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Plaintiffs: CENTER FOR BIOLOGICAL DIVERSITY and
FOOD & WATER WATCH

v.

Defendants: 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.

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Case Number:

Division:

Courtroom:

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COMPLAINT FOR JUDICIAL REVIEW OF FINAL AGENCY ACTION

INTRODUCTION

1. Plaintiffs Center for Biological Diversity and Food & Water Watch (Public Interest Groups) bring this action seeking judicial review of the Colorado Department of Public Health and Environment's (CDPHE) decision to issue and affirm the Colorado General Permit for Concentrated Animal Feeding Operations, Permit No. COA-934000, Modification 1 (the General Permit or Permit) without requiring representative monitoring provisions.

2. The General Permit establishes unambiguous water pollution limits for concentrated animal feeding operations (CAFOs) across Colorado. But CDPHE has made these pollution limits, known as "effluent limitations," unenforceable by failing to include representative monitoring and reporting provisions in the Permit. Failure to include these provisions renders the Permit ineffective at protecting Colorado's waters and unlawful under the federal Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, and Colorado Water Quality Control Act (WQCA), C.R.S. §§ 24-8-101 *et seq.*

3. As explained in more detail below, a CAFO is an industrial-scale livestock facility that confines animals in numbers that meets the established regulatory threshold and does not sustain crops or forage during the normal growing season. For operations that don't meet the regulatory threshold but do meet other confinement and pollution characteristics, CDPHE may designate those smaller "animal feeding operations" as CAFOs for permitting purposes.

4. CAFOs hold hundreds to tens of thousands of animals in confinement buildings or confined feedlots—distinct from traditional husbandry methods such as pasture-based systems.

5. Because these facilities concentrate so many animals in one place, they produce tremendous amounts of animal waste and process wastewater. A single CAFO can produce the same amount of waste as a small or medium-sized city. For example, a single CAFO holding 2,500 dairy cattle produces about as much waste as a city of 411,000 people—more than twice the size of Fort Collins.¹ This waste generally contains pollutants dangerous to human health and the environment, such as nitrates, heavy metals, hormones, pathogens, and antibiotics.²

6. These vast quantities of waste pose significant threats to water quality and must be carefully managed to avoid polluting the surrounding environment. For example,

¹ See U.S. Env't Prot. Agency, *Risk Assessment Evaluation for Concentrated Animal Feeding Operations* 7 (2004), available at <https://nepis.epa.gov/Exe/ZyPURL.cgi?Dockey=901V0100.txt>.

² See Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities* 2–3 (2010), available at <https://stacks.cdc.gov/view/cdc/59792>.

CAFOs store this waste in large open impoundments or lagoons that leak contaminants into nearby groundwater, rivers, and waterways.

7. Congress specifically chose to regulate CAFOs and their pollution discharges under the Clean Water Act. 33 U.S.C. § 1362(14). In determining that CAFOs are “point sources” of pollution that may not discharge waste into waterways without a Clean Water Act permit, Congress acknowledged that:

Animal and poultry waste, until recent years, has not been considered a major pollutant. . . . The picture has changed dramatically, however, as development of intensive livestock and poultry production on feedlots and in modern buildings has created massive concentrations of manure in small areas.

S. Rep. No. 92-414, at 92–93 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3761.

8. Colorado regulates water pollution from CAFOs pursuant to the federal Clean Water Act’s National Pollutant Discharge Elimination System (NPDES) program, which CDPHE implements in Colorado.

9. Under this program, CDPHE issues water pollution permits that must comply with all minimum requirements of the Clean Water Act and implementing federal regulations. These minimum requirements include specific effluent limitations that prohibit certain discharges from CAFOs.

10. Rather than issue individual permits to each CAFO in the state, CDPHE issues a “general” permit that sets the overarching standards and framework for eligible CAFOs in Colorado. This is the General Permit at issue here.

11. In this way, the General Permit is the water pollution control permit for nearly every CAFO in Colorado.

12. The General Permit incorporates federally-required specific effluent limitations for CAFOs, including a prohibition on any pollution discharges from CAFO “production areas” except in extreme rain events.³

13. To determine whether a permitted CAFO is complying with the General Permit and these effluent limitations, the Clean Water Act requires that NPDES permits include representative monitoring and reporting provisions. This clear mandate has been reaffirmed several times by state and federal courts. *See e.g., NRDC v. Cnty. of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013); *NRDC v. EPA*, 808 F.3d 556, 580–81 (2d Cir. 2015);

³ As explained in greater detail below, a “production area” is where animals are housed, feed and waste is stored, and other production processes occur.

Wash. State Dairy Fed'n v. Wash. Dep't of Ecology, 490 P.3d 290, 299–03 (Wash. Ct. App. 2021).

14. Most recently, the Ninth Circuit Court of Appeals specifically considered the CAFO general permit for Idaho CAFOs. In that case, the court held that a CAFO general permit is “arbitrary, capricious, and contrary to law if the permit fails to include monitoring provisions that ensure compliance with the permit’s effluent limitations.” *Food & Water Watch v. EPA*, 20 F.4th 506, 516 (9th Cir. 2021).

15. The General Permit here fails to include the federally-required representative monitoring provisions that can demonstrate whether a CAFO is complying with the Permit's effluent limitations.

16. Beginning in 2021, the Public Interest Groups repeatedly raised this concern—that the General Permit lacked required representative monitoring provisions—at every stage of CDPHE’s administrative processes, including pursuing adjudicatory hearings before an administrative law judge.

17. In 2023, the administrative law judge held that the General Permit was unlawful because it lacked the federally-required representative monitoring provisions and ordered CDPHE to modify the Permit to include those provisions.

18. The agency and Colorado Livestock Association then appealed the administrative law judge's decision to CDPHE, which issued a Final Agency Order reversing the judge's decision and affirming the Permit without the required representative monitoring provisions.

19. Because CDPHE's decision to affirm the General Permit without the federally-required representative monitoring provisions was unlawful, this Court should declare the Permit unlawful, vacate the Final Agency Order, and remand the General Permit back to CDPHE with an order to modify the General Permit to include the required representative monitoring provisions.

PARTIES

20. The Center for Biological Diversity (the Center) is a 501(c)(3) nonprofit corporation headquartered in Tucson, Arizona, with an office in Denver, Colorado, as well as a number of other states and Mexico. The Center has over 1.7 million members and supporters worldwide, including over 3,050 members in Colorado. The Center is committed to protecting Colorado’s wildlife and the ecosystems on which they depend, including by defending the state’s surface and ground waters against impairment by the numerous pollutants discharged from CAFOs in the state, as well as supporting the fundamental rights of Coloradans to a healthy environment, clean drinking water, and swimmable, fishable waterways.

21. Food & Water Watch (FWW) is a 501(c)(3) nonprofit 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 has over 2 million members and supporters nationwide with approximately 42,673 in Colorado. 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. Addressing water pollution from CAFOs is one of FWW's primary goals.

22. The Center and FWW (Public Interest Groups) have members that work, recreate, and conduct educational, scientific, artistic, and other activities in and around Larimer County, Colorado in areas where pollution from CAFOs injures these activities. The Public Interest Groups' members have concrete plans to continue living in these areas and engaging in these activities. The Agency Defendants' issuance of the General Permit without legally-required representative monitoring and reporting provisions causes the Groups and their members continuing concern about exposure to harmful CAFO water pollution and degradation of Colorado's waterways, ecosystems, and wildlife as a result. Agency Defendants' actions additionally injure the Groups' members' recreational, aesthetic, scientific, and educational interests in seeing, living in, and enjoying healthy waterways and ecosystems. The Public Interest Groups' and their members' interests have been, are being, and will continue to be irreparably harmed by Agency Defendants' issuance of the General Permit.

23. The violations alleged in this Complaint have injured and continue to injure the interests of Public Interest Groups and their members. This injury is traceable to the Agency Defendants' issuance of the General Permit. Granting the requested relief would redress these injuries by compelling the Agency Defendants to take action required by the Clean Water Act, the Colorado Water Quality Control Act, and applicable regulations.

24. Defendant Colorado Department of Public Health and Environment (CDPHE) is a state agency responsible for implementing environmental permitting programs that the federal government delegated to Colorado, including the NPDES water pollution permitting program.

25. Defendants Division of Environmental Health and Sustainability (DEHS) and Water Quality Control Division (WQCD) are both divisions within CDPHE. WQCD implements the NPDES permitting program generally, but delegated NPDES permitting authority for CAFOs to the Environmental Agriculture Program (EAP), a program within DEHS.

26. Defendant Jill Hunsaker Ryan is the current Executive Director of CDPHE who issued the Final Agency Order here.

27. Defendant Colorado Livestock Association (CLA) is an advocacy organization that represents CAFO operators. CLA was an intervenor in the administrative proceedings regarding the General Permit. *See* C.R.S. § 24-4-106(4).

JURISDICTION AND VENUE

28. Under the Colorado Water Quality Control Act (WQCA), water pollution permitting decisions are subject to judicial review according to the procedures set forth by the State Administrative Procedure Act (APA) and the WQCA. C.R.S. § 25-8-404(1).

29. Under the APA, “any person adversely affected or aggrieved by any agency action” may seek judicial review of that action in district court. C.R.S. § 24-4-106(4). If the agency action occurs in relation to any hearing pursuant to C.R.S. § 24-4-105, then the party commencing an action for judicial review must also have been a party to such hearing. *Id.*

30. Under the WQCA, a proceeding for judicial review of any final order or determination must be filed within thirty days after the order or determination has become final. C.R.S. § 25-8-404(3).

31. The Final Agency Order issued on April 23, 2024, which completed the administrative process by modifying and affirming the General Permit, constitutes final agency action subject to judicial review under the APA and WQCA.

32. The Public Interest Groups timely filed this request for judicial review on May 23, 2024.

33. The Public Interest Groups are adversely affected and aggrieved by CDPHE’s decision to issue and affirm the unlawful General Permit.

34. The Public Interest Groups’ members and supporters have strong interests in preserving and improving water quality in Colorado and are injured by Agency Defendants’ violations as alleged in this Complaint. As described above, both the Center and FWW have members and supporters who live near, travel to, or regularly use, rely upon, and enjoy the lakes, rivers, and streams that are threatened and harmed by CAFO pollution in Colorado. Groups’ members include individuals who aesthetically enjoy, fish, and recreate in and around waterways in Colorado. Groups’ members also include individuals who may be impacted by groundwater that is or will become contaminated by CAFO pollution in Colorado. As such, these members have concrete interests in clean water, healthy fisheries, and the implementation of the General Permit in a way that complies with federal and state law.

35. The General Permit in its current form adversely affects and will continue to adversely affect the Public Interest Groups and their members and supporters by depriving them of monitoring data from CAFOs covered by the General Permit. These individuals are

concerned about CAFO pollution, yet neither they nor CDPHE are able to determine whether the waters they use and rely on are harmed by CAFO pollution and may be harmful to their health. Neither they nor CDPHE are able to determine whether a CAFO is violating its permit and unlawfully polluting due to this lack of monitoring, and thus cannot hold violators accountable through citizen or government enforcement actions that could protect and restore the waterways they depend on.

36. A decision requiring CDPHE to correct the General Permit's deficiencies would redress these injuries.

37. The Public Interest Groups were parties to OAC Case No. WQ 2022-0001, an adjudicatory hearing regarding the General Permit pursuant to C.R.S. § 24-4-105, and subsequent appeal before CDPHE.

38. This Court has personal jurisdiction over Defendants CDPHE, WQCD, DEHS, Executive Director Jill Hunsaker Ryan and CLA.

39. The WQCA further provides that a petition for judicial review of a water pollution permitting decision must be filed in the district court in which "the pollution source affected is located." C.R.S. § 25-8-404(2).

40. CAFOs permitted under the General Permit are located in Larimer County. Venue is therefore appropriate in Larimer County.

FACTUAL BACKGROUND

A. CAFOs Generate and Manage Large Amounts of Harmful Pollutants

41. CAFOs generate a variety of pollutants that must be carefully managed to protect waterways.

42. CAFOs confine large numbers of animals and their wastes in "production areas," the part of the operation that includes "the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas." 40 C.F.R. § 122.23(b)(8); 5 C.C.R. § 1002-81:81.3(28).

43. The CAFO model thus departs from traditional models of livestock production where animals forage on pasture or rangelands and spread their waste as they forage.

44. Some CAFOs use a waste management system under which manure and urine from confined animals are flushed into earthen or lined storage impoundments, typically called "lagoons."

45. Alternatively, animal waste is allowed to accumulate on production area feedlots, in stockpiles, or in composting windrows.

46. CAFOs produce a large volume of manure. EPA estimated in 2003 that, nationally, confined animals generated approximately 500 million tons of waste annually—three times more raw waste than humans. NPDES Permit Regulation and Effluent Limitation Guidelines and Standards for CAFOs, 68 Fed. Reg. 7,176, 7,180 (Feb 12, 2003).

47. Each year in Colorado, CAFOs produce 17 million tons of manure—more than four times what is produced by humans living in Colorado.

48. In addition to animal waste, CAFOs store feed in production areas before delivering it to animals. This feed is typically stored in large mounds that can produce a highly concentrated waste called leachate.

49. CAFOs can also store and handle chemicals depending on the type of CAFO. For example, dairy CAFOs typically use cleaning chemicals at milking parlors that are flushed out as process wastewater.

50. CAFOs also generate contaminated rainwater or other run-on water that is not diverted from the facility and may mingle with manure or other pollutants at the CAFO, which a CAFO is required to collect and manage.

51. CAFO waste contains “a variety of potential contaminants” known to impair water quality, including nutrients like nitrogen and phosphorous; pathogens such as *E. coli*, cryptosporidium, and salmonella; growth hormones; antibiotics; metals; salts; and chemicals.⁴

52. Some of these contaminants are comingled in impoundments and are thus managed and disposed of together.

53. After collecting the large amounts of waste and wastewater generated in impoundments, CAFOs typically either apply the aggregated waste to land application areas—defined as “land under the control of an [Animal Feeding Operation] owner or operator...to which manure, litter or process wastewater from the production area is or may be applied,” 40 C.F.R. §122.23(b)(3); 5 C.C.R. § 1002-81:81.3(15)—or export it to third parties.

54. CAFOs dispose of waste on land application areas in a variety of ways. Liquid manure and other process wastewater is generally sprayed onto fields via pressurized irrigation systems, applicator tank trucks, or other spreading equipment. Solid manure is generally spread onto fields with manure-spreading equipment.

⁴ Hribar, supra note 2 at 2.

55. Nitrogen and phosphorus in animal wastes may be used to fertilize crops, but when applied in amounts exceeding what crops can uptake as fertilizer, when crops are not growing, or in another manner that allows them to reach subsurface drainage or groundwater prior to crop uptake, they become environmental pollutants.

56. Some constituents of CAFO waste applied to fields, such as pathogens, pharmaceuticals, and heavy metals, have no agronomic value.

57. This disposal practice can lead to concentrations of pollutants and rates of land application that exceed fields' ability to absorb the nutrients or retain other pollutants, resulting in leaching to groundwater or other discharges.

58. Often, as is the case in Larimer County, numerous CAFOs are sited within a single watershed, which can have further cumulative impacts on water quality.

B. CAFOs Discharge Harmful Pollutants into Colorado Waters

59. The contaminants found in CAFO waste are harmful to water quality, wildlife, and public health if allowed to reach surface waters.

60. Thus, CAFOs are widely recognized to pose a significant risk to water quality in Colorado.

61. In fact, animal manure, including CAFO waste, "is a primary source of nitrogen and phosphorus to surface and groundwater."⁵

62. In 2008, EPA estimated that approximately 75 percent of CAFOs discharge pollution into waterways. *See* Revised NPDES Permit Regulation and Effluent Limitation Guidelines for CAFOs in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70,418, 70,469 (Nov. 20, 2008).

63. The storage of waste in CAFO production areas can lead to contamination of nearby waters via leaching and seepage.

64. Manure and other CAFO wastes can contaminate groundwater "through leaks or breaks in storage or containment units" and eventually enter surface water.⁶ Undamaged manure impoundments still threaten groundwater through leaking.⁷ "[E]ven

⁵ Env't Prot. Agency, *Estimated Animal Agriculture Nitrogen and Phosphorus from Manure*, <https://www.epa.gov/nutrientpollution/estimated-animal-agriculture-nitrogen-and-phosphorus-manure> (last visited May 21, 2024).

⁶ Hribar, *supra* note 2, at 3–4.

⁷ Michael Greger & Gorwi Koneswaran, *The Public Health Impacts of Concentrated Animal Feeding Operations on Local Communities*, 33(1) Fam. & Cmty. Health 373, 374 (2010),

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

65. Impoundments in Colorado, as currently authorized by the General Permit and Colorado Regulation 81, have a permitted seepage rate of 1×10^{-6} centimeters per second. C.C.R. § 1002-81:81.8(6).

66. Lagoon liner failures and natural deterioration over time further increase discharge rates. For example, liners can erode or tear when influent is added, when breached by roots or burrowing animals, when damaged during clean out procedures (required periodically to remove accumulated sludge), or when cracked if allowed to dry when emptied.

67. Liner failures can be below the surface level of impounded waste and may not be apparent during visual inspections of a lagoon.

68. Because impoundments are designed to leak, they can pollute surface water in violation of the Clean Water Act when that waste travels through groundwater into streams or other waterways. This Complaint refers to this as an “underground discharge.”

69. Surface waters and groundwater in Colorado are often interconnected.

70. This interconnection can allow for pollutants to move from groundwater to surface water.

71. CAFO impoundments and other manure and feed storage areas can discharge pollutants into groundwater and surface water.

72. CAFO pollution in waterways poses a danger to human health. Over 150 pathogens in manure could impact human health, and water contaminated by pathogens can lead to “widespread outbreaks of illness” that are particularly dangerous for the young, elderly, and immunocompromised.⁸

available at <https://www.humanesociety.org/sites/default/files/docs/public-impacts-factory-farms-on-communities.pdf>. See also Stephen R. Hutchins et al., *Case Studies on the Impact of Concentrated Animal Feeding Operations (CAFOs) on Ground Water Quality 94*, (2012), available at <http://nepis.epa.gov/Adobe/PDF/P100F9DI.pdf> (“all CAFO lagoons do in fact leak”).

⁸ Hribar, *supra* note 2, at 8–10.

73. Indeed, “[e]pidemiological studies have linked CAFO waste runoff to several waterborne outbreaks involving pathogens.”⁹

74. Pathogens from manure “can also threaten human health through shellfish consumption and recreational contact such as swimming in contaminated waters,” leading to infection and disease. 68 Fed. Reg. at 7,238.

75. Nitrogen pollution discharged from CAFOs can also adversely affect human health by contaminating drinking water. High nitrate concentrations in drinking water can be fatal to infants and can cause a blood disorder called methemoglobinemia (blue baby syndrome); this risk led EPA to establish a nitrate limit for drinking water.¹⁰ High nitrate levels in drinking water are also associated with an increased risk of hyperthyroidism, insulin-dependent diabetes, and adverse reproductive outcomes.¹¹

76. Water pollution from CAFOs also poses risks to plant and animal life. Pathogenic microorganisms “have been documented at high densities in receiving surface waters following CAFO waste spills,” causing “major kills” of freshwater and estuarine fish in the affected areas.¹²

77. In 2015, a wastewater containment pond in a cattle feedlot in Colorado overflowed during a severe storm, killing an estimated 15,000 fish. *Colo. Dep’t of Nat. Res. v. 5 Star Feedlot, Inc.*, 486 P.3d 250, 252 (Colo. 2021).

78. Unnatural contributions of nitrogen or phosphorus to surface waters can lead to eutrophication and harmful algal blooms.

79. Eutrophication occurs when a body of water becomes overly enriched with nutrients, leading to an overgrowth of plant life. This overgrowth consumes oxygen, resulting in oxygen depleted (hypoxic) waters and other poor water quality conditions that are unsuitable to many types of aquatic life.¹³

80. When eutrophication becomes extreme, it can result in mass fish kills and severely oxygen deficient (anoxic) “dead zones” incapable of supporting aquatic life.

⁹ Greger & Koneswaran, *supra* note 7, at 375. *See also* Hribar, *supra* note 2, at 8–10.

¹⁰ Susan Cosier, A Sickening Swill, National Resources Defense Council (Dec. 2014), <https://www.nrdc.org/onearth/sickening-swill> (“the condition can be potentially fatal for infants and is the reason the EPA set its 10 [parts per million] standard.”).

¹¹ JoAnn Burkholder, et al., *Impacts of Waste from Concentrated Animal Feeding Operations on Water Quality*, 115(2) *Env’t Health Perspectives* 308, 310 (Feb. 2007), available at <https://ehp.niehs.nih.gov/doi/10.1289/ehp.8839>.

¹² *Id.*

¹³ Hribar, *supra* note 2, at 4–5.

81. Harmful algal blooms, also known as blue-green algae blooms or cyanobacteria, occur when algae rapidly increase in a water body. These blooms can produce toxins that damage the liver and nervous system, leading to potential short- and long-term health effects when humans or animals consume them or recreate in contaminated waters.¹⁴

LEGAL BACKGROUND

A. Federal Clean Water Act and the Colorado Water Quality Control Act

82. The federal Clean Water Act aims to restore and maintain the integrity of the waters of the United States by eliminating discharges of pollution into those waters. 33 U.S.C. § 1251.

83. To that end, the Act prohibits discharges of pollutants into waters of the United States from any point source without a permit issued under the National Pollution Discharge Elimination System, or NPDES, program. 33 U.S.C. § 1342.

84. NPDES permits control pollution by placing limits on discharges called “effluent limitations.” 33 U.S.C. § 1311.

85. The Clean Water Act requires EPA to create federal regulations that establish mandatory effluent limitations that must be included in NPDES permits for certain categories of sources. 33 U.S.C. § 1314(b)(1)–(2).

86. To determine whether a permitted source is violating any effluent limitation, the Clean Water Act mandates that all NPDES permits include representative monitoring provisions that are tailored to the pollution source at issue and that require the permitted source to monitor and self-report its own compliance with its permit’s effluent limitations. 33 U.S.C. §§ 1318(a)(2), (A), 1342(a)(2).

87. Federal regulations clarify that all NPDES permits shall include monitoring provisions that are able to assure compliance with the permit’s effluent limitations by yielding data that is “representative” of the monitored activity. 40 C.F.R. §§ 122.41(j), 122.44(i), 122.48(b); *see also* 40 C.F.R. § 123.25(a) (clarifying that these permitting requirements are applicable to state programs).

88. Failure to include these representative monitoring provisions in an NPDES permit renders the permit unlawful. *NRDC v. Cnty. of Los Angeles*, 725 F.3d 1194, 1207 (9th Cir. 2013) (stating that “an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.”).

¹⁴ Burkholder, *supra* note 11, at 310.

89. The Clean Water Act defines CAFOs as point sources. 33 U.S.C. § 1362(14).
90. The NPDES program specifically regulates discharges from CAFO production areas, which includes the impoundments where CAFOs store waste. 40 C.F.R. §§ 122.23, 412.31.
91. Federal regulations specify that any NPDES permit for a CAFO must include an effluent limitation that prohibits all discharges of pollutants from CAFO production areas except in specific circumstances related to extreme rain events. 40 C.F.R. §§ 412.12, 412.31, 412.35, 412.43.
92. States operating the NPDES program must issue permits that comply with the Clean Water Act's requirements and ensure that permittees adhere to those requirements through adequate monitoring. *See* 33 U.S.C. § 1342(b)(1)(A)–(b)(2)(A) (states operating NPDES programs must issue permits which apply, and insure compliance with, Clean Water Act requirements including effluent limitations and recordkeeping, reporting, and inspection obligations); *see also id.* §§ 1318(a)(A) (requiring owners and operators of point sources to install, use, and maintain monitoring equipment and methods), 1256(e)(1) (prohibiting Clean Water Act grants to states that do not establish and operate necessary devices, methods, systems, and procedures for monitoring), and 1342(b)(2)(B) (state administrators must “inspect, monitor, enter, and require reports” to at least the same extent as required by the Clean Water Act).
93. States that administer the NPDES program must establish requirements “at least as stringent” as the corresponding requirements in the Clean Water Act. 40 C.F.R. § 123.25(a).
94. States that administer the NPDES program must specifically comply with all federal regulations regarding CAFOs. 40 C.F.R. § 123.25(a)(6). *See also* 40 C.F.R. 122.23 (reiterating that federal CAFO regulations are applicable to state permitting programs).
95. The federal government delegated authority to Colorado to administer the NPDES program within the state. Notice of Approval of Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 16,713 (Apr. 14, 1975).
96. In the agreement between EPA and the State of Colorado delegating NPDES permitting authority to the State, Colorado agreed to only issue NPDES permits “which are consistent and compatible with the [Clean Water] Act and with regulations and guidelines promulgated thereunder.” Memorandum of Agreement Between the State of Colorado Dep’t of Health and Env’t Prot. Agency (Dec. 27, 1974) available at <https://www.epa.gov/sites/default/files/2013-09/documents/co-moa-npdes.pdf>.
97. Colorado implements its Clean Water Act and NPDES program obligations through the Colorado Water Quality Control Act (WQCA), which creates the Colorado

Discharge Permit System. *See* C.R.S. § 25-8-501(1) (“No person shall discharge any pollutant into any state water from a point source without first having obtained a permit from the division for such discharge”).

98. The WQCA empowers the Colorado Water Quality Control Commission to promulgate regulations implementing the Colorado Discharge Permit System consistent with the WQCA and federal law. C.R.S. § 25-8-501(3); 5 C.C.R. §§ 1002-61 *et seq.* (Colorado Discharge Permit System Regulations).

99. While the Water Quality Control Division (WQCD) issues most NPDES permits, the WQCD further delegated responsibility for implementing the Clean Water Act’s regulation of CAFOs in Colorado to the Environmental Agricultural Program (EAP) within the Department of Environmental Health & Sustainability.

100. Under this authority, EAP issues NPDES permits for CAFOs, conducts site inspections, responds to complaints, and is responsible for addressing compliance issues through enforcement actions. EAP, Annual Report to the Joint Senate & House Committees (Feb. 22, 2012), at 1.

B. Regulation of CAFOs in Colorado

101. CDPHE regulates CAFOs through two regulatory schemes relevant here.

102. First, Regulation 61 contains the Colorado Discharge Permit System Regulations implementing CDPHE’s obligation under the federal Clean Water Act to protect surface waters, including rivers and streams, from pollution. As required by the Clean Water Act, CAFOs in Colorado must receive a NPDES permit under Regulation 61 before discharging pollutants into waters of the United States. *See* 5 C.C.R. § 1002-61:61.3.

103. Colorado issues one General Permit to provide coverage under the NPDES program for CAFOs, although CAFO owners or operators may apply for coverage under individual permits. 5 C.C.R. § 1002-61:61.17(2)(b).

104. Currently, 102 CAFOs across Colorado are understood to be covered by the General Permit at issue here, including CAFOs in Larimer County.

105. Second, Regulation 81 is a separate set of regulations implementing CDPHE’s obligation under state law to protect groundwater from pollution. Regulation 81 imposes certain requirements on CAFOs to protect groundwater quality, including registering their facility with the state and implementing certain provisions for constructing and inspecting CAFO waste impoundments. 5 C.C.R. §§ 1002-81:81.2, 81.7. The terms of Regulation 81 apply to CAFOs regardless of whether the CAFO receives a NPDES permit under Regulation 61.

106. Because CAFO pollution threatens both surface water and groundwater in Colorado, CAFOs are subject to both regulatory schemes. CDPHE issued the General Permit to permit CAFOs under Regulation 61, while Regulation 81 imposes separate requirements on CAFOs.

C. The General Permit

107. The General Permit as affirmed by CDPHE has nine substantive parts – Part I through Part IX. The parts relevant to this matter are briefly discussed below.

108. Part IX(FF) defines the CAFO “Production Area” to include “the animal confinement area, the manure and residual solids storage area, the raw materials storage area, and the waste containment areas.” This Part further defines “The manure and residual solids storage area” to include but not be limited to “lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments and tanks, static piles, and composting piles.” The Part also defines the “waste containment area” to include but not be limited to “settling basins, and areas within berms and diversions which separate uncontaminated storm water.”

109. Part II is titled “Effluent Limitations.”

110. Part II(A) contains effluent limitations for the CAFO Production Area.

111. Part II(A) includes an effluent limitation stating “[t]here shall be no discharge of process wastewater or manure to surface waters from the production area” except as provided in paragraphs for specific CAFO types.

112. Part II(A)(1)(a), (2)(a), (3)(a), and (4)(a) each include an effluent limitation stating “[t]here shall be no discharge of manure or process wastewater into surface water from the production area” for each CAFO type covered by the permit except in extreme rain events.

113. Part IV is titled “Operating Requirements.”

114. Part IV(B)(1), (2), and (4) require CAFO operators to perform weekly inspections of impoundments and other facilities.

115. Part IV(B)(3) requires CAFO operators to install depth markers in impoundments.

116. The above-ground inspections of impoundments and other facilities required by Part IV(B) do not produce information necessary to determine whether an underground discharge is occurring.

117. The requirements in Part IV(B) are therefore not representative monitoring for underground discharges.

118. Part IV had previously included provisions specific to testing and inspecting impoundments that CDPHE struck from the permit in its Final Agency Order. These provisions were not representative monitoring for underground discharges.

119. Part IV does not, and has never, included representative monitoring for underground discharges.

120. Part VI is titled “Discharge Monitoring.”

121. Part VI(A) includes “Discharge Monitoring Parameters,” identifying parameters, frequency, and sampling practices for monitoring CAFO discharges.

122. Part VI(A) only requires CAFOs to monitor “during” discharges.

123. Part VI(A) only requires monitoring for above-ground discharges, such as through “grab samples.”

124. Part VI does not require monitoring for underground discharges.

PROCEDURAL BACKGROUND

125. The General Permit challenged here has an extensive administrative history over several years. CDPHE first issued the permit in 2021. CDPHE then modified the permit in 2022. CDPHE then finally completed the administrative process by modifying the permit again and affirming this final version of the General Permit in 2024 through the Final Agency Order. Every version of the General Permit—including the final version affirmed by CDPHE—has failed to include the required representative monitoring provisions. For clarity in describing this process, we refer to all of the versions of the permit as “the General Permit” where possible.

126. Since 2021, the Center (later joined by FWW) has raised that the General Permit lacked legally-required representative monitoring provisions at every stage of CDPHE’s administrative processes for issuing and modifying the General Permit.

127. Despite providing CDPHE with extensive comments, studies, and other information about the risks of CAFO pollution leaking through groundwater into waterways and the legally-required representative monitoring provisions, CDPHE finalized the General Permit multiple times without the required representative monitoring provisions. The Center, later joined by FWW, therefore administratively appealed CDPHE’s decisions to finalize the permit without the required representative monitoring provisions and requested adjudicatory hearings. CDPHE granted the hearing requests and referred

them to an administrative law judge, who then consolidated the appeals into a single matter.

128. In 2023, the administrative law judge held that the General Permit was unlawful because it lacked the legally-required representative monitoring provisions. Order Granting Petitioners' Motion for Summary Judgment and Initial Decision, (May 16, 2023), [hereinafter Initial Decision], at 7. The administrative law judge therefore ordered CDPHE to modify the Permit to include the legally-required monitoring provisions. *Id.* The agency Defendants (the Water Quality Control Division and Division of Environmental Health & Sustainability) and Colorado Livestock Association (who joined as a party before the administrative law judge) appealed the administrative law judge's decision to CDPHE.

129. On April 23, 2024, CDPHE issued a Final Agency Order reversing the administrative law judge's decision and affirming the General Permit in substantially the same form as CDPHE first issued it in 2021. The General Permit, as affirmed by the Final Agency Order, still prohibits any water pollution from CAFO production areas (except in extreme rain events) and still does not require representative monitoring for pollution that seeps through groundwater into rivers and waterways.

A. The Initial General Permit

130. On June 10, 2021, EAP published a draft of the General Permit for public comment.

131. In this first draft of the General Permit, the Permit's effluent limitations specifically prohibited all discharges from CAFO production areas, as required by federal law. Part II(A), General Permit at 9-10.

132. On July 12, 2021, the Center submitted comments on the draft General Permit requesting that EAP address several issues, including the lack of representative monitoring for underground discharges to ensure that CAFOs comply with the Permit's prohibition on all discharges from production areas. Center for Biological Diversity Comments on Draft Colorado General Permit for CAFOs (COA934000) (July 12, 2021), at 12. The Center explained that, without such monitoring for underground discharges, the General Permit would be unlawful because it would fail to meet the Clean Water Act's requirements for all NPDES permits.

133. On September 7, 2021, EAP issued the General Permit without including the required representative monitoring provisions for underground discharges.

134. On October 7, 2021, the Center submitted a Notice of Administrative Appeal, Request for an Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action challenging EAP's decision to issue the General Permit without the required representative monitoring for underground discharges. Notice of Administrative Appeal,

Request for Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action, (Oct. 7, 2021), [hereinafter First Notice of Appeal]. The Center’s request explained that federal regulations require that monitoring necessary to ensure compliance with a permit’s terms must be in the permit.

135. On October 18, 2021, CDPHE granted the Center’s request for an adjudicatory hearing.

B. Modification 1 to the General Permit

136. On April 14, 2022—while the Center’s administrative appeal was still pending—EAP proposed “Modification 1” to modify the General Permit and posted the proposed action for public comment. Through Modification 1, EAP proposed to modify the General Permit in three relevant ways. First, the modification “added” a term “to the [permit’s] effluent limitations” that expressly prohibited discharges from production areas to surface water via groundwater with a direct hydrological connection. Fact Sheet for COA-934000 Modification 1 (Apr. 14, 2022) at 1–2. Second, the modification incorporated requirements related to various aspects of construction and operation of CAFO waste impoundments from Regulation 81 into the General Permit. *Id.* Third, the modification added a provision clarifying 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 General Permit. *Id.* at 1.

137. In proposing Modification 1, EAP explained that, “[u]nder the effluent limitations specified in Part II of” the initial General Permit, “there shall be no discharge of process wastewater or manure to surface waters from the production area of a permitted CAFO except whenever precipitation causes an overflow.” Fact Sheet for COA-934000 Modification 1, at 3. These effluent limitations already in the General Permit “prohibited” any “discharge from the production area via groundwater with a direct hydrological connection to surface water” that “is not a result of precipitation,” even though this prohibition against underground discharges was “not expressly stated.” *Id.* EAP proposed Modification 1 merely to “explicitly state” what the permit already prohibited. *Id.*

138. In this way, Modification 1 did not change the scope of the General Permit’s effluent limitations, which already prohibited underground discharges from CAFO production areas.

139. On May 16, 2022, the Center and Food & Water Watch (the Public Interest Groups) submitted comments on the proposed modification. The Groups explained that the modified Permit still “fails to meet the requirements of federal law because it does not incorporate representative monitoring conditions sufficient to ensure compliance with the terms of the Permit, namely the prohibition on production area discharges to surface waters via groundwater.” Petitioners’ Comments on Draft Colorado General Permit for

CAFOs Modification 1 (COA-943000) (May 16, 2022) [hereinafter Petitioners' Comments on Modification 1], at 8.

140. On June 7, 2022, EAP finalized its modification of the General Permit. EAP responded to the Public Interest Groups' comments but did not engage with the studies or regulatory documents provided by the Groups. Rather, EAP relied exclusively on its "professional judgment," asserting without evidence that EAP "feels confident" that Regulation 81's requirements will "assure that there will be no discharge of pollutants from impoundments through groundwater." Fact Sheet for COA-943000 Modification 1 at 8.

141. On June 27, 2022, the Public Interest Groups filed a Notice of Administrative Appeal, Request for an Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action challenging Modification 1. The Groups argued that the General Permit still did not include required monitoring for underground discharges and that EAP's assertion that compliance with Regulation 81's requirements would ensure no underground discharges was arbitrary and factually unsupported.

142. On June 30, 2022, CDPHE granted the Public Interest Groups' request for an adjudicatory hearing on Modification 1.

143. CDPHE referred both hearings to the Office of Administrative Courts for adjudication before an administrative law judge.

C. Proceedings Before the Administrative Law Judge

144. The Water Quality Control Division and Division of Environmental Health & Sustainability (collectively, Agency Respondents) defended the General Permit in the hearings before the administrative law judge.

145. The Colorado Livestock Association (CLA) requested and received party status in both hearings to also defend the General Permit.

146. On July 25, 2022, Administrative Law Judge Matthew E. Norwood consolidated the two appeals into one matter, Case Number WQ 2022-0001.

147. On July 27, 2022, Agency Respondents filed a motion to dismiss arguing the matter was not ripe.

148. On August 19, 2022, Judge Norwood denied the Agency Respondents' motion to dismiss.

149. Following this decision, the parties proceeded with discovery around the Agency Respondents' assertion that Regulation 81's liner and inspection requirements

incorporated into the Permit would ensure that no underground discharge could occur at any CAFO in Colorado.

150. Judge Norwood scheduled a hearing for February 2023 and the parties retained experts to testify about whether Regulation 81's liner and inspection requirements eliminate underground discharges. The parties disclosed their expert's reports in December 2022 and noticed depositions for January 2023.

151. On December 2, 2022, the Agency Respondents and CLA filed a motion for summary judgment arguing that the General Permit's prohibition against underground discharges was not an effluent limitation and therefore did not require monitoring. Respondents' Joint Motion for Summary Judgment, (Dec. 2, 2022), at 10–12. The Agency Respondents and CLA primarily argued that that a prohibition against discharges is not an effluent limitation because a prohibition does not regulate an "actual" discharge, drawing this theory from a particular reading of two federal cases. *Id.* at 13–18.

152. In this motion, the Agency Respondents and CLA also conceded that the General Permit "does not include monitoring requirements" for underground discharges, arguing that this exclusion was "proper[]" because the Permit's prohibition against underground discharges is not an effluent limitation. *Id.* at 16. ("Colorado's General Permit prohibits discharges from CAFO production areas to [surface water] via groundwater, and because of that, the permit properly does not include monitoring requirements for that potential pathway of discharge to [surface water]").

153. On January 4, 2023, Judge Norwood denied the Agency Respondents' and CLA's joint motion for summary judgment. Order Denying Motion for Summary Judgment, (Jan. 4, 2023), at 2. Judge Norwood explicitly rejected the Agency Respondents' and CLA's argument that the General Permit's prohibition against underground discharges did not regulate "actual" discharges, concluding that the theory "defies common sense and turns applicable water pollution law on its head." *Id.* at 2.

154. On January 6, 2023, the parties jointly stayed discovery on the factual issue regarding whether Regulation 81's liner and inspection requirements eliminate underground discharges so that the threshold and independent legal question of whether the General Permit was unlawful because it failed to require representative monitoring for underground discharges could be resolved.

155. On March 31, 2023, the Public Interest Groups filed a motion for summary judgment. The motion argued that the General Permit's prohibition against underground discharges was an effluent limitation that required representative monitoring under the Clean Water Act, and that the General Permit was unlawful because it failed to require that monitoring. Petitioners' Motion for Summary Judgment, (Apr. 3, 2023), at 11.

156. On May 16, 2023, Judge Norwood granted the Public Interest Groups' motion for summary judgment. Judge Norwood concluded that the General Permit's prohibition against underground discharges is an effluent limitation that requires representative monitoring under the Clean Water Act, and that the General Permit is unlawful because it failed to require that monitoring. Initial Decision, at 7.

157. In rendering this decision, Judge Norwood expressly stated that resolving ongoing factual disputes about Regulation 81's requirements and the likelihood of underground discharges in Colorado was not necessary to determine whether the General Permit failed to include the required representative monitoring provisions as a matter of law. *Id.* at 6.

158. The Initial Decision ordered CDPHE to modify the General Permit to require representative monitoring able to assure compliance with the General Permit's effluent limitations prohibiting underground discharges. *Id.* at 2.

D. The Exceptions Process

159. On July 21, 2023, the Agency Respondents and CLA filed "exceptions" to the Initial Decision pursuant to C.R.S. § 24-4-105(14)(a), appealing the administrative law judge's decision to CDPHE.

160. Under C.R.S. § 24-4-105(15)(b), CDPHE does not have authority to sit as a fact-finder when reviewing an administrative law judge's decision. CDPHE's review of an administrative law judge's decision is statutorily limited to the record as developed by the administrative law judge below. *Id.* § 105(15)(a). If a necessary factual finding is not made in the administrative law judge's decision, the "proper course" would be for CDPHE "to remand the case to the" administrative law judge "for additional findings." *Blaine v. Moffat Cnty. Sch. Dist. Re No. 1*, 748 P.2d 1280, 1288 (Colo. 1988), *see also* C.R.S. § 24-4-105(15)(b) (authorizing the Agency to remand the matter back to the administrative law judge).

161. The Agency Respondents and CLA argued that the administrative law judge erred in concluding that the General Permit's prohibition against underground discharges is an effluent limitation for which representative monitoring is required to ensure compliance. Among other arguments, the Agency Respondents and CLA reasserted their argument that the General Permit's prohibition cannot be an effluent limitation because the Permit can only regulate "actual" discharges and that there is no evidence of underground discharges in Colorado. State Respondents' Exceptions to the ALJ's Initial decision, (July 21, 2023), [hereinafter States' Exceptions], at 35.

162. In their exceptions, Agency Respondents also requested that CDPHE strike the provisions that the agency had previously added to the General Permit in Modification 1, asserting that those terms were now "unnecessary." *Id.* at 6.

163. On August 25, 2023, the Public Interest Groups filed a timely response to the exceptions arguing that CDPHE should affirm the Initial Decision because it properly identified that the General Permit lacked the federally-required representative monitoring provisions. Petitioners' Response to States' Exceptions, (Aug. 25, 2023), [hereinafter Petitioners' Response], at 1. The Agency Respondents and CLA replied to the Public Interest Groups' response on September 15, 2023.

164. On October 13, 2023, the Public Interest Groups requested oral argument before CDPHE as authorized by C.R.S. § 24-4-105(15)(a). The Groups noted the importance of the matter and asserted that argument would be valuable to help clarify the technical state and federal regulatory issues presented by this case. The Agency Respondents and CLA opposed argument.

E. The Final Agency Order

165. On April 23, 2024, CDPHE issued the Final Agency Order. The Order reversed the administrative law judge's Initial Decision, struck certain provisions of the General Permit, otherwise affirmed the General Permit, and denied the Groups' request for oral argument. Department of Public Health and Environment's Final Agency Order, (Apr. 23, 2024), [hereinafter Final Agency Order], at 1, 3.

166. In issuing the Final Agency Order, CDPHE made four conclusions relevant here:

- a. First, CDPHE concluded that the General Permit's prohibitions against any discharges from production areas except in certain rain events located in Part II(A)(1)(a), (2)(a), (3)(a), and (4)(a) are "effluent limitations." CDPHE recognized that these prohibitions are required by federal law and are therefore "mandatory" and "proper conditions contained in the General Permit." *Id.* at 6-7.
- b. Second, CDPHE concluded that the General Permit's express prohibition against underground discharges in Part II(A)(5)(a) is not an effluent limitation and struck several provisions from the General Permit, including that express prohibition. *Id.* at 5. CDPHE adopted the Agency Respondents and CLA's arguments that the Clean Water Act only authorizes regulation of "actual" discharges, and that the General Permit's express prohibition against underground discharges improperly regulated "potential" discharges. CDPHE then struck Part II(A)(5)(a) from the General Permit. For similar reasons, CDPHE struck the provisions from Regulation 81 that had been incorporated into the General Permit. *Id.* at
- c. Third, CDPHE concluded that "groundwater-related monitoring" is not required in the General Permit because certain "facts are not present in this

record.” *Id.* at 10. This conclusion related to CDPHE’s view of the case *Food & Water Watch v. EPA*, where the U.S. Court of Appeals for the Ninth Circuit held that a general permit for CAFOs in Idaho was unlawful because it failed to require monitoring for underground discharges. CDPHE concluded that the “record contains no facts that require or warrant the same outcome” as that case because the Public Interest Groups “did not allege and presented no evidence to establish more specific location of CAFOs, their distance to surface water, relation to the identified portions of impaired waters, or geological factors specific to Colorado where CAFOs are located.” *Id.* at 11.

- d. Finally, CDPHE concluded that “groundwater-related monitoring” is not required in the General Permit because “facilities applying for coverage under the General Permit will be required to submit all pertinent information—including location, distance to surface water, and geological factors—to determine how, where, and whether pollutants enter surface water through groundwater.” *Id.* at 12. CDPHE rejected what it understood as the administrative law judge’s conclusion “that groundwater-related monitoring terms are required to effectuate the permit system as a whole.” *Id.* at 11. CDPHE therefore concluded that “no additional monitoring terms are required as conditions in the General Permit.” *Id.* at 12.

167. CDPHE affirmed the General Permit with all of the provisions added by Modification 1 struck except one, the provision clarifying that CAFOs with underground discharges are not eligible for General Permit coverage.

168. For that reason, the General Permit still suffers from the same deficiencies that the Public Interest Groups first identified in 2021.

169. The General Permit as affirmed by CDPHE’s Final Agency Order still prohibits all discharges from production areas and, as a result, still prohibits underground discharges from production areas. As CDPHE confirmed in the Order, these prohibitions against all discharges from production areas are “effluent limitations” and “proper conditions contained in the General Permit.” *Id.* at 7.

170. The General Permit as affirmed by CDPHE still does not include representative monitoring provisions for underground discharges from CAFO production areas.

CLAIM FOR RELIEF

CDPHE's final agency action was arbitrary, capricious, beyond the agency's statutory authority, contrary to the record, and otherwise contrary to law under C.R.S. § 24-4-106(7)(b).

171. The above paragraphs are incorporated herein by reference.

172. Under C.R.S. § 24-4-106(7)(b), this Court shall set aside agency action that is arbitrary or capricious, beyond the agency's statutory authority, contrary to the record, and otherwise contrary to law.

173. CDPHE's decision to issue, modify, and affirm the General Permit was arbitrary, capricious, and contrary to law because the General Permit fails to include representative monitoring provisions that can demonstrate compliance with its effluent limitations, as required by the Clean Water Act and Colorado Water Quality Control Act.

- a. The Clean Water Act requires that state-issued NPDES permits include representative monitoring conditions to demonstrate compliance with a permit's effluent limitations. 40 C.F.R. § 122.41(j), 122.44(i).
- b. Under the Clean Water Act, an effluent limitation is "any requirement" that limits the type or quantity of pollutants that a facility may discharge under a permit. 33 U.S.C. § 1362(11).
- c. In the Part titled "Effluent Limitations," the General Permit prohibits all discharges from CAFO production areas, including underground discharges from CAFO production areas.
- d. The General Permit's prohibition against discharges from CAFO production areas is a "requirement" that limits the discharge of pollutants and is therefore an effluent limitation that requires monitoring under the plain language of the Clean Water Act.
- e. In the Final Agency Order, CDPHE confirmed that the General Permit's prohibitions against discharges from the CAFO production areas are effluent limitations. Final Agency Order at 7.
- f. The General Permit does not require monitoring that can demonstrate a CAFO is complying with the General Permit's effluent limitations because it does not require representative monitoring for underground discharges from CAFO production areas.

- g. Because the General Permit fails to include representative monitoring provisions that can demonstrate compliance with its effluent limitations, the General Permit is unlawful under the Clean Water Act and WQCA.
- h. Because the General Permit is unlawful under federal and state law, CDPHE acted arbitrarily, capriciously, and contrary to law when it issued, modified, and ultimately affirmed the General Permit.

174. CDPHE's decision to affirm the General Permit was arbitrary, capricious, and contrary to law because CDPHE's interpretation in the Final Agency Order of the Clean Water Act's scope and provisions, including the agency's interpretation of "effluent limitation," were contrary to the plain language of the Act and otherwise unlawful.

175. CDPHE's decision to affirm the General Permit was arbitrary, capricious, and contrary to law because the Final Agency Order relied on a misunderstanding of CDPHE's own regulations.

- a. An agency's action is arbitrary and capricious when the agency misapplies its own regulations. *See Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 360 P.3d 186, 191–92 (Colo. App. 2015).
- b. The Final Agency Order concluded that the General Permit does not require monitoring for underground discharges because Colorado regulations require "facilities applying for coverage under the General Permit" to "submit all pertinent information—including location, distance to surface water, and geological factors—to determine how, where, and whether pollutants enter surface water through groundwater." Final Agency Order at 12.
- c. To support this conclusion, CDPHE relied on a provision of the General Permit and several provisions under Regulation 61 and Regulation 81.
- d. The information required by these regulations does not provide "all pertinent information—including location, distance to surface water, and geological factors—to determine how, where, and whether pollutants enter surface water through groundwater." *Id.*
- e. Because CDPHE's decision that monitoring for underground discharges is not required was based on this misunderstanding of its own regulations, CDPHE's decision was arbitrary, capricious, and contrary to law.

176. CDPHE's decision to affirm the General Permit was arbitrary, capricious, and contrary to law because the Final Agency Order exceeded CDPHE's statutory authority in reviewing the administrative law judge's decision.

- a. When CDPHE reviews the decision of an administrative law judge, CDPHE “may not look outside the four corners of” the administrative law judge’s decision to find “some new evidentiary basis for” the agency’s “ultimate determination.” *Blaine v. Moffat Cnty. School Dist. Re No. 1*, 748 P.2d 1280, 1288 (Colo. 1988). To do so would “contravene the underlying statutory scheme by transferring the [administrative law judge’s] responsibility for making factual determinations” to CDPHE’s executive director. *Id.*
- b. The Final Agency Order concludes that the General Permit does not require monitoring for underground discharges because CDPHE concluded that the record did not contain certain facts regarding the likelihood of underground discharges in Colorado, such as “specific location of CAFOs, their distance to surface water, relation to the identified portions of impaired waters, or geological factors specific to Colorado where CAFOs are located.” Final Agency Order at 11.
- c. The likelihood of underground discharges in Colorado was an unresolved factual dispute before the administrative law judge.
- d. By concluding that the General Permit did not require representative monitoring because the record did not demonstrate that leakage was likely, CDPHE made a factual determination that was disputed and had not been resolved by the administrative law judge.
- e. In doing so, CDPHE exceeded its statutory authority by looking “outside the four corners of” administrative law judge’s decision to find “some new evidentiary basis for” its conclusions in the Final Agency Order. *Blaine*, 748 P.2d at 1288.

177. CDPHE’s decision to affirm the General Permit was arbitrary, capricious, and contrary to law because the Final Agency Order was not supported by substantial evidence in the record.

- a. Even if CDPHE had not exceeded its statutory authority in resolving the factual dispute about leakage in Colorado, CDPHE’s factual determination that the record did not demonstrate leakage is possible from permitted facilities was contrary to record.
- b. Because CDPHE’s decision that the General Permit did not require monitoring for underground discharges relied on this unsupported factual conclusion, CDPHE’s decision to affirm the General Permit was not supported by substantial evidence and is therefore unlawful.

PRAYER FOR RELIEF

Public Interest Groups respectfully request that this Court:

1. Declare that the General Permit is unlawful because it fails to require representative monitoring as required by federal and state laws and regulations;
2. Vacate the Final Agency Order;
3. Remand the General Permit to CDPHE with instructions to modify the Permit to include representative monitoring provisions as required by federal and state laws and regulations;
4. Award Public Interest Groups costs of this lawsuit and reasonable attorneys' fees; and
5. Grant such other relief as the Court deems just and equitable.

DESIGNATION OF RECORD

Center for Biological Diversity and Food & Water Watch designate the following documents as relevant parts of the administrative record for this matter pursuant to the Colorado Administrative Procedure Act, C.R.S. § 24-4-106(6):

1. The original or certified copies of all applications, evidence, memoranda, communications, exhibits, comments, studies, guidance documents, publications, policies, manuals, handbooks, and any other papers presented to or considered by CDPHE and any division or program of the agency in issuing the General Permit.
2. The original or certified copies of all applications, evidence, memoranda, communications, exhibits, comments, studies, guidance documents, publications, policies, manuals, handbooks, and any other papers presented to or considered by CDPHE and any division or program of the agency in issuing Modification 1 to the General Permit.
3. The original or certified copies of all pleadings (including all written orders), applications, evidence, memoranda, exhibits, other papers presented to or considered, matters officially noticed, discovery responses, depositions, any findings of fact and conclusions of law proposed by any party, and any written brief before the administrative law judge during the hearings regarding the General Permit, including the electronic recording of the hearing before Administrative Law Judge Matthew E. Norwood on October 31, 2022.
4. The original or certified copies of all pleadings, applications, evidence, memoranda, communications, exhibits, comments, studies, and other papers presented to or considered by CDPHE and any division or program of the agency in issuing the Final Agency Order affirming the General Permit.

Respectfully submitted on May 23, 2024.

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