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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

The Environmental Protection Agency ("EPA") openly admits that it "treats CAFO[s] differently" than other pollution sources regulated by the Clean Water Act. *See* EPA Br. at 41. Though Congress explicitly listed CAFOs as point sources of pollution that must be regulated, 33 U.S.C. § 1362(14), EPA purports to have authority to give CAFOs special treatment. But EPA's approach to CAFOs, as highlighted by the Idaho Permit, directly contravenes the statute, undermines Congressional intent to regulate pollution and enable public involvement, and defies common sense.

Apparently hoping that this Court will not reach the text of the Act, EPA distorts the nature of Petitioners' challenge and baselessly claims that Petitioners' suit is time-barred. Aside from simply being wrong, this argument is a red herring that distracts from the narrow legal questions before this Court: (1) whether the Clean Water Act requires actual pollution monitoring to assure compliance, and (2) whether the Idaho Permit's lack of actual monitoring deprives the public of its right to participate in enforcing the Act. The answer to both questions is yes.

EPA first attempts to justify the Idaho Permit's lack of effluent monitoring by claiming essentially unbridled discretion, which EPA does not have, to omit such requirements altogether. Then, presumably recognizing that monitoring is, in fact, a mandatory part of any National Pollutant Discharge Elimination System

("NPDES") permit, EPA attempts to label practices like equipment inspections, soil sampling, and other operational controls in the Permit as "monitoring." EPA says these practices—which are entirely unrelated to identifying what a CAFO is *discharging into waterways*—somehow assure compliance with the Permit's effluent limitations. These practices are not monitoring provisions, and they do not assure compliance. While EPA complains that Petitioners are being "overly formalistic" for simply citing the text of the law and pointing out the commonsense distinction between practices and monitoring to show that those practices actually result in the required outcomes, EPA's reading of the Clean Water Act unreasonably rewrites the statute. EPA's interpretation would eliminate a core feature of the Act: self-monitoring and reporting of effluent discharges that allow regulators and the public to establish whether permittees have complied with their permits, and if not, to hold those permittees accountable.

This Court should reject EPA's arbitrary and unreasonable special treatment of CAFOs and uphold the text and structure of the Clean Water Act, the nation's most important tool for achieving clean and safe waters. The Idaho Permit should be remanded to EPA with instructions that the agency comply with the Act's clear monitoring mandate.

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ARGUMENT

I. Petitioners' Challenge to the Idaho Permit Is Timely Pursuant to Clean Water Act Section 509(b)(1)(F)

The Clean Water Act establishes a bifurcated approach to judicial review. As the Supreme Court recently explained, Congress "carefully enumerated the seven categories of EPA action for which it wanted immediate circuit-court review . . . ." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 634 (2018). Section 509(b)(1) is written with precision, listing seven discrete EPA actions that must be challenged directly in the courts of appeals within 120 days. Among these is any EPA action "issuing or denying any permit under [the NPDES program]." 33 U.S.C. § 1369(b)(1)(F). Here, because Petitioners are challenging EPA's action in issuing an NPDES permit, Petitioners filed suit in this Court pursuant to section (b)(1)(F). ER 509; Opening Br. at 1.

Notwithstanding Petitioners' clarity, EPA argues that Petitioners are *actually* challenging EPA's 2003 CAFO rule, in which EPA issued Effluent Limitation Guidelines ("ELGs")[1] for CAFOs. As such, according to EPA, Petitioners' claim

[1] ELGs are national standards developed by EPA and used by permitting authorities to develop effluent limitations in specific NPDES permits. As the Second Circuit explained, "ELGs, and the effluent limitations established in accordance with them, are technology-based restrictions on water pollution; they are technology-based because they are established in accordance with various technological standards that the Act statutorily provides and that, pursuant to the Act, vary depending upon the type of pollutant involved, the type of discharge involved, and whether the point source in question is new or already existing."

should have been brought pursuant to section (b)(1)(*E*) years ago, within 120 days of when the 2003 CAFO rule was finalized. This argument disregards the structure of section 509(b)(1), ignores the legal differences between establishing ELGs and issuing a lawful permit, and highlights EPA's dilatory approach to regulating CAFOs through repeated sidestepping of much needed accountability.

A. EPA Improperly Ignores the Distinctions Congress Made in Section 509(b)(1)

EPA's argument is premised on an utter disregard for the distinctions between the precisely enumerated sections of 509(b)(1). In *National Association of Manufacturers*, the Supreme Court shot down EPA's repeated efforts to read section 509(b)'s subsections too broadly and blur the distinctions Congress made. *See* 138 S. Ct. at 629 (rejecting EPA's broad reading of section 509(b)(1)(E) as an attempt to "rewrite the statute to the Government's liking") (quotations omitted); *id.* at 632 (similarly rejecting EPA's reading of section 509(b)(1)(F) because "the Government's proposed 'functional interpretive approach' [was] completely unmoored from the statutory text"). Thus, the Supreme Court made clear that the very two provisions at issue here—subsections (E) and (F)—cover discrete and separate agency actions, and EPA cannot read that kind of precision out of the

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Waterkeeper All., Inc. v. EPA, 399 F.3d 486, 511 (2d Cir. 2005) (citing 33 U.S.C. § 1311).

statute. *Id.* at 634 ("[T]he scope of subparagraphs (E) and (F) is set forth clearly in the statute.").

Notwithstanding the Supreme Court's admonitions, EPA beats that same drum here, asking this Court to blur the lines between distinct categories of actions subject to section 509(b)'s reach. This Court should reject EPA's invitation, as EPA's reading of subsection (E) renders subsection (F) superfluous whenever EPA has promulgated ELGs for a category of point sources. Congress would not have provided citizens a right of action to challenge final NPDES permit issuance under subsection (F), if Congress expected citizens to (somehow) raise all unknown but conceivable permit deficiencies at the time the agency develops ELGs for the industry. Aside from EPA's interpretation making no sense as a practical matter, the Supreme Court explicitly rejected a reading of section 509(b)(1) that would render any provisions superfluous. *Id*. at 630–31. EPA's interpretation here—that a permit challenge should really be viewed as an attack on the underlying ELG regulations—does just that.

Petitioners have plainly challenged the Idaho Permit pursuant to section 509(b)(1)(F), not the ELG regulations themselves pursuant section 509(b)(1)(E). Petitioners filed their Petition for Review of the Idaho Permit on June 4, 2020, a mere eight days after the Idaho Permit became effective for judicial review purposes. *See* ER 509; Opening Br at 1. Thus, Petitioners met the 120-day timeline

applicable to NPDES permit challenges, and this suit is not time-barred.

B. EPA Confuses Its Obligations in Developing ELGs and in Issuing Lawful Permits

The CAFO regulations may have been the starting point for the development of the Idaho Permit, but they are not the end. As EPA admits, the Idaho Permit is not a mere recitation of the ELGs. *See* EPA Br. at 33 (admitting that EPA "ha[s] discretion to include additional monitoring provisions on a case-by-case basis"). Thus, EPA must also ensure that the Permit meets all other statutory and regulatory requirements. As one court noted, "the rubber hits the road" when the permitting authority issues the NPDES permit. *Am. Paper Inst., Inc. v. EPA*, 996 F.2d 346, 350 (D.C. Cir. 1993). This is because an NPDES permit "defines, and facilitates compliance with, and enforcement of, a preponderance of a discharger's obligations under the [Act]." *EPA v. California, ex rel. State Water Res. Control Bd.,* 426 U.S. 200, 205 (1976). Therefore, regardless of EPA's compliance with the CAFO ELGs, the agency must also comply with the Clean Water Act, which requires individual NPDES permits to include representative monitoring sufficient to assure compliance with the permit's limits. 33 U.S.C. §§ 1318(a)(2)(A)(iii), 1342(a)(2).[2]

[2] To be sure, Petitioners take issue with EPA's CAFO regulations more broadly. *See* ER 433–93 (Petitioner Food & Water Watch's 2017 Petition to Revise the Clean Water Act Regulations for Concentrated Animal Feeding Operations). But Petitioners' views on EPA's CAFO regulations are not relevant to the narrow legal

EPA suggests that because it *could have* included national CAFO-specific monitoring requirements in its 2003 rule, Petitioners were required to have raised all monitoring concerns then. But the fact that EPA chose not to impose separate monitoring requirements in the CAFO ELGs is unremarkable, as EPA has already promulgated universal monitoring regulations that apply to all NPDES permits. 40 C.F.R. §§ 122.41(e) & (j)(1), 122.44(i)(1)–(2), 122.48(b). To date, EPA has developed ELGs for 59 categories of sources.[3] By Petitioners' count, EPA has included separate monitoring requirements in the ELGs for just 17 of those 59 categories—fewer than one third. *See, e.g.*, 40 C.F.R. § 468.03 (ELGs for copper forming source category, noting that "[t]he following special monitoring requirements apply to all facilities controlled by this regulation"). In contrast to these ELGs, the remaining 42 categories of ELG regulations contain no separate monitoring requirements. Under EPA's logic, no person could challenge any NPDES permit issued to a source within one of the remaining 42 categories, no matter how obvious the lack of compliance monitoring, because that person should have challenged the underlying ELGs in the first place. This makes no sense.

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issue before this Court. This case is about EPA's duties under the statute and regulations when *issuing permits*, not when *developing ELGs*.

[3] EPA has compiled all of the ELGs on its website with corresponding links to the Code of Federal Regulations for each source category. *See Industrial Effluent Guidelines*, EPA, https://www.epa.gov/eg/industrial-effluent-guidelines (last visited Jan. 11, 2021).

Likewise, there are countless NPDES-permitted sources that do not even have ELGs[4]; this does not mean that NPDES permits issued to those sources do not have to include monitoring requirements. *See NRDC v. EPA*, 808 F.3d 556 (2d Cir. 2015) (successful challenge to NPDES permit based on, *inter alia*, lack of monitoring for discharges from vessels, an industry category for which EPA has not developed ELGs). The fact that certain ELGs contain monitoring requirements does not mean that the *absence* of such "special" monitoring requirements in other ELG categories has any legal import. Each NPDES permit must still require representative monitoring pursuant to the statute, 33 U.S.C. §§ 1318(a)(2)(A)(iii), 1342(a)(2), and EPA's overarching monitoring regulations, 40 C.F.R. §§ 122.41(e) & (j)(1), 122.44(i)(1)–(2), 122.48(b), which are applicable to *all* NPDES permits.

C. EPA Attempts to Kick the Can Down the Road and Avoid Regulating CAFOs as Required by Law

EPA's own statements in the 2003 CAFO Rule belie the position the agency takes before this Court. During the 2003 CAFO rulemaking, EPA declined to use the national ELGs as the vehicle for imposing surface water monitoring "because of concerns regarding the difficulty of designing and implementing *through a national rule* an effective surface water monitoring program that would be capable

[4] When EPA has not developed ELGs for a particular source category, permit writers are required to use their "best professional judgment" to determine the permit's technology-based effluent limitations. 33 U.S.C. § 1342(a)(1); 40 C.F.R. §§ 125.3(a)(2)(v), 125.3(c)(2).

of detecting, isolating, and quantifying the pollutant contributions . . . from individual CAFOs." 68 Fed. Reg. 7176, 7217 (Feb. 12, 2003) (emphasis added). Likewise, EPA considered a provision that would have required water quality testing to monitor whether CAFOs were discharging to surface waters via groundwater. *Id.* at 7216. The agency ultimately rejected this provision because the "factors affecting whether such discharges are occurring at CAFOs are so variable from site to site that a national technology-based standard is inappropriate." *Id.* Instead, EPA stated that such monitoring was "more appropriately addressed through NPDES permit conditions established by the permitting authority." *Id.* at 7217.[5]

Nevertheless, EPA now argues that Petitioners cannot challenge a subsequent permit for failing to include monitoring because EPA chose not to include CAFO-specific monitoring requirements in the national rule. The agency cannot have it both ways; it may not evade legal requirements by postponing them until a more opportune time and then decline to act when that time comes. *High*

[5] Moreover, as EPA admits, the 2003 rulemaking considered and rejected just two specific types of monitoring before it at the time. EPA Br. at 8. EPA *repeatedly* attempts to paint Petitioners as requesting "continuous effluent monitoring." *See* EPA Br. at 1, 18, 19, 28, 29, 30, 32, 33. That is inaccurate. Petitioners are only asking for what the law requires: monitoring that assures compliance with the Idaho Permit's effluent limits. EPA has a number of monitoring mechanisms at its disposal, many of which—such as targeted monitoring at tile drains or ditches—are not "continuous effluent monitoring." EPA cannot reframe Petitioners' requested relief to better suit the agency's defense. *See infra* Part II.C.

Country Conservation Advocates v. U.S. Forest Serv., 52 F. Supp. 3d 1174, 1199 (D. Colo. 2014) ("If site-specific analysis was to be postponed, it should have been performed at a later opportunity."). EPA may not now sidestep its obligation as the permitting authority by asserting Petitioners should have raised this issue back in 2003.

At bottom, EPA's timeliness argument is baseless and a distraction. This Court has jurisdiction to hear Petitioners' timely challenge to the Idaho Permit.

II. EPA Does Not Have Discretion to Ignore Effluent Monitoring or To Arbitrarily Redefine Permit Provisions as "Monitoring"

EPA's position—that it has discretion to ignore the Clean Water Act's monitoring mandate—is incompatible with the text of the Act, its own regulations, and Congressional intent. EPA's demand for essentially unbounded discretion boils down to three arguments. First, EPA incorrectly claims that this Court must be "extremely deferential" to EPA because its decision in this case involves "scientific or technical findings." *See* EPA Br. at 24. It does not. Second, in flagrant disregard of the statute and its own regulations, EPA argues that it has "broad discretion[]" whether to include monitoring requirements in an NPDES permit at all. EPA Br. at 20. And third, EPA arbitrarily attempts to characterize certain provisions of the Idaho Permit as "monitoring," and says that Petitioners are being "overly formalistic" for remaining true to the statute, even though those provisions are unambiguously *not* monitoring as contemplated by the Clean Water

Act. *See* EPA's Br. at 3–4, 30, 39–40. These attempts to dodge the Act's clear monitoring mandate and EPA's own regulations do not hold water.

A. EPA Is Not Entitled to Heightened Deference

This case presents a pure legal question: whether the Clean Water Act and EPA's regulations require actual pollution monitoring that is capable of assuring permit compliance. Thus, the Court should not afford EPA the heightened deference it requests because this is not a case involving "scientific or technical findings." EPA Br. at 24. EPA misstates the appropriate standard of review, hoping that this Court will accept its position by "defer[ring] to a great extent to the expertise of the EPA." *Id.* But this case is not about "complex scientific data" or expertise that might warrant heightened deference. On the contrary, this case is about EPA's unlawful interpretation of the Clean Water Act's mandate 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 limitation. 33 U.S.C. § 1318(a)(2)(A)(iii)–(iv). No scientific or technical finding underpins EPA's decision in this case, and EPA makes no attempt to point the Court to any such findings in the record; instead, EPA has simply adopted an arbitrary interpretation of the law to justify its special treatment of CAFOs. As such, this Court does not

owe EPA's interpretation any heightened deference.[6]

B. EPA May Not Omit Monitoring Capable of Assuring Compliance with the Idaho Permit's Effluent Limitations

By taking two statutory clauses out of context, EPA suggests the Clean Water Act's "broad discretionary language" nullifies the agency's obligation to include representative compliance monitoring provisions in the Idaho Permit. EPA Br. at 28. However, neither the Clean Water Act nor EPA's own regulations grants EPA discretion to issue the Idaho Permit without monitoring requirements that assure compliance with the permit's effluent limitations.[7] To the contrary, by failing to include effluent monitoring in the Idaho Permit, EPA contravenes a cornerstone of the NPDES program.

The Clean Water Act mandates that every point source monitor for the pollution the facility actually discharges so that regulators and the public can determine whether the facility complied with the Act. Opening Br. at 35–42. EPA "shall require" effluent monitoring to "determin[e] whether any person is in

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[6] Congressional intent regarding monitoring to assure compliance is clear, therefore this case can be resolved at *Chevron* Step 1. *See Chevron, U.S.A. v. NRDC*, 467 U.S. 837 (1984). However, if this Court were to perceive ambiguity, EPA's interpretation is not reasonable for the reasons stated herein and thus is not entitled to deference. *See Alaska Wilderness League v. Jewell*, 788 F.3d 1212, 1217–18 (9th Cir. 2015) (outlining the *Chevron* analysis).

[7] EPA has significant discretion to tailor monitoring parameters to match the specific needs and circumstances of a particular NPDES permit, so long as such monitoring is representative and capable of ensuring compliance with effluent limitations. But here EPA seeks to omit monitoring requirements altogether.

violation" of an applicable effluent limitation, 33 U.S.C. § 1318(a)(2)(A), and "shall prescribe conditions for [NPDES] permits to assure compliance with" effluent limitations and other provisions of the Act, *id.* § 1342(a)(2). EPA has accordingly issued regulations that unambiguously require such effluent monitoring in all NPDES permits. *See* Opening Br. at 37–38 (citing 40 C.F.R. §§ 122.41(j), 122.44(i), 122.48(b)).

Here, EPA concedes that the Clean Water Act "requires . . . 'monitoring equipment or methods' to sample *effluents*," EPA Br. at 6 (emphasis added) (quoting 33 U.S.C. § 1318(a)), and that this monitoring "shall be representative of the monitored activity," *id.* (citing 40 C.F.R. § 122.41(j), titled "Conditions applicable to all permits"). EPA further agrees that the activity for which monitoring must be representative is "the discharge of pollutants to waters of the United States." EPA Br. at 36. EPA concludes that "[t]he monitoring provisions in the [Idaho] Permit must be judged against these requirements." *See id.* at 7. Petitioners agree.

Notwithstanding these acknowledgments, EPA claims that "[n]othing in the . . . implementing regulations . . . limits EPA's discretion." EPA Br. at 30. EPA attempts to dodge these legal requirements by selectively pulling out two clauses that it interprets as "broad discretionary language," allowing EPA to ignore the role

of monitoring in the Act's overall framework.[8] EPA Br. at 28. The Supreme Court and this Court have warned against and rejected such a focus on a "single sentence or member of a sentence, [without] look[ing] to the provisions of the whole law, and to its object and policy." *Dole v. United Steelworkers of Am.*, 494 U.S. 26, 35 (1990); *Slaven v. BP Am., Inc.*, 973 F.2d 1468, 1472 (9th Cir. 1992) (noting "courts must consider a statutory provision's phraseology in light of the overall structure and purpose of the legislation" when interpreting the words in a statute).

First, EPA misinterprets section 308's instruction to require that point sources conduct monitoring "[w]henever required to carry out the objective of this [Act]." 33 U.S.C. § 1318(a); *see* EPA Br. at 28 (arguing that this clause reduces effluent monitoring to a mere suggestion that EPA may adopt or ignore). Read in context, it is clear that this provision considers *how* and *when* to require monitoring, not *whether* to require it at all, because some form of pollution monitoring is *always* "required to carry out the objectives of th[e Act]," *i.e.* to eliminate the discharge of pollution into U.S. waters. *See* 33 U.S.C. § 1251(a)(1). As Petitioners have explained, effluent monitoring plays a fundamental role in how

[8] EPA heavily relies on *U.S. Steel Corp. v. Train*, in which the Seventh Circuit upheld EPA's decision to include effluent monitoring more often and in more places than the industry petitioner thought was appropriate. 556 F.2d 822, 850–51 (7th Cir. 1977); EPA Br. at 2, 29, 40. This case shows only that EPA has broad authority to fashion effluent monitoring more robustly than industry may think is appropriate, but provides no support for EPA's assertion that is has discretion to entirely ignore effluent monitoring.

the Clean Water Act operates to achieve this lofty goal. Opening Br. at 36, 39. EPA's regulations reinforce the essential role that monitoring plays in NPDES permitting and enforcement. *See, e.g.*, 40 C.F.R. § 122.48 ("All permits shall specify [appropriate monitoring and reporting requirements]."). The Clean Water Act cannot function as intended, and cannot achieve its goal, without actual monitoring that establishes whether permittees are complying with the effluent limits at the core of the Act's protections. Thus, contrary to EPA's interpretation, this clause in section 308 buttresses the mandatory nature of effluent monitoring to assure compliance.

Next, EPA offers a similarly selective reading of one clause in section 402. Section 402 requires EPA to equip NPDES permits with provisions that assure compliance, "including conditions on data and information collection, reporting, and such other requirements as [the Administrator] deems appropriate." 33 U.S.C. § 1342(a)(2). EPA argues that the phrase "and other such requirements as [the Administrator] deems appropriate" means there are no limits to EPA's discretion as to which requirements it can adopt and which ones it can ignore. *See* EPA Br. at 20, 28. This is plainly unreasonable. As evidenced by the use of the conjunctive "and" rather than "or", Congress included this catchall clause to empower EPA to condition permits so they are fully capable of assuring compliance. By no means does this clause give EPA a blank check to issue NPDES permits that *fail* to assure

compliance. Yet, that is precisely what the Idaho Permit does by failing to require representative monitoring for nearly all aspects of how CAFOs discharge effluent.

This striking interpretation of the statute also explains EPA's erroneous conclusion that the Idaho Permit complies with this Court's holdings in *NRDC v. County of Los Angeles*, 725 F.3d 1194 (9th Cir. 2013) ("*County of L.A.*"). *See* EPA's Br. at 31–32. In that case, this Court recognized that the Act requires monitoring in every NPDES permit "in a manner sufficient to determine whether [the permittee] is in compliance." *County of L.A.*, 725 F.3d at 1207. EPA argues that the Idaho Permit satisfies *County of L.A.* because it "generally prohibits discharges and requires monitoring and reporting of discharges that do occur." EPA Br. at 31. But although the Idaho Permit purports to require reporting of *violations*—which Petitioners dispute because without monitoring many unlawful discharges will go undiscovered—it does not require monitoring to assure *compliance* with the zero-discharge effluent limitation. As Petitioners' have explained, the Idaho Permit's stringent prohibition on most discharges does not obviate the need for monitoring because zero is a numerical limit that must be subject to monitoring to assure compliance, just as EPA has required in other permits with zero-discharge limits. *See* Opening Br. at 54–55. Like the defendants' preferred reading of the permit at issue in *County of L.A.*, under which the permit would not be capable of assuring compliance or establishing liability for permit

violations, the Idaho Permit fails to hold CAFOs accountable for their discharges. Thus, contrary to EPA's assurances, EPA's Br. at 31–32, the Idaho Permit does not comport with binding Ninth Circuit precedent. The Permit's effluent limitations, alone and unverified, are simply not equivalent to the effluent monitoring stations at issue in *County of L.A.* that actually monitored for permit compliance and held permittees accountable.[9]

In sum, EPA's selective interpretation of the statute does not hold up when put into context. This Court must interpret the statute's text "as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (citations omitted). EPA's interpretation should be rejected as contrary to law because, by ignoring mandatory statutory and regulatory text, it

[9] EPA's attempts to distinguish *NRDC v. EPA*, 808 F.3d 556 (2d Cir. 2015) are also unavailing. Just as in that case, where EPA could not rely on *expected* as opposed to actual discharges to assure compliance, *see* EPA's Br. at 32, EPA cannot rely on its *expectations* that CAFO best management practices will result in zero or minimal pollution discharges as required by the Idaho Permit. EPA asserts that the Idaho Permit "requires monitoring and reporting of actual discharges from the production area," something the Second Circuit likely would have found sufficient. EPA Br. at 32. If EPA is referring to the single provision in the Idaho Permit requiring monitoring of one specific discharge activity (*i.e.*, the overflow of waste storage structures at a CAFO production area caused by an extreme precipitation event), then Petitioners agree. Opening Br. at 49–50. But the problem remains that CAFOs have numerous other pathways for the discharge of pollutants, from both production and land application areas, and the Permit fails to assure compliance with its limits on discharges from these points. *Id.* at 16, 50.

eliminates a fundamental and necessary part of the NPDES permitting program.

C. EPA Arbitrarily Characterizes Equipment Inspections and Other Permit Provisions as "Monitoring"

Although EPA's brief is inconsistent about what constitutes "monitoring," it is clear that EPA's position is mistaken in at least two regards. First, EPA has adopted an untenably expansive interpretation of what qualifies as monitoring under the Clean Water Act. While EPA paints Petitioners' arguments as "overly formalistic," EPA Br. at 30, 39, its counter-textual interpretation leaves the word "monitoring" devoid of practical meaning. Second, EPA repeatedly misstates the nature of the monitoring Petitioners seek.

EPA arbitrarily characterizes a handful of provisions in the Idaho Permit as "monitoring." *See* EPA Br. at 3–4, 30. As Petitioners have explained, these other provisions are *not* representative monitoring capable of assuring compliance, and cannot satisfy the Act's monitoring mandate. Opening Br. Part II.B. Because "monitoring" is not specifically defined in the Act, the term should be given its plain meaning in light of the overall statutory structure and context. *Wilderness Soc'y v. U.S. Fish & Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir. 2003) (citing *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (looking to "the structure and purpose of a statute [to] provide guidance in determining the plain meaning of its provisions")), *amended on reh'g*, 360 F.3d 1374 (9th Cir. 2004). Here, monitoring fulfills a particular statutory purpose: to assure compliance with

pollution limits. This purpose provides essential context that must inform the meaning of the term.

In its effort to blur the distinction between effluent monitoring and other permit requirements, EPA fabricates a new all-encompassing term: "accountability requirements." EPA Br. at 11. But of course, *all* permit requirements are "accountability requirements"; this umbrella term cannot erase the statute's differentiation between pollution control practices and the monitoring of their effectiveness in attaining effluent limits. Under EPA's loose interpretation (and in contrast with its own statement of the law, *id.* at 6) the Permit's so-called "monitoring" bears no relation to the effluent actually discharged from a CAFO. Instead, according to EPA, simply verifying that a pollution control mechanism seems to be in place or looking at equipment at some undefined interval is enough to satisfy the Act's monitoring mandate. *Id.* at 20 ("To ensure compliance . . . the Permit contains inspection provisions to determine if discharges are occurring . . ."). Further, EPA claims that nutrient sampling of manure and soil (to calculate waste land application rates) are monitoring because "that can help demonstrate permit compliance." *Id.* at 39–40. But while these requirements may help show compliance with some permit provisions, they do not demonstrate compliance with *effluent limitations*. These examples illustrate just how far afield EPA has gone in claiming freedom to craft "monitoring" provisions that have nothing to do with

what pollution a CAFO actually discharges and do not assure compliance by generating effluent data that can be compared against the permit's effluent limits.

EPA's strained interpretation is likely the reason why EPA's brief fails to offer a consistent position on what exactly is or is not "monitoring" in the Idaho Permit. EPA oscillates between treating equipment inspections, soil sampling, and other practices as "monitoring," and distinguishing between such permit provisions and "monitoring." *Compare* EPA's Br. at 3–4 (describing a "monitoring regime" that includes many non-monitoring provisions), *and id.* at 30 ("types of monitoring EPA deems more appropriate, including inspections"), *with id.* at 11 (separating "monitoring and inspection conditions"), *and* 20 (distinguishing between "inspection provisions" and "monitoring and reporting requirements"). EPA's confusion is understandable; having jettisoned the commonsense requirement that monitoring to assure compliance must relate to actual effluent discharges, a coherent understanding of monitoring is difficult to ascertain.

Tellingly, EPA cannot muster another example where such non-monitoring provisions have been used in an NPDES permit to supplant actual effluent monitoring.[10] Instead, EPA points the Court to a case where it required permittees

[10] EPA represents that "[t]he form of monitoring required in the Idaho Permit is typical for permits like this one," but does not provide any examples. EPA Br. at 30. At best, EPA may be referring to other CAFO permits outside of Idaho, which Petitioners concede also typically, but not universally, fail to include monitoring as

to conduct a "visual sheen test" to determine compliance with a zero-discharge limit on oil discharges. EPA Br. at 29, 35. But that example *supports* Petitioners' position because that permit required actual monitoring of effluent, as it interacted with receiving waters. *NRDC v. EPA*, 863 F.2d 1420, 1433 (9th Cir. 1988) (hereinafter "*Visual Sheen Case*") ("visual sheen test amounts to 'a visual observation of the receiving water' after drilling fluids are discharged, to determine if a sheen results on the surface of the water"). The Idaho Permit's requirements to visually inspect certain *equipment* are entirely different from a monitoring provision requiring a visual observation of an outfall for certain *effluent properties*.

This leads to Petitioners' second point, that EPA misstates Petitioners' request. Petitioners do not argue that EPA lacks authority to tailor effluent monitoring methods and frequencies for CAFO pollution discharges in the same manner it tailored monitoring for oil and gas operation discharges in the *Visual Sheen Case*. Nor are Petitioners demanding "continuous effluent monitoring" as the only option for CAFO compliance monitoring, as discussed in note 5, above. Rather, Petitioners assert that EPA must impose monitoring requirements on the facilities' actual pollution—not merely inspection routines for their practices. *See* EPA Br. at 29 (claiming "discretion to require visual inspections . . . to ensure

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required by the Act. EPA cannot rely on equally unlawful permits outside of Idaho to justify its shortcomings here.

compliance"); ER at 38 (requiring mere "periodic[] inspections" of land application equipment). The Clean Water Act requires both best management practices to control pollution at the facility *and* monitoring to assure that effluent leaving the point source does not violate the permit or water quality standards. 33 U.S.C. §§ 1318(a), 1342(a)(2); 40 C.F.R. §§ 122.44(i) & (k)(3)–(4), 122.48.[11]

EPA accuses Petitioners of being "overly formalistic" in drawing a commonsense distinction between control technologies and practices, on the one hand, and effluent monitoring to confirm that those practices are actually effective, on the other. EPA Br. at 30, 39. But, this distinction is *fundamental*, not formalistic, and EPA's practice of requiring both pollution control practices and effluent monitoring for every other point source category underscores this truth. Though EPA seeks to grant CAFOs special treatment through a permit scheme that assumes without verification that CAFOs do not discharge pollutants, the record demonstrates that CAFOs are a pervasive source of water pollution in Idaho. *See* Opening Br. at 13–22. Thus, EPA's approach is contrary to not just the Clean

[11] EPA also points to the *Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities*, EPA Br. at 29 n.5, but that permit goes on to mandate robust effluent monitoring at all outfalls. EPA, National Pollutant Discharge Elimination System (NPDES) Multi-Sector General Permit for Stormwater Discharges Associated with Industrial Activities (MGSP), https://www.epa.gov/sites/production/files/2015-10/documents/msgp2015_finalpermit.pdf (last visited Jan. 11, 2021) (containing several pages of detailed effluent monitoring provisions, beginning at page 39). Thus, this example also supports Petitioners' position.

Water Act, but commonsense.

Finally, EPA's arbitrary interpretation of what constitutes monitoring renders the whole concept duplicative of other statutory provisions, namely the development and implementation of control technologies or practices through technology-based effluent limitations. *See* 33 U.S.C. § 1311(b)(1)(A). EPA's position would impermissibly cause substantial portions of the statutory text and its own regulations to become mere surplusage. *See* Opening Br. at 36–37. Given all of this, the Clean Water Act interpretations EPA uses to justify its failure to include actual monitoring in the Idaho Permit are arbitrary, capricious, and contrary to law.

III. The Idaho Permit Does Not Provide Adequate Information to Enable Citizen Enforcement as Congress Intended

The Clean Water Act requires EPA to provide for, encourage, and assist citizen enforcement efforts. 33 U.S.C. § 1251(e). By arguing the information generated under the Idaho Permit is merely "sufficient to allow citizen enforcement," EPA Br. at 43, EPA posits a far lower standard. But even under this standard, EPA's argument is untethered from reality and underscores its lax treatment of CAFOs. Citizens bringing Clean Water Act enforcement actions against any other industry typically enter court armed with straightforward effluent data that describes the who, what, when, and where of a given discharge. *See, e.g.*, *Idaho Conservation League v. Atlanta Gold Corp.*, 844 F. Supp. 2d 1116, 1127–28

(D. Idaho 2012) (ruling for citizen plaintiffs based on discharge monitoring reports[12] that established a mining company's regular discharges of certain pollutants into a particular waterway); Opening Br. 59–60. This uncomplicated format is exactly what Congress intended when it structured the Act to rely on citizen enforcement. Contrary to EPA's argument, information generated by the Idaho Permit's Annual Report requirement does not serve the same function. Because the Idaho Permit does not include monitoring requirements that are representative of a CAFO's *effluent discharge*—the activity EPA concedes must be monitored, EPA Br. at 36—EPA has unlawfully deprived the public of information necessary for practicable citizen enforcement.

As a practical matter, CAFOs are prone to undiscovered discharges if discharge points are not monitored. *See* Opening Br. at 16 (discussing the various potential discharge points for a CAFO). While the Idaho Permit requires CAFO operators to disclose unauthorized discharges from production areas in the Annual Report, undiscovered discharges are likely because the Permit does not require monitoring at foreseeable discharge points in the first place. CAFOs cannot report

[12] EPA defines "discharge monitoring report" (DMR) as "the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by 'approved States' as well as by EPA." 40 C.F.R. § 122.2. Though Petitioners do not assert DMRs are the only way to fulfill the Clean Water Act's monitoring requirements, they are illustrative of how monitoring data is meant to facilitate citizen participation in permitting and enforcement.

what they do not perceive, and operators are unlikely to perceive discharges when they are not required to look. So, even if EPA were correct that the "only information that a citizen needs to bring a citizen suit is the fact there was an unauthorized discharge to waters of the United States," EPA Br. at 45, the Permit will not reliably require CAFOs to capture and report this information.

EPA also misstates what Annual Reports must actually include and the utility of that information. *See* EPA's Br. at 43–44. EPA cites Sections IV.A and IV.B of the Idaho Permit as supplying the Annual Report's required contents, including many of the inspection and so-called "monitoring" provisions, such as the depth measurements of waste in storage structures. In reality, the Permit only requires that most of this information be made available to EPA "upon request"—not in the Annual Report. *Compare* ER 18–19 (listing record keeping requirements in the Permit that only become available if requested by EPA), *with* ER 20 (requiring Annual Reports to contain the information outlined in the template, found at ER 151–56, which does not include what EPA claims). Moreover, such information does not establish whether a CAFO actually complied with the Permit's discharge limitations because it documents practices and procedures that are intended to control pollution rather than identifying what effluent actually leaves the facility. Likewise, the Annual Report's generalized information about land application practices—such as the amount of manure applied to a field over

the span of a year—is unable to show whether a CAFO operator consistently abided by its NMP, which EPA admits is the key to distinguishing a wet weather permit violation from an exempt agricultural stormwater discharge,[13] or whether CAFOs are causing dry weather discharges. EPA Br. at 39, 43; ER 20, 151–64 (Annual Reports need only include aggregate land application information). The Annual Report does not even require CAFOs to disclose non-exempt discharges from land application areas when discovered. *See* ER 151–56.

Further, an Annual Report's yearly totals and perceived discharge disclosures provide little, if any, insight into the nature of a violation or whether there was resultant harm. For instance, a CAFO could abide by an NMP's limit on the cumulative amount of waste that may be applied to a field in a year, while still regularly discharging pollutants through prohibited land application practices. Whereas monitoring data from that field's discharge points, such as drainage ditches or tile drains, would provide crucial information about Permit compliance, the Annual Report would not even register if waters were being polluted in

[13] Despite Congress explicitly listing CAFOs as point sources, EPA has functionally transformed them into nonpoint sources by assuming CAFO discharges are exempt agricultural stormwater. *See* 33 U.S.C. § 1362(14); EPA Br. at 32 n.6. This impermissibly makes the exemption the rule. To comply with the law, CAFOs must monitor their discharges and *then* establish that the exemption applies by showing the discharge was caused by precipitation and the CAFO complied with its NMP. *See N. Cal. River Watch v. City of Healdsburg*, 496 F.3d 993, 1001 (9th Cir. 2007) (holding that CWA exemptions are to be "narrowly construed" and the burden is on the permittee to show an exemption applies).

violation of the Permit. Because citizens cannot simply look to the Annual Report to confirm compliance, citizen enforcement efforts against CAFOs are prohibitively complex and resource-intensive. Opening Br. at 60–61. This is precisely the outcome Congress sought to avoid by requiring representative discharge monitoring, and rejecting only noncompliance reporting. *See* S. Rep. 95-370, at 56 (1977) (stating that permittees must do more than "report to the Agency only when their self-monitoring data indicates a violation").

EPA's position also ignores the reality that citizens must establish standing to bring a viable enforcement action. A plaintiff alleging NPDES permit violations must typically be able to demonstrate a reasonable fear of harm from discharges flowing into a waterbody they use for recreation, drinking water, or aesthetic value. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 182–84 (2000). Actual monitoring can show that particular pollutants or particular volumes of effluent entered a particular waterway at a particular time. These details show a plaintiff's fear is reasonable. *Id.* In contrast, the provisions that EPA incorrectly categorizes as monitoring, *supra* Part II.C., do not. For example, a CAFO operator's failure to inspect a storage structure or piece of equipment does not necessarily mean that pollution has been discharged to a particular waterway. Contrary to Congress' purpose in mandating an NPDES monitoring regime, these uncertainties chill citizen enforcement efforts. *See* S. Rep. 92-414, at 80 (1971), *as*

reprinted in 1972 U.S.C.C.A.N. 3668, 3746 ("[C]itizens should be unconstrained to bring [citizen suits."]).

Establishing standing also requires citizens to show the pollutants are "fairly traceable" to a particular CAFO. *Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th Cir. 2000). But, given the large number of CAFOs and other agricultural operations that generate pollutants along Idaho's waterways, linking pollutants to a specific facility is extremely difficult once the pollution has left the immediate vicinity of the CAFO. 68 Fed. Reg. 7176, 7217. This impermissibly places the burden of proving permit compliance on the public and is certain to require the "lengthy fact finding" Congress sought to avoid. Opening Br. at 58–61.

The Idaho Permit is inconsistent with Congress' vision for streamlined enforcement because the public information it will generate predominantly focuses on a CAFO's waste inputs, but not its pollution outputs. The lack of monitoring data from foreseeable discharge points, combined with EPA's counterfactual assumption that control practices prevent illegal discharges in all but the most extreme precipitation events, allows CAFOs to benefit from the protection of NPDES permits without having to affirmatively demonstrate compliance with pollution limits. This scheme leaves citizens scrabbling for evidence capable of supporting lawsuits against a polluting industry that EPA has bent over backwards

to avoid regulating in the manner Congress intended. Accordingly, the Idaho Permit unlawfully deprives Idahoans of their participatory rights under the Clean Water Act. 33 U.S.C. § 1251(e); *Waterkeeper*, 399 F.3d at 503–04.

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.

Dated this 13th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

This brief complies with the length limits permitted by Ninth Circuit Rule 32-1. The brief is 6970 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Dated this 13th day of January, 2021.

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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 January 13, 2021. 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 13th day of January, 2021.

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ADDENDUM OF STATUTES AND REGULATIONS

Except for the following, all applicable statutes and regulations are contained in the brief or Addendum of Petitioners' Opening Brief, ECF No. 16.

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40 C.F.R. § 122.2 – Definitions

. . .

Discharge Monitoring Report ("DMR") means the EPA uniform national form, including any subsequent additions, revisions, or modifications for the reporting of self-monitoring results by permittees. DMRs must be used by "approved States" as well as by EPA. EPA will supply DMRs to any approved State upon request. The EPA national forms may be modified to substitute the State Agency name, address, logo, and other similar information, as appropriate, in place of EPA's.

DMR means "Discharge Monitoring Report."

. . .

40 C.F.R. § 125.3 – Technology-based treatment requirements in permits

(a) General. Technology-based treatment requirements under section 301(b) of the Act represent the minimum level of control that must be imposed in a permit issued under section 402 of the Act. (See §§ 122.41, 122.42 and 122.44 for a discussion of additional or more stringent effluent limitations and conditions.) Permits shall contain the following technology-based treatment requirements in accordance with the following statutory deadlines;

. . .

(2) For dischargers other than POTWs except as provided in § 122.29(d), effluent limitations requiring:

. . .

(v) For all pollutants which are neither toxic nor conventional pollutants, effluent limitations based on BAT—

(A) For effluent limitations promulgated under section 304(b), compliance is required as expeditiously as practicable but in no case

later than 3 years after the date such limitations are established and in no case later than March 31, 1989.

(B) For permits issued on a case-by-case (BPJ) basis under Section 402(a)(1)(B) of the Act after February 4, 1987 establishing BAT effluent limitations compliance is required as expeditiously as practicable but in no case later than three years after the date such limitations are established and in no case later than March 31, 1989.

. . .

(c) Methods of imposing technology-based treatment requirements in permits. Technology-based treatment requirements may be imposed through one of the following three methods:

. . .

(2) On a case-by-case basis under section 402(a)(1) of the Act, to the extent that EPA-promulgated effluent limitations are inapplicable. The permit writer shall apply the appropriate factors listed in § 125.3(d) and shall consider:

(i) The appropriate technology for the category or class of point sources of which the applicant is a member, based upon all available information; and

(ii) Any unique factors relating to the applicant.
[Comment: These factors must be considered in all cases, regardless of whether the permit is being issued by EPA or an approved State.]

40 C.F.R. § 468.03 – Monitoring and reporting requirements

The following special monitoring requirements apply to all facilities controlled by this regulation.

(a) The "monthly average" regulatory values shall be the basis for the monthly average discharge in direct discharge permits and for pretreatment standards. Compliance with the monthly discharge limit is required regardless of the number of samples analyzed and averaged.

(b) As an alternate monitoring procedure for TTO, indirect dischargers may monitor for oil and grease and meet the alternate monitoring standards for oil and grease established for PSES and PSNS. Any indirect discharger meeting the alternate monitoring oil and grease standards shall be considered to meet the TTO standard.