

February 4, 2021

Serena Viswanathan
Associate Director, Division of Advertising Practices
Federal Trade Commission
600 Pennsylvania Avenue N.W.
Washington, D.C. 20580

SUBMITTED VIA U.S. POSTAL SERVICE AND ELECTRONIC MAIL TO:
sviswanathan@ftc.gov & chann@ftc.gov

**Re: Complaint requesting action to enjoin the dissemination of false or deceptive claims
by Smithfield Foods, Inc.**

Dear Associate Director Viswanathan:

The attached complaint is submitted on behalf of Food & Water Watch and the listed coalition of organizations, representing a wide range of environmental, sustainable farming, family farming, and fair market interests.

We write to request that the Federal Trade Commission investigate and take action to enjoin Smithfield Foods, Inc. (“Smithfield”) from making false and misleading claims about its pork products and the methods used to produce them. As set forth in this complaint, Smithfield is misleading consumers with marketing and advertising representations that falsely suggest its pork products are produced in an environmentally responsible and sustainable way.

Such representations, which are widely disseminated via Smithfield’s websites and myriad other media, tell consumers that Smithfield’s pigs were raised by farmers utilizing environmentally sustainable practices and processed in environmentally-friendly facilities. These representations are false. In reality, the practices used at Smithfield’s facilities—as well as those used by Smithfield suppliers—fall far below the level of environmental sustainability that a reasonable consumer would expect based on the company’s representations. Despite its greenwashing, Smithfield utilizes the same unsustainable methods used to produce the overwhelming majority of pigs raised in the United States, and is one of the largest polluters in the country. Further, Smithfield touts its use of anaerobic digesters to produce methane from its pollution-laden waste as a sustainable innovation and solution to Smithfield’s climate damaging production practices—a falsehood that capitalizes on an issue of growing importance to consumers.

Smithfield’s broad and unsubstantiated environmental claims are part of a sophisticated marketing scheme clearly designed to take advantage of the large and growing number of consumers looking to purchase products that are sustainably produced. However, it is extremely difficult for consumers to gauge for themselves whether Smithfield’s sustainability claims are accurate because consumers do not have access to the producers’ facilities, nor do consumers have the technical knowledge necessary to assess Smithfield’s claims. Thus, FTC oversight and enforcement is essential to avoid deception and protect the integrity of the marketplace.

Claims regarding environmental sustainability are material to consumers, many of whom wish to avoid products that are produced in environmentally harmful ways. Smithfield misrepresents its products as sustainable, taking advantage of this consumer concern. As the attached complaint explains in detail, these representations amount to unlawful consumer deception in violation of the Federal Trade Commission Act. In the spirit of FTC Commissioner Chopra's recent public commitment to combat such "greenwashing," we ask the Commission to provide oversight and enforcement of the law against Smithfield's deceptive marketing that seeks to unlawfully influence consumers' purchasing behavior.

We appreciate your prompt attention to this matter and are available to assist your office in any review of this complaint.

Sincerely,

A handwritten signature in black ink, appearing to read "Tyler Lobdell", is centered below the closing. The signature is fluid and cursive.

Tyler Lobdell
Staff Attorney, Food & Water Watch
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Washington, D.C. 20036
(208) 209-3569
tlobdell@fwwatch.org

BEFORE THE UNITED STATES FEDERAL TRADE COMMISSION

FOOD & WATER WATCH; CAPE FEAR RIVER WATCH; DAKOTA RURAL ACTION;
FAMILY FARM ACTION ALLIANCE; INSTITUTE FOR AGRICULTURE AND TRADE
POLICY; IOWA CITIZENS FOR COMMUNITY IMPROVEMENT; MISSOURI RURAL
CRISIS CENTER; PENNSYLVANIA FARMERS UNION; and SOCIALLY RESPONSIBLE
AGRICULTURE PROJECT,
Petitioners,

SMITHFIELD FOODS, INC.,
Proposed Respondent

COMPLAINT FOR ACTION TO STOP
FALSE OR DECEPTIVE ADVERTISING

Tyler Lobdell
Staff Attorney, Food & Water Watch
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Washington, D.C. 20036
(208) 209-3569
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On behalf of Petitioners

EXECUTIVE SUMMARY

Petitioners Food & Water Watch, Cape Fear River Watch, Dakota Rural Action, Family Farm Action Alliance, Institute for Agriculture and Trade Policy, Iowa Citizens for Community Improvement, Missouri Rural Crisis Center, Pennsylvania Farmers Union, and Socially Responsible Agriculture Project (“Petitioners”) submit this complaint requesting that the Federal Trade Commission (“FTC” or “Commission”) investigate false and misleading representations made by Smithfield Foods, Inc. (“Smithfield”) relating to the environmental sustainability of its production methods. Consumers regularly rely on these material misrepresentations, which directly affect their purchasing decisions with respect to Smithfield products.

As a large and growing number of consumers are keenly interested in avoiding products that are produced using environmentally harmful or unsustainable methods, producers like Smithfield have taken note. Smithfield has set out to capitalize on these consumer values by deceptively marketing its brands and products as environmentally friendly and sustainable. However, as the FTC recognizes, it is a heavy burden for any advertiser to substantiate all reasonable interpretations of general sustainability claims such as those made by Smithfield. Moreover, Smithfield’s particularly egregious environmental record and adoption of anaerobic manure digesters to produce and sell dirty, polluting biogas is inconsistent with how reasonable consumers understand the company’s claims. Because it is virtually impossible for consumers to determine for themselves whether such sustainability claims are accurate as to a given product, FTC oversight and enforcement are consumers’ best hope to avoid falling prey to Smithfield’s deception.

Smithfield “assure[s] customers” that its products “were produced in an environmentally responsible plant”¹ and that it is “committed to ensuring the health, safety, and well-being of our employees, the people living and working in communities near our facilities, and the environment,”² while in reality it is one of the largest and most wanton polluters in the country.³

Smithfield tells consumers that it is “living [its] commitment to sustainability,”⁴ and drives the point home with phrases such as “ensuring 100% compliance, 100% of the time.”⁵ But federal records show that Smithfield regularly fails to comply with bare-minimum environmental regulations year after year.⁶ Indeed, Smithfield’s environmental claims stand in stark contrast with reality, including Smithfield’s perpetuation of the highly polluting factory farm model and irresponsible waste management practices. Petitioners have compiled ample evidence of harmful and unsustainable production methods employed by Smithfield and its contract suppliers, causing untold environmental harm throughout the United States. In short, Smithfield’s marketing paints a pastoral picture of environmentally sustainable conditions when, in reality, the company’s products are the result of highly industrialized, dangerous, and extractive practices that recklessly pollute the environment and harm local communities.

This Complaint details the false and deceptive representations that Smithfield has made and continues to make, and contrasts them with the industrialized, pollution-heavy practices Smithfield actually employs. In light of the foregoing, Petitioners requests that the FTC investigate

¹ Smithfield, *Why Smithfield?*, <http://www.smithfield.com/why-smithfield/> (last visited Jan. 27, 2021).

² Smithfield, *Human Rights Policy*, <https://www.smithfieldfoods.com/our-policies-and-disclosures/human-rights> (last visited Jan. 27, 2021).

³ See John Rumppler, *Env’t America Res. & Policy Ctr., Corporate Agribusiness and the Fouling of America’s Waterways* (June 2016) at 2, table ES-3, <https://environmentamerica.org/sites/environment/files/reports/CorpAgFoulingWaterways2016-web.pdf> (last visited Jan. 27, 2021).

⁴ Smithfield, *Sustainability*, <https://www.smithfieldfoods.com/sustainability> (last visited Jan. 27, 2021).

⁵ Smithfield, *Environment*, <https://www.smithfieldfoods.com/sustainability/environment> (last visited Jan. 27, 2021).

⁶ See *infra* Part IV.B.

Smithfield's claims, described in detail below, and take appropriate action to enjoin the company from continuing to make misleading environmental responsibility claims.

I. INTRODUCTION

Pursuant to Sections 2.1 and 2.2 of FTC regulations,⁷ Petitioners hereby request that the Commission investigate and commence an enforcement action against Smithfield for engaging in false or misleading advertising or marketing in violation of the Federal Trade Commission Act (“FTC Act”).⁸

As detailed below, Smithfield unlawfully makes false or misleading representations about its products’ environmental and sustainability attributes. In marketing and advertising materials on websites, social media accounts, and other media, Smithfield represents to consumers that its production practices are environmentally friendly and sustainable.

Contrary to these claims, however, Smithfield’s actual production practices fall far below the standards represented in its marketing materials and far below reasonable consumer expectations based on those claims. Smithfield’s unsustainable practices egregiously pollute air and waterways and frequently violate even *its own* low standards. A plethora of research and public records show undeniable evidence of Smithfield’s systemic violation of environmental statutes.⁹ And Smithfield’s attempt to greenwash its operations by misleadingly marketing its use of anaerobic digesters to produce biogas from its harmful waste only deepens the consumer deception. Simply put, Smithfield’s production of its products takes a tremendous toll on the environment and local communities, a fact the company works to obfuscate through misleading marketing and false solutions like anaerobic digesters.

Reasonable consumers would not consider Smithfield’s actual practices to be environmentally responsible or sustainable. Consumers want to avoid products that are harmful to

⁷ 16 C.F.R. §§ 2.1–2.2.

⁸ 15 U.S.C. §§ 41 *et seq.*

⁹ *See, e.g., infra* Part IV.B.1.

the environment, but they lack technical knowledge regarding pork industry practices and the realities behind Smithfield’s ongoing environmental degradation. Smithfield capitalizes on this knowledge gap by misrepresenting its brands and products as environmentally sustainable, to the detriment of its consumers and competitors who actually practice and invest in truly sustainable production models. Consumers should not be forced to become subject-matter experts in order to navigate the marketplace and avoid being duped into buying Smithfield products.

The FTC’s renewed commitment to combat greenwashing, as exemplified by Commissioner Rohit Chopra’s statement on this issue,¹⁰ can help break the cycle of impunity for companies like Smithfield that profiteer off consumer deception. In the spirit of that statement, we respectfully request that the Commission “exercis[e] its full authority to protect consumers and honest businesses”¹¹ and take prompt action to hold Smithfield accountable for deceiving consumers with false claims of environmentally sustainable production practices.

II. PARTIES

A. Food & Water Watch

Food & Water Watch (“FWW”) is a national, nonprofit membership organization that mobilizes regular people to build political power to move bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect people’s health, communities, and democracy from the growing destructive power of the most powerful economic interests. FWW champions healthy food and clean water and air for all by standing up to corporations that put profits before people. FWW advocates for a healthy, truly sustainable

¹⁰ FTC, Statement of Commissioner Rohit Chopra, *In re Truly Organic*, No. 1923077 (Sept. 19, 2019), https://www.ftc.gov/system/files/documents/public_statements/1544655/commisisoner_rohit_chopra_statement_on_truly_organic_sept_19_2019.pdf (last visited Jan. 27, 2021).

¹¹ *Id.*

agricultural system where independent, sustainable family farmers have a fair chance in the marketplace.

B. Cape Fear River Watch

Cape Fear River Watch is a grassroots clean water advocacy nonprofit that has been protecting and improving the water quality of the Cape Fear River Basin for all people for more than twenty-five years. We are a member of the Waterkeeper Alliance, a global network of clean water advocates working to protect the world's water on six continents.

C. Dakota Rural Action

Dakota Rural Action works to protect environmental resources, advocate for resilient agricultural systems, and empower people to create policy change that strengthens their communities and cultures. Dakota Rural Action envisions healthy, beautiful, and just food, agriculture, and energy systems that protect clean air, water, and soil for all the current and future inhabitants of South Dakota.

D. Family Farm Action Alliance

Family Farm Action Alliance is a national research, policy development, market innovator, and advocacy organization working to build a sustainable, inclusive economy in which everyone has the right to share in the prosperity they help build and that respects our land, natural resources, and neighbors around the world.

E. Institute for Agriculture and Trade Policy

Institute for Agriculture and Trade Policy (“IATP”) is a nonprofit that works locally and globally at the intersection of policy and practice to ensure fair and sustainable food, farm, and trade systems. IATP aims to reduce the harmful impacts of industrialized animal agriculture and promote regenerative systems based on agroecology principles.

F. Iowa Citizens for Community Improvement

Iowa Citizens for Community Improvement (“Iowa CCI”) believes in putting people and their communities first: people before politics, people before profits, and people before polluters. Iowa CCI envisions a future in which the rich diversity of our world and its people are respected, people and the environment are not exploited in the interest of corporate profits, and all citizens and corporations are good stewards of our environment.

G. Missouri Rural Crisis Center

Missouri Rural Crisis Center (“MRCC”) is a statewide farm and rural membership organization founded in 1985. MRCC's mission is to preserve family farms, promote stewardship of the land and environmental integrity, and strive for economic and social justice by building unity and mutual understanding among diverse groups, both rural and urban.

H. Pennsylvania Farmers Union

Pennsylvania Farmers Union (“PFU”) is a membership-driven organization committed to enhancing the quality of life of family farmers in Pennsylvania. PFU is made up of family farmers as diverse as the agricultural landscape in Pennsylvania, including grain farmers, vegetable growers, fruit growers, livestock farmers and dairy farmers. All our members play a role in bringing the issues that matter most to lawmakers and fighting for their rights as family farmers.

I. Socially Responsible Agriculture Project

Socially Responsible Agriculture Project (“SRAP”) informs and educates the general public about the negative effects of concentrated animal feeding operations (“CAFOs”)—also known as factory farms—while working directly with U.S. communities impacted by this destructive form of industrial animal agriculture. Through public education, issue advocacy, and local community organizing, SRAP empowers rural residents to protect their public health,

environmental quality, natural resources and local economies from the damaging impacts of factory farms.

J. Smithfield Foods, Inc.

Smithfield is the largest producer of pork products in the United States.¹² Smithfield is incorporated and has its principal executive office at 200 Commerce St., Smithfield, Virginia, 23430. Smithfield is a wholly owned subsidiary of Hong Kong-based WH Group.¹³ Smithfield produces, processes, markets, and distributes fresh, frozen, and value-added pork products, as well as several lines of pre-packaged pork products. Smithfield’s pork products are available in a wide variety of national supermarket chains, regional stores, and other retail outlets. Smithfield markets these products under its own name as well as under various other brand names (including, but not limited to, “Farmland,” “Healthy Ones,” and “Nathan’s Famous”).

III. STANDARD OF REVIEW

The FTC is the primary federal agency charged with protecting the public from unfair and deceptive trade practices. Through the FTC Act, Congress has vested broad power in FTC to curtail “unfair or deceptive acts,” including false, unfair, or deceptive advertising.¹⁴ Under Section 5 of the FTC Act, unlawful deception will be found “if there is a representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer’s

¹² Betsy Freese, *Pork Powerhouses 2019*, Successful Farming (Oct. 1, 2019), <https://www.agriculture.com/livestock/pork-powerhouses/pork-powerhouses-2019-expansion-continues> (last visited Jan. 27, 2021).

¹³ WH Group, *Brand & Products*, http://www.wh-group.com/html/bp_usa.php (last visited Jan. 27, 2021).

¹⁴ 15 U.S.C. § 45 (“The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”); *id.* § 52 (“It shall be unlawful for any person, partnership, or corporation to disseminate, or cause to be disseminated, any false advertisement”).

detriment.”¹⁵ A representation is thus unlawfully deceptive if it is (1) material to a consumer’s decision-making and (2) likely to mislead the consumer.¹⁶

To ensure that their advertisements are not deceptive, marketers must identify all express and implied claims that the advertisement reasonably conveys. A claim that is literally true can still be a deceptive practice under the FTC Act if its implications deceive or mislead consumers.¹⁷ Marketers must ensure that all reasonable interpretations of their claims are truthful, not misleading, and supported by a reasonable basis before they make the claims.¹⁸ If a particular consumer group is targeted, or is likely to be affected by the advertisement, the advertisement should be examined from the perspective of a reasonable member of that group.¹⁹ Moreover, the advertisement should be evaluated as a whole, including its visual elements, to account for “crafty advertisers whose deceptive messages were conveyed by means other than, or in addition to, spoken words.”²⁰

Also, under Section 5 of the FTC Act, the Commission will find that a practice is unfair if the practice causes a substantial “unjustified consumer injury,” which is an injury that any offsetting consumer or competitive benefits do not outweigh, and that could not have been reasonably avoided by consumers.²¹ While unjustified consumer injury alone “can be sufficient to

¹⁵ FTC, Policy Statement on Deception, *appended to Cliffdale Assocs., Inc.*, 103 F.T.C. 110, 174 (1984), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf (last visited Jan. 27, 2021) (hereinafter “FTC Policy Statement on Deception”); *see* 15 U.S.C. § 45.

¹⁶ *Id.*

¹⁷ *See Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 322 (7th Cir. 1992) (“[E]ven literally true statements can have misleading implications.”).

¹⁸ *See* 16 C.F.R. § 260.2 (citing FTC Policy Statement Regarding Advertising Substantiation, 104 F.T.C. 839 (1984)).

¹⁹ FTC Policy Statement on Deception, *supra* note 15.

²⁰ *Id.* (citing *Am. Home Products Corp. v. FTC*, 695 F.2d 681, 688 (3d Cir. 1982)).

²¹ 15 U.S.C. § 45(n); FTC, FTC Policy Statement on Unfairness, 104 F.T.C. 1070–76 (1984), *appended to International Harvester Co.*, 104 F.T.C. 949 (1984) (codified at 15 U.S.C. § 45(n)) (hereinafter “FTC Policy Statement on Unfairness”), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (last visited Jan. 27, 2021).

warrant a finding of unfairness,” the Commission may also consider whether the practice “violates established public policy” and “whether it is unethical or unscrupulous.”²²

IV. FALSE OR MISLEADING CLAIMS

This Complaint identifies many of Smithfield’s representations regarding the sustainability of its products that are false or misleading in violation of the FTC Act, but it is not exhaustive due to the breadth of Smithfield’s ongoing violations. Smithfield communicates these representations with attention-grabbing text and depictions on the company’s websites, in consumer education reports, and via other media. Smithfield markets and advertises its pork products throughout the United States and targets consumers concerned with environmental protection and sustainability. This marketing makes promises and provides guarantees of environmentally sustainable production practices, and portrays Smithfield as an environmentally-friendly brand and a good neighbor. Unfortunately, these representations are directly contradicted by Smithfield’s long history of environmental degradation, continued reliance on unsustainable practices, and well established harm to communities living near its facilities.

A. Smithfield Makes Myriad Representations Regarding Environmental Sustainability.

Throughout its marketing materials, Smithfield tells consumers about its supposed environmental stewardship and sustainability. For example, its website’s (smithfield.com) front page reassures consumers that Smithfield’s “Good food. Responsibly.®” slogan is “So Much More than Just a Tagline.” And it represents that its “responsibility” and “promise” include “being ever mindful of the impact our operations have on the planet.”²³ Another Smithfield website

²² FTC Policy Statement on Unfairness, *supra* note 21 (citing *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 223, 244–45 n.5 (1972)).

²³ Smithfield, <https://www.smithfieldfoods.com/> (last visited Feb. 2, 2021).

“guarantee[s] the highest environmental standards in the Smithfield production process.”²⁴ “We are Stewards of the Environment,” Smithfield tells consumers while touting its scheme to install biogas-producing digesters at some of its facilities to monetize its harmful and polluting waste streams.²⁵

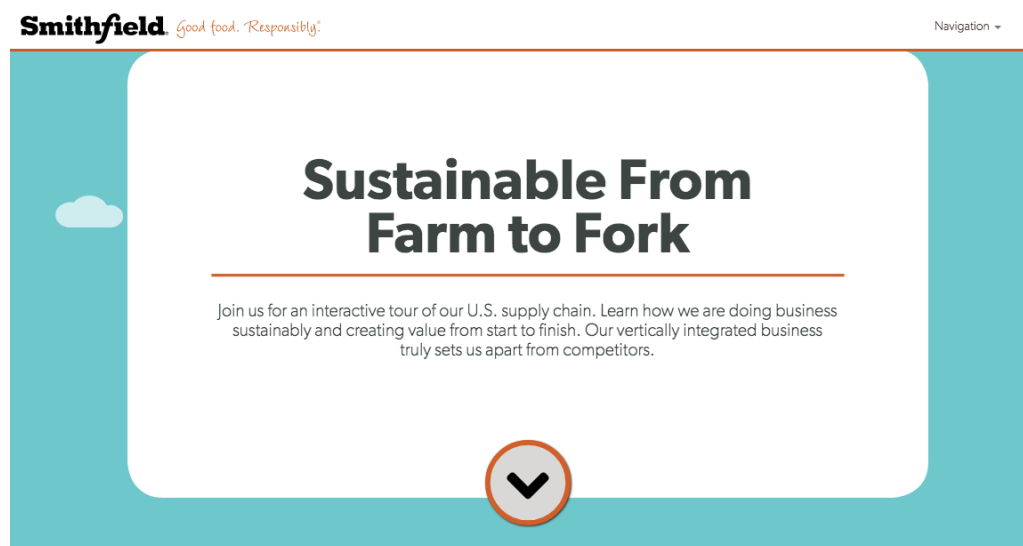


Figure 1. A Smithfield sustainability claim found on its company website, clearly telling consumers that it is “doing business sustainably ... from start to finish.”²⁶

Its advertising videos similarly paint Smithfield and its products as environmentally responsible and sustainable. A 2017 Smithfield promotional video lists “the environment” as one of Smithfield’s “sustainability pillars” on which its “philosophy of responsible operations rests.”²⁷ This video has been viewed nearly 20,000 times. Elsewhere on its company YouTube channel, it provides videos to consumers that it purports will “Tak[e] the Mystery out of Pork Production at Smithfield Foods.”²⁸ In the introductory video of that series, Smithfield represents that it is

²⁴ Smithfield, *supra* note 1.

²⁵ *Id.*

²⁶ Smithfield, *Sustainable from Farm to Fork*, <https://sustainability.smithfieldfoods.com/> (last visited Jan. 27, 2021).

²⁷ Smithfield, *We Are Smithfield Foods*, YouTube (May 5, 2017), <https://www.youtube.com/watch?v=g5MwtXTVFfw> (last visited Jan. 27, 2021).

²⁸ See, e.g., Smithfield, *Introduction & Overview--Taking the Mystery out of Pork Production at Smithfield Foods*, YouTube (Feb. 24, 2011), <https://www.youtube.com/watch?v=fDotDhYnHSY> (last visited Jan. 27, 2021).

“committed to the very highest standards of . . . environmental protection.”²⁹ It later boasts that Smithfield “is committed to our environment in many, many ways.”³⁰ This video has been viewed over 56,000 times. An entire video in that series is devoted to “Environmental Protection” and represents Smithfield as “committed to environmental stewardship.”³¹ It claims that its methods “assure that we are protecting our environment.”³² Smithfield continues to reinforce this deceptive and misleading theme by, for example, telling consumers that it maintains an “unwavering commitment to sustainability.”³³

Smithfield’s social-media accounts are further replete with environmental-stewardship claims. The company’s Facebook page quotes a Smithfield executive boasting that “Smithfield has been proud to lead this process” of “[e]nvironmental stewardship.”³⁴ It reiterates this pro-environment message in myriad posts, including:

- Quoting Smithfield executives saying that “sustainability is a part of our culture and our daily work”³⁵;
- Claiming that “[e]nvironmental stewardship is a key focus for everyone at Smithfield Foods”³⁶; and
- Touting its supposedly “industry-leading sustainability program.”³⁷

²⁹ *Id.*

³⁰ *Id.*

³¹ Smithfield, *Environmental Protection--Taking the Mystery out of Pork Production at Smithfield Foods*, YouTube (Feb. 24, 2011), <https://www.youtube.com/watch?v=L9j1bVzibtE> (last visited Jan. 27, 2021). Note that Murphy-Brown, LLC is a subsidiary of Smithfield that raises livestock for Smithfield products.

³² *Id.*

³³ Smithfield Foods, *Smithfield Foods 2018 Sustainability Report*, YouTube (June 18, 2019), <https://www.youtube.com/watch?v=08L-Z3xmqWs> (last visited Jan. 27, 2021).

³⁴ Smithfield (@SmithfieldFoods), Facebook (Sept. 4, 2019, 10:24 AM), <https://www.facebook.com/SmithfieldFoods/posts/2558761157480585> (last visited Jan. 27, 2021).

³⁵ Smithfield (@SmithfieldFoods), Facebook (May 21, 2019, 10:06 AM), <https://www.facebook.com/SmithfieldFoods/posts/2370435809646455> (last visited Jan. 27, 2021).

³⁶ Smithfield (@SmithfieldFoods), Facebook (May 15, 2019, 6:13 AM), <https://www.facebook.com/SmithfieldFoods/posts/2359351937421509> (last visited Jan. 27, 2021).

³⁷ Smithfield (@SmithfieldFoods), Facebook (Feb. 28, 2019, 11:10 AM), <https://www.facebook.com/SmithfieldFoods/photos/2238717452818292> (last visited Jan. 27, 2021).

This small sampling is representative of Smithfield’s pervasive environmental sustainability marketing.

Smithfield’s campaign of environmental advertising and marketing is not limited to YouTube and Facebook. It also utilizes other social media, such as Twitter, to communicate with consumers about its supposedly “industry leading sustainability” practices.³⁸ It amplifies these messages by marketing across platforms, reposting its sustainability claims on Facebook, Twitter, and Instagram.³⁹

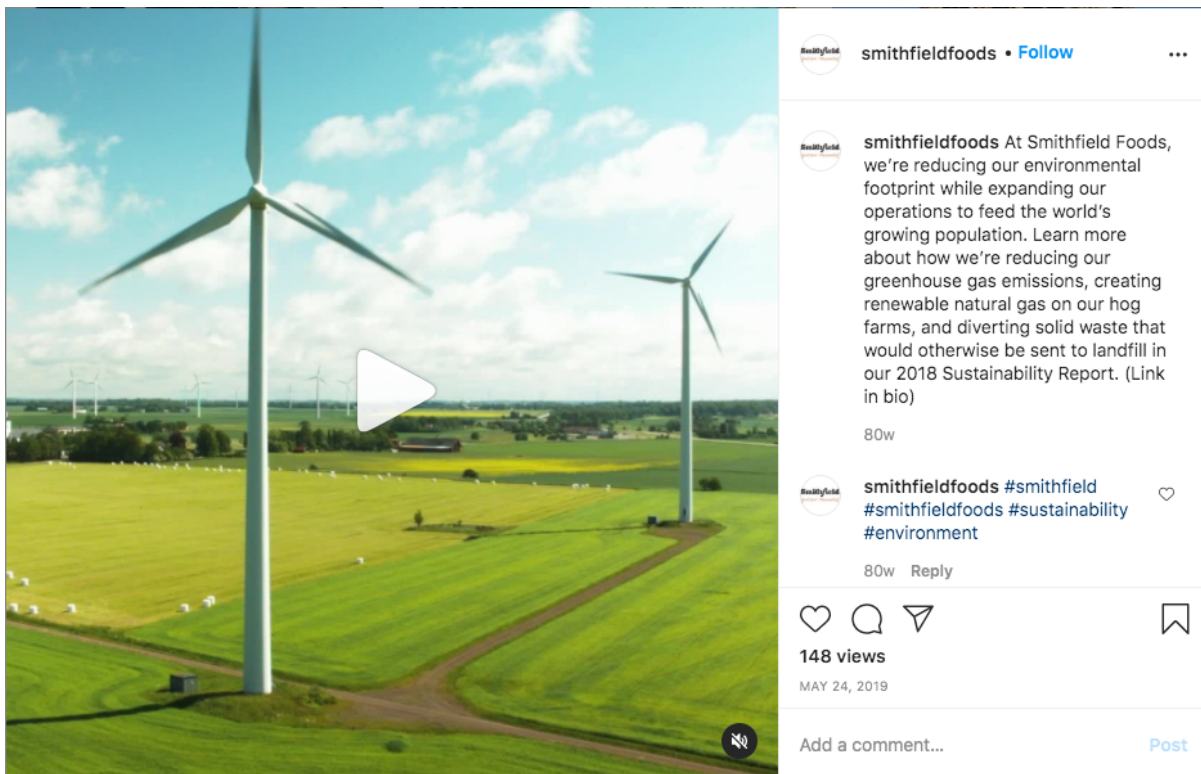


Figure 2. Instagram post touting its supposed commitment to the environment with images of wind farms and hashtags including “#sustainability” and “#environment.”⁴⁰

³⁸ @SmithfieldFoods, Twitter (Oct. 29, 2019, 12:02 PM), <https://twitter.com/SmithfieldFoods/status/1189241167193563136> (last visited Jan. 27, 2021); @SmithfieldFoods, Twitter (Apr. 8, 2019, 12:45 PM), <https://twitter.com/SmithfieldFoods/status/1115324869695217670> (last visited Jan. 27, 2021).

³⁹ See, e.g., @SmithfieldFoods, Twitter (May 21, 2019, 11:10 AM), <https://twitter.com/i/web/status/1130883600575008768> (last visited Jan. 27, 2021) (“[S]ustainability is a part of our culture and our daily work . . .”); Smithfield (@smithfieldfoods), Instagram (May 21, 2019), https://www.instagram.com/p/Bxu4daGl_TA/ (last visited Jan. 27, 2021) (same).

⁴⁰ Smithfield (@smithfieldfoods), Instagram (May 24, 2019), <https://www.instagram.com/p/Bx2jhqbgWWK/> (last visited Jan. 27, 2021).



Figure 3. A Smithfield Foods Twitter post about its “pioneering #sustainability best practices.”⁴¹

Smithfield’s interactive “sustainability” website features illustrations designed to appeal to consumers.⁴² The company has linked to this website multiple times through its Facebook,⁴³

⁴¹ @SmithfieldFoods, Twitter (July 7, 2020, 1:18 PM), <https://twitter.com/SmithfieldFoods/status/1280581927959965697> (last visited Jan. 27, 2021); see also Smithfield (@smithfieldfoods), Instagram (July 7, 2020), <https://www.instagram.com/p/CCWkiCSBQQ/> (last visited Jan. 27, 2021).

⁴² See Smithfield, *Sustainable from Farm to Fork*, supra note 26.

⁴³ See Smithfield (@SmithfieldFoods), Facebook (July 23, 2019, 10:56 AM), <https://www.facebook.com/SmithfieldFoods/videos/2358378837736127> (last visited Jan. 27, 2021); Smithfield Foods (@SmithfieldFoods), Facebook (May 22, 2019, 7:10 AM), <https://www.facebook.com/SmithfieldFoods/posts/2370879059602130> (last visited Jan. 27, 2021).

Twitter,⁴⁴ and Instagram⁴⁵ accounts. The illustrations depict sunny and bucolic farms that bear little resemblance to the actual facilities where the animals used in Smithfield’s products are raised.⁴⁶ Captions accompany these cheerful representations with claims that Smithfield’s practices are environmentally friendly and sustainable.⁴⁷ One prominent caption reads, “Our sustainability program is ingrained in our operations, making responsibility an integral part of our company culture.”⁴⁸ Another claims that Smithfield is “protecting the environment on and around our hog farms.”⁴⁹

Exemplifying Smithfield’s cross-platform marketing scheme, consumers visiting this “sustainability” website are encouraged to click on icons that produce claims and links to other Smithfield videos and webpages.⁵⁰ For example, one such icon shaped like a leaf yields the heading “Accelerating Our Renewable Energy Efforts” along with descriptions of its “renewable energy projects” and its “ambitious goal to reduce greenhouse gas (GHG) emissions.”⁵¹

⁴⁴ See @SmithfieldFoods, Twitter (July 23, 2019, 12:04 PM), <https://twitter.com/SmithfieldFoods/status/1153727480198512640> (last visited Jan. 27, 2021); @SmithfieldFoods, Twitter (May 22, 2019, 8:43 AM), <https://twitter.com/SmithfieldFoods/status/1131209087264403461> (last visited Jan. 27, 2021).

⁴⁵ See Smithfield (@smithfieldfoods), Instagram (May 22, 2019), <https://www.instagram.com/p/BxxMhXulaL4/> (last visited Jan. 27, 2021).

⁴⁶ See Smithfield, *Sustainable from Farm to Fork*, *supra* note 26.

⁴⁷ See *id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *id.*

⁵¹ *Id.*

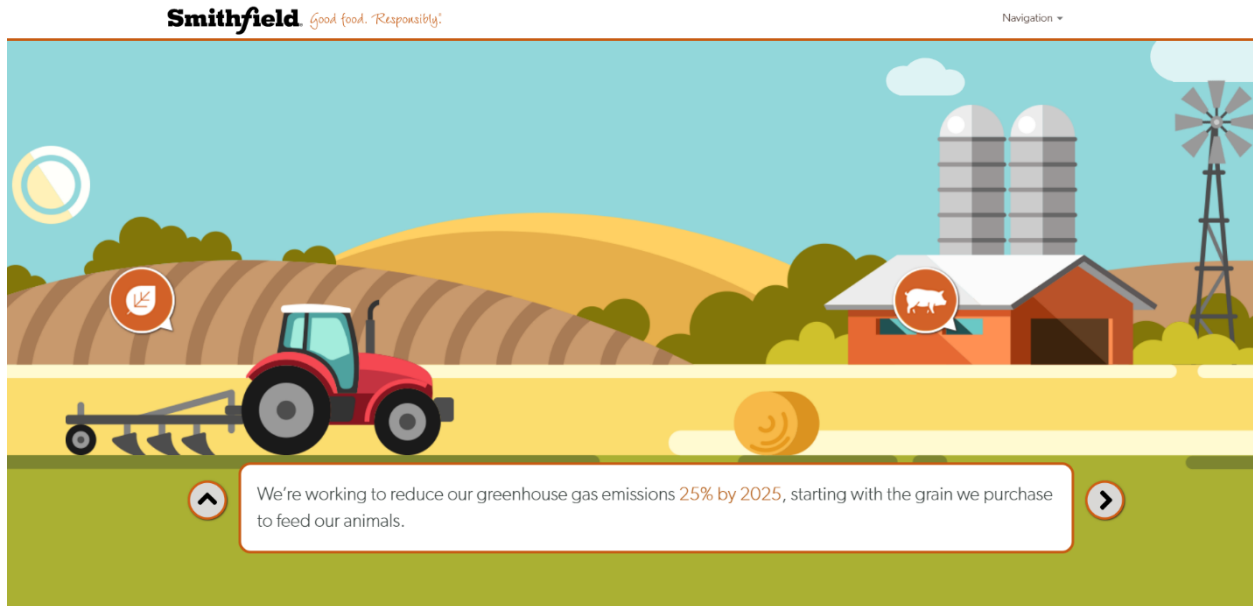


Figure 4. Smithfield's interactive website that shows bucolic farms with no apparent pollution and makes environmental claims.⁵²

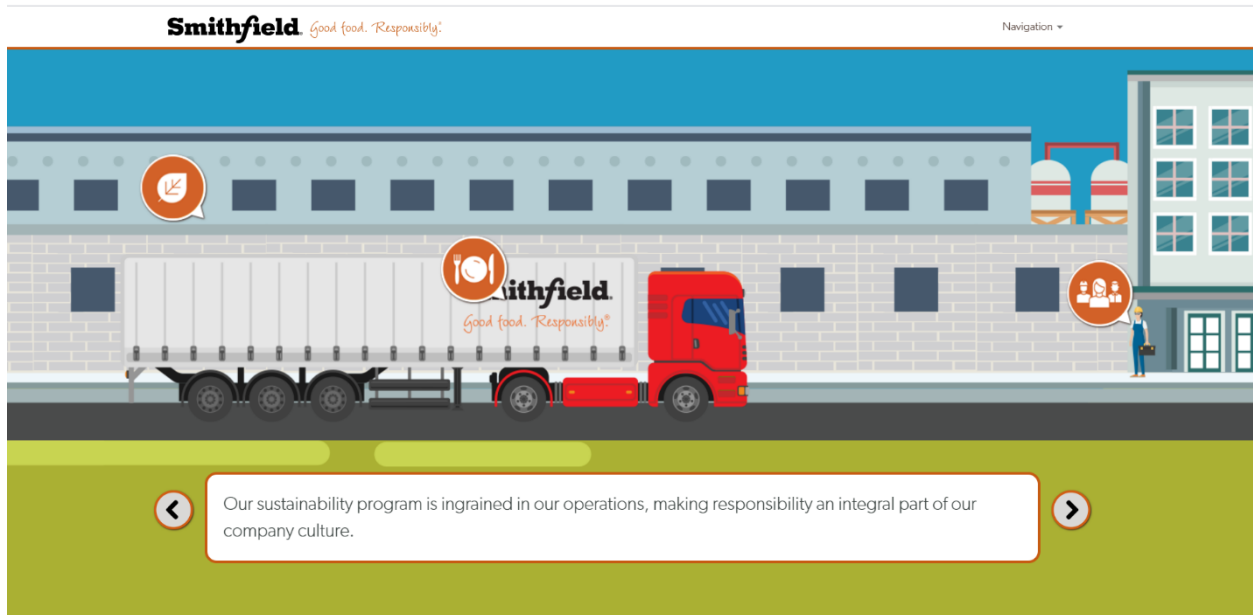


Figure 5. Smithfield's interactive website, claiming that "[o]ur sustainability program is ingrained in our operations."⁵³

Smithfield makes numerous environmental responsibility claims in its annual "sustainability reports" as well. For example, its 2019 Sustainability Report pushes the company's

⁵² *Id.*

⁵³ *Id.*

“100% compliance, 100% of the time” catchphrase, and falsely claims that it is “on track” to meeting this goal.⁵⁴ Smithfield constructs its Sustainability Reports to deliberately bury disclosures that contradict its false sustainability claims, while highlighting and emphasizing those false messages.⁵⁵

Smithfield repeats this kind of environmental-stewardship claim throughout this report via other representations—often featuring large or bolded text or other emphases—including:

- “Our industry-leading efforts to minimize our environmental impact throughout our supply chain are important to protect our people and the communities where we operate.”⁵⁶
- “Innovating for a Clean Energy Future”⁵⁷
- “Our Water Policy outlines our commitment to proactively addressing water quality and use”⁵⁸
- “We obtain operating permits for our facilities from government agencies as required and use state-of-the-art control technologies to capture and treat emissions.”⁵⁹

This most recent sustainability report is no outlier. Smithfield’s 2017 Sustainability Report described its “unwavering commitment to doing business . . . the sustainable way” through its “industry-leading sustainability program[.]”⁶⁰ It claimed that “[s]ustainability is firmly ingrained

⁵⁴ Smithfield, 2019 Sustainability Impact Report 10, 36, https://www.smithfieldfoods.com/pdf/sustainability/SMITHFIELD_CSR_Report.pdf (last visited Jan. 27, 2021). Instead, Smithfield received more notices of violations of environmental regulations at its U.S. facilities in 2019 than in previous years. *Id.* at 112.

⁵⁵ For example, its 2019 Sustainability Impact Report presents readers with dozens of pages presenting easily accessible and emphasized sustainability claims up front, and buries disclosures that contradict these representations in small-print tables near the very end of the 100+ page report. *Compare id.* at 10 (claiming to be “on track” to achieve “zero” notices of environmental non-compliance), *with id.* at 112 (showing an annual *increase* in notices of violations at Smithfield-owned facilities and further disclosing 46 violations at its contract farms conveniently left out of any previous portion of the report).

⁵⁶ *Id.* at 35.

⁵⁷ *Id.* at 37.

⁵⁸ *Id.* at 44.

⁵⁹ *Id.* at 46.

⁶⁰ Smithfield, 2017 Sustainability Report 13 (2017), <https://www.smithfieldfoods.com/pdf/past-reports/smithfield-2017-sustainability-report.pdf> (last visited Jan. 27, 2021).

in our company’s culture[.]” and devoted entire sections spanning dozens of pages to “Environmental Stewardship.”⁶¹

Smithfield has also baked a number of environmental guarantees into its public-facing company policies. The company promises that it “will provide the human, physical, and financial resources necessary to meet [its] commitment” to “the environment.”⁶² Smithfield’s Water Policy, which it purports to be “[c]onsistent with Smithfield’s commitment to environmental stewardship,” claims to “place the highest priority on the conservation and protection of this critical resource.”⁶³ It further self-identifies Smithfield as a “leader in [its] commitment to protect and enhance the environment,” and promises to “take a leadership role in managing water supplies cooperatively,” “help ensure the sustainability of this essential resource,” and “be responsible stewards of water supplies and partners with our communities to ensure the sustainability of the resource.”⁶⁴

One of the recent linchpins of Smithfield’s environmental marketing scheme is its promotion of anaerobic digesters to produce biogas at some of its facilities. Front and center on its “Environment” website are the company’s so-called “manure-to-energy projects.”⁶⁵ Smithfield presents the installation of digesters as a momentous leap towards sustainability. According to Smithfield, “[w]hen we set an objective, we go big at Smithfield to achieve it. . . . Our investment in [digesters] underscores our longstanding commitment to sustainability, as well as our promise to produce good food in a responsible way.”⁶⁶ Through its supposedly “audacious” digester

⁶¹ *Id.* at 13, 56-95.

⁶² Smithfield, *Human Rights Policy*, *supra* note 2.

⁶³ Smithfield, *Water Policy*, <https://www.smithfieldfoods.com/our-policies-and-disclosures/water-policy> (last visited Jan. 27, 2021).

⁶⁴ *Id.*

⁶⁵ Smithfield, *Environment*, *supra* note 5.

⁶⁶ Smithfield, *Smithfield Foods Announces Landmark Investment to Reduce Greenhouse Gas Emissions* (Oct. 25, 2018), <https://www.smithfieldfoods.com/press-room/company-news/smithfield-foods-announces-landmark-investment-to-reduce-greenhouse-gas-emissions> (last visited Jan. 27, 2021).

projects, Smithfield tells consumers that it is “confident [it] can bring about sustainable, revolutionary progress in [its] effort to minimize our environmental footprint.”⁶⁷

No matter where a consumer might look—whether it is at Smithfield’s company websites, its video advertisements, its company social media accounts, or even its public-facing company policies—these environmental sustainability and responsibility messages pervade. Smithfield pushes brand and product greenwashing across all forms of marketing available to it, despite tremendous evidence to the contrary.⁶⁸

B. The Reality of Smithfield’s Production Practices and Environmental Impacts Squarely Contradicts Its Greenwashing Campaign.

Contrary to Smithfield’s representations of being a sustainability leader and producing its products with environmentally-friendly methods, Smithfield is one of the biggest polluters in the United States and is a leader in perpetuating the profoundly unsustainable and environmentally and socially harmful factory farm system of production.⁶⁹ Smithfield’s products are produced from animals raised and processed in industrial facilities that maximize profit at the expense of environmental protection, community health, and animal welfare. Smithfield’s imagery that paints a picture of sustainable, environmentally-friendly farms is squarely contradicted by Smithfield’s actual facilities and those it contracts with to produce its products.

Figures 6 and 7 below illustrate the true nature of Smithfield’s pork production facilities. Figure 6 shows the crowded, filthy conditions typical of the massive confinement barns Smithfield uses and requires its contract producers to use. Figure 7 shows one of Smithfield’s more recent

⁶⁷ *Id.*

⁶⁸ The allegations of this Complaint are intended to encompass all such representations, past and present, in all their verbal and visual iterations, whether or not a particular claim is specifically discussed or cited herein.

⁶⁹ A primer on what constitutes a “factory farm” can be found on FWW’s “Farm vs. Factory” website, https://farmvsfactory.org/?ms=fwvs_ot_10172019_problems-page&oms=fwvs_ot_10172019_problems-page (last visited Jan. 27, 2021).

business ventures in Utah, where it has built massive complexes of factory farms to confine hundreds of thousands of pig in order to capitalize on extracting biogas from their manure.⁷⁰



Figure 6. Images from then-Smithfield contract farm, Kinlaw Farms, North Carolina.⁷¹

⁷⁰ Steve Maxfield, *Pigs, Poop & Pandemic*, Millard Cnty. Chronicle Progress (Oct. 28, 2020), <https://millardccp.com/news/wildlife-news/5045-pigs-poop-pandemic> (last visited Jan. 27, 2021).

⁷¹ Lisa Sorg, *You Can't Photograph a Smell: Lawyers, Witnesses Debate Hog Farm Stench at Smithfield Nuisance Trial*, NC Policy Watch (Apr. 2, 2018), <http://www.ncpolicywatch.com/2018/04/05/you-cant-photograph-a-smell-lawyers-witnesses-debate-hog-farm-stench-at-smithfield-nuisance-trial/> (last visited Jan. 27, 2021).

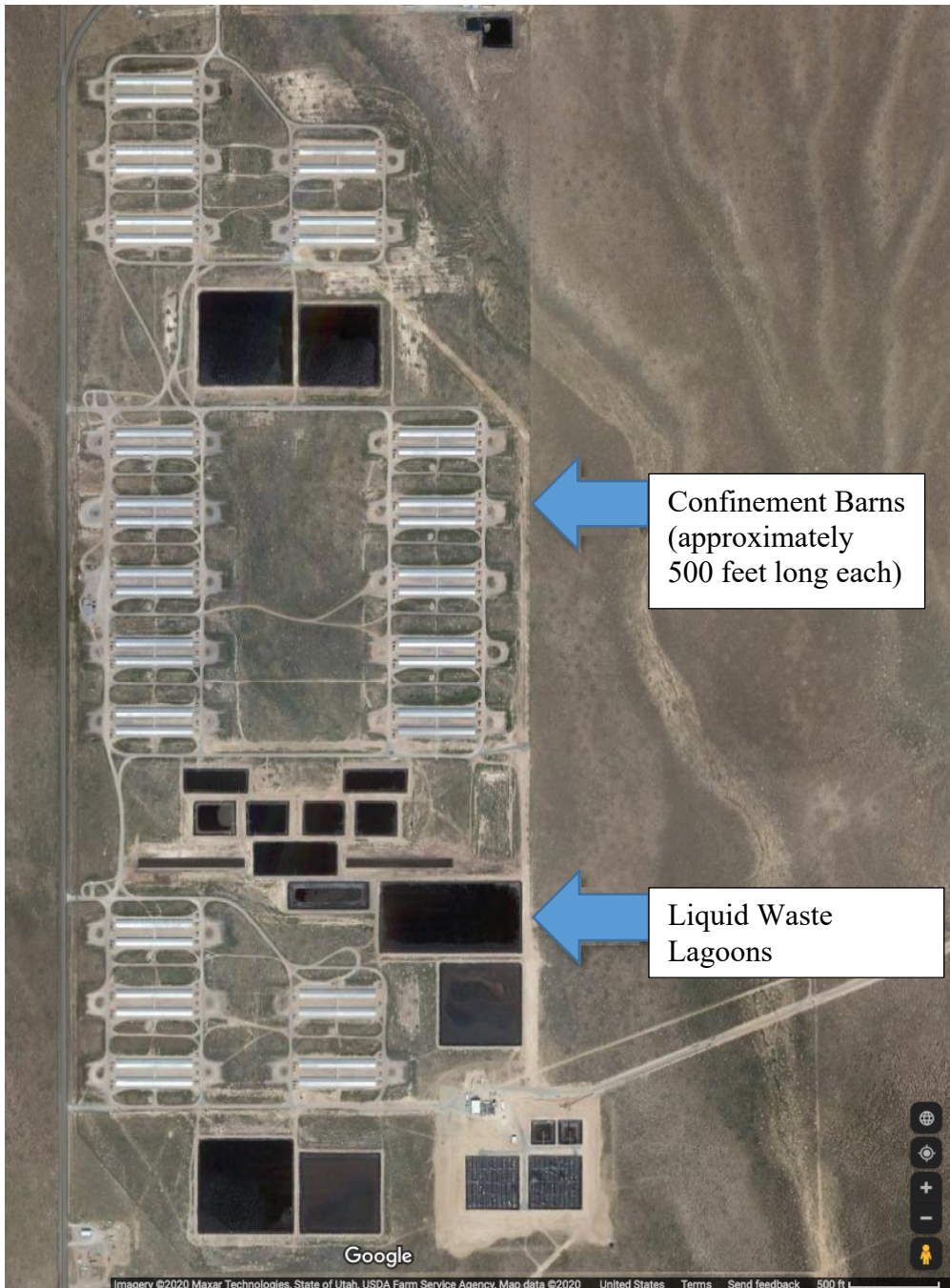


Figure 7. On information and belief, this is one of many massive factory farms that Smithfield operates or controls in Utah, as seen from above,⁷² with barn and waste lagoon labels added by Petitioners for ease of reference. This image is a just one of many such factory farm complexes in Beaver County, Utah.

⁷² Google Maps, <https://www.google.com/maps/place/Smithfield+Hog+Production+-Rocky+Mountain+Region/@38.1723846,-113.2880175,4723m/data=!3m1!1e3!4m12!1m6!3m5!1s0x0:0x6f6128dc383a2ff4!2sSmithfield+Hog+Production+-Rocky+Mountain+Region!8m2!3d38.3944152!4d-113.0112076!3m4!1s0x0:0x6f6128dc383a2ff4!8m2!3d38.3944152!4d-113.0112076> (last visited Jan. 27, 2021).

Smithfield’s long history of violating environmental laws and its adoption of factory farm biogas production that locks in the mismanagement of its pollution-laden waste underscore the reality that Smithfield’s practices are quintessentially *unsustainable*. While Smithfield tells consumers that its production facilities are “the opposite” of “factory farms,”⁷³ the company in reality relies on the factory farm model from start to finish. Put simply, Smithfield’s actual practices and products are unavoidably at odds with how a reasonable consumer would understand Smithfield’s environmentally-related advertisements and marketing.

1. Contrary to Its Marketing, Smithfield’s Pork Production Is Highly Polluting and Environmentally Unsustainable.

Contrary to Smithfield’s representations, Smithfield pork operations take a tremendous toll on the environment and local communities. Lax environmental regulations already permit Smithfield to pollute air and water resources across the country, yet the company still regularly fails to comply with even these minimal environmental requirements. Smithfield’s long history of noncompliance with environmental laws and continued pollution of air and waterways renders its greenwashing campaign patently false or misleading.

Notwithstanding its promises to “be responsible stewards of water supplies,”⁷⁴ Smithfield’s actual record when it comes to water use and protection is nothing short of atrocious. According to a 2016 report by the research group Environment America, the U.S. Environmental Protection Agency’s (“EPA”) Toxic Release Inventory (“TRI”) catalogues 27.3 million pounds of toxic pollutants released directly into waterways by Smithfield between 2010 and 2014.⁷⁵ In 2015, Smithfield’s plant in Tar Heel, North Carolina *alone* discharged almost 4 million pounds of water

⁷³ Smithfield, *Introduction & Overview--Taking the Mystery out of Pork Production at Smithfield Foods*, *supra* note 28.

⁷⁴ Smithfield, *Water Policy*, *supra* note 63.

⁷⁵ Rumpler, *supra* note 3, at 17.

pollutants.⁷⁶ The EPA found federal Clean Water Act violations at that facility in *all 12 of the past 12 quarters*.⁷⁷ And a track record of water pollution violations is not limited to Smithfield’s North Carolina operations: its Sioux Falls processing plant violated its water discharge permit many times throughout 2018, 2019, and 2020, including the discharge into public waters of 353,300% more fecal coliform than its permit allows.⁷⁸ Far from “plac[ing] the highest priority on the conservation and protection of this critical resource,”⁷⁹ Smithfield consistently prioritizes profit over responsible environmental stewardship.

In fact—in sharp contrast to its supposed “commit[ment] to the very highest standards of . . . environmental protection”⁸⁰—among agribusinesses, Smithfield is the third-largest water polluter among meatpackers in the country and the sixth-largest water polluter among *all* industrial polluters in the United States.⁸¹ Its fundamentally unsustainable factory farming model has resulted in acute as well as persistent and cumulative environmental harm, with catastrophic impacts to water quality, aquatic ecosystems, and communities living near its facilities. For example, Smithfield’s North Carolina operations have contributed to massive fish kills in the state, including an estimated 100 million fish in 2009 and 1 *billion* in 1995.⁸² In 2018, irresponsible waste management led to “rivers of hog waste” spilling into the environment in the predictably hurricane-prone areas where Smithfield’s contract growers raise millions of its pigs according to its strict

⁷⁶ U.S. Env’tl. Prot. Agency, *Detailed Facility Report: Smithfield Packing Company Incorporated – Tar Heel*, ECHO, <https://echo.epa.gov/detailed-facility-report?fid=110007377338> (last visited Jan. 27, 2021) (hereinafter “Tar Heel Facility Report”).

⁷⁷ *Id.* (ending Sept. 30, 2020).

⁷⁸ U.S. Env’tl. Prot. Agency, *Detailed Facility Report: Smithfield Packaged Meats Corp. – Sioux Falls*, ECHO, <https://echo.epa.gov/detailed-facility-report?fid=110000427823> (last visited Dec. 14, 2020).

⁷⁹ Smithfield, *Water Policy*, *supra* note 63.

⁸⁰ Smithfield, *Introduction & Overview--Taking the Mystery out of Pork Production at Smithfield Foods*, *supra* note 28.

⁸¹ Rumpler, *supra* note 3, at 2 table ES-3.

⁸² *Id.* at 17.

specifications.⁸³ And the predictable environmental catastrophes caused by the production and waste management practices that Smithfield demands its producers use continues unabated, with a Smithfield lagoon spilling an estimated 1 million gallons of waste into the local environment in late December, 2020.⁸⁴ Any reasonable consumer who purchases a Smithfield product in reliance on the company's greenwashing campaign would find its ignominious status among the nation's largest polluters and its track record of persistently harming the environment and local communities a shocking deceit.

Exacerbating Smithfield's impact on the nation's waters is its massive consumption of freshwater resources. Buried near the end of its 2019 Sustainability Report, hidden behind the plethora of sustainability and environmental protection claims, Smithfield discretely discloses that its water usage and wastewater discharges are consistently rising year after year, while the amount of water it reuses or recycles has dropped.⁸⁵ In 2019 alone, Smithfield consumed 5.19 billion gallons of groundwater, 4.95 billion gallons of municipal water, and 1 billion gallons of surface water to run its operations, for a total of 11.14 billion gallons.⁸⁶ Put into context, this means that Smithfield's company owned sites alone consume more water than all the domestic fresh water users combined in approximately 20 U.S. states and territories, and this does not appear to account

⁸³ Charles Bethea, *Should Smithfield Foods Have Prevented the "Rivers of Hog Waste" in North Carolina after Florence?*, *New Yorker* (Sept. 30, 2018), <https://www.newyorker.com/news/news-desk/could-smithfield-foods-have-prevented-the-rivers-of-hog-waste-in-north-carolina-after-florence> (last visited Jan. 27, 2021); *McKiver v. Murphy-Brown*, 980 F.3d 937, 2020 U.S. App. LEXIS 36416, at *5–*6 (4th Cir. 2020) (“[Smithfield] imposes standard operating procedures for all of its contract growers. Specifically, [Smithfield] . . . mandates design and construction of operations; (3) can require the use of technological enhancements; (4) can require capital investments; . . . and (6) controls hog waste management systems.”).

⁸⁴ See, e.g., Lisa Sorg, *Partial Hog Lagoon Breach Spills 3 Million Gallons of Feces, Urine in Sampson County*, NC Policy Watch (June 15, 2020), <http://pulse.ncpolicywatch.org/2020/06/15/partial-hog-lagoon-breach-spills-3-million-gallons-of-feces-urine-in-sampson-county/#sthash.9P890LbW.KjDv9NYC.dpbs> (last visited Jan. 27, 2021); Lisa Sorg, *Hog Farm that Spilled 1 Million Gallons of Feces, Urine Into Waterways Had Been Warned of Lagoon Problems*, NC Policy Watch (Jan. 12, 2021), <http://www.ncpolicywatch.com/2021/01/12/hog-farm-that-spilled-1-million-gallons-of-feces-urine-into-waterways-had-been-warned-of-lagoon-problems/> (last visited Jan. 27, 2021).

⁸⁵ Smithfield, 2019 Sustainability Impact Report, *supra* note 54, at 107.

⁸⁶ *Id.*

for the many contract facilities that Smithfield controls that also use large amounts of water to flush animal waste into lagoons.⁸⁷

Much of the fresh water that Smithfield uses ends up contaminated with animal manure, blood, and other pollutants, which then has to be managed and disposed of. Unfortunately, Smithfield fails to responsibly address this vast amount of pollution-laden wastewater its operations generate and opts for cheap and dirty methods to maximize profit, rendering its “guarantee of the highest environmental standards in the Smithfield production process”⁸⁸ patently misleading. Per Environment America’s report, Smithfield’s contract hog operations generate almost 19 million tons of pig manure per year.⁸⁹ For reference, “[t]he 500,000 hogs at *one* Smithfield subsidiary in Utah create *eight times* more waste than the Salt Lake City metro area, the state’s biggest city.”⁹⁰ Once combined with fresh water, Smithfield stores this waste in massive lagoons. These rudimentary impoundments leak,⁹¹ and they often spill into nearby water bodies as exemplified above.⁹² These environmentally hazardous practices mean that it is “highly likely that a significant portion of manure from hogs in Smithfield’s supply-chain wind[s] up in our waterways.”⁹³

⁸⁷ See U.S. Geological Survey, Circular 1441, Estimated Use of Water in the United States in 2015, at 10, <https://pubs.usgs.gov/circ/1441/circ1441.pdf> (last visited Jan. 27, 2021) (calculation to enable comparisons: 11.14 billion gallons per year / 365 days = 30,520,547.94 gallons/day).

⁸⁸ Smithfield, *Why Smithfield?*, *supra* note 1.

⁸⁹ Rumpler, *supra* note 3, at 17.

⁹⁰ FWW, *The Trouble with Smithfield: A Corporate Profile* iv (2008) (emphases added), https://www.foodandwaterwatch.org/sites/default/files/smithfield_corporate_profile_report_apr_2007.pdf (last visited Jan. 27, 2021).

⁹¹ *E.g.*, *Cnty. Ass’n for Restoration of the Env’t v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1223 (E.D. Wash. 2015) (“[E]ven assuming the lagoons were constructed pursuant to [Natural Resources Conservation Service] standards, these standards specifically allow for permeability and, thus, the lagoons are designed to leak.”).

⁹² See also Env’t America, *Agricultural Waste Lagoons* 1–2 (2018), <https://environmentamerica.org/sites/environment/files/AccidentsFactsheet-ManureLagoons.pdf> (last visited Jan. 27, 2021).

⁹³ Rumpler, *supra* note 3, at 17.



Figure 8. A lagoon full of pig excrement the size of multiple football fields at a Smithfield facility.⁹⁴



Figure 9. A North Carolina manure lagoon overflowing in Hurricane Florence's aftermath.⁹⁵

⁹⁴ SpeciesismTheMovie, *Spy Drones Expose Smithfield Foods Factory Farms*, YouTube (Dec. 17, 2014), <https://www.youtube.com/watch?v=ayGJ1YSfDXs> (last visited Jan. 27, 2021).

⁹⁵ Rick Dove, *_67P0087*, Flickr (Sept. 17, 2018), <https://www.flickr.com/photos/waterkeeperalliance/42940206780/in/album-72157698057980582/> (last visited Jan. 27, 2021).

Another reason why Smithfield’s waste ends up in the public’s waterways and harms local residents is Smithfield’s irresponsible disposal of untreated manure and other pollutants by spraying the waste on fields under the pretense that it is nothing more than a beneficial fertilizer. This standard operating procedure at Smithfield facilities causes extreme nuisances for local residents, can aerosolize zoonotic microorganisms (*i.e.*, human disease causing pathogens), and contaminates both ground and surface waters, among other harmful outcomes.⁹⁶ While Smithfield is more than sufficiently profitable to change this and other harmful practices to better protect the environment and its neighbors by, for example, not liquefying animal manure for storage in lagoons and to facilitate biogas production, it opts to continue employing these cheap waste-management and disposal methods to maximize profits.⁹⁷ Only when Smithfield can squeeze ever more profits out of its deliberately unsustainable processes does it find the money needed, such as the \$500 million it has committed to generating biogas from its harmful waste.⁹⁸

⁹⁶ *E.g.*, Nate Seltenrich, *Manure Irrigation: Environmental Benefits, Potential Human Health Risks*, 125(12) *Env’tl Health Perspectives* (Dec. 12, 2017), <https://ehp.niehs.nih.gov/doi/pdf/10.1289/EHP2233> (last visited Jan. 27, 2021).

⁹⁷ See N.C. State U., Animal and Poultry Waste Management Center, *The Agreement*, https://projects.ncsu.edu/cals/waste_mgt/smithfield_projects/smithfieldsite.htm (last visited Jan. 27, 2021) (providing an overview of the agreement Smithfield entered into with North Carolina in 2000 to implement “environmentally superior technologies,” but that it never followed through with by complaining about higher costs).

⁹⁸ Dominion Energy, *Dominion Energy and Smithfield Foods Invest Half Billion Dollars to Become Largest Renewable Natural Gas Suppliers in U.S.* (Oct. 23, 2019), <https://investors.dominionenergy.com/news/press-release-details/2019/Dominion-Energy-and-Smithfield-Foods-Invest-Half-Billion-Dollars-to-Become-Largest-Renewable-Natural-Gas-Supplier-in-US/default.aspx> (last visited Jan. 27, 2021).



Figure 10. An example of a typical spray gun used to dispose of factory farm waste on fields,⁹⁹ other methods of spray application are also common.

Smithfield’s irresponsible waste generation and management cause further problems in addition to severe environmental impacts. They also negatively impact quality of life and threaten the health of communities living nearby, disproportionately affecting low-income and minority communities.¹⁰⁰ The realities on the ground belie Smithfield’s representations that it is “committed to protecting the environment on and around our hog farms through pollution prevention”¹⁰¹ or that it is a “responsible steward[] of water supplies and partner[] with our communities.”¹⁰² For

⁹⁹ Seltenrich, *supra* note 96.

¹⁰⁰ For example, Smithfield’s Tar Heel, North Carolina plant is located in an area with a 60% minority population and half of whose population falls below the federal poverty line. *Tar Heel Facility Report*, *supra* note 76. Moreover, its North Carolina hog raising facilities are disproportionately sited in low-income and minority communities.

¹⁰¹ Smithfield, 2017 Sustainability Report, *supra* note 60, at 74.

¹⁰² Smithfield, *Water Policy*, *supra* note 63.

example, in 2014, more than 500 mostly African American North Carolinians brought more than two dozen federal lawsuits alleging that Smithfield’s waste lagoons and accompanying field spraying had created a nuisance for people unfortunate enough to live near Smithfield facilities.¹⁰³ The jury agreed and awarded ten plaintiffs \$50.75 million.¹⁰⁴ Smithfield lost all five subsequent nuisance cases from groups of those plaintiffs, including multiple cases for which the company chose the specific plaintiffs.¹⁰⁵ In those cases, juries found Smithfield liable for damages ranging from \$102,400 to \$473.5 million.¹⁰⁶ The first of these cases to go up on appeal was upheld by the Fourth Circuit, which recognized that Smithfield engaged in “egregious conduct” by “deliberately continuing to disregard [its] duty not to harm neighbors’ use and enjoyment of their own land – because doing so would increase profits.”¹⁰⁷ This pattern of deliberate conduct makes a mockery of Smithfield’s claim that it “is committed to ensuring the health, safety, and well-being of ... the people living and working in communities near our facilities.”¹⁰⁸

Smithfield’s environmental pollution is not limited to water, but also includes air pollution. Its Tar Heel slaughterhouse has a history of Clean Air Act violations and very high air emissions of harmful pollutants in recent years.¹⁰⁹ For example, in 2017, it released almost 126,000 pounds of ammonia, almost quadruple its ammonia emissions the previous year.¹¹⁰ In 2015, that same facility emitted 82,130 pounds of hydrogen sulfide (up from less than 5,000 pounds the previous

¹⁰³ Barry Yeoman, *Here Are the Rural Residents Who Sued the World’s Largest Hog Producer over Waste and Odors—and Won*, Food & Env’t Reporting Network (Dec. 20, 2019), <https://thefern.org/2019/12/rural-north-carolinians-won-multimillion-dollar-judgments-against-the-worlds-largest-hog-producer-will-those-cases-now-be-overtuned/> (last visited Feb. 2, 2020).

¹⁰⁴ *Id.* A judge subsequently reduced the award to \$3.25 million because North Carolina law caps punitive damages.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* A judge subsequently reduced the \$473.5 million award to \$94 million because North Carolina law caps punitive damages.

¹⁰⁷ *Murphy-Brown*, *supra* note 83, at *70 (cleaned up).

¹⁰⁸ Smithfield, *Human Rights Policy*, *supra* note 2.

¹⁰⁹ *Tar Heel Facility Report*, *supra* note 76.

¹¹⁰ *Id.*

year) and 3,904,720 pounds of nitrate compounds (up from about 1,840,000 pounds in 2013).¹¹¹ These air pollutants endanger public health and the environment: ammonia pollutes soil and water and is a precursor to dangerous 2.5PM (particulate matter with a diameter of 2.5 microns or less that is a major public health concern);¹¹² hydrogen sulfide is associated with a long list of negative health effects such as eye irritation, respiratory tract irritation, fatigue, loss of appetite, and even death at high enough concentrations or prolonged exposure;¹¹³ and nitrate particles contribute to acid rain and are associated with a host of health problems including development of asthma in children.¹¹⁴ This single Smithfield plant's greenhouse gas emissions total was 77,179 metric tons of carbon dioxide equivalent in 2019—the equivalent of 191,511,166 average passenger cars over the span of one year.¹¹⁵ And unfortunately, air pollution from the factory farms where Smithfield's hogs are raised is essentially unregulated and unaccounted for, meaning that air pollution directly attributable to the production of Smithfield's products is far greater than available data suggest.¹¹⁶

These environmental impacts are a common feature across Smithfield's facilities and those that it controls to produce its products. Its Crete, Nebraska facility faced a \$58,030 penalty in 2018 for failing to adhere to Clean Water Act requirements.¹¹⁷ Its facility in Arnold, Pennsylvania, was

¹¹¹ *Id.*

¹¹² *E.g.*, Susan W. Gay et al., *Ammonia Emissions and Animal Agriculture*, Va. Tech (2009), <https://vtechworks.lib.vt.edu/bitstream/handle/10919/50720/442-110.pdf?sequence=> (last visited Jan. 27, 2021).

¹¹³ *E.g.*, World Health Organization, *Hydrogen Sulfide: Human Health Effects* (2003) 13–18, <https://www.who.int/ipcs/publications/cicad/en/cicad53.pdf> (last visited Jan. 27, 2021).

¹¹⁴ U.S. Env'tl. Prot. Agency, EPA/600/R-15/068, *Integrated Science Assessment for Oxides of Nitrogen – Health Criteria* (Jan. 2016), <https://cfpub.epa.gov/ncea/isa/recordisplay.cfm?deid=310879> (last visited Jan. 27, 2021).

¹¹⁵ U.S. Env'tl. Prot. Agency, *GHG Summary Report: Smithfield Farmland Corp—Tar Heel*, GHG Data, <https://ghgdata.epa.gov/ghgp/service/html/latest?et=undefined&id=1001851> (last visited Jan. 27, 2021); *see* U.S. Env'tl. Prot. Agency, <https://www.epa.gov/energy/greenhouse-gas-equivalencies-calculator> (last visited Feb. 3, 2021).

¹¹⁶ *See, e.g.*, U.S. Env'tl. Prot. Agency, Office of Inspector General, Report No. 17-P-0396, *Eleven Years After Agreement, EPA Has Not Developed Reliable Emissions Estimation Methods to Determine Whether Animal Feeding Operations Comply with Clean Air Act and Other Statutes* (Sept. 19, 2017), https://www.epa.gov/sites/production/files/2017-09/documents/epaog_20170919-17-p-0396.pdf (last visited Jan. 27, 2021).

¹¹⁷ U.S. Env'tl. Prot. Agency, *Detailed Facility Report: Smithfield Farmland Corp—Crete*, ECHO, <https://echo.epa.gov/detailed-facility-report?fid=110064150449> (last visited Jan 27, 2021).

found to violate the Clean Air Act many times in recent years, also yielding a formal enforcement action and penalties.¹¹⁸ South Dakota’s Department of Environmental and Natural Resources fined Smithfield more than \$53,000 in 2018, and had to issue another fine within a year, for violating its water discharge permit.¹¹⁹ These representative examples comprise a small subset of Smithfield’s federal environmental violations nationwide.

The FTC need not take Petitioners’ word, and the ample evidence compiled here, alone. After being presented with a robust factual record regarding Smithfield’s operations in North Carolina showing the harmful realities behind Smithfield’s production practices, the Honorable Judge Wilkinson of the Fourth Circuit Court of Appeals recently concluded that “interlocking dysfunctions” characterize Smithfield’s production model, leading to air and water pollution and serious harm to communities unlucky enough to live near a Smithfield facility.¹²⁰ Further, the harm caused by Smithfield’s practices is avoidable, yet Smithfield continued (and continues) to “willful[ly]” and “wanton[ly]” harm its neighbors despite full knowledge of the problems.¹²¹

The catalog of ongoing and prevalent environmental and community harms caused by Smithfield makes its “promise” to “be[] ever mindful of the impact our operations have on the planet” patently false or misleading.¹²² Despite telling consumers that Smithfield is “on target” to reach “100% compliance, 100% of the time,” notices of violations issued to Smithfield and its contract factory farms in the U.S. *increased* in 2019 to at least 66 formally recognized violations

¹¹⁸ U.S. Env’tl. Prot. Agency, *Detailed Facility Report: Farmland Foods Inc*, ECHO, <https://echo.epa.gov/detailed-facility-report?fid=110013341801> (last visited Jan. 27, 2021).

¹¹⁹ Lisa Kaczke, *South Dakota Fines Smithfield Foods for Wastewater Violations in Sioux Falls*, Argus Leader (Dec. 7, 2018), <https://www.argusleader.com/story/news/politics/2018/12/06/south-dakota-fines-smithfield-foods-big-sioux-river/2226585002/> (last visited Jan. 27, 2021); Lisa Kaczke, *South Dakota Environment Agency Fines Smithfield Foods for Water Violations*, Argus Leader (Nov. 19, 2019), <https://www.argusleader.com/story/news/politics/2019/11/19/south-dakota-environment-agency-fines-smithfield-foods-water-violations/4239333002/> (last visited Jan. 27, 2021).

¹²⁰ *Murphy-Brown*, *supra* note 83, at *96–*97.

¹²¹ *See id.* at *62–63, *100.

¹²² Smithfield, *supra* note 23.

of environmental protection laws.¹²³ Moreover, these are violations of minimally protective environmental requirements that, even if complied with, would not substantiate sustainability claims like those made by Smithfield. And many of Smithfield’s facilities are subject to *zero* air pollution regulation or oversight; therefore, much of Smithfield’s air pollution is unaccounted for in these violation figures or elsewhere.

In sum, Smithfield’s pork operations have a profoundly negative impact on the environment and the communities living near its facilities. As one of the very largest polluters in the U.S., the company’s representations regarding environmental sustainability are egregiously deceptive.

2. Smithfield’s Biogas Marketing Is a Deceptive Greenwashing Campaign.

Smithfield’s representations touting the purported environmental benefits from its production of factory farm biogas are false and misleading. Smithfield’s digester projects are not a solution to its large climate change contributions, but rather are part and parcel of its concerted and aggressive greenwashing campaign to hide the reality that it is one of the United States’ largest and most dangerous polluters. Smithfield’s supposed “revolutionary progress”¹²⁴ towards sustainability, which it attributes to digesters, is quintessential greenwashing¹²⁵ and these representations are designed to confuse and mislead consumers concerned about climate change and the environmental impact of products they purchase.

¹²³ Smithfield, 2019 Sustainability Impact Report, *supra* note 54, at 10, 112 (as explained above, the truth of the matter comes buried in small print tables at the end of the company’s Sustainability Report, while the misleading compliance claims are emphasized early in the document).

¹²⁴ Smithfield, *Smithfield Foods Announces Landmark Investment to Reduce Greenhouse Gas Emissions* (Oct. 25, 2018), <https://www.smithfieldfoods.com/press-room/company-news/smithfield-foods-announces-landmark-investment-to-reduce-greenhouse-gas-emissions> (last visited Jan. 27, 2021).

¹²⁵ Many environmental and public health advocates have concluded that Smithfield’s digester scheme is “a classic case of greenwashing.” *E.g.*, Dan Charles, *Big Companies Bet on Cleaner Power from Pig Poop Ponds*, NPR (Nov. 22, 2019), <https://www.npr.org/sections/thesalt/2019/11/22/781565978/big-companies-bet-on-cleaner-power-from-pig-poop-ponds> (last visited Jan. 27, 2021) (quoting Blakely Hildebrand, an expert on Smithfield’s operations and an attorney with the Southern Environmental Law Center).

Anaerobic digesters are designed to generate and capture gases from waste such as manure or slaughterhouse waste. The primary gas of economic interest is methane, which is generated by bacteria consuming certain constituents of Smithfield’s waste in oxygen-free environments. This biogas can then be refined into what the industry calls “biomethane,” which can be injected into natural gas pipelines and used interchangeably with fossil natural gas, including gas produced from hydraulic fracturing or “fracking.” Despite Smithfield’s aggressive marketing that paints digesters as a win-win-win, digesters fundamentally entrench the most dangerous factory farm production practices (such as the lagoon-and-sprayfield model of manure management) and prop up continued reliance on dirty natural gas infrastructure that will continue delivering and burning fossil natural gas, while doing nothing to alleviate the vast majority of pollution generated at Smithfield’s facilities.¹²⁶

Smithfield’s “audacious” marketing conveniently fails to recognize the hard realities behind its investment in digesters; this investment is designed to monetize its dangerous waste rather than solving the root problems of its unsustainable factory farm model and the waste management practices inherent in that model. For starters, Smithfield fails to mention that its “plan includes building numerous new factory farms in Utah to capitalize on this technology.”¹²⁷ Thus, Smithfield plans to build and geographically concentrate *new* sources of pollution that deliberately rely on Smithfield’s preferred and harmful method of manure mismanagement, and then burnish

¹²⁶ E.g., Patty Lovera, *Smithfield Manure-to-Energy Plan Is a False Solution for the Environment* (Oct. 26, 2018), <https://www.foodandwaterwatch.org/news/smithfield-manure-energy-plan-false-solution-environment> (last visited Jan. 27, 2021); David Roberts, *The False Promise of “Renewable Natural Gas”*, Vox (Feb. 20, 2020), <https://www.vox.com/energy-and-environment/2020/2/14/21131109/california-natural-gas-renewable-socalgas> (last visited Jan. 27, 2021) (explaining that there is not enough biogas to displace the vast majority of natural gas demand under scenarios that assume continued use of natural gas infrastructure as opposed to transitioning to electrification, even when generously quantifying all potential sources, and citing supporting research).

¹²⁷ Lovera, *supra* note 126; Smithfield, *Smithfield Foods Announces Landmark Investment to Reduce Greenhouse Gas Emissions* (Oct. 25, 2018), <https://www.smithfieldfoods.com/press-room/company-news/smithfield-foods-announces-landmark-investment-to-reduce-greenhouse-gas-emissions> (last visited Jan. 27, 2021) (“building 26 hog farms equipped with covered lagoons specifically designed for anaerobic digestion” in Utah).

claims of sustainability by reducing a fraction of this additional pollution. Smithfield's scheme for producing factory farm biogas is only economically viable for the largest industrialized livestock facilities,¹²⁸ and so adopting this technology necessitates Smithfield's long-term commitment to the most harmful production methods on the largest possible factory farms. It is the factory farm model that makes animals' waste a harmful greenhouse gas source in the first place: when animals are allowed access to the outdoors and they roam on pasture, their waste breaks down naturally and does not generate methane emission.¹²⁹

Moreover, Smithfield maximizes profits by further concentrating its operations and its pollution impacts so that its biogas infrastructure can access large amounts of waste as cheaply as possible. In other words, Smithfield's production of gas from hog manure *fundamentally depends* on the very factory farm production model that creates a plethora of pollution problems in the first place, and the regional consolidation that has long resulted in harm to certain communities and environments and extreme environmental justice problems. Far from being sustainable, Smithfield's scheme entrenches the overtly unsustainable factory farm system, and then monetizes its deliberate mismanagement.

Smithfield also leaves out that the waste remaining after digestion, called digestate, is *more risky* to the environment than what Smithfield started with because the process changes the basic

¹²⁸ See Markus Lauer et al., *Making Money from Waste: The Economic Viability of Producing Biogas and Biomethane in the Idaho Dairy Industry*, 222 *Applied Energy* 621 (2018), <https://www.sciencedirect.com/science/article/pii/S0306261918305695> (last visited Jan. 27, 2021).

¹²⁹ When animal manure breaks down in an aerobic environment (*i.e.*, with oxygen), such as a pasture, it undergoes a natural decomposition process that results in the slow release of nutrients. This is a complex process that involves naturally-occurring microbes that break down the complex molecules in the waste into more plant-accessible basic nutrients, while releasing a modest amount of carbon dioxide. This process bears almost no resemblance to the highly industrialized, anaerobic process Smithfield employs to produce biogas. See Alan Newport, *Coming Up for Air*, *Beef Mag.* (Apr. 1, 2006), https://www.beefmagazine.com/mag/beef_coming_air (last visited Feb. 2, 2021) (describing the problems with anaerobic digestion and concluding that “[o]nce we understand nature’s preferences and biological principles, it’s only logical to look for ways to introduce higher levels of aerobic decomposition back into our modern manure handling systems”).

chemistry of the waste. The USDA’s Natural Resources Conservation Service warns that “[1]and application of digester effluent, compared with fresh manure, may have a higher risk for both ground and surface water quality problems. Compounds such as nitrogen, phosphorus, and other elements become more soluble due to anaerobic digestion and therefore have higher potential to move with water.”¹³⁰ Anaerobic digesters have been found to increase pH and available nitrogen and can increase ammonia emissions.¹³¹ Thus, the digesters that Smithfield promotes as a sustainable solution do not reduce, and can actually make worse, other pollutants that Smithfield then disposes of into the environment.

Smithfield *also* fails to mention that burning this gas releases significant quantities of other harmful pollutants into the atmosphere, including carbon dioxide, nitrogen oxides, ammonia, and hydrogen sulfide.¹³² This is in addition to the emissions from the digester facilities themselves through gas flaring and other control practices, as well as methane leaks common to natural gas delivery infrastructure.¹³³

Compounding the climate impacts of Smithfield’s foray into dirty gas production, Smithfield partners with some of the largest natural gas corporations, propping up and entrenching

¹³⁰ NRCS, 366-CPS-1, Conservation Practice Standard No. 366: Anaerobic Digester at 6, https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_026149.pdf (last visited Jan. 27, 2021).

¹³¹ Michael A. Holly et al., *Greenhouse Gas and Ammonia Emissions from Digested and Separated Dairy Manure During Storage and After Land Application*, 239 *Ag., Ecosystems & Env’t* 410 (Feb. 2017), <https://www.sciencedirect.com/science/article/pii/S0167880917300701> (last visited Jan. 27, 2021).

¹³² FWW, *Biogas From Factory Farm Waste Has No Place in a Clean Energy Future* at 3 (July 2019), https://www.foodandwaterwatch.org/sites/default/files/ib_1906_biogas_manure-2019-web.pdf (last visited Jan. 27, 2021); Jessica McKenzie, *The Misbegotten Promise of Anaerobic Digesters*, *Counter* (Dec. 3, 2019), <https://thecounter.org/misbegotten-promise-anaerobic-digesters-cafo/> (last visited Jan. 27, 2021) (“Burning biogas for energy [or through flaring] converts methane into carbon dioxide, and also produces carbon monoxide, nitrogen oxides, sulfur dioxide, and other hazardous air pollutants.”).

¹³³ *See, e.g.*, FWW, *Dirty Biogas Has No Place in the United States’ Clean Energy Future* at 2 (Dec. 2018), <https://www.foodandwaterwatch.org/insight/dirty-biogas-has-no-place-united-states-clean-energy-future> (last visited Jan. 27, 2021).

the natural gas industry that bears substantial responsibility for causing the climate crisis.¹³⁴ Instead of supporting a transition towards truly renewable clean energy, Smithfield’s digester scheme locks in dirty natural gas infrastructure and perpetuates greenhouse gas emissions. As FWW’s research concludes, “[e]ndorsing biogas encourages the buildout of even more leaky gas infrastructure that poses significant risks to communities and the climate.”¹³⁵ Adding insult to injury, on information and belief, Smithfield and the contract facilities it controls also syphon taxpayer dollars away from truly sustainable, environmentally-friendly projects to fund their digester projects, resulting in lost opportunity costs that hamper critical work to reduce pollution and greenhouse gas emissions from the agricultural sector.¹³⁶

In sum, while Smithfield tells consumers that extracting gas from its pollution-laden waste is laudable and assures that it is protecting the environment, and by extension that all of its products are sustainable, reality tells a much different story. Smithfield’s existing and proposed digester projects fundamentally rely on and entrench the manifestly unsustainable factory farm production model. This new business model also threatens to slow the necessary transition away from fossil gas to truly renewable energy that many consumers want to support. The FTC should not allow Smithfield to deceive consumers into thinking that slapping a technological band-aid on an abjectly unsustainable production model makes Smithfield and its products environmentally friendly or at all sustainable.

¹³⁴ See, e.g., Dominion Energy, *supra* note 98; Nat’l Hog Farmer, *Smithfield, RAE Invest More Resources Into Missouri RNG Project* (Feb. 20, 2020), <https://www.nationalhogfarmer.com/business/smithfield-rae-invest-more-resources-missouri-rng-project> (last visited Jan. 27, 2021).

¹³⁵ FWW, *Dirty Biogas Has No Place in the United States’ Clean Energy Future*, *supra* note 133, at 2.

¹³⁶ These taxpayer funds are accessed through state-level incentive programs and tax incentives, as well as federal programs such as the USDA’s Environmental Quality Incentives Program.

V. ANALYSIS UNDER THE FEDERAL TRADE COMMISSION ACT

For a representation to violate Section 5 of the FTC Act, it must be both “material” and “deceptive.”¹³⁷ Smithfield’s environmental sustainability and responsibility representations about its pork products are both material and deceptive.

A. Smithfield’s Representations Are Material.

Materiality is established when a representation “is likely to affect the consumer’s conduct or decision with regard to a product or service.”¹³⁸ Here, Smithfield directs its environmental claims at those consumers most likely to find these representations material: conscientious consumers inclined to purchase products that were sustainably produced. It is well established that many consumers care deeply about the environmental impact of food production; it is also clear that consumers rely on representations like those made by Smithfield to identify products as sustainably produced. The FTC, the Better Business Bureau, and even Smithfield itself have each recognized that social issues, including environmental impact, are of significant concern to consumers and have an important bearing on consumer purchasing decisions.¹³⁹ In fact, FTC Commissioner Rohit Chopra recently issued the following statement acknowledging the materiality of sustainability claims to consumers and the importance of preserving the integrity of the market for sustainable agricultural products:

I commend Commission staff for investigating fraudulent greenwashing This conduct distorted competition for organic products, inflicting harm on honest producers. . . . In cases involving such conduct, no-money settlements are

¹³⁷ FTC Policy Statement on Deception, *supra* note 15.

¹³⁸ *Id.*

¹³⁹ See Smithfield, *Materiality Analysis*, <https://www.smithfieldfoods.com/integrated-report/2017/governance-management/materiality-analysis#:~:text=Materiality%2C%20which%20identifies%20our%20company's,sustainability%20topics%20for%20Smithfield%20Foods> (last visited Jan. 27, 2021) (listing concerns like “[a]nimal welfare and management,” “[c]limate change,” and “[w]ater use and water quality” as among the most material concerns to Smithfield’s stakeholders); *Starbucks Corporation (Free Trade Certified Coffee)*, Report #4592, NAD Case Reports, at 1 (Nov. 8, 2006) (“Advertising claims which tout that the advertiser is addressing particular social or ethical concerns can provide consumers with important information about their purchasing choices.”).

inadequate, and the Commission should commit itself to exercising its full authority to protect consumers and honest businesses.¹⁴⁰

Numerous sources confirm that environmental sustainability representations such as those made by Smithfield are material to consumers. According to the 2015 Consumer Reports, “[a] range of environmental, safety and social responsibility objectives are *key (very important or important)* to most US consumers when shopping for food.”¹⁴¹ A 2015 Nielsen global survey of 30,000 consumers found that 66% of respondents were willing to pay more for products from companies “committed to positive social and environmental impact.”¹⁴² A 2017 international study by Unilever found that 33% of global consumers are “choosing to buy from brands they believe are doing social or environmental good” and further found that 78% of shoppers in the United States “say they feel better when they buy products that are sustainably produced.”¹⁴³ A 2017 survey of U.S. consumers, based on approximately 25,000 in-person interviews, found that 56% of consumers were willing to pay more for “environment-friendly (‘green’) products.”¹⁴⁴ When a 2019 consumer study asked consumers for the top three most important sustainability issues for companies to address, the four most frequent responses were “[a]ddressing air/water/soil pollution,” “[d]ecreasing waste,” “[m]inimizing impact on climate change,” and “[s]witching to renewable energy.”¹⁴⁵ Similarly, a 2019 Nielsen survey of more than 21,000 households found that

¹⁴⁰ Statement of Commissioner Rohit Chopra, *supra* note 10.

¹⁴¹ Consumer Reports National Research Center, Natural Food Labels Survey: 2015 Nationally-Representative Phone Survey at 3 (2015), http://article.images.consumerreports.org/prod/content/dam/cro/magazine-articles/2016/March/Consumer_Reports_Natural_Food_Labels_Survey_2015.pdf (last visited Jan. 27, 2021).

¹⁴² Nielsen Company, The Sustainability Imperative: New Insights on Consumer Expectations at 8 (2015), https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/Global20Sustainability20Report_October202015.pdf (last visited Jan. 27, 2021).

¹⁴³ Unilever, *Report Shows a Third of Consumers Prefer Sustainable Brands* (May 1, 2017), <https://www.unilever.com/news/press-releases/2017/report-shows-a-third-of-consumers-prefer-sustainable-brands.html> (last visited Jan. 27, 2021).

¹⁴⁴ David Stanton, *In US, Willingness to Pay More for Environment-Friendly Products Grows*, Growth from Knowledge (Apr. 17, 2017), <https://www.gfk.com/en-us/insights/press-release/in-us-willingness-to-pay-more-for-environment-friendly-products-grows/> (last visited Jan. 27, 2021).

¹⁴⁵ The Hartman Group, Inc., *Sustainability 2019: Beyond Business As Usual* at 9 (2019), <http://store.hartman-group.com/sustainability-2019-beyond-business-as-usual/> (report on file with Food & Water Watch).

73% of consumers expressed willingness to change consumption habits to reduce their environmental impact, then identified “environmentally friendly” as one of the top two sustainability attributes for which consumers would be willing to pay extra.¹⁴⁶ Finally, a 2020 study conducted by the Capgemini Research Institute found that nearly 8 in 10 consumers (79%) have changed or may change their purchasing behavior based on sustainability issues.¹⁴⁷

Smithfield is well aware of its environmental representations’ materiality. Its “Materiality Analysis” places “[c]limate change” and “[w]ater use and water quality” near the very top of what its consumers deem most important.¹⁴⁸ It also lists “[e]nvironmental management” and “[r]enewable energy” as prominent concerns.¹⁴⁹ This makes clear that Smithfield understands that representations regarding environmental sustainability and climate change impacts are material to consumers, and the company appears to be actively deceiving these conscientious consumers to win their business.

The first prong of the “unlawfully deceptive” test under Section 5 of the FTC Act is therefore satisfied.

B. Smithfield’s Representations Are Deceptive.

A claim is unlawfully deceptive if it is important to a consumer’s purchasing decision and is likely to mislead consumers acting reasonably under the circumstances.¹⁵⁰ Consumers would find Smithfield’s marketing representations misleading if they were informed of, or could reasonably decipher, the realities behind the company’s production practices. As a threshold

¹⁴⁶ Mary Ellen Shoup, *Nielsen: Which Sustainability Attributes Matter Most to Consumers?*, Food Navigator-USA (Dec. 3, 2019), <https://www.foodnavigator-usa.com/Article/2019/12/03/Nielsen-Which-sustainability-attributes-matter-most-to-consumers> (last visited Jan. 27, 2021).

¹⁴⁷ Capgemini Research Institute, *How Sustainability Is Fundamentally Changing Consumer Preferences* at 7 (2020), https://www.capgemini.com/wp-content/uploads/2020/07/20-06_9880_Sustainability-in-CPR_Final_Web-1.pdf (last visited Jan. 27, 2021).

¹⁴⁸ Smithfield, *Materiality Analysis*, *supra* note 139.

¹⁴⁹ *Id.*

¹⁵⁰ FTC Policy Statement on Deception, *supra* note 15, at 2.

matter, a company is responsible for all reasonable consumer interpretations of its advertisements, so it does not matter that the company's representations may convey differing meanings to different consumers.¹⁵¹ "To be considered reasonable, the interpretation or reaction does not have to be the only one."¹⁵² Instead, "[w]hen a seller's representation conveys more than one meaning to reasonable consumers, one of which is false, the seller is liable for the misleading interpretation."¹⁵³ When a particular consumer group is targeted or is likely to be affected by the advertisement, the FTC should examine the advertisement from the perspective of a reasonable member of that group.¹⁵⁴

Here, Smithfield's marketing representations target consumers most likely to be misled: consumers who are concerned about the environmental impact of the foods they purchase, and who look to companies' marketing and descriptions of corporate responsibility to identify goods that are produced in ways that comport with those values. Many such consumers, and the general public more broadly, have almost certainly reasonably interpreted, and will continue to reasonably interpret, Smithfield's representations as assuring, promising, or guaranteeing that Smithfield's products are environmentally-friendly, environmentally sustainable, and not harmful to communities living near Smithfield's facilities. Smithfield's greenwashing also implicitly communicates to consumers that its operations exceed the standard, highly polluting practices used in industrial animal agriculture.

But as explained at length above, Smithfield's actual practices and environmental and community impacts are unquestionably at odds with the reasonable expectations Smithfield cultivates in consumers' perception of its pork products. Smithfield cannot substantiate many, if

¹⁵¹ *See id.* at 2–3.

¹⁵² *Id.* at 3.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 1–3.

not most, of the reasonable interpretations its broad and pervasive claims elicit, and to the contrary, Smithfield’s actual practices objectively fall well below consumer expectations. Therefore, Smithfield’s representations are unlawfully deceptive in violation of the FTC Act.

1. Smithfield’s Broad Environmental Claims Cannot Be Substantiated.

As described above, Smithfield markets its products with terms like “sustainable” and “highest environmental standards” when, in reality, these products come from extremely unsustainable, industrialized factory farms and processing facilities with long and ongoing track records of degrading the environment. The reality of Smithfield’s production methods cannot be reconciled with reasonable consumers’ interpretation of these marketing claims.

The FTC has specifically acknowledged that the term “sustainable” can be “interpreted to imply certain specific environmental benefits” and has “admonished” companies not to use unqualified claims such as “sustainable,” due to the FTC’s determination that it is “highly unlikely that they can substantiate all reasonable interpretations of these claims.”¹⁵⁵ Furthermore, as the FTC has recognized, other general environmental benefit claims (*e.g.*, “environmentally responsible”) “likely convey that the product, package, or service has specific and far-reaching environmental benefits and may convey that the item or service has no negative environmental impact.”¹⁵⁶ Smithfield cannot substantiate such claims because its production practices and facilities are, in fact, quintessentially unsustainable and have well documented and severe environmental impacts.

¹⁵⁵ FTC, *FTC Sends Warning Letters to Companies Regarding Diamond Ad Disclosures* (Apr. 2, 2019), <https://www.ftc.gov/news-events/press-releases/2019/03/ftc-sends-warning-letters-companies-regarding-diamond-ad> (last visited Jan. 27, 2021).

¹⁵⁶ 16 C.F.R. § 260.4.b.

2. Smithfield's Actual Practices Fall Far Below Consumer Expectations.

Smithfield's environmental representations lead consumers to believe that making its products does not harm the environment and is beneficial for local community members. They portray Smithfield as an environmentally-responsible company that prioritizes environmental protection. Yet Smithfield's facilities, as discussed above, utilize typical factory farm and slaughter practices that differ in no meaningful way from the other large-scale industrial pork companies from which Smithfield is trying falsely to distinguish itself.¹⁵⁷ Smithfield's actual environmental record, replete with significant violations of environmental regulations and pervasive harm to its neighbors, and its profiteering off dirty, climate damaging gas extraction, is patently inconsistent with its advertising and marketing claims.

Smithfield's claims regarding environmental sustainability and corporate responsibility mislead consumers by flatly contradicting the company's egregious ongoing water and air pollution, frequent violation of environmental regulations, and investments in dirty, polluting digester projects. Reasonable consumers who buy a product marketed as environmentally sustainable would reasonably conclude that its production did not involve, *inter alia*, emitting large amounts of pollutants into local waterways and airsheds, building and maintaining massive lagoons of pollution-laden waste that frequently spill or leak into public waters, irresponsibly spraying pollution-laden waste on fields in such quantities that it constitutes a nuisance for anyone unlucky enough to live nearby, or profiteering from polluting energy production. Similarly, a consumer who reads a claim like those asserting that Smithfield's products "were produced in an environmentally responsible plant" or that Smithfield "guarantee[s]" "the highest environmental standards"¹⁵⁸ would not reasonably assume the production of those pork products involved

¹⁵⁷ *Supra*, Part IV.B.

¹⁵⁸ Smithfield, *supra* note 1.

dumping millions of pounds of toxic pollutants directly into waterways every year.¹⁵⁹ This is especially so when less polluting, more sustainable alternative practices are readily available. Yet, these are part of the standard operating procedures for Smithfield's facilities and those it controls. Furthermore, a reasonable consumer would not expect that a company that makes such representations relies on production methods that make it one of the largest polluters in the country.¹⁶⁰ Smithfield cannot substantiate the broad environmental claims it makes about its production practices or its use of unsustainable and polluting digesters to extract gas from its waste. Thus, Smithfield's environmental-sustainability claims are unlawfully deceptive under the FTC Act.

VI. RELIEF REQUESTED

The actions described above constitute unlawful conduct, unfair methods of competition, and unfair and deceptive practices under the FTC Act, 15 U.S.C. § 41 *et seq.*

Accordingly, the undersigned respectfully request that the Commission:

1. require Smithfield to remove the misleading marketing claims;
2. enjoin Smithfield from making such misleading representations in the future;
3. require Smithfield to disseminate corrective statements in all media in which the misleading representations were previously disseminated; and
4. impose all other penalties as are just and proper.

¹⁵⁹ Rumpler, *supra* note 3.

¹⁶⁰ *Id.*

Respectfully submitted February 4, 2021,



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On Behalf of Petitioners:

Food & Water Watch
Cape Fear River Watch
Dakota Rural Action
Family Farm Action Alliance
Institute for Agriculture and Trade Policy
Iowa Citizens for Community Improvement
Missouri Rural Crisis Center
Pennsylvania Farmers Union
Socially Responsible Agriculture Project