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MONTANA EIGHTEENTH JUDICIAL DISTRICT, GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER, FOOD & WATER WATCH, and CENTER FOR FOOD SAFETY Plaintiffs, v. MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, an agency of the State of Montana Defendant.	Case No. **COMPLAINT**

COME NOW Plaintiffs Upper Missouri Waterkeeper ("Waterkeeper"), Food & Water Watch ("FWW"), and Center for Food Safety ("CFS"), through counsel, and in support of their complaint seeking review of the November 15th, 2023, decision of the Montana Department of Environmental Quality ("DEQ") to issue the statewide General Permit for Concentrated Animal Feeding Operations, MTG 010000 ("CAFO Permit" or "the Permit," attached here as Exhibit 1), declaratory relief, and their other claims and causes of action, who state and allege as follows:

INTRODUCTION

1. This case challenges the decision by DEQ to issue the Permit for concentrated animal feeding operations ("CAFOs") across the State without the water pollution monitoring necessary to ensure compliance with the Permit's terms and with applicable water quality standards, as required under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.*, ("Clean Water Act") and the Montana Water Quality Act ("MWQA"), § 75-5-101 *et seq.*, MCA.

2. DEQ's failure to include necessary compliance monitoring provisions threatens to seriously degrade water quality throughout the State, undermines the basic framework of the Clean Water Act permit program, precludes DEQ from protecting Montanans' inalienable right to a clean and healthful environment, and renders much of the Permit unenforceable, creating an absence of adequate remedies at law.

3. As explained in more detail below, a CAFO is an industrialized lot or facility that confines hundreds, thousands, or even millions of animals (depending on the species) and that does not sustain crops or vegetation for those animals' consumption and sustenance during the normal growing season.

4. Because of their concentrated nature and industrial-scale operations, CAFOs produce significant quantities of waste that must be carefully managed to avoid polluting the surrounding environment.

5. For this reason, Congress specifically chose to regulate CAFOs and their pollution discharges under the Clean Water Act. 33 U.S.C. § 1362(14). In making that choice over fifty years ago, 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. The recycling capacity of the soil and plant cover has been surpassed…. Precipitation runoff from these areas picks up high concentrations of pollutants which reduce oxygen levels in receiving streams and lakes…. [W]aste management systems are required to prevent waste generated in concentrated production areas from causing serious harm to surface and ground waters.

S. Rep. No. 92-414, 92-93 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3670.

6. Under the Clean Water Act and the MWQA, the discharge of pollutants from point sources like CAFOs to waters of the United States are strictly prohibited unless such discharge is authorized by a National Pollutant Discharge Elimination System ("NPDES") permit (called Montana Pollutant Discharge Elimination System or "MPDES" permits under Montana law). 33 U.S.C. § 1311(a).

7. Because the national goal of the Clean Water Act is to eliminate all discharges of pollution in the United States, 33 U.S.C. §1251(a)(1), all NPDES permits must contain "effluent limitations" to control, reduce, and ultimately eliminate the discharge of pollutants.

8. To determine whether a permitted entity is complying with all effluent limitations, the Clean Water Act requires that all NPDES permits contain monitoring provisions tailored

to the pollution source at issue. 33 U.S.C. §§ 1318(a)(2)(A), 1342(a)(2). This requirement extends to MPDES permits as well. *Id.* § 1342(b).

9. Federal regulations implementing the Clean Water Act further clarify the mandate that all NPDES permits must contain representative monitoring to ensure compliance with effluent limitations. 40 C.F.R. §§ 123.25(a), 122.41(j), 122.44(i), and 122.48.

10. Montana carries out NPDES permitting responsibilities through its MPDES program. *See* ARM 17.30.1301. Under state law, MPDES permitting is administered by DEQ through a program that must be at least as stringent as the NPDES program as established by the U.S. Environmental Protection Agency ("U.S. EPA") pursuant to section 402 of the federal Clean Water Act. *See* ARM 17.30.1301, 17.30.1330(10) (providing for specific consistency between Montana CAFO permits and federal NPDES requirements), 17.30.1311(1) (prohibiting permit issuance unless a permit provides for compliance with the MWQA); *see also* § 75-5-203(2), MCA (authorizing DEQ to establish MPDES regulations more stringent than the federal regulations under certain circumstances).

11. Therefore, it is DEQ's responsibility and obligation to issue a CAFO Permit that complies with both the Clean Water Act and federal implementing regulations, as well as the MWQA.

12. The Ninth Circuit Court of Appeals recently held that the Clean Water Act and implementing regulations mandate compliance monitoring that is representative of the monitored activity in CAFO general permits, such as the CAFO Permit here. *Food & Water Watch v. U.S. EPA*, 20 F.4th 506 (9th Cir. 2021) (holding the CAFO general permit for Idaho was unlawful because it lacked representative monitoring). The Ninth Circuit confirmed 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." *See id.* at 516.

13. The CAFO Permit challenged herein does not contain representative monitoring necessary to ensure compliance with effluent limitations. As held in *Food & Water Watch*, this omission violates the Clean Water Act and federal implementing regulations. *Id.* It is therefore unlawful.

14. By omitting provisions requiring CAFOs to conduct representative monitoring, DEQ renders the effluent limitations in the CAFO Permit unenforceable and leaves Montana's waters vulnerable to unchecked pollution.

15. The MWQA's MPDES permit program and Nondegradation Policy implement the constitutional imperatives that the State must take anticipatory action to protect the "environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources." Mont. Const. Article IX, Section 1(3).

16. DEQ's ability to quantify and characterize pollution discharges from CAFOs is fundamental to enforcing the Permit, and enforcing the Permit is fundamental to preventing unreasonable depletion or degradation of Montana's waters in accordance with the State Constitution. These tasks become impossible where—as here—a MPDES permit fails to provide for adequate monitoring of permitted activities.

17. DEQ's failure to issue a permit capable of identifying, or preventing, CAFO discharges that can cause or contribute to degradation or violations of water quality standards also violates Montanans' Constitutional right to a "clean and healthful environment" and

leaves Montanans without an "adequate remed[y] at law" to protect that right. *See* Mont. Const. Article II, Section 3, and Article IX, Section 1.

JURISDICTION AND VENUE

18. This Court has jurisdiction over Plaintiffs' claims for review of DEQ's administrative action pursuant to the Uniform Declaratory Judgments Act, §§ 27-8-201, 202, MCA; the Montana Water Quality Act, § 75-5-101 *et seq.*, MCA; and Article II, Section 3 and Article IX, Section 1 of the Montana Constitution.

19. Venue is proper in this district under § 25-2-126, MCA, because the Permit's scope applies to operations within Gallatin County and Plaintiff Waterkeeper has its principal place of business in this judicial district.

PARTIES

20. Plaintiff Upper Missouri Waterkeeper ("Waterkeeper") is a member-supported nonprofit organization based in Bozeman, Montana. Waterkeeper works to protect and restore fishable, swimmable, drinkable water throughout the 25,000 square miles of Southwest and West-central Montana's Upper Missouri River Basin. One of the primary strategies Waterkeeper employs in its advocacy efforts is using public participation opportunities to educate and engage the public. Over 1,000 individuals in Montana and around the country support Waterkeeper as members, both financially and with their activism. Since its founding in 2013, Waterkeeper has advocated and litigated at the local, state, and federal level to prevent degradation of water resources. Waterkeeper is also dedicated to assuring that state officials comply with and fully uphold the laws of Montana that are designed to protect the environment from pollution. Waterkeeper's work has included protecting water resources from surface and ground water contamination, misuse, and

degradation resulting from activities authorized by DEQ, including the issuance of discharge permits like the CAFO permit.

21. Plaintiff Food & Water Watch ("FWW") is a national nonprofit organization that mobilizes regular people to build political power to advance bold and uncompromised solutions to the most pressing food, water, and climate problems of our time. FWW uses grassroots organizing, media outreach, public education, research, policy analysis, and litigation to protect public health, the environment, and democracy from the destructive power of polluting, extractive industries. Addressing water quality impacts from CAFOs is central to FWW's mission and one of the organization's primary areas of focus. Since its founding in 2005, FWW has advocated for more stringent regulation of CAFO pollution at the state and national levels, campaigned for moratoria against new CAFOs, and compiled educational resources about pollution and other societal harms associated with industrial agriculture and specifically the CAFO model of livestock production. This work regularly involves engaging with state and federal agencies and communicating with FWW members about opportunities to get involved in administrative processes. FWW has more than one million members and supporters nationwide, including approximately 2,720 members residing in Montana.

22. Plaintiff Center for Food Safety ("CFS") is a national, nonprofit, public interest organization with a mission to protect public health and the environment by curbing the proliferation of harmful food production technologies and practices. CFS represents over one million members, including thousands of members residing in Montana. CFS's members support safe, sustainable food production. Since its inception in 1997, CFS has advocated for increased regulation of CAFOs and the pollution they create and discharge

to United States waters. This advocacy takes many forms, including litigating against polluters and government agencies to uphold environmental laws, advancing legislation, educating CFS members and the public more broadly about the harms proliferated by CAFOs, and participating in administrative rulemaking and permitting processes at the state and national level.

23. Each Plaintiff organization has members who live in the State of Montana, travel to the State, and/or regularly use, rely upon, and enjoy the very lakes, rivers, and streams that are threatened and harmed by CAFO pollution. Plaintiffs' members include individuals who aesthetically enjoy, fish, and recreate in and around Montana's waters, including the Gallatin, Madison, Missouri, Jefferson, Big Hole, Beaverhead, and Yellowstone Rivers and Hebgen and Holter Lakes. Plaintiffs' members also include individuals who may be impacted by ground water that is or will become contaminated by CAFO pollution in Montana. As such, these members have concrete interests in clean water, healthy fisheries, and the implementation of water quality protections strong enough to comply with environmental and public health laws.

24. DEQ's issuance of the CAFO Permit without monitoring provisions adequate to comply with the Clean Water Act and the Montana Constitution harms Plaintiffs' members' interests in clean water, safe access to recreational opportunities, lawful governance, and the availability of accurate environmental compliance data. Many CAFOs are sited near waterways, including but not necessarily limited to the Gallatin, Madison, Missouri, Jefferson, Big Hole, Beaverhead, and Yellowstone Rivers and Hebgen and Holter Lakes that Plaintiffs' members rely on for aesthetic, recreational, economic, and spiritual value.

25. If these CAFOs are not required to monitor their facilities for pollution discharges, CAFOs will have undiscovered and/or unreported pollution discharges and DEQ will be unable to intervene to enforce the Permit and prevent further pollutants from contaminating surface and ground water.

26. Unmonitored discharges also will not be sampled for their constituent pollutants, depriving the public of access to information about the quality and safety of their recreational waters that monitoring would have provided.

27. Further, unmonitored discharges cannot be assessed to inform the State about pollutants entering its waters or the impact those pollutants are having on overall water quality. A database of monitoring submissions would be highly beneficial in informing DEQ and other State officials' regulatory decisions, assessing the efficacy of the CAFO Permit, and protecting Montanan's constitutional right to a clean and healthful environment going forward.

28. Thus, the CAFO Permit's lack of monitoring directly contributes to pollution of the waters Plaintiffs' members use and enjoy, interferes with Plaintiffs' members' ability to educate themselves about the safety of their recreational activities, and hinders Plaintiffs' members' ability to effectively participate in the regulatory process.

29. The CAFO Permit's failure to comply with statutory monitoring requirements also interferes with both the public's and government's ability to enforce the Clean Water Act and the right of all Montanans to a clean and healthful environment. Without access to the monitoring data CAFOs are legally required to collect and disclose, neither the public nor governmental agencies have the information necessary to ensure CAFOs are complying with the Permit's effluent limitations and to initiate enforcement actions if

they are not. Thus, DEQ's issuance of a legally deficient CAFO Permit injures the public's right to an adequate remedy at law and is harming the health, livelihoods, and recreational interests of Plaintiffs' members.

30. This action is brought on Plaintiffs' behalf and on behalf of their members.

31. Plaintiffs' missions include protecting water quality and ensuring compliance with the laws and regulations of Montana and the United States.

32. Plaintiffs participated in the DEQ permit review process and submitted timely technical comments on the draft CAFO Permit, including the issues raised in this Complaint.

33. The comments Plaintiffs submitted to DEQ included the claims raised in this Complaint.

34. In addition to causing the injuries to Plaintiffs' members described above, DEQ's refusal to incorporate the changes Plaintiffs requested into the final Permit deprives Plaintiffs of the information needed to advocate for effective regulation of CAFO pollution. In this manner, DEQ's failure to develop a permit that complies with the Clean Water Act's monitoring requirements directly impedes Plaintiffs' pursuit of their missions.

35. Defendant DEQ was established by the legislature in Chapter 418, Laws of 1995 (SB 234). Under Montana law, DEQ is responsible for protecting water quality and issuing permits. *Mont. Env't Info. Ctr. v. DEQ*, 1999 MT 248, ¶ 5, 296 Mont. 207, 988 P.2d 1236 (hereinafter "*MEIC*").

36. DEQ has the power to redress the injuries to Plaintiffs and their members by issuing a permit with representative monitoring provisions capable of showing whether a CAFO has violated the Permit's effluent limitations or degraded water quality.

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FACTUAL BACKGROUND

CAFOs Generate and Handle Large Amounts of Harmful Pollutants

37. CAFOs generate and handle a variety of harmful pollutants that must be carefully managed to protect waterways.

38. 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); ARM 17.30.1330(10)(a).

39. Manure and urine from confined animals are sometimes flushed into earthen or lined storage impoundments, typically referred to as "lagoons" or "pits."

40. Alternatively, animal wastes are allowed to accumulate on production area feedlots, in stockpiles, or in composting windrows.

41. CAFO animal waste contains dangerous pathogens including *E. coli.* and fecal coliform.

42. CAFO animal waste also contains pharmaceuticals like antibiotics and hormones fed or otherwise administered to animals because these often pass through target animals unmetabolized and are therefore excreted in the animals' manure or urine.

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

44. CAFOs can also store and handle a variety of chemicals depending on the type of CAFO. For example, dairy CAFOs often use cleaning chemicals at milking parlors that are flushed out along with other debris and collected as process wastewater.

45. 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 they are required to collect.

46. Some of these different waste steams commingle in lagoons and are thus disposed of together.

47. These various waste streams contain many pollutants known to impair water quality and threaten public and environmental health. These include nitrogen and phosphorus, pathogens, pharmaceuticals such as antibiotics and hormones, pesticides, salts, chemicals, and metals.

48. CAFOs typically either apply their 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); ARM 17.30.1330(10)(a)—or export it to third parties.

49. 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.

50. 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 a manner than allows them to run off the field prior to crop uptake, they become environmental pollutants.

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

52. This disposal practice often leads 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 ground water or runoff to surface waters.

53. 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.

54. Numerous CAFOs can be sited within a single watershed, which can lead to cumulative impacts on water quality.

CAFOs Discharge Harmful Pollutants into State Waters

55. Regulators, including DEQ, have long understood that harmful pollutants generated at CAFOs can and do discharge into surface water and ground water.

56. Montana's branch of the Natural Resources Conservation Service, an agency within the U.S. Department of Agriculture, recognizes that "CAFOs can negatively impact surface water quality by loading streams with excessive nutrients and pathogens and potentially harming aquatic environments and drinking water quality." U.S. Dep't Agric., Gallatin Surface Water Quality CAFO Targeted Implementation Plan at 3, https://www.nrcs.usda.gov/sites/default/files/2022-09/Montana-TIP-Gallatin-Surface-Water-CAFO.pdf.

57. In fact, animal manure, including CAFO waste, "is a primary source of nitrogen and phosphorus to surface and groundwater." U.S. EPA, *Estimated Animal Agriculture Nitrogen and Phosphorus from Manure*, https://www.epa.gov/nutrientpollution/estimated-animal-agriculture-nitrogen-and-phosphorus-manure.

58. CAFO pollutants discharge to surface water through a number of pathways including, but not limited to, manure and wastewater handling infrastructure such as pipes, pumps, and storage facilities; waste impoundment overflows; waste transport equipment; irrigation canals; ditches; land application area conduits to surface waters such as tile drains and other drainage systems; and surface runoff.

59. CAFO pollutants can also discharge to ground water and, through ground water transport, reach State Waters.

60. State Waters include "a body of water, irrigation system, or drainage system, either surface or underground," but does not include lagoons themselves. § 75-5-103(32), MCA.

61. Surface water and ground water in Montana are often interconnected.

62. CAFO pollution discharged to shallow ground water in many Montana river valleys affects ground water quality and can impact connected surface waters.

63. CAFO waste lagoons and other manure storage or processing areas can discharge pollutants into ground water and surface water.

64. Subsurface lagoon leakage can and does reach ground water.

65. The CAFO Permit allows a specific seepage rate from waste lagoons. CAFO Permit at II.C.

66. Lagoons and other CAFO animal waste storage impoundments that are constructed to allow specific seepage rates "are designed to leak." *Food & Water Watch*, 20 F.4th at 509 (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)).

67. Lagoons are prone to failures and deterioration that 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.

68. Because liner failures can be below the surface level of impounded waste, they may not be apparent during visual inspection.

69. Land application activities can also cause a discharge if equipment fails to operate properly or by user error, such as failing to shut off waste delivery pumps to irrigation systems. Such discharges can go unnoticed if not monitored in a proper and timely manner.

70. Land application activities can also cause discharges if conditions are imperfect, for example if a field is saturated or contains melting snow or ice.

71. When the U.S. EPA conducted an analysis of CAFO characteristics, it concluded that approximately 75 percent of all CAFOs discharge pollution into waterways. *See* Revised National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitations Guidelines for Concentrated Animal Feeding Operations in Response to the *Waterkeeper* Decision, 73 Fed. Reg. 70,418, 70,469 (Nov. 20, 2008) (explaining that only about 25 percent of CAFOs are not designed to discharge).

CAFO Pollutants Threaten Montana Water Quality and Public Health

72. When CAFO pollutants reach surface waters or ground water, they pose significant threats to water quality, fish, other wildlife, and public health.

73. Unnatural contributions of nitrogen or phosphorus to surface waters can lead to eutrophication and/or harmful algal blooms ("HABs").

74. 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.

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

76. Wild fish populations in Montana are declining.

77. For example, several river systems in southwest Montana are experiencing severe and alarming declines in fish populations. The full causes of these declines are unclear due to an absence of data, but agriculture and eutrophication are widely accepted as part of the problem.

78. Publications by Montana fishing interests have raised these concerns and the impacts that declining fish populations could have on Montana's economy and Montanans' way of life. *See* Joshua Bergan, *Southwest Montana Trout Populations Continue Alarming Decline*, FLY FISHERMAN (May 31, 2023), https://www.flyfisherman.com/editorial/montana-trout-populations-continue-decline/474356; *Fish Populations and a River in Peril*, BIG HOLE RIVER FOUND. (May 26, 2023), https://www.bhrf.org/newsandevents/fish-populations-amp-a-river-in-peril.

79. Harmful algal blooms ("HABs"), also known as blue-green algae blooms or cyanobacteria, occur when algae rapidly increase in a water body. HABs 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.

80. HABs are increasingly common in Montana waters.

81. Pathogens like *E. coli* and fecal coliform are present in CAFO waste streams and can cause serious gastrointestinal symptoms when consumed by humans or other animals in drinking water or through contact with contaminated waters.

82. Pharmaceuticals used at CAFOs and found in animal waste can act as endocrine disruptors. Endocrine disrupting substances can interfere with how hormones work in the body.

83. One peer-reviewed study specifically looking at a river affected by feedlot effluent in Nebraska found that wild fish collected downstream of the feedlot exhibited altered reproductive biology. Edward F. Orlando et al., *Endocrine-Disrupting Effects of Cattle Feedlot Effluent on an Aquatic Sentinel Species, the Fathead Minnow*, 112(3) ENV'T HEALTH PERSP. 353, 356 (Mar. 2004), https://ehp.niehs.nih.gov/doi/epdf/10.1289/ehp.6591.

84. Montana's catalog of impaired waters, known as the Integrated Report, demonstrates that CAFOs are already having a significant impact on water quality. *See* List of Impaired Waters, data available online at: https://clean-water-act-information-center-mtdeq.hub.arcgis.com.

85. DEQ has identified rivers and streams running through areas with CAFOs that are impaired by pollutants produced by and commonly associated with CAFOs, such as nutrients and pathogens.

86. Some CAFO pollutants are not analyzed for purposes of the Integrated Report, and thus may be polluting State Waters undetected.

87. CAFO pollutants discharged to ground water also have adverse impacts.

88. One common ground water contaminant found in association with CAFOs is nitrate, a form of nitrogen.

89. Nitrate contamination in drinking water is associated with dangerous human health conditions like colorectal cancer, thyroid disease, birth defects, premature births, and methemoglobinemia (a potentially fatal condition commonly known as "blue baby syndrome").

90. Hydrologic systems vary, with ground water flowing into surface waters in some and surface waters infiltrating ground water in others. Contaminants can thus be transmitted from ground to surface waters, or vice versa.

91. DEQ acknowledges in its Integrated Reports that agriculture is a contributing source to many documented river impairment designations. *See, e.g.*, 2020 Integrated Report, App'x A (listing the following river impairments: Gallatin (A-45 to A-49), Madison (A-41 to A-44), Jefferson (A-32 to A-35), Big Hole (A-20 to A-31), Beaverhead River (A-12 to A-15), Yellowstone (A-122 to A-134)), available at https://deq.mt.gov/water/resources.

92. As of July 2023, there were 116 CAFOs covered by the CAFO Permit.

93. These CAFOs are causing or contributing to exceedances of water quality standards in Montana.

94. Similarly, CAFOs are causing or contributing to water quality degradation in Montana. *See* § 75-5-103(6), MCA (defining "degradation" as "a change in water quality that lowers the quality of high-quality waters for a parameter").

95. Because CAFOs have not been required to conduct representative monitoring in past iterations of the CAFO permit and are not required to conduct representative monitoring

under the current CAFO Permit, the magnitude of their contributions to these water quality impairments and degradation is unknown.

96. Similarly, due to a lack of monitoring at CAFOs, determining whether and to what extent specific CAFOs are causing or contributing to ground water degradation is difficult if not impossible.

Procedural History of Montana's CAFO Permit

97. On July 13th, 2023, DEQ noticed the draft General Permit for CAFOs and associated supporting documents throughout Montana, except within the boundaries of Indian Reservations. DEQ invited comments from the public until August 21st, 2023.

98. Plaintiffs submitted comments on the draft Permit on August 21st, 2023. (Plaintiffs' public comments are attached here as Exhibit 2).

99. U.S. EPA and other concerned citizens also submitted public comments alerting DEQ to the lack of representative monitoring in the draft Permit.

100. On November 15th, 2023, DEQ issued the final CAFO Permit—along with associated documents including the Fact Sheet, Environmental Assessment, and the agency's Response to Public Comments—with an effective date of November 1st, 2023, and an expiration date of October 31, 2028. (The supporting documents are attached here as Exhibit 3 (Fact Sheet), Exhibit 4 (Environmental Assessment), and Exhibit 5 (Response to Public Comments)).

101. In response to comments, DEQ added limited, visual-only inspection conditions at land application areas when a CAFO operator determines an area poses a uniquely high risk of nutrient run off, *see* CAFO Permit at II.D.1.a–b, but declined to include effluent sampling or water quality monitoring *even when a visual inspection identifies a discharge*.

102. DEQ otherwise wholly declined to add additional monitoring provisions, despite comments stating that without such monitoring the agency lacks an evidentiary basis to ensure compliance with the Permit's effluent limitations, assess exceedances of water quality standards, or determine whether CAFO activities are causing degradation of high-quality waters.

103. Per § 75-5-403(3)(a), MCA, Plaintiffs now timely file this Complaint within 30 days of DEQ's final decision, challenging the Permit's lack of representative monitoring to ensure compliance with the Permit's discharge limitations.

LEGAL BACKGROUND

104. It is the policy of the State of Montana to "provide a comprehensive program for the prevention, abatement, and control of water pollution." § 75-5-101(2), MCA. DEQ is responsible under Montana law for protecting water quality and issuing permits that protect State Waters. § 75-5-211, MCA; *MEIC*, ¶ 5.

105. Section 402 of the Clean Water Act creates a cooperative federalism scheme for issuing permits authorizing discharges of pollutants to waterways from any "point source." 33 U.S.C. § 1342; *id.* § 1362(14) (defining "point source"). The Act enables U.S. EPA to authorize States desiring to administer their own permitting programs, provided such States can demonstrate their programs are stringent enough to comply with the minimum requirements imposed by federal law. *Id.* § 1342(b).

106. The State of Montana has been delegated section 402 permitting authority by U.S. EPA since 1974. Under that delegation of authority, the State agreed to operate its permitting program in conformity with the Clean Water Act and federal regulations.

107. Accordingly, Montana's MPDES permitting program for CAFOs must include three essential elements to comply with section 402 of the Clean Water Act.

108. First, all permits must include effluent limitations restricting the types and quantities of pollutants that point sources are authorized to discharge. 33 U.S.C. §§ 1311, 1342; ARM 17.30.1344(1) (incorporating 40 C.F.R. § 122.44 into Montana law).

109. As defined by Montana law, an effluent limitation or "effluent standard" is "a restriction or prohibition on quantities, rates, and concentrations of chemical, physical, biological, and other constituents that are discharged into state waters." § 75-5-103(9), MCA.

110. These effluent standards must meet federal regulatory baselines, at a minimum, and must ensure dischargers do not cause or contribute to exceedances of State water quality standards.

111. Second, MPDES permits rely on self-monitoring to ensure compliance with effluent standards. ARM 17.30.1344(1) (incorporating 40 C.F.R. § 122.43 into Montana law), 17.30.1351(1); *see also* § 75-5-616, MCA ("The department shall take actions that are authorized under this part to ensure that the terms and conditions of issued permits are complied with and to ensure that violations of this chapter are appropriately prosecuted."); § 75-5-602, MCA (authorizing DEQ to require monitoring); *Food & Water Watch,* 20 F.4th at 515 ("Monitoring is performed to determine compliance with effluent limitations established in NPDES permits, establish a basis for enforcement actions, assess treatment efficiency, characterize effluents and characterize receiving waters." (quoting U.S. EPA, NPDES Permit Writers' Manual at 8-2 (Sept. 2010))).

112. Monitoring must be representative of the monitored activity. 40 C.F.R. §§ 122.41(j)(1), 122.48(b); ARM 17.30.1342(10)(a); ARM 17.30.1351(1)(b).

113. Third, permittees must report this monitoring data to inform DEQ and the public of a permittee's pollution management and monitoring results and to "establish a basis for enforcement actions" against violators. *Food & Water Watch*, 20 F.4th at 515; *see also* 33 U.S.C. § 1318(b) (requiring public disclosure of effluent data except in limited circumstances); 40 C.F.R. § 122.44(i)(1)–(2) (requiring that all permits include monitoring and reporting provisions); ARM 17.30.1344 (incorporating the requirements of 40 C.F.R. § 122.44 into Montana law).

114. Permittees self-monitoring their pollution discharges and reporting monitoring results is how the Clean Water Act facilitates DEQ or public enforcement of a MPDES permit against facilities that fail to comply with permit terms.

115. Without monitoring, the Permit's effluent limitations are rendered unenforceable.

116. Citizen enforcement of MPDES permits is a critical function upon which the Clean Water Act framework relies. 33 U.S.C. § 1365; *see also* § 75-5-636, MCA (empowering persons to notify DEQ of a violation and, if valid, mandating that DEQ initiate appropriate enforcement).

117. Therefore, the CAFO Permit's function as a limit on pollution entering Montana waters is undermined if DEQ does not includes these three essential pillars of an effective permit.

CAFOs Under the Clean Water Act and the MWQA

118. The Clean Water Act specifically includes CAFOs in the definition of a "point source" due to their unique threat to water quality. 33 U.S.C. § 1362(14).

119. CAFOs are defined as a lot or facility where the following conditions are met:

a. Animals have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period;

b. Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility; and

c. Enough animals are on site to qualify as a Large CAFO under Clean Water Act regulations, or enough animals are on site to qualify as a Medium CAFO under the federal regulations and the facility either discharges through a manmade device or allows run-on water to mingle with CAFO operations and then discharge. § 75-5-801(2)–(4), MCA; 40 C.F.R. § 122.23(b).

120. Large CAFOs are those lots or facilities that confine a certain number of animals. For example, CAFOs that confine 1,000 or more beef cattle, 700 or more mature dairy cows, 2,500 or more swine weighing 55 pounds or more, 500 horses, or 55,000 turkeys are defined as Large CAFOs. § 75-5-801(3), MCA (listing these and other animal number thresholds); 40 C.F.R. § 122.23(b)(4) (same).

121. Medium CAFOs are those lots or facilities that confine a certain number of animals, and either discharge pollutants to waters of the United States through a conveyance or allow CAFO pollutants to contaminate run-on water and be discharged. § 75-5-801(4), MCA; 40 C.F.R. § 122.23(b)(6).

122. Montana law requires all Large CAFOs and Medium CAFOs to obtain coverage under a general permit or, if DEQ discovers information indicating the general permit as applied to a particular CAFO is not sufficiently protective of water quality, coverage under an individual permit.

123. DEQ may also designate a smaller animal feeding operation as a CAFO upon determination that it is a significant contributor of pollutants to State Waters. § 75-5-801(2), MCA; ARM 17.30.1330(5); 40 C.F.R. § 122.23(c).

124. Montana law requires all designated CAFOs to obtain coverage under the general permit or, when DEQ discovers the general permit as applied to a specific CAFO is not sufficiently protective of State Waters, an individual permit. § 75-5-802, MCA.

125. Federal regulations establish minimum effluent limitation requirements for CAFO permits. 40 C.F.R. § 122.42(e) and part 412. These regulations prohibit discharges from production areas except under very limited circumstances. *See* 40 C.F.R. § 412.31(a).

126. The adoption and implementation of "Nutrient Management Plans" intended to "minimiz[e] nitrogen and phosphorus movement to surface waters," is an important requirement in any CAFO general permit. *Id.* §§ 122.42(e)(1), 412.4(c); ARM 17.30.1334(1). The terms of Nutrient Management Plans are considered effluent limitations.

127. The MWQA is intended to protect State Waters from degradation, including from seepage from CAFOs that "may reach [State Waters] in a condition which may pollute" State Waters. § 75-5-104, MCA.

The MWQA and Montanan's Constitutional Right to a Clean and Healthful Environment

128. Montana's Constitution establishes an inalienable right to a "clean and healthful environment" for all Montanans. Article II, Section 3.

129. Article IX, Section 1(2) requires the Montana legislature to "provide for the administration and enforcement of this duty."

130. Further, Article IX, Section 1(3) requires the legislature to "provide adequate remedies" to protect environmental life support systems and guard against unreasonable depletion and degradation of natural resources.

131. These constitutional provisions are intended to not "merely prohibit that degree of environmental degradation which can be conclusively linked to ill health or physical endangerment." *MEIC,* ¶ 77. Rather, read together, they provide environmental "protections which are both anticipatory and preventative." *Id*.

132. DEQ is an agent of the State of Montana. The constitutional obligation to maintain and improve the environment therefore extends to DEQ.

133. The MWQA expressly implements citizens' constitutional environmental rights. § 75-5-102(1), MCA.

134. The MWQA's purpose is to "conserve water by protecting, maintaining, and improving [its] quality and potability," and to "provide a comprehensive program for the prevention, abatement, and control of water pollution." § 75-5-101(1)–(2), MCA.

135. To achieve these goals, the MWQA authorizes DEQ to adopt water quality standards. Water quality standards set pollutant ceilings necessary to protect a water's beneficial uses, including "public water supplies, wildlife, fish and aquatic life, agriculture, industry, recreation, and other beneficial uses." ARM 17.30.601, 17.30.603(1).

136. Water quality standards also apply to ground water by prohibiting discharges to ground water that would cause a violation of an established water quality standard. ARM 17.30.603(4).

137. Under the MQWA, DEQ must issue CAFO permits with effluent standards sufficient to prevent violations of water quality standards. *See* § 75-5-303(1), MCA (requiring maintenance of state water quality at levels sufficient to protect beneficial uses); ARM 17.30.637(2) (prohibiting discharges that, alone or in combination, violate water quality

standards); *see also* 33 U.S.C. § 1311(b)(1)(C) (requiring implementation of effluent limitations stringent enough to meet water quality standards).

138. Effluent standards in MPDES permits "establish maximum allowable changes in surface water quality" and "establish a basis for limiting the discharge of pollutants which affect prescribed beneficial uses of surface waters." ARM 17.30.603(1).

139. The MWQA's Nondegradation Policy requires the protection and maintenance of existing uses of State Waters and the level of water quality necessary to protect those uses. § 75-5-303(1), MCA.

FIRST CLAIM FOR RELIEF

(Violation of the Clean Water Act: Failure to Include Monitoring to Ensure Compliance)

140. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

141. Under the Clean Water Act, permits authorizing the discharge of pollutants may only issue where such permits *ensure* that every discharge of pollutants will comply with all applicable effluent standards. This applies to the CAFO Permit.

142. Permits must specify "[r]equired monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring." 40 C.F.R. § 122.48(b).

143. The CAFO Permit does not include representative monitoring sufficient to ensure CAFOs comply with the Permit's effluent limitations or to assess whether CAFO discharges cause or contribute to exceedances of water quality standards or degradation of high-quality waters.

144. The CAFO Permit includes effluent standards applicable to production areas and effluent standards applicable to land application areas. Effluent standards for production areas depend on the type of CAFO and whether a CAFO is new or existing.

145. For existing CAFOs, "[t]here must be no discharge of manure, litter, or process wastewater pollutants from the production area into State Waters" except when a severe storm event results in waste impoundment overflow and operators are otherwise in compliance with all relevant pollution control practices required by the Permit. CAFO Permit at II.A.

146. For new swine, chicken, turkey, and veal calf CAFOs, "there must be no discharge of manure, litter, or process wastewater pollutants from the production area into State Waters" whatsoever. *Id.*

147. Despite these prohibitions on nearly all production area discharges, the Permit expressly authorizes continuous seepage from waste lagoons at any CAFO. *Id.* at II.C.1.

148. As explained above and in Plaintiffs' public comments to DEQ, CAFO lagoons with the seepage rate allowed by the Permit can pollute local ground water underlying CAFOs.

149. As for land application areas, one of the Permit's effluent standards states "[t]here must be no discharge from the land application area during dry weather." *Id.* at II.D.1. The other states that land application activities must conform to an approved Nutrient Management Plan to "minimiz[e] nitrogen and phosphorus movement into surface waters" under all conditions. *Id.* at II.D.2.

150. Aside from production areas and land application areas, the CAFO Permit also authorizes "[p]rocess wastewater discharges from outside the production area." *Id.* at II.G.

151. Finally, the CAFO Permit flatly prohibits any discharge that "either alone or in combination with other wastes will violate or can reasonably be expected to violate any [water quality] standard." Fact Sheet at 6.

152. Contrary to the Clean Water Act, the Permit does not contain representative monitoring for multiple sources of discharges from CAFOs.

153. The CAFO Permit has no monitoring requirement to ensure production area pollutants do not discharge to ground water in violation of the Permit's effluent standards.

154. The CAFO Permit has no monitoring requirement to ensure that authorized discharges through seepage from waste storage lagoons comply with the Permit's effluent standards, including the requirement that discharges do not cause or contribute to an exceedance of water quality standards via ground water transport.

155. The CAFO Permit also fails to require representative monitoring even under the limited circumstances when above-ground discharges are allowed (*i.e.*, when caused by extreme precipitation events), instead merely requiring notice to DEQ of the discharge. Permit at II.A.1.e.

156. Regarding land application areas, the Permit only requires that CAFOs visually inspect a subset of fields to determine whether pollutants are discharged during dry weather in violation of the corresponding effluent standard. *See id.* at II.D.1.a–b. And even when land application area discharges are discovered, the Permit does not require effluent sampling, in-stream water quality monitoring, or any other kind of monitoring.

157. The Permit does not contain representative monitoring to ensure land application activities meet effluent limitations under all conditions. *Id.*

158. The Permit contains no monitoring at all to ensure that CAFO pollutants spread onto land application areas do not leach into ground water.

159. These omissions leave a large swath of land application area discharges entirely unmonitored.

160. Finally, the Permit does not require any monitoring of the process wastewater it authorizes CAFOs to discharge "outside the production area." Instead, regarding such discharges, the CAFO Permit merely requires that a facility's Nutrient Management Plan "identify measures necessary to meet applicable water quality standards in DEQ Circular 7." *Id*. at II.G.

161. Without adequate monitoring, there is no means of ensuring a CAFO is not discharging pollutants in violation of the Permit's effluent standards and no means of ensuring waters receiving discharges authorized by the CAFO permit will continue to meet water quality standards. Thus, DEQ's failure to include monitoring in the Permit renders much of the permit unenforceable and puts Montana's water quality at serious risk.

162. DEQ's failure to require necessary monitoring will also prevent successful implementation of its overall CAFO permit program. For instance, the CAFO Permit contains provisions requiring operations to obtain an individual MPDES permit in lieu of general permit coverage when the permittee cannot comply with the terms of the permit or when DEQ determines "that discharge causes or contributes to a violation of water quality standards." *Id*. at I.H. Without representative monitoring data, DEQ has no way of determining whether a discharge from a CAFO is causing or contributing to a violation of the State's water quality standards.

163. Additionally, the CAFO Permit contains a "Reopener" provision that allows DEQ to "reopen[] and modif[y]" appropriate effluent limitations "or other appropriate requirements" if one or more of four conditions are met. *Id*. V.T. Two of those four conditions relate to water quality standards. As with determining if a CAFO needs an individual MPDES permit, if representative monitoring is not required, DEQ will not know whether a CAFO's discharges raise a water quality issue.

164. The Permit allows DEQ, at its *discretion*, to require individual permittees to undertake some sort of monitoring. *See* CAFO Permit at III.C and V.K.1. This case-by-case monitoring by individual permittees is no replacement for the type of routine, representative monitoring that is required by the Clean Water Act and its implementing regulations for *all* permittees operating under a General Permit.

165. The Permit's lack of monitoring renders DEQ's exclusion of CAFOs that "do not meet the minimum ground water protection" and those that "cannot comply with any applicable water quality standard" from coverage under the Permit meaningless. *See* CAFO Permit at I.C.3 and .4.

166. Furthermore, by relying on a system that fails to require necessary monitoring, DEQ cannot ascertain whether the pollution control practices required by the Permit are actually effective in the real world, or whether better controls should be implemented to protect water quality and public health.

167. This not only undermines DEQ's ability to enforce the law and protect water quality, but also nearly eliminates Montanans' ability to enforce the Permit through citizen suits as intended under the Clean Water Act.

168. For all these reasons, DEQ issuance of the Permit violates the Clean Water Act.

SECOND CLAIM FOR RELIEF

(Montana Water Quality Act and the Montana Constitution)

169. The allegations in the foregoing paragraphs are re-alleged and incorporated herein by reference.

170. As explained above, the Montana Constitution guarantees all Montanans "the right to a clean and healthful environment," and imposes duties—including the provision of adequate remedies to protect the environment—upon the State. Mont. Const., Art. II, Sec. 3, Art. IX, Sec. 1.

171. The MWQA was enacted to give form and substance to DEQ's constitutional obligations to maintain clean and healthful water and provide adequate remedies to prevent degradation of Montana's waters. § 75-5-102(1), MCA.

172. Thus, DEQ's MPDES permitting actions must be guided by the imperatives of Article II, Section 3 and Article IX of the Montana Constitution.

173. In implementing the MPDES program, DEQ must establish effluent limitations stringent enough to keep waters in compliance with water quality standards designed to protect the waters' beneficial uses.

174. Maintaining these beneficial uses is necessary to safeguard the constitutional right to a clean and healthful environment. *See MEIC*, ¶ 80 (holding the MWQA's Nondegradation Policy implements Article IX, Section 1 of the Montana Constitution); § 75-5-303(1). MCA (requiring maintenance of existing uses as part of Montana's Nondegradation Policy).

175. DEQ must act in an anticipatory and preventative manner to protect State Waters from pollution.

176. Thus, DEQ must preserve water quality at levels permissible under applicable water quality standards—including through the enforcement of effluent standards—in order to comply with its constitutional obligation to maintain a clean and healthful environment for present and future generations.

177. By excluding representative monitoring requirements from the CAFO Permit, DEQ has foreclosed enforcement of the Permit's effluent standards, including the standard that "[n]o wastes may be discharged such that the waste either alone or in combination with other wastes will violate or can reasonably be expected to violate any standard." Fact Sheet at 6.

178. The CAFO Permit does not contain representative monitoring to ensure permittees actually meet this standard. *See* ARM 17.30.1311(1) (no permit may be issued when conditions do not provide for compliance with the MWQA).

179. And where the Permit authorizes CAFOs to discharge—*i.e.*, the construction and/or use of waste impoundment lagoons with continuous seepage rates, above-ground discharges from production areas under certain circumstances, precipitation-induced runoff from land application activities, and process wastewater discharges from outside the production area—DEQ still omits representative monitoring provisions.

180. Without knowledge of whether permittees are complying with these effluent standards, DEQ has no way of knowing whether enforcement is necessary to safeguard water quality as mandated by the MWQA and the Clean Water Act.

181. In this manner, DEQ's permitting decision unconstitutionally "undercut[s] the State's ability to determine in advance whether a given activity will cause environmental harm and thereby take actions to 'prevent unreasonable depletion and degradation of natural

resources.'" *Park County Env't. Co. v. DEQ*, 2020 MT 303, ¶ 88, 402 Mont. 168, 477 P.3d 288.

182. In addition to preventing DEQ from complying with its constitutional duties through the development and enforcement of effluent limits sufficient to protect water quality standards, the CAFO Permit's omission of mandatory monitoring provisions also prevents DEQ from complying with its obligations under the MWQA's Nondegradation Policy.

183. The MWQA's Nondegradation Policy prohibits degradation of high-quality waters unless DEQ makes an affirmative finding that the degradation is necessary and unavoidable. § 75-5-303(3), MCA.

184. Compliance with the Nondegradation Policy is another means by which DEQ must comply with the duties imposed by Article II, Section 3 and Article IX, Section 1 of the Montana Constitution. *MEIC*, ¶ 80.

185. DEQ's conclusory nondegradation analysis, Fact Sheet at 7, is unsupported by evidence in the record.

186. This exemplifies how the Permit's lack of monitoring impedes DEQ's ability to comply with its constitutional duties.

187. Because the Permit lacks representative monitoring necessary to ascertain whether and to what extent CAFOs are discharging pollutants or causing or contributing to an exceedance of water quality standards, DEQ has no basis for determining whether CAFOs operating under this Permit may be unlawfully degrading high-quality waters. *See* ARM 17.30.1311(4) (no permit may be issued when the imposition of conditions

cannot ensure compliance with water quality requirements). Thus, the agency's issuance of the CAFO Permit is unlawful.

188. Instead of meeting its obligations to protect Montana's waters and Montanans' interest in those waters by preventing degradation, DEQ merely assumes compliance with the Permit and takes for granted that State Waters will never be degraded by CAFO discharges authorized under the Permit. DEQ may not rely on such unfounded assumptions.

189. Additionally, the Permit's failure to require any monitoring of such discharges, "categorically remove[s] Plaintiffs' only available remedy adequate to prevent potential constitutionally-proscribed environmental harms, in violation of Article IX, Section 1(3), of the Montana Constitution's guarantees of 'adequate remedies.'" *Park County*, ¶ 88.

190. In keeping with their constitutional obligation to provide adequate remedies for the protection of environmental resources, Montana's legislature expressly granted the public the right to submit alleged MWQA violations to DEQ, and obligated DEQ to initiate enforcement against confirmed violators. §§ 75-5-636, 75-5-616, MCA.

191. Without monitoring that yields representative data about discharges from CAFOs, the public is hamstrung in any efforts to identify and report MPDES permit violations, and DEQ is hamstrung in its ability to identify—much less enforce against—CAFO Permit violations or unlawful degradation stemming from the Permit itself.

192. The Permit's pervasive lack of representative monitoring interferes with the legislature's water quality protection and enforcement scheme and deprives the public of adequate remedies in violation of Article IX, Section 1 of the Montana Constitution.

193. For the foregoing reasons, DEQ's issuance of the CAFO Permit without monitoring provisions necessary to detect and analyze discharges is contrary to requirements of the Montana Water Quality Act, the Clean Water Act, and the fundamental rights enshrined in Article II, Section 3 and Article IX of the Montana Constitution, and is unconstitutional as-applied.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs pray for relief against Defendant DEQ as follows:

A. Determine and declare that DEQ violated the Clean Water Act and the Montana Water Quality Act by failing to require representative discharge monitoring in the CAFO Permit;

B. Determine and declare that issuance of discharge permit MTG010000 is unlawful, void *ab initio*, and remand the matter to the agency for reconsideration;

C. Determine and declare that the CAFO Permit as-applied violates Article II, Section 3 and Article IX, Section 1 of Montana's Constitution;

D. Award Plaintiffs their reasonable fees, costs, and expenses, including attorney's fees, associated with this litigation, as provided under the Private Attorney General Doctrine, Uniform Declaratory Judgments Act, and otherwise provided by Montana law; and

E. Grant Plaintiffs such additional relief as the Court may deem just and proper.

Respectfully submitted on this 15th day of December 2023.

/s/ Guy Alsentzer
Attorney for Plaintiffs