Case No. 20-71554

In the United States Court of Appeals
for the Ninth Circuit

FOOD & WATER WATCH, INC.; SNAKE RIVER WATERKEEPER, INC.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for Review of Final Action of the United States Environmental Protection Agency

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PETITIONERS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Food & Water Watch and Snake River Waterkeeper hereby disclose that they are non-profit organizations, and as such, have no parent corporations or publicly held corporations owning 10% or more of any of their stock.

Dated this 22nd day of September, 2020.

s/ Tyler Lobdell
Tyler Lobdell
Food & Water Watch

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

Regulations **Page(s)**

Federal Register **Page(s)**

Other **Page(s)**

JURISDICTIONAL STATEMENT

Petitioners Food & Water Watch and Snake River Waterkeeper ("Petitioners") seek review of the Environmental Protection Agency's ("EPA") Final Reissuance of National Pollutant Discharge Elimination System ("NPDES") General Permit for Concentrated Animal Feeding Operations in Idaho (IDG010000) ("Idaho Permit" or "the Permit"). This Court has original jurisdiction over this case pursuant to Clean Water Act section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F) (authorizing review by the Court of Appeals for EPA action in "issuing or denying any permit under [33 U.S.C. § 1342 (NPDES program)]"). EPA published its issuance of the Idaho Permit in the Federal Register on May 13, 2020. *See* 85 Fed. Reg. 28,624 (May 13, 2020). Petitions for review of NPDES permits must be filed within 120 days from the date of permit issuance. 33 U.S.C. § 1369(b)(1). NPDES permits are considered "issued" for purposes of judicial review two weeks after the date of publication in the Federal Register, here May 27, 2020. 40 C.F.R. § 23.2. Petitioners filed a petition for review of the Idaho Permit in this Court on June 4, 2020. *See* Excerpts of Record ("ER") 509. Thus, the petition was filed within 120 days of the Idaho Permit's issuance and is timely under 33 U.S.C. § 1369(b)(1).

STANDARD OF REVIEW

"Challenges to EPA actions under section 509(b) of the Clean Water Act, 33

U.S.C. § 1369(b), are reviewed under the arbitrary and capricious standard of the Administrative Procedure Act." *Alaska Eskimo Whaling Comm'n v. EPA*, 791 F.3d 1088, 1092 (9th Cir. 2015). Under this standard of review, this Court reviews EPA's action to determine whether it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law[.]" 5 U.S.C. § 706(2)(A); *Native Vill. of Kivalina IRA Council v. EPA*, 687 F.3d 1216, 1219 (9th Cir. 2012). To this end, the Court must decide whether the agency "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Assn. v. State Farm Mutual Ins. Co.*, 463 U.S. 29, 43 (1983). An agency action found wanting "shall" be "set aside." 5 U.S.C. § 706(2).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether EPA's failure to require representative effluent monitoring in the Idaho Permit violates the Clean Water Act and EPA's regulations, which mandate that all NPDES permits contain effluent monitoring to ensure compliance with all applicable effluent limitations.

STATEMENT REGARDING ADDENDUM

Pursuant to Circuit Rule 28-2.7, an addendum at the end of this brief includes the pertinent statutory and regulatory provisions necessary for the Court's determination of the issues presented.

STATEMENT OF THE CASE

This case centers on EPA's failure to abide by the requirements of the Clean Water Act in drafting and promulgating the Idaho Permit. On May 13, 2020, EPA finalized the Idaho Permit, a general NPDES permit that details the provisions Idaho CAFOs must obey if they discharge pollutants into waters of the United States. 85 Fed. Reg. 28,624 (May 13, 2020). The Clean Water Act dictates that all NPDES permits must contain several elements, including limitations on the discharge of pollution, monitoring to ensure permittees stay within the permit's limitations, and reporting to inform regulators and the public of their compliance or noncompliance. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. § 122.44(i)(1) & (2). Together, these elements create a system that is fundamental to holding dischargers accountable and protecting the nation's waters.

The Idaho Permit omits one of these critical elements—monitoring—thereby preventing identification and reporting of illegal discharges of pollution that threaten ecosystems, recreational interests, and human health. *See* ER 350–365. Committed to maintaining this effective regulatory exemption for Idaho CAFOs, EPA did nothing to remedy this legal error in the final Permit in response to Petitioners' comments. *See generally* ER 220, 231–232. But as Petitioners' comments explained, the Idaho Permit's lack of representative monitoring requirements that actually measure compliance with the Permit's effluent

limitations throws a wrench in the NPDES permit system by "leav[ing] regulators and the public to guess whether and how CAFOs are violating the law." ER 422.

The black box in which CAFOs are allowed to operate threatens severe environmental consequences. Without monitoring, enforcement through the Clean Water Act's citizen suit provision, 33 U.S.C. § 1365, becomes all but impossible as the public is deprived of information necessary to demonstrate violations. In this manner, the Idaho Permit not only violates the Clean Water Act's monitoring requirements, but also deprives the public of participatory rights enshrined in the Act. *See* 33 U.S.C. § 1251(e) ("Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established [under the Act] shall be provided for, encouraged, and assisted by [EPA]."). Further, the Permit's scheme—and EPA's approach to CAFO regulation in general—ensures that the adverse impacts of CAFO pollution will continue unabated.

The Clean Water Act and EPA's implementing regulations mandate that all NPDES permits include representative monitoring requirements to ensure compliance with permit terms. But while the Idaho Permit imposes effluent limitations requiring permittees to minimize pollutant discharges from land application areas and all but eliminate discharges from the production area, ER 7–10, it includes no monitoring provisions capable of measuring compliance with

these terms. Thus, Petitioners ask this Court to remedy EPA's mistake by holding the Idaho Permit to be arbitrary, capricious, and in violation of the Clean Water Act.

LEGAL BACKGROUND

I. The Clean Water Act and NPDES Permits

The Clean Water Act, 33 U.S.C. §§ 1251–1387, "is a cornerstone of the federal effort to protect the environment." *Waterkeeper All., Inc. v. EPA*, 399 F.3d 486, 490 (2d Cir. 2005). Congress passed the Act with the goal of not just reducing, but *eliminating*, all water pollution. *Id.* (citing 33 U.S.C. § 1251(a)(1)). To achieve this goal, the Clean Water Act prohibits the "discharge of any pollutant" from a "point source"—defined as "any discernible, confined and discrete conveyance"—to navigable waters "except in compliance with law." 33 U.S.C. §§ 1311, 1362. The main way to achieve compliance with the Clean Water Act's general pollutant discharge prohibition is by obtaining an NPDES permit. 33 U.S.C. §§ 1311(a), 1342.

NPDES permits control pollution by establishing effluent limitations that restrict the discharge of pollutants. *Id.* All NPDES permits must ensure compliance with both technology-based and, as needed, water-quality based effluent limitations ("TBELs" and "WQBELs," respectively). *Id*. § 1311(b)(1)(A) & (C).

TBELs operate by identifying specific technologies capable of controlling a pollutant and setting numeric or narrative effluent limitations based on that demonstrated capacity. In this manner, the Act was designed to ratchet up water quality protections as pollution control technology advances, improving water quality over time through more stringent controls. *Id.* § 1311(b)(2)(A) (requiring application of the "best available technology economically achievable"[1] for many pollutants); *NRDC v. EPA*, 808 F.3d 556, 563–64 (2d Cir. 2015) ("Congress designed [TBELs] to be technology-forcing, meaning it should force agencies and permit applicants to adopt technologies that achieve the greatest reductions in pollution.").

If the TBELs in an NPDES permit are not sufficient to meet water quality standards developed by the states for waters within their boundaries, permits must additionally contain WQBELs specifically designed to achieve those standards. *See* 33 U.S.C. §§ 1311(b)(1)(C), 1313(a)(3), 1313(c)(2)(A), 1342(a)(2); 40 C.F.R. Part 131; *PUD No. 1 of Jefferson Cnty. v. Wash. Dept. of Ecology*, 511 U.S. 700, 704–707 (1994). State water quality standards consist of designated uses for waters, such as swimmable, fishable, or drinkable, as well as numeric and narrative

[1] The Clean Water Act defines this standard as "the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives." 33 U.S.C. § 1314(b)(2).

water quality criteria necessary to protect those uses. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. §§ 131.10–11. WQBELs in NPDES permits must be "derived from, and compl[y] with all applicable water quality standards." 40 C.F.R. § 122.44(d)(1)(vii). Further, NPDES effluent limitations must control all pollutants that are or may be discharged at a level "which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality." *Id*. § 122.44(d)(1)(i).

Both TBELs and WQBELs are typically expressed numerically, but when "numeric effluent limitations are infeasible," a permit may instead require "[b]est management practices (BMPs) to control or abate the discharge of pollutants." *Id*. § 122.44(k)(3). BMPs may also function as a point source's primary pollutant control technology, and may be required where they are considered "reasonably necessary to achieve effluent limits and standards." *Id*. § 122.44(k)(4). However, "[n]o permit may be issued: . . . [w]hen the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States." *Id*. § 122.4(d). When EPA or states establish water quality standards, they must translate them into permit limitations. *See Trustees for Alaska v. EPA*, 749 F.2d 549, 556–57 (9th Cir. 1984) (holding that a permit must do more than merely incorporate state water quality standards—it must translate state water quality standards into effluent limitations necessary to achieve those standards).

NPDES permits must also contain conditions requiring both representative effluent monitoring and reporting of monitoring results. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. § 122.44(i)(1) & (2). EPA "shall require" permitted point sources to "install, use, and maintain such monitoring equipment or methods" required to "determin[e] whether [they] are in violation" of an applicable effluent limitation or other effluent standard. 33 U.S.C. § 1318(a)(2)(A)(iii). EPA's regulations, in turn, state that all permits "shall include conditions" requiring representative monitoring "[t]o assure compliance with permit limitations," 40 C.F.R. §§ 122.44(i)(1), 122.41(j)(1), and additionally "shall specify" the "type, intervals, and frequency [of monitoring] sufficient to yield data which are representative of the monitored activity." *Id.* § 122.48(b). Such monitoring conditions are necessary to verify compliance with effluent limitations and to facilitate permit enforcement. *NRDC v. Cnty. of Los Angeles*, 725 F.3d 1194, 1208 (9th Cir. 2013). Monitoring requirements are in addition to, and separate from, permit conditions establishing the operational systems and controls used to achieve compliance with permit limits. *See* 40 C.F.R. § 122.41(e).

The Clean Water Act relies on this multipronged approach where effluent limits, practices or technologies capable of achieving those limits, and monitoring to establish compliance with those limits work together to protect waters from

pollutants. Leave out any one leg, as the Idaho Permit does, and the stool cannot stand.

II. Regulation of CAFOs Under the Clean Water Act

Discharges of pollution from CAFOs are "point source" discharges subject to the Clean Water Act's general prohibition on unpermitted discharges. 33 U.S.C. § 1362(14). Congress' decision to include CAFOs in the definition of point source demonstrates an unambiguous intent to control and reduce discharges of pollutants from CAFOs through the NPDES program's imposition of progressively more protective TBELs. *See NRDC v. EPA*, 822 F.2d 104, 123–24 (D.C. Cir. 1987) ("[T]he most salient characteristic of this statutory scheme, articulated time and again by its architects and embedded in the statutory language, is that it is technology forcing" and "progressively more demanding").

EPA has established TBELs for CAFO discharges from both their production and land application areas.[2] EPA's regulations essentially forbid discharges from CAFO production areas, aside from wastewater overflows caused by extreme precipitation events. *See* 40 C.F.R. § 412.31(a)(1)(i) (allowing such a

[2] The CAFO production area is the part of the facility "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). The CAFO land application area is land under the control of the CAFO operator "to which manure, litter or process wastewater from the production area is or may be applied." *Id*. § 122.23(b)(3).

discharge provided "[t]he production area is designed, constructed, operated and maintained to contain . . . runoff and the direct precipitation from a 25-year, 24-hour rainfall event," and certain additional measures are in place). EPA's regulations require CAFOs that land apply waste to "minimize[e] nitrogen and phosphorus movement to surface waters." *Id*. § 412.4(c)(1).[3] CAFOs must implement a site-specific Nutrient Management Plan that contains "[BMPs] necessary to meet . . . applicable effluent limitations," including the general prohibition on production area discharges and the land application area requirement to minimize discharges. *Id*. § 122.42(e)(1). The Nutrient Management Plan's practices and other BMPs are, in effect, the pollution control technology that CAFOs use to achieve their effluent limitations. *See id*.; *id.* § 122.44(k)(4).

However, despite these effluent limitations, EPA has not included effluent monitoring requirements in CAFO permits as it has done with almost every other sector regulated under the Clean Water Act. Regulation of CAFOs instead has typically stopped at requiring BMPs and Nutrient Management Plans. *See id.* §§ 122.42(e)(1), 122.23. As a result, there is a dearth of data on the actual pollution discharged from permitted CAFOs.

[3] CAFO land application discharges are point source discharges unless they qualify as "agricultural stormwater." This exception is limited to precipitation-related runoff that occurs despite compliance with a Nutrient Management Plan. 40 C.F.R. § 122.23(e). The lack of monitoring requirements in the Idaho Permit prevents identification of such land application violations.

EPA's CAFO regulations previously included a "duty to apply" for an NPDES permit for facilities that proposed to discharge due to design, construction, operation, or maintenance characteristics, which EPA said describes approximately three out of every four CAFOs. 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, 70,423, 70,469 (Nov. 20, 2008). However, following the Fifth Circuit's vacatur of this provision in 2011, *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 751 (5th Cir. 2011), EPA revised its regulations to remove the "duty to apply" provision. National Pollutant Discharge Elimination System Permit Regulation for Concentrated Animal Feeding Operations: Removal of Vacated Elements in Response to 2011 Court Decision, 77 Fed. Reg. 44,494, 44,494–95 (July 30, 2012). As a result, CAFOs are only required to seek NPDES permit coverage if they actually discharge, which EPA's assessment concluded should include approximately 75 percent of CAFOs and essentially "all dairies and most beef feedlots." 73 Fed. Reg. at 70,469. But EPA's failure to require CAFOs to seek coverage, coupled with the general lack of monitoring data indicating which CAFOs actually discharge pollutants, has created a "catch me if you can" situation that CAFOs have widely exploited in states like Idaho. Facilities—even facilities that previously had NPDES permits authorizing them to discharge—can claim that

they do not discharge any pollution, and therefore do not require a permit. As facilities fail to apply for renewed coverage, CAFO permitting has plummeted. *See* EPA, NPDES CAFO Regulations Implementation Status Reports 2011 – 2019 (showing Idaho's permitted CAFOs dwindling from over 100 to zero).[4] As a result of EPA's approach, although many of Idaho's hundreds of CAFOs likely discharge pollutants, *not a single CAFO* is currently operating under any Clean Water Act permit whatsoever, and the public remains in the dark about CAFO pollution degrading their waters.

EPA's lack of regulation and its failure to require monitoring in CAFO permits virtually guarantees there will be unregulated and unaccountable discharges of CAFO pollution to waterways—the very concern that prompted Congress to regulate CAFOs as point sources in the first place. *See* S. Rep. No 92-414, 92–93 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3668, 3761 ("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

[4] https://www.epa.gov/npdes/npdes-cafo-regulations-implementation-status-reports (last visited Sept. 16, 2020). The Court may consider this, and other information from government websites cited in this brief, even though these documents are not in the administrative record. *See, e.g.*, *Daniels-Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998–99 (9th Cir. 2010) (allowing judicial notice of information made publicly available through a government website).

massive concentrations of manure in small areas."). Thus, Congress recognized the unique threat CAFOs pose to the nation's waters, but EPA's oversight of the industry has proven woefully ineffective.

FACTUAL BACKGROUND

I. CAFOs Are a Significant Source of Water Pollution

CAFOs generate and handle a variety of pollutants, and their practice of concentrating thousands or tens of thousands of animals in confinement buildings and feedlots creates serious waste management challenges. ER 347. EPA has long recognized CAFOs' potential to discharge these pollutants, and the unique risks that CAFOs pose to water quality. *See* National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations (CAFOs), 68 Fed. Reg. 7,176 (Feb. 12, 2003); 73 Fed. Reg. at 70,418. As noted, EPA's analysis of CAFO characteristics estimated that approximately 75 percent of all CAFOs discharge pollution into waterways. 73 Fed. Reg. at 70,469 (explaining that only about 25 percent of CAFOs are not designed to discharge). Yet, because CAFO operators have not been required to show whether they are discharging facilities through effluent monitoring, they have been left to decide for themselves whether their operations are subject to Clean Water Act regulation.

A. CAFO Wastes Contain Numerous Harmful Pollutants

CAFOs collect, store, transport, and dispose of many materials that threaten Idaho's waterways. The most prevalent and potentially harmful sources of pollution from CAFOs are animal manure, litter, and process wastewater. ER 350, 358–65; 68 Fed. Reg. at 7,180 (improperly handled CAFO waste "can contribute pollutants to the environment and pose a risk to human and ecological health"). CAFOs also deal with a variety of other materials that have the potential to discharge into waters as pollutants, such as animal feed, animal byproducts such as hair or feathers, bedding materials, sediments, and contaminated run on water. ER 373, 379–83, 387–88. CAFO wastewater can contain a plethora of pollutants, including nutrients commonly associated with animal manure, such as nitrogen and phosphorus, but also pathogens, sediments, antibiotics, harmful metals, chemicals, hormones, and endocrine disrupting substances. ER 350–67, 395–98; *see also* ER 233 (recognizing that non-nutrient CAFO pollutants are "comingled in waste streams"); ER 508 (Idaho Dairymen's Association admitting that chemicals commonly used at dairy CAFOs inevitably mix with wastewater).

EPA primarily regulates CAFO manure and wastewater in the Idaho Permit as a beneficial "fertilizer" to be stored in massive lagoons or pits and then transported and applied to agricultural fields. ER 11–14. The Permit instructs CAFOs to develop land application protocols in accordance with University of

Idaho fertilizer and crop production guides. ER 14. This land disposal system does not account for the variety of harmful pollutants in CAFO waste that crops do not utilize, such as pathogens, antibiotics, hormones, salt, metals, and excess nutrients. ER 350–65; 68 Fed. Reg. at 7,181. As these pollutants are not utilized by crops, they risk entering surface water or subsurface flows, where they pose serious threats to human and ecological health. *See* ER 350 (listing disease outbreaks and health problems in young children as effects of CAFO pollution); ER 403 (acknowledging the potential for CAFOs to adversely impact endangered salmon and steelhead through, *inter alia*, toxic algal blooms). Though Idaho's Department of Environmental Quality raised questions about why the Idaho Permit fails to address the full range of pollutants of concern, ER 343, EPA chose not to account for pollutants beyond nutrients.

B. CAFOs Discharge These Harmful Pollutants

CAFOs discharge pollution to waters in a variety of ways. *See, e.g.*, EPA-833-R-10-006, Implementation Guidance on CAFO Regulations – CAFOs That Discharge or Are Proposing to Discharge (May 28, 2010) (describing factors that lead to CAFO discharges).[5] These include discharges from CAFO production areas, as well as land application areas. ER 35, 347. CAFO pollutants reach surface

[5] https://www3.epa.gov/npdes/pubs/cafo_implementation_guidance.pdf (last visited Sept. 14, 2020).

waters through "a number of pathways," such as surface runoff and erosion, manure lagoons, spills, and leaching. 68 Fed. Reg. at 7,181.

A CAFO's discharge points can be numerous and include ditches; manure and wastewater handling infrastructure such as pipes, pumps, and storage facilities; leaking equipment and manure lagoons; irrigation canals; ventilation systems; land application areas, and subsurface drainage systems such as tile drains (which are designed to transport excess water applied to a field into surface waters or an adjacent water conveyance system). ER 384–85 (discussing "voluntary controls" to minimize spills and leaks from storage structures); ER 387 (noting that certain CAFOs must have "reception pits . . . , diversions, sediment basins, and underground outlets"); ER 389 (describing irrigation systems for applying CAFO waste); ER 391 (discussing "unplanned discharges" from pumps and pipes); ER 394 (explaining that fields with subsurface (tile) drainage "creat[e] a surface water pollution hazard from direct tile discharge"); ER 369, 374–75 (discussing transport of pollutants to groundwater); *Nat'l Pork Producers Council*, 635 F.3d at 748 (agreeing with EPA's position that "litter released through confinement house ventilation fans" would be a Clean Water Act violation).

Numerous sources in the record, and EPA itself, indicate that CAFOs in Idaho currently discharge, and will continue to discharge, pollutants from both production and land application areas. *See, e.g.*, 73 Fed. Reg. at 70,469 (estimating

that 75% of CAFOs will discharge). In assessing the Idaho Permit, the National Marine Fisheries Service found that harmful effects from Idaho CAFOs "are reasonably likely to include: excess nutrients, declining dissolved oxygen, increased suspended solids/turbidity, introduction of salts and trace elements, increasing temperature, and the addition of antibiotics, pesticides, hormones, and/or pathogens." ER 402. Idaho officials acknowledge that CAFOs are not zero-discharge facilities, ER 342, and Petitioners provided EPA a detailed analysis identifying impaired waters in Idaho near or directly adjacent to CAFOs. ER 416 nn.22–23.

Idaho's CAFO industry also provided admissions of ongoing discharges of pollutants from CAFOs. For example, one CAFO operator admitted that it has been and will be unable to comply with EPA regulations requiring the diversion of clean water from manure or other production area pollutants, and that these pollutants in turn discharge to the Snake River. ER 503–04 (J.R. Simplot Company requesting that EPA remove a permit condition required by EPA regulations because "[i]t is not feasible to contain run on water at Simplot's Grand View property"). And the Idaho Cattle Association admitted that manure spillage from transportation equipment is "impossible to manage." ER 506.

Further, EPA's own risk assessment recognizes that waste storage lagoons authorized by the Idaho Permit are known to leak and leach pollutants. ER 352

("Leaky lagoons and below grade storage facilities are potential sources of [pollutants]."); ER 354 ("Leaking from lagoons is also a likely source."); ER 364 ("[Hormone] releases may be associated with leakage from storage lagoons."); ER 370 (recognizing that leakage from storage facilities at best can be "minimized" and that "[c]lay-lined lagoons have the potential to leak"). The Idaho Permit allows for a continuous "discharge rate" of pollutants from CAFO storage lagoons. ER 12 (allowing CAFOs to prove proper operation and maintenance of wastewater and manure storage structures through compliance with Natural Resources Conservation Service Appendix 10D and Idaho Admin. Code r. 02.04.14.030.01); Natural Resources Conservation Service, Appendix 10D: Design and Construction Guidelines for Waste Impoundments Lined with Clay or Amendment-Treated Soil, at 10D-2 (rev. Mar. 2008) (discussing "acceptable seepage rates");[6] Idaho Admin. Code r. 02.04.14.030.01 (allowing a continuous discharge rate from wastewater storage lagoons at dairy CAFOs). This leached pollution can then discharge into surface waters, which is a point source discharge. *See* ER 417 (explaining that the Snake River is "a quintessential example of a river fed by groundwater" and citing supporting research); *Cnty. of Maui v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020).

[6]https://directives.sc.egov.usda.gov/OpenNonWebContent.aspx?content=17767.wba (last visited Sept. 13, 2020).

II. CAFO Pollution Is Contributing to Water Impairments in Idaho

Improper management of CAFO waste is responsible for serious water quality problems throughout the United States, and in Idaho. 68 Fed. Reg. at 7,176; *Nat'l Pork Producers Council*, 635 F.3d at 742 ("[T]he improper management of [CAFO] waste can pose a significant hazard to the environment."); Idaho's 2016 Clean Water Act Integrated Report, App'x K, at 20 (identifying a CAFO as "the primary source of the high E. coli").[7] Idaho is home to a large and growing CAFO industry, with many CAFOs concentrated along the Snake River valley.

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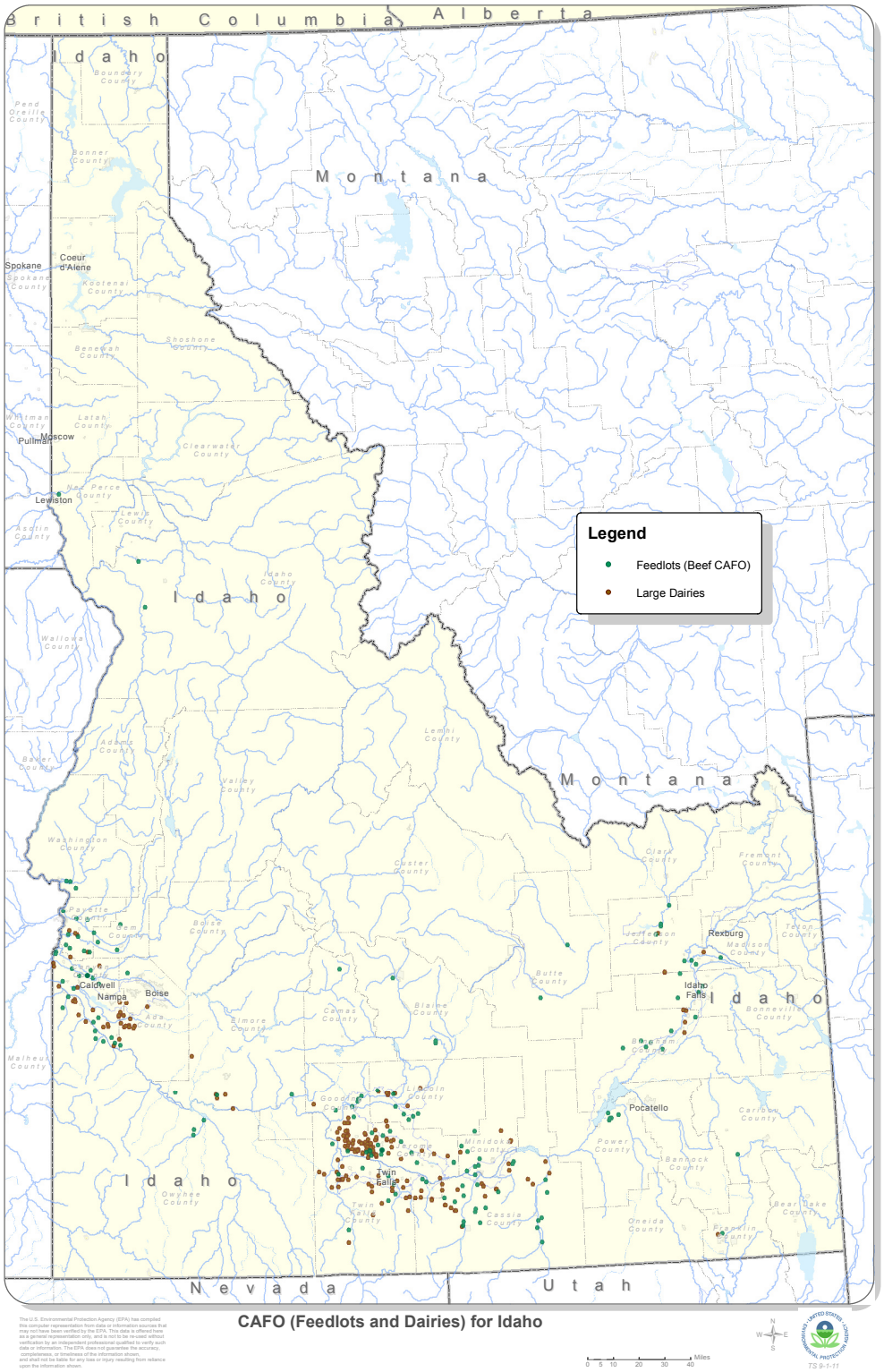
[7] https://www.deq.idaho.gov/media/60182296/idaho-integrated-report-2016.pdf (last visited Sept. 13, 2020).



ER 340 (showing a concentration of large CAFOs in the Snake River watershed across southern Idaho).

Idaho is now the third largest dairy producing state in the United States, with approximately 614,000 dairy cows as of January 1, 2019. ER 415 (citing U.S. Department of Agriculture statistics). The Snake River watershed is also home to many large beef feedlots, including one of the largest such CAFOs in the world where 150,000 cows can be housed at any one time. ER 415 (providing evidence of large CAFOs in the Snake River watershed); ER 504 (discussing Simplot's Grand View feedlot, located along the Snake River). Many Idaho CAFOs are located in watersheds impaired by pollutants commonly associated with CAFOs. ER 415–16.

Idaho's waters, and in particular the Snake River and its tributaries, are suffering from increasing levels of pollution. *See* ER 415–18 (describing this pollution problem, and citing Idaho state reports showing steady increases in *E. coli* contaminated waters). According to Idaho's most recently compiled list of waters failing to meet water quality standards—*i.e.*, waterways with degraded water quality that no longer support the uses they once did because of pollution—34,404 miles of rivers and streams and 258,383 acres of lakes are impaired. ER 415–16 (citing Idaho's 2016 Clean Water Act Integrated Report). Specific waterways located in areas dominated by CAFOs show excessive and unsafe levels of *E. coli*, fecal coliform, and nutrients, as well as low levels of dissolved oxygen, which is essential to healthy aquatic life. *Id.* (citing to Idaho's Integrated Report

and providing specific examples of impaired waterways in close proximity to CAFOs). The Upper and Middle Snake River are already under Total Maximum Daily Loads ("TMDLs"),[8] which act as pollution budgets for impaired waters in an attempt to meet water quality standards, for pollutants such as nutrients. These are exactly the types of water quality impairments one would expect in a region where many CAFOs operate and discharge polluted effluent. *See* ER 348–49 (recognizing that too much CAFO waste accumulates in certain areas, bringing the risk of excess nutrient loads and pathogenic contamination); ER 311–16 (identifying nutrients, pathogens, and a reduction in dissolved oxygen as pollutants of concern and potential impacts associated with CAFOs in Idaho).

III. Procedural History of the Idaho Permit

On October 23, 2019, EPA issued its notice for the proposed reissuance of an NPDES general permit for Idaho CAFOs ("Draft Permit"). 84 Fed. Reg. 56,809 (Oct. 23, 2019). Petitioners submitted timely comments to EPA on December 9, 2019, identifying legal deficiencies with the Draft Permit and requesting several improvements that would better protect Idaho's waters. ER 411–31. Petitioners

[8] The Clean Water Act requires states to establish TMDLs for waters not meeting water quality standards. *See* 33 U.S.C. § 1313(d)(1)(C) (defining a TMDL as "the total maximum daily load [for a waterbody] . . . established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality"); *see also* 40 C.F.R. § 130.2(i) (EPA's regulations further defining TMDLs).

specifically commented that the Draft Permit proposed to unlawfully allow CAFOs to operate without effluent monitoring provisions required by the Clean Water Act and EPA's own regulations. ER 416 (noting that without monitoring "there is no way for the public or regulators to know the full extent of the harm" caused by CAFO discharges); ER 421–23 (notifying EPA of the legal mandate to include effluent monitoring in the permit); ER 423 (noting that the permit requires CAFOs to meet a production area effluent limit of zero discharge under most circumstances, and that this is a numeric limit subject to compliance monitoring).

On May 13, 2020, EPA issued the final Idaho Permit, which went into effect on June 15, 2020. 85 Fed. Reg. 28,624 (May 13, 2020). In its brief response to comments, EPA rejected Petitioners', and the Idaho Conservation League's, arguments and requests regarding monitoring. ER 220, 231–32. Instead of requiring effluent monitoring to assure compliance, EPA pointed to the Idaho Permit's provisions requiring "daily and weekly inspections in the production area, manure and soil analyses and land application equipment inspections." ER 220. EPA stated that these inspection and recordkeeping requirements "maintain the framework" set forth in "CAFO regulations prohibit[ing] regular/ongoing discharges," and, except for a one-time sample and report in the event of an overflow discharge from a production area manure storage impoundment, ER 21, declined to include effluent monitoring in the final permit, ER 220.

IV. The Idaho Permit Requires Inspections of Practices Rather than Monitoring of Effluent

The Idaho Permit establishes clear effluent limits for CAFOs. CAFOs must have "no discharge of manure, litter, or process wastewater into waters of the United States from the production area except" under limited circumstances. ER 7. Regarding land application areas, "[a]pplication rates for manure, litter, or process wastewater must minimize phosphorus and nitrogen transport from the field to surface waters." ER 9. While the Permit contains requirements designed to document that various practices are in place, it does not contain the required *effluent monitoring* to confirm whether a CAFO, through the implementation of these practices, achieves these effluent limits.

The Idaho Permit requires permitted CAFOs to conduct certain inspections related to the production area and land application activities. Production area inspections include weekly visual inspection of storm water diversion devices, runoff diversion structures, and devices that channel contaminated water; weekly visual inspection of manure, litter, and process wastewater containment structures and their fill level; and daily inspection of water lines. ER 8. Land application inspections are limited to "periodic[]" inspection of land application equipment. ER 10.

The Idaho Permit also contains certain sampling requirements, but aside from the requirement to sample overflow discharges from waste storage facilities,

these are limited to what a CAFO expects to apply to fields over a given year, rather than what discharges off of them. To help determine manure application rates based on crops' nutrient uptake ability, Nutrient Management Plans require CAFO operators to sample the facility's manure as well as the soil at fields where waste will be applied. ER 9–10, 13–14. These application rates are designed to "minimize" nutrient discharges to surface waters, not eliminate them. ER 9. Operators need only take these samples annually. *Id.* CAFOs must analyze manure for nitrogen and phosphorus content, and must analyze soil samples for pH, soil organic matter, nitrate-nitrogen, ammonium-nitrate, and phosphorus. ER 13–14.

Like all NPDES permits, the Idaho Permit also contains a variety of recordkeeping and reporting requirements. For example, CAFOs must identify and maintain records that document implementation of the facility's Nutrient Management Plan, track inspection results, disclose how animal mortalities were handled, and detail transfers of CAFO waste to third parties. ER 9–19. However, for the most part, permittees only maintain records "on-site," and make those records available to EPA "upon request." ER 19. The primary reporting requirement, constituting the sum total of the information *the public* can access regarding a CAFO's actual (as opposed to expected) activities, is the Annual Report. ER 20. The Annual Report contains generalized, aggregate information such as an animal inventory, confirmation as to whether the CAFO's Nutrient

Management Plan was approved by a certified professional, and the total acreage where waste was applied. ER 151–56. The Annual Report also contains crop management details including what crops were harvested, how much CAFO waste was applied to each receiving field, the soil analyses conducted for each receiving field, and the nutrient budgets used by the CAFO to determine application rates. *Id.* Finally, the Report briefly identifies any known production area discharges. ER 152.

Lastly, the Permit requires that CAFOs notify government officials in certain circumstances. CAFOs must notify EPA, the State of Idaho, and county officials of any unauthorized discharge of manure, litter, or process wastewater. ER 20. This notification simply provides a "description of the discharge and its cause, including a description of the flow path to the receiving water body and an estimate of the flow and volume discharged." ER 21. CAFOs must also notify the National Response Center and appropriate Idaho official of spills or releases of hazardous substances, in accordance with applicable laws (for example, oil spills). ER 22.

SUMMARY OF THE ARGUMENT

NPDES permits are the Clean Water Act's primary tool to achieve the goal of eliminating pollution discharges to the nation's waterways. Without an NPDES permit, the discharge of pollutants from a point source is unlawful. Recognizing that CAFOs are a significant threat to water quality and require NPDES permits to

control their pollution, Congress specifically defined CAFOs as point sources. Decades later, however, EPA's NPDES permits for this industry are failing to meet fundamental Clean Water Act requirements.

The statute, EPA's regulations, and circuit court case law are clear that NPDES permits must not only establish effluent limitations for pollutants of concern, which dischargers must meet through the use of BMPs and other pollution control technology, but must *also* require point sources to monitor their effluent discharges to demonstrate whether they are meeting those permit limits. These public monitoring data are essential to ensuring that permits are reducing pollution in fact, not only in theory.

Despite this clear and well-established requirement, which EPA has correctly applied to essentially all other point source categories, EPA's Idaho Permit does not require CAFOs to conduct representative effluent monitoring. Instead, EPA points to the Permit's CAFO pollution control practices, general facility inspections, and recordkeeping provisions, asserting without basis that these wholly distinct permit requirements constitute "monitoring" and satisfy the effluent monitoring mandate. They do not. EPA lacks authority to simply trust without verification that CAFO pollution control practices will always result in perfect compliance with effluent limits. While EPA may prefer to operate under the legal fiction that CAFOs never discharge pollutants, or presume that the Idaho

Permit's BMPs are sufficient to ensure compliance with all effluent limits, the Clean Water Act and EPA's own regulations require far more.

EPA's failure to require that CAFOs monitor their effluent renders the Idaho Permit toothless, keeping citizens and regulators in the dark about which facilities are unlawfully discharging pollutants like *E. coli* into Idaho's waterways. Because it does not require CAFOs to monitor their discharges and make their compliance data publicly available, the Idaho Permit also deprives Petitioners and other citizens of their right to enforce the Clean Water Act against violators. Congress intended citizens to fulfill a critical public function by supplementing government enforcement of the Clean Water Act, but the Idaho Permit makes that all but impossible. EPA has, in effect, created a regulatory exemption for CAFOs that undermines the Clean Water Act's framework, and leaves Petitioners and their members to suffer the consequences of an unaccountable polluting industry.

ARGUMENT

I. Petitioners Have Article III Standing

An organization has standing if "its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claims asserted nor the relief requested requires participation of individual members in the lawsuit." *Friends of the Earth v. Laidlaw Envtl. Servs., Inc. (TOC)*, 528 U.S. 167, 181 (2000). Here, ensuring the

protection of Idaho's waters under the Clean Water Act is clearly germane to Petitioners' purposes as water protection-focused organizations, Declaration[9] of Michele Merkel ("Merkel Decl."), ¶¶ 5–6; Declaration of Ferrell S. Ryan III ("Ryan Decl."), ¶ 3, and individual members' participation is not required for, nor would it aid, the proper resolution of this case, *see W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 485 (9th Cir. 2011) (finding "no indication that resolving this case would require or even be aided by the participation of either organization's individual members"). As demonstrated below, Petitioners' members also have standing to sue in their own right for both substantive and procedural injuries.

A. Petitioners Have Traditional Article III Standing

To establish standing, an individual must show an (1) "injury in fact" (2) that is fairly traceable to the challenged conduct and (3) capable of redress by a favorable decision from the court. *NRDC v. Jewell*, 749 F.3d 776, 782 (9th Cir. 2014). "[S]howing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable – that he or she

[9] Petitioners have contemporaneously filed a Consent Motion for Leave to File Standing Declarations, and have appended thereto four declarations (Exhibits 1–4) that establish Petitioners' standing in this case. *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 117 F.3d 1520, 1527–28 (9th Cir. 1997) (considering affidavits to prove standing because "petitioners had no reason to include facts sufficient to establish standing as a part of the administrative record").

really has suffered or will suffer in his or her degree of aesthetic or recreational satisfaction – if the area in question remains or becomes environmentally degraded" establishes injury in fact. *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859–860 (9th Cir. 2005) (citation omitted). Threat of environmental harm to specific areas used by a plaintiff suffices to establish injury in fact. *Idaho Conservation League v. Mumma*, 956 F.2d 1508, 1517 (9th Cir. 1992).

Petitioners' members, long-time users of the Snake River watershed, face ongoing injury to their recreational, aesthetic, professional, and spiritual values. Declaration of Adra Lobdell ("Lobdell Decl."), ¶¶ 7–13; Ryan Decl., ¶¶ 7–9; Declaration of Jordan Warren ("Warren Decl."), ¶¶ 8–16. Based on concerns about unknown CAFO pollution in waters they use, as well as documented water quality degradation from pollutants associated with CAFOs, they have reduced their usage of specific waterbodies, limited their recreational activities within certain waterways, and enjoyed those activities less. *Id*. Having to guess at the magnitude of the threat CAFOs pose to these waters perpetuates and exacerbates their injuries. Lobdell Decl. ¶¶ 12, 17; Ryan Decl., ¶¶ 11, 18, 22; Warren Decl., ¶¶ 17, 19–21. These members live near, extensively use, and intend to continue using these waters to the extent they safely can. Lobdell Decl., ¶¶ 1, 7; Ryan Decl., ¶¶ 1, 7; Warren Decl., ¶¶ 1, 8–10; *see Wilderness Soc'y, Inc. v. Rey*, 622 F.3d 1251, 1256

(9th Cir. 2010) (requiring more than "vague desire to return" to the area). Thus, Petitioners' members have established cognizable injuries. *Laidlaw,* 528 U.S. at 181–83; *Ocean Advocates*, 402 F.3d at 859–60.

Petitioners' members also show that their injuries are fairly traceable to the defendant's conduct. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). "Where Congress has expressed the need for specific regulations relating to the environment, that expression supports an inference that there is a causal connection between the lack of those regulations and adverse environmental effects." *NRDC v. EPA*, 542 F.3d 1235, 1248 (9th Cir. 2008). These members' injuries are traceable to the Idaho Permit's lack of specific regulations, *i.e.*, monitoring provisions that both the Clean Water Act and EPA's regulations require to ensure compliance with pollution limitations. EPA's omission of these provisions threatens waters with adverse environmental effects and leaves these members in the dark about threats to the waters they cherish. Lobdell Decl., ¶¶ 9, 12, 15–17; Warren Decl., ¶¶ 11–15. Thus, Petitioners have established causation. *See NRDC*, 542 F.3d at 1248.

Petitioners' members also show that "it is likely, as opposed to merely speculative, that the[ir] injur[ies] will be redressed by a favorable decision." *Laidlaw*, 528 U.S. at 181. When an agency "lessens the controls on pollution-emitting agricultural sources," associated injuries are redressable by a court compelling revision of the unlawful regulation. *Ass'n of Irritated Residents v. EPA*,

790 F.3d 934, 940 n.4 (9th Cir. 2015). An order compelling EPA to include effluent monitoring that establishes compliance with pollutant limitations in the Idaho Permit would redress the injuries described above, at least in part, by enabling Petitioners' members to identify, avoid, and rectify CAFO pollution in the waterbodies they use. *See* Ryan Decl., ¶¶ 11, 19; Lobdell Decl., ¶ 16; Warren Decl., ¶ 20. Such redress is more than "merely speculative," as actual monitoring of CAFO discharges would generate publicly-available data upon which Petitioners and their members would act to protect their interests. Merkel Decl., ¶¶ 17-18; Ryan Decl., ¶¶ 16-21; Lobdell Decl., ¶ 17; Warren Decl. ¶¶ 17, 20-21; *Laidlaw*, 528 U.S. at 181. Therefore, Petitioners have satisfied the redressability requirement.

B. Petitioners Also Have Standing to Sue for Restoration of Their Procedural Right to Enforce the Clean Water Act

Petitioners also suffer from a procedural injury because EPA's unlawful decision to omit monitoring requirements from the Idaho Permit has deprived the public of the right to enforce the Clean Water Act. *See Nat'l Family Farm Coal. v. EPA*, 966 F.3d 893, 909 (9th Cir. 2020) (finding a procedural injury where EPA deprived plaintiffs of statutory procedures meant to prevent environmental harm). A procedural injury requires a plaintiff to demonstrate that "the procedures in question are designed to protect some threatened concrete interest," and that following those procedures "*could* protect their concrete interests." *Salmon*

Spawning & Recovery All. v. Gutierrez, 545 F.3d 1220, 1225–26 (9th Cir. 2008) (emphasis in original) (citation omitted). "A showing of procedural injury lessens a plaintiff's burden on the last two prongs of the Article III standing inquiry, causation and redressability." *Id.* at 1226 (9th Cir. 2008).

Here, Petitioners' members have concrete interests in the preservation of Idaho's waters because there is a "geographic nexus between the individual asserting the claim and the location suffering an environmental impact." *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1154 (9th Cir. 2015) (citation omitted). *See also supra*, I.A.1 (explaining Petitioners' members' geographic nexus). However, the Idaho Permit's lack of monitoring precludes these members from participating in Clean Water Act enforcement procedures specifically designed to protect citizens' concrete interests in public waters.

Section 101(e) of the Clean Water Act provides citizens with the procedural right to "participat[e] in the . . . enforcement of any regulation, standard, effluent limitation, plan, or program [developed under the Act]." 33 U.S.C. § 1251(e). To facilitate public participation in enforcement, Congress specifically gave citizens the right to sue for Clean Water Act violations, including violations of NPDES permit conditions. *See* 33 U.S.C. § 1365; *Sierra Club v. Chevron U.S.A., Inc.*, 834 F.2d 1517, 1525 (9th Cir. 1987). By omitting monitoring that establishes whether a permittee is complying with effluent limitations, EPA has effectively robbed

Petitioners and their members of the right to institute enforcement proceedings against CAFOs. This constitutes a cognizable procedural injury. *See Waterkeeper All.*, 399 F.3d at 503–04 (vacating a rule that "impermissibly compromise[d] the public's ability to bring citizen suits").

Finally, the enforcement right enshrined in the Clean Water Act is "designed to," and—if exercised—"could protect" Petitioners' concrete interests in clean waterways, satisfying procedural causation and redressability. *Salmon Spawning*, 545 F.3d at 1225–26. Thus, Petitioners have standing.

II. The Idaho Permit Violates the Clean Water Act and EPA's Regulations Because It Lacks Required Monitoring

Congress expressly prohibited the "discharge of pollutants" from any "point source" to "waters of the United States," unless those discharges comply with a permit issued under the NPDES or other Clean Water Act program. 33 U.S.C. §§ 1311, 1342, 1362. Documenting this compliance through permittee self-monitoring is central to achieving the Clean Water Act's goal of restoring and maintaining the integrity of the nation's waters. *Id.* § 1251(a). Therefore, the Clean Water Act unambiguously requires that every NPDES permit contain effluent monitoring to ensure compliance with all applicable effluent limitations. *Id*. §§ 1318(a)(2)(A), 1342. EPA's regulations, in turn, detail these monitoring requirements applicable to all NPDES permits. 40 C.F.R. §§ 122.41(j), 122.44(i), 122.48. Representative monitoring is an indispensable part of the NPDES program, which relies on a

multi-faceted approach: 1) effluent limits (which can be numeric or narrative), 2) technologies or practices capable of achieving those limits, and 3) effluent monitoring to establish compliance with or violations of said effluent limits. *See* NPDES Permit Writers' Manual (Sept. 2010), at 5-1, 8-2 ("One of the major strategies of the Clean Water Act . . . is to require effluent limitations based on the capabilities of the technologies available to control those discharges," and "[m]onitoring is performed to determine compliance with effluent limitations established in NPDES permits").[10] Because the Idaho Permit does not contain representative monitoring to ensure compliance, the Permit is unlawful.

A. All NPDES Permits Must Contain Effluent Monitoring to Ensure Compliance with Pollution Limitations

The statute and regulations unambiguously require all NPDES permits to contain effluent monitoring requirements that can assure compliance with effluent limits. Courts have accordingly rejected EPA permits that fail to include representative monitoring provisions, as this Court should do here.

First, the statute is clear. The Clean Water Act makes plain that EPA "shall require" all permitted point sources to monitor their effluent to "determin[e] whether any person is in violation" of an applicable effluent or other limitation. 33 U.S.C. § 1318(a)(2)(A)(iii)–(iv). All NPDES permits must require 1) establishing

[10] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf (last visited Sept. 13, 2020).

and maintaining records, 2) making reports, 3) installing, using, and maintaining monitoring equipment or methods, 4) sampling effluent, *and* 5) providing any other information reasonably required to "determine whether [the permittee] is in violation of" an effluent limitation, prohibition, or standard of performance. 33 U.S.C. § 1318(a)(2)(A); *see also Confederated Tribes & Bands of the Yakama Nation v. Yakima Cnty.*, 963 F.3d 982, 990 (9th Cir. 2020) (recognizing that unless context overcomes ordinary meaning, "and" used to join multiple concepts "is usually interpreted to require 'not one or the other, but both.'" (quoting *Crooks v. Harrelson*, 282 U.S. 55, 58 (1930)). Section 402 of the Act, dealing specifically with NPDES permits, further establishes that such permits must contain conditions "to assure compliance" with effluent limitations and water quality standards, "including conditions on data and information collection, reporting, and such other requirements as [EPA] deems appropriate." 33 U.S.C. § 1342(a)(2).

Because effluent monitoring is necessary "to assure compliance" with limitations specifically designed to achieve the Clean Water Act's goal, both sections 308 and 402 provide a monitoring mandate, in addition to whatever other provisions EPA may deem appropriate. 33 U.S.C. §§ 1318, 1342. EPA may not collapse this distinct statutory requirement for monitoring into other permit conditions such as effluent limitations or pollution control practices. *See Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 928–29 (9th Cir. 2004) ("it is

'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001)).

Giving effect to the statute's plain language, EPA's regulations specify that "each NPDES permit shall include" monitoring requirements "[t]o assure compliance with permit limitations." 40 C.F.R. § 122.44(i);[11] *see also id.* § 122.41(j) (listing monitoring as a condition that "shall be incorporated" into "all NPDES permits"). EPA's regulations demonstrate that the purpose of monitoring is to measure effluent and constituent pollutants in effluent to document whether a discharger is meeting its permitted limits. Such monitoring must include "[t]he mass (or other measurement specified in the permit) for each pollutant limited in the permit; [t]he volume of effluent discharged from each outfall; or [o]ther measurements as appropriate," and the results shall be reported on "a frequency dependent on the nature and effect of the discharge, but in no case less than once a year." 40 C.F.R. § 122.44(i)(1)(i)–(iii) & 2. EPA further requires that every NPDES permit specify the "type, intervals, and frequency [of sampling] sufficient

[11] This regulation states that a variety of permit conditions are required "when applicable." 40 C.F.R. § 122.44. As explained throughout this Part, the Clean Water Act's text and binding case law make clear that effluent monitoring conditions are necessarily "applicable" for all NPDES permits.

to yield data which are representative of the monitored activity," 40 C.F.R. § 122.48(b); *see also* NPDES Permit Writers' Manual, at 3-2 ("All NPDES permits consist, at a minimum, of five sections" including "[m]onitoring and [r]eporting [r]equirements").[12] Monitoring must also comply with established methodologies. *See* 40 C.F.R. Part 136; *id.* § 122.41(j)(4). CAFOs do not occupy a special place under the Clean Water Act allowing for less rigorous oversight, and EPA's regulations provide no general exemptions from these compliance monitoring requirements.[13]

Federal courts have given effect to the plain language of the Act and EPA's regulations, recognizing that NPDES permits must include compliance monitoring provisions. In *NRDC v. County of Los Angeles* ("*County of L.A.*"), this Court considered L.A.'s municipal separate storm sewer system permit and its monitoring provisions. 725 F.3d 1194 (9th Cir. 2013). Using the county's monitoring data, the plaintiffs cataloged water quality exceedances in the sewer

[12] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf (last visited Sept. 17, 2020).

[13] The regulations do allow pollutant monitoring waivers for certain pollutants such as fecal coliform and biochemical oxygen demand, granted on a case-by-case basis where "the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger." 40 C.F.R. § 122.44(a)(2). EPA has not invoked this waiver provision for any CAFO in Idaho, nor could it for the entire category under a general permit.

system's receiving waters and brought a citizen suit to enforce the Clean Water Act. *Id.* at 1200–01. Defendants there argued the monitoring data in question was not intended to establish liability for permit violations, but this Court found that their argument "r[an] counter to the purposes of the [Clean Water Act]" because the Act "*requires* every NPDES permittee to monitor its discharges into navigable waters of the United States in a manner sufficient to determine whether it is in compliance with the relevant NPDES permit." *Id.* at 1202, 1205, 1207–08 (citing 33 U.S.C. § 1342(a)(2) and 40 C.F.R. § 122.44(i)(1)) (emphasis in original). In fact, "[t]he NPDES program fundamentally relies on self-monitoring." *Id.* at 1208 (quoting *Sierra Club v. Union Oil Co. of Cal*., 813 F.2d 1480, 1491 (9th Cir. 1987)). Because the Clean Water Act mandates monitoring that ensures compliance and the monitoring data in question were the permit's only means of satisfying that mandate, pollution exceedances documented by such monitoring necessarily established liability—any other interpretation would have been unreasonable and resulted in an unlawful permit. *Id.* at 1208–09.

Also recognizing the necessity of monitoring to ensure compliance, the Second Circuit rejected an EPA general permit, in part, based on the permit's lack of actual monitoring provisions. *NRDC v. EPA*, 808 F.3d 556, 565, 583–84 (2d Cir. 2015) ("*Vessel General Permit Case*"). In that petition for review of EPA's general permit for the discharge of ballast water from vessels, the petitioners

argued that the permit's monitoring and reporting requirements violated the law by failing to guarantee compliance with water quality-based effluent limitations. *Id.* at 561–62, 570. To start, that court recognized that "[g]enerally, an NPDES permit is unlawful if a permittee is not required to effectively monitor its permit compliance." *Id.* at 583 (quoting *County of L.A.*, 725 F.3d at 1207). The only requirement in the permit was for vessels to report "*expected* date, time, location, volume, and salinity" of its discharges, which the court held provided "no way to derive . . . whether a vessel is actually in compliance." *Id.* (emphasis in original). The court also rejected EPA's argument that if a vessel was in compliance with the permit's other effluent limitations, the permittee was "generally expected to already be controlling [its] vessel discharges to a degree that is protective of water quality." *Id.* In other words, each distinct effluent limitation requires monitoring capable of establishing compliance with that specific limitation. Without a "mechanism to evaluate compliance" with all effluent limitations, the permit was unlawful. *Id.*[14]

[14] At least two state courts have considered whether state-issued CAFO NPDES permits must include effluent monitoring. In an unreported 2018 opinion, the Maryland Court of Special Appeals upheld Maryland's CAFO permit, holding that the mere existence of BMPs and effluent limitations sufficed to ensure compliance. *Food & Water Watch v. Md. Dept. of the Env't*, No. 2602, 2018 WL 2203175, at *9–11 (Md. Spec. App. May 14, 2018). That decision, however, incorrectly conflated these components of that permit with the separate federal monitoring requirement. The following year, the Delaware Superior Court upheld Delaware's CAFO permit, relying almost entirely on the Maryland court's opinion. *Food &*

Moreover, years of Clean Water Act enforcement actions confirm that the monitoring requirement is distinct from other obligations that NPDES permits impose. In *Save Our Bays & Beaches v. City & County of Honolulu*, the court considered a citizen enforcement action alleging violations spanning many of the relevant NPDES permit's requirements. 904 F. Supp. 1098, 1139–42 (D. Haw. 1994). The court held that a single point source is separately liable for violations of an NPDES permit's effluent limitations, maintenance and operational conditions, reporting requirements, *and* monitoring requirements. *Id.* (finding 11,095 effluent limit violations; 1,110 violations for failing to monitor effluent discharges; 1,106 violations for failing to report its failures to monitor; 7,492 violations for failing to report water quality violations; and 75 violations for failing to report bypass incidents).

EPA itself has taken this position against CAFOs subject to actual effluent monitoring in other states. *United States v. Cal-Maine Food, Inc.*, Complaint, 3:15-cv-00278-HTW-LRA, ECF 1 (Apr. 13, 2015) at ¶ 56 (alleging separate violations of the Clean Water Act under a Mississippi CAFO NPDES permit for, *inter alia*, failing to conduct stormwater sampling, failing to submit timely discharge monitoring reports, failing to comply with BMPs, and land applying nitrogen in

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Water Watch v. Delaware Dept. of Nat. Res. and Envtl. Control, C.A. No. N19A-04-006 FWW, 2019 WL 6481888 (Del. Super. Nov. 27, 2019), at *1–4.

excess of limits).[15] Were these not wholly distinct requirements under the Clean Water Act, they could not constitute separate violations. *See* 33 U.S.C. § 1319(a) (empowering EPA to initiate civil enforcement actions for violations of Clean Water Act sections 1311 and 1318, among others, or permit conditions that implement these sections). In fact, monitoring is such a critical element to Clean Water Act regulation that EPA's regulations establish separate, and severe, penalties for failing to monitor or for tampering with monitoring equipment. 40 C.F.R. § 122.41(j)(5). As the *Save Our Bays* court recognized, "[operational] requirements (and reporting thereof) are wholly independent of the monitoring requirement; compliance with one neither excuses nor voids compliance with the other." *Save Our Bays & Beaches*, 904 F. Supp. at 1139.

The statute's text, EPA's implementing regulations, and case law unambiguously establish that "monitoring" under the Clean Water Act means that permittees must measure their effluent for pollutants to ensure compliance with all applicable effluent limitations, and that *every* NPDES permit must contain such representative monitoring.

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[15] https://www.epa.gov/sites/production/files/2015-04/documents/cal-maine-cp.pdf (last visited Sept. 10, 2020).

B. The Idaho Permit Does Not Require Monitoring to Ensure Compliance with the Permit's Effluent Limitations

The Idaho Permit does not contain effluent monitoring provisions, in violation of the Clean Water Act and EPA's own regulations. While the Permit requires CAFOs to adopt BMPs and a Nutrient Management Plan, and contains certain recordkeeping and reporting requirements, these are distinct pollution control practices and operational requirements, not effluent monitoring to ensure compliance. The law is clear; EPA may not simply assume that Nutrient Management Plans and other practices are effective and that CAFOs implementing these permit provisions maintain perfect compliance. Requiring compliance monitoring in the Idaho Permit is especially critical considering CAFOs' ongoing impacts to water quality in Idaho, which indicate that current practices are insufficiently protective. *See supra* Factual Background Part II.

1. The Permit's Pollution Controls Are Not Monitoring to Assure Compliance

All NPDES permits must control the discharge of pollutants through technology-based and water-quality based effluent limits, but they must also require monitoring to establish compliance with those limits. 33 U.S.C. § 1342(a); 40 C.F.R. § 122.44(i)(1); *County of L.A.*, 725 F.3d at 1207. The Permit includes BMPs intended to reduce pollution discharges, inspections to check whether those controls are in place, and recordkeeping to document them. However, these distinct

permit requirements do not supplant pollution monitoring to ensure compliance with effluent limits. EPA unlawfully conflates these requirements.

In response to Petitioners' comments objecting to the Idaho Permit's failure to require effluent monitoring, EPA briefly explained that it was rejecting Petitioners' request for effluent monitoring because the Idaho Permit contains "e.g., daily and weekly inspections in the production area, manure and soil analyses and land application equipment inspections." ER 220, 231–32. Despite EPA's misrepresenting these as "monitoring requirements," ER 220, these provisions have nothing to do with monitoring pollutant discharges or demonstrating compliance with all effluent limitations; instead, they only deal with documenting the existence of BMPs and operational requirements. EPA may not, in effect, create a regulatory monitoring exemption for the CAFO industry. *See, e.g.*, 33 U.S.C. § 1318(a)(2)(A); 40 C.F.R. § 122.41(j).

The Permit terms EPA points Petitioners to, along with all similar Permit provisions, are clearly distinct from the pollution monitoring the Act requires. The Permit requires CAFOs to visually inspect production area features and periodically inspect land application equipment, ER 8, 10—tools to ensure that facility requirements such as wastewater diversion structures are in place and equipment is operational. As part of the Permit's Nutrient Management Plan requirement, permittees must sample their manure's nutrient content once a year to

help establish how much manure they can apply to particular fields. ER 9–10 (requiring manure sampling); ER 15 (requiring a CAFO to establish "budgets" of how much CAFO waste it will land apply based on fertilizer and crop production guides).

These practices are intended to control pollutant discharges so that CAFOs can feasibly *meet* their effluent limits; they have nothing to do with monitoring actual pollution discharge outcomes to confirm that a CAFO's discharges do not violate the Permit's general effluent limit of zero discharge of pollutants from the production area or its effluent limit of minimizing discharges from land application areas. ER 7, 9. The BMP provisions in the Idaho Permit do not establish the "type, intervals, and frequency" of monitoring "sufficient to yield data which are representative of the monitored activity." 40 C.F.R. §§ 122.48(b), 122.41(j)(1); *see id.* § 122.43 (permits "shall establish conditions" including those set forth in "122.48 (monitoring)"). Nor do they identify the "mass (or other measurement specified in the permit) for each pollutant limited in the permit," the "volume of effluent discharged from each outfall," or other "measurements as appropriate" to "assure compliance with permit limitations." *Id*. § 122.44(i)(1). Further, soil and manure sampling cannot yield data representative of the activity for which the permit is issued—the discharge of pollutants to waters of the U.S—as is required of all monitoring. *Id*. § 122.48(b). Instead, these practices are the pollution

reduction technology, the effectiveness of which monitoring is needed to determine.

The Idaho Permit is akin to defendants' interpretation of the NPDES permit in *County of L.A.*, which this Court rejected as unreasonable. 725 F.3d at 1206 ("Defendants contend that the [] monitoring program neither measures nor was designed to measure any individual permittee's compliance with the Permit. But if [] Defendants are correct, the Permit would be unlawful under the [Clean Water Act]."") (citation omitted). "The Clean Water Act *requires* every NPDES permittee to monitor its discharges . . . in a manner sufficient to determine whether it is in compliance," and a permit's failure to accomplish this is unreasonable and unlawful. *Id.* at 1206–07. The Idaho Permit provides "no way to derive" actual compliance with effluent limitations. *See Vessel General Permit Case*, 808 F.3d at 583. Instead, at best, EPA merely *expects* that BMPs and Nutrient Management Plans will adequately protect surface waters, that Idaho's water quality standards will not be violated,[16] and that CAFOs will perfectly comply with the Permit's

[16] The Idaho Permit does not separately impose water quality-based effluent limits. EPA instead merely assumes without support that BMPs adequately protect Idaho's already degraded waters. ER 231 ("It is the best professional judgement of the permit writer that the implementation of these same BMPs via the conditions specified in a general permit are appropriate and adequate to control pollutants in impaired watersheds."). Absent representative monitoring, it is difficult, if not impossible, to identify situations where water quality-based effluent limits should be required to attain water quality standards.

effluent limits. But, this expectation-based approach was squarely rejected in the *Vessel General Permit Case* because without a "mechanism to evaluate compliance," a permit is unlawful. *Vessel General Permit Case*, 808 F.3d at 583 (holding that EPA cannot rely on "expected" discharges, nor can it "generally expect[]" that compliance with other permit conditions ensures compliance with all effluent limits).

EPA's own defense of the Idaho Permit further illustrates its fundamentally flawed approach. EPA first states that it evaluated certain "methods and tools included in the permit for water quality outcomes," and included alternative methods "[w]here appropriate." ER 222. It then states that "CAFO permits specify the [BMPs] (i.e., methods) to be implemented rather than numeric effluent limits (i.e., outcomes), which are typical in NPDES permits for other sectors." *Id.* EPA's apparent rationale is that simply documenting the existence of pollution control "methods" suffices, because EPA believes the methods are generally effective. But this is not how the NPDES program works. NPDES permits must contain effluent limits based on the control technology capable of achieving the limits *and* effluent monitoring to establish compliance with those limits. Furthermore, contrary to EPA's statement, the Permit *does* contain a numeric effluent limitation: "no discharge of manure, litter, or process wastewater into waters of the United States from the production area except" under limited circumstances. ER 7. In other

words, the Permit establishes an effluent limit of zero pollutants from CAFO production areas under most circumstances, but contains no monitoring provision capable of ensuring compliance with that numeric limit.

Also, the Permit text itself contradicts EPA's assertion that the Permit already includes monitoring requirements. While EPA tells Petitioners that soil and manure sampling is a "monitoring requirement," ER 220, 231–32, the Permit describes Nutrient Management Plans—which actually contain those sampling requirements—as "special conditions" that "must include site-specific practices and procedures necessary to *implement* the applicable effluent limitations and standards," ER 11 (emphasis added). Implementing effluent limitations is distinct from, and cannot take the place of, monitoring the actual pollution a CAFO discharges. EPA cannot conflate these requirements. *See* 33 U.S.C. § 1318(a)(2)(A) (listing permit requirements in the conjunctive); 40 C.F.R. § 122.41(e), (j), (l) (requiring each NPDES permit to include conditions for, *inter alia*, proper operation and maintenance, reporting, *and* representative monitoring).

2. The Permit's Reporting Requirements Are Not Monitoring to Assure Compliance

Similarly, the Idaho Permit's only reporting provision, the Annual Report requirement, is not monitoring, but rather a summary of facility details, BMPs, nutrient management, and certain identified permit violations at the production area. ER 151–56. As discussed, the Clean Water Act requires reporting and

recordkeeping *in addition* to monitoring—so on its face the Annual Report cannot supplant effluent monitoring. *See* 33 U.S.C. § 1318(a)(2)(A); *Planned Parenthood of Idaho, Inc.*, 376 F.3d at 928–29. Annual Reports only contain aggregate details of CAFO practices, and when pollution discharges from the production area occur, a one-line entry identifying the discharge date, time, and approximate volume is all they require. ER 152. This fails to constitute the kind of monitoring required by the Act and regulations because it is not representative of the conduct permitted, 40 C.F.R. § 122.41(j)(1), nor does it require identifying or measuring the constituent pollutants in any such effluent. *Id*. § 122.44(i). The Annual Report has no requirement to even record discovered pollutant discharges from land application areas, instead only requiring an aggregate accounting of nutrients applied to a given field. ER 151–56. And to the extent that the Idaho Permit's recordkeeping and reporting provisions could show a CAFO has followed certain BMPs, monitoring for actual pollution discharges is still required because "compliance with one [permit provision] neither excuses nor voids compliance with [an]other." *Save Our Bays & Beaches*, 904 F. Supp. at 1139. For all these reasons, the Annual Report clearly cannot take the place of effluent monitoring.

3. The Idaho Permit's One, Limited Sampling Provision Is Not Monitoring to Assure Compliance

The Permit *does* require discharge sampling in one limited way: one-time pollution analysis when wastewater overflows from a CAFO production area's

waste impoundment structure. ER 21. But this limited provision falls far short of effluent monitoring to determine permit compliance, as required by the Clean Water Act and EPA's regulations.[17] First, CAFOs can and do discharge from a variety of production and land application areas—not only from overflowing waste impoundments—and such limited and non-representative monitoring cannot possibly provide the information necessary to determine compliance with the Permit's effluent limitations, which themselves apply to the entire production area as well as land application areas. ER 7–10; ER 341 ("The CAFO permit allows discharge in some circumstances (production area and land app area").

Second, the required one-time waste impoundment monitoring is inadequate to constitute the required representative monitoring to assure compliance even for that limited part of the production area. The Permit's instruction to analyze such a discharge fails to account for expected discharges from these structures to subsurface flows directly connected to surface waters. *See supra* p. 18 (explaining that the Permit allows for a continuous discharge rate from wastewater lagoons); ER 236 ("EPA is not requiring the use of synthetic liners with leak monitoring systems in the permit"); *see also Cmty. Ass'n for Restoration of the Env't v. Cow*

[17] Although the one-time discharge sampling falls short of the compliance monitoring that the Clean Water Act requires, its inclusion in the Permit demonstrates that EPA understands that effluent monitoring of specific CAFO pollutants of concern is feasible.

Palace, LLC, 80 F. Supp. 3d 1180, 1223 (E.D. Wash. 2015) ("[E]ven assuming the lagoons were constructed pursuant to [Natural Resources Conservation Service] standards, these standards specifically allow for permeability and, thus, the lagoons are designed to leak.").

Moreover, discharges from waste storage impoundments are only *permitted* if they result from an extreme precipitation event. ER at 7–8. Therefore, absent an extreme weather event, in which case the zero-discharge effluent limit simply does not apply, the Idaho Permit only contemplates monitoring of *unpermitted* discharges. This, by definition, is monitoring of violations, as opposed to monitoring to ensure compliance, which turns the NPDES program's monitoring requirements on their head. *See* S. Rep. No. 95-370, at 56 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4381 (NPDES permittees must do more than merely "report to the Agency only when their self-monitoring data indicates a violation").

C. EPA Requires Monitoring of Other Point Source Categories and in Other EPA-Endorsed Programs, Illustrating the Inadequacy of Its "Catch Me If You Can" Approach for Idaho CAFOs

EPA's regulation of other point source categories underscores that monitoring is a separate requirement from pollution reduction practices. Many non-CAFO point sources must comply with best available technology standards, but those permittees must then demonstrate compliance with their discharge limits by *also* conducting effluent monitoring to show that the technologies are in fact

keeping the point source within permit requirements. *See* EPA, NPDES Permit Writers' Manual, 8-2 (Sept. 2010) ("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.").[18]

For example, a wastewater treatment plant dealing with human waste and other influent is typically subject to a variety of requirements including pretreatment standards and inspections of the plant's pollution control technology. But, the plant must then actually monitor the facility's effluent to ensure that it meets permitted pollution limits. *See, e.g.*, EPA, *Authorization to Discharge Under NPDES for Lander Street Wastewater Treatment Facility, City of Boise* (ID-002044-3), at 10–12, 17–18, 22, 24, 26 (requiring, *inter alia*, pollution prevention programs, inspections, and enforcement of BMPs, *as well as* effluent monitoring and surface water monitoring up and downstream of discharge point).[19] EPA recently issued a General NPDES Permit for aquaculture facilities in Idaho that similarly establishes effluent limitations and requires representative effluent monitoring to ensure compliance with those limits. EPA, *Authorization to*

[18] https://www.epa.gov/sites/production/files/2015-09/documents/pwm_2010.pdf (last visited Sept. 17, 2020).
[19] https://www.epa.gov/sites/production/files/2017-10/documents/r10-npdes-boise-lander-id0020443-final-permit-mod-2012.pdf (last visited Sept. 17, 2020).

Discharge Under NPDES for Aquaculture Facilities in Idaho Excluding Facilities Discharging Into the Upper Snake-Rock Subbasin or in Indian Country in Idaho (IDG131000), 14–18 (requiring monitoring of effluent for pollutants of concern "just prior to discharge").[20] It is not enough that a facility simply ensures that pollution controls are in place and assumes that they are working effectively enough to achieve compliance. *Vessel General Permit Case*, 808 F.3d at 583 ("regulations require monitoring to 'assure compliance'") (quoting 40 C.F.R. § 122.44).

Applying the Idaho Permit's "catch me if you can" approach—where EPA assumes that BMPs are so effective that they result in perfect compliance, without any monitoring to confirm this assumption—to other point source categories illustrates its patent inadequacy at providing the accountability that Congress intended to accomplish with effluent monitoring. *County of L.A.*, 725 F.3d at 1208 (explaining that "Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement of the Act"). If merely inspecting certain operational conditions and reporting on the existence of practices were sufficient to satisfy the Clean Water Act, then actual effluent monitoring would

[20] https://www.epa.gov/sites/production/files/2019-10/documents/r10-npdes-idaho-aquaculture-gp-idg131000-idg133000-final-permit-2019.pdf (last visited Sept. 17, 2020).

hardly ever be required for any point sources. Slaughterhouses and wastewater treatment plants, among others, would not need to monitor their actual pollution discharges and submit the results for public scrutiny, so long as they merely inspected and reported that pollution control technologies were in place. Similarly, noncontinuous dischargers such as municipal stormwater sewer systems would not need to monitor actual pollution in effluent so long as they complied with their permit's other conditions. *See id*. at 1199 (recognizing that the L.A. stormwater sewer system permit "contain[ed] a myriad of rules, regulations, and conditions"). Allowing permittees to forego monitoring in those contexts would never be tolerated.

Moreover, the fact that the Idaho Permit generally prohibits production area discharges has no bearing on the monitoring requirement. EPA has understood in other contexts that even permits with true zero-discharge limitations still require monitoring, because otherwise they lack the required mechanism to ensure compliance. *See NRDC v. EPA*, 863 F.2d 1420, 1434 (9th Cir. 1988) (in which EPA defended, and this Court upheld, its decision "to require the visual sheen test as a method for monitoring compliance of the no discharge of oil limitation"); *see also* EPA, Discharge Monitoring Report Form (requiring that "[i]f 'no discharge' occurs during monitoring period, enter 'No Discharge' across form in place of data

entry.").[21] Indeed, monitoring for compliance with the strict limits here is extremely important because the environmental analyses underlying the Idaho Permit relied upon this general no discharge standard. For instance, after acknowledging that CAFOs are "not always zero discharge," an Idaho official responsible for state approval of the Permit stated "but if they comply with the permit effectively, we expect them to operate as a zero discharge facility." ER 342. In fact, Idaho's certification that the Permit will not violate Idaho's water quality standards is expressly conditioned on perfect compliance with Permit conditions. ER 400 ("DEQ has concluded that as long as permittees operate consistent with the terms of the [Permit] and the requirements set forth in this certification, there is a reasonable assurance that existing and designated beneficial uses will be protected and maintained and there will be no lowering of water quality."). Documents assessing the Permit's effects on endangered species similarly relied upon an assumption of zero discharge. ER 327 (finding that "the Permit is not expected to have adverse effects on essential fish habitat" because it "is essentially a no discharge permit").[22] This effluent limitation undergirds the decision-making

[21] https://www.epa.gov/sites/production/files/2015-09/documents/dmr.pdf (last visited Sept. 17, 2020).

[22] Petitioners note the inherent inconsistency in EPA's presentation of the Permit as a zero-discharge permit, when elsewhere it admits that it is *not* zero discharge. ER 9, 341.

process EPA relied on to issue the Permit, making a monitoring mechanism to ensure compliance all the more crucial.

EPA has developed and promoted monitoring in similar contexts, admitting that assuming BMPs are effective without verification is inappropriate. For example, EPA's guidance on water quality trading[23] acknowledges that monitoring is important to evaluate the effectiveness of agricultural BMPs, including those used by CAFOs. EPA, Office of Wastewater Management, 833-R-07-004, Water Quality Trading Toolkit for Permit Writers: Fundamentals 17–18 (updated 2009) (recommending "monitoring to verify load reductions").[24] According to EPA, monitoring is important "to assess the effectiveness of BMPs or to verify BMP installation, implementation, and maintenance." *Id.* at Water Quality Trading Scenario: *Point Source-Nonpoint Source Trading* 28. Yet, when it comes to the Idaho Permit, EPA inexplicably decided to ignore its own advice.

In sum, while the Idaho Permit contains effluent limits, along with BMPs, recordkeeping, and reporting to help achieve those effluent limits, it does not contain effluent monitoring as required by the Clean Water Act and EPA's regulations. Instead, EPA asks Petitioners to simply hope that BMPs result in

[23] Water quality trading describes market-based approaches where a source may generate transferrable "credits" through pollution reduction practices, and other sources may purchase the credits.
[24] https://www.epa.gov/sites/production/files/2016-04/documents/wqtradingtoolkit.pdf (last visited Sept. 17, 2020).

compliance and achieve the Clean Water Act's goal. EPA's special treatment of CAFOs, which Congress specifically identified as point sources in response to the threat they pose to waterways, is baseless. CAFOs are no different than any other permitted point sources—their pollution controls sometimes fail, and they are not an industry of perfect actors. Particularly in light of the severely degraded waters where hundreds of Idaho CAFOs operate, this Court should not accept EPA's unlawful approach.

III. EPA's Permit Scheme Unlawfully Deprives Citizens of the Right to Hold CAFOs Accountable Through Citizen Suits

This Court has long recognized the importance of the Clean Water Act's citizen suit provision. *See, e.g.*, *Nw. Envtl. Advocates v. City of Portland*, 56 F.3d 979, 989 (9th Cir. 1995) (calling the Clean Water Act's citizen suit provision "an important enforcement tool" that is "necessary to the effective enforcement of effluent limitations"); *Sierra Club*, 834 F.2d at 1522, 1525 (refusing to apply a state statute of limitation because citizen enforcement of the Clean Water Act is a "national polic[y]" that should not be frustrated). By spurring and supplementing federal enforcement authority, S. Rep. No. 99-50, at 28, citizen suits "perform an important public function." *Sierra Club*, 834 F.2d at 1525. Thus, deprivation of the public's right to enforce the Clean Water Act is a particularly affronting—and illegal—result. *See Waterkeeper*, 399 F.3d at 503–04 (holding EPA CAFO regulations violated the Clean Water Act by "impermissibly compromis[ing] the

public's ability to bring citizen suits" against CAFOs). Yet, that is precisely the result EPA has achieved by failing to include monitoring in the Idaho Permit.

The Clean Water Act's monitoring requirements are designed to place the burden of establishing permit compliance upon the permittee. 33 U.S.C. § 1342(a)(2); *id.* § 1318(a)(2)(A)(iii)–(iv); *County of L.A.*, 725 F.3d at 1208. In this way, "the NPDES program fundamentally relies on self-monitoring." *County of L.A.*, 725 F.3d at 1208 (internal quotes omitted). "Congress' purpose in adopting this self-monitoring mechanism was to promote straightforward enforcement" by regulators and citizens. *Id.* In other words, the Clean Water Act's self-monitoring and reporting scheme was Congress' way of clearing a path for citizens to access judicial enforcement when necessary. *See* S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3746 ("The information and other disclosure obligations required throughout the [Clean Water Act] are important to the operation of [the citizen suit] provision. The Administrator [has] a special duty to make meaningful information on discharging sources available to the public on a timely basis.").

But under the Idaho Permit, a citizen's path to enforcement is anything but straightforward. EPA's decision to omit compliance monitoring in the Idaho Permit flips Clean Water Act enforcement on its head by placing the burden of establishing permit compliance (or violations) on the public rather than the

permittee. Because monitoring of actual effluent at discharge points is the only realistic way to confirm compliance with the Idaho Permit's effluent limitations, this scheme leaves citizens like Petitioners unable to fulfill their critical enforcement role under the Clean Water Act.

The information Idaho's CAFOs would be required to collect, were it not for EPA's failure to include monitoring provisions, is the very information that enables citizens to bring viable citizen suits. Robert W. Vinal, *Proof of Wrongful Discharge of Pollutant Into Waterway Under Federal Clean Water Act*, *in* 36 Am. Jur. 3d *Proof of Facts* § 20 (2020). Self-monitoring reports "constitute evidence-in-chief on the issue of liability in a CWA citizen suit [because they are] the litmus test as to whether the discharges are in compliance with the [terms of the permit]." *Id.* Indeed, effluent data collected by permittees have empowered citizens across the country to successfully defend their waters against permit violators.

For instance, in New Jersey, plaintiffs prevailed in a citizen suit by showing a chemical storage company had "consistently and uninterruptedly dumped pollutants" in violation of its NPDES permit. *Pub. Interest Research Grp. v. Powell Duffryn Terminals, Inc.*, 913 F.2d 64, 68–69, 79 (3d Cir. 1990). The deciding evidence came from discharge monitoring reports the permittee was required to submit to EPA. *Id.* at 68–69. Likewise, by using information gleaned from the permittee's effluent monitoring reports, plaintiffs in Hawaii were able to

hold a polluting facility accountable for discharging sewage that contained impermissibly high levels of harmful pollutants. *Save Our Bays*, 904 F. Supp. at 1106 nn.8–9, 1124–25. Without mandatory effluent monitoring, these citizens likely would have been unable to hold these facilities accountable.

The disservice the Idaho Permit does to the public's enforcement right is especially obvious considering the manner in which EPA itself uses monitoring data to facilitate enforcement actions. For example, EPA relied on discharge monitoring reports to hold a Nebraska facility accountable for illegally disposing of dead cows. *United States v. STABL, Inc.*, 800 F.3d 476, 483–86 (8th Cir. 2015). In that case, the facility's effluent monitoring reports "were the primary evidence on which the government relied." *Id.* at 483. In rejecting the defendant's position that these monitoring reports were insufficiently probative, that court noted "[w]hen a defendant's own [discharge monitoring reports] demonstrate permit exceedances, they constitute sufficient evidence to meet a Clean Water Act plaintiff's burden of production on liability." *Id.* at 484.

EPA's approach to the Idaho Permit upends Congress' intent that permittees assume the burden of monitoring for permit compliance. *County of L.A.*, 725 F.3d at 1208. Because Idaho's CAFOs are not required to generate and report monitoring data that actually measures compliance, concerned citizens hoping to prevail in court are saddled with the burdensome, costly, and impractical task of

conducting their own investigations. Even Petitioners—organizations devoted to the pursuit of clean water through many forms of advocacy, including citizen suits—face often insurmountable hurdles in trying to collect effluent data from CAFOs. *See* Ryan Decl., ¶ 3; Merkel Decl., ¶ 5. Petitioners' "efforts to monitor CAFOs are limited by a lack of access to private lands and facilities, [and] the non-transparent ways in which CAFOs operate." *See* Ryan Decl., ¶ 16. Consequently, Petitioners and other citizens are forced to "cobble together" data from incomplete sources in hopes of holding polluters accountable. Merkel Decl., ¶¶ 6, 12. Having to uncover, rely on, and defend such evidence is antithetical to Congress' intent that compliance self-monitoring and reporting would "avoid the necessity of lengthy fact finding, investigations, and negotiations at the time of enforcement. Enforcement of Clean Water Act violations should be based on relatively narrow fact situations requiring a minimum of discretionary decision making or delay." *Sierra Club v. Union Oil Co. of Cal*., 813 F.2d 1480, 1492 (9th Cir. 1987), *vacated and remanded on other grounds*, 485 U.S. 931 (1988), *and reinstated and amended by* 853 F.2d 667 (9th Cir. 1988) (quoting S. Rep. No. 92-414 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3730)).

EPA certainly recognizes the value of monitoring data in Clean Water Act enforcement proceedings. It defies logic for the agency to deprive the public—and itself—of this compliance data from CAFOs subject to the Idaho Permit.

Monitoring data are critical to ensuring permit compliance, holding violators accountable, and protecting U.S. waters. By failing to require CAFOs to monitor their effluent, the Idaho Permit undermines the Clean Water Act's fundamental design.

Further, the Idaho Permit's lack of effluent monitoring leaves citizens with no way to discern whether CAFOs are contributing to violations of water quality standards. As required by the Clean Water Act, Idaho must establish limits for, and the Idaho Permit must control, pollution that may be discharged at a level that would compromise established uses of waters. *See supra* Legal Background Part I; 33 U.S.C. § 1313(c)(2)(A). For instance, waters designated for primary contact recreation, such as the Snake River, have regulatory maximums set for *E. coli*—a common CAFO pollutant. Idaho Admin. Code r. §§ 58.01.02.150, 58.01.02.251a.02.a. Without monitoring data from CAFOs, Petitioners and other members of the public are thwarted in their attempts to ascertain whether waters are meeting this standard and to craft effective strategies to protect impaired waters. *See* Ryan Decl. ¶¶ 18–20 (CAFO monitoring would enable more effective advocacy efforts to hold CAFOs accountable and protect Idaho waterways). Thus, the Permit's lack of monitoring defies the Clean Water Act's mandate that EPA provide for, encourage, and assist public participation in the development, revision and enforcement of standards, limits, and plans. 33 U.S.C. § 1251(e).

Without question, Idaho's lakes, rivers, and streams—and all forms of life that depend on these waters—are imperiled by pollution. ER 169; ER 405–10; ER 415–18. While EPA may prefer to operate under the legal fiction that CAFOs never discharge pollutants, or presume that the Idaho Permit's BMPs ensure perfect compliance with all effluent limits, the Clean Water Act's public participation requirements reflect an understanding that communities impacted by CAFO pollution do not have this luxury. The injuries documented in Petitioners' members' declarations are merely examples of the harms that have been and will continue to be suffered by Idahoans because of EPA's unwillingness to properly regulate CAFOs. Now, adding insult to injury, the Idaho Permit's lack of effluent monitoring provisions strips these citizens of the right to defend their waters through the Clean Water Act's citizen suit provision. 33 U.S.C. § 1365. Because the Idaho Permit's scheme obstructs public access to information necessary to participate in enforcement against CAFOs, it violates the Clean Water Act. *Id*. § 1251(e).

CONCLUSION

For the foregoing reasons, EPA's Idaho Permit is arbitrary, capricious, an abuse of discretion, and not in accordance with the Clean Water Act. Petitioners respectfully request the Court set aside and remand the Idaho Permit for further proceedings consistent with the Court's opinion.

Respectfully submitted,

Dated this 22nd day of September, 2020.

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STATEMENT OF RELATED CASES

The undersigned, counsel of record for Petitioners Food & Water Watch and Snake River Waterkeeper are aware of no pending related cases.

Dated this 22nd day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on September 22, 2020. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 22nd day of September 2020.

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ADDENDUM OF STATUTES AND REGULATIONS

INDEX

State Law **Page**

United States Code

5 U.S.C. § 706 – Scope of Review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

. . .

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

33 U.S.C. § 1251 – Congressional declaration of goals and policy

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

. . .

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

. . .

33 U.S.C. § 1311 – Effluent limitations

(a) Illegality of pollutant discharges except in compliance with law

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives

In order to carry out the objective of this chapter there shall be achieved—

(1)(A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title. . . .

. . . or,

[(1)(C)] not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) for pollutants identified in subparagraphs (C), (D), and (F) of this paragraph, effluent limitations for categories and classes of point sources, other than publicly owned treatment works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination

is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title.

. . .

33 U.S.C. § 1313 – Water quality standards and implementation plans

(a) Existing water quality standards

. . .

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

[(3)(B)] If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

[(3)(C)] If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

. . .

(c) Review; revised standards; publication

. . .

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards

shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.

. . .

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

. . .

[(1)(C)] Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

. . .

33 U.S.C. § 1314

. . .

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall. . .

. . .

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

[(2)(B)] specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

. . .

33 U.S.C. § 1318 – Records and reports; inspections

(a) Maintenance; monitoring equipment; entry; access to information

Whenever required to carry out the objective of this chapter, including but not limited to (1) developing or assisting in the development of any effluent limitation, or other limitation, prohibition, or effluent standard, pretreatment standard, or standard of performance under this chapter; (2) determining whether any person is in violation of any such effluent limitation, or other limitation, prohibition or effluent standard, pretreatment standard, or standard of performance; (3) any requirement established under this section; or (4) carrying out sections 1315, 1321, 1342, 1344 (relating to State permit programs), 1345, and 1364 of this title—

(A) the Administrator shall require the owner or operator of any point source to (i) establish and maintain such records, (ii) make such reports, (iii) install, use, and maintain such monitoring equipment or methods (including where appropriate, biological monitoring methods), (iv) sample such effluents (in accordance with such methods, at such locations, at such intervals, and in such manner as the Administrator shall prescribe), and (v) provide such other information as he may reasonably require; and

(B) the Administrator or his authorized representative (including an authorized contractor acting as a representative of the Administrator), upon presentation of his credentials--

(i) shall have a right of entry to, upon, or through any premises in which an effluent source is located or in which any records required to be maintained under clause (A) of this subsection are located, and

(ii) may at reasonable times have access to and copy any records, inspect any monitoring equipment or method required under clause (A), and sample any effluents which the owner or operator of such source is required to sample under such clause.

. . .

33 U.S.C. § 1319 - Enforcement

(a) State enforcement; compliance orders

(1) Whenever, on the basis of any information available to him, the Administrator finds that any person is in violation of any condition or limitation which

implements section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title in a permit issued by a State under an approved permit program under section 1342 or 1344 of this title he shall proceed under his authority in paragraph (3) of this subsection or he shall notify the person in alleged violation and such State of such finding. If beyond the thirtieth day after the Administrator's notification the State has not commenced appropriate enforcement action, the Administrator shall issue an order requiring such person to comply with such condition or limitation or shall bring a civil action in accordance with subsection (b) of this section.

. . .

(3) Whenever on the basis of any information available to him the Administrator finds that any person is in violation of section 1311, 1312, 1316, 1317, 1318, 1322(p), 1328, or 1345 of this title, or is in violation of any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by him or by a State or in a permit issued under section 1344 of this title by a State, he shall issue an order requiring such person to comply with such section or requirement, or he shall bring a civil action in accordance with subsection (b) of this section.

. . .

33 U.S.C. § 1342 – National pollutant discharge elimination system

(a) Permits for discharge of pollutants

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including

conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

. . .

33 U.S.C. § 1362 – Definitions

Except as otherwise specifically provided, when used in this chapter:

. . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

. . .

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

. . .

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

. . .

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

. . .

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. § 1365 – Citizen Suits

(a) Authorization; jurisdiction

Except as provided in subsection (b) of this section and section 1319(g)(6) of this title, any citizen may commence a civil action on his own behalf—

> (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or

duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

. . .

(f) Effluent standard or limitation

For purposes of this section, the term "effluent standard or limitation under this chapter" means (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) an effluent limitation or other limitation under section 1311 or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) a standard of performance or requirement under section 1322(p) of this title; (6) a certification under section 1341 of this title; (7) a permit or condition of a permit issued under section 1342 of this title that is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title); or (8) a regulation under section 1345(d) of this title.

(g) "Citizen" defined

For the purposes of this section the term "citizen" means a person or persons having an interest which is or may be adversely affected.

33 U.S.C. § 1369 – Administrative procedure and judicial review

. . .

(b) Review of Administrator's actions; selection of court; fees

(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title, (F) in issuing or denying any permit under section 1342 of this title, and (G) in promulgating any individual control strategy under section 1314(1) of this title, may be had by any

interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person. Any such application shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day.

Code of Federal Regulations

40 C.F.R. § 23.2 – Timing of Administrator's actions under Clean Water Act

Unless the Administrator otherwise explicitly provides in a particular promulgation or approval action, the time and date of the Administrator's action in promulgation (for purposes of sections 509(b)(1) (A), (C), and (E)), approving (for purposes of section 509(b)(1)(E)), making a determination (for purposes of section 509(b)(1) (B) and (D), and issuing or denying (for purposes of section 509(b)(1)(F)) shall be at 1:00 p.m. eastern time (standard or daylight, as appropriate) on (a) for a Federal Register document, the date that is two weeks after the date when the document is published in the Federal Register, or (b) for any other document, two weeks after it is signed.

40 C.F.R. § 122.4 – Prohibitions

No permit may be issued:

. . .

(d) When the imposition of conditions cannot ensure compliance with the applicable water quality requirements of all affected States.

§ 122.23 – Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25).

(a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least

one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

. . .

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

. . .

(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns, milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

. . .

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this

paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

40 C.F.R. § 122.41 – Conditions applicable to all permits

The following conditions apply to all NPDES permits. Additional conditions applicable to NPDES permits are in § 122.42. All conditions applicable to NPDES permits shall be incorporated into the permits either expressly or by reference. If incorporated by reference, a specific citation to these regulations (or the corresponding approved State regulations) must be given in the permit.

. . .

(e) Proper operation and maintenance. The permittee shall at all times properly operate and maintain all facilities and systems of treatment and control (and related appurtenances) which are installed or used by the permittee to achieve compliance with the conditions of this permit. Proper operation and maintenance also includes adequate laboratory controls and appropriate quality assurance procedures. . . .

. . .

(j) Monitoring and records.

(1) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(2) Except for records of monitoring information required by this permit related to the permittee's sewage sludge use and disposal activities, which shall be retained for a period of at least five years (or longer as required by 40 CFR part 503), the permittee shall retain records of all monitoring information, including all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, copies of all reports required by this permit, and records of all data used to complete the application for this permit, for a period of at least 3 years from the date of the sample, measurement, report or application. This period may be extended by request of the Director at any time.

(3) Records of monitoring information shall include:

(i) The date, exact place, and time of sampling or measurements;

(ii) The individual(s) who performed the sampling or measurements;

(iii) The date(s) analyses were performed;

(iv) The individual(s) who performed the analyses;

(v) The analytical techniques or methods used; and

(vi) The results of such analyses.

(4) Monitoring must be conducted according to test procedures approved under 40 CFR Part 136 unless another method is required under 40 CFR subchapters N or O.

(5) The Clean Water Act provides that any person who falsifies, tampers with, or knowingly renders inaccurate any monitoring device or method required to be maintained under this permit shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than 2 years, or both. If a conviction of a person is for a violation committed after a first conviction of such person under this paragraph,

punishment is a fine of not more than $20,000 per day of violation, or by imprisonment of not more than 4 years, or both.

. . .

(l) Reporting requirements.—

(1) Planned changes. The permittee shall give notice to the Director as soon as possible of any planned physical alterations or additions to the permitted facility. . . .

(2) Anticipated noncompliance. The permittee shall give advance notice to the Director of any planned changes in the permitted facility or activity which may result in noncompliance with permit requirements.

. . .

(4) Monitoring reports. Monitoring results shall be reported at the intervals specified elsewhere in this permit. . . .

(5) Compliance schedules. Reports of compliance or noncompliance with, or any progress reports on, interim and final requirements contained in any compliance schedule of this permit shall be submitted no later than 14 days following each schedule date.

(6) Twenty-four hour reporting.

(i) The permittee shall report any noncompliance which may endanger health or the environment. . . .

. . .

(7) Other noncompliance. The permittee shall report all instances of noncompliance not reported under paragraphs (l)(4), (5), and (6) of this section, at the time monitoring reports are submitted. . . .

(8) Other information. Where the permittee becomes aware that it failed to submit any relevant facts in a permit application, or submitted incorrect information in a permit application or in any report to the Director, it shall promptly submit such facts or information.

(9) Identification of the initial recipient for NPDES electronic reporting data. The owner, operator, or the duly authorized representative of an NPDES-regulated entity is required to electronically submit the required NPDES information (as specified in appendix A to 40 CFR part 127) to the appropriate initial recipient, as determined by EPA, and as defined in § 127.2(b) of this chapter.

40 C.F.R. § 122.42 – Additional conditions applicable to specified categories of NPDES permits

. . .

(e) Concentrated animal feeding operations (CAFOs). Any permit issued to a CAFO must include the requirements in paragraphs (e)(1) through (e)(6) of this section.

(1) Requirement to implement a nutrient management plan. Any permit issued to a CAFO must include a requirement to implement a nutrient management plan that, at a minimum, contains best management practices necessary to meet the requirements of this paragraph and applicable effluent limitations and standards, including those specified in 40 CFR part 412. The nutrient management plan must, to the extent applicable:

(i) Ensure adequate storage of manure, litter, and process wastewater, including procedures to ensure proper operation and maintenance of the storage facilities;

(ii) Ensure proper management of mortalities (i.e., dead animals) to ensure that they are not disposed of in a liquid manure, storm water, or process wastewater storage or treatment system that is not specifically designed to treat animal mortalities;

(iii) Ensure that clean water is diverted, as appropriate, from the production area;

(iv) Prevent direct contact of confined animals with waters of the United States;

(v) Ensure that chemicals and other contaminants handled on-site are not disposed of in any manure, litter, process wastewater, or storm water storage or treatment system unless specifically designed to treat such chemicals and other contaminants;

(vi) Identify appropriate site specific conservation practices to be implemented, including as appropriate buffers or equivalent practices, to control runoff of pollutants to waters of the United States;

(vii) Identify protocols for appropriate testing of manure, litter, process wastewater, and soil;

(viii) Establish protocols to land apply manure, litter or process wastewater in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater; and

(ix) Identify specific records that will be maintained to document the implementation and management of the minimum elements described in paragraphs (e)(1)(i) through (e)(1)(viii) of this section.

40 C.F.R. § 122.43 – Establishing permit conditions (applicable to State programs, see § 123.25)

(a) In addition to conditions required in all permits (§§ 122.41 and 122.42), the Director shall establish conditions, as required on a case-by-case basis, to provide for and ensure compliance with all applicable requirements of CWA and regulations. These shall include conditions under §§ 122.46 (duration of permits), 122.47(a) (schedules of compliance), 122.48 (monitoring), electronic reporting requirements of 40 CFR part 3 (Cross-Media Electronic Reporting Regulation) and 40 CFR part 127 (NPDES Electronic Reporting), and, for EPA permits only, §§ 122.47(b) (alternatives schedule of compliance) and 122.49 (considerations under Federal law).

(b)

(1) For a State issued permit, an applicable requirement is a State statutory or regulatory requirement which takes effect prior to final administrative disposition of a permit. For a permit issued by EPA, an applicable requirement is a statutory or regulatory requirement (including any interim final regulation) which takes effect prior to the issuance of the permit. Section 124.14 (reopening of comment period) provides a means for reopening EPA permit proceedings at the discretion of the Director where new requirements become effective during the permitting process and are of sufficient magnitude to make additional proceedings desirable. For State and EPA administered programs, an applicable requirement is also any requirement which takes effect prior to the modification or revocation and reissuance of a permit, to the extent allowed in § 122.62.

(2) New or reissued permits, and to the extent allowed under § 122.62 modified or revoked and reissued permits, shall incorporate each of the applicable requirements referenced in §§ 122.44 and 122.45.

(c) Incorporation. All permit conditions shall be incorporated either expressly or by reference. If incorporated by reference, a specific citation to the applicable regulations or requirements must be given in the permit.

40 C.F.R. § 122.44 – Establishing limitations, standards, and other permit conditions

In addition to the conditions established under § 122.43(a), each NPDES permit shall include conditions meeting the following requirements when applicable.

(a)(1) Technology-based effluent limitations and standards based on: effluent limitations and standards promulgated under section 301 of the CWA, or new source performance standards promulgated under section 306 of CWA, on case-by-case effluent limitations determined under section 402(a)(1) of CWA, or a combination of the three, in accordance with § 125.3 of this chapter. For new sources or new dischargers, these technology based limitations and standards are subject to the provisions of § 122.29(d) (protection period).

[(a)(2)] Monitoring waivers for certain guideline-listed pollutants.

(i) The Director may authorize a discharger subject to technology-based effluent limitations guidelines and standards in an NPDES permit to forego sampling of a pollutant found at 40 CFR Subchapter N of this chapter if the discharger has demonstrated through sampling and other technical factors that the pollutant is not present in the discharge or is present only at background levels from intake water and without any increase in the pollutant due to activities of the discharger.

. . .

(d) Water quality standards and State requirements: any requirements in addition to or more stringent than promulgated effluent limitations guidelines or standards under sections 301, 304, 306, 307, 318, and 405 of CWA necessary to:

(1) Achieve water quality standards established under section 303 of the CWA, including State narrative criteria for water quality.

(i) Limitations must control all pollutants or pollutant parameters (either conventional, nonconventional, or toxic pollutants) which the Director determines are or may be discharged at a level which will cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard, including State narrative criteria for water quality.

. . .

(vii) When developing water quality-based effluent limits under this paragraph the permitting authority shall ensure that:

(A) The level of water quality to be achieved by limits on point sources established under this paragraph is derived from, and complies with all applicable water quality standards; and

(B) Effluent limits developed to protect a narrative water quality criterion, a numeric water quality criterion, or both, are consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 CFR 130.7.

. . .

(i) Monitoring requirements. In addition to § 122.48, the following monitoring requirements:

(1) To assure compliance with permit limitations, requirements to monitor:

(i) The mass (or other measurement specified in the permit) for each pollutant limited in the permit;

(ii) The volume of effluent discharged from each outfall;

(iii) Other measurements as appropriate including pollutants in internal waste streams under § 122.45(i); pollutants in intake water for net limitations under § 122.45(f); frequency, rate of discharge, etc., for noncontinuous discharges under § 122.45(e); pollutants subject to notification requirements under § 122.42(a); and pollutants in sewage sludge or other monitoring as specified in 40 CFR part 503; or as determined to be necessary on a case-by-case basis pursuant to section 405(d)(4) of the CWA.

(iv) According to sufficiently sensitive test procedures (i.e., methods) approved under 40 CFR part 136 for the analysis of pollutants or pollutant parameters or required under 40 CFR chapter I, subchapter N or O. . . .

. . .

(2) Except as provided in paragraphs (i)(4) and (5) of this section, requirements to report monitoring results shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year. . . .

(3) Requirements to report monitoring results for storm water discharges associated with industrial activity which are subject to an effluent limitation guideline shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge, but in no case less than once a year.

(4) Requirements to report monitoring results for storm water discharges associated with industrial activity (other than those addressed in paragraph (i)(3) of this section) shall be established on a case-by-case basis with a frequency dependent on the nature and effect of the discharge. . . .

(5) Permits which do not require the submittal of monitoring result reports at least annually shall require that the permittee report all instances of noncompliance not reported under § 122.41(l) (1), (4), (5), and (6) at least annually. . . .

. . .

(k) Best management practices (BMPs) to control or abate the discharge of pollutants when:

(1) Authorized under section 304(e) of the CWA for the control of toxic pollutants and hazardous substances from ancillary industrial activities;

(2) Authorized under section 402(p) of the CWA for the control of storm water discharges;

(3) Numeric effluent limitations are infeasible; or

(4) The practices are reasonably necessary to achieve effluent limitations and standards or to carry out the purposes and intent of the CWA.

40 C.F.R. § 122.48 – Requirements for recording and reporting of monitoring results

All permits shall specify:

(a) Requirements concerning the proper use, maintenance, and installation, when appropriate, of monitoring equipment or methods (including biological monitoring methods when appropriate);

(b) Required monitoring including type, intervals, and frequency sufficient to yield data which are representative of the monitored activity including, when appropriate, continuous monitoring;

(c) Applicable reporting requirements. . . .

40 C.F.R. § 130.2 – Definitions

. . .

(i) Total maximum daily load (TMDL). The sum of the individual [waste load allocations] for point sources and [load allocations] for nonpoint sources and natural background. If a receiving water has only one point source discharger, the TMDL is the sum of that point source [waste load allocation] plus the [load allocations] for any nonpoint sources of pollution and natural background sources, tributaries, or adjacent segments. TMDLs can be expressed in terms of either mass per time, toxicity, or other appropriate measure. If Best Management Practices (BMPs) or other nonpoint source pollution controls make more stringent load allocations practicable, then wasteload allocations can be made less stringent. Thus, the TMDL process provides for nonpoint source control tradeoffs.

40 C.F.R. § 131.10 – Designation of uses

(a) Each State must specify appropriate water uses to be achieved and protected. The classification of the waters of the State must take into consideration the use and value of water for public water supplies, protection and propagation of fish, shellfish and wildlife, recreation in and on the water, agricultural, industrial, and other purposes including navigation. . . .

. . .

(h) States may not remove designated uses if:

> (1) They are existing uses, as defined in § 131.3, unless a use requiring more stringent criteria is added; or
>
> (2) Such uses will be attained by implementing effluent limits required under sections 301(b) and 306 of the Act and by implementing cost-effective and reasonable best management practices for nonpoint source control.

(i) Where existing water quality standards specify designated uses less than those which are presently being attained, the State shall revise its standards to reflect the uses actually being attained.

40 C.F.R. § 131.11 – Criteria

(a) Inclusion of pollutants:

(1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

(2) Toxic pollutants. States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. . . .

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values. . . .

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

40 C.F.R. § 412.4 – Best management practices (BMPs) for land application of manure, litter, and process wastewater.

(a) Applicability. This section applies to any CAFO subject to subpart C of this part (Dairy and Beef Cattle other than Veal Calves) or subpart D of this part (Swine, Poultry, and Veal Calves).

. . .

(c) Requirement to develop and implement best management practices. Each CAFO subject to this section that land applies manure, litter, or process wastewater, must do so in accordance with the following practices:

(1) Nutrient Management Plan. The CAFO must develop and implement a nutrient management plan that incorporates the requirements of paragraphs (c)(2) through (c)(5) of this section based on a field-specific assessment of the potential for nitrogen and phosphorus transport from the field and that addresses the form, source, amount, timing, and method of application of nutrients on each field to achieve realistic production goals, while minimizing nitrogen and phosphorus movement to surface waters. . . .

40 C.F.R. 412.31 – Effluent limitations attainable by the application of the best practicable control technology currently available (BPT)

Except as provided in 40 CFR 125.30 through 125.32, any existing point source subject to this subpart must achieve the following effluent limitations representing the application of BPT:

(a) For CAFO production areas. Except as provided in paragraphs (a)(1) through (a)(2) of this section, there must be no discharge of manure, litter, or process wastewater pollutants into waters of the U.S. from the production area.

> (1) Whenever precipitation causes an overflow of manure, litter, or process wastewater, pollutants in the overflow may be discharged into U.S. waters provided:
>
> > (i) The production area is designed, constructed, operated and maintained to contain all manure, litter, and process wastewater including the runoff and the direct precipitation from a 25–year, 24–hour rainfall event;
> >
> > (ii) The production area is operated in accordance with the additional measures and records required by § 412.37(a) and (b). . . .

State Law

Idaho Admin. Code § 02.04.14.030 – Dairy Environmental Management Plan Approval

01. Dairy Storage and Containment Facility Criteria.

a. Dairy storage and containment facilities shall be constructed to meet a minimum of one hundred eighty (180) days of holding capacity. Process water containment structures that are utilized as the secondary or final storage for effluent shall have a minimum two (2) vertical feet of freeboard.

b. Earthen dairy storage and containment facilities less than ten (10) vertical feet high with a maximum high water line of eight (8) vertical feet shall be required to have a top embankment width of at least eight (8) feet and a minimum of one (1) vertical foot of freeboard shall be maintained. The combined inside and outside embankment slopes must be at least five (5) horizontal to one (1) vertical, and neither slope shall be steeper than two (2) horizontal to one (1) vertical. Earthen dairy storage and containment facilities with outside embankments higher than ten (10) vertical feet from the naturally occurring ground level shall meet the NRCS Idaho Conservation Practice Standard Waste Storage Facility Code 313 December 2004 embankment requirements as incorporated by reference in Subsection 004.03 of these rules.

c. The inside bottom of the dairy storage and containment facility shall be a minimum of two (2) feet above the high water table, bed rock, gravel, or permeable soils. For an earthen dairy storage and containment facility, a soil liner shall be installed such that the specific discharge rate of the containment structure meet 1 x 10-6 cm3/cm2/sec or less as described in Appendix 10D. Concrete or synthetic liners must be constructed to the American Society of Agricultural and Biological Engineers Specification ASABE EP393.3 Manure Storages February 2004 and Appendix 10D as incorporated by reference in Section 004 of these rules.

d. Storage areas for dairy byproduct, including compost and solid manure storage areas, shall be located on approved soils and appropriately protected to prevent run on and run off.

e. Dairy environmental management systems shall be maintained in a condition that allows the producer to regularly inspect the integrity of the systems.

Idaho Admin. Code § 58.01.02.251 – Surface Water Quality Criteria for Recreation Use Designations

Effective for CWA purposes until the date EPA issues written notification that the revisions in Docket No. 58-0102-1802 have been approved.

01. E. Coli Bacteria. Waters designated for recreation are not to contain E. coli bacteria, used as indicators of human pathogens, in concentrations exceeding: []

a. Geometric Mean Criterion. Waters designated for primary or secondary contact recreation are not to contain E. coli bacteria in concentrations exceeding a geometric mean of one hundred twenty-six (126) E. coli organisms per one hundred (100) mL based on a minimum of five (5) samples taken every three (3) to seven (7) days over a thirty (30) day period. []

b. Use of Single Sample Values. A water sample exceeding the E. coli single sample maximums below indicates likely exceedance of the geometric mean criterion, but is not alone a violation of water quality standards. If a single sample exceeds the maximums set forth in Subsections 251.01.b.i., 251.01.b.ii., and 251.01.b.iii., then additional samples must be taken as specified in Subsection 251.01.c .: []

. . .

ii. For waters designated as primary contact recreation, a single sample maximum of four hundred six (406) E. coli organisms per one hundred (100) mL; or []

iii. For areas within waters designated for primary contact recreation that are additionally specified as public swimming beaches, a single sample maximum of two hundred thirty-five (235) E. coli organisms per one hundred (100) mL. Single sample counts above this value should be used in considering beach closures. []

c. Additional Sampling. When a single sample maximum . . . is exceeded, additional samples should be taken to assess compliance with the geometric mean E. coli criteria in Subsection 251.01.a. Sufficient additional samples

should be taken by the Department to calculate a geometric mean in accordance with Subsection 251.01.a. This provision does not require additional ambient monitoring responsibilities for dischargers.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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