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*Attorneys for Montana League of Cities and Towns*

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MONTANA  
GREAT FALLS DIVISION

<p>UPPER MISSOURI WATERKEEPER,</p> <p>Plaintiff,</p> <p>v.</p> <p>UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and GINA McCARTHY, Administrator, United States Environmental Protection Agency,</p> <p>Defendants.</p>	<p>Case No.4:16-cv-00052-BMM</p> <p><b>THE MONTANA LEAGUE OF CITIES AND TOWNS BRIEF IN SUPPORT OF UNOPPOSED MOTION TO INTERVENE</b></p>
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The Montana League of Cities and Towns through its undersigned counsel, states the following in support of its Unopposed Motion to Intervene in this matter:

## INTRODUCTION

The Montana League of Cities and Towns (Cities or League) is an incorporated, nonpartisan, nonprofit association of 129 Montana municipalities, seeking to intervene in the Upper Missouri Waterkeeper's action against the Environmental Protection Agency (EPA). The League seeks to protect Montana municipalities' ability to comply with the Clean Water Act and defend EPA's approval of Montana's Numeric Nutrient Criteria and Variance Rules (hereinafter collectively "Nutrient Rules"). Montana's Nutrient Rules include two parts: (1) numeric nutrient standards for wadable streams and numeric nutrient criteria for segments of the Yellowstone River (collectively "Department Circular DEQ-12A"); and (2) a time-limited interim variance procedure adopted in recognition that it will take time for dischargers, such as municipalities, to make progress toward attaining the Department Circular DEQ-12A standards and criteria ("Department Circular DEQ-12B").

In its Complaint, Waterkeeper alleges that EPA violated the Clean Water Act and associated regulations in approving Montana's Nutrient Rules. Dkt. No. 1, at 7. If Waterkeeper prevails in its efforts to vacate EPA's approval of the Montana Nutrient Rules, the interests of municipalities currently discharging through Publicly Owned Treatment Works (POTW), will be impaired. A ruling favoring Waterkeeper's interpretation of the Clean Water Act would also impair

every Montana municipality's interests and ability to comply in the future. For these reasons the League is entitled to intervene as of right pursuant to Federal Rule of Civil Procedure 24(a)(2). Alternatively, this Court should permit the League to intervene pursuant to Rule 24(b)(2).

## **ARGUMENT**

### **I. THE LEAGUE MAY INTERVENE AS A MATTER OF RIGHT**

The League is entitled under Federal Rule of Civil Procedure 24(a)(2) to intervene as a matter of right. An applicant seeking to intervene as of right under Rule 24 must demonstrate that four requirements are met: (1) the intervention application is timely; (2) the applicant has a significant protectable interest relating to the property or transaction that is the subject of the action; (3) the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect its interest; and (4) the existing parties may not adequately represent the applicant's interest. *Citizens for Balanced Use v. Montana Wilderness Association*, 647 F. 3d 893, 897 (9th Cir. 2011) ("While an applicant seeking to intervene has the burden to show that these four elements are met, the requirements are broadly interpreted in favor of intervention.").

#### **A. The League's Motion to Intervene is Timely**

The League's motion to intervene is timely. Timeliness considerations, along with each of the other factors of Rule 24(a), are to be interpreted liberally in

favor of the applicant for intervention. *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d at 527-28, (9th Cir. 1983). Plaintiff filed its action in late May 2016, and the federal defendant filed its answer on September 15, 2016. The Court has not yet issued a scheduling order, nor has the administrative record yet been submitted. At this early stage, intervention by the League will not disrupt or delay the proceedings and will not result in prejudice to any of the parties. These factors indicate this is a timely motion. *Citizens for Balanced Use*, 647 F.3d at 897.

**B. The League Has Significantly Protectable Interests in the Subject of this Action**

The League has “significantly protectable” interests in maintaining EPA’s approval of Montana’s Nutrient Rules. This is a practical, threshold inquiry; it is enough that the interest of the intervenor is protected under the law and there is a relationship between the legally-protected interest and the claim at issue. *Sierra Club v. EPA*, 995 F.2d 1478, 1484 (9th Cir. 1993).

The League has a clear interest in the subject of this litigation. Plaintiff’s challenge concerns the legality of Montana’s Nutrient Rules, which affects the requirements imposed in the municipalities’ permits to discharge water treated in a POTW. The attached Declarations of Craig Woolard and David Mumford, Public Works Directors for the City of Bozeman and the City of Billings, respectively, establish that the advocated-for change to Department Circular DEQ-12B will

adversely affect the League's members' ability to comply with Montana law. *See* Woolard Decl., ¶¶ 4-6 (attached as Ex. 1); Mumford Decl., ¶¶ 4-6 (attached as Ex. 2). These examples demonstrate the interests of the League and its members are significantly protectable within the meaning of the Fed. R. Civ. P. 24(a)(2).

**C. Plaintiff's Challenge to the Nutrient Rules Threatens the League's Ability to Protect Its Interests**

Intervention is necessary to allow the League to protect its interest in Montana's Nutrient Rules, which has been approved by EPA. Rule 24(a) requires that an applicant for intervention as a matter of right be "so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect [his or her] interest." Fed. R. Civ. P. 24(a). As a practical matter, if Plaintiff were to succeed in the litigation, the ability of municipalities to operate their POTWs would be harmed and impaired. *See* Ex. 1, ¶¶ 4-6; Ex. 2, ¶¶ 4-6. Disposition of this matter without the League's participation would subject Montana's municipalities to additional or different requirements without the ability to protect their rights and interests.

**D. The League's Interests Are Not Adequately Represented by Existing Parties**

The fourth element in considering intervention as of right is that "the existing parties may not adequately represent the applicant's interest." *Citizens for Balanced Use*, 647 F.3d at 898. The burden of showing inadequacy of the parties'

ability to protect its interests is satisfied if the applicant shows that representation of its interest may be inadequate; and the burden of making that showing should be treated as minimal. *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972); *Sw. Ctr. For Biological Diversity v. Berg*, 268 F. d 810, 823 (9th Cir. 2001) (burden of showing inadequacy of representation “is minimal”); *see also Wildearth Guardians v. United States Forest Service*, 573 F.3d 992, 996 (10th Cir. 2009) (“intervenor’s showing is easily made when the party upon which the intervenor must rely is the government, whose obligation is to represent not only the interest of the intervenor but the public interest generally, and who may not view that interest as coextensive with the intervenor’s particular interest.”) (citations omitted).

The EPA cannot adequately represent the League’s interests in the disposition of the Waterkeeper’s Complaint against EPA. The League has its own interests that differ from regulators, including but not limited to cost, feasibility of implementation, and taxpayer/ratepayer impacts. *See* Ex.1, ¶¶ 4-6; Ex. 2, ¶¶ 4-6. The League thus satisfies the final requirement for intervention as of right.

## **II. THE LEAGUE ALSO SATISFIES THE REQUIREMENTS FOR PERMISSIVE INTERVENTION**

Rule 24(b) of the Federal Rules of Civil Procedure allows permissive intervention at the Court’s discretion upon timely motion and where the applicant’s

claim or defense shares questions of law or fact in common with the existing action.

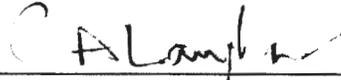
As set forth above, the League's application for intervention is timely and will not prejudice the rights of the existing parties. The claims raised by Plaintiff regard the proper interpretation of the Clean Water Act, and the League's defense responds directly to that issue. The League's viewpoint will not otherwise be represented if it is unable to intervene. If the Court declines to authorize the League's intervention as of right, it should grant the League permissive intervention.

**CONCLUSION**

For the foregoing reasons, the League respectfully requests that its Unopposed Motion to Intervene be granted.

Respectfully submitted this 21st day of September, 2016.

BROWNING, KALECZYC, BERRY & HOVEN, P.C.

By:   
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Catherine A. Laughner

*Attorneys for Montana League of Cities and Towns*

**CERTIFICATE OF COMPLIANCE**

Pursuant to L.R. 7.1(d)(2)(E), I certify that the League's Brief in Support of its Motion to Intervene complies with the rule and contains 1505 words.

  
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Catherine A. Laughner/

## CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of September, 2016, a true copy of the foregoing was served:

Via ECF to the following parties:

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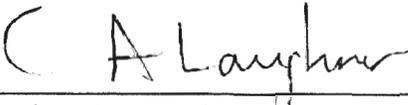
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