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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

SARAH KING and GODSPEED HOLLOW FARM, CHRISTINE ANDERSON and CAST IRON FARM, WANWVA LAVELLE and PURE GRACE FARM and MELISSA DERFLER and RAINBOW VALLEY DAIRY GOATS,

Plaintiffs,

v.

LISA CHARPILLOZ HANSON, in her official capacity as Director of the Oregon Department of Agriculture, and WYM MATTHEWS, in his official capacity as Program Manager of the Oregon Department of Agriculture Confined Animal Feeding Operations Program,

Defendants.

Case No. 3:24-cv-00152-JR

DEFENDANTS' MOTION TO DISMISS

ORAL ARGUMENT REQUESTED

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Table of Acronyms

AWMP	Animal waste management plan
CAFO	Confined animal feeding operation
CWA	Clean Water Act
DEQ	Oregon Department of Environmental Quality
EQC	Oregon Environmental Quality Commission
NPDES permit	National Pollutant Discharge Elimination System permit, a type of CAFO permit
ODA	Oregon Department of Agriculture
WPCF permit	Water Pollution Control Facilities permit, a type of CAFO permit

LR 7-1(A) CERTIFICATION

Undersigned counsel for Defendants certifies that the parties made a good faith effort through email and a telephone conference to resolve the dispute and have been unable to do so.

MOTION

Defendants Lisa Charpilloz Hanson and Wym Matthews respectfully move to dismiss this lawsuit with prejudice under FRCP 12(b)(1) for lack of subject matter jurisdiction and FRCP 12(b)(6) for failure to state a claim upon which relief may be granted. In support, Defendants rely upon the following memorandum, the pleadings, the Declaration of Lisa Charpilloz Hanson and its Exhibit 1, the Declaration of Isaak Stapleton and its Exhibits 1-3, and the Declaration of Sadie Forzley and its Exhibits 1-2.

MEMORANDUM OF LAW

I. INTRODUCTION

Plaintiffs bring this action under 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. §§ 2201–02, claiming that an Oregon Department of Agriculture ("ODA") Confined Animal Feeding Operation ("CAFO") program policy that interpreted ODA's administrative rules to impose broad permitting requirements violated their rights under the Fourteenth Amendment to the United States Constitution. Defendant Lisa Charpilloz Hanson is ODA's Director. The challenged policy was announced in early 2023, prior to Director Hanson's tenure

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at ODA and without her knowledge. Under Director Hanson's leadership, ODA withdrew the policy on March 21, 2024.

The withdrawn policy interpreted ODA's rules to impose a permit requirement on all Oregon dairies, including small dairies that had not historically been permitted by the agency. Under the interpretation announced in the policy, the keeping of an animal in a building, pen, or lot during milking or the washing of milking or dairy processing equipment on a small farm categorically triggered a CAFO permit requirement.

Plaintiffs contend that the policy violates their equal protection and substantive due process rights. Because the challenged policy is no longer in effect, both claims are now jurisdictionally barred both because they are moot and because the Eleventh Amendment bars claims for retrospective relief against state officials.

In addition, Petitioners' claims are without merit. Even assuming the truth of their allegations, it is not a constitutional violation to require a dairy, even a small one, to get a permit that is designed to protect water quality. Oregon has a strong interest in preventing pollution from manure runoff to ensure that its water quality standards, which protect beneficial uses of Oregon's waters—such as drinking water, human recreation, and fish and wildlife habitat—are met. Requiring small dairies to obtain permit coverage is rationally related to Oregon's interest in protecting water quality.

II. BACKGROUND

A. Regulatory background

1. State and federal water quality framework

Water quality is regulated under both state and federal law. The federal Clean Water Act ("CWA") regulates "navigable waters," which the United States Environmental Protection Agency defined and implements through its definition of "waters of the United States." 33

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C.F.R. § 328.3 ("Waters of United States" means, among other things, "(1) Waters which are: (i) Currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide; (ii) The territorial seas; or (iii) Interstate waters . . . .").

States bear primary responsibility for implementing the CWA and addressing water pollution. 33 U.S.C. § 1251(b) (recognizing, preserving, and protecting "the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources . . . ."). States are also empowered to regulate water pollution more stringently than the CWA. 33 U.S.C. § 1370 (except as expressly provided, "nothing in this chapter shall [ ] preclude or deny the right of any State or political subdivision thereof . . . to adopt or enforce [ ] any standard or limitation respecting discharges of pollutants" unless the standard is less stringent than an existing standard).

In Oregon, state law regulates "waters of the state," a category which is broader than, but includes, waters of the United States. "[W]aters of the State" include "lakes, bays, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Pacific Ocean within the territorial limits of the State of Oregon and all other bodies of surface or underground waters, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction." ORS 468B.005(10).

Oregon has water quality standards that address pollutants, including pathogens and nutrients from animal waste. For instance, Oregon has statewide standards for fecal coliform and E. coli bacteria. *See* OAR 340-041-0009. This includes both numeric water quality criteria as well as a requirement that "[r]unoff contaminated with domesticated animal wastes must be minimized and treated to the maximum extent practicable before it is allowed to enter waters of

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the State." OAR 340-041-0009(4). Oregon also addresses nutrient pollution on a basin-specific basis. *See e.g.*, OAR 340-041-0345 (setting out nutrient criteria for Willamette Basin). These water quality standards protect designated beneficial uses of water such as fish and aquatic life, human water contact recreation, fishing, and domestic water supply. *See* OAR 340-041-0002(17) (defining designated beneficial use); OAR 340-041-0101–340-041-0350 (setting forth basin-specific beneficial uses and water quality standards).

2. Confined Animal Feeding Operations

The Oregon Legislature has adopted a special regulatory program for Confined Animal Feeding Operations, or CAFOs. ORS 468B.200–.230. Under this regulatory program, "it is the policy of the State of Oregon to protect the quality of the waters of this state by preventing animal wastes from discharging into the waters of the state." ORS 468B.200. Accordingly, Oregon law prohibits the discharge of "any wastes into the waters of the state from any industrial or commercial establishment or activity without a permit." ORS 468B.050(1)(a). Further, a person may not "construct, install, operate or conduct any . . . confined animal feeding operation or other establishment or activity or any extension or modification thereof or addition thereto, the operation or conduct of which would cause an increase in the discharge of wastes into the waters of the state or which would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized" without a permit. ORS 468B.050(1)(d).

The term "confined animal feeding operation" is not defined by statute. Rather, the Oregon legislature delegated the authority to define that term to ODA and the Oregon Environmental Quality Commission ("EQC"), the policy and rulemaking board for the Oregon Department of Environmental Quality ("DEQ"). ORS 468B.205(1) ("[CAFO]" has the meaning given that term in rules adopted by [ODA] or [EQC]"); ORS 468B.050(3) (agencies to define CAFO by rule); ORS 468.015 (describing EQC functions). The sole limitation imposed by the

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legislature is that "[t]he definition must distinguish between various categories of animal feeding operations, including but not limited to those animal feeding operations that are subject to regulation under 33 U.S.C. 1342." ORS 468B.205(1).

By rule, a CAFO is:

> (a) The concentrated confined feeding or holding of animals or poultry, including but not limited to horse, cattle, sheep, or swine feeding areas, dairy confinement areas, slaughterhouse or shipping terminal holding pens, poultry and egg production facilities and fur farms;
>
> (A) In buildings or in pens or lots where the surface has been prepared with concrete, rock or fibrous material to support animals in wet weather; or
>
> (B) That have wastewater treatment works; or
>
> (C) That discharge any wastes into waters of the state.
>
> (b) An animal feeding operation that is subject to regulation as a concentrated animal feeding operation pursuant to 40 CFR § 122.23

OAR 603-074-0010(3); OAR 340-051-0010(2) (same). CAFOs are regulated under federal and state water quality laws and are required to hold a water quality permit. ORS 468B.050(1)(d), ORS 468B.215(3). CAFO permits fall into two general categories: NPDES and WPCF.

3. NPDES and WPCF CAFO permits

CAFOs that meet the federal criteria for a concentrated animal feeding operation are requires to hold a National Pollutant Discharge Elimination System ("NPDES") permit. An NPDES Permit is "a waste discharge permit issued under the National Pollutant Discharge Elimination System" authorized by the federal CWA and state law. OAR 340-045-0010(13). The "discharge of any pollutant" into navigable waters—i.e., waters of the United States—is prohibited without an NPDES Permit. 33 U.S.C. § 1311(a); ORS 468B.025(1)(a). In relevant part, the CWA defines "discharge of a pollutant" to mean "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12). In turn, "point source" is defined to include a "concentrated animal feeding operation." 33 U.S.C. § 1362(14).

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A WPCF Permit "means a Water Pollution Control Facilities permit to construct and operate a disposal system with no discharge to navigable waters." OAR 340-045-0010(32). These permits are issued solely under state law, *see* ORS 468B.025(1)(a), not under the CWA. WPCF permits are required for farms that constitute a CAFO.

Each permit category has a general permit.[1] The current WPCF general permit is Oregon CAFO WPCF General Permit Number 01-2015.[2] Stapleton Decl., Ex. 3; *see* Compl. ¶ 127 (link to permit). Each CAFO must also have an individualized, ODA-approved animal waste management plan (AWMP) containing site specific procedures that ensure that permit conditions are met. *See* Stapleton Decl., Ex. 3 at 11-12 (setting out AWMP requirements under CAFO WPCF General Permit Number 01-2015).

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[1] Individuals not wishing to be covered by a general permit have the option to seek an NPDES or WCPF individual permit in accordance with OAR 340-045-0030.

[2] The Complaint references, cites, and makes extensive allegations about—and therefore incorporates—Oregon CAFO WPCF General Permit Number 01-2015. *See* Compl. ¶ 127 (citing to and providing permit URL; *see also* ¶ 14 (stating that requirement that plaintiffs obtain permit is the basis of the lawsuit); ¶ 71, 72, 74, 76, 77, 130, 133–5, 145 (referencing permit). The permit is also available on ODA's website. https://www.oregon.gov/oda/programs/naturalresources/pages/cafo.aspx

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The criteria for CAFO permit coverage are incorporated into the general permit and by rule. CAFO WPCF General Permit Number 01-2015 contains a table which addresses permit coverage. *See* OAR 603-074-0010(8)–(9); Compl. ¶ 127. As shown by the below table, CAFOs are grouped into categories of small, medium, and large according to size and animal type.

Table 1: Classification of CAFOs that require coverage by WPCF General Permit #01-2015

Type of CAFO	*Small*	*Medium*	*Large*
	• Confines for more than 120 days in any 12 month period with a wet waste treatment works, or • Discharging to groundwater of the state.	• Confines for more than 120 days in any 12 month period, or • With a wet or dry waste treatment works, or • Discharging to groundwater of the state.	• Confines for more than 120 days in any 12 month period, or • With a wet or dry waste treatment works, or • Discharging to groundwater of the state.
mature dairy cows[1]	<200	200-699	≥700
veal calves	<300	300-999	≥1,000
cattle[2]	<300	300-999	≥1,000
swine ≥ 55 lbs	<750	750-2,499	≥2,500
swine < 55 lbs	<3,000	3,000-9,999	≥10,000
horses	<150	150-499	≥500
sheep or lambs	<3,000	3,000-9,999	≥10,000
turkeys	<16,500	16,500-54,999	≥55,000
chickens, including laying hens or broilers	<9,000	9,000-29,999 (wet waste treatment works)	≥30,000 (wet waste treatment works)
laying hens		25,000-81,999 (layers, dry waste treatment works)	≥82,000 (layers, dry waste treatment works)
broiler chickens		37,500-124,999 (broilers, dry waste treatment works)	≥125,000 (broilers, dry waste treatment works)
ducks	<1,500	1,500-4,999 (wet waste treatment works)	≥5,000 (wet waste treatment works)
		10,000-29,999 (dry waste treatment works)	≥30,000 (dry waste treatment works)
other animal type[3]	Determined by director.	Determined by director.	Determined by director.

[1] Whether milked or dry.
[2] Other than mature dairy cows or veal calves; cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs.
[3] To determine the number of animals that require permit coverage, ODA will compare the operation to the most similar animal type in the table.

Id., Stapleton Decl., Ex. 3 at 5 (Table 1); *see also* Compl. ¶ 134 (describing small, medium, and large CAFO criteria for dairy cattle and cattle).

DEQ generally issues NPDES and WPCF permits. ORS 468B.030; ORS 468B.035. However, ODA also has such statutory authority, ORS 468B.035(2), and implements state water

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pollution control laws and the provisions of the CWA "relating to the control and prevention of water pollution from a confined animal feeding operation," ORS 468B.217(2)(a). Under a memorandum of understanding with DEQ, ODA runs the CAFO program and coordinates the permitting process, conducts inspections of permitted facilities, and investigates potential permit violations, among other things. *See* ORS 468B.217(1) (instructing the EQC to enter a Memorandum of Understanding with ODA to allow ODA "to operate a program for the prevention and control of water pollution from [CAFOs].").[3]

Oregon's administrative rules set out detailed procedures for the issuance, renewal, transfer, denial, and modification of NPDES and WPCF permits. OAR 603-074-0012 (permit procedures for CAFOs to follow OAR chapter 340, division 45); OAR 340-045-0035 and OAR 340-045-0037 (issuance); OAR 340-045-0040 (renewal); OAR 340-045-0045 (transfer); OAR 340-045-0050 (denial); OAR 340-045-0055 (modification); OAR 340-045-0060 (termination or revocation).

Individuals can challenge CAFO permit decisions under state administrative and judicial review processes. *See* OAR 340-045-0035(8)–(9) (providing for contested case procedure for WPCF and NPDES permit issuance decisions); OAR 340-045-0050; OAR 340-045-0055; OAR 340-045-0060(2) - (3) (providing for contested case procedure for denial, modification, termination, or revocation of NPDES or WCPF permit). *See also* ORS 183.310(2) and 183.482 (authorizing contested case procedure and judicial review of agency permit decisions); ORS 183.413–.470 (contested case procedure statutes). ODA also has authority to take enforcement actions to compel CAFO permit compliance. *See* OAR 603-074-0040. Such actions are also subject to judicial review. *See* OAR 603-074-0040(1)(g).

[3] EQC and ODA MOU for CAFO Permit Program (December 2015), *available at* https://www.oregon.gov/ODA/shared/Documents/Publications/NaturalResources/CAFOMOU.pdf

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B. Factual background

1. The challenged policy

In early 2023, ODA announced a new CAFO policy (hereinafter "the policy") that interpreted ODA's rules as requiring small dairies (those with fewer than 200 dairy cattle or fewer than 3,000 milking goats or sheep) to obtain CAFO permit if they (1) confined animals during milking in a pen, lot, or building during milking or (2) generated wastewater from cleaning milking or other milk processing equipment. Stapleton Decl., Ex 1 at 1; Ex. 2 at 1–2; *see* Compl. ¶ 113 (alleging that policy was announced in February 2023); ¶¶ 116–133 (allegations about the policy). The policy announced a rule interpretation under which ODA viewed the act of keeping animals in a confined space such as a building, lot, or pen or on a prepared surface during milking to categorically constitute "concentrated confined feeding or holding" of the animals under the definition of CAFO under OAR 603-074-0010(3)(a)(A). Compl. ¶¶ 128, 131, 133.[4] The policy also announced a rule interpretation under which ODA viewed the use of water to clean milking or processing equipment to categorically qualify any dairy operation as having a "wastewater treatment works" under OAR 603-074-0010(3)(a)(B). Compl. ¶¶ 130, 132, 133, 194, 197.

ODA described the challenged policy in two documents.[5]

a. Program Elements document

Outreach and Education Program to Unpermitted Raw Milk CAFOs Program Elements (January 2023) (hereinafter "Program Elements document") is attached as Exhibit 1 to the Stapleton Declaration. *See* Compl. ¶ 120 (quoting and providing URL to document). The

[4] The complaint generally refers to the policy as a "reinterpretation" of existing CAFO regulations. *See* Compl. ¶¶ 1–2, 69, 112, 122–24, 129-130, 139, 150, 192–194, 196, 197, 199, 200, 202–210.

[5] The policy was also discussed an April 13, 2023 meeting of the CAFO Advisory Committee. *See* Compl. ¶¶ 120, 124, 127, 128, 146.

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Program Elements document states that ODA "has established a Raw Milk Dairies Outreach and Education Program to support planned or existing, unpermitted dairies in obtaining a CAFO permit." Stapleton Decl., Ex 1 at 1. "Dairy owners and operators have a duty under Oregon law to seek coverage under an Oregon CAFO permit." *Id.* The document states:

> "Dairies care for livestock and operate manure and wastewater systems that require management. Dairy wastewater facilities require registration (CAFO permit) to the Oregon CAFO general permit. The ODA CAFO permit sets operational parameters that prevent wastes from entering surface and ground waters, as federal and state law requires. Dairy owners and operators have a duty under Oregon law to seek coverage under an Oregon CAFO general permit.
>
> The ODA CAFO Program has received concerns from the Oregon dairy industry that many raw milk or herd-share dairies are operating in Oregon without CAFO Permit registrations. Unpermitted raw milk and herd-share dairies enjoy an unfair competitive advantage of not having a CAFO Permit by failing to pay Permit fees and not bearing the costs of environmental protection contained in the Permits."

Id. The Program Elements document also describes a phased implementation process for the policy, with education and outreach planned throughout 2023 and 2024. *Id.* at 2–3.

b. White Paper

Another document, entitled *White Paper: Raw Milk Dairies and CAFO Permit Requirements, January 2023* (hereinafter "White Paper"), provides a more detailed discussion of the policy. *See* Stapleton Decl., Ex. 2; Compl. ¶¶ 110, 116–117, 122, 128, 130, 136 (referencing, quoting, and citing White Paper).[6]

Per the White Paper, raw milk dairies are subject to CAFO permit requirements "because they entail animal confinement and manure handling" and because "[t]hey use wastewater management systems to collect, transfer, store, treat, land apply manure, and process wastewater.

[6] Because the complaint extensively references, quotes, and links the White Paper and Program Elements documents, and because these documents form the basis of their claims, they are incorporated into the complaint and are considered as part of the pleadings for purposes of this motion. *Ecological Rts. Found. v. Pac. Gas & Elec. Co.*, 713 F.3d 502, 511 (9th Cir. 2013) ("Under the 'incorporation by reference' doctrine, '[e]ven if a document is not attached to a complaint, it may be incorporated by reference into a complaint if the plaintiff refers extensively to the document or the document forms the basis of the plaintiff's claim.'" (quoting *United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003))).

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As far as is known, raw milk dairies will generally be considered small CAFOs, defined as having fewer than 200 mature dairy cows and fewer than 3,000 milking goats or sheep (OAR 603-074-0010)." Stapleton Decl., Ex. 2 at 1–2. With respect to the confinement of dairy cattle, the White Paper stated that "all animals are technically confined during the milking process, whether in pens, lots, or buildings." *Id.* at 2. It also explained, as to wastewater:

> "Dairy animal husbandry requires handling manure and, at minimum, managing process wastewater from cleaning milking equipment. Wastewater may also be generated from washing containers, sanitizing processing equipment, and cleaning facilities. Raw milk producers may also be cheesemakers or produce other value-added products generating additional process wastewater streams. . . . All wastewater systems, regardless of size are considered Water Pollution Control Facilities. Therefore, when associated with animal feeding operations, a permit is necessary to construct and operate a CAFO."

Id.

The White Paper states three underlying rationales for the policy. "First, to prevent water pollution. Second, to comply with the federal and state law. Third, to maintain a level playing field with all dairies holding Grade A Fluid Milk Licenses that bear the costs of compliance with water quality regulations." *Id.* at 1.

2. ODA withdrawal of the policy[7]

At the direction of Director Hanson, ODA withdrew the policy on March 21, 2024. Hanson Decl. ¶ 5. ODA announced the withdrawal on its website and on Facebook. *Id.* ¶ 6; Ex. 1 (public announcement).

Director Hanson did not authorize the policy and was not at ODA when it was created. *Id.* ¶¶ 2-5. In fact, Director Hanson first became aware of the policy after learning that she was named as a defendant in this case and began working to withdraw the policy soon after. *Id.* ¶ 5.

[7] This section is not exclusively based on the facts alleged in the complaint—it also includes new facts which defendants rely upon solely for their jurisdictional defenses.

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Now that the policy is withdrawn, ODA will not enforce or implement the rule interpretation announced in the policy. The withdrawal of the policy was a final decision. Moving forward, ODA has no plans to interpret its current rules in the manner laid out in the withdrawn policy. *Id.* ¶¶ 7-8. Additionally, although ODA is in the early stages of a rulemaking for its chapter 603, division 74 rules, and may, through that process, clarify or modify the types of entities which constitute CAFOs (and, accordingly, which are required to obtain a CAFO permit), ODA does not intend to modify or clarify its rules in a manner that would effectively reinstate the withdrawn policy. *Id.* ¶ 9.

Even before the policy was withdrawn by ODA, the policy was never fully implemented. ODA staff conducted public education and outreach from approximately January of 2023 through March 21, 2024. Only one person, plaintiff Christine Anderson (Cast Iron Farm), obtained a CAFO WPCF permit under the policy. Stapleton Decl. ¶ 5. ODA never enforced the withdrawn policy by imposing a civil penalty or taking any other enforcement action such as issuance of notices of violation or fines and penalties. *Id.* ¶ 6.

By withdrawing the policy, ODA returned to the longstanding status quo under which the determination as to whether small dairies and other small operations constitute a CAFO and are required to obtain a CAFO permit is made on a case-by-case basis. The withdrawal of the policy has been fully implemented. Hanson Decl. ¶ 10.

C. Overview of the complaint

1. The parties

Plaintiffs are small dairy operators that sell or have a herdshare arrangement[8] for raw cow milk or unpasteurized goat milk. Compl. ¶¶ 23-24, 26, 48–49, 51, 85, 100. According to the

[8] A herdshare system is an arrangement that allows members of the public to purchase "shares" of dairy cows, which make the shareholders eligible to make regular pickups of milk. Compl. ¶ 48.

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complaint, Plaintiffs Sarah King (Godspeed Hollow Farm) and Christine Anderson (Cast Iron Farm) each have three cows. Compl. ¶¶ 21, 45. Plaintiff Waneva LaVelle (Pure Grace Farm) has nine goats. *Id.* ¶¶ 8, 83. Plaintiff Melissa Derfler (Rainbow Valley Dairy Goats) milks eight to nine goats. *Id.* ¶¶ 10, 96.[9] Plaintiff Christine Anderson obtained a CAFO permit from ODA, which she alleges she applied for in August 2023 in an effort to comply with the policy. *Id.* ¶¶ 69-78, 159.

The remaining Plaintiffs do not have CAFO permits but allege that under the interpretation that was announced in the policy, they would have been required to obtain permits because they milk their animals in enclosed areas and on a prepared surfaces, or because they generate wastewater. *Id.* ¶¶ 90–91, 102, 130, 148, 152, 173, 180, 194.

As noted above, Defendant Lisa Charpilloz Hanson is ODA's Director. *Id.* ¶ 11. Defendant Wym Matthews is the manager of ODA's CAFO program. *Id.* ¶ 12.

2. The claims

Plaintiffs assert two grounds for relief. Count I alleges that the policy violates their equal protection rights under the Fourteenth Amendment. Compl. ¶¶ 191–200.

Count II alleges that the policy violates their substantive due process rights under the Fourteenth Amendment. *Id.* ¶¶ 201-210.

Plaintiffs seek declaratory judgments that "as applied to Plaintiffs and all those similarly situated, the Department's CAFO definition, *see* Or. Admin. R. 603-074-0010(3), and the compliance it triggers," violates their rights to equal protection and substantive due process. Compl. at p. 40. They also seek a permanent injunction "prohibiting Defendants and their agents

[9] The complaint does not allege how many goats Ms. Derfler owns.

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from enforcing the CAFO regulation against Plaintiffs and all those similarly situated." *Id.* at p. 41.[10]

III. LEGAL STANDARDS

A. Motion to dismiss for lack of subject matter jurisdiction

In a Rule 12(b)(1) motion, a defendant may raise a facial or factual jurisdictional challenge. *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). "A 'facial' attack accepts the truth of the Plaintiffs' allegations but asserts that they 'are insufficient on their face to invoke federal jurisdiction.'" *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014) (quoting *Safe Air for Everyone*, 373 F.3d at 1039). A factual attack "contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings." *Leite*, 749 F.3d at 1121.

A federal court is one of limited jurisdiction and is presumed to lack jurisdiction. *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). In considering a Rule 12(b)(1) motion to dismiss, a court takes the allegations in the complaint as true, unless challenged. *See Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1139 (9th Cir. 2003) ("A jurisdictional challenge under Rule 12(b)(1) may be either on the face of the pleadings or by presenting extrinsic evidence."). When a defendant challenges the jurisdiction of the court, the plaintiff bears the burden of establishing jurisdiction. *Sopcak v. N. Mountain Helicopter Serv.*, 52 F.3d 817, 818 (9th Cir. 1995).

B. Motion to dismiss for failure to state a claim

A claim must be dismissed when it "fail[s] to state a claim upon which relief can be granted." FRCP 12(b)(6). The complaint must allege facts that amount to a claim "that is plausible on its face," containing "factual content that allows the court to draw the reasonable

[10] Defendants do not concede that Plaintiffs have standing to seek relief on behalf of others similarly situated and reserve the right to raise that issue.

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inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). Thus, to survive a motion to dismiss under FRCP 12(b)(6), a complaint must provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The court construes all factual allegations in the complaint in the plaintiff's favor. *Sun Sav. & Loan Ass'n v. Dierdorff*, 825 F.2d 187, 191 (9th Cir. 1987). This presumption does not apply to legal conclusions. *Iqbal*, 556 U.S. at 678–79.

IV. ARGUMENT

A. The Court does not have jurisdiction over this case.

1. The case is moot because there is no longer a live controversy.

Plaintiffs seek declaratory and injunctive relief that would prevent implementation of the interpretation announced in the challenged policy, under which they likely would have been required to obtain (or in the case of Christine Anderson, continue to maintain)[11] a CAFO permit. But as of March 21, 2024, ODA withdrew the challenged policy. Hanson Decl., ¶ 6. As a result, a requirement that Plaintiffs obtain a CAFO permit to be able to continue operating their small dairy operations because they milk and generate wastewater from two to three dairy cows or eight to nine dairy goats no longer exists, and the claims that Plaintiffs raise over the policy's validity are no longer live.

2. No mootness exceptions apply.

Plaintiffs may contend that this Court is not precluded from resolving the claims because, even if the claims are moot, one or more exceptions applies. But no exception applies here. And

[11] The process for Ms. Anderson to terminate her CAFO permit is set out under OAR 340-045-0060 and is initiated by a written request to terminate from the permittee. OAR 340-045-0060(1)(b).

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even if one did, the Eleventh Amendment would prevent this Court from addressing a claim against the state or state actors that is no longer live.

a. Voluntary cessation does not apply.

As the Ninth Circuit has explained, government officials are treated differently and granted "more solicitude" than private parties when determining whether voluntary cessation of conduct moots a case.

> A private defendant's voluntary cessation of challenged conduct does not necessarily render a case moot because, if the case were dismissed as moot, the defendant would be free to resume the conduct. However, we treat the voluntary cessation of challenged conduct by government officials "with more solicitude . . . than similar action by private parties." For this reason, the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal.

Bd. of Trustees of Glazing Health & Welfare Tr. v. Chambers, 941 F.3d 1195, 1198 (9th Cir. 2019) (internal citations omitted) (quoting *Am. Cargo Transp., Inc. v. United States*, 625 F.3d 1176, 1180 (9th Cir. 2010). The Ninth Circuit has also explained that "we presume the government is acting in good faith." *Am. Cargo Transp.*, 625 F.3d at 1180. Although the policy is not a legislative action, Defendants are nonetheless entitled to the presumption that ODA acted in good faith in withdrawing the policy. *See id.* (applying presumption of good faith in context of mootness caused by a governmental policy change).

"[The Ninth Circuit] ha[s] not set forth a definitive test for determining whether a voluntary cessation . . . not reflected in statutory changes or even in changes in ordinances or regulations [] has rendered a case moot . . . Ultimately, the question remains whether the party asserting mootness 'has met its heavy burden of proving that the challenged conduct cannot reasonably be expected to recur.'" *Rosebrock v. Mathis*, 745 F.3d 963, 972 (9th Cir. 2014) (quoting *Friends of the Earth, Inc.*, 528 U.S. at 189).

Where, as here, a governmental voluntary cessation is not legislative in nature, "mootness is more likely" based on five factors:

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> "(1) the policy change is evidenced by language that is broad in scope and unequivocal in tone, (2) the policy change fully addresses all of the objectionable measures that the Government officials took against the plaintiffs in the case; (3) the case in question was the catalyst for the agency's adoption of the new policy, (4) the policy has been in place for a long time when we consider mootness; and (5) since the policy's implementation the agency's officials have not engaged in conduct similar to that challenged by the plaintiff. On the other hand, [the Ninth Circuit] [is] less inclined to find mootness where the new policy . . . could be easily abandoned or altered in the future.

Id. at 972 (internal citations and quotation marks omitted). Here four of the five factors are met.

First, the policy has been unequivocally—and publicly—withdrawn in its entirety. *See* Hanson Decl., ¶¶ 4, 6, 8; Ex. 1 at 1-2 (public announcement). Prior to that, ODA announced its intention to withdraw the policy through counsel in correspondence with Plaintiffs. Forzley Decl., Ex. 1 at 3, 6, 8 & Ex. 2 (correspondence with counsel).

Second, the withdrawal fully addresses Plaintiffs' complaints, because they are not subject to the policy and are no longer required to obtain a CAFO permit as a result of the policy. Furthermore, during the time that the policy was in place, three of the four Plaintiffs did not obtain a CAFO permit—their complaint is merely that the policy applied to them. Christine Anderson, who currently holds a CAFO permit, chose to obtain the permit and is now eligible to have it terminated if she so choses. ODA did not use enforcement tools such as notice of violation, fines, or penalties to force her to comply with the policy. *See above* pp. 12-15. Under these circumstances, and considering both the limited enforcement and the unequivocal withdrawal of the policy, Plaintiffs' complaints are fully addressed. No remedy that the Court could impose will have a practical effect on Plaintiffs.

Third, this case was the catalyst for the withdrawal. *See* Hanson Decl. ¶ 5.

And fourth (as to the fifth *Rosebrock* factor), since the withdrawal, agency officials have not engaged in the challenged conduct because the policy is no longer being enforced or implemented. Hanson Decl. ¶¶ 7, 10. Indeed, ODA was easily able to execute the withdrawal because the policy was never fully implemented to begin with, Stapleton Decl. ¶¶ 4-6, and

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because, with the withdrawal, ODA was able to simply return to the longstanding status quo wherein CAFO permit determinations for small farms are made on a case-by-case basis, Hanson Decl. ¶ 10. Also, there is no reasonable expectation that the policy could be accidentally enforced given that the withdrawal has been fully executed and that, by withdrawing the policy, ODA is simply returning to the status quo. *See id.*

The fourth factor is likely not met because the policy withdrawal occurred recently, on March 21, 2024, so the withdrawal has not been in place "for a long time." However, the absence of that single, nondispositive factor should not alter the analysis under these circumstances, particularly given that Director Hanson did not authorize the policy and withdrew the policy soon after she learned about it.

Finally, as to whether the policy withdrawal "could be easily abandoned or altered in the future," *Rosebrock*, 745 F.3d at 972, the policy has been withdrawn publicly and unequivocally. Furthermore, the policy will not be reinstated, through rulemaking or otherwise. Hanson Decl. ¶¶ 8, 9. That is enough to establish that the policy will not be reinstated. The fact that ODA retains the authority to make policy changes—as all government defendants do—is alone not enough to support a conclusion that there is a reasonable likelihood of the policy being reinstated, in light of the circumstances here. If having the power to make policy were enough to skirt mootness "no suit against the government would ever be moot." *Boston Bit Labs, Inc. v. Baker*, 11 F.4th 3, 10 (1st Cir. 2021). A fear that the policy could be reinstated and will then be applied to Plaintiffs personally—simply because ODA retains policy-making authority—would be too "remote and speculative" to establish jurisdiction. *Lee v. Schmidt-Wenzel*, 766 F.2d 1387, 1390 (9th Cir. 1985); *cf. Murphy v. Hunt*, 455 U.S. 478, 482 (1982) (reasonable expectation means something more than "a mere physical or theoretical possibility").

b. The capable of repetition, yet evading review exception does not apply.

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Courts can exercise jurisdiction over disputes that are capable of repetition, yet evading review, but this case does not meet the requirements of that exception. "That exception applies only in exceptional situations, where (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 170 (2016) (internal citations omitted). Here, Plaintiffs cannot meet the second element. For the same reasons that they cannot demonstrate that the voluntary cessation expect applies, Plaintiffs also cannot establish that they have a reasonable expectation that they will be subject to the withdrawn policy again. The record clearly demonstrates that the policy is withdrawn and cannot reasonably be expected to be reinstated.

3. Even if a mootness exception applied, the Eleventh Amendment prevents this Court from addressing the claims.

Mootness is not the only jurisdictional bar to Plaintiffs' claims; the Eleventh Amendment is another jurisdictional barrier. The Eleventh Amendment prohibits federal courts from issuing declaratory and injunctive relief against state officials when no continuing violations exist. *Green v. Mansour*, 474 U.S. 64, 67 (1985) (affirming the dismissal of a declaratory relief claim under the Eleventh Amendment because the claim "related solely to past violations of federal law"); *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645 (2002) (explaining that the *Ex parte Young* exception to immunity allows suits against state officials but only for prospective relief for ongoing violations of federal law). Plaintiffs ask this Court to issue relief as to the constitutionality of a policy that is no longer in effect. Thus, the claims at this point seek retrospective relief only. For that reason, they are barred by the Eleventh Amendment.

B. The complaint fails to state a claim.

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Even if the Court concludes that it has jurisdiction, it should dismiss this case under FRCP 12(b)(6). The complaint fails to state facts sufficient to establish any constitutional violation under current law.

1. The complaint fails to state a claim for an equal protection violation.

Plaintiffs fail to state a claim under the Equal Protection Clause, because they fail to establish that they were treated differently from others similarly situated, and the challenged policy survives rational basis review. The first claim should be dismissed.

a. Legal framework

Under the Equal Protection clause, "[n]o state shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "[T]hose words now are understood to state a commitment to the law's neutrality where the rights of persons are at stake." *Romer v. Evans*, 517 U.S. 620, 623 (1996). To state a claim for an equal protection violation, a plaintiff must show that (1) the law causes members of a certain group to be treated differently from other persons based on membership in that group; and (2) the distinction made between groups is unjustified in light of the applicable level of scrutiny. *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995). Plaintiffs' claims fail under both prongs of that test.

b. There are no allegations of facts showing Plaintiffs were treated differently from others similarly situated.

First, Plaintiffs fail to allege facts showing that "'a class that is similarly situated has been treated disparately.'" *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014) (quoting *Christian Gospel Church, Inc. v. City and Cnty. of S.F.*, 896 F.2d 1221, 1225–26 (9th Cir. 1990)). "[A]n equal-protection claim must assert that a plaintiff was treated differently than other similarly situated persons and that the disparate treatment was intentional." *Recinto v. U.S. Dep't of Veterans Affairs*, 706 F.3d 1171, 1177 (9th Cir. 2013). "To avoid dismissal, a plaintiff must plausibly suggest the existence of a discriminatory purpose." *Id.*

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Plaintiffs' equal protection claim does not meet that standard. The challenged policy would not treat Plaintiffs disparately from a similarly situated class. Under the policy, all dairies—specifically, farming operations that milk animals on more than 120 days out of the year—would be required to obtain a CAFO permit. While Plaintiffs claim that raw-milk dairies have been "singled out," they allege no facts plausibly suggesting that the policy would discriminate, in intent or in effect, against raw milk dairies. *See* Compl. ¶ 122.

The challenged policy would impose the same CAFO requirements on raw milk dairies as on all other dairies. "Raw milk dairies [would] fall under CAFO regulations because they entail animal confinement and manure handling." Stapleton Decl., Ex. 2 at 1 (White Paper).[12] The same would be true of all dairies, which all would be considered to entail animal confinement and manure handling. *See id.* at 2 ("[A]ll animals are technically confined during the milking process . . . . Dairy animal husbandry requires handling manure and, at minimum, managing process wastewater from cleaning milking equipment."). Thus, under the policy, which would consider milking to entail confinement, any farm that milks animals on more than 120 days out of the year would be subject to CAFO regulations.[13] *See* Stapleton Decl., Ex. 3 at 5 (WPCF general permit, indicating 120-day confinement threshold for CAFO status). Whether a dairy produces raw milk would make no difference.[14]

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[12] As explained above, the White Paper, the Program Elements document, and the WPCF general permit are incorporated by reference into the complaint. *See Glazer Capital Mgmt., L.P. v. Forescout Techs., Inc.*, 63 F.4th 747, 763 (9th Cir. 2023) (in determining the adequacy of a complaint, a court considers "the factual allegations in the complaint" as well as "any materials incorporated into the complaint by reference").

[13] Plaintiffs argue that the challenged policy misreads the term "confined" as used in the CAFO regulations. Compl. ¶¶ 2, 129, 192. But such arguments about the proper interpretation of state law do not affect the constitutional analysis. *See Snowden v. Hughes*, 321 U.S. 1, 11 (1944) ("[S]tate action, even though illegal under state law, can be no more and no less constitutional under the Fourteenth Amendment than if it were sanctioned by the state legislature.").

[14] Nor would the policy "appl[y] only to raw-milk producers who milk cows, but not goats or other animals." *See* Compl. ¶ 193. The policy would make no such distinction that would

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Plaintiffs object that certain farms that do *not* milk livestock would not be required to get a CAFO permit. Compl. ¶¶ 192, 194. But dairies are not similarly situated with other types of farms. Dairies are a distinct type of farming operation that may pose distinct environmental concerns, as recognized by state and federal CAFO regulations. *See* OAR 603-074-0010(9) (distinguishing between "cattle" and "dairy cattle" in calculating the size of a CAFO for regulatory purposes); 40 C.F.R. § 122.23(b)(4), (6) (same); *infra* § IV.B.1.d. (explaining rational bases for distinguishing between dairies and other farms); *see also Burt v. Ark. Livestock & Poultry Comm'n*, 278 Ark. 236, 241, 644 S.W.2d 587, 589 (1983) ("[T]reating all beef cattle owners alike is valid even though they are not treated the same as all dairy cattle owners. Dairy and beef herds are clearly kept for different purposes. This distinction is properly within the bounds of the equal protection provisions of the United States and Arkansas Constitutions."); *id.* at 589–90 (upholding a law that distinguished between beef and dairy cattle for the purposes of indemnity payments for disposal of diseased cattle).

Plaintiffs argue that Defendants "singled out raw-milk producers" by specifying that the CAFO permit requirement would apply to raw milk dairies. Compl. ¶ 122. But the documents and statements cited by Plaintiffs merely indicate that raw milk dairies would be required to get CAFO permits along with all other dairies. *See* Stapleton Decl., Ex. 2 at 1 (White Paper, explaining that raw milk dairies' Fluid Milk License exemptions would not exempt them from the CAFO permit requirement). Declining to *exempt* raw milk dairies from that requirement is not disparate treatment.

Indeed, Plaintiffs' own arguments illustrate that their complaint is not that they *received* disparate treatment, but rather that they were *not* treated differently because of their status as

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exempt goats or other animals from CAFO requirements. *See* Stapleton Decl., Ex. 2 at 1–2 (White Paper, indicating that small CAFOs would include raw milk dairies with "fewer than 3,000 milking goats or sheep").

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small raw milk dairies. For example, Plaintiffs object that the policy "essentially means that every farm in Oregon, if it milks any livestock, is a CAFO." Compl. ¶ 192. Treating Plaintiffs the same as every other dairy in Oregon would not amount to disparate treatment.

Nor do Plaintiffs' allegations otherwise "plausibly suggest the existence of a discriminatory purpose" against raw milk dairies. *See Recinto*, 706 F.3d at 1177. To the contrary, Plaintiffs' allegations show an intent *not* to discriminate among different types of dairies. Plaintiffs, citing statements from ODA, allege that the real purpose of the policy "is to impose a burden on small dairies simply because it's one that *other*, bigger dairies must shoulder too." Compl. ¶ 118; *see* Stapleton Decl., Ex. 2 at 1 (White Paper, referring to the importance of "maintain[ing] a level playing field with all dairies holding Grade A Fluid Milk Licenses that bear the costs of compliance with water quality regulations"). But an intent to subject small dairies to the *same* regulatory burden as other dairies is not a discriminatory purpose; it is precisely the opposite.

In any event, even if an intent to treat all dairies the same could be considered a discriminatory purpose, the policy would nonetheless be valid "[s]o long as there are other legitimate reasons for the economic distinction" between dairies and other farms. *See S.F. Taxi Coal. v. City & County of San Francisco*, 979 F.3d 1220, 1225 (9th Cir. 2020). That is because, as explained below, such a distinction is subject to rational-basis review, which it easily satisfies.

c. The policy's distinction between dairies and other farms is subject to rational basis review.

Unless a classification "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage," courts must "presume the constitutionality" of that classification and require only that it be "rationally related to a legitimate state interest." *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Here, the

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challenged policy would distinguish between farms that milk animals on more than 120 days out of the year, and farms that do not. That distinction neither burdens a fundamental right nor targets a suspect class.

First, distinguishing between dairies and other farming operations does not burden a fundamental right. Fundamental rights are rights that are "objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1087 (9th Cir. 2015). An asserted fundamental right "must be carefully stated and narrowly identified," with reference to "the scope of the challenged regulation and the nature of Plaintiffs' allegations." *See id.* at 1085–88 (concluding that there is no fundamental "right to own, operate, or work at a licensed professional business free from regulations requiring the business to engage in activities that one sincerely believes lead to the taking of human life"). The right asserted by Plaintiffs' here, "carefully stated and narrowly identified," is a right to operate a dairy free from environmental regulations aimed at preventing water pollution. *See id.* at 1086. That is not a fundamental right. *See Country Classic Dairies, Inc. v. State of Mont., Dep't of Commerce Milk Control Bureau*, 847 F.2d 593, 596 (9th Cir. 1988) (citing *Dukes*, 427 U.S. at 303–05) ("The Supreme Court has held that the right to pursue a calling is not a fundamental right for purposes of the Equal Protection Clause."); *id.* (holding that distinguishing between in-state and out-of-state milk processors did not implicate a fundamental right); *see also United States v. White Plume*, 447 F.3d 1067, 1075 (8th Cir. 2006) (recognizing, in the context of a substantive-due-process claim, that "[t]he Supreme Court has not declared 'farming' to be a fundamental right").

Second, dairies are not a suspect class. Plaintiffs do not argue otherwise. *See Country Classic Dairies*, 847 F.2d at 596 (noting that the plaintiffs "[did] not argue that milk processors

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make up a suspect class," and concluding that the challenged regulation was subject to rational-basis review).

d. Distinguishing between dairies and other farms is rationally related to preventing water pollution.

Because the challenged policy does not draw a classification that burdens a fundamental right or targets a suspect class, it is subject to rational-basis review, under which it bears "a strong presumption of validity." *Heller v. Doe*, 509 U.S. 312, 319 (1993). The policy is valid if there is "a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at 320. "[A] classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (internal quotation marks omitted). The State "need not actually articulate at any time the purpose or rationale supporting its classification." *Id.* (internal quotation marks omitted). Further, the State "has no obligation to produce evidence to sustain the rationality of [the] . . . classification," and may rely on "rational speculation unsupported by evidence or empirical data." *Id.* (internal quotation marks omitted). "[T]he burden is on the one attacking the [classification] to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320–21 (internal quotation marks, internal citations, and brackets omitted).

Here, Plaintiffs cannot meet their burden of negating "every conceivable basis" which might support distinguishing between dairies and other farms in the context of water-quality regulations. *See id.* at 320. Oregon has a legitimate interest in preventing water pollution. *See S.D. Warren Co. v. Me. Bd. of Envtl. Prot.*, 547 U.S. 370, 386 (2006) (recognizing that the federal Clean Water Act "preserve[s] state authority to address the broad range of pollution"). Requiring dairies to get CAFO permits is rationally related to that purpose. It is more than "reasonably conceivable" that there is a connection between dairies and water pollution, which

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could justify imposing more stringent waste-disposal regulations on dairies than on other farms. *See Heller*, 509 U.S. at 320. Two "conceivable bas[e]s" for that distinction are that milking processes lead to increased wastewater output and that dairy animals themselves tend to produce more waste than animals kept for other purposes. *See id.*

As one rational basis, it is reasonably conceivable that the regular milking of animals results in an increased output of wastewater, which could lead to manure, raw milk, or cleaning substances entering public waters. As the White Paper reasoned, "Dairy animal husbandry requires handling manure and, at minimum, managing process wastewater from cleaning milking equipment." Stapleton Decl., Ex. 2 at 2. "Wastewater may also be generated from washing containers, sanitizing processing equipment, and cleaning facilities." *Id.* "Raw milk producers may also be cheesemakers or produce other value-added products generating additional process wastewater streams." *Id.*

Plaintiffs' own allegations illustrate that even a small dairy operation could emit thousands of gallons of milking-related wastewater each year. According to the Complaint, Godspeed Hollow Farm milks two cows daily, producing roughly six gallons of wastewater per cow each day, which is poured out onto the ground. Compl. ¶¶ 4, 21, 32, 36–37. A full year of that milking routine would produce over 4,300 gallons of wastewater. It is reasonably conceivable that Godspeed Hollow Farm would not be emitting that wastewater, or would be emitting less wastewater, if it did not have cows that were being milked more than 120 days out of the year. It is therefore reasonably conceivable that the milking-related wastewater output of Godspeed Hollow Farm and other dairies across the State could justify imposing heightened water-pollution controls on dairies. There is therefore a rational basis for the challenged policy to distinguish between dairies and other farms for the purpose of the CAFO permit requirement.

As an additional rational basis, it is reasonably conceivable that dairy animals themselves tend to generate more waste than animals kept for other purposes. Indeed, federal and Oregon

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CAFO regulations already recognize dairy cows as posing a greater threat of water pollution than other cattle. Under both sets of regulations, a CAFO with up to 999 beef cows may be regulated as a "medium" CAFO, while a CAFO with only 700 dairy cows is subject to the more stringent requirements of a "large" CAFO. *See* OAR 603-074-0010(9), (11)(a) (listing CAFO sizes by numbers of dairy cattle and other cattle); 40 C.F.R. § 122.23(b)(4)(i)–(iii), (b)(6)(i)(A)–(C), (b)(9) (same); Stapleton Decl., Ex. 3 at 13–14 (WPCF general permit, indicating heightened monitoring, inspection, recordkeeping, and reporting requirements for large CAFOs).

Other states' CAFO regulations also subject dairy cows to heightened requirements at lower numbers than other cattle. Missouri's and Wisconsin's regulations further indicate that such distinctions between different animal types reflect differences in manure volume and content. *See* Mo. Code Regs. Ann. tit. 10, § 20-6.300(1)(B)(3), (7) (CAFOs reach "Class I" size at 700 mature dairy cows or 1,000 beef cows, while CAFO sizes for unlisted animal types are calculated based on "manure characteristics that include manure volume and nutrient concentration"); Wis. Admin. Code N.R. §§ 243.03(31), 243.05 (Tables 2A and 2B) (CAFOs reach "Large" size at 700 mature dairy cows or 1,000 beef cows, with CAFO sizes for unlisted animal types to be calculated based on "live animal weights, the characteristics of the manure, including nutrient content or pollutant concentration, or a combination of both").

Similarly, New Jersey Animal Waste Management regulations explicitly assume that dairy cows will produce substantially more manure than other cows. The regulations include a table indicating that one lactating dairy cow will produce 19,992 pounds of solid manure a year—over 6,000 pounds more than a beef cow of the same size. *See* N.J. Admin. Code § 2:91-2.1 (Table, "Animal Unit Equivalents and Manure Production": 1,000-pound beef cow produces 13,400 pounds of solid manure per year; 1,000-pound lactating dairy cow produces 19,992 pounds of manure; 1,400-pound lactating dairy cow produces 28,000 pounds of manure).

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All of these state and federal regulations assume that dairy cows produce more manure or more harmful manure, or otherwise contribute more to water pollution than other types of cattle. It is at least reasonably conceivable that the judgment of these various regulators has some basis in reality, and that dairy cows might pose a greater threat of water pollution. There is therefore a rational basis to impose a CAFO permit requirement on dairies, even when similarly-sized farms without dairy animals might not need a permit.

Thus, distinguishing between dairies and other farms is rationally related to preventing water pollution based on both the wastewater associated with milking processes and the characteristics of dairy animals themselves. Because both of those rationales are "plausible, arguable, or conceivable reasons which may have been the basis" for the distinction, the policy survives rational-basis review. *See Jackson Water Works, Inc. v. Pub Utils. Comm'n*, 793 F.2d 1090, 1094 (9th Cir. 1986) (internal quotation marks omitted).

Plaintiffs allege that the real motivation behind the policy was economic protectionism. Compl. ¶ 2. But as noted above, ODA's stated intent to subject all dairies to the same CAFO requirement does not plausibly suggest an intent to discriminate against raw milk dairies or in favor of other dairies. Moreover, rational-basis review does not "inquire into the actual purpose of the challenged classification," but rather must uphold the law "if there is any reasonable state of facts that *could* provide a rational basis for the classification." *Lazy Y Ranch v. Behrens*, 546 F.3d 580 (9th Cir. 2008) (quoting *Heller*, 509 U.S. at 321) (emphasis added). Further, while "'[m]ere economic protectionism for the sake of economic protectionism'" would not be a valid basis for a classification, "[s]o long as there are other legitimate reasons for [an] economic distinction, [a court] must uphold the state action." *S.F. Taxi Coal.*, 979 F.3d at 1225 (9th Cir. 2020) (quoting *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008)). Here, even if Plaintiffs' allegations were to plausibly suggest a protectionist motivation behind treating all

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dairies the same, there would nonetheless be multiple other legitimate reasons for distinguishing between dairies and other farms.

Plaintiffs also argue that the policy would be both overinclusive and underinclusive, because it would include small dairies while excluding certain other farms with more animals. Compl. ¶¶ 196–97. But as explained above, dairies are not the same as all other farms. In any event, "[e]ven if the classification involved here is to some extent both underinclusive and overinclusive, and hence the line drawn by [the State] imperfect, it is nevertheless the rule that in a case like this perfection is by no means required." *Vance v. Bradley*, 440 U.S. 93, 108 (1979). "[C]ourts are compelled under rational-basis review to accept a [State's] generalizations even when there is an imperfect fit between means and ends." *Heller*, 509 U.S. at 321.

Plaintiffs further argue that it would be irrational to apply the CAFO regulations to their dairies, because, they allege, those dairies are not causing any environmental impact. Compl. ¶¶ 195–96. But for equal protection purposes, the question is "whether there is a rational basis for the *distinction*, rather than the underlying government *action*." *Gerhart v. Lake Cty., Mont.*, 637 F.3d 1013, 1023 & n.9 (9th Cir. 2011). Here, there is a rational basis to distinguish between farms that are dairies and farms that are not. Moreover, whether that distinction will "*in fact*" further the State's purpose "is not the question"; if the State "*could rationally have decided*" that the distinction would further a legitimate purpose, then "the Equal Protection Clause is satisfied." *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981). Because the State could rationally have decided that dairies pose a greater risk of water pollution than other farms, the policy easily withstands rational-basis review.

2. The complaint fails to state a claim for a substantive due process violation.

The Due Process clause contains "a substantive component that protects certain individual liberties from state interference." *Mullins v. Oregon*, 57 F.3d 789, 793 (9th Cir. 1995). Plaintiffs' allegations do not support a substantive due process claim. This claim fails for many

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of the same reasons as Plaintiffs' equal protection claim: the challenged policy does not interfere with the exercise of a fundamental right, it does not target a suspect classification, and it is rationally related to a legitimate purpose.

In the context of a substantive due process claim, much like an equal protection claim, a challenged government action is subject to rational-basis review unless it "utilizes a suspect classification" or "implicate[s] fundamental rights." *Richardson v. City & County of Honolulu*, 124 F.3d 1150, 1162 (9th Cir. 1997). Here, as explained above, neither dairies, nor small farms, nor raw milk producers are a suspect classification, and there is no fundamental right to operate such an entity without being subject to environmental regulations. Therefore, rational-basis review applies.

"The rational basis test is identical under the two rubrics of equal protection and due process." *Gamble v. City of Escondido*, 104 F.3d 300, 307 (9th Cir. 1997) (brackets omitted). Thus, for the purposes of Plaintiffs' substantive due process claim, rational-basis review "ask[s] whether [the policy], as applied to plaintiffs, is rationally related to a legitimate governmental purpose." *Sylvia Landfield Tr. v. City of Los Angeles*, 729 F.3d 1189, 1191 (9th Cir. 2013) (internal quotation marks omitted). The policy is valid if there is a "conceivable legitimate purpose that could have supported it," regardless of the "actual purpose" that motivated it, and regardless of whether the State can show that the policy will actually "achieve its asserted purpose." *Raidoo v. Moylan*, 75 F.4th 1115, 1121 (9th Cir. 2023). "A law thus survives rational basis review even if it requires rough accommodations that may be illogical or unscientific, and that may even appear unjust and oppressive." *Id.* (internal quotation marks omitted). Plaintiffs have the burden of showing that the policy is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Sylvia Landfield Tr.*, 729 F.3d at 1193 (9th Cir. 2013) (internal quotation marks omitted). Plaintiffs' burden is "extremely high." *Richardson*, 124 F.3d at 1162.

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Plaintiffs cannot meet that burden here. As explained above, preventing water pollution is a legitimate governmental purpose, and regulating dairy wastewater and manure disposal is rationally related to that purpose. Even if, as Plaintiffs allege, *their* dairies have been operating "without incident," it would still be reasonably conceivable that imposing permit requirements on *all* dairies could help prevent potential wastewater problems. *See* Compl. ¶ 204. The State therefore has a rational basis to require all dairies to obtain permits, even if not all of the permitting requirements are perfectly tailored to the circumstances of each dairy. *See Merrifield*, 547 F.3d at 988 (holding that subjecting a non-pesticide-using pest controller to the same licensing requirements as pesticide-using pest controllers did not violate substantive due process); *id.* ("The [pest controller] licensing statute does not fail because it is not tailored to each precise specialization within a field. [. . . .] [. . .] California has a legitimate public health interest in requiring *all* structural pest controllers to obtain licenses.").

Plaintiffs further argue that it would be arbitrary and irrational for the State to impose the permit requirement on farms that are exempt from the fluid milk license requirement. Compl. ¶ 207; *see* ORS 621.012 (exempting small-scale on-farm milk sales from certain statutes, including the requirement of a license to use a grade designation in connection with the sale of fluid milk). But a license to sell milk is not an authorization to pollute, nor is it at all related to the likelihood of the relevant facility to cause water pollution. Fluid milk licenses and CAFO permits have different sets of requirements and exceptions because they serve different purposes. Fluid milk regulations focus on food safety, while CAFO regulations are aimed at keeping the State's waters free from the contaminants in manure. *See* ORS 621.060(1)–(2) (directing ODA to "establish official state standards of quality for all forms of fluid milk," based on factors including "the quality and nutritional value of fluid milk as a human food"); *cf.* ORS 468B.200 (declaring policy of "protect[ing] the quality of the waters of this state by preventing animal

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wastes from discharging into the waters of the state"). Milk and manure present different concerns, and it is more than reasonably conceivable that the two might be regulated differently.

Plaintiffs also allege, as discussed above, that the actual motivation behind treating all dairies as CAFOs was economic protectionism in favor of certain dairies. Compl. ¶¶ 202–03. Again, that allegation is not plausibly supported by the facts in the complaint, and in any event, rational-basis review does depend on the "actual purpose" behind the challenged law. *Raidoo*, 75 F.4th at 1121. There need only be "plausible, arguable, or conceivable reasons that *may* have been the basis" for the law. *Jackson Water Works, Inc.*, 793 F.2d at 1094 (emphasis added; internal quotation marks omitted). "Where, as here, there are plausible reasons for [the States'] action, [the] inquiry is at an end." *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980).

Because Plaintiffs cannot show that there is no conceivable legitimate purpose for requiring them, along with all other dairies, to obtain CAFO permits, the complaint fails to state a valid claim for a violation of substantive due process.

V. CONCLUSION

For the above reasons, Defendants respectfully request the Court dismiss this action for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted.

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Respectfully submitted,

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