected by dangerous water and air pollutants or damaged by disturbing views of
10 piles of poultry corpses and their accompanying odors. HSUS members also have a
11 health and safety interest in preventing the spread of HPAI to humans. HSUS
12 members who own farm animals have an economic interest in preventing the spread
13 of HPAI to their animals.⁶ Moreover, these members have an interest in preventing

14
15 ⁵ Avian Influenza has been detected in poultry populations throughout California
16 in the years since the 2014–15 HPAI outbreak. *See, e.g., Avian Influenza*
17 *Updates*, CAL. DEP'T OF FOOD AND AGRIC.,
18 https://www.cdffa.ca.gov/AHFSS/Animal_Health/Avian_Influenza.html (listing
19 Avian Influenza outbreaks in California since 2015). As recently as 2018,
20 California was recognized as having environmental conditions “favorable for
21 AIV [Avian Influenza Virus] presence, and thus future outbreaks (in poultry
22 and waterfowl) are likely to occur” in high risk areas across the state, including
23 in counties located within this District. Jaber Belkhiria et al., *Identification of*
High Risk Areas for Avian Influenza Outbreaks in California Using Disease
Distribution Models, PLOS ONE, Jan. 2018, at 9, 11,
<https://doi.org/10.1371/journal.pone.0190824>.

⁶ HPAI spreads to pigs as well as birds. *See, e.g.,* Clement Meseko et al.,
Evidence of Exposure of Domestic Pigs to Highly Pathogenic Avian Influenza

1 the development of HPAI in the areas they keep animals. When an infected flock is
2 identified, the government commonly establishes a control area wherein it will kill all
3 birds in a 10 to 15-kilometer radius, possibly including HSUS members' animals.
4 One such member owns an organic-certified, multi-generational farm and raises pigs
5 and egg laying hens that spend their days outside on pasture. HSUS members also
6 benefit from adequate environmental impact analyses of a government agency's
7 outbreak response plans—informed by HSUS's participation in that process on its
8 members' behalf—as these plans affect their health, aesthetic, financial, and
9 recreational interests, and proper consideration of these impacts could help mitigate
10 those effects.

11 10. Defendant USDA APHIS, Veterinary Services is an agency of the
12 United States government that, pursuant to the Animal Health Protection Act, 7
13 U.S.C. § 8301 *et seq.*, is responsible for protecting and improving the health, quality,
14 and marketability of US animals, animal products, and veterinary biologics by (1)
15 preventing, controlling, and/or eliminating animal diseases, and (2) monitoring and
16 promoting animal health and productivity.

17 11. Defendant Kevin Shea is the Administrator of USDA APHIS. He is
18 sued in his official capacity.

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H5N1 in Nigeria, SCIENTIFIC REPORTS (Apr. 12, 2018),
<https://www.nature.com/articles/s41598-018-24371-6>.

1 12. Defendant Dr. Burke Healy is the Deputy Administrator of Veterinary
2 Services and Chief Veterinary Officer of APHIS. In his prior role as Executive
3 Director for Veterinary Services’ Surveillance, Preparedness, and Response Unit, he
4 served as the National Incident Commander for the HPAI outbreak of 2014–2015.
5 He is sued in his official capacity.

6 13. Defendant Dr. Mark Davidson is the Associate Administrator of APHIS.
7 From November 2013 to February 2018, he served as Veterinary Services’ Associate
8 Deputy Administrator. He is sued in his official capacity.

9 **STATUTORY AND REGULATORY FRAMEWORK**

10 **I. National Environmental Policy Act**

11 14. NEPA is the United States’ “basic national charter for the protection of
12 the environment.” 40 C.F.R. § 1500.1(a). “NEPA procedures must insure that
13 environmental information is available to public officials and citizens *before*
14 decisions are made and *before* actions are taken.” *Id.* § 1500.1(b) (emphasis added).
15 “Public scrutiny [is] essential to implementing NEPA.” *Id.*

16 15. NEPA requires federal agencies to prepare a “detailed” EIS for all
17 “major Federal actions significantly affecting the quality of the human environment.”
18 42 U.S.C. § 4332(2)(C). Accordingly, when an agency proposes to undertake an
19 “action,” the agency must first determine whether the action is one that “normally
20 requires” the preparation of an EIS pursuant to NEPA and its implementing
21 regulations. 40 C.F.R. § 1501.4(a).

1 16. If the agency is not certain whether an EIS is required, it must prepare an
2 Environmental Assessment (“EA”) to determine whether to prepare an EIS or instead
3 issue a FONSI. *Id.* § 1501.4(b). The EA must discuss the need for the proposal,
4 evaluate alternatives that would cause less adverse environmental impacts, and
5 provide sufficient evidence and analysis to support the agency’s determination as to
6 whether the proposed action will significantly affect the environment. If an
7 action *may* have a significant effect on the environment, or even if there
8 are *substantial questions* as to whether it may, the agency *must* prepare an EIS.

9 17. The Council on Environmental Quality (“CEQ”) promulgated
10 regulations implementing NEPA that are “binding on all Federal agencies.” 40
11 C.F.R. § 1500.3. They instruct that analysis of whether an action will have a
12 “significant” impact on the environment—thus warranting the preparation of an
13 EIS—requires considerations of “context” (effects at the national, regional, and local
14 levels) and “intensity” (the severity of the impact). *Id.* § 1508.27.

15 18. Ten “intensity” factors help determine whether an agency action may
16 cause significant impacts. *Id.* § 1508.27(b). Such factors include:

- 17 • “Unique characteristics of the geographic area such as proximity to . . .
18 prime farmlands, wetlands, wild and scenic rivers, or ecologically
19 critical areas;”
- 20 • Effects that are “highly uncertain or involve unique or unknown risks” or
21 “likely to be highly controversial;”

- 1 • The “cumulative impacts” of the proposed action;
- 2 • “The degree to which the action may adversely affect an endangered or
- 3 threatened species or its habitat that has been determined to be critical
- 4 under the Endangered Species Act of 1973;” and
- 5 • The extent to which the action threatens violation of other laws.

6 *Id.* The presence of even one of the factors may require preparation of an EIS.

7 19. NEPA requires that agencies take a “hard look” at the environmental
8 effects of their planned action, even after a proposal has received initial approval.
9 *See Ctr. for Biological Diversity v. Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d 1172,
10 1194 (9th Cir. 2008). Both an EIS and an EA must discuss a proposed action’s
11 direct, indirect, and cumulative effects. *Id.* § 1502.16. Direct effects are “caused by
12 the action and occur at the same time and place,” whereas indirect effects are “caused
13 by the action and are later in time or farther removed in distance, but are still
14 reasonably foreseeable.” *Id.* § 1508.8. Cumulative effects are “the impact on the
15 environment which results from the incremental impact of the action when added to
16 other past, present, and reasonably foreseeable future actions.” *Id.* § 1508.7.

17 20. For purposes of NEPA, “federal actions” include “circumstance[s] where
18 the responsible officials fail to act and that failure to act is reviewable by courts or
19 administrative tribunals under the [APA] or other applicable law as agency action.”
20 *Id.* § 1508.18. “Actions include new and continuing activities, including projects and
21 programs entirely or partly financed, assisted, conducted, regulated, or approved by

1 federal agencies; new or revised agency rules, regulations, plans, policies, or
2 procedures; and legislative proposals.” *Id.* § 1508.18(a).

3 **II. The Administrative Procedure Act**

4 21. NEPA does not contain an internal standard of review, so judicial review
5 is therefore governed by the APA. Under the APA, courts “shall hold unlawful and
6 set aside” agency action, findings, or conclusions found to be “arbitrary, capricious,
7 an abuse of discretion, or otherwise not in accordance with the law” or “without
8 observance of procedure required by law.” 5 U.S.C. § 706(2)(A), (D).

9 22. Where an agency fails to adequately analyze a project’s environmental
10 impact in an EA and fails to provide a reasoned and convincing explanation for its
11 decision to not prepare an EIS, it has acted arbitrarily and capriciously in violation of
12 the APA and NEPA.

13 **III. The Federal Clean Water Act**

14 23. The Clean Water Act (“CWA”) serves to “restore and maintain the
15 chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. §
16 1251(a). It operates in large part by controlling the discharge of pollution from point
17 sources into waters of the United States. *See, e.g., id.* §§ 1342, 1362(14).

18 24. Among other things “the term point source means any . . . concentrated
19 animal feeding operation . . . from which pollutants are or may be discharged.” *Id.* §
20 1362(14).

1 25. The CWA proscribes “the discharge of *any* pollutant by *any* person”
2 except in circumstances as specified by the CWA. *Id.* § 1311(a) (emphasis added).

3 **IV. The Clean Air Act**

4 26. The Clean Air Act (“CAA”) serves to “protect and enhance the quality
5 of the Nation’s air resources so as to promote the public health and welfare and the
6 productive capacity of its population,” 42 U.S.C. § 7401(b)(1), and to “encourage . . .
7 Federal, State, and local governmental actions . . . for pollution prevention.” *Id.* §
8 7401(c).

9 27. Under the CAA, noncompliance penalties are imposed against every
10 person who owns or operates a stationary source⁷ that does not comply with the
11 requirements of the Act. *Id.* § 7420(a)(2)(A). The CAA limits hazardous pollutants
12 through emission standards. *Id.* § 7412(d). Tetrachlorodibenzo-p-dioxin (also known
13 as “dioxin”⁸) is considered a hazardous air pollutant under the CAA. *Id.* §
14 7412(b)(1).

15 _____
16 ⁷ “The term ‘stationary source’ means generally any source of an air pollutant
17 except those emissions resulting directly from an internal combustion engine
18 for transportation purposes or from a nonroad engine or nonroad vehicle[.]” 42
19 U.S.C. § 7602(z).

18 ⁸ *2,3,7,8-Tetrachlorodibenzo-P-dioxin*, NAT’L CENTER FOR BIOTECHNOLOGY
19 INFORMATION,
20 <https://pubchem.ncbi.nlm.nih.gov/compound/Tetradoxin#section=Top> (last
21 visited April 5, 2020) (“2,3,7,8-Tetrachlorodibenzo-p-dioxin . . . is often
22 referred to simply as dioxin and is the reference for a number of compounds
23 which are similar structurally and have dioxin-like toxicity. [It is] extremely
toxic to mammals, with a wide variation in sensitivity among species. Longer-
term exposure of test mammals to lesser amounts can affect reproduction,

1 **V. The Endangered Species Act**

2 28. It is unlawful to “take” an endangered species of fish or wildlife. 16
3 U.S.C. § 1538(a)(1)(B). Within the meaning of the Endangered Species Act
4 (“ESA”), to take means “to harass, harm, pursue, hunt, shoot, wound, kill, trap,
5 capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

6 **VI. The Migratory Bird Treaty Act**

7 29. The Migratory Bird Treaty Act (“MBTA”) makes it unlawful to “take,
8 capture, kill, [or] attempt to take, capture, or kill . . . any migratory bird” *Id.* §
9 703(a).

10 **VII. The Bald And Golden Eagle Protection Act**

11 30. The Bald and Golden Eagle Protection Act penalizes anyone who
12 “knowingly, or with wanton disregard for the consequences of his act take[s] . . . any
13 bald eagle commonly known as the American eagle, or any golden eagle” *Id.* §
14 668(a).

15 **FACTS GIVING RISE TO CAUSES OF ACTION**

16 31. In 2014, the U.S. poultry industry produced 8.54 billion broilers (*i.e.*,
17 chickens bred and raised specifically for meat production), 238 million turkeys, and
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20 _____
21 cause birth defects, damage the liver and suppress the immune system. Several
22 studies suggest that exposure to TCDD increases the risk of several types of
23 cancer in people.”).

1 over 365 million hens that laid roughly 101 billion eggs.⁹ According to the 2012
2 Census of Agriculture, 21,000 farms produced 5 million ducks primarily in
3 California, Indiana, and Pennsylvania, while about 10,000 farms produced 106,000
4 geese, primarily in Texas, South Dakota, and California.¹⁰ Moreover, over 8 billion
5 chickens were slaughtered for human consumption throughout the U.S. in 2012,
6 primarily in the southeast and west coast regions.¹¹

7 32. Most of these birds are produced in factory farm systems where they are
8 tightly confined in conditions that incubate and spread disease. Any one of these
9 billions of factory-farmed animals may produce a novel Avian Influenza that could
10 do extraordinary harm to the U.S. food supply and potentially to humans. Bird flu is
11 a recurring problem with epidemic and pandemic potential. For example, as recently
12 as March 2020, the USDA notified the World Organisation for Animal Health
13 (formerly, the “OIE”) of multiple low pathogenic Avian Influenza infections on farms
14 in two counties in North Carolina.¹²

17 ⁹ Final EA at 13.

18 ¹⁰ *Id.* at 12–13.

19 ¹¹ *Id.*

20 ¹² Fabian Brockotter, *Multiple LPAI Infections in US Turkey Operation*, POULTRY
21 WORLD (Mar. 19, 2020),
[https://www.poultryworld.net/Health/Articles/2020/3/Multiple-LPAI-
infections-in-US-turkey-operation-557469E/](https://www.poultryworld.net/Health/Articles/2020/3/Multiple-LPAI-infections-in-US-turkey-operation-557469E/).

1 33. Recently, a new HPAI strain, H5N6, has been detected in thousands of
2 birds across several Asian and European countries.¹³ In March 2017, a HPAI strain,
3 H7N9, sickened two commercial chicken breeder flocks in Tennessee.¹⁴

4 34. In December 2014, APHIS identified two highly pathogenic, mixed-
5 origin HPAI strains affecting wild bird, backyard, and commercial poultry flocks in
6 the Pacific, Central, and Mississippi flyways.¹⁵ The Pacific Flyway is a migratory
7 bird path that extends through Alaska, Arizona, California, Idaho, Nevada, Oregon,
8 Utah, Washington, and portions of other western U.S. states.

9 35. In 2015, 223 detections of HPAI were reported in fifteen U.S. states,
10 including throughout California, affecting roughly 50 million chickens and turkeys
11 nationwide (“2015 HPAI outbreak”).¹⁶

12 36. All told, USDA estimates the 2015 HPAI outbreak and the response to it
13 cost the US economy between one and \$3.3 billion. Importantly, according to the
14
15

16 ¹³ Jackie Linden, *New Avian Flu Outbreaks Impact China, India, Philippines*, WATTAGNET (Mar. 19, 2020),
17 <https://www.wattagnet.com/articles/39870-new-avian-flu-outbreaks-impact-china-india-philippines?v=preview>.

18 ¹⁴ *2nd Case of HPAI Detected in Tennessee*, THE CHATTANOOGAN (Mar. 16, 2017), <https://www.chattanooga.com/2017/3/16/344040/2nd-Case-Of-HPAI-Detected-In-Tennessee.aspx>.

19 ¹⁵ Final EA at 5.

20 ¹⁶ *Id.* at 6–8.

1 World Organisation for Animal Health, investing in preventing outbreaks is far
2 cheaper than trying to contain them, and investments in prevention pay off well.¹⁷

3 37. In July 2015, APHIS prepared its first EA addressing the impacts of
4 HPAI and APHIS's corresponding response ("July 2015 EA"). APHIS was
5 statutorily required to prepare a "detailed statement" of "alternatives to the proposed
6 action." 42 U.S.C. § 4332(2)(C). Instead, APHIS's inadequate evaluation considered
7 only two responses to an HPAI crisis: (1) do nothing (*i.e.*, placing the burden of
8 handling an HPAI epidemic on state and local authorities), or (2) continue "to provide
9 assistance to States and local authorities in establishing and enforcing HPAI
10 quarantines and conducting bird flu control activities as outbreaks occur throughout
11 the nation" (the "preferred alternative").¹⁸

12 38. The preferred alternative permits the use of hazardous depopulation
13 methods without appropriately assessing their environmental impact, including
14 VSD—a highly dangerous and extremely cruel practice that involves shutting down a
15 facility's entire ventilation system, which causes a build-up of carbon dioxide and
16 heat in the facility that suffocates the birds. This essentially cooks the conscious
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18 ¹⁷ The World Organisation for Animal Health & Agra CEAS Consulting,
19 *Prevention and Control of Animal Diseases Worldwide: Economic Analysis –*
20 *Prevention Versus Outbreak Costs* 12–14 (2007),
[https://www.oie.int/fileadmin/Home/eng/Support_to_OIE_Members/docs/ppt/
OIE_-_Cost-Benefit_Analysis__Part_I_.pdf](https://www.oie.int/fileadmin/Home/eng/Support_to_OIE_Members/docs/ppt/OIE_-_Cost-Benefit_Analysis__Part_I_.pdf).

21 ¹⁸ See July 2015 EA at 7.

1 birds to a protracted, and unnecessarily torturous death. The preferred alternative
2 also permits disposal methods that pose significant risks, such as incineration and
3 burial in unlined pits. Using these disposal methods, the carcasses of infected birds
4 are broken down, and their bodily fluids, chemical and biological leachate
5 components, agricultural dust, and other gases (including dioxin¹⁹) are released into
6 the surrounding environment, threatening the health and safety of both humans and
7 wildlife.

8 39. In August 2015, APHIS issued its FONSI with respect to the July 2015
9 EA, concluding “there would be no significant impact to the human environment
10 from the implementation of the preferred alternative.”²⁰ On September 4, 2015,
11 APHIS made the July 2015 EA and FONSI available to the public for review and
12 comment.²¹

13 40. On October 5, 2015, HSUS submitted a comment on APHIS’s national
14 approach to HPAI control, which emphasized the detrimental impacts of APHIS’s
15 proposed depopulation and disposal plan and explained how it violated NEPA, as

16 ¹⁹ Dioxin can cause liver and immune system damage, birth defects, and
17 reproductive problems, and has been traced to cancer in some people. *See*
18 NAT’L CENTER FOR BIOTECHNOLOGY INFORMATION, *supra* note 8.

19 ²⁰ USDA APHIS, Finding of No Significant Impact for High Pathogenicity Avian
20 Influenza Control in Commercial Poultry Operations – A National Approach
21 (Aug. 2015) [hereinafter FONSI].

22 ²¹ Highly Pathogenic Avian Influenza; Availability of an Environmental
23 Assessment and Finding of No Significant Impact, 80 Fed. Reg. 53,485 (Sept.
4, 2015).

1 reflected in this complaint.²² Notably, HSUS’s comment proposed reasonable and
2 viable alternatives to APHIS’s plan, including conditioning APHIS’s indemnification
3 of poultry producers’ depopulated livestock on such producers limiting the stocking
4 density of the birds housed in their farms and facilities, rather than on the number of
5 birds culled by the producer.²³ HSUS made it clear that “APHIS should require
6 producers to agree that all their birds be kept cage free and given enough space to
7 spread their wings and turn around freely.”²⁴ As HSUS suggested, conditioning the
8 USDA’s reimbursement of poultry producers for lost stock on their adoption of
9 improved confinement measures would help limit future HPAI outbreaks from
10 rapidly spreading and potentially causing significant harm to humans, animals, and
11 the environment.

12 41. In December 2015, APHIS published a supplemental EA setting forth an
13 HPAI containment plan that was essentially identical to the original inadequate EA.²⁵
14 In the Final EA, APHIS failed to broaden the scope or depth of its analysis of
15 alternative containment approaches and failed to sufficiently respond to the serious
16 concerns raised by HSUS in its comment. Significantly, APHIS’s Final EA

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18 ²² HSUS, Comment Letter on Environmental Assessment for High Pathogenicity
19 Avian Influenza Control in Commercial Poultry Operations – A National
Approach (Oct. 5, 2015) [hereinafter HSUS Comment].

20 ²³ *Id.* at 14–18.

21 ²⁴ *Id.* at 16.

22 ²⁵ *See* Final EA.

1 materially ignored the alternative proposal in HSUS’s comment to establish
2 indemnification conditions that would create effective safeguards to curb the harmful
3 impacts of a future outbreak. In response to the suggestion that it should “reduce the
4 number of birds allowed in poultry houses[,]” APHIS simply noted that “APHIS and
5 the poultry industry agree that the impact of an HPAI outbreak is amplified where
6 poultry production is highly concentrated or networked,” but that “APHIS is not
7 going to adopt this type of governmental restriction at this time.”²⁶ Instead, APHIS
8 essentially reaffirmed its FONSI and declined to prepare an EIS.

9 42. APHIS declined to prepare an EIS despite having conducted an EIS in
10 December 2015, entitled *Carcass Management During a Mass Animal Health*
11 *Emergency* (“Carcass Management EIS”), analyzing the environmental impacts of
12 various carcass management alternatives that could be implemented as part of an
13 HPAI outbreak crisis.²⁷ As discussed below, APHIS’s preparation of the 2015
14 carcass management EIS further demonstrates the need for an HPAI-Specific EIS.

15 43. As set forth below, APHIS’s analyses are egregiously insufficient to
16 satisfy NEPA for several reasons, including for failing to sufficiently evaluate
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19 ²⁶ *Id.* at 77.

20 ²⁷ USDA APHIS, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT,
21 CARCASS MANAGEMENT DURING A MASS ANIMAL HEALTH EMERGENCY, at v
(2015) [hereinafter *Carcass Management EIS*].

1 reasonable alternatives, inadequately examining the consequences, environmental
2 impacts, and adverse effects of its actions, and failing to prepare an EIS.

3 44. Also, as set forth below, APHIS's proposed depopulation and disposal
4 methods threaten to violate multiple state and federal laws, including federal laws
5 enacted to protect the environment, such as the Clean Water Act, the Clean Air Act,
6 the Endangered Species Act, and the respective implementing regulations associated
7 with such acts. Because APHIS failed to adequately evaluate the potential impact of
8 its EAs on these important environmental laws, APHIS's failure to prepare an EIS
9 violates NEPA. 42 U.S.C. § 4332(2)(C).

10 **VIII. APHIS Failed To Consider An Adequate Range Of Reasonable**

11 **Alternatives For Combatting HPAI**

12 45. APHIS's EAs are deficient because they fail to consider a reasonable
13 range of alternative methods for combatting HPAI, as required by NEPA. *Id.* APHIS
14 was therefore obligated to "study, develop, and describe appropriate alternatives to
15 recommended courses of action in any proposal which involves unresolved conflicts
16 concerning alternative uses of available resources." *Id.* § 4332(2)(E). Accordingly,
17 CEQ requires that APHIS analyze the possible environmental impacts of a proposed
18 action and weigh available alternatives. *See* 40 C.F.R. § 1508.9.

19 46. Significantly, APHIS failed to meaningfully consider conditioning
20 indemnification on reducing stocking density and shifting to cage-free, low stocking
21 density production as a viable alternative method to control and contain HPAI.

1 Establishing such conditions would reduce the severity of outbreaks, ensure that more
2 of the animals are treated humanely, cause fewer birds to be killed and disposed of in
3 the event of an outbreak, and mitigate much of the environmental impacts that
4 severely affect the welfare of both humans and wildlife. Even after HSUS directly
5 proposed a plan involving indemnification conditions and explained its advantages in
6 the comment it submitted to APHIS, the Agency ignored this indemnification
7 proposal and did not address indemnification in the Final EA and FONSI.

8 47. Massive poultry raising operations increase the likelihood that an HPAI
9 outbreak will be severe and uncontrollable.²⁸ This likelihood increases specifically in
10 caged poultry flocks because “cages can be difficult to disinfect and the housing may
11 harbor breeding populations of rodents and other potential vectors such as flies or
12 littler beetles.”²⁹ Indeed, even common houseflies can serve as transmitters of HPAI
13 amongst chickens. As a result, the disease is more likely to mutate and spread:
14 “[a]mplification occurs if the size of the epidemic in humans is increased due to
15 transmission of the influenza into the CAFO species which leads to an epidemic in
16

17 ²⁸ See Final EA at 77 (“APHIS and the poultry industry agree that the impact of
18 an HPAI outbreak is amplified where poultry production is highly concentrated
19 or networked.”); Roberto A. Saenz et al., *Confined Animal Feeding Operations
20 as Amplifiers of Influenza*, 6 VECTOR-BORNE & ZOONOTIC DISEASES 338, 339
21 (2006) (“The crowding of swine and poultry in CAFOs increases the
22 transmission of influenza viruses.”).

21 ²⁹ HSUS Comment at 15 (citing a study conducted by the European Food Safety
22 Authority).

1 the CAFO species, and subsequent transmission back to the local human
2 population.”³⁰

3 48. Poultry factory farm facilities are vented with large fans to maintain
4 specific temperatures. These same vents emit dust from poultry flocks, which can
5 consist of bedding, feathers, feces, and a high concentration of micro-organisms.
6 When the wind picks up this dust, it can be blown to a nearby facility or community,
7 potentially increasing the transmission of HPAI.

8 49. APHIS concedes that airborne transmission of HPAI can occur,
9 particularly in high winds, and studies confirm that HPAI can spread through air.³¹ If
10 HPAI were to mutate and begin infecting humans, airborne emissions could rapidly
11 spread the virus and cause devastating results.³² The EAs discuss the use of
12 ventilation systems at poultry facilities, but do not acknowledge them as a potential
13 source of disease transfer. APHIS failed to consider the implementation of viable
14 measures that encourage a lower bird stocking density, which would result in fewer
15

16 ³⁰ Saenz, *supra* note 28, at 339.

17 ³¹ Final EA at 6, 21.

18 ³² High-density poultry operations serve as an opportunity and conduit for HPAI,
19 and may increase the chances of HPAI mutating and becoming a massive threat
20 to human health. See Michael Greger, *The Human/Animal Interface:
Emergence and Resurgence of Zoonotic Infectious Diseases*, 33 CRITICAL
21 REVIEWS IN MICROBIOLOGY 243, 265 (2007),
[http://www.birdflubook.org/resources/Greger_2007_CRM_33\(4\)_243.pdf](http://www.birdflubook.org/resources/Greger_2007_CRM_33(4)_243.pdf); see
22 also Saenz, *supra* note 28, at 338–46

1 airborne particles passing through the system and decrease the threat of spreading
2 HPAI.

3 50. In direct violation of NEPA, the Agency neither “rigorously explore[d]”
4 nor “objectively evaluate[d]” structuring indemnification procedures to discourage
5 these dangerous, high-density animal operations as part of a reasonable alternative
6 approach. 40 C.F.R. § 1502.14(a); 42 U.S.C. § 4332(2)(E). APHIS distributes
7 indemnification payments to producers for birds and eggs that must be destroyed
8 during an outbreak response based on “the fair market value, as determined by the
9 Secretary, of the destroyed animal, article, facility, or means of conveyance.” 7
10 U.S.C. § 8306(d)(2). However, payments shall not be made when an owner handles
11 an animal “in violation of an agreement for the control and eradication of diseases or
12 pests in violation of this chapter.” *Id.* § 8306(d)(3). Accordingly, APHIS should
13 have considered implementing indemnification procedures that incentivize producers
14 to stock birds in safer conditions at much lower densities than in current facilities that
15 pose serious risks to both human and environmental health.

16 51. As explained above, this alternative would greatly diminish
17 environmental impacts, threats to public health, federal response costs, and inhumane
18 treatment of poultry populations in ways that the preferred and no action alternatives
19 do not. APHIS was required to assess this reasonable option, especially in light of
20 the comment HSUS submitted that highlighted indemnification as a major component
21 of its recommended alternative proposal. By disregarding these proposed

1 indemnification conditions in its EAs and FONSI, APHIS violated NEPA and the
2 APA.

3 52. Instead, APHIS's inadequate evaluation considered only two deficient
4 responses to a HPAI crisis. Under the "no action" alternative, "APHIS would not be
5 involved in HPAI depopulation, transport and disposal of carcasses, and disinfection
6 of equipment and premises."³³ Nor would APHIS "address the impacts perpetuated
7 by the continued presence and genetic reassortment of AI viruses across the nation."³⁴
8 In contrast, under the preferred alternative, APHIS would use an "Adaptive
9 Management Approach," which purports to control HPAI through surveillance,
10 quarantine, depopulation, carcass management, cleaning and disinfection, and
11 environmental sampling. However, the Adaptive Management Approach entails
12 disposing of poultry carcasses using problematic methods such as VSD, landfilling,
13 rendering, incineration, composting, and mass-burial.³⁵ The assessment of these
14 approaches in the EAs fails to show that the methods used to kill and dispose of
15 infected birds will not have a significant impact on human health and the
16 environment.

17 53. It is not enough to study only the "no-action" and "preferred"
18 alternatives. In the alternatives analyses, the EAs must "provide sufficient evidence

19 ³³ Final EA at 19.

20 ³⁴ *Id.* at 25.

21 ³⁵ *Id.* at 74–76.

1 and analysis for determining whether to prepare an environmental impact statement
2 or a finding of no significant impact.” 40 C.F.R. § 1508.9(a)(1). Because the EAs
3 considered only two options for combatting HPAI, their analyses are insufficient to
4 satisfy the basic requirements of NEPA. *See Nat’l Hwy. Traffic Safety Admin.*, 538
5 F.3d at 1218, 1224–27 (holding that NHTSA violated NEPA by preparing an
6 inadequate EA that “considered a very narrow range of alternatives.”).

7 54. Both EAs fail to consider the likelihood that hazardous methods of
8 depopulation and carcass management, such as VSD, unlined burial, and incineration,
9 will be utilized, and also fail to consider a range of reasonable, safer, and more
10 humane alternatives. One such alternative is a nitrogen filled foam-based euthanasia
11 method developed in 2006 and commonly used in Europe. Unlike water-based
12 foams, the gases in this foam render birds unconscious before they suffocate.

13 55. Moreover, by only considering no action and its Adaptive Management
14 Approach, APHIS disregarded the possibility of implementing tighter restrictions to
15 ensure that one of the most dangerous forms of disposal—unlined burial—is never
16 used.

17 56. As previously discussed, the use of unlined burial pits for the mass-
18 disposal of bird carcasses may contaminate nearby water sources, and the likelihood
19 of such pollution increases as the number of carcasses increases. The use of unlined
20 burial pits may also “release gases associated with anaerobic decomposition, such as
21 carbon dioxide, carbon monoxide, nitrogen oxides, sulfur dioxide, hydrogen chloride

1 and fluoride, and methane.”³⁶ Additionally, unlined burial pits and the heavy
2 machines used to dig trenches and remove topsoil to create such pits “*will* impact the
3 physical properties of soil,” including “increased erosion during and after burial
4 activities have occurred.”³⁷

5 57. Unlined mass-burial may also cause serious harm to humans. “Public
6 health impacts associated with unlined burial arise from potential exposure to
7 pathogens and decomposition chemicals released into the environment, including
8 surface and ground waters. . . . Unlined burial releases high concentrations of
9 ammonia, organic acids, and gases (e.g., carbon dioxide or methane) . . . which may
10 be toxic to humans.”³⁸

11 58. Further, as detailed by APHIS in the December 2015 Carcass
12 Management EIS, “[u]nlined burial and open-air burning of carcasses during a mass
13 animal health emergency are expected to have the greatest impacts to the
14 environment, particularly when carcasses are contaminated with biological, chemical,
15 and/or radiological agents not naturally found in animal carcasses.”³⁹ HPAI would
16 qualify as such an agent. The same EIS also noted that “current environmental
17 conditions at carcass management sites could already be compromised, and this

18
19 ³⁶ Final EA at 27.

20 ³⁷ *Id.* at 28–30.

21 ³⁸ *Id.* at 34.

22 ³⁹ Carcass Management EIS at vi–vii.

1 should be considered in context of any potential for additional impacts from
2 managing carcasses.”⁴⁰

3 59. In light of these hazardous effects and the “variety of [other] methods for
4 disposal of poultry carcasses,”⁴¹ APHIS was required to consider and analyze a
5 response plan that eliminated unlined burial as a potential method of carcass disposal.
6 Instead, APHIS simply notes “[i]f unlined burial is considered for use at a site,
7 APHIS guidance recommends a site-specific investigation be performed prior to
8 selecting this disposal method to avoid groundwater impacts.”⁴² The EA is therefore
9 inadequate because it fails to examine a viable alternative in which unlined burial is
10 never used due to the substantial dangers it poses to humans, animals, and the
11 environment.

12 **IX. APHIS’s Proposed Actions Threatened, And Continue To Threaten**
13 **Violations Of Federal And State Laws**

14 60. As noted above, in determining whether to prepare an EIS, APHIS was
15 required to assess “[w]hether the action threatens a violation of Federal, State, or
16 local law or requirements imposed for the protection of the environment,” and “[t]he
17 degree to which the action may adversely affect an endangered or threatened species
18 or its habitat that has been determined to be critical under the Endangered Species

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⁴⁰ *Id.* at 131.

20 ⁴¹ Final EA at 75.

21 ⁴² *Id.* at 79.

1 Act of 1973.” 40 C.F.R. § 1508.27(9)–(10). APHIS’s proposed depopulation and
2 disposal practices threaten violations of the CWA, CAA, ESA, MBTA, Bald and
3 Golden Eagle Protection Acts, and various state laws, and APHIS failed to adequately
4 evaluate these threats in its EAs. These potential violations are another reason
5 APHIS’s failure to prepare an EIS violates NEPA. 42 U.S.C. § 4332(2)(C).

6 **A. Threatened Violations Of The Clean Water Act**

7 61. Historically, small independent farms raised poultry in the U.S.
8 However, over the last few decades, many of these farms have been replaced by
9 CAFOs, which are large-scale industrial agricultural facilities that raise a large
10 number of animals for human consumption in closely confined areas.

11 62. Although APHIS recognizes that “every improperly managed poultry
12 carcass could become a point source of water pollution,”⁴³ the EAs do not mention
13 that *all* CAFOs are intended to be regulated as “point sources” under the CWA. *See*
14 33 U.S.C. § 1362(14). Nor do the EAs mention that many CAFOs fail to operate
15 with even a basic CWA permit, or that many farming operations fall slightly outside
16 the parameters of the specific, statutory definition of “CAFO,”⁴⁴ meaning that
17 innumerable point sources may not be counted or regulated as CAFOs.

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19 _____
43 Final EA at 20.

20 44 *See* EPA, CAFO CONSOLIDATED FINAL RULES (2008),
21 https://www.epa.gov/sites/production/files/2015-08/documents/cafo_final_rule2008_comp.pdf.

1 63. APHIS also fails to identify how many of the thousands of farms that
2 have been or may be impacted by HPAI outbreaks are CAFOs. In 2011, the EPA
3 estimated that there were over 24,000 CAFOs in the U.S., several thousand of which
4 confine birds.⁴⁵

5 64. The risk to water quality from the disposal of hundreds of thousands of
6 poultry carcasses nationwide, statewide, and locally—especially by CAFO
7 facilities—is astronomic, and should have been more fully analyzed by APHIS in
8 advance of finalizing its national approach to HPAI, as required by NEPA.

9 65. Specifically, during carcass decay, contaminants such as ammonia-
10 nitrogen, phosphorous, and chloride may leach into groundwater, while waste can
11 carry pathogens.⁴⁶ Drugs given to birds may also leach into the soil and groundwater,
12 as evidenced by the “[e]levated levels of phosphorus, nitrogen, chloride, antibiotics,
13 hormones, and veterinary pharmaceuticals [that] have been observed in soils
14 surrounding unlined burial pits.”⁴⁷ Additionally, poultry by-products and waste can
15 contain pathogens that contaminate water sources, and the Avian Influenza virus can
16
17

18 ⁴⁵ See EPA, SUPPORTING STATEMENT FOR THE INFORMATION COLLECTION
19 REQUEST FOR REVISIONS TO NPDES RULES FOR CONCENTRATED ANIMAL
20 FEEDING OPERATIONS—PROPOSED 308 RULE, EPA-HQ-OW-2011-0188-0055,
21 at 9 (2011).

20 ⁴⁶ Final EA at 28.

21 ⁴⁷ *Id.* at 30.

1 survive in bird fecal material and may remain infectious for extended durations
2 depending on water temperature.⁴⁸

3 66. APHIS's EAs fail to identify which drugs and compounds are commonly
4 administered to poultry, and they fail to address the potential impact of burying
5 several hundreds of thousands of birds containing harmful drugs together in unlined
6 pits.

7 67. The EAs also fail to consider that the use of pharmaceuticals in poultry
8 flocks increases when producers fear an outbreak of infection, and when signs of
9 illness first appear. For instance, poultry producers outside of the U.S. have
10 unlawfully used antiviral drugs to try to stop the outbreak of Avian Influenza, with
11 serious human consequences.

12 68. These drugs and other compounds, together with leachates⁴⁹ from
13 thousands of animals decomposing in unlined burial pits, threaten to cause water
14 pollution and violate the CWA. Although the EAs cursorily acknowledge this risk,
15 APHIS nevertheless fails to set forth even the most basic information about the types
16 and amounts of pharmaceutical leachates and their proximity to surface and
17 groundwater in different regions of the country. 40 C.F.R. § 1508.27(a) ("the
18

19 ⁴⁸ *Id.* at 20, 28

20 ⁴⁹ Leachate is the liquid that is formed when water comes into contact with
21 decomposing waste and biomass, including bodily fluids that leak from dead
22 animals. Final EA at 6.

1 significance of an action must be analyzed in several contexts such as society as a
2 whole (human, national), the affected region . . . and the locality.”). Thus, the EAs
3 are missing critical information essential to an adequate assessment of environmental
4 impacts at the local, state, or national level.

5 69. APHIS attempted to explain this critical failure by simply noting, “[i]f
6 unlined burial is considered for use at a site, APHIS guidance recommends a site-
7 specific investigation be performed prior to selecting this disposal method.”⁵⁰
8 However, NEPA requires more. Specifically, such “environmental information [must
9 be] available to public officials and citizens *before* decisions are made and *before*
10 actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis added). Moreover, given the
11 necessity of responding quickly and rapidly disposing of carcasses, conducting site-
12 specific EAs or EIS’s for each HPAI outbreak while trying to contain it is
13 impractical.

14 70. Moreover, after listing several other potential impacts on water quality
15 parameters, such as pH, conductivity, biological oxygen demand, nutrient loading
16 from phosphorus and nitrogen, and decreasing dissolved oxygen, APHIS explicitly
17 states that “the potential for impacts to water quality rises as the number of carcasses
18 increases.”⁵¹ Again, however, the EA does not meaningfully analyze such increased
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20 ⁵⁰ Final EA at 79.

21 ⁵¹ Final EA at 28.

1 risk, especially as it relates to carcass disposal, facility restocking, or the lack of
2 facility CWA permitting.

3 **B. Threatened Violations Of State Clean Water Laws**

4 71. For the same reasons, the actions outlined in the EAs also threaten
5 violations of the robust body of state laws that protect surface and groundwater from
6 pollution, some of which are even broader in scope than the CWA. These laws affect
7 both small farms and CAFOs, and may protect groundwater even absent a connection
8 to surface water.

9 72. For instance, California strongly protects against groundwater pollution,
10 and the state's Sustainable Groundwater Management Act establishes Groundwater
11 Sustainability Agencies, sustainability plans, and state evaluation and assessments.
12 CA WATER § 10720 *et seq.* California's Water Law reflects the public's "primary
13 interest in the conservation, control, and utilization of the water resources of the
14 state," and intends to advance that interest by ensuring the protection of the "quality
15 of all the waters of the state," including "any surface water or groundwater . . . within
16 the boundaries of the state," "for the public's use and enjoyment." *Id.* §§ 13000,
17 13050; *Tesoro Refining & Mktg. Co. LLC v. L.A. Regl. Water Quality Control Bd.*,
18 255 Cal. Rptr. 3d 343, 347 (Cal. Ct. App. 2019). Likewise, Minnesota—one of the
19 "top five turkey production states"⁵²—has enacted a regulation imposing, whenever

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21 _____
⁵² Final EA at 13.

1 practical, a statewide goal of maintaining groundwater “free from any degradation
2 caused by human activities.” MINN. STAT. ANN. § 103H.001 (West 2018). Similarly,
3 South Dakota has declared that “pollution of groundwater . . . constitutes a menace to
4 public health, welfare and the environment,” and has enacted an extensive set of
5 regulations that effectuate the state’s public policy “to conserve the groundwaters of
6 the state and to protect, maintain and improve the quality thereof for present and
7 future beneficial uses through the prevention of pollution, correction of groundwater
8 pollution problems and close control of limited degradation perimeters permitted for
9 necessary economic or social development.” S.D. CODIFIED LAWS § 34A-2-104; S.D.
10 ADMIN. R. 74:54:01–02.

11 **C. Threatened Violations Of The Clean Air Act**

12 73. APHIS has recognized that various carcass disposal processes
13 contemplated in its EAs may have significant detrimental impacts on air quality. In
14 its December 2015 Carcass Management EIS, APHIS acknowledges that the unlined
15 burial disposal method can cause harmful gases from contaminated carcasses to build
16 up and vent through the soil during decomposition. Released gases can harm plant
17 growth and contaminate air in the surrounding areas, sometimes causing pathogens
18 from infected birds to be discharged into the atmosphere. These gases can also
19 accumulate in enclosed underground spaces and cause explosion hazards.⁵³

20
21 ⁵³ Carcass Management EIS at 76–77.

1 74. APHIS has also recognized that the open-air burning disposal method
2 similarly threatens air quality by dispersing odor, smoke, pathogens, and other
3 pollutants into the atmosphere, and “[t]here are additional potential impacts to air
4 when the carcasses are contaminated with biological, chemical, and/or radiological
5 agents.”⁵⁴

6 75. Even the alternative procedures recommended in APHIS’s Carcass
7 Management EIS pose potential hazards to air quality, including disposal in rendering
8 facilities, fixed-facility incineration, composting, and landfills. Despite more
9 controlled environments and reduced risks from these methods, the threat of harmful
10 pollutant emissions is still present.⁵⁵ Both Riverside and San Bernardino County,
11 which collectively have millions of factory-farmed egg laying hens, received an F in
12 the 2019 American Lung Association State of the Air Report.⁵⁶ Burning thousands of
13 birds in or near counties like these can push air quality from bad to dangerously bad.

14 76. Accordingly, the actions outlined in the EAs threaten multiple violations
15 of the CAA. The risk to air quality at the local, state, and national level from the
16 disposal of tens of millions of poultry carcasses nationwide, especially through
17 methods such as incineration, is troubling and should have been more fully analyzed

18 ⁵⁴ *Id.* at 78.

19 ⁵⁵ *Id.* at 79–80.

20 ⁵⁶ *State of the Air Report Card: California*, AMERICAN LUNG ASSOCIATION,
21 <http://www.stateoftheair.org/city-rankings/states/california/> (last visited Apr. 6,
2020).

1 by APHIS. 40 C.F.R. § 1508.27(a) (“the significance of an action must be analyzed
2 in several contexts such as society as a whole (human, national), the affected region .
3 . . and the locality.”).

4 77. The EAs provide that “[a]ir emissions from rendering, fixed-facility,
5 incineration, and landfilling are regulated through a Federal or State permitting
6 process to minimize releases[,]” and that these disposal methods “are effective at
7 containing pollutants associated with carcasses.”⁵⁷ APHIS arrives at this conclusion
8 without citing any study or fact showing that these permitting processes can be safe
9 and environmentally sound when operated at the scale of a major HPAI outbreak,
10 despite acknowledging that such emissions “can impact human health.”⁵⁸

11 78. Similarly, APHIS fails to make clear whether states are permitted to use
12 open incineration under the program. By merely stating that air emissions from
13 incineration are subject to “Federal or State permitting process[es] to minimize
14 releases[,]” APHIS does not ensure that open burning will not be used to dispose of
15 large quantities of affected birds.⁵⁹ In an article published by the EPA entitled
16 *Carcass Management During Avian Influenza Outbreaks*, the EPA makes its position
17 clear that incineration, including the use of open pyres, is an “option” for handling
18 diseased poultry carcasses, despite also recognizing that some incineration methods

19 ⁵⁷ Final EA at 27.

20 ⁵⁸ *Id.*

21 ⁵⁹ *Id.* at 10, 27.

1 have a detrimental impact on human health and the environment.⁶⁰ For example, the
2 EPA has acknowledged that open pyres “may pose risks to human health and the
3 environment.”⁶¹ In spite of this, APHIS did nothing to limit the use of incineration
4 methods that it clearly knew to be dangerous, and incineration was used to dispose of
5 poultry carcasses infected during the 2015 HPAI outbreak. Given that even regulated
6 incineration may release ash, particulate matter, dioxins, polyaromatic hydrocarbons,
7 and metals, APHIS has been reckless in allowing open incineration and the
8 uncontrolled harmful effects it produces. Furthermore, the groundwater and soil
9 contamination that results from open-air burning poses additional clean-up
10 challenges.

11 79. Pre-existing state or federal regulation of an industry cannot act as a
12 substitute for the required “hard look” under NEPA. If it were otherwise, NEPA
13 would be rendered meaningless, as most industries are subject to federal and/or state
14 regulation. Accordingly, hoped-for compliance with other environmental laws is not
15 a legally sufficient justification for failing to meet the requirements of NEPA.

16 **D. Threatened Violations Of The Endangered Species Act, Migratory**
17 **Bird Treaty Act, And Bald And Golden Eagle Protection Act**

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19 _____
20 ⁶⁰ *Carcass Management During Avian Influenza Outbreaks*, EPA,
<https://www.epa.gov/homeland-security-waste/carcass-management-during-avian-influenza-outbreaks> (last visited Apr. 6, 2020).

21 ⁶¹ *Id.*

1 80. Birds listed under the ESA, MBTA, and Bald and Golden Eagle
2 Protection Acts are all at risk of contracting HPAI when they can access carcasses of
3 infected birds.⁶² Indeed, bald eagles are among the wild birds listed in the Final EA
4 as having tested positive for HPAI during the 2014 to 2015 period.⁶³

5 81. APHIS claims that it is “most likely that [ESA] listed birds would be
6 exposed to HPAI from wild, migratory birds as the viruses circulate in the flyways . .
7 . and the proposed program targets only domestic poultry. Thus, the proposed action
8 may be of limited benefit to federally listed birds.”⁶⁴ However, the issue is not
9 whether the action would “benefit” the birds protected under these statutes; it is
10 whether any “takings”⁶⁵ of these protected species, or disturbances to their critical
11 habitats, will *definitely not* result from the proposed program. *See* 16 U.S.C. § 1538.

12 82. Particularly troublesome is APHIS’s conclusion that “[a]lthough it is
13 possible that [federally] listed scavenging species or bird species could enter barns
14 where carcasses are held prior to composting, there is a great deal of human activity
15
16

17 ⁶² Final EA at 39 (“All bird species federally listed as threatened or endangered in
18 the United States may be susceptible to infection by HPAI[.]”).

19 ⁶³ *Id.* at 36.

20 ⁶⁴ *Id.* at 39–40.

21 ⁶⁵ The term “take” in this context “means to harass, harm, pursue, hunt, shoot,
22 wound, kill trap, capture, or collect, or attempt to engage in such conduct.” 16
23 USC § 1532(19).

1 around commercial poultry facilities, and these species would avoid such areas.”⁶⁶
2 This incorrectly assumes that there will *always* be significant activity around *all* piles
3 of decaying carcasses, which is a baseless conclusion. APHIS also incorrectly
4 assumes that these carcasses will always be held inside and fails to provide any
5 explanation for drawing such an erroneous conclusion. Wild birds can easily access
6 any carcasses that are left outside or unattended inside open facilities.

7 83. In any event, the fact that federally listed birds could likely access piles
8 of infected carcasses suggests that the detrimental impact of the HPAI depopulation
9 and disposal methods could be significant on these protected birds, especially
10 considering the speed with which HPAI can spread in the wild and the almost certain
11 fatality of the disease to threatened and endangered species.

12 84. Moreover, APHIS claims that “landfilled and buried carcasses are
13 covered with several feet of soil or other material, soon after placement, and that
14 composted carcasses are covered with 8 to 12 inches of clean material such as wood
15 chips.”⁶⁷ However, APHIS fails to set out any timeframe within which this covering
16 would need to occur, even though any amount of time that carcasses are left
17 uncovered is a threat to endangered avian species.

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20 _____
⁶⁶ Final EA at 40.

21 ⁶⁷ *Id.* at 41.

1 85. Finally, as mentioned above, the pharmaceuticals used in poultry rearing
2 pose an entirely separate set of problems for protected species. When certain disposal
3 practices—including burial and incineration—are employed, the drugs used in these
4 processes can enter the environment and linger there for extended periods of time.
5 APHIS’s EAs failed to analyze *any* of the potentially serious impacts on endangered
6 plant and animal species from *any* of the many pharmaceuticals regularly used on
7 poultry throughout the industrial farming industry. Additionally, neither EA
8 discussed the increase in drugs routinely given to confined birds during disease
9 outbreaks or the detrimental effects posed by the accrual of such drugs in the
10 environment.

11 **X. APHIS Improperly Postponed Analyzing The Local Consequences Of The**
12 **Proposed Action**

13 86. APHIS also violated NEPA by failing to analyze local environmental
14 impacts in its EAs. APHIS was required by NEPA to take a “hard look” at the
15 consequences, environmental impacts, and adverse effects of any proposed federal
16 action. *Nat’l Hwy. Traffic Safety Admin.*, 538 F.3d at 1194; *see also* 42 U.S.C. §
17 4332(2)(C); 40 C.F.R. § 1508.9. APHIS’s decision to forego such analyses runs
18 counter to the well-established notion that “NEPA is not designed to postpone
19 analysis of an environmental consequence to the last possible moment. Rather, it is
20 designed to require such analysis *as soon as it can reasonably be done.*” *Kern v.*
21 *United States BLM*, 284 F.3d 1062, 1072 (9th Cir. 2002) (emphasis added).

1 87. As detailed above, the actions proposed in APHIS’s EAs threaten to
2 have significant local impacts. However, despite requirements to do so under NEPA,
3 APHIS’s EAs did not address any local environmental conditions at the regional,
4 state or local level. *See* 40 C.F.R. § 1508.27 (“[I]n the case of a site-specific action,
5 significance would usually depend upon the effects in the locale rather than in the
6 world as a whole.”). While APHIS recognized the existence of divergent regional
7 and local regulations and broadly claimed that it would “evaluate disposal options
8 based on . . . local conditions[,]”⁶⁸ it nonetheless proposed a system in which local
9 impacts are inevitably addressed at the last possible moment—*i.e.*, only *after* HPAI
10 has been detected in a specific area and, in all likelihood, after potentially harmful
11 depopulation and disposal methods have been employed. Moreover, because the
12 Agency must respond rapidly to stop the spread of disease, ad hoc thoughtful
13 environmental review of local impacts is unlikely to be adequately undertaken.

14 88. In the EAs, APHIS failed to consider that even seemingly minor
15 environmental differences among localities can lead to similar depopulation and
16 disposal methods producing drastically different results and environmental impacts.
17 Even though there is variability at the local level, APHIS could have addressed these
18 differences in its EAs. For instance, the depth of groundwater in a particular locality
19 should inform the types of disposal methods that APHIS allows. Because these
20

21 ⁶⁸ Final EA at 7, App’x A.

1 decisions must be made promptly when responding to HPAI, APHIS should have
2 specified which modes of depopulation and carcass disposal are acceptable based on
3 varying conditions in different regions and localities. This type of analysis likely
4 cannot be adequately performed immediately before or during an outbreak crisis, as
5 the need to respond in short order does not allow time for thorough environmental
6 review.

7 **XI. APHIS's EAs Failed To Consider The Most Likely Scenarios**

8 89. Although APHIS describes various methods of depopulation and carcass
9 disposal in its EAs, it does not properly address the likelihood that the “preferred”
10 methods will be the ones that are actually carried out.

11 90. For instance, the EAs assert that “the use of water-based foam and
12 carbon dioxide are preferred [depopulation] methods during HPAI outbreaks.”⁶⁹
13 Additionally, as a result of comprehensive studies, animal scientists have presented
14 high expansion gas-foam filled with nitrogen or carbon dioxide as a viable and more
15 humane form of depopulation. Yet the EAs also provide that when these methods
16 “cannot be deployed within 24 hours,” the dangerous practice of ventilation shutdown
17 “may be applied under limited circumstances.”⁷⁰ According to APHIS, VSD is
18 “infrequently used,” and this method is selected “on a case-by-case basis.”⁷¹

19 _____
⁶⁹ *Id.* at 75.

20 ⁷⁰ *Id.* at 10.

21 ⁷¹ *Id.* at 28.

1 91. However, APHIS’s proposed depopulation strategy is not realistic in
2 practice. Indeed, when analyzing the effectiveness of APHIS’s “preferred” methods
3 on controlling HPAI outbreaks, the USDA concluded:

4 More than one method of depopulation is likely to be required in an
5 HPAI outbreak; carbon dioxide (CO₂) and water-based foam have been
6 the most commonly implemented methods during the current outbreak.

7 However, at the height of outbreak detections, these methods were
8 *insufficient for rapid depopulation and disposal, and could not be*
9 *executed quickly enough to halt the production of HPAI* virus in
10 infected flocks. As such, APHIS, State, and industry stakeholders
11 acknowledged that other rapid depopulation methods must be
12 considered if HPAI re-emerges in the fall.⁷²

13 The USDA therefore reasoned that “rapid stamping-out” of the infected birds (within
14 24 hours) was “needed to prevent continued virus shedding and further amplification
15 of HPAI.”⁷³ According to the USDA, under these circumstances VSD is “a necessary
16 alternative” to APHIS’s “preferred” methods,⁷⁴ meaning that operators are effectively

18 ⁷² *HPAI Outbreak 2014-2015: Ventilation Shutdown Evidence & Policy*, USDA
19 (Sept. 18, 2015), [https://www.aphis.usda.gov/animal_health/emergency_](https://www.aphis.usda.gov/animal_health/emergency_management/downloads/hpai/ventilationshutdownpolicy.pdf)
20 management/downloads/hpai/ventilationshutdownpolicy.pdf (emphasis added).

21 ⁷³ *Id.* at 1.

22 ⁷⁴ *Id.* at 2 (“The need to control and eradicate HPAI . . . makes VSD a necessary
23 alternative”).

1 forced to shut down facility ventilation systems until the birds suffocate and are
2 slowly cooked to death.

3 92. APHIS's claim that CO₂ and water-based foam are the preferred
4 depopulation methods, and that these methods will achieve the Agency's purpose,
5 cannot be reconciled with the USDA's claim that these very methods are inadequate.
6 This is especially true given that other effective and more humane methods exist,
7 such as high expansion nitrogen filled foam. Indeed, the EAs do not even treat VSD
8 as a *likely* outcome in lieu of the use of CO₂ or water-based foams, let alone a
9 *necessary* one. Even under the allegedly "limited" circumstances when VSD is
10 intended to be used, VSD *still* poses a threat to human physical safety, especially to
11 persons tasked with removing dead birds from their cages.⁷⁵ Moreover, in addition to
12 the substantial pain and suffering that VSD inflicts on birds, the process may not
13 ultimately kill all of the birds, meaning that other methods may still be required.

14 93. Because APHIS only considered the effects of using VSD "under limited
15 circumstances,"⁷⁶ the EAs are deficient. APHIS therefore violated NEPA by failing
16 to analyze the direct, indirect, or cumulative effects of using VSD as a primary killing
17 method.

19 ⁷⁵ Final EA at 32 ("The ventilation shutdown method . . . may result in elevated
20 levels of ammonia" that pose a threat to workers involved in depopulation
efforts.).

21 ⁷⁶ *Id.* at 10.

XII. APHIS Failed To Adequately Consider Environmental Justice Issues

94. Executive Order 12898 requires that federal agencies identify and address “disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.” Exec. Order No. 12898, § 1-101 (Feb. 11, 1994).

95. Significantly, although the Executive Order does not create a new right to judicial review, a United States District Court in the Central District of California has found that when an agency chooses to consider environmental justice in its analysis (as is required by the Order and as APHIS has done here), that analysis is reviewable under both NEPA and the APA’s arbitrary and capricious standard. *See Crenshaw Subway Coal. v. L.A. Metro. Trans. Auth.*, 2015 WL 6150847, at *29 (C.D. CA Sept. 23, 2015). Other courts have similarly held that an environmental justice analysis is reviewable under these circumstances. *See Cmtys. Against Runway Expansion, Inc. v. FAA*, 355 F.3d 678, 689 (D.C. Cir. 2004) (holding that when an agency “exercise[s] its discretion to include the environmental justice analysis in its NEPA evaluation,” an environmental justice claim “is properly before this court because it arises under NEPA and the APA” rather than under Executive Order 12898); *Coliseum Square Ass’n, Inc. v. Jackson*, 465 F.3d 215, 232 (5th Cir. 2006), *cert denied*, 552 U.S. 810 (2007) (holding an environmental justice study contained in a NEPA analysis was subject to arbitrary and capricious review).

1 96. In the EAs, APHIS stated that “[a]ffected poultry production operations
2 are likely to be in rural areas,” but concluded, without further explanation or factual
3 support, that there was “no way to determine in advance how many will be among the
4 rural poor.”⁷⁷ Accordingly, APHIS simply adopts yet another wait-and-see approach,
5 under which it proposes to “address minority and low-income population concerns
6 expressed by individuals as they arise.”⁷⁸ However, there is no realistic possibility
7 that APHIS will have time to conduct such a review in the middle of an outbreak.

8 97. This unsupported conclusion is troubling. The USDA is the nation’s
9 leading agency responsible for developing, implementing, and analyzing agricultural
10 programs. When it declares a lack of knowledge regarding the impact that its actions
11 will have on minority populations, this is a cause for citizen concern.

12 98. APHIS’s purported inability to determine the effects of its action on low-
13 income populations is also contradicted by the USDA’s own statistical information
14 about the location of poultry operations nationwide.⁷⁹ Additionally, according to the
15 most recent agricultural census, the USDA even took “special efforts” and
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19 ⁷⁷ Final EA at 38.

20 ⁷⁸ *Id.*

21 ⁷⁹ See *EJSCREEN: Environmental Justice Screening and Mapping Tool*, EPA,
<https://www.epa.gov/ejscreen> (last visited April 6, 2020).

1 “implemented several activities to improve coverage” of socially disadvantaged and
2 minority farm operators.⁸⁰

3 99. The correlation between race, income, and exposure to hazardous waste
4 disposal is well documented. CAFOs are typically located in disenfranchised
5 communities that have limited access to healthcare and, due to community members’
6 close proximity to waste disposal sites and the contamination caused thereby, the
7 disenfranchised are likely to bear the brunt of the harm stemming from inadequate
8 carcass disposal methods. Research has shown that the waste, pathogens, heavy
9 metals, and odor produced by CAFOs contribute to excessive respiratory and
10 digestive ailments, mood disorders, impaired mental health, and decreased quality of
11 life for the low-income community members living nearby such operations. These
12 adverse health impacts are only exacerbated when inadequate carcass disposal
13 methods are used to cull large populations of diseased poultry.

14 100. In January 2017, the EPA issued a letter to the North Carolina
15 Department of Environmental Quality expressing “deep concern about the possibility
16 that African Americans, Latinos, and Native Americans have been subjected to
17 discrimination as the result of NC DEQ’s operation of the Swine Waste General
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19

20 ⁸⁰ See USDA, 2012 CENSUS OF AGRICULTURE, at IX, App’x A-1-A-6 (2014),
21 https://www.agcensus.usda.gov/Publications/2012/Full_Report/Volume_1,_Chapter_2_US_State_Level/st99_2_001_001.pdf.

1 Permit program, including the 2014 renewal of the Swine Waste General Permit.”⁸¹

2 This reflects the EPA’s acknowledgement that factory farm waste disposal
3 disproportionately impacts minority communities.

4 101. It is exceptionally troubling that APHIS’s environmental justice
5 conclusions make no attempt to measure the impact on minority populations. In the
6 Final EA, APHIS simply notes that it would be “speculative” to determine when
7 impacts may occur, what APHIS could do to reduce any potential impacts, and the
8 extent to which “minority populations ‘off of the farm’ may be impacted by a
9 particular outbreak.”⁸² This rationale is belied by the existence of relevant
10 environmental justice information as noted above, and is plainly insufficient to satisfy
11 NEPA, which requires either an analysis of likely impacts or a determination that the
12 impacts are unlikely.

13 102. The deficient analysis in APHIS’s EA also directly conflicts with the
14 conclusion that APHIS makes in its corresponding FONSI. In the FONSI, Defendant
15 Dr. Burke Healy addresses this important issue in a single sentence that states: “the
16 preferred alternative poses no disproportionate adverse effects to minority and low-

18 ⁸¹ Letter from Lilian S. Dorka, US EPA, to William G. Ross, Jr., NC Dept. of
19 Enviro. Quality (Jan, 12, 2017),
20 [https://www.epa.gov/sites/production/files/2018-
05/documents/letter_of_concern_to_william_g_ross_nc_deq_re_admin_compl
aint_11r-14-r4_.pdf](https://www.epa.gov/sites/production/files/2018-05/documents/letter_of_concern_to_william_g_ross_nc_deq_re_admin_complaint_11r-14-r4_.pdf).

21 ⁸² Final EA at 79.

1 income populations[.]”⁸³ However, the FONSI cites no evidence to support this
2 conclusory determination, and it contradicts APHIS’s assertion in the EA that there
3 was “no way to determine” any such impacts in advance.⁸⁴ Defendant Healy lacked a
4 factual basis for this conclusion, and any adequate consideration of available
5 information would have compelled APHIS to conduct a more thorough
6 environmental justice analysis.

7 **XIII. APHIS’s Preparation Of The Carcass Management EIS Further**
8 **Demonstrates The Need For A HPAI-Specific EIS**

9 103. In December 2015—nearly simultaneous to the release of the Final
10 EA—APHIS also released its lengthy Carcass Management EIS, which “analyzes the
11 environmental effects associated with various carcass management alternatives that
12 could be implemented during a mass animal health emergency.”⁸⁵ The Carcass
13 Management EIS details various “improved carcass management options,” including
14 “landfill, rendering, incineration, composting, and non-standard methods, rather than
15 the traditional options of unlined burial and open-air burning.”⁸⁶ The fact that APHIS
16 considered substitutes in the Carcass Management EIS for the dangerous practices
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18 ⁸³ FONSI at 1.

19 ⁸⁴ Final EA at 38.

20 ⁸⁵ Carcass Management EIS at v.

21 ⁸⁶ *Id.* at 2.

1 *that are permissible under the preferred approach in the Final EA* further
2 demonstrates the existence of these viable but unexamined alternatives.

3 104. More generally, if carcass management itself requires an EIS, then it
4 follows that a depopulation and disposal program incorporating carcass management
5 must also warrant an EIS. Although APHIS attempts to use the Carcass Management
6 EIS as a substitute for an HPAI-specific EIS,⁸⁷ agencies cannot avoid preparing an
7 EIS by segmenting action. *See Nat'l Audubon Soc'y v. Butler*, 160 F. Supp. 2d 1180,
8 1189 (W.D. Wash. 2001); 40 C.F.R. § 1508.27(b)(7).

9 105. NEPA requires that an EIS accompany “*every* recommendation or report
10 on proposals for . . . major Federal actions significantly affecting the quality of the
11 human environment.” 42 U.S.C. § 4332(2)(C) (emphasis added).

12 106. An EIS was necessary because the HPAI outbreak control activities
13 proposed in the EAs may significantly affect the human environment. HPAI has
14 virulently spread across the country in recent years, threatening human health, animal
15 welfare, and the environment, and leaving tens of millions of dead birds in its wake.
16 In a comparable situation that dealt exclusively with carcass disposal, APHIS
17 explicitly acknowledged that NEPA demands the comprehensive consideration of an
18 EIS.⁸⁸ The Agency has not explained—and cannot explain—how one subset of a

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20 _____
⁸⁷ See Final EA at 77.

21 ⁸⁸ See Carcass Management EIS.

1 problem (carcass disposal) warrants an EIS, yet the problem as a whole (killing
2 millions of animals, disinfecting massive facilities, and carcass disposal) somehow
3 does not have a significant impact on the human environment.

4 CLAIMS FOR RELIEF

5 **Claim One: The USDA Violated NEPA By Failing To Evaluate A Reasonable** 6 **Range Of Alternative Actions.**

7 107. The allegations of all prior paragraphs are incorporated by reference.

8 108. APHIS violated NEPA by failing to undertake a thorough and objective
9 evaluation of a reasonable range of alternative actions in the July 2015 EA, the Final
10 EA, and the FONSI. This claim is brought pursuant to the judicial review provision
11 of the APA, 5 U.S.C. § 706(2).

12 109. NEPA requires all federal agencies to undertake a thorough and public
13 analysis of the environmental consequences of proposed federal actions, including a
14 reasonable range of alternative actions.

15 110. APHIS's EAs and FONSI violate NEPA and APA in failing to
16 rigorously explore and objectively evaluate all reasonable alternatives.

17 111. For the foregoing reasons, APHIS's preparation and approval of the EAs
18 and the FONSI is arbitrary, capricious, an abuse of discretion, and not in accordance
19 with law under NEPA and the APA.

20 **Claim Two: The USDA Violated NEPA And The APA By Approving Arbitrary** 21 **And Capricious Environmental Assessments And The FONSI.**

1 112. The allegations of all prior paragraphs are incorporated by reference.

2 113. APHIS violated NEPA by failing to undertake a thorough and objective
3 “hard look” at the environmental impacts of its activities proposed in the July 2015
4 EA, the Final EA, and the FONSI. This claim is brought pursuant to the judicial
5 review provision of the APA, 5 U.S.C. § 706(2).

6 114. NEPA requires all federal agencies to undertake a thorough and public
7 analysis of the environmental consequences of proposed federal actions, including: a
8 description of baseline conditions; a reasonable range of alternative actions, including
9 a “no action” alternative; and a thorough evaluation of the direct, indirect, and
10 cumulative impacts of proposed actions.

11 115. APHIS’s EAs and FONSI violate NEPA and APA in the following
12 ways, each of which is a distinct and separate violation of law:

- 13 (a) APHIS improperly segmented its analysis;
- 14 (b) APHIS failed to take a “hard look” at the direct, indirect, and
15 cumulative impacts of the most likely scenarios that will result
16 from the proposed action; and
- 17 (c) APHIS failed to adequately consider environmental justice issues.

18 116. For the foregoing reasons, APHIS’s preparation and approval of the EAs
19 and the FONSI is arbitrary, capricious, an abuse of discretion, and not in accordance
20 with law under NEPA and the APA.

1 **Claim Three: The USDA Violated NEPA By Failing To Prepare An EIS On The**
2 **Proposed Action.**

3 117. The allegations of all prior paragraphs are incorporated by reference.

4 118. APHIS violated NEPA by refusing to prepare a NEPA-compliant EIS
5 for its HPAI outbreak control activities, notwithstanding available information
6 showing these activities may have a significant adverse effect on the human
7 environment.

8 119. APHIS's HPAI outbreak control activities may have a significant effect
9 on the human environment for reasons including but not limited to the following:

- 10 (a) APHIS's activities encompass an immensely broad geographic
11 area: the entire United States;
- 12 (b) The proposed action threatens violations of the CWA, CAA, ESA,
13 MBTA, and Bald and Golden Eagle Protection Act, and various
14 state laws;
- 15 (c) The proposed action may adversely affect endangered or
16 threatened species and habitats that have been determined to be
17 critical under the ESA;
- 18 (d) The proposed action improperly postpones analyses of its local
19 environmental impacts until the last possible moment;
- 20 (e) It is reasonable to anticipate that the proposed action will have a
21 cumulatively significant impact on the environment; and

1 (f) APHIS improperly segmented its analysis by preparing an EIS for
2 only one portion of the proposed action, carcass management, as a
3 substitute for an assessment of the entirety of the proposed
4 action’s impact.

5 120. The decision not to prepare an EIS was therefore arbitrary and
6 capricious, an abuse of discretion, not in accordance with NEPA, 42 U.S.C. § 4332,
7 40 C.F.R. § 1502.9(c), and must be set aside. 5 U.S.C. §§ 701–706.

8 **PRAYER FOR RELIEF**

9 WHEREFORE, Plaintiff requests that the Court:

10 A. Order, adjudge, and declare that APHIS violated NEPA, NEPA’s
11 implementing regulations and policies, and the APA by refusing to prepare an EIS
12 analyzing the full range of its HPAI outbreak control activities;

13 B. Order, adjudge, and declare that APHIS violated NEPA, NEPA’s
14 implementing regulations and policies, and/or the APA in approving the EAs and
15 FONSI without taking the required NEPA “hard look” at actions, alternatives, and
16 environmental impacts;

17 C. Reverse, vacate and set aside the EAs and FONSI;

18 D. Order APHIS to prepare an EIS that satisfies the requirements of NEPA;
19 and

1 F. Grant such further and other relief as the Court deems just and proper to
2 remedy Defendants' violations of law and protect the wildlife and people of the
3 United States.

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1 Dated: April 8, 2020

Respectfully submitted,

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