STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
CENTER FOR BIOLOGICAL DIVERSITY AND FOOD & WATER WATCH, Petitioners, vs. **COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL HEALTH AND SUSTAINABILITY AND WATER QUALITY CONTROL DIVISION,** Respondent And **COLORADO LIVESTOCK ASSOCIATION** Respondent.	**CASE NUMBER:** **WQ 2022-0001**
ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION	

Summary

This case is an action by the Petitioners to require the Colorado Department of Public Health and Environment ("CDPHE") to modify its "General Permit for Concentrated Animal Feeding Operations (COA934000)," as modified June 7, 2022, ("General Permit"). Petitioners seek requirements in the General Permit to insure that pollution from feedlots does not contaminate the water supply. A feedlot, a "concentrated animal feeding operation," or "CAFO," is required to apply to CDPHE for certification under the General Permit. [1] CAFO's are required to apply for an individual "NPDES" (National Pollutant Discharge Elimination System) permit, or submit a notice of intent for coverage under a general permit. 40 C.F.R. sec. 122.23(d)(1). States may administer their own NPDES permitting program as long as they comply with federal law. 33 U.S.C. sec. 1342(b) and 40 C.F.R. sec. 123.1.

The Petitioners assert that the General Permit is unlawful in that it does not require "representative monitoring" for pollution from feedlots, "to surface water through groundwater with a direct hydrological connection to surface water." Respondents assert that because the General Permit prohibits this kind of pollution, it is has no authority to

[1] See: https://cdphe.colorado.gov/environmental-agriculture-program/general-information-for-animal-feeding-operations or at: https://bit.ly/3HYyRJJ.

require such monitoring. The Administrative Law Judge ("ALJ") rejects this assertion. He grants the Petitioners' March 31, 2023 Motion for Summary Judgment and orders the General Permit to be modified to require "representative monitoring" for such pollution.

Background

On February 23, 2022, the Office of Administrative Courts ("OAC") received a "case transmittal" letter from the CDPHE. The letter stated that the Executive Director was requesting that an Administrative Law Judge ("ALJ") be appointed to hear this appeal between Center for Biological Diversity and the CDPHE, Division of Environmental Health and Sustainability and Water Quality Control Division. The OAC assigned this case no. WQ 2022-0001. On June 7, 2022 CDPHE modified the General Permit. On July 6, 2022, the OAC received a second case transmittal from the CDPHE regarding the appeal of this modification. On October 14, 2022, the ALJ granted Food & Water Watch's September 22, 2022 request for party status as one of the Petitioners. On November 22, 2022, the ALJ granted Colorado Livestock Association's request for party status as one of the Respondents.

CDPHE's July 27, 2022 Motion to Dismiss

The case of *Food & Water Watch v. U.S. EPA*, 20 F.4th 506 (9th Cir. 2021) plays a large role in this dispute. That case ordered the federal Environmental Protection Agency ("EPA") to issue a new general permit for feedlots in the state of Idaho. It remanded the case and ordered that the general permit require underground monitoring that would ensure compliance with limitations on water pollution. The Petitioners seek such a monitoring requirement for the General Permit.

On July 27, 2022, the Respondents moved to dismiss this appeal on ripeness grounds. That motion asserted that it did not know how the EPA would respond to the *Food & Water Watch* remand. The Respondents (then termed "the Program") said that it had to wait for this response to know whether it could impose further restrictions in its General Permit. The ALJ denied the Motion to Dismiss August 19, 2022. He reasoned that how the EPA planned to respond to the remand should not affect the Program's own ability to draft a legally compliant General Permit.

The ALJ's August 19, 2022 order also questioned how it was that he had authority to hear this appeal and to enforce federal water law. That August 19, 2022 order asked the parties to show cause how this was the case. The parties and the ALJ agree that this is a proceeding per Section 25-8-403, C.R.S., which provides in pertinent part:

> During the time permitted for seeking judicial review of any final order or determination of the commission or division, any party directly affected by such order or determination may apply to the commission or division, as appropriate, for a hearing or rehearing with respect to, or reconsideration of, such order or determination.

The ALJ questioned whether public policy organizations such as the Center for Biological Diversity were "directly affected" by the General Permit so as to allow the hearing. In an order dated November 2, 2022, the ALJ determined that there was no jurisdictional bar to the Petitioners being granted this reconsideration. The parties saw

no jurisdictional issue and noted that Water Quality Commission ("Commission") rules at 21.4 (A) 3), 5 CCR 1002-21 and 61.7, 5 CCR 1002-61 permit an appeal by "any aggrieved person," or "any other person, affected or aggrieved."

Respondents' Joint Motion for Summary Judgment

On December 2, 2022, the Respondents moved for summary judgment. On December 15, 2022, the Petitioners responded in opposition, and on December 21, 2022, the Respondents submitted a reply. The ALJ denied the December 2, 2022 motion for summary judgment January 4, 2023.

The General Permit (as modified) prohibits discharges, "to surface water through groundwater with a direct hydrological connection to surface water." These prohibitions appear in the General Permit at Part I (D)(2)(g) and Part II (A)(5)(a):

> (2) The following facilities are not eligible for coverage under this permit:
>
> …
>
> (g) A CAFO that has a discharge to surface water through groundwater with a direct hydrological connection to surface water.
>
> …
>
> (5) Prohibitions applicable to all CAFOs (new and existing)
>
> (a) There shall be no discharge of manure, litter, or process wastewater into surface water through groundwater with a direct hydrological connection to surface water.

The Respondents' joint motion for summary judgment asserted that because such discharges are prohibited, the monitoring for such discharges is also prohibited. This counter-intuitive argument is based on 33 U.S.C. secs. 1342(a)(1) and (2) which permits the EPA Administrator to "issue a permit for the discharge of any pollutant." Respondents also rely on the definition of "effluent limitation" at 33 U.S.C. sec. 1362(11) as any restriction on "chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters …." The Respondents' asserted that a total prohibition on certain discharges is not an "effluent limitation" and monitoring is not authorized. Only "actual" discharges can be monitored.

As argued by the Petitioners, that a discharge is prohibited does not mean it is not occurring, and not "actual." It makes no sense to allow monitoring for those discharges (presumably less problematic ones) that are allowed under a permit, but not to monitor for those (presumably more problematic) that are not.

The *Food & Water Watch* case above does not support Respondents' argument, and Respondents assert that it was wrongly decided. That case also concerned a permit that absolutely prohibited certain discharges from feedlots. The EPA in that case did not make the Respondents' argument that it was *prevented* from monitoring for prohibited discharges. At 517, the Court described EPA's position:

> It [the EPA] concedes that a permit must contain sufficient monitoring requirements to ensure that a CAFO complies with the effluent limitations in its permit. However, the EPA argues that the Idaho Permit contains sufficient monitoring requirements to ensure compliance, and that we must defer to its expertise.

Food & Water Watch at 517 also treated the Idaho permit's zero-discharge limitation as an "effluent limitation." In their December 21, 2022 reply at pp. 6-7, Respondents sought to distinguish this holding. They asserted that a "zero-discharge" permit limitation *is* an "effluent limitation," but that a "complete prohibition of any discharge of pollutants" is different and is not. This is hairsplitting and a distinction without a difference.

Respondents also relied on *Waterkeeper Alliance, Inc. v. United States EPA*, 399 F.3d 486 (2d Cir. 2005). To the extent that that case is helpful to the Respondents, it is only in its limited holding at 504-505 that a CAFO is not required to *apply* for an NPDES permit unless it is actually discharging pollutants. But that is not the same thing as saying that a general permit is barred from monitoring for prohibited discharges. Similarly, *Nat'l Pork Producers Council v. United States EPA*, 635 F.3d 738 (5th Cir. 2011) provides only that the EPA could not require an application for an NPDES permit for CAFO's that are not discharging, but may fit the special definition of "proposing to discharge" under the regulations.

Respondents assert that because no monitoring is permitted for prohibited discharges, Colorado law also prohibits it from monitoring. It cites Section 25-8-504(2), C.R.S., which provides that no permit for animal waste can be more stringent than required by federal law. For what it is worth, this limitation applies only to animal waste on "farms, ranches, and horticultural or floricultural operations." "Feedlots" or "CAFO's" are not included. CAFO's are defined at 40 C.F.R. sec. 122.23 as lots where animals are stabled and fed for 45 days and crops are not grown. This does not sound like what is commonly thought of as a "farm" or "ranch." Words in statutes are to be construed according to common usage. Section 2-4-201, C.R.S.

Subsequent submissions

Following the ALJ's denial of Respondents' joint motion for summary judgment, Respondents submitted a January 30, 2023: "Respondents' Joint Motion for Clarification and Issuance of Initial Decision" ("Joint Motion"). The "clarification" sought at p. 3 of the Joint Motion was as follows:

> Respondents request clarification as to whether the Court [the ALJ] has determined, as a matter of law, that the General Permit's prohibition on discharges of pollutants to waters of the United States through groundwater is an "effluent limitation" under the federal Clean Water Act for which groundwater monitoring is required to ensure compliance. … If that is the Court's legal conclusion, because Respondents concede that the General Permit does not contain groundwater monitoring for discharges to waters of the United

> States through groundwater, then the issue on appeal is effectively resolved in Petitioners' favor.

The Petitioners were opposed to such a resolution of this case. On February 9, 2023, they filed a response in opposition and their own "Cross-Motion for Clarification and Issuance of an Initial Decision." They objected to "groundwater monitoring," as described by the Respondents. The Petitioners argued that "representative monitoring" is what is required. They cited 40 C.F.R. secs. 122.41(j)(1) and 122.48(b) which require monitoring "representative of the monitored activity," and capable of yielding "data which are representative of the monitored activity."

The Petitioners were concerned that the term "groundwater monitoring" would leave the ALJ's decision vulnerable on appeal due to potential differences in interpretation. (As it turns out, this suspicion was justified. The Respondents resist the idea of "representative monitoring," despite its source in the federal regulations.) At that point it seemed to the ALJ that the parties were close to a resolution. He proposed in an order dated February 17, 2023 that the parties come to an agreement on language that contained both the terms "groundwater monitoring" and "representative monitoring."

In a February 21, 2023 "joint response" to the Petitioners' February 9, 2023 submission, the Respondents stated that "representative monitoring" was unacceptable. They do not dispute that this is the language in the above referenced portions of the C.F.R. They state that because the Petitioners used the term "groundwater monitoring" in their earlier internal agency appeals, they are stuck with it now. Respondents assert that to issue a decision with the term "representative monitoring" would exceed the scope of the issues referred to the ALJ.

There is no such restriction. Hearings referred to the OAC are to be conducted by ALJ's. Section 25-8-401(4), C.R.S. There are no "hearing officers" at the OAC. Part 10, article 30 of title 24 of the C.R.S. The initial decision of the ALJ shall include findings of fact and conclusions of law upon all the material issues of fact, law, or discretion presented by the record. Section 24-4-105(14)(a), C.R.S. In any case, the February 23 and July 6, 2022 referrals to the OAC sought a determination whether there was a violation of 40 C.F.R. part 122 by not including sufficient groundwater monitoring requirements. That part of the C.F.R. describes "representative monitoring" at 40 C.F.R. secs. 122.41(j)(1) and 122.48(b). Also, the February 23, 2022 case transmittal to the OAC contained a request for a hearing from the Center for Biological Diversity relying on the *Food & Water Watch* case. That case held at 515 that "representative monitoring" per 40 C.F.R. secs. 122.41(j) and 122.48(b) was the legal requirement, and that Idaho had failed to meet it.

Petitioners' Motion for Summary Judgment

On March 31, 2023, the Petitioners themselves moved for summary judgment ("Motion"). On April 10, 2023, Respondents responded in opposition ("Response"). On April 17, 2023, the Petitioners submitted a reply ("Reply").

Summary judgment is appropriate when the pleadings and supporting documentation show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c); *W. Elk Ranch, L.L.C. v. United*

States, 65 P.3d 479, 481 (Colo. 2002). The Colorado Rules of Civil Procedure, the rules of procedure in the district courts, apply "to the extent practicable" to administrative hearings. Section 24-4-105(4), C.R.S.

As stated, the Respondents are unwilling to resolve this case with a requirement for "representative monitoring." At the same time, the April 10, 2023 Response asserts that CDPHE has met the "representative monitoring" requirement by insuring that feedlots have liners that contain engineer certification, and which are inspected weekly. The Respondents argue that the facts in the present case are different than those in *Food & Water Watch, supra* because, among other things, the geology in Idaho is different than that in Colorado. They argue that their expert witness, Dr. David Parker, will testify that Colorado's liner and inspection requirements, as well as other facts, meet "representative monitoring" requirements.

Respondents assert that the General Permit incorporates impoundment controls and monitoring requirements contained in 5 CCR 1002-81. Response at 7. The Response does not identify where in the General Permit these are located, but they are presumably the following at pages 15 and 18 of the General Permit:

> (4) Impoundments shall be operated and maintained in compliance with section 81.7 of Regulation No. 81 to demonstrate lack of direct hydrological connection to surface water.
>
> …
>
> (F) ADDITIONAL SPECIAL DOCUMENTATION The permittee shall retain the applicable documentation, certifications, and records required under section 81.7 of Regulation No. 81 to demonstrate that no direct hydrological connection exists between impoundments and surface waters.

Although Respondents do not say so explicitly, they apparently are offering Dr. Parker's information about impoundments and liners to show a genuine issue of material fact making summary judgment improper per C.R.C.P. 56. But if this is true, why then did they assert in their January 30, 2023 joint motion that the ALJ's denial of their motion for summary judgment meant that: "the issue on appeal is effectively resolved in Petitioners' favor." This appears to concede that factual disputes have been resolved. As Petitioners point out, Respondents' position has heretofore been that no monitoring is permitted, not that liners and other safeguards meet legal requirements.

Whether the General Permit provides for monitoring "representative of the monitored activity," and capable of yielding "data which are representative of the monitored activity" as required by 40 C.F.R. secs. 122.41(j)(1) and 122.48(b) is a legal question. It can be resolved by summary judgment without the input of a professional engineer such as Dr. Parker per C.R.E. 702. That proper maintenance of liners combined with Colorado geology and other physical factors makes leakage unlikely does not eliminate the legal requirement to have representative monitoring to make sure such leakage does not occur. *Food & Water Watch* at 517 provides: "Without a requirement

that CAFOs monitor waste containment structures for underground discharges, there is no way to ensure that production areas comply with the Permit's zero-discharge requirement."

Order granting Petitioners' Motion for Summary Judgment

The ALJ grants Petitioners' Motion and issues this Initial Decision. The hearing scheduled for October 3 and 4, 2023 is cancelled.

Colorado has been authorized to issue NPDES permits. 40 Fed. Reg. 16713; https://www.epa.gov/npdes/npdes-state-program-authority. Such authorization requires that states have the authority to carry out the permit program. 33 U.S.C. sec. 1342(b); 40 C.F.R. sec. 123.25(a). The General Permit for Concentrated Animal Feeding Operations (COA934000), as modified June 7, 2022, ("General Permit") prohibits discharges, "to surface water through groundwater with a direct hydrological connection to surface water." These prohibitions appear in the General Permit at Part I (D)(2)(g) and Part II (A)(5)(a) and are an "effluent limitation" as defined at 33 U.S.C. sec. 1362(11). The prohibition requires representative monitoring as described at 40 C.F.R. secs. 122.41(j)(1), 122.44(i)(1), and 122.48(b).

Initial Decision

CDPHE's "General Permit for Concentrated Animal Feeding Operations (COA934000)," as modified June 7, 2022, is unlawful in that:

1. The General Permit's prohibition on discharges to waters of the United States through groundwater is an effluent limitation for which representative monitoring is required to assure compliance; and

2. The General Permit does not contain representative monitoring provisions sufficient to assure compliance with that effluent limitation.

Per Section 24-4-105(14)(a), C.R.S., this Initial Decision will be sent to the agency for mailing. A courtesy copy will also be emailed to counsel at the below addresses. Unless exceptions are filed, this Initial Decision is the Final Agency Decision of the agency. Section 24-4-105(14); *Colo. State Bd. of Med. Exam'rs v. Lopez-Samayoa*, 887 P.2d 8, 11, n. 4 (Colo. 1994).

DONE AND SIGNED

May 16, 2023

MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

I certify that I have sent a courtesy copy of the above **ORDER GRANTING PETITIONERS' MOTION FOR SUMMARY JUDGMENT AND INITIAL DECISION** to the parties listed below by email to:

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Dated: May 18, 2023

*/s/ Katherine Singleton*_____
Office of Administrative Courts