

THE ATTORNEYS GENERAL OF CALIFORNIA, WISCONSIN, MARYLAND, NEW JERSEY, NEW YORK, AND OREGON

March 25, 2024

Submitted via Federal eRulemaking Portal

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

Re: Comments on the Environmental Protection Agency’s proposed Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, 89 Fed. Reg. 4474 (Jan. 23, 2024), EPA-HQ-OW-2021-0736

Dear Administrator Regan:

The Attorneys General of California, Wisconsin, Maryland, New Jersey, New York, and Oregon (together, “Attorneys General” or “States”) submit these comments on the Environmental Protection Agency (EPA)’s proposed Clean Water Act Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, 89 Fed. Reg. 4474 (Jan. 23, 2024) (MPP Rule or Rule).

We support the EPA’s decision to revise the existing, outdated effluent limitation guidelines and standards (ELGs) for the meat and poultry products (MPP) point source category, which have not been updated for 20 years. While the MPP Rule makes important changes to better address the significant pollution discharged by MPP facilities, the Attorneys General are concerned that the Rule does not go nearly far enough to meet the requirements of the Clean Water Act. Therefore, as discussed in the comments below, we advocate for EPA to adopt, at a minimum, the proposed Option 3.

Below we highlight some of the main points in our comment letter:

- ***Support for Revising the MPP ELGs.*** We support EPA in promulgating revised ELGs for the MPP industry. Adding phosphorus effluent limits and reducing nitrogen and fecal limits for direct dischargers would provide some environmental improvements, as would adding conventional pretreatment standards for indirect dischargers.
- ***Support for Option 3.*** We urge EPA to adopt Option 3, which provides by far the most environmental protection, as EPA’s own extensive analysis has found. The other options are inconsistent with the Clean Water Act’s mandate that EPA prevent pass-through and interference.

- **Environmental Justice.** EPA failed to consider its own detailed environmental justice analysis and applicable Executive Orders, which give further support for Option 3. We urge EPA to address the environmental justice impacts from MPP facilities by adopting Option 3.

Our comments are organized as follows: Section I is an introduction, which discusses (A) our interests in addressing pollutants discharged from MPP facilities; (B) EPA’s obligations under the Clean Water Act; (C) the historical regulation of the MPP industry’s wastewater discharges; and (D) an overview of the proposed Rule. In Section II, we comment on the following aspects of the Proposed Rule: (A) the benefits provided by EPA’s proposed Rule; (B) why Option 3 should be EPA’s preferred option; (C) EPA’s inadequate justification for choosing Option 1; (D) EPA’s reliance on unverified industry concerns in rejecting the most protective option; (E) why EPA should have taken into account environmental justice considerations; (F) EPA’s legal obligation to prevent pass-through and interference from pollutants; and (G) other aspects of the proposed Rule. Finally, we offer some concluding thoughts in Section III.

I. INTRODUCTION

A. States’ Interests in Reducing MPP Wastewater Pollution

1. Overview of Wastewater Generated by MPP Facilities

MPP facilities, including slaughtering, further processing, and rendering facilities,¹ generate large volumes of wastewater from their operations that contain detrimental pollutants. MPP wastewater is discharged to waterways either directly or indirectly. Directly discharging MPP facilities discharge straight into waterways via outfalls and are regulated by National Pollution Discharge Elimination System (NPDES) permits, whereas indirect dischargers discharge to wastewater treatment plants, or publically owned treatment works (POTWs).² MPP processes, which include slaughtering, cutting, deboning, grinding, curing, and cooking, generate high amounts of wastewater from washing carcasses, hair removal (via scalding), evisceration,

¹ Slaughtering facilities, or “first processing” facilities receive and hold live animals, kill them, and produce raw products, either whole or in parts. These products are either sold to distributors, retailers, or consumers, or further processed, onsite or after transfer to other facilities. Some slaughtering facilities engage in cutting of carcasses that have been slaughtered elsewhere, which is still considered “first processing” when done at these facilities. Further processing facilities take whole carcasses or carcass parts and process them further; further processing operations include cutting, deboning, grinding, breading, canning, curing, pickling, and smoking. Rendering operations convert meat and poultry byproducts such as viscera, fat, bone, blood, feathers, and dead animals into marketable products. Rendering processes include cooking raw materials to recover oil and grease, grinding remaining materials into a meal, and hide curing. EPA, Technical Development Document for Proposed Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category, (Dec. 2023) (EPA Technical Development Document), at xii, 17, 18, 22, 27, 30.

² 89 Fed. Reg. at 4475.

condensing of cooking vapors, and cleaning of equipment and facilities.³ The wastewater from these operations contains blood, feathers, soft tissue, offal, viscera, bone, urine, feces, soil, brine, fats, oils, greases, and cleaning compounds.⁴

Because of these wastes, MPP wastewater has high concentrations of harmful pollutants, many of which are not currently regulated or treated under existing regulations. Animal slaughtering and processing at MPP facilities introduce high levels of nitrogen (including ammonia) and phosphorus into wastewater. Animal tissues contain both phosphorus and nitrogen, and nitrogen also originates from animal bone, blood, manure, and cleaning compounds used at MPP facilities.⁵ The significant levels of nutrients, organic matter, and fats, oils, and greases present in MPP wastewater result in elevated concentrations of nitrogenous and carbonaceous materials with high biological oxygen demand (BOD).⁶ Meat and poultry processing operations also generate high suspended solid concentrations in wastewater.⁷ MPP wastewater also contains bacteria and other pathogens from blood, excrement, offal of slaughtered animals, carcasses, and equipment.⁸ In addition, due to widespread use of antibiotics in animal agriculture, MPP wastewater can also contain antibiotics and bacteria with antimicrobial resistance genes.⁹ These harmful pollutants can impair States' waters, impact drinking water supplies, and overwhelm or pass through POTWs.

The large number of MPP facilities compounds the problem. EPA has identified 5,055 MPP facilities operating in the United States, 826 of which are meat first processing and 290 of which are poultry first processing facilities.¹⁰ Of the remaining facilities, 3,460 primarily conduct meat further processing and 294 conduct poultry further processing (not including those that also do first processing), and 185 are independent renderers.¹¹ Many of these facilities are located close together in the same county or region, and communities with clusters of MPP facilities often contain overburdened and underserved populations.¹²

2. Harms to the States

Harms to Waterways and Aquatic Life

MPP discharges of nutrients can overload surface waters, leading to negative impacts on

³ EPA Technical Development Document, at xii, 17, 18, 22, 27, 30, 35, 43, 49.

⁴ *Id.* at 22, 37, 41, 43.

⁵ EPA, Environmental Assessment for Revisions to the Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category (Dec. 2023) (EPA Environmental Assessment), at 2-2.

⁶ *Id.* at 2-12; 89 Fed. Reg. at 4506.

⁷ EPA Environmental Assessment, at 2-10.

⁸ *Id.* at 2-12.

⁹ *Id.* at 2-25.

¹⁰ EPA Technical Development Document, at 21, 26.

¹¹ *Id.* at 24, 29, 31.

¹² EPA Environmental Assessment, at 7-4.

aquatic life. Elevated nitrogen and phosphorus levels in aquatic environments cause eutrophication, resulting in algal and bacterial blooms.¹³ Excessive growth of algae and bacteria depletes dissolved oxygen in water, which can cause fish kills and impact fish development and reproduction, as well as release toxic metals and phosphorus previously bound in sediments.¹⁴ In addition, eutrophic conditions can stimulate the growth of harmful cyanobacteria (also known as blue-green algae) which can contaminate shellfish with toxins.¹⁵ The risk of these harms from MPP wastewater is significant, since the MPP industry discharges the highest phosphorus levels and second highest nitrogen levels of all industrial dischargers.¹⁶ Moreover, over 40% of the total nitrogen and phosphorus loads discharged by MPP facilities are discharged to waters impaired for algal growth, ammonia, nutrients, and/or oxygen depletion, further impairing these waters.¹⁷

In fact, many of the nation's waters are already impaired for nutrients: 58% of rivers and streams and 45% of lakes suffer from excess phosphorus levels, and 43% of rivers and streams and 46% of lakes have excess nitrogen levels.¹⁸ EPA reports that, "More than 100,000 miles of rivers and streams, close to 2.5 million acres of lakes, reservoirs and ponds, and more than 800 square miles of bays and estuaries in the United States have poor water quality because of nitrogen and phosphorus pollution."¹⁹ The 2018-2019 National Rivers and Streams Assessment found that over 40% of sampled river and stream miles are rated poor based on total nitrogen and/or phosphorus levels.²⁰ As such, "Nutrient pollution is one of the most widespread, costly, and challenging environmental problems impacting water quality in the United States."²¹ MPP discharges contribute to these problems: EPA found that 36% of catchments downstream of direct MPP dischargers, and 37% of those downstream of indirect MPP dischargers, were impaired due to excess nutrients and/or high oxygen demand.²²

The waters of the undersigned States suffer from nutrient-induced impairment. For example, 758 pollutant-water body combinations²³ and 520 unique water bodies in California are

¹³ *Id.* at 2-5.

¹⁴ *Id.* at 2-5, 2-8 to 2-9; 89 Fed. Reg. at 4506; A.P. Kirol, et al, *Linking Sediment and Water Column Phosphorus Dynamics to Oxygen, Temperature, and Aeration in Shallow Eutrophic Lakes*, Water Res. Rsch., 60, e2023WR034813, at 2 (2024).

¹⁵ 89 Fed. Reg. at 4506.

¹⁶ *Id.* at 4475, 4480.

¹⁷ EPA, Preliminary Effluent Guidelines Program Plan 15 (Sept. 2021) (EPA Preliminary Program Plan 15), at 6-3.

¹⁸ EPA, Appendix A2, Materials Shared with Small Entity Representatives for the Panel Outreach Meeting Held on July 17, 2023, at A2-13.

¹⁹ EPA, Where Nutrient Pollution Occurs, <https://www.epa.gov/nutrientpollution/where-nutrient-pollution-occurs> (last updated on November 30, 2023).

²⁰ EPA Environmental Assessment, at 2-5.

²¹ EPA, Effluent Guidelines Program Plan 14 (Jan. 2021), at 5-2.

²² 89 Fed. Reg. at 4506.

²³ The 303(d) list catalogues each combination of impaired water body and pollutant. Because some water bodies are impaired due to more than one pollutant, the number of pollutant-

currently listed as impaired for nutrients.²⁴ California’s State Water Resources Control Board, which is tasked by the Clean Water Act with issuing water quality criteria to protect beneficial uses of surface waters,²⁵ is currently developing statewide water quality objectives for nutrients to address the significant problem of eutrophication in California’s surface waters.²⁶ In New York, “nearly all New York City and Long Island coastal waterbodies are listed as impaired or impacted with respect to excessive N [nitrogen] inputs.”²⁷

Other MPP pollutants can also negatively impact waterways and aquatic life. For example, pathogens from MPP wastewater can alter the microbial ecology of receiving waters.²⁸ In addition, antibiotics can harm native flora and fauna in surface receiving waters, and bacteria with antimicrobial resistance (AMR) genes can persist in the environment.²⁹ High BOD concentrations discharged to waterways use up available oxygen, causing low dissolved oxygen which is detrimental to aquatic environments as described above.³⁰ Oil and grease discharged to waterways can inhibit oxygen mixing with water, adding to problems with low dissolved oxygen.³¹ Elevated levels of suspended solids can stress aquatic organisms, clog fish gills, and smother spawning sites.³² Lastly, increased turbidity resulting from high suspended solids can block light infiltration in surface waters, limiting photosynthesis and negatively impacting the food chain.³³

Harms to Drinking Water

Significantly, some MPP facilities and POTWs that receive MPP wastewater discharge to waters upstream of drinking water sources. EPA found that almost 8 million people are served by a public water system with source water downstream of an MPP wastewater outfall.³⁴ High levels of nitrogen in these surface waters can cause elevated nitrate levels in drinking water, which in turn can lead to infant methemoglobinemia (blue baby syndrome), colorectal cancer, thyroid disease, and neural tube defects.³⁵ The States are particularly concerned with nitrate in drinking water arising from MPP nitrogen, as public water systems sourcing water downstream

waterbody combinations can be greater than the number of unique water bodies that are deemed impaired.

²⁴ 2022 Clean Water Act 303(d) List of Impaired Waters in California.

²⁵ 33 U.S.C. § 1313(c).

²⁶ California State Water Resources Control Board, 2024 Strategic Work Plan, at 8; Cal. Water Code § 13050(h).

²⁷ Watson et al., Indicators of nutrient pollution in Long Island, New York, estuarine environments, *Marine Environmental Research* 134 (2018), 109-120 at 109.

²⁸ EPA Environmental Assessment, at 2-12.

²⁹ *Id.* at 2-25 to 2-26.

³⁰ *Id.* at 2-12; 89 Fed. Reg. at 4506.

³¹ EPA Environmental Assessment, at 4-1.

³² *Id.* at 2-11 to 2-12; 89 Fed. Reg. at 4506.

³³ EPA Environmental Assessment, at 2-6 to 2-7.

³⁴ *Id.* at 7-11.

³⁵ 89 Fed. Reg. at 4506.

from MPP dischargers have violated the drinking water standards for nitrate.³⁶ Nitrate in drinking water is a persistent concern in California, disproportionately burdening marginalized communities, and this holds true for the nation as a whole.³⁷ Algal blooms caused by high levels of nutrients can also release toxins into surface waters that serve as drinking water supplies.³⁸ Eutrophication of drinking water supplies and the resulting dense algae can also lead to the formation of carcinogenic disinfection byproducts during drinking water treatment via reaction of the excess organic matter with disinfection oxidants.³⁹ In addition, suspended solids can impact the safety of drinking water by harboring bacteria and other pathogenic organisms and increasing water turbidity, making drinking water treatment to remove these organisms more difficult.⁴⁰ Finally, excessive algae growth can impair the taste and odor of drinking water.⁴¹

Additional Harms to Human Health

Pathogenic discharges from MPP facilities pose additional threats to human health. Pathogens from MPP wastewater can lead to human infection through drinking and recreating in contaminated waters and ingestion of crops.⁴² In particular, MPP wastewater contains high levels of *E. coli* and other fecal coliforms,⁴³ which when discharged directly to waters can be ingested by individuals recreating or fishing in these waters and lead to serious health effects.⁴⁴ Humans can also be exposed to AMR strains of bacteria by consuming contaminated water, which can lead to drug-resistant bacterial infection.⁴⁵

Harms to POTWs

As noted above, some MPP facilities discharge to POTWs rather than directly to waterways. MPP pollutants discharged to POTWs can interfere with POTW operations and ultimately negatively impact waters receiving POTW discharges. For example, because BOD discharged to waters can deplete dissolved oxygen, POTWs have strict BOD effluent limits.⁴⁶ Consequently, high levels of BOD entering a POTW from MPP facilities can lead to violations

³⁶ EPA Environmental Assessment, at 2-10.

³⁷ Arianna Q. Tariqi & Colleen C. Naughton, *Water, Health, and Environmental Justice in California: Geospatial Analysis of Nitrate Contamination and Thyroid Cancer* (2021), 38 *Env't Eng'g Sci.* 377, 384 (2021); Bridget R. Scanlon et al, *Drinking water quality and social vulnerability linkages at the system level in the United States* (2023), 18 *Env't Rsch. Letters* 094039, at 5 (finding 49% of population impacted by drinking water nitrate violations are within the high social vulnerability index tercile).

³⁸ *Id.*

³⁹ EPA Environmental Assessment, at 2-9.

⁴⁰ *Id.* at 2-12; 89 *Fed. Reg.* at 4506.

⁴¹ EPA Environmental Assessment, at 2-10.

⁴² *Id.* at 2-12.

⁴³ EPA Technical Development Document, at 38.

⁴⁴ EPA Environmental Assessment, at 5-2.

⁴⁵ *Id.*, at 2-26.

⁴⁶ 40 C.F.R. § 133.102(a).

of the POTW's NPDES permit, as can high concentrations of other MPP pollutants.⁴⁷ Discharges of MPP pollutants can cause operational difficulties at POTWs, such as premature fouling of filters.⁴⁸ Oil and grease in MPP wastewater can also cause operational difficulties for POTWs such as sanitary sewer overflows.⁴⁹ Lastly, antibiotics present in wastewater can also inhibit beneficial microbes used in wastewater treatment to breakdown waste, reducing the efficiency of treatment.⁵⁰

Harms to Environmental Justice Communities

Environmental Justice communities are deeply, and disproportionately, impacted by MPP dischargers. EPA's Environmental Assessment outlines the staggering effect on these communities from direct and indirect MPP dischargers:

The construction of new facilities in regions with preexisting industrial facilities compounds the environmental burden on the local environment and communities. Communities surrounded by clusters of MPP facilities are often overburdened and underserved and particularly vulnerable to CWA violations. . . . In 2021, EPA found that '74% of [MPP] facilities that directly discharge to surface waters are within one mile of census block groups with demographic or environmental characteristics of concern.' . . . The Environmental Integrity Project found that half of the communities surrounding some of the largest slaughterhouses in the U.S. contain at least 30 percent of residents living below the poverty line, which is over twice the national level. A third of the facilities are located in towns with over 30 percent people of color. . . .⁵¹

In particular, EPA found that communities within one mile of a surface water downstream of a directly discharging MPP wastewater outfall, subject to harmful pollutants as described above, have greater proportions of low income individuals and those identifying as Black, Asian, and/or Hispanic compared to the national average.⁵² Further, indirect discharges can also negatively impact environmental justice communities. EPA found that people living within one mile of an MPP facility—the vast majority of which lived in the vicinity of an indirect discharger⁵³—experienced a higher potential for exposures to environmental stressors than the average community.⁵⁴ The approximately 27 million people living within one mile of an MPP facility (mostly indirect dischargers)⁵⁵ are more likely to be Black, Hispanic, or Asian and

⁴⁷ EPA Environmental Assessment, at 2-10; 89 Fed. Reg. at 4506; EPA Technical Development Document, at 3.

⁴⁸ EPA Technical Development Document, at 3.

⁴⁹ *Id.* at 3.

⁵⁰ EPA Environmental Assessment, at 2-26.

⁵¹ *Id.* at 7-10.

⁵² *Id.* at 7-8.

⁵³ *Id.* at 7-7.

⁵⁴ 89 Fed. Reg. at 4521.

⁵⁵ EPA Environmental Assessment, at 7-7.

these areas have greater proportions of low-income individuals (approximately 38%).⁵⁶ As such, these communities disproportionately experience the harms set forth above.

Environmental justice populations in the undersigned States experience disproportionate harm from MPP facilities. Many of the MPP plants in California are located in environmental justice communities. For example, Foster Farms' poultry processing plants are located in Livingston, Turlock, and Fresno, California, which include communities with some of the highest scores for environmental pollution burdens in the state.⁵⁷ As another example, the community of Vernon, California, which is one of the most polluted communities of color in the state and ranks above the 90th percentile for several EPA Environmental Justice Screening and Mapping Tool indices, has 27 indirect MPP dischargers clustered in one small area adjacent to residents and other sensitive receptors.⁵⁸

B. Summary of EPA's Clean Water Act Obligations

Congress passed the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters."⁵⁹ The Clean Water Act protects all waters of the United States, including rivers, streams, and other surface waters that supply drinking water, support fish and wildlife, and provide aesthetic value and recreational opportunities. It sets a national goal of eliminating water pollution.⁶⁰ To achieve this goal, the Clean Water Act requires EPA to promulgate national, industry-specific pollution control standards at different levels of stringency for conventional, toxic, and non-conventional pollutants and to revise these standards as appropriate to keep pace with advances in technology.⁶¹

For facilities that discharge directly into surface waters, EPA must promulgate control standards in the form of effluent limitation guidelines, which then form the basis of the effluent limitations included in individual wastewater discharge permits.⁶² The Clean Water Act requires EPA to review and, if appropriate, revise these effluent limitations at least every five years.⁶³ In addition, to ensure that direct discharger regulations keep pace with advances in control

⁵⁶ *Id.*

⁵⁷ See CalEnviroScreen 4.0,

<https://experience.arcgis.com/experience/11d2f52282a54ceebcac7428e6184203/>.

⁵⁸ Comments of the Environmental Integrity Project, et al, on Meat and Poultry Products Industry Data Collection (Mar. 2022), at 11.

⁵⁹ 33 U.S.C. § 1251(a).

⁶⁰ *Id.*

⁶¹ *Id.* §§ 1314(b), 1317(b). For toxic and non-conventional pollutants, standards must be based on either the best practicable control technology available (BPT) or the best available technology economically achievable (BAT) *Id.* §§ 1311(b)(1), (2), 1314(b)(1), (2). Conventional pollutant standards are based on BPT or the best conventional pollutant control technology (BCT). *Id.* §§ 1311(b)(1), (2), 1314(b)(1), (4).

⁶² *Id.* § 1314(b).

⁶³ *Id.* § 1311(d).

technology, EPA must revise them at least annually, if appropriate.⁶⁴ With respect to indirect dischargers, “recogniz[ing] that regulating only those sources that discharge effluents directly into the Nation’s waters would not be sufficient to achieve the [Clean Water Act]’s goals,”⁶⁵ Congress directed EPA to establish pretreatment standards in the form of technology-based regulations that govern the introduction of pollutants into POTWs.⁶⁶ The Clean Water Act mandates that EPA revise pretreatment standards as control technology evolves.⁶⁷

In mandating that EPA establish pretreatment standards, “Congress recognized that the pollutants which some indirect dischargers release into POTWs could interfere with the operation of the POTWs, or could pass through the POTWs without adequate treatment.”⁶⁸ As such, “for those pollutants which are determined not to be susceptible for treatment by such treatment works or which would interfere with the operation of such treatment works,” the EPA “shall...establish[] [pretreatment standards] to prevent the discharge of any pollutant through treatment works [] which are publicly owned, which pollutant interferes with, passes through or otherwise is incompatible with such works.”⁶⁹

C. Previous Regulation of MPP Facilities under the Clean Water Act

EPA first promulgated ELGs for the MPP point source category in 1974, and they applied to only direct discharges from large meat slaughterhouses and packinghouses and regulated only conventional pollutants.⁷⁰ Thirty years later, the EPA revised the ELGs to apply them to poultry facilities and to add ammonia nitrogen effluent limits.⁷¹ EPA initially proposed to also add effluent limitations for phosphorus,⁷² but these limits were removed in the final rule.⁷³ EPA declined to establish pretreatment standards for indirect dischargers in the 2004 ELG revisions,⁷⁴ and as a result, they apply to only 150 of the estimated 5,055 MPP facilities in the United States.⁷⁵ After 2004, EPA did not take any action to update the 2004 ELGs until 2019 when it announced only that it “intend[ed] to continue the review or study” of the MPP

⁶⁴ *Id.* § 1314(b).

⁶⁵ Effluent Limitations Guidelines and New Source Performance Standards for the Meat and Poultry Products Point Source Category, 69 Fed. Reg. 54,476 (Sept. 8, 2004), at 54,479.

⁶⁶ 33 U.S.C. § 1317(b).

⁶⁷ *Id.* § 1317(b)(2).

⁶⁸ *Nat’l Ass’n of Metal Finishers v. EPA*, 719 F.2d 624, 633 (3d Cir. 1983), *rev’d on other grounds sub nom, Chem. Mfrs. Ass’n. v. N.R.D.C., Inc.*, 470 U.S. 116 (1985).

⁶⁹ 33 U.S.C. § 1317(b)(1).

⁷⁰ 69 Fed. Reg. at 54,480, 54,492. Regulations for meat further processing and rendering facilities were added in 1975. *Id.* at 54,480.

⁷¹ *Id.* at 54,476.

⁷² Effluent Limitations Guidelines and New Source Performance Standards for the Meat and Poultry Products Point Source Category, 67 Fed. Reg. 8582 (Feb. 25, 2002), at 8630.

⁷³ 69 Fed. Reg. at 54,482.

⁷⁴ *Id.* at 54,488.

⁷⁵ 89 Fed. Reg. at 4480.

category.⁷⁶ EPA's inaction led to lawsuits brought by environmental groups, resulting in EPA's issuance of a pre-publication notice of the proposed MPP Rule on December 13, 2023, which must be finalized by August 31, 2025.⁷⁷

D. Overview of the Proposed MPP Rule

In the proposed Rule, EPA presents three options for revising the MPP ELGs. All three options would add phosphorus effluent limitations and reduce nitrogen effluent limitations for direct dischargers.⁷⁸ Options 1 and 2 would apply the new phosphorus and more stringent nitrogen limits for direct dischargers to MPP facilities based on the same production thresholds as the 2004 ELGs, which vary from 7 million pounds per year (for poultry further processors) to 100 million pounds per year (for poultry processors).⁷⁹ Option 3 would apply these limits to direct dischargers based on lower⁸⁰ production thresholds, with a phosphorus production threshold of 10 million pounds per year, and for full nitrogen treatment, 20 million pounds per year for all applicable subcategories.⁸¹ All options include stricter fecal coliform limits for direct dischargers, based on the same disinfection technologies currently prescribed.⁸² Limits for conventional pollutants BOD, total suspended solids, pH, and oil and grease would remain unchanged from the 2004 ELGs under all options.⁸³ EPA did not propose any revised ELGs for the small processor category (up to 2.19 million pounds per year of any type or combination of finished product), so these facilities would not be subject to nutrient limitations under any of the options, but they would still have conventional pollutant limits.⁸⁴

Significantly, the proposed MPP Rule would for the first time regulate indirect dischargers, which comprise the vast majority of MPP dischargers.⁸⁵ Option 1 would add

⁷⁶ EPA, Preliminary Effluent Guidelines Program Plan 14 (Oct. 2019), at 6-1.

⁷⁷ *Cape Fear River Watch et al., v. U.S. EPA et al.*, Case No. 19-2450 (Dec. 18, 2019); *Cape Fear River Watch et al. v. U.S. EPA et al.*, Case No. 1:22-cv-03809-BAH (Dist. D.C. Dec. 23, 2022); Proposed Consent Decree, Clean Water Act and Administrative Procedure Act Claims, 88 Fed. Reg. 12,930 (Mar. 1, 2023), at 12,931.

⁷⁸ 89 Fed. Reg. at 4476.

⁷⁹ *Id.* at 4476.

⁸⁰ The States note that the phosphorus and full nitrogen treatment production thresholds for direct dischargers under Option 3—10 million pounds/year (phosphorus) and 20 pounds/year (full nitrogen treatment) for *all* subcategories result in a *less* stringent standard for direct dischargers for the poultry further processing subcategory, which under Options 1 and 2 would apply based on a production threshold of 7 million pounds/year for phosphorus and 10 million pounds/year for full nitrogen treatment. EPA, Technical Development Document, at 81. We encourage EPA to adopt the lower production thresholds for this subcategory under Options 1 and 2 if it adopts Option 3.

⁸¹ 89 Fed. Reg. at 4476.

⁸² *Id.* at 4488.

⁸³ *Id.*

⁸⁴ *Id.*; 40 C.F.R., §§ 432.52 - 432.57.

⁸⁵ 89 Fed. Reg. at 4475.

pretreatment standards for only the conventional pollutants BOD, suspended solids, and oil and grease, based on the existing production thresholds for direct dischargers.⁸⁶ Options 2 and 3 would include pretreatment standards for these conventional pollutants and also add pretreatment standards for nitrogen and phosphorus.⁸⁷ Option 2 would use the same production thresholds as Option 1 for conventional pollutants, and much higher production thresholds to trigger application of nitrogen and phosphorus pretreatment standards, ranging from 200 to 350 million pounds per year; Option 2 would also exempt the meat further processing and poultry further processing subcategories from nitrogen and phosphorus pretreatment standards.⁸⁸ Option 3 would have significantly lower production thresholds for which facilities are subject to the pretreatment standards – 5 million pounds per year for conventional pollutants and 30 million pounds per year for nitrogen and phosphorus – and would not exempt any subcategories.⁸⁹ EPA has identified Option 1 as its “preferred” option,⁹⁰ as reflected in the proposed revised regulations set forth in the Federal Register notice.⁹¹

II. COMMENTS ON THE PROPOSED RULE

A. We Acknowledge the Benefits from EPA’s Proposed Rule

As noted above, EPA has not updated the MPP point source category ELGs in 20 years, despite its mandates to regularly review and revise ELGs as required by the Clean Water Act.⁹² EPA’s proposal provides important benefits by imposing stricter discharge limits on direct dischargers and establishing conventional pollutant pretreatment standards for indirect dischargers.

1. Stronger Regulation of Direct Dischargers Is Necessary

The Attorneys General strongly support the proposed standards for pollutants discharged by direct dischargers, which greatly improve the existing 2004 ELGs for the MPP industry. Adding phosphorus effluent limits for direct dischargers is an important step that will reduce some of the wastewater phosphorus load from MPP facilities – the largest contributor of phosphorus to wastewater.⁹³ We also support reducing the total nitrogen effluent limits for direct dischargers. This action is warranted given that the MPP industry discharges the second highest nitrogen levels of any industry.⁹⁴ Since approximately 120 of the 150 direct dischargers that are

⁸⁶ *Id.* at 4476-77.

⁸⁷ *Id.* at 4477.

⁸⁸ *Id.*; EPA Technical Development Document, at 82-83.

⁸⁹ 89 Fed. Reg. at 4477.

⁹⁰ *Id.* at 4476.

⁹¹ *Id.* at 4523-4537.

⁹² *Id.* at 4486.

⁹³ *Id.* at 4480; EPA Technical Development Document, at 2; EPA Preliminary Program Plan 15, at 6-2.

⁹⁴ 89 Fed. Reg. at 4480; EPA Technical Development Document, at 2; EPA Preliminary Program Plan 15, at 6-2.

regulated by the 2004 ELGs discharge to impaired waters, many of which are impaired for nutrients,⁹⁵ imposing new phosphorus and more stringent nitrogen limits on direct dischargers will certainly improve water quality in those receiving waters. We also support EPA's proposal to further restrict discharges of fecal coliforms for direct dischargers due to the risk these organisms pose to human health. Further, as discussed above, individuals who utilize waters receiving MPP discharges are more likely to belong to one or more disadvantaged groups.

2. New Conventional Pollutant Pretreatment Standards for Indirect Dischargers Are Warranted

We also strongly support the establishment of conventional pollutant pretreatment standards for indirect dischargers. Since MPP indirect dischargers, which comprise a majority of all MPP facilities – 3,708 of 5,055 facilities – are currently subject to no pretreatment standards, implementing conventional pollutant pretreatment standards would reduce some of the pollution generated by this industry. Conventional pollutants from MPP facilities are known to cause problems for POTWs.⁹⁶ EPA found that 73% of POTWs receiving MPP wastewater violated their NPDES permit limitations for a number of MPP conventional pollutants, including BOD, suspended solids, oil and grease, and fecal coliforms.⁹⁷

Further, high levels of BOD and suspended solids from MPP wastewater also cause interference with treatment processes and operational difficulties at POTWs, in some cases leading to fish kills.⁹⁸ In addition, oil and grease discharged from MPP facilities can lead to sanitary sewer overflows from POTWs.⁹⁹ EPA has also determined that conventional pollutants BOD, suspended solids, and oil and grease pass through POTWs.¹⁰⁰ It is well established that pretreatment of MPP wastewater for conventional pollutants can help mitigate these problems.¹⁰¹ Therefore, pretreatment standards for conventional pollutants are certainly warranted, and as set forth below, required by the Clean Water Act, for the MPP industry. As discussed below, the States believe that pretreatment standards for conventional pollutants must be applied to a broader number of indirect dischargers than provided for under Option 1.

However, we oppose EPA's suggestion that POTWs not currently experiencing pass-through and interference could waive conventional pollutant pretreatment standards.¹⁰² Like EPA, the States are "unclear on how this would work in practice."¹⁰³ For example, it would not

⁹⁵ 89 Fed. Reg. at 4480; EPA Preliminary Program Plan 15, at 6-3.

⁹⁶ EPA Technical Development Document, at 3.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ EPA Passthrough Analysis, at 3; 33 U.S.C. § 1317(b)(1).

¹⁰¹ *U.S. EPA v. Green Forest*, 921 F.2d 1394, 1400 (8th Cir. 1990) (quality of POTW effluent "improved dramatically" after Tyson chicken processing facility pretreatment plant went on-line).

¹⁰² 89 Fed. Reg. at 4487.

¹⁰³ *Id.*

seem practical for a POTW to revise indirect discharger permits whenever its pass-through and interference status changes. Moreover, we are concerned with the idea of allowing POTWs to wait until an emergency exists to attempt to limit these pollutants rather than preventing the emergency in the first place. Further, “[pretreatment] standards are based upon [a] POTW’s efficiency of removing certain pollutants, and are therefore an integral part of the overall regulatory scheme designed to reduce water pollution...Therefore, [a] POTW’s compliance with its permit limitations neither absolves an indirect source’s violation of categorical pretreatment standards, nor prevents the introduction of such pollutants into the Nation’s waterways.”¹⁰⁴ For these reasons, we urge EPA to reject this potential exemption.

B. EPA Should Adopt Option 3 as its Preferred Choice

The improvements that would result from the adoption of EPA’s preferred Option 1 do not go nearly far enough to address the pollution and resulting harms from the MPP industry and its wastewater. While Option 2 would be better than Option 1, we believe this Option also does not suffice. The Attorneys General accordingly urge adoption of Option 3, at a minimum.

1. Option 3 Is More Protective of the Environment

The Attorney Generals urge EPA to adopt, at a minimum, Option 3, which is far more protective of human health and the environment than EPA’s other options. Compared to Option 2, Option 3 would impose nutrient pretreatment standards on a much larger proportion of indirect dischargers. Option 3 would use a much lower production threshold than Option 2 to trigger application of nutrient pretreatment standards (30 million pounds per year for all subcategories),¹⁰⁵ and would not exempt the meat further and poultry further processing subcategories.¹⁰⁶ As a result, under Option 3, approximately 777 indirect dischargers would be subject to nitrogen and phosphorus pretreatment standards.¹⁰⁷ While this is only about 21% of indirect dischargers, application of pretreatment standards to 777 facilities would help result in removal a high proportion of MPP nitrogen and phosphorus under Option 3.

We also prefer Option 3 because it would apply the proposed conventional pollutant pretreatment standards to indirect dischargers at a lower production threshold (5 million pounds per year) than Options 1 and 2 (ranging from 7 to 100 million pounds per year, depending on subcategory).¹⁰⁸ Consequently, under Option 3, conventional pollutant pretreatment standards would apply to 1,485 indirect dischargers as compared to only 719 facilities under Options 1 and 2.¹⁰⁹ In addition, under Option 3, more direct dischargers would be regulated under the new nutrients effluent limits than under Options 1 and 2. Option 3’s nutrient limits would apply at

¹⁰⁴ *Atl. States Legal Found. v. Colonial Tanning Corp.*, 827 F.Supp. 903, 908-909 (N.D.N.Y. 1993).

¹⁰⁵ 89 Fed. Reg. at 4477.

¹⁰⁶ EPA Technical Development Document, at 82-83.

¹⁰⁷ 89 Fed. Reg. at 4493.

¹⁰⁸ EPA Technical Development Document, at 82-83.

¹⁰⁹ *Id.* at 80-84.

lower thresholds than under Option 1 or Option 2, as described in section I.D, resulting in an additional 8 direct dischargers being regulated under the new limits.¹¹⁰ Overall, under Option 3, a total of 1,618 MPP dischargers (42% of those discharging to waterways or POTWs) would be regulated under the ELGs.¹¹¹

The Attorneys General find the differences in pollutant reduction between Options 1, 2, and 3 to be compelling. According to EPA's estimation, its preferred Option 1 would reduce only 10% of nitrogen, 37% of phosphorus, and 31% of conventional pollutants currently discharged by all MPP facilities.¹¹² Option 3 would provide much greater pollutant removal: 83% of nitrogen, 94% of phosphorus, and 87% of conventional pollutants currently discharged by MPP facilities would be removed.¹¹³ Option 2 would provide for removal of 49% of nitrogen, 78% of phosphorus, and 64% of conventional pollutants.¹¹⁴ Based on these stark differences, we urge EPA to adopt Option 3, at a minimum. It is clear that of the three options presented by EPA, Option 3 would provide the most protection for the environment and communities.¹¹⁵

We believe that Option 3 is clearly supported by the record in this rulemaking. As discussed above, Option 3 would provide far superior pollutant removal. Further, as set forth below, Option 3 meets the Clean Water Act's cost-effectiveness tests, is the only option that would approach consistency with the Clean Water Act's directives to prevent pass-through and interference, and would provide the most protection for environmental justice communities.

Below we explain why the other two options are inadequate.

2. Option 1 Provides Insufficient Environmental Protection

While we acknowledge that Option 1's implementation of new phosphorus limits and reduced nitrogen limits for direct dischargers would result in some improvement to our nation's waters, these new requirements would apply to only 125 direct dischargers of the estimated 5,055 MPP dischargers.¹¹⁶ Option 1 does not include pretreatment standards for phosphorus or nitrogen, leaving the 3,708 indirect dischargers unregulated for nutrients. Many of the States, whose MPP dischargers are mainly if not wholly indirect dischargers, would see limited or no removal of nitrogen and phosphorus from their waters. For example, California has approximately 415 indirect dischargers and zero direct dischargers; EPA determined that California waters would experience "[n]o load reduction" of nitrogen or phosphorus under

¹¹⁰ *Id.* at 80-81, 84.

¹¹¹ 89 Fed. Reg. at 4486, 4496.

¹¹² *Id.* at 4504.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 4476.

¹¹⁶ EPA Technical Development Document, at 84.

Option 1.¹¹⁷ Wisconsin has approximately 204 indirect dischargers and only 14 direct dischargers.¹¹⁸

In addition, most POTWs receiving discharge of MPP wastewater do not have effluent limits for nitrogen or phosphorus for their own discharges, so these pollutants are regularly not removed from wastewater.¹¹⁹ EPA found that only 45% of surveyed POTWs receiving MPP wastewater had nitrogen effluent limits and only 15% had phosphorus effluent limits.¹²⁰ Without such limits, POTWs likely are not removing much of the MPP nutrient load because they lack tertiary treatment designed to remove these nutrients.¹²¹ And EPA has determined that both nitrogen and phosphorus can pass through even well-performing POTWs.¹²² Therefore, under Option 1, POTWs receiving MPP discharges would continue to discharge excess phosphorus and nitrogen to their receiving waters, continuing the harms discussed above. As EPA acknowledged in formulating the MPP Rule, “because not all POTWs fully pass on these treatment costs to MPP plants, more pollution may occur than if pollution costs were fully borne by MPP plants.”¹²³

Moreover, because the production thresholds under Option 1 are so high, only 719 – less than 1 out of 5 – indirect dischargers would be subject to conventional pollutant pretreatment standards.¹²⁴ Overall, 79% of all direct and indirect dischargers fell below the production thresholds in Option 1, and therefore would have no new limitations under the proposed Rule.¹²⁵ Because of these deficiencies that would harm our states, EPA should not adopt Option 1.

3. Option 2 Also Fails to Provide Sufficient Protection of the Environment

Option 2 is also insufficiently protective. Option 2 would add nitrogen and phosphorus pretreatment standards for indirect dischargers, and is therefore more protective than Option 1. However, because Option 2 proposes extremely high production thresholds (200 to 350 million pounds per year) and excludes meat further processing and poultry processing facilities, Option 2 would apply to a very small number facilities – only 143 of 3,708 indirect dischargers, less

¹¹⁷ EPA, Benefit Cost Analysis for Revisions to the Effluent Limitations Guidelines and Standards for the Meat and Poultry Products Point Source Category (Dec. 2023) (EPA Benefit Cost Analysis), at E-7.

¹¹⁸ Information from Wisconsin Department of Natural Resources staff implementing the state-delegated NPDES permit program in Wisconsin.

¹¹⁹ 89 Fed. Reg. at 4480.

¹²⁰ EPA Preliminary Program Plan 15, at 6-2.

¹²¹ *Id.* at 6-2; 89 Fed. Reg. at 4480.

¹²² EPA, Meat and Poultry Products POTW Passthrough Analysis (Nov. 2023) (EPA Passthrough Analysis), at 3.

¹²³ EPA, Regulatory Impact Analysis for Revisions to the Effluent Limitations Guidelines and Standards for the Meat and poultry Products Point Source Category (Dec, 2023) (EPA Regulatory Impact Analysis), at 1-1.

¹²⁴ EPA Technical Development Document, at 84.

¹²⁵ 89 Fed. Reg. at 4486.

than 4% of facilities.¹²⁶ EPA provided no justification for excluding from nutrient pretreatment standards the meat further processing and poultry further processing categories, which comprise the vast majority of MPP dischargers. As noted above, 3,460 of 5,055 MPP dischargers are primarily meat further processing facilities and 294 are poultry further processing.¹²⁷ Since 74% of meat further processing facilities¹²⁸ and 81% of poultry further processing facilities¹²⁹ are indirect dischargers, Option 2 would leave most further processing facilities unregulated for nutrients. Further processing facilities generate more wastewater per pound of product than first processing facilities.¹³⁰ Therefore, these subcategories of indirect dischargers should not be exempted from nutrient pretreatment standards. In addition, because Option 2 would use the same production thresholds for conventional pollutants as Option 1, it would regulate an inadequate number of indirect dischargers for these pollutants, only 719 of 3,708.¹³¹ Because Option 2 would leave so many facilities unregulated, EPA should not adopt Option 2.

C. EPA's Rejection of Option 3 is Not Adequately Justified

1. Overview of Legal Standards for Considering Costs

The Clean Water Act requires EPA to take into account certain cost-related factors when establishing ELGs, and also allows EPA to take into account other factors not enumerated in the statute as deemed appropriate by the EPA administrator to determine ELGs.¹³² With respect to the cost-effectiveness of BAT standards, ELGs should represent the greatest pollutant reductions that are economically achievable for an industry, which means that the costs can be reasonably borne.¹³³ Pretreatment standards for non-conventional pollutants are equivalent to BAT standards, and therefore must be "economically achievable."¹³⁴ For BPT and BCT limitations, costs cannot be "wholly disproportionate" to the benefits.¹³⁵ Here, EPA determined that all options are economically achievable and that for each, the costs are not wholly disproportionate to the benefits.¹³⁶ However, EPA selected Option 1 due to its stated reliance on Biden-Harris Executive Order 14036.

¹²⁶ EPA Technical Development Document, at 84.

¹²⁷ *Id.* at 42, 29. These numbers do not include facilities that engage in both first and further processing. *Id.*

¹²⁸ *Id.* at 37.

¹²⁹ *Id.* at 41.

¹³⁰ *Id.* at 36, 40.

¹³¹ *Id.* at 84.

¹³² 33 U.S.C. § 1314(b).

¹³³ *Id.* § 1311(b)(2)(A); *Chem. Mfrs. Assn. v. U.S. EPA*, 870 F.2d 177, 262 (5th Cir. 1989).

¹³⁴ *Chem. Mfrs. Assn.*, 870 F.2d at 249.

¹³⁵ *Id.* at 205 (5th Cir. 1989).

¹³⁶ 89 Fed. Reg. at 4490-92.

2. EPA's Heavy Focus on Executive Order 14036 in Rejecting Option 3 Is Not Warranted

In rejecting Option 3, EPA focused primarily on its interpretation of how the MPP Rule would affect the goals of President Biden's Executive Order 14036,¹³⁷ which was directed at promoting competition across various industries.¹³⁸ While Executive Order 14036 only briefly referenced the MPP industry in the context of product labeling and recurring deceptive or discretionary practices, the Biden Administration referenced it in announcing initiatives aimed at expanding independent MPP capacity to protect against supply chain disruptions such as those that arose at the beginning of the COVID-19 pandemic.¹³⁹ It therefore appears EPA is actually relying on this announcement regarding MPP capacity rather than Executive Order 14036 itself to justify choosing Option 1.

EPA cited as its primary basis for rejecting Options 2 and 3 the prospect of potential facility closures which it viewed as impeding Executive Order 14036.¹⁴⁰ However, EPA's analysis shows that there would be little change in closure risk across the options, with only 53 potential closures under Option 3, 22 under Option 2, and 16 under Option 1, out of 5,055 MPP facilities.¹⁴¹ Further, despite these potential facility closures, EPA's analysis shows that in the long term, there would actually be a net gain in jobs under each option.¹⁴² Thus, EPA's decision to rely almost exclusively on its perceived impediment to Executive Order 14036 to choose Option 1 is unjustified, especially considering the significant difference in environmental benefits provided by Option 3 versus Option 1, as compared to the minimal difference in potential facility closures between those options.

3. EPA Determined that all Options in the MPP Rule, Including Option 3, Are Cost-Effective Under the Clean Water Act

EPA found that it was economically achievable for MPP facilities to implement all options under the proposed Rule, including Option 3, despite the potential closures noted above. While the Attorneys General are not advocating for or supporting any closure of facilities, we point out that EPA – and courts – have found much higher rates of potential facility closures than those estimated in the MPP Rule to be economically achievable. For example, the closure of 14% of indirect discharger plants in the organic chemicals, plastics, and synthetic fibers

¹³⁷ *Id.* at 4492.

¹³⁸ Executive Order 14036 of July 9, 2021, Promoting Competition in the American Economy, 86 Fed. Reg. 36,987. (July 14, 2021).

¹³⁹ FACT SHEET: The Biden-Harris Action Plan for a Fairer, More Competitive, and More Resilient Meat and Poultry Supply Chain, <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/> (Jan. 3, 2022).

¹⁴⁰ 89 Fed. Reg. at 4492.

¹⁴¹ *Id.*

¹⁴² *Id.* at 4502.

category,¹⁴³ the closure of 14% of integrated steel plants in the iron and steel industry,¹⁴⁴ and the closure of 16% of direct discharging seafood processing plants, were all found to be economically achievable under the Clean Water Act.¹⁴⁵ In contrast, under Option 3 in this proposed Rule, the estimated 53 closures out of 5,055 MPP facilities is only 1% of all MPP facilities. EPA also determined that the facility level after-tax compliance cost to revenue ratio would be less than 1% for over 97% of facilities under Option 3, and therefore “are unlikely to face economic impacts.”¹⁴⁶

Thus, in line with EPA’s previous determinations and the corresponding case law, EPA determined here that both the projected facility closures and cost to revenue ratio under Option 3 (and Option 2) for nutrient pretreatment standards were “within the range of impacts that EPA has historically considered to be economically achievable.”¹⁴⁷ EPA also found that the costs for conventional pollutant pretreatment standards were not “wholly disproportionate” to the benefits.¹⁴⁸ Finally, we note that Congress “clearly expressed [a] concern that pollution control devices be installed even at the expense of some economic dislocation,” to achieve the goals of the Clean Water Act.¹⁴⁹ Because it meets the Clean Water Act’s cost-effectiveness tests EPA should adopt the more protective Option 3.

4. EPA’s Analysis Does Not Provide for Direct Comparison of Benefits to Costs

The Attorneys General caution that EPA’s analysis of monetized costs and benefits that would result from adopting Option 3 versus the other two Options does not provide a meaningful comparison since important benefits were not monetized. EPA determined compliance costs to be \$232 million under Option 1, \$642 million under Option 2, and \$1 billion under Option 3.¹⁵⁰ To determine benefits flowing from the MPP Rule, EPA conducted a detailed benefit analysis but quantified only a small subset of the benefits it considered, which included: (1) reduced human health effects from exposure via recreational use; (2) reduced human health effects from exposure via drinking water; (3) improved aquatic and wildlife habitat; (4) protection of threatened and endangered species; (5) reduced drinking water treatment costs; and (6) reduced wastewater treatment costs for POTWs.¹⁵¹

However, notably excluded from monetization were the value of reduced human health effects from exposure via drinking water and recreational use (benefits number 1 and 2) and that of reduced POTW treatment costs (benefit number 6),¹⁵² which are all vitally important benefits

¹⁴³ *Chem. Mfrs. Assn.*, 870 F.2d at 250.

¹⁴⁴ *Am. Iron & Steel Inst. v. EPA*, 526 F.2d 1027, 1054 (3d Cir. 1975).

¹⁴⁵ *Ass’n of Pac. Fisheries v. EPA*, 615 F.2d 794, 808 (9th Cir. 1980).

¹⁴⁶ 89 Fed. Reg. at 4498-99.

¹⁴⁷ *Id.* at 4492.

¹⁴⁸ *Id.*

¹⁴⁹ *Am. Iron & Steel Inst.*, 526 F.2d at 1055.

¹⁵⁰ 89 Fed. Reg. at 4490.

¹⁵¹ EPA Benefit Cost Analysis, at ES-4.

¹⁵² *Id.*

that would flow from implementation of the MPP Rule, particularly under Option 3. Thus, EPA’s monetized benefit estimates of \$90 million, \$146 million, and \$178 million under Options 1, 2, and 3, respectively,¹⁵³ do not include half of the benefits that would flow from the MPP Rule, which are arguable some of the most important. In apparent recognition of this, EPA determined that costs were not wholly disproportionate to the benefits under all Options, including Option 3, as discussed above.¹⁵⁴

5. The Burden of Pollutant Treatment Should Fall on Polluters with the Appropriate Support

MPP facilities should pay the cost of treating pollutants in their wastewater since they generate these pollutants. This is particularly true for indirect discharges, which the EPA recognizes “impose costs on water systems for those pollutants removed by the POTWs.”¹⁵⁵ Further, “prohibiting discharges that cause POTW noncompliance fairly allocates treatment responsibilities between the POTW and its users.”¹⁵⁶ In its regulatory impact analysis, EPA also acknowledged that, “POTWs typically do not remove all pollutants received from indirect dischargers” and that “[t]hose pollutants in the MPP effluent not removed by the POTWs constitute a negative externality to the public that the agency seeks to address with the proposed rule.”¹⁵⁷ In order to avoid forcing POTW customers to pay for treating MPP pollutants, as EPA pledged it was seeking to avoid with the proposed MPP Rule, EPA should adopt Option 3.

While we urge EPA to adopt Option 3, we are mindful of the concern that compliance with that option may be costly. We therefore urge EPA to provide federal funding or other financial assistance to mitigate the cost of wastewater treatment upgrades at affected facilities. Such funding and financial assistance may help reduce or eliminate any closures of meat and poultry processing facilities.¹⁵⁸ Along those lines, we note that the USDA has pledged to provide more than \$1 billion to the MPP industry to increase competition and capacity, including \$150 million specifically for smaller facilities.¹⁵⁹ We encourage the Biden Administration to provide parallel funding that will help these facilities pay for treatment upgrades necessary to comply

¹⁵³ *Id.* at 6-1.

¹⁵⁴ 89 Fed. Reg. at 4492.

¹⁵⁵ EPA Regulatory Impact Analysis, at 1-1.

¹⁵⁶ General Pretreatment Regulations for New and Existing Sources, 52 Fed. Reg. 1586, (Jan. 14, 1987), at 1590.

¹⁵⁷ EPA Regulatory Impact Analysis, at 1-1.

¹⁵⁸ 89 Fed. Reg. at 4492.

¹⁵⁹ USDA, USDA Announces \$500 Million for Expanded Meat & Poultry Processing Capacity as Part of Efforts to Increase Competition, Level the Playing Field for Family Farmers and Ranchers, and Build a Better Food System, <https://www.usda.gov/media/press-releases/2021/07/09/usda-announces-500-million-expanded-meat-poultry-processing> (July 9, 2021); USDA Rural Development, USDA Announces Funding Availability to Expand Meat and Poultry Processing Options for Underserved Producers and Tribal Communities, <https://www.rd.usda.gov/newsroom/news-release/usda-announces-funding-availability-expand-meat-and-poultry-processing-options-underserved-producers-2> (Apr. 19, 2023).

with Option 3. Such funding will ensure the expansion of meat and poultry processing capabilities does not come at a cost to the environment and disadvantaged communities and will be consistent with the Administration’s goals to both protect water resources and increase food supply chain resiliency.

D. EPA Improperly Relied on Unverified Industry Concerns

We believe EPA’s other proffered justifications for choosing Option 1 lack merit. First, as part of its rationale for rejecting Options 2 and 3, EPA referenced *potential* industry concerns about space limitations at some indirect discharging facilities for installing nitrogen removal treatment based on the premise that the technologies require a greater land area than that for conventional pollutant control.¹⁶⁰ Second, EPA also noted that industry stakeholders had raised a concern that zoning restrictions may prevent acquisition of adjacent land to install technology.¹⁶¹ However, EPA did not conduct a detailed analysis or provide information on how many facilities, if any, would face these difficulties.¹⁶² Further, EPA acknowledged that there may exist small footprint nitrogen removal technologies available to treat MPP wastewater.¹⁶³ EPA also found that nitrogen and phosphorus removal technologies are widely used in municipal wastewater treatment in the U.S. and around the world.¹⁶⁴ Finally, it is inappropriate for EPA to rely on unverified industry reports as part of its rationale to reject implementation of nutrient pretreatment standards, rather than using its data collection authorities under its Clean Water Act authorities, including 33 U.S.C. sections 1318 and 1342.

E. EPA Should Have Considered Environmental Justice in Choosing its Preferred Option

The Attorneys General strongly urge EPA to adopt Option 3 because, as EPA has acknowledged, this option is the most protective of disadvantaged communities. As the agency has recognized, its authorities under the Clean Water Act provide one of “[t]he primary opportunities for advancing environmental justice . . . because [the Act] regulates a broad range of activities that affect communities with environmental justice concerns that are or may be disproportionately impacted by environmental pollution.”¹⁶⁵ Further, as discussed above, EPA conducted an extensive analysis demonstrating that Option 1 is the least protective for disadvantaged and low-income communities. Despite this, EPA declined to use its environmental justice analysis as “a basis or rationale for any of the actions EPA propos[ed] in this rulemaking,”¹⁶⁶ and chose not to utilize its broad authority to regulate MPP facilities in a manner that will increase protection of disadvantaged communities. EPA should have considered environmental justice in proposing the MPP Rule and, accordingly, adopted Option 3 as its

¹⁶⁰ 89 Fed. Reg. at 4492-4493.

¹⁶¹ *Id.* at 4493.

¹⁶² Space requirements were not mentioned at all in EPA’s 107-page Regulatory Impact Analysis.

¹⁶³ 89 Fed. Reg. at 4492.

¹⁶⁴ *Id.*

¹⁶⁵ EPA, Legal Tools to Advance Environmental Justice (May 2022), at 9.

¹⁶⁶ EPA Environmental Assessment, at 7-1.

preferred option.

1. EPA's Analysis Demonstrates that Option 3 Would Most Protect Environmental Justice Communities

Because environmental justice communities disproportionately experience harms from MPP wastewater, they would also see disproportionate benefits from tighter regulations. For example, benefitted populations under all options would have higher proportions of low-income and Hispanic individuals, and under Option 3, those benefitting would be more likely than the national average to be Black and/or Asian.¹⁶⁷ Benefits include increased protection of downstream drinking water sources and improved water quality in fish habitat.¹⁶⁸ EPA also found communities served by drinking water sources downstream of MPP facilities were more likely to be Black and low-income and that an estimated 5% of the population in surrounding low-income communities may rely on subsistence fishing from these downstream waters.¹⁶⁹

Benefits to environmental justice communities would be most pronounced under Option 3. Of the approximately 60 million people living within one mile of a stream or river potentially impacted from MPP discharges (both direct and indirect), approximately 1.3 million, 8.9 million, and 22.1 million people would benefit from reduced nitrogen and phosphorus loads under Options 1, 2, and 3, respectively.¹⁷⁰ It is clear that regulation of indirect MPP dischargers, particularly under Option 3, would be more protective of environmental justice communities who bear the brunt of pollution loads indirectly discharged from MPP facilities.

2. EPA Also Should Have Considered Executive Orders Related to Environmental Justice to Make its Choice

In addition, EPA is subject to three Executive Orders concerning Environmental Justice: Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; Executive Order 14008: Tackling the Climate Crisis at Home and Abroad; and Executive Order 14096: Revitalizing Our Nation's Commitment to Environmental Justice for All.¹⁷¹ While EPA briefly discussed two of these Executive Orders in the proposed Rule,¹⁷² it did not consider them in proposing Option 1 as its preferred option.¹⁷³ Since EPA has "considerable discretion in assigning the weight to be accorded [the] factors" under the Clean Water Act¹⁷⁴ it should have relied on these Executive Orders to exercise its broad authority to use the Clean Water Act to protect disadvantaged communities. We therefore urge EPA to adopt Option 3 and reduce environmental justice impacts from this extremely

¹⁶⁷ *Id.* at 7-10.

¹⁶⁸ *Id.* at 7-11 to 7-13.

¹⁶⁹ *Id.* at 7-11.

¹⁷⁰ *Id.* at 7-10.

¹⁷¹ *Id.* at 7-1.

¹⁷² 89 Fed. Reg. at 4521.

¹⁷³ EPA Environmental Assessment, at 7-1.

¹⁷⁴ 89 Fed. Reg. at 4480.

polluting industry.

F. EPA is Required to Prevent Pass-Through and Interference from Pollutants

EPA has determined that MPP pollutants can both pass through and interfere with POTWs,¹⁷⁵ and is therefore required to establish pretreatment standards for these pollutants. Option 3 would implement pretreatment standards for all relevant pollutants and apply them to the largest proportion of MPP indirect dischargers of the three options. In our view, this is the only acceptable option of those offered.

1. The Clean Water Mandates EPA to Establish Pretreatment Standards

The Clean Water Act “requires EPA to establish pretreatment standards to prevent pollutants passing through POTWs or interfering with POTW operations.”¹⁷⁶ EPA has acknowledged that, “Industrial dischargers to POTW[]s are known to be the source of significant environmental problems” and that “there are [] many pollutants that do not receive adequate treatment in most POTW[]s (passthrough). These pollutants pass through POTW[]s in quantities and concentrations that may be harmful to the environment and that would be unacceptable under national, State, and local regulations dealing with direct dischargers.”¹⁷⁷ Since most POTWs were designed and built to treat domestic sewage, rather than industrial waste, industrial facilities discharging to POTWs may discharge pollutants in excess of what a POTW can treat.¹⁷⁸

Because MPP pollutants nitrogen, phosphorus, BOD, suspended solids, and oil and grease from MPP discharges can all pass through POTWs¹⁷⁹ and frequently cause interference with and disruption of POTW operations,¹⁸⁰ EPA must establish pretreatment standards for them. This is borne out by the States’ experiences. For example, in Wisconsin, even small MPP processors have contributed to significant upsets and permit violations at POTWs.¹⁸¹ Pass-through is particularly serious for nitrogen and phosphorus, since even well-operated POTWs can remove only 39% of total nitrogen and 30% of total phosphorus from MPP wastestreams,¹⁸² and most POTWs which receive wastewater from MPP facilities do not have nutrient limits for

¹⁷⁵ EPA Passthrough Analysis, at 3; EPA Technical Development Document, at 3, 56.

¹⁷⁶ Effluent Limitations Guidelines, Pretreatment Standards, and New Source Performance Standards for the Commercial Hazardous Waste Combustor Subcategory of the Waste Combustors Point Source Category, 65 Fed. Reg. 4360 (Jan. 27, 2000), at 4362; 33 U.S.C. § 1317(b)(1).

¹⁷⁷ Pretreatment Standards for Existing Sources and New Sources of Pollution, 42 Fed. Reg. 6476 (Feb. 2 1977), at 6476.

¹⁷⁸ *Ark. Poultry Fed’n v. U.S. EPA*, 852 F.2d 324, 326 (8th Cir. 1988).

¹⁷⁹ EPA Passthrough Analysis, at 3.

¹⁸⁰ EPA Technical Development Document, at 3.

¹⁸¹ Based on the experience of Wisconsin Department of Natural Resources staff implementing the state-delegated NPDES permit program in Wisconsin.

¹⁸² EPA Passthrough Analysis, at 3.

their own discharges.¹⁸³ Moreover, EPA found that removal of nitrogen and phosphorus from MPP wastewater is feasible, since “these pollutants are at concentrations that can be reduced with current wastewater treatment technology . . . and some facilities are already removing nutrients, achieving effluent concentrations well below the limitations in the existing MPP ELGs.”¹⁸⁴

Lastly, as stated in the preamble to the MPP Rule, “the combination of pretreatment and treatment by the POTW is intended to achieve the level of treatment that would be required if the industrial source were making a direct discharge.”¹⁸⁵ “Requiring industrial users to pretreat their wastes so as not to cause POTW noncompliance assures the public that dischargers cannot contravene the statutory objectives of eliminating or at least minimizing discharges of toxic and other pollutants simply by discharging indirectly through POTWs rather than directly to receiving waters.”¹⁸⁶ And, particularly important for environmental justice communities, “[n]ational ELGs and pretreatment standards can help ensure [] people in all areas in the vicinity of industrial direct and indirect discharges receive the same degree of protection from environmental and health hazards, and equal access to the decision-making process to have a healthy environment in which to live, learn, and work.”¹⁸⁷

2. Option 3 is the Only Option with Meaningful Prevention of Pass-Through and Interference

Option 3 is the only proffered option that approaches compliance with the Clean Water Act’s mandate to prevent pass-through of pollutants.¹⁸⁸ Option 3 would establish pretreatment standards for nitrogen and phosphorus – MPP pollutants that mostly pass through even well-performing POTWs, as noted above – and apply them to many more facilities than Option 2. Nutrient pretreatment standards would apply to 777 MPP facilities under Option 3, almost five times as many as under Option 2 (173 facilities).¹⁸⁹ Moreover, Option 3 would also apply conventional pollutant treatment standards to over twice as many facilities as Option 2, preventing a much greater share of BOD and suspended solids from passing through or interfering with POTWs (1,485 versus 719 facilities).¹⁹⁰ The advantages of Option 3 in reducing pollutant loads is clear from the percentages discussed above, and therefore, should be adopted by EPA.

¹⁸³ 89 Fed. Reg. at 4480; EPA Preliminary Program Plan 15, at 6-2.

¹⁸⁴ EPA Preliminary Program Plan 15, at 6-2.

¹⁸⁵ 89 Fed. Reg. at 4478.

¹⁸⁶ 52 Fed. Reg. at 1590.

¹⁸⁷ EPA Preliminary Program Plan 15, at 6-2.

¹⁸⁸ As we note in section II.B.3, *infra*, we question whether EPA has authority to establish pretreatment standards that apply only if a certain production threshold is met. While Option 3 would achieve removal of a significant portion of currently discharged nitrogen and phosphorus, it would not completely prevent pass-through.

¹⁸⁹ EPA Technical Development Document, at 84.

¹⁹⁰ *Id.*

3. EPA's Preferred Option 1 Fails to Prevent Pass-Through and Interference

EPA's preferred Option 1 is inconsistent with the Clean Water Act's requirement to prevent pass-through and interference of pollutants. Option 1 would not prevent pass-through of nitrogen or phosphorus at all, since it would not implement pretreatment standards for these pollutants.¹⁹¹ In addition, Option 1 would apply conventional pollutant standards to less than one half of the number of indirect dischargers as Option 3, which does not adequately prevent pass-through of or interference by BOD, suspended solids, or oil and grease. We also question whether EPA has authority under the Clean Water Act to enact pretreatment standards that apply to less than all facilities based on production thresholds. For example, none of the other point source categories for which EPA has established pretreatment standards have effluent limits that are triggered based on a production basis. Doing so for the MPP point source category appears to be a departure from the dictates of 33 U.S.C. section 1317(b)(1).¹⁹² As such, EPA should reject Option 1 and instead adopt Option 3.

G. Comments on Other Aspects of the MPP Rule

Below we comment on the following additional aspects of the MPP Rule: (1) the proposed requirement to remove chlorides from MPP wastewater prior to discharge; (2) EPA's suggestion that nutrient pretreatment standards could be conditional; and (3) the absence in the Rule of requirements related to antibiotics in MPP wastewater.

1. Attorneys General Support a Requirement for Chlorides Removal

We support the proposal to add requirements that would mandate treatment and zero discharge of chloride in MPP wastewater. High levels of chloride can adversely affect aquatic organisms, and EPA found that 70% of MPP facilities discharge wastewater containing chloride concentrations that exceed ambient water quality criteria.¹⁹³ POTWs are not designed to remove 100% of chloride, as would be required under the proposal, so chloride can pass through POTWs.¹⁹⁴ Indeed, some POTWs in Wisconsin have violated chloride limits due to MPP processor chloride loading.¹⁹⁵ EPA's proposed zero discharge requirements for chloride, which would require segregation of high chlorides waste streams from other process wastewater streams and salt recycle/evaporation for both indirect and direct dischargers, are therefore

¹⁹¹ We also find Option 2 to be inconsistent with the Clean Water Act's requirements, since it would apply pretreatment standards to very few facilities, as discussed in Section II.B.3, which would in effect fail to prevent pass-through or interference.

¹⁹² *See Chem. Mfrs. Assn.*, 870 F.2d at 249 ("EPA concludes that small dischargers cannot be exempted from PSES or subject to relaxed standards without allowing large quantities of pollutants to go, unregulated, into public sewage systems.").

¹⁹³ 89 Fed. Reg. at 4494.

¹⁹⁴ EPA Passthrough Analysis, at 1.

¹⁹⁵ Based on the experience of Wisconsin Department of Natural Resources staff implementing the state-delegated NPDES permit program in Wisconsin.

warranted and prudent.¹⁹⁶

2. We Oppose Conditional Nutrient Pretreatment Standards

We cannot support the idea of conditional nitrogen and phosphorus pretreatment standards without more detail. EPA is considering including a provision that would allow POTWs with existing nutrient treatments to exempt indirect dischargers from nitrogen and phosphorus limits in the event it adopts Option 1 or 2.¹⁹⁷ EPA suggests such a provision would be warranted because nutrient treatment is more expensive than that required for conventional limits.¹⁹⁸ The Attorneys General do not believe the expensiveness of technology justifies putting this cost on the POTW and general ratepayers, rather than the polluting discharger, especially since EPA acknowledged that these standards are economically achievable. As EPA proclaimed decades ago, “The discharge results from the industrial user’s activities; equitably, the burden of treating the discharge should thus be imposed on the entity that creates it, and not on the local or Federal ratepayers and taxpayers.”¹⁹⁹ Further, “It also makes sense to put some of the burden of anticipating and determining how to avoid discharges that could cause noncompliance on the industrial user, because it is in a better position than the POTW to know what pollutants are currently being discharged and are most likely to be discharged in the future.”²⁰⁰

In the event EPA moves forward with conditional nutrient pretreatment standards, the States recommend that: (1) receiving POTWs allowing for conditional limits have strict nitrogen and phosphorus effluent limits, lower than applicable pretreatment standards; (2) a POTW be required to obtain authorization from its respective approval authority (state or EPA regional administrator) prior to granting a request for application of conditional limits; (3) POTWs be required to regulate MPP facilities with conditional nutrient limits through discharge permits; (4) MPP facilities with conditional limits be required to sample their process effluent for nitrogen and phosphorus on a regular basis; (5) costs for nutrient monitoring and any needed upgrades be incurred by MPP facilities with conditional limits rather than general ratepayers. The cost of treating MPP nutrient dischargers should not fall on residential POTW consumers whose domestic discharges POTWs are designed to address.

3. We Urge EPA to Address Antibiotics in MPP Wastewater

EPA’s Environmental Assessment documented the common occurrence of antibiotics in MPP discharges and resultant harms, including the promotion of AMR genes in bacteria, as described above. Despite this, and the fact that POTWs may not remove antibiotics from wastewater,²⁰¹ EPA’s proposed Rule did not address antibiotics in MPP wastewater at all. The Attorneys General are concerned with the proliferation of drug-resistant bacteria which threaten

¹⁹⁶ 89 Fed. Reg. at 4494.

¹⁹⁷ *Id.* at 4493-94.

¹⁹⁸ *Id.* at 4493.

¹⁹⁹ 52 Fed. Reg. at 1590.

²⁰⁰ *Id.*

²⁰¹ EPA Environmental Analysis, at 2-25.

the viability of antibiotics medically important for human health.²⁰² We further note that according to EPA, humans can be exposed to AMR strains of bacteria by consuming contaminated water, which can lead to drug-resistant bacterial infection.²⁰³ Accordingly, we urge EPA to consider adopting requirements to address the presence of antibiotics in MPP wastewater.

III. CONCLUSION

We commend EPA's efforts in the proposed Rule to address pollution in MPP facility discharges. EPA's decision to establish new phosphorus and more stringent nitrogen limits for direct dischargers and to establish conventional pretreatment standards for indirect dischargers will be beneficial for the environment. We urge EPA to go further and adopt, at a minimum, Option 3, which would more effectively reduce pollution and protect the environment, public health, and environmental justice communities from the harms of MPP wastewater.

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²⁰² NRDC, Issue Brief, U.S. Livestock Industries Persist in High-Intensity Antibiotic Use, IB: 22-11-A (Nov. 2022), at 1.

²⁰³ EPA Environmental Assessment, at 2-26.

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