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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 ▲
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APPELLANTS' REPLY 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 5,463 words.

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 Wildlife Areas (SWAs) are for wildlife and all wildlife-related recreation, not just for hunting and fishing. Yet Appellees the Colorado Parks and Wildlife Commission and the Division of Parks and Wildlife (collectively, “CPW”) favored hunting and fishing at the expense of wildlife watching at SWAs in the challenged action. In their Answer Brief, CPW almost entirely fails to engage with the arguments Appellants raised in their Opening Brief about why CPW violated the Administrative Procedure Act (APA) when it revised the regulations for SWAs in 2023 (hereinafter, the “Regulations”). Rather than explain how the Regulations’ disparate treatment of hunters and fishers was lawful or how it was reasonable for CPW to ignore almost all public comments, CPW largely whitewashes the Regulations and spends large portions of its brief defending aspects of them that have never been at issue. CPW’s shift of focus is perhaps understandable, as there is no justification for its actions.

Plaintiffs-Appellants Friends of Animals, Living Rivers, and River Runners for Wilderness (hereinafter, “Nonprofits”) have shown that CPW violated the APA in issuing the Regulations and that the Regulations are substantively unlawful. For either reason, this Court must reverse the District Court, declare the Regulations unlawful, and vacate them.

ARGUMENT

A. While CPW has the general authority to regulate SWAs, the specific Regulations it issued here are unreasonable in several respects.

CPW does not dispute that this Court must overturn the Regulations if they are arbitrary, capricious, or contrary to law. § 24-4-106(7)(b), C.R.S. 2025. The parties' disagreement concerns *whether* the Regulations are unreasonable. In CPW's mind, it should be able to restrict activities within SWAs as it likes in order to reduce overcrowding. *See, e.g.*, Answer Br. at 19. What CPW largely overlooks in its brief is that it has no reasonable or lawful basis to treat hunting and fishing differently than wildlife watching in SWAs. Yet that is just what the Regulations do throughout in prohibiting many activities for wildlife viewers that they allow for hunters and fishers. That disparate treatment is arbitrary and violates the APA.

1. CPW identifies no lawful basis for the Regulations' disparate treatment of hunters and fishers vis-à-vis wildlife watchers at SWAs.

CPW fails to address the disconnect between the Regulations' stated basis and purpose, which was to address increases in SWA use, and the challenged aspects of the Regulations, which prohibit certain activities for non-hunters and non-fishers. Because CPW never identified the alleged problems as arising from wildlife watchers rather than hunters or fishers, it had no basis to restrict activities from the former but not the latter.

CPW misstates Nonprofits’ argument in claiming that Nonprofits “desire that SWAs be open to all recreation,” including “broad general recreation.” Answer Br. at 30. To the contrary, Nonprofits recognize that CPW may lawfully restrict certain types of non-wildlife-related recreation at SWAs as long as those restrictions are lawful, reasonable, and applied evenhandedly. But CPW may not restrict certain activities for wildlife viewers but allow hunters and fishers to engage in those same activities. That is textbook arbitrary rulemaking. And that is why the Regulations are not simple “time, place and manner restrictions.” *Contra* Answer Br. at 19.

In other contexts, courts have found that disparate treatment is arbitrary and capricious unless the agency offered a valid reason for the disparate treatment. *E.g., Orangeburg v. FERC*, 862 F.3d 1071, 1084 (D.C. Cir. 2017).¹ “[A]n agency’s unjustifiably disparate treatment of two similarly situated parties works a violation of the arbitrary-and-capricious standard.” *FEC v. Rose*, 806 F.2d 1081, 1089 (D.C. Cir. 1986) (holding that unjustifiable disparate treatment is not only reason to invalidate agency action but also reason for finding that agency’s litigation position

¹ Where a section of the Colorado APA “parallels” the federal APA, like here, 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 Colo. Motor Carriers Ass’n v. Pub. Util. Comm’n*, 761 P.2d 737, 748 (Colo. 1988).

was not “substantially justified” for purposes of awarding attorneys’ fees). In equal protection cases under Colorado law, disparate treatment without a valid justification cannot survive rational basis review. *Higgs v. W. Landscaping & Sprinkler Sys., Inc.*, 804 P.2d 161, 165 (Colo. 1991) (holding statute unconstitutional because disparate treatment of farm and ranch employees was “based on an arbitrary and illusory distinction”); *Rodriguez v. Schutt*, 914 P.2d 921, 929 (Colo. 1996) (overturning statutory provision for “an arbitrary distinction between classes of judgment creditors and of judgment debtors without a rational basis in fact”).

CPW claims that wildlife-related recreation should only be understood to include hunting, fishing and wildlife watching, not “simply paddleboarding, camping, wading, or dog-walking.” Answer Br. at 28. This explanation might make sense if the Regulations flatly prohibited these activities or prohibited them unless done in connection with hunting, fishing, or wildlife viewing. But that is not what the Regulations do. Rather, they prohibit these activities unless someone is hunting or fishing, without allowing a similar accommodation for wildlife viewers. *E.g.*, CF, pp.458-463. CPW fails to explain why activities like paddleboarding and wading are compatible with hunting but somehow incompatible with wildlife viewing. Under the Regulations, hunters can camp at many SWAs to enable them

to hunt during early morning hours. However, the Regulations hamper wildlife viewers' opportunity to engage in their form of wildlife-related recreation—observation—during early morning hours because camping by non-hunters is prohibited at most SWAs. *See* CF, p.460. CPW does not provide any reasonable basis for why the Regulations treat hunters and wildlife viewers differently when it comes to camping or any of the other activities the Regulations prohibit based on whether someone is hunting or fishing.

CPW's stray argument that “wildlife viewing” must be closely associated with hunting and fishing” because of the canon of *noscitur a sociis*, Answer Br. at 29, is misplaced. The canon only applies to an ambiguous phrase, and CPW never claims that “wildlife viewing” is susceptible of multiple interpretations. *See Young ex. rel. C.Y. v. Brighton Sch. Dist.* 27J, 325 P.3d 571, 581 (Colo. 2014). To the extent that “wildlife viewing” is ambiguous, the canon against surplusage dictates that it must have a meaning distinct from both “hunting” and “fishing.” *See People v. Rediger*, 416 P.3d 893, 899 (Colo. 2018). If instead CPW is arguing that “wildlife viewing” should be construed narrowly to exclude any wildlife viewing done with dogs, while in water, or on a “vessel,” it fails to explain why “hunting” and “fishing” should also not be construed narrowly to exclude those things.

CPW concedes that some of the property-specific Regulations “benefit hunters and anglers.” Answer Br. at 37. This admission is fatal to CPW’s case because CPW—both during the rulemaking and again in its brief—identifies no lawful basis under which it can “benefit hunters and anglers” at the expense of wildlife watchers in SWAs. To the contrary, Colorado law generally requires CPW to make SWAs available to wildlife watchers on the same basis as hunters and fishers. *See* § 33-1-102(42), C.R.S. 2025 (defining SWAs as for “the benefit of wildlife populations or for **wildlife-related recreation**”) (emphasis added). Colorado law also requires CPW to more generally provide “**the greatest possible variety of wildlife-related recreational opportunity**.” § 33-1-101(1), C.R.S. 2025 (emphasis added).

CPW’s argument that its obligation to offer “the greatest possible variety of wildlife-related recreational opportunity,” *id.*, “cannot override” and must be “reconcile[d]” with its authority to regulate activities in SWAs misses the point. *See* Answer Br. at 31-32. The two provisions do not necessarily conflict, and Nonprofits are not arguing that one “override[s]” the other. Instead, they must be viewed in harmony. “If separate clauses within a statute may be harmonized by one construction, but would be antagonistic under a different construction, a construction which results in harmony rather than inconsistency should be

adopted.” *Ouray v. Olin*, 761 P.2d 784, 788 (Colo. 1988). There would be no conflict had CPW addressed any SWA overcrowding by issuing time, place, and manner restrictions that applied equally to hunters, fishers, and wildlife viewers.

Thus, by admitting that aspects of the Regulations prioritize hunting and fishing but not wildlife watching, CPW has inadvertently acknowledged that these aspects of the regulations are contrary to law and must be overturned. *See* § 24-4-106(7)(b), C.R.S. 2025.

2. CPW is wrong to suggest that the restrictions are isolated and that the Regulations are reasonable on that basis.

CPW also claims that the Regulations do not unreasonably favor hunters and fishers because there is no “wildlife-related recreational activity that the Regulations completely or unduly restrict.” Answer Br. at 33. These are two different things, but neither offers a basis for affirming the Regulations.

First, a restriction may still be arbitrary even if limited exceptions mean the restriction does not “completely” prohibit an activity. CPW, however, seemingly contends, without citing any authority, that no restriction can be unreasonable if there are some exceptions. Yet by defending the restrictions on the basis that they are reasonable because they are not applicable everywhere, CPW effectively implies that they are unreasonable where applicable. Simply put, the limited

exceptions do not justify the Regulations' disparate treatment of wildlife-related recreation.

Second, CPW is wrong that the Nonprofits identified no wildlife-related activities that the Regulations unduly restrict. On the contrary, Nonprofits identified six wildlife-related activities that the Regulations generally prohibit. Opening Br. at 6. Nonprofits also identified examples of especially onerous property-specific restrictions. *Id.* at 7-8. Wildlife viewing is plainly "unduly restricted" at Heckendorf SWA, for example, where it is allowed only from parking areas for more than two thirds of the year. *Id.*; *contra* Answer Br. at 33-34. CPW offered no justifications for any of these prohibitions.²

Nonprofits also highlighted the absurd results created by the Regulations' disparate treatment of hunters and fishers. Opening Br. at 22. CPW does not explain why hunting dogs are generally allowed yet wildlife viewers are generally prohibited from bringing their dogs. Nor does it explain why hunters and fishers may wade in water, but wildlife viewers are generally prohibited from doing so.

² CPW misstates Nonprofits' argument about the Regulations' treatment of camping. Answer Br. at 35. The Regulations do generally prohibit camping. CF, p.460. That forty of the more than 300 SWAs allow camping by all does not address Nonprofits' specific argument, which is that dozens of SWAs, for reasons CPW never explained, only allow camping by licensed hunters. *See* Opening Br. at 8 (citing exceptions at Gunnison and Huerfano SWAs).

Answer Br. at 35-37. CPW instead nitpicks by claiming that other regulations and practical limitations may prevent an “unlimited” number of hunters and fishers from engaging in activities the Regulations prohibit for wildlife viewers. *See id.* But the Regulations themselves include no such limitations. And even if CPW is right that other mechanisms may limit the number of hunting dogs or hunters wading, that does not explain why the Regulations generally prohibit wildlife viewers from wading or bringing their dogs.

CPW also cites to Exhibit A, a chart that it created for its brief, to show examples of SWAs where some generally restricted activities are allowed. *See Answer Br. at 35-36.* But Exhibit A does not rebut the unreasonableness of the Regulations for several reasons. First, Nonprofits have never claimed, nor need they, that any of the arbitrary restrictions are in place at every single SWA. Second, Exhibit A includes only 102 SWAs even though there are more than 300 SWAs, so Exhibit A shows less than a third of the SWAs covered by the Regulations. Third, even within CPW’s handpicked samples of SWAs in Exhibit A, many SWAs included therein have disparate restrictions. For example, there are only two SWAs in Exhibit A where all four restricted activities listed (camping, dogs, vessels, and water contact activities) are allowed for all.

Contrary to CPW's implication in Exhibit A, the Regulations' disparate treatment of wildlife viewers is widespread across SWAs. CPW cannot deny that, unless a property-specific regulation provides otherwise, the Regulations generally prohibit dogs, wading, and vessel use for wildlife viewers, but not for hunters and fishers. CF, pp.458-462. Almost all SWAs restrict wildlife viewers from access, camping, vessels, wading, or dogs, but allow hunters or fishers to engage in those same activities. *See* CF, pp.458-543. It appears that only eight SWAs permit wading by anyone other than hunters and fishers. *See id.* There are at least thirty SWAs where the Regulations create exceptions to allow camping for hunters and fishers but not for wildlife viewers. *See id.*

Elsewhere, CPW claims that it strived "to keep the management of SWAs 'relatively consistent' across the state," Answer Br. at 20, which only further highlights the unreasonableness of allowing certain activities for hunters and fishers but not for wildlife viewers. Furthermore, this explanation is plainly contrary to the record because CPW has not kept the restrictions "relatively consistent" across SWAs. It has instead enacted a complex system where the public must consult both the general restrictions and a particular SWA's property-specific restrictions before determining when and how it may engage in wildlife watching at any SWA. Where the Regulations prohibit wildlife viewers from

bringing their dogs, viewing wildlife from the water, and camping (to have the best opportunity to view wildlife in the evening or early morning) but allow hunters and fishers to do those same things, they are anything but “relatively consistent.”

3. Favoring hunters and fishers over wildlife viewers is not a lawful policy decision.

CPW attempts to limit judicial review of the Regulations by straining to describe them as a policy choice. Answer Br. at 17-23. But there is no lawful policy justification for the aspects of the Regulations that Nonprofits challenge—the unreasonable and arbitrary restrictions on wildlife viewers vis-à-vis hunters and fishers. CPW did not make a general policy choice at SWAs, such as banning loud music. To the extent CPW made a policy decision, that policy decision (addressing overuse by favoring hunting and fishing over wildlife viewing) was unlawful. §§ 33-1-101, 102(42), C.R.S. 2025.

CPW admits that it was reacting to conditions at SWAs, which are indisputably capable of some level of proof. *See* Answer Br. at 19 (“CPW staff observed negative impacts to wildlife, wildlife habitat, and wildlife-related recreation due to overuse of SWAs.”). And CPW did not respond by making a broad policy like capping access to SWAs but instead by issuing regulations that vary across more than 300 SWAs and proscribe different activities, oftentimes

depending on whether the user is hunting or fishing. This Court should reverse the District Court's error in finding that the Regulations are not fact-based.

But no matter where this Court believes the Regulations fall on the policy-fact continuum, *Citizens for Free Enter. v. Dep't of Rev.*, 649 P.2d 1054, 1063-64 (Colo. 1982), there is no basis to sustain their unlawful aspects. To the extent that the Regulations are supported by evidence in the record, that evidence at best supports limiting the number of wildlife-related recreators at SWAs. All evidence goes to overuse, not to the impact of different types of wildlife recreation. Thus, the evidence in no way supports allowing hunters and fishers to partake in the same activities that the Regulations often prohibit for wildlife watchers. Similarly, even if consistency with habitat stamp funding and safeguarding federal funding may warrant restricting incompatible uses at SWAs, it does not provide a rational basis for allowing hunters and fishers to partake in the very activities that CPW labels as "non-compatible" when undertaken by wildlife viewers. *Contra* Answer Br. at 25.

CPW wholly ignores the evidence in the record that shows CPW's intent to use the Regulations to make SWAs better for hunters. *See* Opening Br. at 21-22. CPW cannot explain away any of the examples from the Regulations' Basis and Purpose showing that CPW was intent on prohibiting "activities not related to

hunting and fishing” and “improv[ing] the hunting experience for the hunters.”

E.g., CF, pp.550, 554. Notably, CPW cannot identify any contrary examples from the Basis and Purpose where CPW discussed improving the wildlife viewing experience. The reason for that is because the Regulations were not intended to improve the experience for wildlife viewers; they were intended to improve SWAs only for hunters and fishers.

CPW claims that the tier system shows that CPW acted rationally, Answer Br. at 24-25, but wholly ignores Nonprofits’ argument that some of the tier ratings are based on the quality of hunting, whereas the Regulations placed no SWA into a tier because of the quality of wildlife viewing. It is contrary to the record for CPW to claim that tier system was based only on SWA’s importance to wildlife and to ignore the impact that hunting and fishing (but not wildlife viewing) also had on the tiers. CF, pp. 446-50. In sum, the tiers offer additional evidence that CPW acted unreasonably in offering disparate treatment to hunting and fishing.

CPW also implies that any alternatives to the Regulations have their own downsides. Answer Br. at 21. But Nonprofits are not arguing that CPW acted unlawfully in not erecting signs or increasing law enforcement presence. The problem is that there is no rational basis to favor hunting and fishing over wildlife

viewing. It would not “cost money” to apply restrictions evenly to wildlife viewers, hunters, and fishers.

CPW’s general prohibition of leashed family dogs in SWAs but general allowance of hunting dogs is especially arbitrary. It must be overturned not simply because Friends of Animals submitted un rebutted evidence that off-leash dogs like hunting dogs cause greater negative impacts than leashed dogs, but because there is no rational basis to allow hunting dogs but ban leashed dogs. CPW offered no explanation at all, much less a satisfactory one, for allowing hunting dogs but banning leashed dogs. *See Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1984) (holding that “the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made” (cleaned up)). CPW identifies no reason why hunters should be allowed to bring their hunting dogs to most SWAs while non-hunters are generally prohibited from bringing their dogs when they visit most SWAs to view wildlife.

Finally, while Friends of Animals does not hide the fact that it is opposed to hunting and believes that government agencies like CPW should do more to serve the needs of the vast majority of citizens who do not hunt rather than continue to cater to the minority who do hunt, Nonprofits are not arguing in this appeal that

hunting should not be allowed in SWAs. *Contra* Answer Br. at 38. Instead, Nonprofits are arguing that CPW cannot address general overuse by favoring one type of wildlife recreation over another. It is obligated to provide wildlife viewers the same access and enjoyment of SWAs as hunters and fishers, and if it does not, to provide a rational explanation for why it is necessary to favor some types of wildlife-related recreation over others.

B. CPW’s unsupported interpretation of the APA, in an attempt to justify misdirecting the public and ignoring the vast majority of comments, cannot be reconciled with the statute and binding authority.

CPW violated APA rulemaking requirements when it entirely failed to consider more than 95% of public comments. The APA requires agencies to “maintain all written submissions and comments received by agency as of the date of the public hearing” and “must consider all such submissions.” *Studor, Inc. v. Examining Bd. of Plumbers*, 929 P.2d 46, 49-50 (Colo. App. 1996) (citing § 24-4-103(4)(a), (8.1)(b)(III), C.R.S. 2025). CPW insists that it was only obligated to consider comments submitted in accordance with one set of its instructions. *See* Answer Br. at 40. This argument suffers from a fatal flaw: CPW offers no reason at all why it chose to ignore the comments from the vast majority of people whose only error was taking CPW at its word.

Regardless of the APA's requirements and CPW's overtechnical interpretation, the agency acted arbitrarily and abused its discretion by providing misinformation to the public and failing to consider the vast majority of public comments that were submitted in accordance with CPW's news release. CPW provided no reasonable basis for its refusal to consider EngageCPW comments after it undertook public outreach explicitly soliciting comments on EngageCPW and assuring the public that the Commission would consider them. *See* CF, p.945. Even if the agency was not required to solicit comments on EngageCPW, it acted arbitrarily by misleading the public. *Wilderness Workshop v. U.S. BLM*, 342 F. Supp. 3d 1145, 1159 (D. Colo. 2018) (holding that even if analysis is not required, if an agency voluntarily conducts it then "that analysis should not be misleading"). Regardless of whether a rule is substantively valid, "agencies must pursue their goals reasonably." *DOC v. New York*, 588 U.S. 752, 785 (2019). Here, CPW failed to do so by misleading the public and inexplicably failing to consider the EngageCPW comments. By any measure, CPW's actions were arbitrary, unlawful, and an abuse of discretion. *See* § 24-4-106(7), C.R.S. 2025.

- 1. CPW ignores the factors that the Court must consider in determining whether it substantially complied with the APA, including the public participation purpose of the APA and the severe extent of the violation.**

In determining whether an agency has substantially complied with the APA,

this Court should consider “the purpose of the provision violated.” *Studor*, 929 P.2d at 48. Tellingly, CPW’s brief is silent on this critical issue. As explained in Nonprofits’ opening brief, the purposes of the APA rulemaking provisions are “to accord interested persons an opportunity to participate” in the rule-making process and to ensure that the agency considers all pertinent information. § 24-4-103(1), C.R.S. 2025; Opening Br. at 36-38. CPW did not address how the Commission’s failure to consider EngageCPW comments directly undermines these purposes. The purpose of the provision does not give agencies an excuse to ignore comments based on a technicality when the agency was the source of the confusion. By failing to address the purposes of the APA’s rulemaking provisions, CPW has conceded that its actions were inconsistent with such purposes.

Likewise, CPW also fails to address the second factor that the Court should consider in evaluating whether the agency substantially complied with the APA: the extent of noncompliance. Opening Br. at 38-41. While CPW mentions some comments were summarized by a memorandum prepared for the Commission, it does not dispute that this memorandum provided an incomplete picture of the comments or that CPW failed to consider the comments. Answering Br. at 10-11 n.14. Nor does CPW dispute that the EngageCPW comments made up over 95% of the total comments submitted on the Regulations. *See* Opening Br. at 39.

An agency clearly violates the APA and abuses its discretion when, like here, it provides false information to the public about the commenting process and dismisses comments submitted in accordance with those instructions. Courts have found violations when the agency errors were far less significant than they are here. For example, an agency's failure to include six documents in the record was substantial. *Studor*, 929 P.2d at 50. Courts have held that an opportunity for comment must be "meaningful." *E.g.*, *Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan*, 979 F.2d 227, 240 (D.C. Cir. 1992) (holding that public participation "would not be meaningful" if agencies utilize "nonobvious readings" and do not make the public "aware of the scope of their demands" (quotation omitted)); *see also Nat'l Ass'n of Home Health Agencies v. Schweiker*, 690 F.2d 932, 949-50 (D.C. Cir. 1982) (finding violation of the APA where agency action was inconsistent with the APA's "public participation" and "fairness" purposes). Because of CPW's instructions, almost all commenters submitted their comments via EngageCPW. CPW was aware of those comments, and it refused to consider them. This was not a "meaningful" opportunity to comment. *Sullivan*, 979 F.2d at 240.

Lastly, CPW's attempt to distinguish the Court's holding in *Studor* by labeling the six documents that were missing from the record as "critical" technical

and safety information is misleading. Answering Br. at 47. The Court did not label them as “critical” or discuss their contents. Rather, it held that “even if a majority of the information provided by Studor was duplicated in other portions of the record, the Board nonetheless violated its duty to include in the record all written comments received from the public.” *Studor*, 929 P.2d at 50. In addition, whether the documents were submitted at a hearing or sent beforehand was immaterial to the Court’s holding. *Contra* Answering Br. at 48. Instead, the Court held that the APA’s requirement to include “all such submissions,” was determinative because it “assures that an agency will consider all pertinent information when engaging in rule-making.” *Studor*, 929 P.2d at 50. Like the information at issue in *Studor*, the comments here were pertinent because they discussed the Regulations’ impact on regulated parties and whether the agency should approve them. *See* Opening Br. at 40, 11-12.

2. CPW cannot circumvent the APA by directing the public to submit comments to an “unofficial” forum or to the Division.

CPW violated the APA by excluding EngageCPW comments from the record and failing to consider them. Opening Br. at 29-41. Nothing in the APA suggests that the rulemaking record may only include comments submitted to an email listed in the Colorado Register. *Contra* Answering Br. at 40-41. Indeed, the APA’s mandate to compile a rulemaking record is expansive and directs agencies

to include, among other things, transcripts of oral presentations from the rulemaking proceedings and “[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), C.R.S. 2025 (emphasis added).

The requirement that the agency “maintain all written submissions,” is a substantive obligation, not a technicality. It cannot be circumvented by confusing the public, whether purposefully or inadvertently, about where to submit comments and only considering a small subset of comments that were emailed to the agency. Notably, the APA could specify how submissions must be made or limit what should be included in the record, but it does not. It mandates that the rulemaking record include “[a]ll” submissions related to the rulemaking that are received as of the date of the hearing. § 24-4-103(8.1)(b), C.R.S. 2025.

Likewise, CPW cannot claim the records should not be part of the record merely because it refused to consider them. Instead, CPW’s failure to consider submissions also violates the APA. *See Studor*, 929 P.2d at 50 (holding that agency violated the APA’s requirement “to consider all comments submitted”).

Second, CPW’s argument that the public and the district court erred in conflating the Division and Commission is meritless because CPW itself did not distinguish between the two in its communications with the public, including in the

news release about the Regulations. When CPW directed the public to submit comments at EngageCPW, it never represented that the press release was from the Division, nor did it state that comments would go to the Division rather than the Commission. In fact, it explicitly stated that such “[c]omments will be reviewed by CPW staff and **considered by the Parks and Wildlife Commission.**” CF, p.945 (emphasis added).³ Moreover, CPW indicates that the Commission was responsible for the news release soliciting comments at EngageCPW by noting that the “**Commission** engaged in significant public outreach.” Answering Br. at 14 (emphasis added) (citing CF, pp.935-957). After submitting comments on EngageCPW, CPW again assured the public that their feedback was being reviewed by the “PWC [Parks and Wildlife Commission] in advance of the June PWC meeting.” CF, p.900. Thus, CPW abused its discretion and violated the APA in refusing to consider such comments.

Next, the Division and Commission are closely related under Colorado law. The Division is under the jurisdiction of the Commission. § 33-9-104(1), C.R.S. 2025. The two have the same mission. § 33-9-101(b), C.R.S. 2025. The Director of the Division “shall perform such duties as prescribed by the commission.” § 33-9-103(3), C.R.S. 2025. The law even specifies that “when necessary, the term

³ A copy of the new release appears at CF, pp.645-646 and pp.945-946.

[Division] may be construed as referring to the parks and wildlife commission.” § 33-1-102 (10), C.R.S. 2025.

A provision that CPW cites in its brief to distinguish the two, § 33-9-103(3), C.R.S. 2025, merely reinforces that EngageCPW submissions should have been included in the record regardless of whether the Division or the Commission received them. *Contra* Answering Br. at 6, 42. That provision states that the Director of the Division “shall act as recording secretary **for the commission**” and is the custodian of records **of the commission**. § 33-9-103(3), C.R.S. 2025 (emphases added). In other words, the Division is not an improper recipient of public input; it is the Commission’s designated recordkeeper. CPW fails to cite any authority stating that it is appropriate to exclude comments submitted to the Division rather than to the Commission.

There is nothing “illogical” or “absurd” about including comments that the Division receives on a specific rulemaking in the record. *Contra* Answering Br. at 44. Moreover, Nonprofits are not asking the Court to fashion a rule that would “require any agency engaged in a rulemaking to include any related communication from the public in the administrative record regardless of the public comment process described in its rulemaking notices and regardless of who at the agency received the submission.” *Id.* Here, CPW explicitly directed the

public to submit rulemaking comments at EngageCPW and represented that such comments would be considered by the Commission. CF, p.945. The comments were “received” because CPW designated EngageCPW as the forum for public comments. *Id.*, § 24-71.3-115(2), (5), C.R.S. 2025. Furthermore, CPW was aware that the vast majority of commenters submitted their comments via EngageCPW. CF, p.305. This is a far cry from an isolated member of the public sending a comment to a random agency employee. Holding that CPW violated the APA here is not imposing any unreasonable obligation on agencies.

3. CPW’s APA violations were not harmless.

The Colorado Supreme Court has emphasized that the statutory requirements for rulemaking are “mandatory, and noncompliance is fatal to the agency’s rule-making actions.” *Home Builders Ass’n v. Pub. Utils. Comm’n*, 720 P.2d 552, 562 (Colo. 1986); *see also Joseph v. Mieka Corp.*, 282 P.3d 509, 516-17 (Colo. App. 2012) (same). In arguing that the errors at issue here were harmless, CPW fails to cite a single case where a court held that a violation of APA rulemaking requirements was a harmless error. *See* Answering Br. 44-47. CPW instead cited cases challenging agency authorization of a project or issuance of a permit. *Id.* at 45. Thus, CPW overlooks the APA’s mandate that rules “shall be invalid” unless

adopted in substantial compliance with the APA's rulemaking provisions. § 24-4-103(8.2)(a), C.R.S. 2025.

CPW further misstates the standard, arguing that Nonprofits must show that following the correct rulemaking process would have changed the vote on the Regulations. Answering Br. at 48-49. This Court has held that a rule is void for failure to follow rulemaking proceedings even if it is possible that the agency might have arrived at the same policy had it followed proper rulemaking procedures. *Colo. Med. Bd. v. Boland*, No. 16CA1269, 2018 Colo. App. LEXIS 2726, at *20 (Colo. App. Jan. 18, 2018). Courts interpreting the federal APA “exercise great caution in applying the harmless error rule in the administrative rulemaking context,” applying it only if the error “clearly had no bearing on the procedure used or the substance of decision reached.” *Cal. Wilderness Coalition v. U.S. DOE*, 631 F.2d 1072, 1090-91 (9th Cir. 2011) (quotations omitted) (citing cases).

Regardless, Nonprofits and its members were harmed by CPW's failure to follow the required procedures, including failure to compile a proper rulemaking record and consider all comments. *See* CF, pp.625-644. As discussed in the opening brief, numerous substantive issues from the comments were not addressed in the brief memorandum shared with the Commission and could have had an

impact on whether the Commission approved the Regulations. Opening Br. at 39-41, 11-12. Had CPW considered the nearly 200 comments, instead of a selective and sanitized summary in a 3½ page memorandum, it may have chosen to revise the Regulations. Indeed, the remarks from one Commissioner indicated her opinion may have changed if she had considered all the comments, the vast majority of which opposed the Regulation for favoring hunters and fishers. *See* CF, p.303 (Commissioner Adams discussing her belief that SWAs should be for wildlife and a variety of wildlife recreation, not just hunters and fishers).

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 6th day of May, 2026.

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CERTIFICATE OF SERVICE

I certify that on May 6, 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:

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