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Re: Notice of Administrative Appeal, Request for Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action

The Center for Biological Diversity hereby submits this Notice of Administrative Appeal, Request for Adjudicatory Hearing, and Request for Reconsideration for the General Permit for Concentrated Animal Feeding Operations under the Colorado Discharge Permit System (Permit No. COA-934000), issued by the Environmental Agriculture Program, Division of Environmental Health and Sustainability, Colorado Department of Public Health and the Environment (EAP), on Sept. 7, 2021. By way of this letter, the Center intends to exhaust its administrative remedies related to the General Permit.

I. Identification of Person Requesting Hearing and Subject Matter of the Request

The Center and its members are affected and aggrieved by EAP's issuance of the General Permit. Members of the Center live, work, and recreate in areas of Colorado that will be affected by pollution from Concentrated Animal Feeding Operations ("CAFOs")

resulting from the General Permit. 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, constitutional rights of Coloradans who are entitled to a healthy environment, clean drinking water, and swimmable, fishable waterways.

The Center submits this appeal, request for adjudicatory hearing, and request for reconsideration to address EAP's failure to include sufficient monitoring requirements within the General Permit to ensure that CAFOs meet the terms of the permit. The Center submitted comments on the Draft Permit during the public comment period requesting that EAP make changes related to several issues identified in the permit in order to protect public health and the environment by preventing discharges into Colorado's waters. *See* Ex. A, Center for Biological Diversity Comments on Draft Colorado General Permit for Concentrated Animal Feeding Operations (COA934000) (July 12, 2021) ("Comments"). EAP responded to the Comments in the Fact Sheet accompanying the General Permit. *See* Ex. B, General Permit, and Ex. C, Fact Sheet – Rationale, Discharges Associated with Concentrated Animal Feeding Operations ("Fact Sheet"). EAP's response to the Center's comments related to the monitoring of discharges does not sufficiently address the legal concerns identified in the Center's comments and reflects a misunderstanding of monitoring requirements in federal law. EAP's issuance of the General Permit without sufficient monitoring requirements was arbitrary, capricious, and contrary to law.

II. Statutory and Regulatory Authority

Administrative appeal. C.R.S. § 25-8-503.5(3) provides that "[a] party may appeal a general permit issued under section 25-8-502 (1)(b)(I)(G) pursuant to the appeals process set forth in section 24-4-105, C.R.S." Under § 24-4-105(14)(a)(II), an appeal to the Division must be made by "filing exceptions within thirty days after service of the initial decision upon the parties."

Request for adjudicatory hearing. Under 5 CCR 1002-61 (Colorado Discharge Permit System Regulations), Regulation 61.7, any person "affected or aggrieved by the Division's final determination" regarding a discharge permit may demand an adjudicatory hearing within thirty days of the final permit determination. The Fact Sheet accompanying the General Permit likewise provides that any person who is affected or aggrieved by the final determination may request an adjudicatory hearing within thirty days of the date of issuance under Regulation 61.7. Ex. C, Fact Sheet at 15. The Center is affected and aggrieved by the issuance of the General Permit, and therefore is entitled to an adjudicatory hearing.

Regulation 61.7(c) provides that only issues of law or fact identified during the public comment period or not reasonably ascertainable from the Draft Permit may be identified at the adjudicatory hearing. The Center's Comments addressed all issues within the scope of this request.

Request for reconsideration of adjudicatory action. C.R.S. § 25-8-403 permits "any party directly affected" by a "final order or determination of the commission or division" to apply to the commission or division for "a hearing or rehearing with respect to, or reconsideration of, such order or determination" within the time permitted for seeking judicial review of such order or determination. C.R.S. § 25-8-404 provides that a proceeding for judicial review shall be filed within thirty days after an order or determination has become final. *See also* 5 CCR 1002-21 (Procedural Rules), Regulation 21.14 ("During the time permitted for seeking judicial review of any final order or determination of the Commission or Division rendered in any adjudicatory proceeding, any party directly affected by such order or determination may apply to the Commission or the Division, as appropriate, for a hearing...with respect to, or reconsideration of, such order or determination."). As a party directly affected by the issuance of the General Permit, the Center is entitled to seek reconsideration of the permit.

III. Basis for Error

Under the Clean Water Act (CWA), CAFOs that discharge to waters of the United States must be regulated under the National Pollutant Discharge Elimination System (NPDES) program. Since 1975, the federal government has delegated authority to Colorado to administer the NPDES program.¹ Colorado regulates the discharge of pollutants under the Colorado Water Quality Control Act. C.R.S. § 25-8-501. General Permit COA-934000 "provides coverage under the NPDES regulations promulgated at 40 CFR Part 122 and the Effluent Guidelines Limitations and Standards promulgated at 40 CFR Part 412, along with coverage under the Colorado Water Quality Control Commission, Colorado Discharge Permit System Regulations, Regulation No. 61 (5CCR 1002-61), and the Colorado Water Quality Control Act as amended in sections 25-8-501 to 504, C.R.S." Ex. C, Fact Sheet at 1. Therefore, the General Permit must meet the requirements of the CWA as well as state law.

In its Comments, the Center identified an issue in the Draft Permit related to the monitoring of discharges and requested that EAP make changes to the permit's monitoring requirements. The Center noted that

[u]nder the CWA, every NPDES permittee is required to "monitor its discharges into the navigable waters of the United States in a manner sufficient

¹ Notice of Approval of Program for Control of Discharges of Pollutants to Navigable Waters, 40 Fed. Reg. 16713 (Apr. 14, 1975).

to determine whether it is in compliance with the relevant NPDES permit.”²
“That is, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance.”³

Ex. A, Comments at 12. The Center then noted its concern that the Draft Permit’s monitoring requirements only required monitoring “when a CAFO reports its own spill,” and argued that “the final permit must extend beyond its current terms in order to meet legal obligations and protect health and the environment.” *Id.* In particular, the Center identified that EAP should, at a minimum, “add groundwater monitoring and remediation conditions to the permit,” noting that the permit’s ultimate standard is zero discharge and that the potential harms resulting from discharges are even greater “where there is a hydrological connection or recharge relationship between surface and ground waters.” *Id.* The Center additionally argued that groundwater monitoring requirements are necessary due to pollution issues related to lagoons, which are “often located near waterways and floodplains” and which can leak and contaminate groundwater. *Id.* at 12-13.

EAP declined to make the requested modifications to the General Permit’s monitoring requirements. In response to the Comments, EAP provided two justifications for its decision: (1) C.R.S. § 25-8-504(2)(a) “prevents the program from being any more stringent than what is required by the federal act or regulations,” and (2) “[g]roundwater protection requirements for CAFOs are covered in WQCC regulation, 5 CCR 1002-81 and are outside the scope of this draft permit.” Ex. C, Fact Sheet at 23. As a result of this decision, the monitoring terms in the final General Permit are inadequate and remain largely based on self-reporting after a discharge or noncompliance event. *See* Ex. B, General Permit at 16, 20-23.

EAP erred in its response to the Center’s Comments because it misstated the monitoring requirements for CAFO NPDES permits. As the Center noted in its Comments, the requirement to monitor discharges in a manner sufficient to determine compliance with the NPDES permit arises from the CWA itself. Ex. A, Comments at 12 (quoting *Nat. Res. Def. Council v. County of Los Angeles (NRDC)*, 725 F.3d 1194, 1207 (9th Cir. 2013) (citing 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1)). The General Permit prohibits discharges from production areas except in limited circumstances, Ex. B at 9-10, as is required by both federal CAFO regulations⁴ and Colorado CAFO regulations.⁵ The monitoring requirements in the General Permit are insufficient for EAP to determine whether CAFOs are complying with this prohibition on discharges from production areas in

² *Nat. Res. Def. Council v. County of Los Angeles (NRDC)*, 725 F.3d 1194, 1207 (9th Cir. 2013) (citing 33 U.S.C. § 1342(a)(2); 40 C.F.R. § 122.44(i)(1)).

³ *Id.*

⁴ *See* 40 CFR § 412.12, 40 CFR § 412.31(a), 40 CFR § 412.43.

⁵ *See* 5 CCR 1002-61 (Colorado Discharge Permit System Regulations), Regulations 61.17(6)(a)(i), 61.17(6)(a)(iii)(A), 61.17(6)(b)(i), 61.17(6)(b)(iv)(A).

every case. For example, inspection of water lines and the installation of depth markers in open surface impoundments and terminal storage tanks, Ex. B at 16, would be insufficient to detect potentially relevant discharges such as underground seepage from lagoons. EAP's argument, which is in effect that it cannot improve the permit's monitoring requirements because it is precluded from exceeding the regulatory floor and ceiling set by federal law, therefore cannot be correct because federal law in fact *requires* EAP to prohibit discharges from production areas and to include conditions in the permit to ensure that CAFOs comply with that prohibition. The monitoring provisions of the General Permit are thus legally insufficient.

Indeed, the Ninth Circuit Court of Appeals recently confirmed that the monitoring requirements identified by the Center are essential for ensuring lawful compliance with the CWA and the terms of a CAFO NPDES permit. In *Food & Water Watch & Snake River Waterkeeper, Inc. v. U.S. EPA*, the court vacated a permit issued by EPA for CAFOs in Idaho due to a lack of sufficient monitoring provisions. No. 20-71554, 2021 WL 4203496 (9th Cir. Sept. 16, 2021) (attached as Ex. D).⁶ Like the General Permit at issue here, the Idaho permit prohibited discharges of pollutants from production areas (with one exception related to precipitation). Ex. D at 14. Notably, the permit included monitoring requirements for above-ground discharges from production areas, such as visual inspections of a waste container's depth marker, but did not include monitoring provisions for underground discharges from production areas. *Id.* at 21-22.

Noting the CWA's requirement that permits prescribe conditions to assure compliance with the permit's effluent limitations, *id.* at 18, as well as evidence in the record before EPA showing that containment structures, especially lagoons, are a source of groundwater pollution that in turn contaminates surface water, *id.* at 22, the court observed that "[w]ithout a requirement that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit's" discharge requirements. *Id.* at 23-24. Ultimately, the court held that because the permit at issue did not contain monitoring requirements for underground discharges from production areas, the issuance of the permit was arbitrary, capricious, and a violation of law. *Id.* at 25.

The Ninth Circuit's interpretation of the monitoring requirements within the CWA demonstrates that groundwater monitoring is necessary to ensure compliance with NPDES discharge requirements for CAFOs. EAP, therefore, erred in determining that the requirement in C.R.S. § 25-8-504(2)(a) prohibited Colorado from requiring groundwater monitoring. On the contrary, federal law mandates that Colorado require groundwater

⁶ The decision in *Food & Water Watch* was issued following the close of the public comment period for this permit.

monitoring in order to ensure that CAFOs comply with the General Permit's zero-discharge requirement from production areas.

Likewise, EAP cannot evade the requirement to include groundwater monitoring provisions by stating that groundwater is regulated in another state regulation, 5 CCR 1002-81, and is thus outside the scope of the General Permit. Fact Sheet at 23. The CWA makes clear that the permit itself must contain the necessary monitoring requirements to ensure that CAFOs comply with the terms of the permit. *See* 33 U.S.C.A. § 1342(b)(1)(A) (state permit programs must have authority to issue permits that “apply, and insure compliance with, any applicable requirements” of the CWA); *see also* Ex. D, *Food & Water Watch*, at 19 (“NPDES permits must contain monitoring provisions sufficient to ensure compliance with the terms of a permit.”); *Wash. State Dairy Fed’n & Wash. State Farm Bureau v. State of Wash., Dep’t of Ecology*, 490 P.3d 290 (Wash. Ct. App. Div. 2 2021) (“State agencies authorized to issue NPDES permits must craft permit conditions that protect water quality standards established by both state and federal statutes and regulations.”). EAP erred in stating that groundwater monitoring is outside the scope of the General Permit.

The Division's issuance of the General Permit without sufficient monitoring requirements to ensure compliance with the permit terms was arbitrary, capricious, and contrary to law. The Center respectfully requests that EAP modify the General Permit to include monitoring conditions as required by federal law.

IV. Estimate of Time Required for Hearing

The issue that the Center raises in this request is a narrow question of law. The Center estimates that one day will be required to conduct an adjudicatory hearing on this issue.

Dated October 7, 2021.

Sincerely,

/s/ Amy Volz

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CERTIFICATE OF MAILING

I hereby certify that on October 7, 2021, I delivered a copy of the foregoing Notice of Appeal, Request for Adjudicatory Hearing, and Request for Reconsideration of Adjudicatory Action by electronic mail to cdphe_legalservices@state.co.us and cdphe.cafo@state.co.us, as well as to the following individuals:

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