The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
November 19, 2026

**2026 COA 85**

**No. 25CA2144, *Friends of Animals v. Colorado Parks & Wildlife Commission* — Administrative Law — State Administrative Procedure Act — Rule-making Procedure — Official Rule-making Record — Substantial Compliance**

A division of the court of appeals considers whether a state agency violates the rulemaking provisions of the State Administrative Procedure Act (APA), §§ 24-4-101 to -204, C.R.S. 2026, when it invites public comment on proposed legislative rules using a communication method not mentioned in the official notice of rulemaking but then fails to include those comments in the rulemaking record or consider them when promulgating the final rules. The division concludes that it does. The division also concludes that the violations in this case prevented the agency from substantially complying with the APA, requiring that the challenged rules be set aside as invalid.

COLORADO COURT OF APPEALS **2026 COA 85**

Court of Appeals No. 25CA2144
City and County of Denver District Court No. 23CV32544
Honorable Christopher J. Baumann, Judge

Friends of Animals, River Runners for Wilderness, and Living Rivers,

Plaintiffs-Appellants,

v.

Colorado Parks and Wildlife Commission and Division of Parks and Wildlife,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE SULLIVAN
J. Jones and Schock, JJ., concur

Announced November 19, 2026

Jennifer Best, Stephen Hernick, Greenwood Village, Colorado, for Plaintiffs-Appellants

Philip J. Weiser, Attorney General, John E. Matter, Jr., Senior Assistant Attorney General, Christopher R. Stork, Senior Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

¶ 1 When a state agency engages in rulemaking, it must consider written comments received from the public on the proposed rule and include those comments in the rulemaking record. This participatory process affords the public an opportunity to provide input before binding obligations are created, which in turn produces higher quality rules.

¶ 2 In this rulemaking challenge brought by plaintiffs, Friends of Animals, River Runners for Wilderness, and Living Rivers (the nonprofits), defendant, Colorado Parks and Wildlife (CPW), invited the public to submit comments to its proposed state wildlife area rules on its online platform. Nearly 200 people did so. But the agency concedes that those comments were never presented to or considered by the agency decision-makers who promulgated the final rules, nor were the comments included in the rulemaking record. This was error. And because the error prevented CPW from substantially complying with the public participation requirements underlying agency rulemaking, we reverse the district court's order upholding the agency action and remand with directions for the court to vacate the rules.

## I. Statutory and Regulatory Framework

¶ 3 The Department of Natural Resources houses the Division of Parks and Wildlife (Division), § 33-9-104, C.R.S. 2026, and the thirteen-member Parks and Wildlife Commission (Commission), § 33-9-101, C.R.S. 2026. The Commission, but not the Division, has rulemaking authority. §§ 33-1-104(1), 33-1-107(1), 33-9-102(2), 33-9-103(3), C.R.S. 2026. Like the parties, we refer to the two entities collectively as CPW in this opinion unless context requires that we identify them separately.

¶ 4 CPW manages approximately 350 state wildlife areas. These are lands and waters held by the Division that are designated by the Commission "for the benefit of wildlife populations or for wildlife-related recreation." § 33-1-102(42), C.R.S. 2026. As part of its management of wildlife areas, CPW is tasked with providing "a comprehensive program designed to offer the greatest possible variety of wildlife-related recreational opportunity" and maintaining "a continuous operation of planning, acquisition, and development of wildlife habitats and facilities for wildlife-related opportunities." § 33-1-101(1), C.R.S. 2026.

## II. Background

¶ 5 In 2019, CPW staff began analyzing perceived negative impacts resulting from increased use of wildlife areas. CPW eventually convened a stakeholder working group that categorized each wildlife area into one of four tiers based on the area's wildlife value and the types of use that the area can best sustain. A "Tier 1" designation, for example, is reserved for wildlife areas holding significant wildlife value. By contrast, a "Tier 4" designation means the area may no longer have significant or important wildlife value.

¶ 6 Using these classifications, the working group developed proposed updates to the general and property-specific rules on wildlife area use, codified at Department of Natural Resources Regulations, 2 Code Colo. Regs. 406-9. The group's proposed changes to the general rules included, among other things, bans on recreational camping; "water contact activity" (except wading "for the purpose of fishing or hunting"); and launching a "vessel" on water (unless it's "being actively used for fishing and/or hunting"). Dep't of Nat. Res. Reg. 900(I)(C)(2), (I)(C)(17), (I)(C)(25), 2 Code Colo. Regs. 406-9. The working group also developed other property-

specific restrictions and exceptions to the general provisions. *See id.* at Reg. 900(I)(C).

¶ 7 In January 2023, the Commission commenced rulemaking proceedings to consider adopting the working group's proposed changes to the Department of Natural Resources Regulations, 2 Code Colo. Regs. 406-9. The Commission held three rulemaking meetings over four months, publishing notices about each in the Colorado Register. These notices directed the public to submit written comments to a CPW email address.

¶ 8 In addition, CPW solicited public input on the proposed rule changes by issuing a press release that was posted on its website and sent to various local news outlets and stakeholders. But unlike the notices of rulemaking, the press release directed the public to submit written comments through CPW's online public engagement site, EngageCPW. The press release, which prominently displayed CPW's official seal, stated in pertinent part:

> Colorado Parks and Wildlife is seeking public input on proposed regulation changes to [s]tate [w]ildlife [a]reas.
>
> [Wildlife area] visitors are encouraged to learn more about the proposed changes to general [wildlife area] regulations and property-specific

> changes. The public can learn more and provide feedback on EngageCPW through Wed., May 24, 2023. CPW is looking for specific feedback regarding its general provision and property-specific changes. Comments will be reviewed by CPW staff and considered by the Parks and Wildlife Commission.

¶ 9 In total, CPW received 198 written comments — 191 on EngageCPW and seven at the email address shown in the notices of rulemaking.

¶ 10 CPW included the seven emailed comments in the rulemaking record that formed the basis for the final rules. But it didn't similarly include the 191 comments submitted on EngageCPW, nor were the EngageCPW comments presented to or considered by the Commission. Instead, Division staff prepared a two-and-a-half-page memorandum summarizing portions of the 191 comments submitted on EngageCPW. According to CPW's summary, only 25% of the EngageCPW commenters generally agreed with the proposed rule changes.

¶ 11 At its third rulemaking meeting, the Commission voted to approve the proposed rules, which became effective in August 2023.

¶ 12 The nonprofits challenged the new rules in the district court under section 24-4-106, C.R.S. 2026. Among other arguments, they asserted that (1) the new rules arbitrarily favored hunters and fishers, and (2) CPW violated the rulemaking provisions of the State Administrative Procedure Act (APA), §§ 24-4-101 to -204, C.R.S. 2026, by failing to consider the vast majority of the public's submitted comments.

¶ 13 On review, the district court upheld the new rules, finding that they didn't arbitrarily favor hunters and fishers and that CPW had substantially complied with the APA's rulemaking provisions. As to the latter issue, the district court determined that the APA required the Commission to consider only those comments that had been submitted to the CPW email address shown in the official notices of rulemaking. The court also concluded, however, that CPW had failed to maintain a proper rulemaking record when it excluded the EngageCPW comments. Even so, the court concluded that error didn't render the rules "per se" invalid because CPW had still substantially complied with the APA.

¶ 14 The nonprofits appeal, reraising the same two contentions that they raised before the district court.

## III. Exclusion of Public Comments

¶ 15 Because we find it dispositive, we start and end our analysis with the nonprofits' contention that CPW didn't substantially comply with the APA's rulemaking requirements. More specifically, the nonprofits contend that CPW improperly (1) excluded the EngageCPW comments from the rulemaking record and (2) failed to consider such comments when promulgating the final rules.

### A. Standard of Review

¶ 16 Like the district court, we must hold unlawful and set aside an agency's action if, among other reasons, we determine that the agency's action isn't in accord with the APA's procedures or procedural limitations. § 24-4-106(7)(b)(V). But we presume an administrative regulation is valid and will not strike it down unless the challenging party carries its burden to show that the regulation exceeds the agency's statutory authority or is otherwise invalid. *Studor, Inc. v. Examining Bd. of Plumbers*, 929 P.2d 46, 48 (Colo. App. 1996).

¶ 17 We review questions of statutory interpretation de novo. *Macomber v. Nations Roof, LLC*, 2025 COA 59, ¶ 11. Our primary task is to ascertain and give effect to the General Assembly's intent.

*St. Vrain Valley Sch. Dist. RE-1J v. A.R.L.*, 2014 CO 33, ¶ 10. In determining legislative intent, we look to the entire statutory scheme to give consistent, harmonious, and sensible effect to all its parts, and we apply words and phrases according to their plain and ordinary meanings. *Reynolds v. Great N. Ins. Co.*, 2023 COA 77, ¶ 9.

### B. Rulemaking Law

¶ 18 When an agency engages in rulemaking to issue legislative rules, the agency must maintain an official rulemaking record for each proposed rule that contains, at a minimum, the following:

> [a]ll written petitions, requests, submissions, and comments received by the agency as of the date of the hearing on the rule and all other written materials, or a listing of such materials, considered by the agency in connection with the formulation, proposal, or adoption of the rule or the proceeding upon which the rule is based . . . .

§ 24-4-103(8.1)(b)(III), C.R.S. 2026; *see also Doe 1 v. Colo. Dep't of Pub. Health & Env't*, 2018 COA 106, ¶¶ 55-57 (discussing distinction between legislative rules, which are subject to the APA's rulemaking procedures, and other types of rules that are exempt from the APA), *aff'd*, 2019 CO 92.

¶ 19 The agency must consider all such submissions when promulgating the final rule, which must be "based on" the rulemaking record. § 24-4-103(4)(a); *see Studor*, 929 P.2d at 49-50. This public participation requirement affords interested persons the opportunity to submit written data, views, and arguments on the proposed rule. *Regular Route Common Carrier Conf. of Colo. Motor Carriers Ass'n v. Pub. Utils. Comm'n*, 761 P.2d 737, 743 (Colo. 1988). It also fosters informed agency decision-making following an administrative process infused with a degree of openness, explanation, and participatory democracy. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *Weyerhaeuser Co. v. Costle*, 590 F.2d 1011, 1027 (D.C. Cir. 1978); *see also Citizens for Free Enter. v. Dep't of Revenue*, 649 P.2d 1054, 1063 n.7 (Colo. 1982) (noting that federal cases interpreting and applying the Federal APA's informal notice-and-comment procedures offer "appropriate references for comparison").

¶ 20 Similarly, when an agency's rule is challenged, the rulemaking record provides a reviewing court with "a concrete body of material for assessing the basis of the administrative agency's conclusions,"

including the agency's "rationale and support" for its adopted rules. *Studor*, 929 P.2d at 50.

¶ 21 Any rule not adopted in "substantial compliance" with section 24-4-103 is invalid. § 24-4-103(8.2)(a). "Substantial compliance" means more than minimal compliance but less than strict or absolute compliance. *Brighton Pharmacy, Inc. v. Colo. State Pharmacy Bd.*, 160 P.3d 412, 415 (Colo. App. 2007). To determine whether an agency substantially complied with section 24-4-103, we look to (1) the extent of the noncompliance and (2) the purpose of the provision violated. *Studor*, 929 P.2d at 48.

C. Analysis

¶ 22 We agree with the nonprofits that CPW violated the APA by not including the comments submitted on EngageCPW in the rulemaking record and by not considering such comments when promulgating the adopted rules.[1] We also conclude that, as a result

[1] Section 24-4-103(8.1)(b)(III), C.R.S. 2026, refers to written "petitions, requests, submissions, and comments" received by the rulemaking agency. In the interest of brevity, we use "comments" as a shorthand to refer to all such written materials submitted to the agency.

of these violations, CPW didn't substantially comply with section 24-4-103, requiring that we vacate the rules.

1. Rulemaking Record

¶ 23 We start with the rulemaking record. All agree that the rulemaking agency "shall maintain" an official rulemaking record, § 24-4-103(8.1)(a), which must contain "[a]ll" written comments "received by the agency as of the date of the hearing on the rule," § 24-4-103(8.1)(b)(III); *accord Studor*, 929 P.2d at 50; *see also N.D. v. N.J.D.*, 2026 COA 18, ¶ 11 (unless context requires otherwise, "shall" imposes a mandatory duty). Because the public's input on EngageCPW qualified as written comments received by CPW on the proposed rules as of the date of the hearing, CPW violated this mandatory obligation by failing to include such comments in the rulemaking record.

¶ 24 Contrary to CPW's assertion, nothing in section 24-4-103 cabins the rulemaking record to only those comments received through the channel of communication specified in the agency's official notice of rulemaking. While the General Assembly could have so limited the rulemaking record had it intended to, it instead directed agencies to include in the record *all* written comments

received on the rule as of the date of the rulemaking hearing. *See* § 24-4-103(8.1)(b)(III); *see also Hess v. Hobart*, 2020 COA 139M2, ¶ 19 ("All" is synonymous with "every" and "each." (quoting *Hudgeons v. Tenneco Oil Co.*, 796 P.2d 21, 23 (Colo. App. 1990))). This broad statutory language necessarily encompasses comments received on a platform that, as here, the agency affirmatively invited the public to use when providing written input. Indeed, CPW's press release invited the public to "provide feedback on EngageCPW" regarding the proposed rules and represented that the Commission would consider such comments.

¶ 25 We aren't persuaded by CPW's argument that this plain-language interpretation would require the agency to scour its employees' various email inboxes for public comments that potentially bear on the proposed rules. Unlike CPW's press release that solicited public comment on EngageCPW, nothing in the record suggests that CPW affirmatively invited the public to provide input on the proposed rules by emailing individual agency employees. The scenario that CPW describes thus isn't before us, so we need not address it.

¶ 26 We also aren't convinced by CPW's attempt to distinguish between the Division and the Commission. As we understand CPW's argument, section 24-4-103(8.1)(b)(III)'s requirement that the "agency" include written comments in the rulemaking record refers only to the Commission, not the Division, which issued the press release inviting comments on EngageCPW. In support, CPW points out that only the Commission, not the Division, has rulemaking authority. *See* §§ 33-1-104(1), 33-1-107(1), 33-9-102(2), 33-9-103(3).

¶ 27 Although we agree that the Commission and Division are separate entities, nothing in the press release indicated that it came only from the Division. Rather, the press release was issued by "Colorado Parks and Wildlife" — a phrase that CPW concedes refers to both the Division and the Commission collectively. *Cf.* § 33-1-102(10) (the "Division" may be construed as also "referring to the parks and wildlife commission"). More importantly, the press release said that *the Commission* would consider the comments submitted on EngageCPW. What's more, the rulemaking notices published in the Colorado Register directed the public to provide comments to *the Division*, which would then relay them to the

Commission. This is consistent with section 33-9-103(3), which says that the Division's director acts as the Commission's custodian of records and recording secretary. Given all this, any distinction between the Division and the Commission didn't relieve CPW from section 24-4-103(8.1)(b)(III)'s requirement that all submitted comments be included in the rulemaking record.

2. Failure to Consider EngageCPW Comments

¶ 28 We next turn to the nonprofits' contention that the Commission violated the APA by not considering the public comments submitted on EngageCPW.

¶ 29 CPW admits that the individual EngageCPW comments weren't presented to or considered by the Commission. Instead, the Division prepared a two-and-a-half-page memorandum for the Commission that summarized some, though not nearly all, of the 191 comments submitted on EngageCPW. Given the brevity of the memorandum, CPW admitted in the district court that the document didn't discuss all the concerns raised by the EngageCPW comments. Our independent review confirms as much. The memorandum's first four paragraphs discuss general background information that led to the rulemaking and the number of

comments submitted, not the comments' substance. The remainder of the memorandum (approximately one and a half pages) summarizes only eight select themes from the comments in a limited manner, with three of those themes receiving just one sentence each.

¶ 30 After the public is afforded the "opportunity to submit written data, views, or arguments," the rulemaking agency must "consider *all* such submissions" and promulgate final rules "based on" the record. § 24-4-103(4)(a) (emphasis added). Again, the record must include, among other things, "any written comments." *Id.*; *accord Studor*, 929 P.2d at 49-50. Based on this clear statutory directive, we conclude that the Commission violated the APA by not considering the nearly 200 public comments submitted on EngageCPW. *Cf. N.C. Growers' Ass'n v. United Farm Workers*, 702 F.3d 755, 763 (4th Cir. 2012) (the opportunity to comment "must be a meaningful opportunity" (citation omitted)). Even if we assumed that a thorough summary covering the comments' substance could suffice to fulfill this statutory requirement — an issue we don't reach — the Division's brief memorandum didn't meet that bar.

¶ 31 In any event, CPW doesn't rely on the Division's memorandum to argue that it complied with the APA. Rather, it argues that the Commission had to consider only the seven comments submitted to the CPW email address. Agreeing with CPW, the district court concluded that the agency's obligation to consider written public comments was limited to those submitted in compliance with the official notices of rulemaking published in the Colorado Register. *See* § 24-4-103(11)(a) (establishing the Colorado Register). We disagree. Nothing in section 24-4-103(4)(a) restricts the universe of comments that the agency must consider to those submitted in strict conformity with the official notice of rulemaking — particularly when, as in this case, the agency solicits public comment through another channel. Although the statute mentions the "notice," it does so only when referring to the rulemaking hearing, stating that it must occur "[a]t the place and time stated in the notice." § 24-4-103(4)(a).

¶ 32 Moreover, while *official* notice in the Colorado Register is of course necessary, § 24-4-103(11)(a), a rulemaking agency isn't limited to that publication when providing other notice to the public of the opportunity to comment. Section 24-4-103(2) allows the

agency to provide "public announcement" of the rulemaking "at such time and in such manner as the agency determines." The Commission's own rulemaking statute provides similar discretion. *See* § 33-1-108(1), C.R.S. 2026 (stating that rulemaking shall be "as prescribed" in the APA but that "[n]otice of rules and regulations may also be given such other publicity as the commission may deem desirable"). CPW exercised that discretion here by choosing to issue a press release that deviated from the official notices of rulemaking. The press release requested public input through EngageCPW, stated that the Commission would consider the comments, and provided information about two of the upcoming rulemaking hearings. Nevertheless, the Commission failed to consider the EngageCPW comments.

¶ 33 Under these circumstances, we conclude that CPW violated the APA's procedural requirements.

3. Substantial Compliance

¶ 34 Because we have concluded that CPW violated multiple APA provisions, we must determine whether the agency nonetheless

substantially complied with section 24-4-103.[2] *See* § 24-4-103(8.2)(a). This requires us to examine the extent of CPW's noncompliance and the purposes of the provisions it violated. *See Studor*, 929 P.2d at 48.

¶ 35 At its core, the APA requires a rulemaking agency to provide (1) public notice; (2) an opportunity for, and full consideration of, any public comments; and (3) a complete rulemaking record. *See id.* at 50.

¶ 36 We have already determined that CPW didn't fully consider the public's comments or provide a complete rulemaking record. As to the extent of its noncompliance, more than 95% of the individual written comments received by CPW weren't considered by the Commission or included in the rulemaking record. And by CPW's own count, only 25% of the EngageCPW commenters generally

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[2] CPW argues that harmless error, not substantial compliance, governs our judicial review. That's not right. The APA says expressly that any rule not adopted in "substantial compliance" with section 24-4-103 is invalid. § 24-4-103(8.2)(a). And neither case cited by CPW in support of its urged harmless error standard involved a rulemaking challenge. *See Rags Over the Ark. River, Inc. v. Colo. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 13 (challenge to agency's approval of project); *Sheep Mountain All. v. Bd. of Cnty. Comm'rs*, 271 P.3d 597, 600 (Colo. App. 2011) (challenge to agency's issuance of special use permit).

agreed with the proposed rule changes. Had the Commission considered all the EngageCPW comments, the sheer volume of those opposed to the proposed rules may well have made a difference. While the Division's two-and-a-half-page memorandum no doubt reflected *some* of the EngageCPW commenters' perspectives, we can't say on the record before us that its brief, partial summary pushed CPW over the line into substantial compliance with the APA's requirement that the agency consider "all" comments. § 24-4-103(4)(a).

¶ 37 In short, CPW's noncompliance was extensive. *See Studor*, 929 P.2d at 50 (finding no substantial compliance when 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").

¶ 38 The purposes of the APA provisions that CPW violated are also significant. Contrary to the APA's purpose, CPW created a process that thwarted fully informed agency decision-making and lacked transparency. *See Chrysler Corp.*, 441 U.S. at 316; *Weyerhaeuser*, 590 F.2d at 1027. Equally troubling, CPW's process actively misled a large swath of the public participants into believing that the

Commission would consider their comments, preventing those participants from providing input into the final rules. *See Regular Route*, 761 P.2d at 743.

¶ 39 The purposes underlying the rulemaking record were also frustrated, at least in part. *See Studor*, 929 P.2d at 49-50. True, the parties stipulated in the district court to add the omitted EngageCPW comments to the record for purposes of judicial review. *See* § 24-4-106(6) (permitting such stipulations); *Studor*, 929 P.2d at 49 (the record provides information to the reviewing court to assess "the appropriateness of the agency's decision"). But the rulemaking record is also meant to form the basis for the final adopted rules. Put differently, the final rules must be "based on" the rulemaking record, § 24-4-103(4)(a), which must provide the agency's "rationale and support" for its promulgated rules, *Studor*, 929 P.2d at 50. Additionally, the rulemaking record must be available for public inspection, thus promoting transparency during not only judicial review but also the rulemaking process itself. § 24-4-103(8.1)(a). CPW impeded these statutory objectives by directing members of the public to comment on EngageCPW and then failing to include those comments in the rulemaking record.

¶ 40 As a result, we conclude that CPW didn't substantially comply with section 24-4-103.

¶ 41 Our holding is narrow. We hold that an agency violates the APA's rulemaking provisions if it invites the public to comment on proposed legislative rules using a method of communication not mentioned in the official notices of rulemaking but then fails to consider those comments when promulgating the final rules. The agency similarly violates the APA when it fails to include such comments in its official rulemaking record. CPW violated the APA in this case on both fronts, and the extent of its noncompliance prevented it from substantially complying with section 24-4-103. Accordingly, we set aside the challenged rules as invalid. *See* § 24-4-103(8.2)(a).

## IV. Disposition

¶ 42 We reverse the district court's judgment and remand the case with directions for the court to enter an order vacating the challenged rules.

JUDGE J. JONES and JUDGE SCHOCK concur.