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Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from: District Court: City and County of Denver District Court Case Number: 2023CV32544 District Court Judge: Hon. Christopher J. Baumann	
Plaintiffs-Appellants: FRIENDS OF ANIMALS, RIVER RUNNERS FOR WILDERNESS, AND LIVING RIVERS, v. Defendants-Appellees: COLORADO PARKS AND WILDLIFE COMMISSION AND DIVISION OF PARKS AND WILDLIFE	▲ FOR COURT USE ▲
Stephen Hernick, Atty. Reg. #: 54679 Jennifer Best, Atty. Reg. #: 46549 6041 S. Syracuse Way, Suite 250 Greenwood Village, CO 80111 720-945-9453 shernick@friendsofanimals.org jennifer@friendsafanimals.org	Court of Appeals Case Number: 2025CA2144
APPELLANTS' OPENING BRIEF	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of Colorado Appellate Rules (C.A.R.) 28 and 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with the applicable word limits set forth in C.A.R. 28(g).

It contains 9,347 words.

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A).

For each issue raised by the appellant, the brief contains under a separate heading before the discussion of the issue, a concise statement: (1) of the applicable standard of appellate review with citation to authority; and (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled, not to an entire document.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 28.1, and C.A.R. 32.

/s/ Stephen R. Hernick

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INTRODUCTION

State agencies cannot arbitrarily restrict the activities of most people on state lands while allowing a favored few to engage in the same activities. But that is exactly what Appellees the Colorado Parks and Wildlife Commission and the Division of Parks and Wildlife (collectively “CPW”) did here. In 2023, CPW approved a rule revising the regulations for State Wildlife Areas (SWAs) to restrict a large number of outdoor activities that it had always allowed (hereinafter, the “Regulations”). But the Regulations do not outright prohibit these activities; instead, they generally authorize hunters and fishers to continue these activities, while prohibiting other wildlife enthusiasts from partaking in those same activities. Specifically, the Regulations prohibit the vast majority of people from paddleboarding, camping, wading in creeks and lakes, or walking their dog in SWAs. Yet the Regulations allow hunters and fishers to do these very things. CPW never explained why activities that it marked as off limits for most are permissible for those who hunt or fish. In many SWAs, CPW has severely restricted all public access, except for hunting and fishing.

These are significant changes that affect people who enjoy the Colorado outdoors and wildlife. Yet CPW arrived at these changes haphazardly: CPW conducted no surveys or studies to document how SWAs are used; it did not

consider any less drastic alternatives; and the Colorado Parks and Wildlife Commission (Commission) inexplicably failed to even look at more than 95% of the comments that concerned citizens submitted in accordance with CPW's instructions. The arbitrary process of approving these Regulations violated the Administrative Procedure Act (APA).

Accordingly, Plaintiffs-Appellants Friends of Animals, Living Rivers, and River Runners for Wilderness, three nonprofit organizations (hereinafter, "Nonprofits"), sued. The District Court ruled in favor of CPW and upheld the Regulations. In doing so, the District Court misunderstood Nonprofits' arguments, mischaracterized the Regulations, and misapplied the APA. For the reasons that follow, Nonprofits respectfully request that this Court reverse the District Court, declare the Regulations unlawful, and vacate them.

ISSUES PRESENTED FOR REVIEW

1. Are the Regulations arbitrary and otherwise unlawful in violation of § 24-4-106(7), C.R.S. 2025 when they prohibit a wide range of wildlife-related recreation in SWAs while allowing similar activities by hunters and fishers and when there is no evidence in the record to support such disparate treatment?
2. Did CPW substantially comply with APA rulemaking requirements when it directed the public to comment on EngageCPW, explicitly stated the

Commission would consider such comments, and then the Commission failed to consider such comments and excluded them from the administrative record?

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. SWAs are intended to afford the public a wide variety of wildlife-related recreation.

Colorado law defines SWAs as places for “the benefit of wildlife populations or for wildlife-related recreation.” § 33-1-102(42), C.R.S. 2025. Colorado law further reinforces this idea by stating that wildlife should be protected and preserved for the “use, benefit, and enjoyment of the people,” and directing state agencies to make available “the greatest possible variety of wildlife-related recreational opportunity to the people of this state and its visitors.” § 33-1-101(1), C.R.S. 2025. Nowhere in the statutes are SWAs, or wildlife-related recreation in general, limited to hunting and fishing. *See id.*

Furthermore, it is longstanding CPW policy that SWAs be used for (1) “the preservation and conservation of wildlife and their habitat” and (2) “wildlife-related recreational opportunities to the public, so long as such uses are compatible with wildlife and habitat management goals.” CF, p.104. Such wildlife-related recreation is intended to include “hunting, fishing and trapping of appropriate game species **as well as watchable wildlife use and enjoyment of all wildlife species.**” *Id.* (emphasis added). CPW has further made broad statements supporting

this policy, such as declaring that SWAs are “for the benefit of wildlife.” CF, p.433 (quoting CPW website). CPW has also stated that one reason it purchases SWAs is to “provid[e] areas for wildlife-related recreation.” CF, p.550 (Regulations’ Basis and Purpose statement).

But beginning in 2020, CPW has, through multiple means, tried to limit recreation in SWAs to hunting and fishing. On April 30, 2020, CPW approved a new regulation that prevented anyone from accessing any SWA unless they possessed a state hunting or fishing license. *See* 43 Colo. Reg. 11 (June 2020).

Plaintiff-Appellant Friends of Animals filed a lawsuit against CPW, alleging that it was unlawful to require the majority of Coloradans who are not hunters or fishers to purchase a hunting or fishing license in order to enter any SWA. First Am. Compl., *Friend of Animals v. Colorado Parks & Wildlife Commission, et al.*, 2020-CV-32680 (Denver Dist. Ct.). After some discussion internally and with Friends of Animals, CPW amended this regulation and created the “SWA Pass,” which allows non-hunters and non-fishers to pay for access to SWAs. 2 Colo. Code Regs. § 406-9(C)(1)(c) (2025). Thus, as a result of Friends of Animals’ lawsuit, people can enter SWAs without needing to purchase a hunting or fishing license and by instead purchasing an SWA Pass. *Id.*

However, CPW has continued to prioritize the experience of hunters and fishers at SWAs. For instance, CPW conducts annual surveys with hunters to determine if they are satisfied with their hunting experiences, including whether they felt crowded by other people. CF, p.568, ¶¶ 138-39. In contrast, CPW conducts no satisfaction surveys of SWA Pass holders. *Id.* at ¶¶ 141-42.

After the SWA Pass was created, and in the context of discussing the Regulations at issue here, CPW Commissioner Taishya Adams reiterated that CPW should not simply cater to hunters and fishers. Referencing that non-consumptive wildlife recreationalists had no way to directly fund CPW's conservations efforts before the SWA Pass, Commissioner Adams observed that "it's important that [CPW] not differentiate between those who have paid in and those who are paying in now." CF, p.303. She stressed that "everyone plays a management role, regardless if they're hunters and anglers, if they're hikers, if they're birders, if they're boaters." *Id.* But CPW did not heed Commissioner Adams' words.

B. CPW proposes and approves the Regulations, which prohibit wildlife-related recreational activities other than hunting and fishing in a large number of SWAs.

The Regulations challenged here both made additions to the generally prohibited activities in SWAs and altered the property-specific prohibited activities for most of the more than 300 SWAs throughout the state. CF, pp.459-62, 467-543.

Specifically, activities now generally prohibited in SWAs include (1) off-road biking, (2) camping, (3) building a fire, (4) taking a dog or other pet, (5) using any “vessel,” and (6) any “water contact activities.” CF, pp.459-62. The Regulations define “vessel” to mean “every description of watercraft,” including paddleboards and tubes. CF, p.458. The Regulations define “water contact activities” to mean “swimming, wading (**except for the purpose of fishing or hunting**) . . . and other water-related activities.” *Id.* (emphasis added). Notably, the Regulations generally do not prohibit hunting dogs (including off leash) or the use of “vessels” when used for hunting or fishing. CF, p.461.

The Regulations place each SWA into one of four tiers. CF, pp.443-53. Ostensibly, the tiers were intended to help determine how restrictive CPW would be in allowing recreational activities. *See* CF, p.443 (“Tier 1 properties should be considered for more restrictive regulations regarding public access and non-wildlife or hunting/fishing related activities.”). CPW’s prioritization of hunting and fishing over any other type of wildlife-related recreation is clear from the tiers. For instance, an SWA could qualify for Tier 1 or Tier 2 if it had “important hunting or fishing access [or] high quality hunting opportunity,” but not if it offered particularly strong wildlife viewing opportunities. *Id.* In contrast, an SWA was placed into the lower Tier 3 category if “[h]unting is significantly limited or

unavailable on the property,” even if educational and interpretive opportunities are “significant.” CF, p.444.

Similarly, the rationales provided by CPW for each SWA’s tier placement often rely on the quality of hunting and fishing at the SWA. *See, e.g.*, CF, p.446 (Ralston SWA rated as Tier 1 for “Year round elk use, hunting”). CPW occasionally notes when hunting or fishing opportunities at an SWA are impacted by other recreation, but it never mentions whether wildlife viewing is negatively affected by too many hunters or fishers. *See, e.g.*, CF, p.447 (noting that there is “[m]inimal fishing activity due to heavy recreational pressures” at Beaver Lake SWA).

It is not possible to describe all of the nearly 300 property-specific restrictions amended by the Regulations, as the details differ at each SWA. Instead, Nonprofits will summarize some of the common restrictions they have challenged while highlighting some of the SWAs that have these restrictions. At some SWAs, CPW prohibits public access for much of the year except for hunting and fishing. *E.g.*, CF, pp.472. At Beaver Creek SWA, for example, from August 15 through April 30—more than two thirds of the year—the only public access allowed is hunting and fishing and “wildlife viewing from established parking areas.” *Id.*; *see also* CF, p.497 (same prohibition at Heckendorf SWA). At Basalt SWA, public

access is prohibited in most of the SWA for seven-and-a-half months, except for spring turkey hunting. CF, p.471. At other SWAs, CPW allows an exception for the general prohibition on camping, but only for “licensed hunters during an established big game season.” *E.g.*, CF, p.496 (Gunnison SWA); CF, p.500 (Huerfano SWA).

CPW’s statutorily required “basis and purpose” for the Regulations begins by repeating the general purpose of SWAs discussed above, *see* Part A *supra*, and then includes the following short justification for the Regulations:

Over the last 7-8 years [SWA] use has dramatically increased, causing a corresponding rise in negative impacts on wildlife and wildlife related recreation. To combat these trends CPW has examined SWAs across the state and modified regulations to protect the wildlife and wildlife habitats found on these lands. These changes include updating the general provisions to be more restrictive and modifying language found in the property specific regulations. . . .

CF, p.550. The “basis and purpose” does not quantify the increase in use, explain what the “negative impacts” were, or explain how the new restrictions will protect wildlife. *See id.* The “basis and purpose” then has brief descriptions of some of the property-specific prohibitions at about two dozen SWAs. *See* CF, pp.550-57. It is not clear why CPW chose to explain the property-specific prohibitions at these SWAs but not at the more than 200 other SWAs where property-specific prohibitions were revised. *Compare id. with* CF, p.467-543. As just one example,

Basalt SWA has significant new property-specific restrictions that are not explained in the “basis and purpose.” CF, pp.471-72.

The administrative record does not reveal the details of the process leading to the proposal of the Regulations or the specific reasons why they were proposed. *See generally* CF, pp.97-559. Apparently, some kind of external CPW working group recommended that certain activities be restricted within SWAs. *See* CF, pp.193-96. The record does not include information on what the group discussed. *See id.*

Apart from the “basis and purpose,” a memorandum from CPW employee Hilary Hernandez is the only other document in the administrative record that provides any type of explanation of the need for the Regulations. *See* CF, pp.101-03. Hernandez asserted that SWA “use has dramatically increased” in the past seven to eight years and claimed this has led to a “rise in negative impacts on wildlife and wildlife related recreation.” CF, p.101. Hernandez did not offer any further details on what these negative impacts were or what specific uses caused them. *See id.* Hernandez also did not assert that the negative impacts were caused by the activities the Regulations prohibit or by users who were not hunting or fishing. *Id.*

It does not appear that CPW simply forgot to include evidence about “negative impacts” on SWAs from the administrative record. Before it filed this lawsuit, Plaintiff-Appellant Friends of Animals made multiple requests for records under the Colorado Open Records Act (CORA). Friends of Animals requested information on both the number of visitors, actual or estimated, at SWAs over the previous five years and any reports or studies detailing the impact on SWAs by people and dogs over the previous five years. CF, pp.640-41 at ¶¶ 14 and 23. For both of these specific requests, CPW either responded that it had no documents responsive to Friends of Animals’ requests or produced documents not responsive to the requests. *Id.* at ¶¶ 14-23. Accordingly, prior to promulgating the Regulations, it does not appear that CPW studied the number of visitors to SWAs or their impact on SWAs.

C. CPW ignores public comments in approving the Regulations.

CPW advised the public to “provide feedback” on the Regulations on EngageCPW. CF, p.645. CPW assured the public that comments submitted via EngageCPW “will be reviewed by CPW staff and **considered by the Parks and Wildlife Commission.**” *Id.* (emphasis added). CPW advertised the opportunity to comment on EngageCPW via “a news release, local news outlets, and announcements sent to CPW stakeholders.” CF, p.305.

Nearly 200 members of the public submitted comments on the SWA regulations via EngageCPW. CF, p.305. The vast majority of comments, three quarters, opposed the Regulations. *Id.* Commenters expressed their “strong opposition” to the Regulations and explained their many flaws. *See e.g.*, CF, pp.670-71 (Jackson T), 662-63 (Basalt Town Council), 663 and 667-78 (Andre Wille), 666-67 (mposchman), 652-53 (K Mutz), 661 (Julie Wille). Tom Martin, of Plaintiff River Runners for Wilderness, submitted a comment via EngageCPW in which he explained that the Regulations would no longer allow him to launch at the Loma Boat Launch SWA, which would cause him to stop buying a permit in order to do so. CF, p.675 (Tom Martin).

However, the Commission never considered any of the EngageCPW comments. Indeed, Counsel for CPW explicitly admitted that the Commission did not “consider the actual comments submitted to Engage CPW in connection with the rulemaking.” CF, p.648.

Instead, the Commission only considered a three-page memorandum that purported to summarize the 191 comments (hereinafter, “Memo”). CF, pp.305-307. CPW admits that the Memo did not discuss all concerns raised by commenters. CF, p.88 at ¶ 127 (Am. Compl.), CF, p.567 at ¶ 127 (Am. Answer). Rather, the Memo listed about a dozen common themes from the comments. CF,

pp.305-307. For instance, missing from the Memo was any mention of comments that raised issues with stakeholder engagement (*see* comments 1, 13, 40, 65), unfair prioritization of hunters and fishers (*see, e.g.*, comments 10, 15, 16, 20, 25, 26, 31, 34, 50, 56, 65, 80, 114, 116, 131) impacts to climbing (*see* comments 8, 31, 32), impacts to bicycle use (*see* comment 8), negative impacts from fishing (*see* comments 6, 56, 103, 108, 128, 131), or that the changes should be more tailored to individual SWAs (*see* comments 123, 131). CF, pp.650-701. These are just some examples of the concerns shared by the public that were not included in the documents considered by the Commission in approving the Regulations.

Compared to the nearly 200 comments submitted via EngageCPW, only a handful of people emailed comments to the Commission, including Plaintiff-Appellant Friends of Animals. *See* CF, pp.425-441, 575. Friends of Animals' comment raised a number of problems with the Regulations, including that they unreasonably restrict certain types of wildlife-related recreational activities while making exceptions for those same activities if done by hunters or fishers, irrationally prohibit leashed dogs and other pets from SWAs while allowing unleashed hunting dogs, and are disconnected from the stated basis and purpose of reducing impacts to SWAs. CF, pp.434-38. CPW never addressed these concerns or explained why they were dismissed.

D. The District Court upholds the Regulations and CPW’s failure to consider comments.

Nonprofits filed this lawsuit on September 1, 2023. *See* CF, pp.1-18. The parties completed briefing the issues in March 2024, CF, p.1036, and the District Court issued an order affirming the Regulations on October 21, 2025. CF, p.1069. The District Court held that because the Regulations were “reasonably connected to the basis and purpose”—the need to curb the increase in use of SWAs—they were not arbitrary. CF, pp.1078-79. Further, the District Court held that the Regulations did not require substantial evidence because the necessity for the Regulations was based on policy considerations rather than discrete facts capable of proof. CF, pp.1081-83. Separately, the District Court correctly found that CPW violated the APA in failing to include the EngageCPW comments in the record. CF, pp.1085-86. However, it misinterpreted the law in finding that CPW’s violation was insubstantial and in finding that CPW did not have to consider such comments. CF, pp.1083-87.

Nonprofits filed a timely Notice of Appeal on November 6, 2025. CF, p.1091. Since Nonprofits filed this lawsuit, CPW has not offered to reconsider or amend the Regulations in any way.

SUMMARY OF THE ARGUMENT

CPW provided no legitimate basis for approving the Regulations, which unlawfully favor hunting and fishing over all other wildlife-related recreation. There is a glaring mismatch between CPW's stated basis and purpose for the Regulations and the actual Regulations that it approved. While the statement of basis and purpose describes increased use and a rise in negative impacts as a driving force behind the Regulations, *see* CF, p.550, the Regulations do not limit the total number of visitors to SWAs or address the alleged negative impacts. Instead, the Regulations favor two types of use—hunting and fishing—over all other wildlife-related recreation. In fact, CPW admits that the restrictions imposed by the Regulations “turn on whether the visitor is, among other things, actively hunting or fishing.” CF, p.561 at ¶¶ 4-7. There is **no** evidence in the record to support this favoritism. In fact, the limited evidence in the record from commenters shows that hunting and fishing, as well as off-leash hunting dogs, are likely to have a greater negative impact on wildlife than non-consumptive wildlife recreation.

This is a quintessential example of arbitrary decision-making and directly conflicts with state law requiring that SWAs be for wildlife or wildlife-related recreation and mandating that CPW offer the “greatest possible variety of wildlife-related recreational opportunity.” §§ 33-1-101, 102(42), C.R.S. 2025.

Finally, CPW failed to substantially comply with the APA when it dismissed over 95% of public comments, failing to include them in the administrative record or even consider them. CPW affirmatively directed the public to submit comments on EngageCPW and assured the public that comments would be “considered by the Parks and Wildlife Commission.” CF, p.645. However, the Commission never considered these comments and proceeded to approve the Regulations.

The Commission’s position—that it may disregard those submissions because they were not filed through the “official” channel—turns the statute on its head. An agency cannot frustrate public participation through its own misdirection. This flawed process cut out the voices of nearly all parties. Many commenters pointed out how the proposed Regulations were irrational, would unfairly restrict wildlife-related recreation, and would restrict their lawful use and enjoyment of SWAs. But the Commission, never directly considering the comments, proceeded to approve the Regulations without addressing these problems and without providing any rational explanation for approving them. Accepting CPW’s position in this case would reward agency obstinance, impede meaningful participation, and reduce § 24-4-103, C.R.S. 2025 to a hollow formality—precisely what the statute was enacted to prevent.

ARGUMENT

I. Issue 1: The Regulations violate the APA because they arbitrarily restrict wildlife-related recreation other than hunting and fishing without any basis for doing so.

A. Standard of Review

Review of the District Court’s decision under the APA is de novo. *Weld Air & Water v. Colo. Oil & Gas Conservation Comm’n*, 457 P.3d 727, 735 (Colo. App. 2019). The APA sets the Court’s standard for review of agency action. §§ 24-4-106(7), (11), C.R.S. 2025. Courts must hold agency action unlawful, set it aside, and restrain enforcement of the rule at issue when agency action is:

(I) Arbitrary or capricious;

...

(IV) In excess of statutory jurisdiction, authority, purposes, or limitations;

(V) Not in accord with the procedures or procedural limitations of this article 4 or as otherwise required by law;

(VI) An abuse or clearly unwarranted exercise of discretion;

...

(VIII) Unsupported by substantial evidence when the record is considered as a whole; or

(IX) Otherwise contrary to law

§ 24-4-106(7)(b), C.R.S. 2025.

Agencies must not adopt rules unless “[t]he record of the rule-making proceeding demonstrates the need for the regulation,” “[t]he proper statutory authority exists for the regulation,” and “[t]he regulation does not conflict with other provisions of law.” § 24-4-103(4)(b), C.R.S. 2025. “[T]he requirement that

rules be ‘based on the record’ provides a concrete body of material for assessing the basis of the administrative agency’s conclusions.” *Citizens for Free Enterprise v. Dep’t of Revenue*, 649 P.2d 1054, 1062 (Colo. 1982).

Furthermore, agency rules must incorporate “a written concise general statement of their basis, specific statutory authority, and purpose.” § 24-4-103(4)(c), C.R.S. 2025. The Colorado Supreme Court has held that this basis and purpose requirement “assures that the administratively perceived necessity for the rule will be explicated and serves to provide a reference point against which the validity of the rule can be measured.” *Citizens for Free Enterprise*, 649 P.2d at 1062. This “removes the review process from the realm of speculation and provides a context within which meaningful judicial review can occur.” *Id.*

Such “a requirement that an administrative regulation be defensible in terms of the agency’s statement of basis and purpose, and with reference to the administrative record, does not undercut administrative flexibility or cast the courts in the role of second-guessing the agency.” *Id.* at 1063. Instead, this “serves to enhance the thoroughness of the administrative reasoning process in the first instance and to assure the effectiveness of subsequent judicial review.” *Id.*

In deciding whether agency rulemaking “is arbitrary and capricious, the underlying question is whether the agency action is reasonable.” *Barela v. Beye*,

916 P.2d 668, 677 (Colo. App.1996) (citing *Motor Vehicle Manufacturers Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)). Where “the necessity for the rule may be based on discrete facts capable of demonstrative proof. . . . the reasonableness of the rule depends on the degree to which the rule is predicated on provable facts.” *Barela*, 916 P.2d at 677.

The Colorado Supreme Court has held that where a section of the Colorado APA “parallels” the federal APA, it is appropriate to “consider federal precedent and other commentary on the federal counterpart to [the relevant APA provision].” *Regular Route Common Carrier Conf. of Col. Motor Carriers Ass’n v. Pub. Util. Comm’n*, 761 P.2d 737, 748 (Colo. 1988). “[F]or purposes of the State APA, the appropriate references for comparison with federal law are those cases interpreting and applying the Federal APA requirements contained in 5 U.S.C. § 553.” *Citizens for Free Enterprise*, 649 P.2d at 1063 n.7.

An agency’s decision “must be supported by substantial evidence—otherwise it would be arbitrary and capricious.” *Safe Extensions, Inc. v. FAA*, 509 F.3d 593, 604 (D.C. Cir. 2007). Similarly, “[a]n agency’s declaration of fact that is capable of exact proof but is unsupported by any evidence is insufficient to make the agency’s decision non-arbitrary.” *Id.* at 605 (internal quotations omitted).

B. Preservation on Appeal

Nonprofits raised this issue in their complaint and in briefing before the District Court. CF, pp.90-91, 603-14, 1041-52. The District Court rejected Nonprofits' arguments. CF, pp.1076-83.

C. Discussion

No one disputes that CPW has the authority to issue reasonable rules regarding the use of SWAs. But the Regulations violate the APA because they unreasonably prohibit non-hunters and non-fishers from engaging in wildlife-related recreation at SWAs. *See Barela*, 916 P.2d at 677. Legally, CPW cannot restrict SWAs to only hunters and fishers. CPW must “offer the greatest possible variety of wildlife-related recreation opportunity,” and it thus cannot favor hunting and fishing over other types of wildlife-related recreation. *See* § 33-1-101, C.R.S. 2025. Likewise, Colorado law defines SWAs as for “the benefit of wildlife populations or for wildlife-related recreation.” *See* § 33-1-102(42), C.R.S. 2025. Yet CPW has tried since at least 2020 to largely restrict wildlife-related recreation at SWAs to hunting and fishing.

Initially, CPW issued a rule limiting SWAs to people who had an active hunting or fishing license. 43 Colo. Reg. 11 (June 2020). This was a transparent attempt to keep non-hunters and non-fishers out of SWAs. It was also

unconstitutional, as CPW was violating the First Amendment rights of people opposed to hunting and fishing by compelling them to buy a hunting or fishing license if they wished to enter an SWA. For these reasons, Friends of Animals filed a lawsuit challenging the hunting or fishing license requirement. Following Friends of Animals' lawsuit, CPW eventually relented, creating the SWA Access Pass, which allows people to purchase a pass and enter SWAs without a hunting or fishing license. 2 Colo. Code Regs. § 406-9(C)(1)(c).

The Regulations are a creative attempt to achieve what CPW failed to accomplish in 2020. By prohibiting virtually all recreation in SWAs other than hunting and fishing, and in many cases prohibiting non-hunters and non-fishers from entering SWAs during certain hours or months of the year, CPW seeks to limit the number of non-hunters and non-fishers who access SWAs. Such favoritism towards hunting and fishing on public lands that are not reserved for hunting and fishing is unreasonable and arbitrary.

CPW's favoritism towards hunting and fishing is seen throughout the Regulations, including in the categorization of SWAs into tiers based on the quality of hunting and fishing available. *See* CF, p.443-44 (an SWA can qualify for Tiers 1 and 2 if it has "high quality hunting opportunity" and may be relegated to Tier 3 if "[h]unting is significantly limited or unavailable on the property"). In the

“basis and purpose,” CPW justifies the Regulations as intended to improve the hunting and fishing experience. *See, e.g.*, CF, p.550. CPW explains, for example, that “Beaver Creek SWA offers a very unique hunting and fishing opportunity,” and laments that it “has become a more popular destination for activities not related to hunting and fishing.” *Id.* In banning virtually all access to Beaver Creek SWA other than for hunting, CPW aims to “reduce the overcrowding and loss of a quality hunting and angling experience.” *Id.*; *see also* CF, p.556 (“Restricting camping and campfires to those engaged in hunting and fishing activities is consistent with the intended use for this area [San Luis Hills SWA] by said entities.”).

CPW occasionally justifies the Regulations’ restrictions as being related to wildlife. *E.g.*, CF, pp.553-54 (bemoaning the increase of activities such as dog walking, snowshoeing, and jogging at Heckendorf SWA in “critical winter range for deer, elk, and pronghorn”). But rather than prohibiting all access during these months to protect these animals, CPW has instead banned non-hunters for more than eight months of the year, observing that this should “improve the hunting experience for the hunters.” CF, p.554. That may well be true, but the law directs CPW “to offer the greatest possible variety of wildlife-related recreational opportunity,” not to “improve the hunting experience.” § 33-1-101(1), C.R.S.

2025. Thus, it is unlawful for CPW to attempt to appease hunters by limiting the variety of wildlife-related recreation, under the guise of protecting wildlife.

The Regulations' carveouts for hunting and fishing lead to some especially absurd results. Paddleboarding is prohibited, but not if one is somehow paddleboarding and hunting simultaneously. CF, p.461. A family cannot bring their dog to an SWA and walk it on a leash while they go birdwatching, but a hunter can bring as many dogs as she wants to an SWA and let them run free in search of a target. *Id.* On a family summer wildlife viewing hike, a child cannot cool off in a lake with her parents, but an unlimited number of hunters and fishers may enter that same lake. CF, pp.458, 462. The record does not explain why CPW allowed these obvious inconsistencies. Their inclusion is the clearest example that the purpose of the Regulations was to appease hunters and fishers, not to protect SWAs and wildlife.

Even if there were some evidence in the record that activities like paddleboarding, camping, or people wading in waters were having negative impacts on SWAs—and there is no such evidence in the record—CPW had no evidence that those negative impacts were uniquely caused by non-hunters and non-fishers. In other words, there was no evidence in the record that generally prohibiting these activities but allowing them for hunters and fishers would

alleviate whatever negative impacts CPW thought there were. It was arbitrary for CPW to make certain forms of recreation only permissible for hunters and fishers.

Similarly, it makes no sense for CPW to generally prohibit pets from SWAs—even those on a leash—but to make a massive exception for hunting dogs. The Regulations impose no limits on the numbers of hunting dogs and do not require that they be leashed. Multiple unleashed hunting dogs running unattended through an SWA in search of prey are likely to have a far more significant impact on the SWA and its wildlife than a single attended and leashed family pet. *See* CF, pp.436-37 (Friends of Animals’ comment discussing and citing multiple studies about the negative effects of unleashed dogs on wildlife). If CPW is concerned enough about pets to mostly prohibit them from SWAs, it is unreasonable to make an exception for hunting dogs. In this respect, the Regulations are actually contrary to the evidence before CPW, as they ignore the unrebutted evidence that off-leash dogs have greater impacts than leashed dogs. *See id.*

The District Court did not explain why the Regulations’ arbitrary and disparate treatment of hunters and fishers did not violate the APA. Instead, the District Court quickly dismissed this argument for two reasons. First, the District Court wrongly stated that Nonprofits did not acknowledge CPW’s authority to regulate SWAs. *Compare* CF, p.1079 *with* CF, p.606.

Second, the District Court held that it could not overturn the regulations as arbitrary because they were “reasonably connected to the stated basis and purpose.” CF, p.1079. However, the District Court failed to point to anything in the record that supported the disparate treatment of different types of wildlife-related recreation. Moreover, the APA requires more of judicial review than simply determining whether there is a connection between a regulation and its stated basis and purpose. *Citizens for Free Enterprise*, 649 P.2d at 1062 (explaining that the basis and purpose “provides a context within which meaningful judicial review can occur”). While some relationship between the regulation and the basis and purpose is certainly necessary, it is hardly sufficient to make a rule reasonable. *Barela*, 916 P.2d at 677 (Colo. App.1996) (“[T]he underlying question is whether the agency action is reasonable.”).

For example, CPW could explain in a basis and purpose statement that SWAs are experiencing overcrowding so anyone with a surname beginning with the letters M through Z is prohibited from visiting an SWA. That regulation would certainly accomplish the goal of reducing overcrowding, but it would still be unreasonable, and therefore arbitrary, because there would be no rationale for why people with surnames beginning with M to Z were completely banned while anyone with a surname beginning with A to L could use SWAs as often as they

like. The Regulations are arbitrary for a similar reason. While the Regulations may “decrease SWA use and ameliorate the consequences of prior overuse,” CF, p.1078, they are unreasonable because they disproportionately impact wildlife-related recreation “not related to hunting and fishing” to ensure a “quality hunting and angling experience,” CF, p.550, which is contrary to CPW’s obligation to offer “the greatest possible variety of wildlife-related recreational opportunity.” § 33-1-101(1), C.R.S. 2025.

What is particularly notable about the record is the complete lack of consideration of any alternatives. *See generally* CF, pp.97-559. CPW apparently did not consider anything less burdensome, for example prohibiting camping for longer than a certain number of days, restricting where dogs could be off leash, or restricting only motorized water vessels. *See id.* Despite CPW claiming that SWAs are overused, the record is devoid of any evidence that CPW looked at imposing limits on the total number of daily visitors (including hunters and fishers) at the most impacted SWAs. Never did CPW consider limiting hunting and fishing in conjunction with the other prohibited recreational activities. *See id.* Any of these reasonable alternatives would have achieved the stated purpose of the Regulations, and none would have violated the APA or unreasonably restricted the variety of wildlife recreation.

Regardless of whether SWAs are being overused, CPW has no basis to arbitrarily discriminate against people who do not hunt and fish. The record contains no descriptions about the alleged “negative impacts” at SWAs, much less any evidence that such impacts were caused by non-hunters and non-fishers. *See generally id.*

The facts here are similar to those in *Safe Extensions*, where the FAA offered a number of rationales for why it treated adjustable and fixed runway light bases differently by requiring more testing for the former. 509 F.3d at 604. The D.C. Circuit found that none of the rationales for the disparate treatment offered had sufficient support in the record. *Id.* at 605. While the FAA had claimed in the record that fixed light bases had anti-rotational devices inherent to their design while adjustable light bases did not, the court rejected this rationale because the record included “no documents, drawings, or affidavits to support this claim.” *Id.*

Like in *Safe Extensions*, missing from the record here are any “documents, drawings, or affidavits to support” the Regulations. *See id.* There is no evidence that shows it is necessary to treat hunting and fishing differently from other wildlife recreation. Without some kind of evidence in the record showing that wildlife-related recreation by non-hunters and non-fishers was having an especially negative impact on SWAs, CPW had no basis to issue the Regulations. *See* § 24-4-

103, C.R.S. 2025 (agency cannot adopt a rule unless the record “demonstrates the need for the regulation.”). Thus, CPW acted arbitrarily in approving the Regulations.

The District Court misread Colorado Supreme Court precedent and erred in holding that a regulation “capable of demonstrable proof . . . sits at the opposite end of the spectrum from the regulation at issue here, which directs the agency to effectuate a policy consideration.” CF, p.1081. CPW explained the basis for the Regulations as the “dramatic[] increase[]” in SWA use over the previous seven to eight years, “causing a corresponding rise in negative impacts on wildlife and wildlife related recreation.” CF, p.550. Both the “dramatic[] increase[]” in SWA use and the “negative impacts on wildlife and wildlife related recreation” can be quantified, measured, or described and thus “turn upon a discrete fact capable of demonstrable proof.” *Citizens for Free Enterprise*, 649 P.2d at 1064. That proof might be the actual or estimated number of SWA visitors over the years, explanation of what type of activities are causing negative impacts, remedial work required or expended by CPW to repair any “negative impacts,” or data about wildlife populations at SWAs. Whatever the case, the Regulations were certainly not on the “opposite end” of regulations whose necessity would “turn upon a

discrete fact capable of demonstrable proof.” CF, p.1081 (quoting *Citizens for Free Enterprise*, 649 P.2d at 1064).

A hypothetical should help illustrate why the Regulations are far closer to ones turning upon discrete facts capable of proof than to ones based primarily on policy considerations. Imagine CPW had issued a different regulation, the basis and purpose for which was the following: “CPW does not like loud music in SWAs, so it is banning all music from SWAs.” There, CPW is declaring that it believes it does not want music in SWAs. This is not readily capable of proof; instead it is a policy choice. Such a policy-based regulation is far different than the Regulations here, which require some level of factual support. *See Safe Extensions*, 509 F.3d at 604-05.

The District Court found that testimony from Mark Lamb was sufficient evidence for the Regulations. CF, p.1082-83. Yet Lamb never even claimed that wildlife-related recreation other than hunting and fishing had a negative impact on SWAs, much less that such disparate treatment was warranted. *See* CF, p.198. Lamb also in no way estimated, much less quantified, the increase in SWA use or made any attempt to describe the supposed issues this had created. *See id.* Even when directly asked by a Commissioner “about how we are going about collecting data on the impacts of various user groups,” Lamb provided a nonresponsive

answer by instead discussing “management” of wildlife. CF, pp.420-21. While CPW can certainly in theory rely on CPW staff’s experience and knowledge about SWAs, here staff provided no evidence about the need for the Regulations other than generalized claims that use of SWAs had increased.

Even if this Court were to agree with the District Court that the Regulations reflect a policy judgment, “the reasoning process” leading to the Regulations’ adoption still “must be defensible.” *Citizens for Free Enterprise*, 649 P.2d at 1064. Specifically, the Court must review policy judgment regulations “based on the record” and ensure the “consistency of the regulation with the purpose of the statute under which it was adopted.” *Id.* at 1063. And as explained above, the Regulations are both inconsistent with the statute under which they were adopted and unreasonable.

II. Issue 2: CPW failed to substantially comply with APA rulemaking requirements when it failed to consider the vast majority of public comments and excluded them from the record.

A. Standard of Review

Review of the District Court’s decision under the APA is de novo. *Weld Air & Water*, 457 P.3d at 735. The APA sets the Court’s standard for review of agency action. § 24-4-106(7), (11), C.R.S. 2025. The APA mandates “substantial compliance” with the rule-making procedures. § 24-4-103(8.2)(a), C.R.S. 2025. An

agency's failure to meet that standard renders a rule invalid. *Id.* In determining whether an agency has substantially complied with the APA, courts should look to (1) "the purpose of the provision violated," and (2) "the extent of the noncompliance." *Studor, Inc. v. Examining Bd. of Plumbers*, 929 P.2d 46, 48 (Colo. App. 1996).

B. Preservation on Appeal

Nonprofits raised and preserved this issue in their complaint and briefing before the District Court. CF, pp.92, 597-600, 614-19, 1052-1061. The District Court correctly found that CPW violated the APA in failing to include the EngageCPW comments in the record. CF, pp.85-86. However, the District Court misinterpreted the law in finding that CPW's violation was insubstantial and in finding that CPW did not have an obligation to consider such comments. CF, pp.1083-87.

C. Discussion

CPW violated both the letter and the purpose of the APA when it ignored over 95% of public comments, failing to include them in the administrative record or even consider them. CPW affirmatively directed the public to submit comments on EngageCPW and assured the public that comments would be "considered by the Parks and Wildlife Commission." CF, p.645. Interested parties sent 191 written

submissions through EngageCPW in accordance with CPW’s instructions. *See* CF, pp.305, 650-701, 741-774, 853-854. However, CPW did not include the written submissions in the original administrative record, as required by the APA. § 24-4-103(8.1)(b)(III), C.R.S. 2025. Moreover, it violated the APA when the Commission proceeded to approve the regulations without ever considering these comments. *See* § 24-4-103(4)(a), C.R.S. 2025.

When considering the severity of APA violations, this Court looks to the “combined effect of the violations.” *Studor*, 929 P.2d at 50. This includes consideration of the three key APA requirements when performing rule-making functions: “(1) public notice; (2) an opportunity for, and full consideration of, any comments; and (3) a complete rule-making record.” *Id.* Here, like in *Studor*, the agency “violated two of the three primary legislative requirements of the APA—to consider all comments submitted and to formulate a proper rule-making record.” *Id.*

First, the APA mandates that agencies maintain an official rule-making record for all rules and requires that it include, among other things, “[a]ll written petitions, requests, submissions, and comments received by the agency as of the date of the hearing on the rule.” § 24-4-103(8.1)(b)(III), C.R.S. 2025; *see also Studor*, 929 P.2d at 50 (holding that an agency substantially violated its statutory

obligations when it did not include in the record “all written comments received from the public”).

CPW does not dispute that the EngageCPW comments were submitted on time. Nor does it dispute that these comments were submitted in accordance with CPW’s own instructions.

However, CPW failed to include these submissions in the official rule-making record. Thus, the District Court correctly held that “[a]s Defendants failed to keep all the EngageCPW comments in the official rulemaking record, they violated their obligation to maintain a complete rulemaking record as defined in and required by C.R.S. § 24-4-103 (8.1)(a).” CF, pp.1085-86.

Second, CPW violated the APA by failing to consider these comments. As part of the official record, “an agency must include and maintain **all written submissions and comments** received by the agency as of the date of the public hearing. Section 24-4-103(8.1)(b)(III), C.R.S. (1988 Repl. Vol. 10A). The agency is then instructed that it **must consider all such submissions**. Section 24-4-103(4)(a), C.R.S. (1988 Repl. Vol. 10A).” *Studor*, 929 P.2d at 49-50 (emphases added).

It is undisputed that the Commission did not “consider the actual comments submitted on EngageCPW in connection with the rulemaking.” CF, p.648. Thus, it

violated the requirement to consider all such submissions. *See* § 24-4-103(4)(a), C.R.S. 2025.

To uphold the Regulations and the flawed procedures CPW employed, the District Court adopted an artificially narrow reading of the APA’s rule-making provisions. It claimed that CPW only had to consider submissions that were submitted in connection with the “sole official publication” of the proposed rulemaking and not the majority of comments that were submitted in accordance with CPW’s news release. *See* CF, p.1085.

This narrow interpretation is inconsistent with this Court’s precedent and the plain language of the statute. The APA’s mandate to include all written submissions in the record is not limited to those submissions that were sent to the email listed in the “official” notice. The District Court recognized this when it held that the EngageCPW comments were required to be included in the record. The court correctly explained that “the agency is required to maintain a record of not only the ‘materials . . . considered by the agency in connection with’ rulemaking proceedings, but all ‘submissions[] and comments received by the agency as of the date of the hearing on the rule,’ regardless of whether those submissions or comments were actually considered.” CF, p.1085 (citing § 24-4-103(8.1)(b)(III), C.R.S. 2025).

However, the District Court then reached a holding that directly contradicts both the APA and controlling precedent. The court found that, although the agency was required to include these submissions in the record, it was not required to consider them. CF, p.1085. That conclusion cannot be reconciled with this Court's holding in *Studor*.

In *Studor*, this Court referenced the agency's obligation to include "**all written submissions and comments** received by the agency" as part of the administrative record, citing § 24-4-103(8.1)(b)(III), C.R.S. *Studor*, 929 P.2d at 49-50 (emphasis added). This is the same provision the District Court referenced when holding that CPW should have included EngageCPW comments in the record. *Studor* then proceeded to hold that the agency "**must consider all such submissions.**" *Id.* (citing § 24-4-103(4)(a), C.R.S.) (emphasis added).

The APA's text, structure, and purpose confirm that agencies must consider all public submissions, not merely those sent to a particular email address listed in a rule-making notice. Although one provision describing the obligation to consider submissions appears after a sentence addressing the time and place of the public hearing, § 24-4-103(4)(a), C.R.S. 2025, nothing in the APA suggests that comments submitted outside the precise method identified in a notice may be ignored. The APA does not authorize agencies to disregard written submissions

simply because they were submitted through a different method, especially when the agency expressly instructed the public to use that different method.

To the contrary, the APA repeatedly emphasizes the agency’s obligation to consider public input. The legislature declared that regulations may issue only after “a full consideration of the effects of agency action.” § 24-4-101.5, C.R.S. 2025. Likewise, § 24-4-103(4)(b)(I), C.R.S. 2025, prohibits adoption of a rule unless “[t]he record of rulemaking proceedings demonstrates the need for the regulation.” And § 24-4-103(4)(c), C.R.S. 2025, requires the agency to issue a statement of the rule’s basis and purpose “[a]fter consideration of the relevant matter presented.”

These provisions read together, along with the overall purpose of the APA, make it clear that CPW was required to consider all submissions and that CPW abused its discretion by dismissing written submissions submitted through EngageCPW.

The District Court’s finding that only the official notice and hearing are relevant to CPW’s APA obligations is further undercut by the fact that even at the public hearing referenced in the rulemaking notice, CPW official Mark Lamb referenced EngageCPW as the appropriate place to submit public comments. CF, p.300, TR 5/4/23, p.7:12-24. Another person at the rule-making hearing on the Regulations commended CPW for the EngageCPW platform “because it was great

that we could all submit our comments, and also see everybody else's comments." CF, p.416, TR 6/22/23, p.4:4-8. At no point during the hearings, or any other time, did CPW indicate that it would not consider EngageCPW comments or retract the affirmative statement that it would consider comments submitted on EngageCPW.

By encouraging public participation through EngageCPW and then refusing to consider the resulting comments, CPW frustrated the very purpose of the APA. *See* § 24-4-103(1), C.R.S. 2025 (procedures are intended "to accord interested persons an opportunity to participate" in the rule-making process).

These were not merely slight violations that the Court can overlook. In determining whether an agency has substantially complied with the APA, courts should look to (1) "the purpose of the provision violated," and (2) "the extent of the noncompliance." *Studor*, 929 P.2d at 48. As discussed in more detail below, both of these factors demonstrate that the Commission's failure to consider the vast majority of public comments was a significant error.

1. CPW's failure to include and consider public comments directly undermines the APA's central purpose of ensuring meaningful public participation.

Public participation and informed decision-making go to the heart of the APA. The APA's provisions requiring public notice and consideration of all comments are not a mere formality, the purpose is "to accord interested persons an

opportunity to participate” in the rule-making. § 24-4-103(1), C.R.S. 2025. The Colorado Supreme Court highlighted that “section 24-4-103, 10 C.R.S. (1982 & 1985 Supp.), clearly intends the statutory procedures for rule-making to increase the opportunity for members of the public to have input into the formulation of regulatory policy and to enable the agency to educate itself about the effects of its proposed policy on those regulated by it.” *Home Builders Ass’n v. Pub. Utils. Com.*, 720 P.2d 552, 561 (Colo. 1986). Likewise, this Court emphasized that the requirement to include all public submissions in the record serves to provide interested parties an opportunity to participate and “assures that an agency will consider all pertinent information when engaging in rule-making.” *Studor*, 929 P.2d at 50.

CPW directly undermined these purposes when it failed to consider comments submitted in accordance with its own directions. Based on the representation from CPW, people who submitted their comments via EngageCPW, including members of Nonprofits, believed their comments would be considered by the Commission. CF, p.627 at ¶ 21. Had CPW instead advised that only public comments emailed to CPW would be considered, people surely would have emailed their comments.

By encouraging public participation through EngageCPW and then refusing to consider the resulting comments, CPW frustrated the very purpose of the APA.

2. The extent of non-compliance was substantial where CPW omitted over 95% of comments from the record and failed to consider them.

The record includes one news release from CPW that was specifically focused on the Regulations at issue here, titled “Colorado Parks and Wildlife seeking public input on proposed changes to State Wildlife Area regulations through May 24.” CF, p.944. This directed people to provide feedback on EngageCPW and explicitly stated that “comments will be reviewed by CPW staff and considered by the Parks and Wildlife Commission.” CF, pp.944-945. This public comment opportunity was “advertised through a news release, local news outlets, and announcements sent to CPW stakeholders.” CF, p.305. This news release did not say anything about emailing comments to CPW.

In contrast, the notice CPW put in the Colorado Register included multiple regulatory subjects and was generally about the upcoming Parks and Wildlife Commission Meeting. *See* CF, p.97.¹ Neither here, nor anywhere else, did CPW say it would only consider emailed comments.

¹ While the official notice listed the Commission’s email address, it also provided a link to CPW’s website for more information on commenting, where people

Thus, it is not surprising that 95% of comments on the Regulations were submitted through EngageCPW rather than emailed to CPW's email address. Namely, 191 people or entities submitted written comments on EngageCPW. *See* CF, p.305. In contrast, only six comments were emailed to the Commission. CF, pp.425-441, 575.

CPW's failure to consider these comments is not excused by the existence of a brief memorandum summarizing some EngageCPW comments. *See* CF, pp. 305-307 (hereinafter, "Memo"). As admitted by CPW, the Memo did not include all concerns raised by EngageCPW commenters. CF, p.88 at ¶ 127 (Am. Compl.); CF, p.567 at ¶ 127 (Am. Answer). CPW's counsel tried to minimize the significance of its errors by arguing that the Commission "generally" considered the comments submitted on EngageCPW because it was aware of the comments and received the Memo. CF, p.982. However, this Court already rejected an analogous argument in *Studor*, where the agency claimed it substantially complied with the APA because the "majority" of submissions were included in other parts of record. *Studor*, 929 P.2d at 50. The Court emphasized that the APA requirement that the agency "maintain all written submissions . . . assures that an agency will consider all

conceivably could have come across CPW's news release instructing people to comment on EngageCPW. *See* CF, p.97.

pertinent information when engaging in rule-making.” *Id.* Thus, the failure to include six documents was substantial “even if a majority of the information [] was duplicated in other portions of the record.” *Id.*

Here, the agency dismissed far more than the six documents at issue in *Studor*—over 190 comments were omitted from the record and consideration. Moreover, the Memo did not mention several concerns that were raised by commentors including: unfair prioritization of hunters and fishers (Comments 10, 15, 16, 20, 25, 26, 31, 34, 50, 56, 65, 80, 114, 116, 131), impacts to climbing (Comments 8, 31, 32), impacts to bicycle use (Comment 8), negative impacts from fishing (Comments 6, 56, 103, 108, 128, 131), or that restrictions should be more tailored to individual SWAs (Comments 123, 131). *Compare* CF, pp.305-307 with CF, pp.650-701. Overall, 75% of the EngageCPW comments expressed disagreement with the proposed Regulations,² only exacerbating the significance of CPW’s violation because these are “precisely the type of documentation that should have been pertinent” to the agency’s decision-making process. *Studor*, 929 P.2d at 50.

² CF, p.305 (Memo admitting that only 25% of comments voiced overall agreement with the proposed changes).

If CPW had considered these submissions, as required by the APA, it could have led to a different outcome. CPW could have rejected the Regulations or amended them to better conform with the law, accommodate a variety of wildlife-related recreation, and fairly address any concerns about overuse of SWAs.

The APA rulemaking provision at issue “clearly intends the statutory procedures for rulemaking to increase the opportunity for members of the public to have input into the formulation of regulatory policy and to enable the agency to educate itself about the effects of its proposed policy on those regulated by it.” *Home Builders Ass’n*, 720 P.2d at 561. Here, CPW’s actions had the opposite effect. By sending out misinformation about where to submit comments and whether comments would be considered, CPW curtailed meaningful public participation and remained ignorant about how the regulations would impact people that responsibly visit SWAs for wildlife-related recreation. This conduct constitutes a substantial violation of the APA, not a technical or inconsequential error.

III. Nonprofits have standing to challenge the Regulations and CPW’s rule-making process.

CPW did not challenge Nonprofits’ standing, and the District Court did not raise the issue. *See* CF, p.1069. Nonetheless, Nonprofits will briefly explain why they have associational standing. “[A]n organization has associational standing

when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted, nor the relief requested, requires the participation of individual members of the lawsuit.” *Colo. Union of Taxpayers Found. v. City of Aspen*, 418 P.3d 506, 510 (Colo. 2018).

Nonprofits' members would have standing to sue CPW in their own right. For instance, John Weisheit, a member of Plaintiff-Appellant Living Rivers and Plaintiff-Appellant Friends of Animals, visits SWAs to river run. CF, p.629-31. One of Mr. Weisheit's greatest joys is seeing wildlife such as fish, squirrels, mountain lions, porcupines, bears, and bald eagles while river running. CF, p.631. The Regulations harm him because, as someone who does not fish, he is no longer able to visit SWAs to view wildlife while river running. CF, p.632. For no reason at all, however, the Regulations would force Mr. Weisheit to set aside his moral objection to fishing in order to continue river running at SWAs. *See id.*

Similarly, Tom Martin, a member of Plaintiff-Appellant River Runners for Wilderness and Plaintiff-Appellant Friends of Animals, enjoys river running, and viewing wildlife while doing so, in SWAs. CF, p.625-27. The Regulations harm him because he now cannot do so unless he fishes, something he refuses to be

forced to do. CF, p.628. Mr. Martin was also harmed by the Commission's failure to consider the comment he submitted on EngageCPW. CF, pp.627-28.

Adam Kreger and Andreia Marcuccio, both employees and members of Plaintiff-Appellant Friends of Animals, are also injured by the Regulations. *See generally* CF, pp.633-37, 638-40. Ms. Marcuccio, who has hiked and camped across Colorado with her husband and dog, wants to explore the SWAs and view the wildlife that live there. CF, pp.634-36. Such activities are a "great source of joy" in her life and bring her a sense of connectedness with her environment. CF, p.636. But the Regulations restrict her ability to visit SWAs with her dog because they only allow dogs when hunting or training to hunt, a practice she finds "cruel and inhumane." *Id.* Mr. Kreger would "like to appreciate wildlife in SWAs while hiking, trail running, or wading in the water," but the Regulations prevent him from doing so. CF, p.639. If the Regulations are vacated, then both Ms. Marcuccio and Mr. Kreger would be able to go the SWAs and do activities that they enjoy. CF, pp.633, 640.

Nonprofits seek to ensure that public lands are open to the public for responsible, non-consumptive wildlife-related recreation and that public lands are not dedicated solely to hunting and fishing. *See* CF, pp.626, 630, 639. These interests are germane to the purposes of the three Nonprofits. *See, e.g., Living*

Rivers v. Exec. Dir. of the Utah Dep't of Env'tl. Quality, 417 P.3d 57, 63-63 (Utah 2017) (holding that Living Rivers had standing to protect the recreational interests of members to watch birds and other wildlife). Furthermore, the participation of the individual members is not required because Nonprofits seek declaratory and injunctive relief. *See Conestoga Pines Homeowners' Ass'n v. Black*, 689 P.2d 1176, 1177 (Colo. App.1984). Therefore, Nonprofits have associational standing.

CONCLUSION

For the reasons described above, this Court should reverse the District Court, declare that CPW violated the APA, and vacate the Regulations.

Respectfully submitted this 4th day of February, 2026.

/s/ Stephen Hernick

Stephen Hernick, Atty. Reg. # 54679

Jennifer Best, Atty. Reg. # 46549

Friends of Animals Wildlife Law Program

6041 S. Syracuse Way, Suite 250

Greenwood Village, CO 80111

720-945-9453

jennifer@friendsofanimals.org

shernick@friendsofanimals.org

Attorneys for Plaintiffs-Appellants

CERTIFICATE OF SERVICE

I certify that on February 4, 2026, I served the foregoing Appellants' Opening Brief on the following counsel through the Colorado Courts E-File & Serve electronic court filing system, pursuant to Colorado Appellate Rule 25:

Christopher R. Stork, Attorney for Defendants-Appellees.

/s/ Stephen R. Hernick
Stephen R. Hernick

Attorney for Plaintiffs-Appellants