COLORADO COURT OF APPEALS 2 East 14th Avenue, Denver, CO 80203	DATE FILED February 6, 2026 3:43 PM FILING ID: 5B8599C88340D CASE NUMBER: 2025CA1546
Appeal from: Larimer County District Court The Honorable C. Michelle Brinegar Case No. 2024CV30436	▲ COURT USE ONLY ▲
CENTER FOR BIOLOGICAL DIVERSITY and FOOD & WATER WATCH, Plaintiffs/Appellants, v. COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT; WATER QUALITY CONTROL DIVISION; DIVISION OF ENVIRONMENTAL HEALTH AND SUSTAINABILITY; JILL HUNSAKER RYAN, in her official capacity as Executive Director, Colorado Department of Public Health and Environment; and COLORADO LIVESTOCK ASSOCIATION, Defendants/Appellees.	Case No. 2025CA1546
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OPENING BRIEF	

Certificate of Compliance

The undersigned hereby certifies that this brief complies with the requirements of Colorado Appellate Rules (C.A.R.) 28 and 32, including formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limit set forth in C.A.R. 28(g), because it contains 9,412 words, which is not more than the limit of 9,500 words.

The brief also complies with the requirements set forth in C.A.R. 28(a)(7)(A) because for each issue raised it provides a standard of review with citation to authority and statement of issue preservation with citation to where in the record the issue was raised and ruled upon before arguing each issue.

The undersigned acknowledges that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

Tyler Lobdell
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Glossary of Acronyms and Abbreviations

The following is a glossary of the acronyms and abbreviations used in this opening brief:

ALJ	Administrative Law Judge
APA	Administrative Procedure Act
CAFO	Concentrated Animal Feeding Operation
CDPHE	Colorado Department of Public Health and Environment
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
FAO	Final Agency Order
NPDES	National Pollutant Discharge Elimination System
WOTUS	Waters of the United States
WQCA	Water Quality Control Act

Statement of Issues on Review

1. Whether the Colorado Department of Public Health and Environment ("CDPHE") erred by concluding that the National Pollutant Discharge Elimination System ("NPDES") general permit for concentrated animal feeding operations ("CAFOs"), COA-934000 ("CAFO Permit" or "the Permit") does not contain a zero-discharge effluent limitation for production area discharges of pollutants to waters of the U.S. that occur through groundwater or other subsurface conduit based on a misinterpretation of the Clean Water Act ("CWA") and misapplied federal case law.
2. Whether CDPHE erred by refusing to include representative monitoring in the CAFO Permit despite the CWA, its implementing regulations, and federal case law that require representative monitoring for all effluent limitations to ensure Permit compliance.

Statement of the Case

I. Procedural Background

The procedural history of this matter reaches back almost five years. CDPHE released a draft of the CAFO Permit for public comment on June 10, 2021. CF, p. 833. The Center for Biological Diversity ("the Center"), submitted comments raising, among other issues, the need for monitoring for pollution

discharges to groundwater and surface waters. CF, pp. 1915–17. On September 7, 2021, CDPHE issued a final CAFO Permit and accompanying Fact Sheet. CF, pp. 1928–94. CDPHE declined to include the monitoring requested by the Center because it believed it would go beyond what federal law requires and thereby run afoul of § 25-8-504(2)(a), C.R.S. 2025, and that groundwater-associated considerations were outside the scope of the CAFO Permit. CF, p. 841.

On October 7, 2021, the Center submitted a Notice of Administrative Appeal, Request for Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action to CDPHE regarding the Permit's lack of monitoring requirements. CF, pp. 936–43. CDPHE granted the request for an adjudicatory hearing on October 18, 2021. CF, pp. 1063–73.

While the parties awaited that hearing, CDPHE released a modified CAFO Permit for public comment ("Modification 1"). CF, pp. 1621–54. Modification 1 revised the Permit in three ways. First, CDPHE included a provision stating that "[a] CAFO that has a discharge to surface water through groundwater with a direct hydrological connection to surface water" is not eligible for coverage under the Permit. CF, p. 1625 (Section I(D)(2)(g)).

Second, CDPHE added to the Permit: "There shall be no discharge of manure, litter, or process wastewater into surface water through groundwater with

a direct hydrological connection to surface water." CF, p. 1629 (Section II(A)(5)). CDPHE explained that since these discharges had already been prohibited by the permit's zero-discharge limit, the new language merely dispelled "unintentional ambiguity" and "explicitly state[d] . . . terms and conditions which were heretofore implied." CF, pp. 1656.

Third, CDPHE incorporated provisions from Regulation 81 regarding impoundment liners, construction, and operation. CF, pp. 1635, 1638 (Sections IV(A)(4) and V(F)). CDPHE explained that these modifications were intended to "ensure that an underground discharge from the production area to surface waters of the United States through groundwater with a direct hydrological connection to surface water does not occur." CF, p. 1658.

The Center, now joined by Food & Water Watch (collectively "the Public Interest Groups"), submitted comments on Modification 1. CF, pp. 1664–81. They explained that Modification 1 still failed to include monitoring capable of assuring compliance with the Permit's effluent limitations. CF, p. 1664. On June 7, 2022, CDPHE issued a final version of Modification 1 with accompanying Fact Sheet. CF, pp. 1682–1724.

On June 27, 2022, the Public Interest Groups submitted a Notice of Administrative Appeal, Request for Adjudicatory Hearing, and Request for

Reconsideration of Adjudicatory Action to CDPHE regarding the modified Permit's lack of representative monitoring requirements. CF, pp. 1601–20. CDPHE granted the request for an adjudicatory hearing. CF, pp. 2552–60.

Now before an Administrative Law Judge ("ALJ"), on July 27, 2022, CDPHE moved to dismiss the Public Interest Groups' appeal on ripeness grounds because CDPHE needed guidance from the U.S. Environmental Protection Agency's ("EPA") response to the remand of Idaho's NPDES CAFO permit in *Food & Water Watch v. EPA*, 20 F.4th 506 (9th Cir. 2021). CF, p. 2764–66. The ALJ denied the motion because he did not believe EPA's response to the remand was necessary for CDPHE to draft a legally compliant permit. CF, pp. 2972, 2976.

The ALJ also directed the parties to show cause as to whether the Public Interest Groups were "directly affected" by the permit such that the ALJ had jurisdiction to hear the appeal. CF, p. 2976. The ALJ agreed with the parties in a November 2, 2022, order that Colorado allows "any aggrieved person" to appeal and found no jurisdictional bar to the proceeding. CF, pp. 3004–05.

On November 3, 2022, the Colorado Livestock Association submitted a Request for Party Status. CF, p. 3008. The ALJ granted their request shortly thereafter. CF, p. 3018.

Then on December 2, 2022, CDPHE and the Colorado Livestock Association jointly moved for summary judgment, arguing that CDPHE lacked authority to require monitoring for prohibited discharges because only "actual" discharges may be monitored. CF, p. 3098–3122. On January 4, 2023, the ALJ denied CDPHE's motion, reasoning that it "makes no sense" to require monitoring for all but the strictest of limits and rejecting CDPHE's argument that *Waterkeeper Alliance, Inc., v. EPA*, 399 F.3d 486 (2d Cir. 2005) (hereinafter *Waterkeeper*), bars monitoring in the CAFO Permit. CF, p. 3397–401.

Also in December 2022, the parties began conducting expert discovery. The Public Interest Groups submitted the expert report of Mr. David Erickson on December 23, 2022. CF, pp. 3370–95. CDPHE submitted the expert report of Dr. David Parker on the same date. CF, pp. 3270–3368. A deposition of Dr. Parker was taken on January 9, 2023. CF, pp. 3962–4205.

On March 21, 2023, the ALJ granted the parties' joint motion to set a summary judgment briefing schedule. CF, p. 3495. According to this schedule, the Public Interest Groups moved for summary judgment on March 31, 2023. CF, p. 3501–23. On May 16, 2023, the ALJ issued his Order and Initial Decision granting their motion. CF, pp. 4226–33. It held that whether the Permit provides for adequate monitoring was a legal question that could be resolved without further

factual development, and even assuming a reduced risk of leakage due to geology or maintenance "does not eliminate the legal requirement to have representative monitoring to make sure such leakage does not occur." CF, pp. 4231. It concluded that the Permit prohibits discharges to surface waters via groundwater and that this prohibition is an effluent limitation requiring representative monitoring. CF, p. 4232.

CDPHE and the Colorado Livestock Association filed exceptions to the Initial Decision on July 21, 2023. CF, pp. 4268–4336.

On April 23, 2024, the Director of CDPHE issued its Final Agency Order ("FAO") reversing the ALJ's Initial Decision, striking several provisions from the Permit, and affirming the final Permit. CF, pp. 4425–38. First, the FAO concluded that the prohibition on discharges via groundwater in Part II(A)(5)(a), rather than having been "heretofore implied," CF, p. 1656, instead exceeded statutory authority and was not an effluent limitation, and therefore removed it from the Permit. CF, pp. 4429–32. Second, the Director decided that Part I(D)(2)(g), which purports to exclude CAFOs that discharge via groundwater from Permit coverage, was not an effluent limitation and required no monitoring. CF, p. 4432–33. Third, the Director struck the groundwater-related provisions from "Regulation 81" that had been incorporated into the Permit at Parts IV(A)(4)(a)–(e) and V(F)(1)–(5),

arguing that they exceeded statutory authority and required no monitoring. CF, pp. 4433–37. It concluded: "no additional monitoring terms are required as conditions in the General Permit." CF, p. 4436.

The Public Interest Groups filed their Complaint for Judicial Review of Final Agency Action on May 23, 2024. CF, pp. 4–32. The District Court heard oral arguments on May 1, 2025, and issued its opinion affirming the FAO on June 27, 2025. CF, pp. 5818–39. Petitioners timely filed their notice of appeal on August 14, 2025. CF, pp. 5847–56.

II. Legal Background

CDPHE issued the CAFO Permit pursuant to its delegated permitting authority under the CWA's NPDES program. 33 U.S.C. § 1342. CDPHE carries out this permitting program through the Colorado Water Quality Control Act ("WQCA"), §§ 25-8-101 *et seq*., C.R.S. 2025, and the authority delegated by EPA to Colorado under the CWA's cooperative federalism framework. 33 U.S.C. § 1342(b) (discussing state permit programs); *see* Notice of Approval of Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 16,713 (April 14, 1975).

Federal regulations require that delegated states administer permits in conformity with federal law, unless state law imposes more stringent requirements.

40 C.F.R. § 123.25(a). Under Colorado law, CDPHE must issue NPDES permits that are at least as stringent as, but are not more stringent than, what federal law requires. § 25-8-503(1)(a), C.R.S. 2025; § 25-8-504(2)(a), C.R.S. 2025.

The CWA prohibits "point sources"—defined to include CAFOs—from discharging pollutants into the navigable waters of the United States ("WOTUS") without an NPDES permit. *See* 33 U.S.C. §§ 1311(a), 1362(14). All NPDES permits must establish "effluent limitations" restricting pollutants that are discharged from point sources to WOTUS. *Id.* §§ 1311, 1342. The CWA defines an effluent limitation to include "any restriction established by a State" on rates of pollution discharged from point sources. *Id.* § 1362(11). The WQCA defines an effluent limitation as "any restriction or prohibition established under this article or federal law on quantities, rates, and concentrations of [pollutants] which are discharged from point sources into state waters." § 25-8-103(6), C.R.S. 2025.

One type of effluent limitation is a total prohibition on certain discharges, known as a "zero-discharge" effluent limitation. *See Food & Water Watch v. EPA*, 20 F.4th at 517. Such prohibition reflects Congress's instruction for permitting authorities to rapidly eliminate pollutant discharges to fulfill the "national goal" established in the CWA "that the discharge of pollutants into the navigable waters be eliminated by 1985." 33 U.S.C. § 1251(a)(1); *see also id.* § 1316(a)(1) (setting

the "standard of performance" for new sources under the CWA to include "where practicable, a standard permitting no discharge of pollutants").

Federal regulations require CAFOs to prepare and implement a site-specific Nutrient Management Plan that contains "best management practices necessary to meet . . . applicable effluent limitations," including the zero-discharge limitation. 40 C.F.R. § 122.42(e)(1). The Nutrient Management Plan's practices and operational requirements are a pollution control technology intended to enable CAFOs to achieve their effluent limitations. *See id*. §§ 122.42(e)(1), 122.44(k)(4). How a CAFO manages its waste, including how it operates waste impoundments, are details that are found in a CAFO's Nutrient Management Plan. *Id.* § 122.42(e)(1)(i). These Plans and their contents are considered "effluent limitations" under the CWA. *Waterkeeper*, 399 F.3d at 502.

The regulations further provide minimum effluent limitations for certain sectors, including the CAFO sector. *See* 40 C.F.R. Pt. 412. These effluent limitations provide for the regulation of CAFOs by separating them into two distinct parts: "production areas" and "land application areas." *See id.* § 412.2(e), (h). The production area includes "the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." *Id.* § 412.2(h). "Land application areas" are lands "to which manure, litter, or process

wastewater from the production area is or may be applied." *Id.* § 412.2(e).[1] The federal effluent limitations for large CAFOs state there shall be "no discharge of manure, litter, or process wastewater pollutants into [WOTUS] from the production area" except in limited circumstances not relevant here. 40 C.F.R. § 412.31(a).[2]

The CWA and its implementing regulations require that all NPDES permits contain *representative monitoring* to assure compliance with their effluent limitations and any other limitations, prohibitions or effluent restrictions, pretreatment standards, or standards of performance they contain. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. § 122.44(i)(1) (all permits "shall include conditions" requiring monitoring "[t]o assure compliance with permit limitations."); *see also* CF, p. 5831 (District Court concurring). Permitted sources "shall" be required to "install, use, and maintain such monitoring equipment or methods" required to "determin[e] whether [they] are in violation" of an applicable

[1] The Public Interest Groups' challenge is limited to the Permit's failure to include representative monitoring for production areas; CAFO land application areas are not at issue in this case.

[2] A permitted CAFO is allowed to discharge overflow from a production area if caused by an extreme precipitation event and the "production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25-year, 24-hour rainfall event." 40 C.F.R. § 412.31(a)(1)(i).

effluent limitation or other standard. 33 U.S.C. § 1318(a)(2)(A)(iii). Monitoring must be "representative of the monitored activity," 40 C.F.R. § 122.41(j)(1), and "shall specify" the "type, intervals, and frequency [of monitoring] sufficient to yield data which are representative of the monitored activity." *Id.* § 122.48(b). Such monitoring conditions are necessary to verify compliance with the terms of a permit and enforce the law. *Nat. Res. Def. Council v. Cnty. of Los Angeles*, 725 F.3d 1194, 1207–08 (9th Cir. 2013).

Three federal cases are particularly relevant to the legal question at issue in this litigation. The first, *County of Maui v. Hawaii Wildlife Fund*, confirms that the CWA contains "no exception for discharges through groundwater." 590 U.S. 165, 180 (2020). In that case, the U.S. Supreme Court considered whether a permit was required for a wastewater treatment facility on the island of Maui, Hawaii, that pumped polluted water into four underground wells, after which groundwater carried it half a mile to the ocean. *Id.* at 170–71. The Court held that the CWA covers discharges to groundwater when they are "the functional equivalent of a direct discharge from the point source into navigable waters." *Id.* at 170, 183.

The second case, *Food & Water Watch v. EPA*, confirms that CAFO permits must contain the production area zero-discharge effluent limitation and that representative monitoring is required to ensure compliance with that permit term.

20 F.4th at 517. In *Food & Water Watch*, the Ninth Circuit Court of Appeals considered whether the NPDES general permit for CAFOs in Idaho was unlawful for failing to include monitoring provisions for, among other things, underground discharges originating from CAFO waste impoundments. *Id.* at 508–09, 517. As required by the federal effluent limitations, that permit allowed no discharge of pollutants from CAFO production areas except in the extreme precipitation events noted above. *Id.* at 513. The court held that the permit must require monitoring to ensure compliance with the zero-discharge effluent limitation. *Id.* at 517. The court explained that while permitting authorities have discretion to craft appropriate monitoring requirements that will yield representative data, they may not forgo monitoring altogether.

The third, *Waterkeeper Alliance, Inc., v. EPA*, considered the threshold question of when a CAFO must seek NPDES permit coverage, and held that EPA cannot force point sources to apply for permit coverage based on only the potential to discharge. 399 F.3d at 504–06. In that case, the Second Circuit Court of Appeals considered a challenge to EPA's effluent limitation guidelines for CAFOs for, among other things, requiring CAFOs to apply for an NPDES permit unless they demonstrated they had "no potential to discharge." *Id.* at 495. In finding that the CWA does not categorically allow EPA to require potential dischargers to apply

for a permit or "affirmatively demonstrate that no permit is needed," the Court concluded that the CWA only gives EPA the authority to regulate discharges, "not point sources themselves." *Id*. at 505.

Finally, under state law, "Regulation 61" governs Colorado's discharge permit system, including the CAFO sector and the Permit here. 5 Colo. Code Regs. § 1002-61 *et seq.*; *id.* § 1002-61:61.17. "Regulation 81" also applies to CAFOs and other animal feeding operations, but Regulation 81 is self-implemented by CAFOs and is not a permitting program. *Id.* § 1002-81 *et seq*. Regulation 81 includes provisions aimed at protecting groundwater from CAFO pollution. *Id.* § 1002-81:81.7(2)(a). Regulations 61 and 81 articulate an allowable "seepage rate" of 1 x 10^{-6} cm/second for CAFO waste impoundments. *Id.*; *id.* § 1002-61:61.14(9).

III. Factual Background

CAFOs are large-scale animal confinement facilities that generate vast quantities of pollutant-laden waste that, if not managed properly, can significantly impair water quality. CF, p. 66–67. For this reason, Congress specifically chose to regulate this industry and its pollution discharges under the CWA by including CAFOs in the definition of "point source." *See* 33 U.S.C. § 1362(14). As Senator Bob Dole explained at the time:

> "Animal and poultry waste, until recent years, has not been considered a major pollutant. … The picture has changed dramatically, however,

> as development in intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas."

CF, p. 67.

CAFO waste contains a variety of pollutants that can threaten water quality, the environment, and public health. These include pathogens like *E. coli*, pharmaceuticals like antibiotics and hormones, heavy metals, and excess nutrients. CF, pp. 1738, 1792, 3320, 4447–49, 4453–4455; *see also Waterkeeper*, 399 F.3d at 494 (listing "pollutants associated with CAFO waste"). Excess nutrients like phosphorus and nitrogen can degrade water quality and lead to dangerous conditions such as "harmful algal blooms." CF, p. 1738.

These pollutants can reach WOTUS through a variety of pathways from CAFO production areas. These include surface overflows, including those caused by extreme precipitation events that are authorized by the Permit, through failing infrastructure such as ruptured piping, or—the main focus of this case—seepage from waste impoundments. CF, pp. 2071 ("Storage and handling of animal waste in CAFOs and related agricultural practices are contributing to groundwater contamination, and may have severe impact on surface water quality, since 40 percent of the average stream flow is derived from ground water discharge as base flow …."), 2178, 3372. CAFO impoundments have intended seepage rates, and

therefore even in the best of circumstances "are designed to leak." *Food & Water Watch*, 20 F.4th at 509. This leakage permeates into the subsurface below an impoundment and percolates into and through the soil to reach hydrologically connected groundwater or other conduits to WOTUS. *See* CF, pp. 2092 (finding that *E. coli* "could move easily through the soil"), 2180–82 (studies finding "high levels of nitrate were transported through the soil"), 3850 ("there is potential for significant movement of [phosphorus] through the soil profile when soil [phosphorus] values increase to very high or excessive values due to long-term [exposure]"), 4641 ("Nitrate is highly mobile and easily leached as water moves through the soil profile, and can be a source of nitrogen pollution in surface and ground water if it is not utilized by growing crops.").

The Public Interest Groups also introduced an expert in this case with years of experience conducting investigations and remediation involving CAFO impoundments, Mr. David J. Erickson. CF, pp. 3370, 3383–88. Mr. Erickson explained the reasons why CAFOs threaten water quality in Colorado, the discharge rates from CAFO waste impoundments in Colorado, and why the monitoring at issue in this matter is especially important. *See* CF, pp. 3370–3381. As Mr. Erickson explained, "The principles, pathways and science behind the discharge of pollution by CAFOs is both simple and proven throughout the

industry." CF, p. 3372. One of those principles and pathways is the fact that CAFO waste impoundments "are assumed to and approved to leak and seep." *Id.* This holds true for Colorado, where Colorado regulations advise CAFOs to build impoundments with a 1 X 10^{-6} cm/second seepage rate. 5 Colo. Code Regs. §§ 1002-61:61.14(9), 1002-81:81.7(2)(a)(i). Using that same seepage rate, Mr. Erickson explained that CAFOs are allowed 8,313 gallons of wastewater seepage per day, or *3 million gallons per year*, for every acre of impoundment holding a typical amount of wastewater. CF, p. 3374–75.

He also explained common ways that impoundments become compromised in the field, for example through routine cleaning or erosion, leading to even higher seepage rates. CF, p. 3376; *see also* CF, pp. 2467 (discussing how uplift pressure can compromise impoundment integrity), 4872–73 ("Numerous studies have found seepage through clay liners due to: 1) cracking during wet/dry and/or freeze/thaw cycles, 2) penetration by worms, roots, or rodents, 3) physical damage due to erosion of lagoon berms and agitation during pumping, and 4) liner collapse due to external pressure and groundwater intrusion.").

Mr. Erickson explained that because of this impoundment seepage, CAFO pollutants can "migrate very quickly through ground water and form large ground water contamination plumes traveling long distances." CF, p. 3375. Based on his

years of performing remedial investigations at CAFOs, Mr. Erickson explained that "the contamination migration pathway from the source to ground water beneath the facility, with migration to or toward surface water is almost always complete." CF, pp. 3378–79. In other words, CAFO impoundments seep significant amounts of pollution into surrounding soils and groundwater, which then typically serves as a conduit for that pollution to reach surface waters.

Finally, Mr. Erickson emphasized that monitoring is critical to ensure that CAFO impoundments do not have unintended impacts to water quality. Without some sort of monitoring, such as leak detection systems or groundwater monitoring wells, CAFOs are unable to know if the designed leakage is causing an impact to groundwater or surface water, much less whether an impoundment is meeting initial design specifications and intended seepage rates. CF, p. 3375–76.

IV. Standing

Colorado law requires an injury in fact to a legally protected interest resulting from the defendant's conduct. *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). To establish associational standing, an organization must show that its members would have standing to sue individually.[3] *Colo. Union of Taxpayers*

[3] An organization must also show that the interests it seeks to protect are germane to the organization's purpose and that neither the claim asserted nor the relief

Found. v. City of Aspen, 418 P.3d 506, 510 (Colo. 2018). To challenge agency action under the Colorado State APA, a party must be "adversely affected" or "aggrieved," meaning it has suffered actual or potential injury to legitimate interests, including economic, aesthetic, recreational, or conservational interests. § 24-4-102(3.5), C.R.S. 2025; § 24-4-106(1), C.R.S. 2025. An informational injury satisfies this requirement when it produces "downstream consequences" affecting those interests. *See Roane v. Elizabeth Sch. Dist.*, 555 P.3d 69, 81 (Colo. App. 2024).

The Public Interest Groups have standing because they have demonstrated that they suffer an informational injury to their legally protected aesthetic and recreational interests as a result of CDPHE's failure to include effective monitoring in the Permit. *See* CF, p. 5828. This monitoring and the information it would provide has created downstream consequences for their members, who have been impeded from participating in recreational activities in Colorado waterways or have experienced diminished enjoyment of their activities. *Id.*; CF, pp. 5427, 5430–31. Therefore, the Public Interest Groups have standing.

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requested requires the participation of individual members. It was undisputed below that the Public Interest Groups satisfied these elements. CF, p. 5825 n. 3.

Summary of the Arguments

This case presents a relatively straightforward question of law: does the CAFO Permit contain a zero-discharge effluent limitation for pollution discharges from CAFO production areas to WOTUS that occur through groundwater or another subsurface conduit? The answer to that question is yes. Once that question is answered, the federal CWA mandate that the Permit require representative monitoring to ensure compliance with that effluent limitation follows. Such monitoring is a cornerstone of the CWA's permit program, enabling regulators and citizens to ensure that CAFOs comply with pollution limits imposed to protect Colorado's waters.

The Public Interest Groups contend that the Permit's zero-discharge pollution limitation is what is says it is: a discharge prohibition imposed by the CWA and incorporated into the Permit that does not allow a CAFO to discharge pollutants to WOTUS via any pollution pathway. Under the CWA, effluent limitations not only *can* be set at zero discharge – in some cases, including this one, they must. The CWA, EPA's regulations, and federal case law confirm that representative monitoring is required to ensure compliance with that effluent limitation, as with all effluent limitations. CDPHE cannot merely assume that pollution prevention controls like waste impoundment liners will achieve

compliance with effluent limitations; for this reason, separate state law requirements that are not part of the Permit have no bearing on the Court's analysis.

CDPHE previously admitted that the Permit prohibits discharges from a CAFO's production area waste impoundments to WOTUS when the pollutants are carried by groundwater or other subsurface conduit, going so far as amending the Permit to make what it called an implicit prohibition explicit. It has since changed tack, adopting the strained position that the Permit neither prohibits nor authorizes these discharges, and, therefore, that no monitoring is required or even allowed. CDPHE's position is premised on several erroneous legal conclusions.

First, the Permit undeniably prohibits the discharge of pollutants, as expansively defined under the CWA, from CAFO production areas to WOTUS, including when groundwater serves as the conduit of that pollutant discharge. This is clear from the CWA, which was enacted to *eliminate* the discharge of pollutants to WOTUS, and the federal implementing regulations that are incorporated into the Permit, which require "no discharge" of pollutants from CAFO production areas. As the U.S. Supreme Court held in *County of Maui*, the CWA contains "no exception for discharges through groundwater."

Central to CDPHE's error is its misapplication of federal case law. It relies on *Waterkeeper* to reach the untenable conclusion that the CAFO Permit cannot require compliance monitoring because a prohibition on the discharge of pollutants is not an effluent limitation. But the CWA imposes zero-discharge effluent limitations regularly, in line with the statute's ultimate goal. CDPHE bases its analysis on a holding and reasoning from *Waterkeeper* that is inapplicable to the legal question presented here. This misapplication leads CDPHE to take irrational and internally inconsistent positions.

Second, representative monitoring is required to ensure permitted CAFOs do not violate the Permit's zero-discharge effluent limitation via subsurface discharges to WOTUS. This was made clear in *Food & Water Watch v. EPA*, the most recent and on-point federal case that directly addresses the questions presented here. In that case, the Ninth Circuit vacated the NPDES general permit for CAFOs in Idaho on nearly identical grounds raised by the Public Interest Groups here.

CDPHE's argument that no representative monitoring is required falls apart once the production area discharge prohibition is correctly acknowledged as an effluent limitation. Its reliance on Regulation 81, a state regulation that is not a permitting scheme and is not part of the CAFO Permit, is misplaced. Under the

CWA, the whole purpose of monitoring is to show whether pollution controls and technologies are working to actually achieve compliance; therefore, they cannot take the place of monitoring. For the same reason, Regulation 81's construction and operational provisions in no way obviate the need for representative monitoring to ensure CAFOs comply with the CAFO Permit. Furthermore, the record below shows that the standards found in Regulation 81 affirmatively allow CAFOs to discharge pollutants from production area waste impoundments, including to WOTUS, making compliance monitoring all the more necessary.

The law is clear. The CWA mandates that all NPDES permits, including the CAFO Permit, contain monitoring to ensure compliance. The CAFO Permit imposes a zero-discharge effluent limitation for CAFO production areas to WOTUS from all pollution pathways. Therefore, the Permit must include representative monitoring to ensure CAFOs do not violate the Permit in this way.

Argument

I. The Permit Contains a Zero-Discharge Effluent Limitation for CAFO Production Areas

A. Standard of Review

Pursuant to the Colorado Administrative Procedure Act ("APA"), a reviewing court "shall hold unlawful and set aside the agency action" if the agency acted arbitrarily and capriciously, made a decision that is unsupported by the

record, exceeded its authority, or erroneously interpreted the law. § 24-4-106(7)(b), C.R.S. 2025. The court "shall determine all questions of law and interpret the statutory and constitutional provisions involved and shall apply the interpretation to the facts duly found or established." § 24-4-106(7)(d), C.R.S. 2025. Courts review agency interpretations of statutes and regulations de novo. *Gomez v. JP Trucking, Inc.*, 509 P.3d 429, 436 (Colo. 2022). Whether the record contains substantial evidence to support an agency's final decision is also a question of law courts review de novo. *Chase v. Colo. Oil & Gas Conservation Comm'n*, 284 P.3d 161, 165 (Colo. App. 2012).

In an appeal from a district court's ruling in a case challenging administrative agency action, the Court of Appeals applies the same APA standards above and reviews the "decision of the administrative body itself, not that of the court." *Citizens for Clean Air & Water v. CDPHE*, 181 P.3d 393, 396 (Colo. App. 2008).

B. Issue Preservation

The Public Interest Groups preserved this issue before the Agency in its permit development process through public comments, in briefing before the Administrative Law Judge, and in their arguments before the District Court. CF, pp. 1671, 3521, 5599; TR-5/1/25, pp. 8–9. CDPHE and District Court ruled on the

Public Interest Groups' arguments in the Final Agency Order and District Court Order. CF, pp. 4429–4432, 5834–5839.

C. As Required by Federal Law, the Permit Prohibits All Discharges to Waters of the U.S. from CAFO Production Areas Except in Limited Circumstances

The Permit contains a strict effluent limitation for CAFO production areas that prohibits all relevant discharges of pollutants to WOTUS. CF, p. 1689 (Permit at II(A)) ("There shall be no discharge of process wastewater or manure to surface waters from the production area ….")[4]; 40 C.F.R. §§ 412.31(a); *see also* 5 Colo. Code Regs. § 1002-61:61.1(a). The parties agreed below that the Permit and the relevant regulations prohibit any above-ground discharges to WOTUS except for the noted storm overflows, and that the Permit must require monitoring to ensure compliance with that limitation. CF, p. 5882. But CDPHE erroneously concluded that the same prohibition and associated monitoring do not apply to pollution that

[4] The final, operative CAFO Permit was not entered into the Administrative Record below. Therefore, the Public Interest Groups, as the parties did below, cite to the Case File for interim versions of the CAFO Permit that were included in the Administrative Record for provisions that *are found* in the operative Permit, and will cite to CDPHE's FAO to discuss provisions that *are not found* in the operative Permit because they were struck by the FAO. If the Court finds that a full version of the operative CAFO Permit is needed, it may take judicial notice of it under Colorado Rule of Evidence 201. *Doyle v. People*, 343 P.3d 961, 964 (Colo. 2015) (allowing judicial notice of adjudicative facts that are not subject to reasonable dispute). The operative permit, as confirmed by counsel for CDPHE on January 27, 2026, is maintained here: https://cdphe.colorado.gov/dehs/eag/forms.

is conveyed by groundwater, soils, or other sub-surface means from a CAFO production area to WOTUS. CDPHE's conclusion, and its resulting failure to require representative monitoring for this discharge pathway, was based on three misinterpretations of law: 1) that when pollution is transported by groundwater or other sub-surface means it is categorically outside the Permit's zero-discharge effluent limitation, 2) that discharge prohibitions are not effluent limitations, and 3) that imposing a zero-discharge effluent limitation in an NPDES permit transforms actual discharges into "potential" ones such that regulation is impermissible under *Waterkeeper*. Each is incorrect.

1. *The CAFO Permit Prohibits Discharges to WOTUS via Groundwater, as Allowed and Required by Federal Law*

Under the CWA, no discharges of pollutants from point sources, such as CAFOs, are allowed to WOTUS unless authorized through a lawfully issued permit. 33 U.S.C. §§ 1311(a), 1342(a). The Permit allows CAFOs to discharge from production area impoundments as overflow during extreme precipitation events, but otherwise prohibits *all* discharges through its zero-discharge effluent limitation. CF, p. 1689–90 (Permit at II(A)(1)(a), 2(a), (3)(a), 4(a)) ("There shall be no discharge of manure or process wastewater into surface water from the production area ….''). Because a CAFO production area is itself a point source, *see* 33 U.S.C. § 1362(14), that zero-discharge restriction applies regardless of the

pathway (surface or subsurface) by which the discharge occurs. This is so because, as the Supreme Court has explained, there is "no exception for discharges through groundwater" in the CWA. *Cnty. of Maui*, 590 U.S. at 180.

In *County of Maui*, the Supreme Court rejected the idea that discharges via groundwater never require NPDES permits. In *Maui*, the federal government argued for an exclusion for all releases of pollution to groundwater regardless of whether those pollutants are then "conveyed to [WOTUS] via groundwater." *Cnty. of Maui*, 590 U.S. at 179–80. While recognizing that not *every* release of a pollutant to groundwater is covered by the CWA, the Court was clear: "The statutory text itself alludes to no exception for discharges through groundwater" and EPA's position was "neither persuasive nor reasonable." *Id.* at 180. CDPHE cannot insert a groundwater exemption in the Permit where none exists in the CWA.

The Ninth Circuit made this clear in *Food & Water Watch* by squarely answering this question in the context of the general permit for CAFOs in Idaho and implementing the same federal regulations that control the Colorado Permit. 20 F.4th at 512 (discussing the zero-discharge effluent limitation in the federal regulations that dictated the terms of the Idaho CAFO permit). As the court there emphasized: the "zero-discharge requirement" "does not allow *any* discharges

from the production area," including "underground discharges" from waste impoundments. *Id.* at 517.

Furthermore, the Permit itself is clear that it contains a universal prohibition on discharges to WOTUS from production areas, without exception for impoundment discharges to WOTUS via groundwater or other subsurface conduit. CF, p. 1689–90 (Permit at II(A)). Indeed, the Permit explicitly provides that "[impoundment] operations shall be conducted in a manner that does not result in a discharge to surface water not specifically authorized by this permit." CF, p. 1696 (Permit Pt. IV(A)). Furthermore, in seeking to exclude any CAFO with a "discharge to surface water through groundwater with a direct hydrological connection to surface water" from Permit coverage, CF, p. 1686 (Permit at I(D)(2)(g)), the Permit makes clear that it does not authorize discharges to WOTUS from the production area that occur through groundwater. Accordingly, the Permit's blanket production area discharge prohibition encompasses discharges from CAFO impoundments to WOTUS that occur by any pathway, including via groundwater.

Finally, CDPHE admitted that the Permit contains this restriction through its own terms and as a necessary consequence of the holding in *County of Maui*. In its Answer to the Public Interest Groups' administrative complaint, CDPHE admitted

"that, according to its Fact Sheet, and consistent with the County of Maui decision, if groundwater flows in such a way that it ultimately causes 'the functional equivalent of a direct discharge' to surface water, that discharge is unlawful under the CWA and the modified permit." CF, p. 5014. That remains the case today, regardless of subsequent arguments that obscure this necessary legal conclusion.

2. The Discharge Prohibition Here Is an Effluent Limitation

When a permit prohibits the discharge of pollutants to WOTUS, it contains a zero-discharge effluent limitation. CDPHE argued below that "a total prohibition on certain discharges is not an 'effluent limitation.'" CF, p. 4228. But CDPHE's novel interpretation of settled law is unsupported by the statutory text and would undermine the purpose of the CWA and protection of state waters under the WQCA.

Both Colorado and federal law make perfectly clear that to prohibit the discharge of a pollutant under a NPDES permit is to impose an effluent limitation. The WQCA defines "effluent limitation" as follows:

> any restriction *or prohibition* established under this article or federal law on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into state waters, including, but not limited to, standards of performance for new sources, toxic effluent standards and schedules of compliance.

§ 25-8-103(6), C.R.S. 2025 (emphasis added); *see also* 5 Colo. Code Regs. 1002-61:61.2(26) (same). The CWA similarly defines an effluent limitation as "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into [WOTUS]." 33 U.S.C. § 1362(11); *see Sherritt v. Rocky Mt. Fire Dist.*, 205 P.3d 544, 547 (Colo. App. 2009) (use of the word "any" denotes inclusive application and "without limitation or restriction").[5]

As explained in the Legal Background, *supra*, the goal of the CWA is to "eliminate" the discharge of pollutants to WOTUS. 33 U.S.C. § 1251(a)(1). The CWA then relies on NPDES permits "to transform generally applicable effluent limitations and other standards including those based on water quality into the obligations . . . of the individual discharger." *Waterkeeper*, 399 F.3d at 491 (quoting *EPA v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 205 (1976)). It would make no sense for that statutory scheme to stop short of completely prohibiting discharges in NPDES permits to achieve these objectives. Looking elsewhere in the statute, that clearly is not the case. *See* 33 U.S.C. §

[5] The CWA also defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). The repeated use of "any" denotes broad application. *See Nat'l Farmers Union Prop. & Cas. Co. v. Estate of Mosher*, 22 P.3d 531, 534 (Colo. App. 2000).

1316(a)(1) (defining "standard of performance" to include "where practicable, a standard permitting no discharge of pollutants."). As the ALJ below succinctly explained, "It makes no sense to allow monitoring for [discharges] (presumably less problematic ones) that are allowed under a permit, but not to monitor for [discharges] (presumably more problematic) that are not." CF, p. 4228. In sum, effluent limitations are *any* restriction on point sources, including complete prohibitions like the one in the CAFO Permit.

3. CDPHE Erroneously Applied Waterkeeper

CDHPE's incorrect interpretation of "effluent limitation" stems in part from its misapplication of the Second Circuit's holding in *Waterkeeper Alliance, Inc. v. EPA* and the resulting confusion over "actual" vs "potential" discharges. This confusion arises because the part of the *Waterkeeper* decision CDPHE relies on—"The Duty to Apply for an NPDES Permit"—is simply inapplicable to this case. *See* 399 F.3d at 495, 504–06. That holding in *Waterkeeper* was about whether EPA could compel all large CAFOs to "either apply for a permit – and comply with the effluent limitations contained in the permit – or affirmatively demonstrate that no permit is needed." *Id.* at 505. The issue before the Second Circuit was the threshold matter of whether EPA had the authority to bring all large CAFOs into the NPDES permit program on the presumption they all had the "potential to discharge." The

court held that EPA did not. *Id.*at 504–05. It was in this context that the *Waterkeeper* court held that it is impermissible to regulate "potential" discharges; in other words, the mere potential that a point source will discharge to WOTUS cannot be the basis for compelling it *to apply for* a NPDES permit. But what it did *not* address is how NPDES permits and attendant effluent limitations operate once a point source is covered by a permit.

In contrast, this case is about an issued NPDES CAFO general permit and what it must include to ensure compliance *for CAFOs that have sought and received coverage*. After the determination that a CAFO will be covered by the Permit has been made,[6] *Waterkeeper*'s concern about EPA regulating "potential" dischargers is irrelevant. At that point we look to the CWA, its implementing regulations, and Colorado law, all of which are clear that effluent limitations can be zero and require an effluent limitation of no discharges from CAFO production areas except in limited overflow circumstances. *See supra* 26–29.

[6] There are reasons why a Colorado CAFO may seek coverage under the Permit in addition to being compelled because of ongoing pollution discharges to WOTUS. Having NPDES permit coverage provides a "permit shield" that "is very valuable because violations of the CWA, even if entirely inadvertent, are subject to hefty penalties." *City & Cnty. of San Francisco v. EPA*, 604 U.S. 334, 350 (2025) (citing 33 U.S.C. § 1342(k)).

CDPHE's misapplication of *Waterkeeper* also leads to circular logic and internal inconsistencies. Under their reasoning, if a CAFO claims it is in compliance with the Permit's zero discharge effluent limitation, what the Permit is regulating transforms from something "actual" to something that is merely "potential" and the Permit becomes unlawful. This ignores that the Permit and the management practices included therein are responsible for preventing the discharge of pollutants in the first place. And under this reasoning, the CWA's definition of "standard of performance," which is the effluent limitation for new point sources, is incoherent because it includes: "where practicable, a standard permitting no discharge of pollutants." 33 U.S.C. § 1316(a)(1).

CDPHE's position is also internally inconsistent. A prohibited discharge to WOTUS through groundwater from a CAFO impoundment is no more "potential" than a prohibited above-ground discharge from the same impoundment, but CDPHE readily admits that it can regulate the latter and require monitoring to ensure compliance. CF, p. 5882 ("No party contests the propriety of the General Permit conditions that prohibit the discharge of certain pollutants—manure, litter, or process wastewater—to surface waters or [WOTUS] and require the permittee to monitor to ensure compliance with this effluent limitation."). By CDPHE's reasoning, it should not be able to prohibit or monitor for above ground discharges

because the Permit does not authorize them and, thus, they are merely "potential." These contortions illustrate why CDPHE's reliance on *Waterkeeper* was inapt and has led it to adopt an untenable position.

II. Monitoring Is Required to Ensure Compliance with All Effluent Limitations

A. Standard of Review

The same standard of review articulated in the prior section governs the Court's review of the issue discussed below. *See supra* Argument, Section I.A.

B. Issue Preservation

The Public Interest Groups preserved this issue before the Agency in its permit development process through public comments, in briefing before the Administrative Law Judge, and in their briefs and oral argument before the District Court. CF, pp. 1672–76, 3142-3146, 4364–4365, 4371–4372, 5402-5405, 5602–08, 5610; TR-5/1/25, pp. 14–15. CDPHE and District Court ruled on Public Interest Groups' arguments in the Final Agency Order and District Court Order. CF, pp. 4427, 4433–4437, 5834–5835, 5839.

C. Federal Law Mandates Representative Monitoring that Ensures Compliance with All Limits in the CAFO Permit

The law is clear that "the [CWA] *requires* every NPDES permittee to monitor its discharges into the navigable waters of the United States in a manner

sufficient to determine whether it is in compliance with the relevant NPDES permit." *Cnty. of Los Angeles*, 725 F.3d at 1207 (citing 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1)); *see also* CF, p. 5831 (District Court agreeing). This is consistent across statute, regulations, and case law.

The CWA establishes that NPDES permits must contain conditions "to assure compliance" with effluent limitations and water quality standards, "including conditions on data and information collection, reporting, and such other requirements as [EPA] deems appropriate." 33 U.S.C. § 1342(a)(2). Additionally, the CWA demands that permitting authorities, like CDPHE, issue permits that ensure compliance by requiring permittees "install[], us[e], and maintain[] monitoring equipment or methods." 33 U.S.C. § 1318(a)(2)(A)(iii). Even CDPHE agreed below that "permits must require monitoring to ensure compliance with the permit's effluent limitations." CF, p. 5467 (citing 40 C.F.R. § 122.44(i)(1)).

The CWA also enshrines affected individuals' ability to be part of the CWA permitting process and to assist enforcement by bringing citizen suits. 33 U.S.C. § 1251(e); *Waterkeeper*, 399 F.3d at 503 (describing citizen suits as "a proven enforcement tool" that "Congress intended [to be used…] to both spur and supplement government enforcement actions." (internal quotation marks omitted)). When a permit fails to contain monitoring that ensures compliance with the permit,

it hinders, if not eliminates, the public's ability to engage in citizen enforcement of that permit. "Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement" by regulators and citizens. *Cnty. of Los Angeles*, 725 F.3d at 1208. CDPHE's refusal to include this in the CAFO Permit therefore frustrates the design of and intent behind the CWA. *See Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1522 (9th Cir. 1987) (refusing to apply a state statute of limitation because citizen enforcement of the CWA is a "national polic[y]" that should not be frustrated).

Federal regulations further articulate this monitoring mandate. "[E]ach NPDES permit shall include" monitoring requirements "[t]o assure compliance with permit limitations." 40 C.F.R. § 122.44(i); *see also id.* § 122.41(j) (listing monitoring as a condition that "shall be incorporated" into "all NPDES permits"). EPA's regulations demonstrate that the purpose of monitoring is to measure effluent and its constituent pollutants to document whether a discharger is meeting its permit limits. 40 C.F.R. § 122.44(i)(1)(i)–(iii) (requiring monitoring that includes "[t]he mass (or other measurement specified in the permit) for each pollutant limited in the permit; [t]he volume of effluent discharged from each outfall; or [o]ther measurements as appropriate"). The regulations further require that permits specify the "type, intervals, and frequency [of sampling] sufficient to

yield data which are representative of the monitored activity." 40 C.F.R. § 122.48(b).

Finally, case law confirms the CWA's monitoring mandate and how it applies to the CAFO Permit here. As the *Food & Water Watch* court concluded: "Without a requirement that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit's zero-discharge requirement." 20 F.4th at 517 (citing *Waterkeeper*, 399 F.3d at 499). As the Washington Court of Appeals similarly found, given the inherently hazardous nature of CAFO impoundments, without monitoring requirements "to ensure that a permittee can effectively monitor its permit compliance[,] … CAFOs may still unknowingly violate groundwater standards." *Wash. State Dairy Fed'n v. Dep't of Ecology*, 18 Wn. App. 2d 259, 303 (Wash. Ct. App. 2021).

CDPHE fails to implement this clear requirement in the CAFO Permit.

D. Colorado's Regulation 81 Does Not Obviate the CWA's Requirements or the Need for Compliance Monitoring

The central focus of this case is whether the CAFO Permit contains adequate representative monitoring to ensure compliance with the required zero-discharge effluent limitation for CAFO production areas. The Public Interest Groups contend this is a question of law and a matter of applying the correct legal interpretations to

the terms and conditions found in the CAFO Permit, and not outside policies or regulations, to determine its lawfulness. *See Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 ("the [NPDES] permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations"); *see also* CF, p. 2773 (arguing, in CDPHE's motion to dismiss the Public Interest Groups' administrative review of the Permit, that "the question of whether the CWA requires underground monitoring for CAFOs is purely legal"). But because CDPHE and the Colorado Livestock Association attribute significant weight to Regulation 81, 5 Colo. Code Regs. § 1002-81, in their arguments below, the Public Interest Groups address it here.

1. Regulation 81 Is A Control Regulation, Not Representative Monitoring that Ensures Compliance

As an initial matter, introducing Regulation 81 into the arguments here is a red herring. Even if Regulation 81 can be properly considered in this case, it does not alleviate CDPHE's obligation to issue a *NPDES* permit that meets all the minimum federal requirements under the CWA. Regulation 81 is a self-implementing control regulation intended to protect Colorado state groundwater from CAFO pollution. This means that it is not a permitting program like Colorado's NPDES program, but instead relies on generalized operational standards that include impoundment construction documentation, visual inspection

of exposed portions of an impoundment (*i.e.*, whatever portion is not submerged under impounded waste), development of standard operating procedures for the removal of manure and wastewater from impoundments, and the aforementioned maximum seepage rate of 1 X 10^{-6} cm/second, among others. 5 Colo. Code Regs. § 1002-81:81.7.

The CAFO Permit *also* contains operational procedures and requirements for production areas that are intended to enable CAFOs to achieve the Permit's effluent limitations. But as explained, that does not mean CDPHE can merely assume that CAFOs operating under a Permit will achieve compliance. As the CWA regulations make clear, CWA permits must include management practices and technologies to reduce pollution *and* representative monitoring to ensure those practices are effective. 40 C.F.R. § 122.41(e), (j) (requiring all NPDES permits to include conditions for, *inter alia*, proper operation and maintenance *and* representative monitoring); *see Save Our Bays & Beaches v. City & Cnty. of Honolulu*, 904 F. Supp. 1098, 1139 (D. Haw. 1994) (compliance with required operational practices "neither excuses nor voids compliance with [monitoring requirements]."). CDPHE cannot merely assume that a required practice is effective in the real world. *See Nat. Res. Def. Council v. EPA*, 808 F.3d 556, 583 (2d Cir. 2015) (rejecting EPA's general expectation that compliance with one part

of a NPDES general permit for vessel ballast discharges would ensure compliance with water-quality based effluent limitations). The CWA requires "regulation in fact, not only in principle," and Regulation 81 does not help CDPHE or the CAFO Permit clear that bar. *See Food & Water Watch v. EPA*, 20 F.4th at 515 (quoting *Waterkeeper*, 399 F.3d at 498).

Thus, even if the Court finds that Regulation 81 has any bearing on the legal questions in this case (it does not), that cannot change the interpretive landscape. Regulation 81 is a control regulation akin to the management practices already deemed to require representative monitoring under the CWA. *See Food & Water Watch*, 20 F.4th at 513 (discussing the Idaho CAFO permit's documentation, operational, and treatment requirements, but still concluding that the Permit lacked necessary monitoring).

2. Regulation 81 Allows Discharges from CAFO Production Areas

Further confounding CDPHE's reliance on Regulation 81 is the fact that it plainly allows CAFOs to violate the CAFO Permit's zero-discharge effluent limitation for production areas. While Regulation 81 is only concerned with groundwater with respect to permitted CAFOs, 5 Colo. Code Regs. § 1002-81:81.2, the seepage standard allowed by Regulation 81 is known to result in CAFO production area discharges of pollutants to WOTUS.

That CAFO waste impoundments are a long-known and understood source of water pollution is not controversial. *See supra*, 13–17. This can be seen in *Washington State Dairy Federation v. Department of Ecology*, a case where the state Court of Appeals found Washington's CAFO general permit unlawful for, among other reasons, not containing monitoring for discharges to groundwater. 18 Wn. App. 2d at 300. That court analyzed an extensive record and noted how "studies have consistently shown that manure lagoons leak" and that seepage from lagoons "'[p]rimarily' goes to groundwater." 18 Wn. App. 2d at 279.

Similarly in *Food & Water Watch v. EPA*, the Ninth Circuit had little trouble seeing that CAFO impoundments are "serious hazards." 20 F.4th at 509. Among other hazards, CAFO impoundments "are sources of groundwater pollution" and "groundwater flow is the primary contributor of nitrate to surface water from agriculture." *Food & Water Watch*, 20 F.4th at 517 (quoting *Cmty. Ass'n for Restoration of the Env't, Inc. v. Cow Palace, LLC*, 80 F. Supp. 3d 1180, 1223 (E.D. Wash. 2015)). The court understood that CAFO waste impoundments are essentially "designed to leak." *Id.* at 509.

The record below also supports this well-established reality. While no longer a term of the CAFO Permit itself, Regulation 81 allows CAFOs to seep wastewater from their impoundments at rates of 1 X 10^{-6} cm/second. 5 Code Colo. Regs. §

1002-81:81.7(2)(a). An impoundment that meets the 1 X 10^{-6} cm/second seepage rate can have "up to 3,000,000 gallons of contaminated seepage per year or 8,313 gallons per day to the subsurface" per acre of impoundment, and many Colorado CAFOs have several acres of wastewater impoundments. CF, p. 3374. This is "clearly neither insignificant nor protective." *Id.* It is also not capable of ensuring compliance with the CAFO Permit's zero-discharge standard.

Thus, even assuming a CAFO meets the requirements of Regulation 81's seepage rate, these impoundments are "designed to leak" and are therefore a significant source of pollution that need monitoring to ensure compliance with the Permit's zero-discharge effluent limitation. *Food & Water Watch*, 20 F.4th at 509 ("[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." (quoting *Cow Palace*, 80 F. Supp. 3d at 1223)).

E. CDPHE's Modifications to the Permit Did Not Materially Change the Permit's Zero-Discharge Effluent Limitation

Finally, The FAO's removal of an express statement of prohibition regarding discharges to groundwater with a direct hydrological connection with surface water had no material effect. On the other hand, removal of other groundwater provisions merely weakened the Permit. As explained in the Procedural Background *supra*,

CDPHE modified the CAFO Permit twice during the administrative appeals process. First, CDPHE proposed several additional provisions in Modification 1 to the Permit that expressly addressed discharges via groundwater. These included three changes: 1) making a CAFO that has a known discharge to surface water through groundwater ineligible for coverage under the Permit (Part I(D)(2)(g)); 2) stating expressly that the Permit prohibits the discharge of CAFO wastewater to surface water through hydrologically connected groundwater (Part II(A)(5)); and 3) incorporating parts of Regulation 81 into the Permit (Parts IV(A)(4) and V(F)). CF, p. 2613.

Then in the FAO, the Director of CDPHE struck the second and third additions made in Modification 1, leaving only the statement of ineligibility at Part I(D)(2)(g) of the Permit. CF, p. 5893. The Director's decision to strike the express statement of prohibition was without practical effect because, as CDPHE conceded, it was an unnecessary addition to the Permit in the first place. CF, p. 1717. The decision was also based on the misinterpretations of law explained above regarding the definition of an effluent limitation and regulation of "potential" discharges. On the other hand, the Director's decision to strike incorporation of certain parts of Regulation 81 only serves to undermine CDPHE's position.

First, the addition of an express statement of prohibition was unnecessary because the Permit already prohibited these discharges, and thus the Director's striking of the same had no material effect. When describing the added groundwater related provisions, CDPHE stated that it "had reopened provisions of [the Permit] for modification to include language that explicitly states the following terms and conditions which were *heretofore implied*." CF, p. 1717 (emphasis added); *see also* CF, p. 5014 (admitting that "if groundwater flows in such a way that it ultimately causes 'the functional equivalent of a direct discharge' to surface water, that discharge is unlawful under the CWA"). Therefore, CDPHE's back-and-forth during the administrative appeal on how to articulate the Permit's zero-discharge effluent limitation did not change what the Permit prohibits, it was merely semantics.

But removing reference to Regulation 81 weakens the Permit and CDPHE's position. CDPHE's reason for adding these was an attempt to "ensure that an underground discharge from the production area to surface waters of the United States through groundwater with a direct hydrological connection to surface water does not occur." CF, p. 2614. While Regulation 81 would not enable CDPHE to ensure compliance, removing those provisions from the Permit only makes things worse by putting them beyond NPDES permit enforcement generally. *See* 33

U.S.C. § 1342(k) ("Compliance with a permit issued pursuant to this section shall be deemed compliance" with the CWA); 40 C.F.R. § 122.41 (requiring all applicable conditions "be incorporated into the permits either expressly or by reference"); *Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. at 205 ("the [NPDES] permit defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations").

Conclusion

The CAFO Permit contains a strict effluent limitation that prohibits all discharges to WOTUS, including those that travel through groundwater as a conduit to WOTUS. The law demands representative monitoring to ensure permitted CAFOs comply with this standard, but the CAFO Permit lacks such monitoring. The Court should reject CDPHE's erroneous conclusions of law and find the CAFO Permit unlawful.

Respectfully submitted on February 6, 2026.

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CERTIFICATE OF SERVICE

I certify that, on February 6, 2026, I caused to be electronically filed this **Opening Brief** using the Colorado Courts E-Filing System, which will serve notification of this filing to all counsel of record in this case:

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