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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and SCOTT PRUITT, Administrator, United States Environmental Protection Agency, Defendants, and STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; TREASURE STATE RESOURCES ASSOCIATION OF MONTANA; MONTANA LEAGE OF CITIES AND TONS; and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Defendant Intervenors.	Cause No. 4:16-cv-00052-BMM **DEFENDANT-INTERVENORS NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' AND THE MONTANA LEAGUE OF TOWNS AND CITIES' BRIEF IN SUPPORT OF EXPEDITED MOTION TO STAY JUDGMENT PENDING APPEAL** Judge: Hon. Brian Morris

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I. INTRODUCTION

On October 25, 2019, Defendant-Intervenor National Association of Clean Water Agencies (NACWA) and The Montana League of Cities and Towns (Cities and Towns) (collectively, Defendant-Intervenors) timely filed a Notice of Appeal with the United States Court of Appeals for the Ninth Circuit from this Court's March 25, 2019 summary judgment order (Dkt. No. 177) (March Order), the July 16, 2019 order regarding remedies (Dkt. No. 184) (July Order or Remedies Order), and the September 20, 2019 final judgement entering the March and July Orders (Dkt. No. 187) (collectively, Orders). These Orders stem from Plaintiff's challenge to the United States Environmental Protection Agency (EPA) 2015 approval the State of Montana's "Base Numeric Nutrient Water Quality Standards," also referred to as the numeric nutrient criteria (Base WQS or NNC) for certain waters in the State. The NNC include criteria for total nitrogen (TN) and total phosphorus (TP). Concurrently, in accordance with the Clean Water Act, EPA also approved water quality standard variances (Original Variance Standard) from the NNC, recognizing the widespread economic and social impacts of requiring immediate compliance with the NNC.

Plaintiff challenged the Original Variance Standard in this Court in May 2016. Montana law requires that the Montana Department of Environmental Quality (MDEQ) and EPA (collectively, the Agencies) review the variance every three

years. Mont. Code Ann. § 75-5-313(8). Accordingly, MDEQ reviewed and began the process of amending the Original Variance Standard during the pendency of the May 2016 lawsuit, and EPA approved an amended variance (Current Variance Standard) in October of 2017, pursuant to its first triennial review. Plaintiff amended its complaint to address the Current Variance Standard, and the parties submitted briefing on summary judgment.

This Court then made a series of rulings on various aspects of the Montana nutrient variance. First, this Court upheld EPA's policy that water quality standards can be based on factors other than water quality science, such as cost and attainability. March Order, at p. 15–16. Second, this Court held that EPA's variance rule, 40 C.F.R. § 131.14—which recognizes that designated uses may not be attainable due to "substantial widespread economic and social impacts"—"comports with Congress's intent" and constitutes a permissible reading of the CWA. March Order, at p. 15. Third, this Court ruled that EPA's interpretation of its own variance regulations, to allow consideration of cost, and EPA's approval of the Montana variance on that basis, is "reasonable and deserves deference." *Id.* at 19. Fourth, regarding the Agencies' finding of "substantial and widespread economic and social impact," this Court noted that the environmental groups did not challenge the validity of MDEQ's findings, or of EPA's determination that those impacts would occur if the variance were not granted. *Id.* Fifth, this Court rejected Plaintiff's claim

that the Current Variance Standard functions as a replacement water quality standard that fails to protect designated uses. Defendant-Intervenors do not challenge these findings. *Id.* at 29–32.

On the issue of "highest attainable condition," however, this Court incorrectly held that variance term must result in attainment of WQS. *Id*. at 28–29. This Court's holding—that the Current Variance Standard must, or should, include a compliance schedule that ends in compliance with the NNC—is contrary to the CWA. In other words, the CWA does not require that a variance result in full attainment of designated uses. Rather, the primary purpose of the variance is to provide relief from otherwise applicable permit conditions and CWA regulations when achieving water quality standards is "unattainable." *See* 40 C.F.R. § 131.14(b)(2)(i).

Additionally, this Court incorrectly held that the highest attainable condition must reflect the best condition that the permittee can attain at the beginning of the variance period. The CWA does not require that the highest attainable condition be met at the start of the variance term. Rather, a variance must include a term that is only as long as necessary to achieve the highest attainable conditions during the term of the variance. *See* 40 C.F.R. § 131.14(b)(1)(iv). Any ambiguity regarding the highest attainable condition concept in the Current Variance Standard should be resolved by the Agencies with administrative expertise and not by this Court substituting its own judgment for that of the Agencies.

The March Order remands the matter to MDEQ and partially vacates the Current Variance Standard with instructions to set forth a timeline that begins with the Current Variance Standard and works toward Montana's water quality standards. The July Order then directs MDEQ to revise the Current Variance Standard using the Plaintiff's timeframe for the variance term. Consequently, the July Order directs a predetermined outcome that will result in an invalid rule based on this Court's own judgment rather than EPA's variance rules, the public rulemaking process, and the administrative expertise of the Agencies. Specifically, the July Order directs MDEQ to promulgate a revised rule adopting Plaintiff's variance timeline by November 13th, 120 days from the date of the July Order.

An expedited stay pending appeal of this Court's Orders is warranted to prevent permittees from suffering irreparable harm by having to expend significant and unrecoverable resources to comply with a revised variance rule that has been predetermined by this Court's Orders regarding how the rulemaking should proceed. An expedited briefing schedule and ruling from this Court are necessary to prevent irreparable harm resulting from MDEQ's promulgation of the revised variance rule that is anticipated to become effective on or before November 13, 2019. The legal justifications underlying these orders are contrary to the CWA and variance regulations and, therefore, Defendant-Intervenors submit, the orders are likely to be overturned. Defendant-Intevenors will raise significant legal issues on appeal, and

an expedited stay will serve the public interest by allowing those issues to be resolved before MDEQ promulgates a new variance that the appeal might later render invalid. In addition, an expedited stay will not harm Plaintiff or the public.

The legal issues on appeal will include (1) whether the CWA requires that permittees meet water quality standards at the conclusion of a variance, (2) whether this court afforded appropriate deference to EPA's approval of Montana's approach regarding the highest attainable condition, and (3) whether the record supports this Court's order directing Montana to take a specific approach to revising the variance that predetermines the final rule. As set forth below, an expedited stay is necessary to prevent irreparable harm to NACWA and Cities and Towns members and permittees pending appeal and will not harm the Plaintiff or the public. Therefore, this Court should grant an expedited stay of its Orders pending appeal, or, in the alternative, a brief stay of thirty (30) days to allow Defendant-Intervenors to seek a stay in the Ninth Circuit Court of Appeals.

II. LEGAL STANDARD

"[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Nken v. Holder*, 556 U.S. 418, 421 (2009) (citing *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9–10 (1942) (citation omitted)); *see also* Fed. R. Civ. P. 62(c) (providing that a district court may "suspend, modify, restore, or grant an injunction"

during the pendency of an appeal). Courts consider four factors in determining whether to issue a stay pending appeal: (1) whether the stay applicant has made a strong showing on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether a stay will substantially injure other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Golden Gate Rest. Ass'n v. City & Cnty. of S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2008).

Courts in this Circuit apply a "sliding scale" approach to stay requests as they do to preliminary injunction requests. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Indeed, Ninth Circuit courts have recognized that "a flexible approach is even *more* appropriate in the stay context." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). "Whereas the extraordinary remedy of injunction is the means by which a court directs the conduct of a party . . . with the backing of its full coercive powers, a stay operates only upon the judicial proceeding itself . . . . either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* (citation and internal quotations omitted).

Under the sliding scale approach, "the elements of the preliminary injunction are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance*, 632 F.3d at 1131. Accordingly, a motion for stay pending appeal should be granted when there is either: (1) a substantial case for relief on the

merits and the possibility of irreparable injury; or (2) serious legal questions and balance of hardships tipping sharply in the movant's favor. *Leiva-Perez*, 640 F.3d at 967; *Golden Gate*, 512 F.3d at 1115–16.

III. THIS COURT SHOULD GRANT AN EXPEDITED STAY PENDING APPEAL.

A. Defendant-Intervenors have a Substantial Case on the Merits and Will Raise Important Legal Questions on Appeal.

The Ninth Circuit has explained that "[t]here are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' . . . 'a substantial case on the merits,' . . . or . . . that 'serious legal questions are raised.'" *Leiva-Perez*, 640 F.3d at 967 (citations omitted). "We think these formulations are essentially interchangeable, and that *none of them demand a showing that success is more likely than not*." *Id*. (emphasis added) (internal quotations omitted) (citing *Hilton*, 481 U.S. at 778; *Hollingsworth v. Perry*, 130 S. Ct. 705, 710 (2010) (per curiam); *Abassi*, 143 F.3d at 514; *Indiana State Police Pension Trust v. Chrysler LLC*, __ U.S. __, 129 S. Ct. 2275, 2276 (2009) (per curiam)).

NACWA has a substantial case on the merits and raises serious legal questions on appeal, including the following.

1. The March Order confuses variances with compliance schedules.

The CWA does not support this Court's holding that the Current Variance Standard must, or should, include a compliance schedule that results in compliance with the NNC. Notably, Plaintiff argued that the Current Variance Standard was deficient because it included no provision requiring compliance with the NNC. This argument has no basis in the CWA and should not have informed this Court's decision. Indeed, a variance need not result in compliance with water quality standards. Rather, the purpose of the variance is to provide relief from water quality standards that are "unattainable." *See* 40 C.F.R. § 131.14(b)(2)(i).

The Plaintiff and this Court seem to conflate two different CWA regulatory mechanisms: the variance and the compliance schedule. A variance is a "time-limited designated use and criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance." 40 C.F.R. § 131.3(o). Variances "can be appropriate to address situations where it is known that the designated use and criterion are unattainable today (or for a limited period of time) but feasible progress could be made toward attaining the designated use and criterion." Proposed Rule on Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54,517, 54,532 (September 4, 2013). A variance is a useful tool because it can result in water quality improvements over

time, though not necessarily full attainment of designated uses. EPA has described the concept of a variance as follows:

> If an individual or group of dischargers determine they cannot meet their current permit limit immediately *but are also uncertain whether they can ultimately meet it*, a permitting authority can grant a variance.

U.S. EPA Water Quality Standards: Regulations and Resources, *Key Concepts Module 5: Flexibilities*, *available at* https://www.epa.gov/wqs-tech/key-concepts-module-5-flexibilities.

In this regard, a variance does not require that a permittee will ultimately meet water quality standards. Rather, a variance provides relief from applicable water quality standards by requiring that the permittee instead meet the highest attainable condition during the term of the variance. *See* 40 C.F.R. § 131.14(b)(2)(i). "Because variances are allowed only where the designated use and criterion are demonstrated to be unattainable during the term of the variance, it would not be appropriate to use a variance if the designated use and criterion can be attained. . . ." 78 Fed. Reg. at 54,533. As the language from EPA's rulemaking explains, a variance is not intended to result in attainment of water quality standards; indeed, a variance would not be appropriate where water quality standards are attainable. *See id*.

A different regulatory mechanism exists for permittees who cannot currently meet water quality standards but will ultimately be able to meet them, and that is a compliance schedule. *See id*. "When appropriate," NPDES permits may include "a

schedule of compliance leading to compliance with CWA and regulations . . . as soon as possible, but not later than the applicable statutory deadline under the CWA." 40 C.F.R. § 122.47(a)(1). Unlike a compliance schedule, the purpose of a variance is not to provide a grace period for the permittee to achieve attainment; rather, the purpose of the variance is to modify water quality standards if such standards are "unattainable." Ideally, as the Current Variance Standard contemplates, the variance will provide permittees with time to work toward attainment of water quality standards, but the CWA does not mandate that a variance ultimately result in attainment of water quality standards.

"Variances . . . are intended as a mechanism to provide time for states, authorized tribes and stakeholders to implement adaptive management approaches that will improve water quality where the designated use and criterion currently in place are not being met, but still retain the designated use as a long-term goal." 78 Fed. Reg. at 54,531. EPA has approved this adaptive management approach to expressing the highest attainable condition through interim requirements over the term of the variance. For example, in March 2015, EPA approved Michigan's multiple-discharger variance for mercury. "EPA Approval Letter of the Mercury Multiple Discharger Variance" (March 5, 2015), *available at* https://www.michigan.gov/documents/deq/wrd-npdes-rules-Mercury-EPAapproval_508883_7.pdf. Like the Current Variance Standard here, Michigan's

multiple-discharger variance for mercury required facilities to meet the interim requirements applicable throughout the term of the WQS variance. "Multiple Discharger Variance and Permitting Strategy for Mercury Fiscal Years 2015-2019" (March 5, 2015), *available at* https://www.michigan.gov/documents/deq/wrd-npdes-rules-MercuryVariance2015_2019_508884_7.pdf. The interim requirements represented the effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the state adopted the WQS variance. This approach has resulted in progress toward attainment of water quality standards through interim requirements, even though the variance itself does not require attainment of water quality standards.

Contrary to Plaintiff's position, the Current Variance Standard need not contain a schedule that requires permittees to attain water quality standards by the end of the variance term. Instead, a variance term should be as long as necessary to allow permittee time to achieve the highest attainable condition during the term of the variance, not the underlying water quality standards. *See* 40 C.F.R. § 131.14(b)(1)(iv). Accordingly, this Court's order directing EPA to include a schedule requiring that permittees ultimately achieve water quality standards over the term of the variance is likely to be overturned on appeal as contrary to the CWA.

2. EPA's interpretation of "highest attainable condition" is reasonable and entitled to deference.

EPA advanced a reasonable interpretation of its own regulations relating to highest attainable conditions, to which this Court should have deferred. Instead, this Court substituted its own judgment as to how the highest attainable condition should be achieved. Specifically, this Court reasoned that the highest attainable condition must represent the best condition that the discharger can attain at the beginning of the variance period. March Order, at p. 16 (incorrectly inferring that "The regulations initially contemplate that a discharger must begin with the highest possible condition that it can attain – the 'highest attainable condition.' *See* 40 C.F.R. § 131.3(o), (b)(1)(ii)."). Therefore, the Court held that, permittees cannot be allowed up to twenty years to achieve the highest attainable condition and must, instead, meet the highest attainable condition immediately. This rationale is contrary to both the CWA and the language of EPA's variance regulations thereunder.

The CWA does not require that the "highest attainable condition" be met at the start of the variance term. Rather, a variance must include a term that is only as long as necessary to achieve the highest attainable condition over the term of the variance. *See* 40 C.F.R. § 131.14(b)(1)(iv). EPA's proposed rule revising the definition of variance, which added the highest attainable condition concept, requires that states establish interim requirements reflecting the highest attainable condition during the variance. 78 Fed. Reg. at 54,533. This approach of setting interim

requirements that reflect the highest attainable condition "creates a framework for variances to provide states and tribes with time to implement adaptive management approaches that drive progress towards meeting the designated use and criterion in a transparent and accountable manner—a key environmental benefit of a variance." *Id.* at 54,534.

In accordance with EPA rules, the Current Variance Standard establishes a process for short-term interim milestones to ensure that incremental progress toward the highest attainable condition is being made. Dkt. 77, at pp. 29–30, 43–47. EPA determined that MDEQ's practical approach to meeting its highest attainable condition through short-term interim milestones, adopted on a triennial basis, was appropriate. *Id*. EPA's approval of MDEQ's phased approach to achieving the highest attainable condition—with an initial effluent condition, a requirement to complete an optimization study in the short term and future interim milestones to be adopted every three years based on new information to drive water quality progress towards the long-term highest attainable condition over the term of the variance—is consistent with the CWA. The CWA rules require that the term of the WQS variance "must only be as long as necessary to achieve the highest attainable condition. . . ." 40 C.F.R. § 131.14(b)(1)(iv); *see also* "Water Quality Standards Variance Building Tool – Frequently Asked Questions," EPA 820-F-17-016 (July 2017) (directing permittees to consider: "How long might it take to achieve that highest attainable

condition?"). Contrary to the Court's Orders, this language shows that a variance term is intended to be used to achieve the highest attainable condition, through short-term interim milestones, during the variance term.

This Court's rationale, that "EPA's regulations contradict themselves and [the] purposes of the CWA by establishing time to 'achieve' merely the 'highest attainable condition,'" is incorrect. The CWA rules governing the administration of variances expressly provide that a variance term should be timed to allow permittees to achieve the highest attainable condition. EPA's reasoned approval of MDEQ's phased approach in the Current Variance Standard to achieving the highest attainable condition complies with the CWA and was not arbitrary and capricious. Further, to the extent that this Court found EPA's regulations contradictory, it should have deferred to the Agency's interpretations of its own rules regarding when and how the highest attainable condition must be met or remanded the matter to the Agencies for clarification.

3. This Court's Remedies Order uses materials outside the record to limit Montana's approach to the rulemaking and predetermines the final variance rule.

This Court asked the parties to submit briefs on suggested remedies to accomplish the holdings in the March Order because the parties could not reach agreement. The March Order expressly held that "[t]his case involves review of final agency action and an administrative record." Dkt. 177, at p. 11. As part of its brief,

without leave of the Court, Plaintiff went beyond the Court's instructions and administrative record and submitted a new expert report. Defendant and Defendant-Intervenors did not submit expert reports at this time, as that was clearly beyond the scope of this Court's request for briefs from the March Order on the remedy issue. All parties filed their remedy briefs on the same date and Defendants and Defendant-Intervenors had no opportunity to respond to or address the expert report unilaterally submitted by Plaintiff.

Without notice to any party that it would consider information beyond the briefing and administrative record, the Court considered and cited to Plaintiff's unsolicited expert report (Dkt. 180-1) in remanding the case to the Agencies to revise the variance timeframe. Problematically, the Court directed that the Agencies' replacement variance comport with the Court's March Order and adopt the timeframe proposed by Plaintiff's expert to achieve the NNC. The expert report concludes that currently available technology exists sufficient to meet the highest attainable condition in as few as four to six years for mechanical plants and one to seven years for lagoons. This expert report is critically flawed in a number of ways, and, in any event, was not part of the administrative record or subject to challenge by the other parties. The Court's consideration of such evidence not in the record, as well as the failure to provide all parties with any notice of or reasonable opportunity to respond to such expert report, was improper. Therefore, this Court's Orders

directing MDEQ to promulgate a rule adopting such evidence should be stayed promptly pending appeal.

B. An Expedited Stay is Necessary to Prevent Irreparable Harm to NACWA Members, Cities and Towns Members, and Permittees.

This Court's Orders direct a predetermined result requiring the Agencies to adopt Plaintiff's expert's timeframe, rather than relying on their own administrative expertise to set the variance term and establish interim benchmarks toward achieving the highest attainable condition over the variance term. Accordingly, an expedited stay is necessary to prevent irreparable harm to NACWA members and Cities and Towns members and other permittees pending appeal. If MDEQ promulgates a revised variance rule in accordance with the Court's Orders, before the appeal, permittees will have to conform their actions and make significant and unrecoverable expenditures to comply with a rulemaking based on the Orders, which direct a predetermined outcome that is contrary to the CWA and ignores the Agencies' administrative expertise.

Even if this Court's opinion is reversed, MDEQ's promulgation of a revised variance based on this Court's Orders and Plaintiff's unjustified timeline will cause permittees to suffer irreparable harm in terms of the unrecoverable costs of complying with an invalid rule that is based on a fundamental misunderstanding and misapplication of the CWA. If MDEQ is forced to proceed in promulgating a predetermined rule as this Court directs, NACWA's and Cities and Towns' members

and ratepayers in affected communities across the country will be adversely impacted, including, in particular, NACWA's Montana members and Cities and Towns' members. According to this Court's Orders, MDEQ must promulgate a rule that is effectively a compliance schedule, rather than a variance, for achieving the NNC within an infeasible timeframe established unilaterally by the Plaintiff.

In its 2015 letter approving MDEQ's nutrient criteria and variance provisions as representing "significant progress towards addressing nutrient pollution issues in the state," EPA included its rationale describing the potential cumulative adverse impacts facing POTWs absent a variance. EPA Region 8, "Rationale for the EPA's Action on Montana's New and Revised Water Quality Standards" (February 2, 2015). EPA based its rationale, in part, on Montana's analysis of economic impacts for 24 of the 107 dischargers across Montana. *Id.* at 14–16. Montana's analysis examined effluent data and financial information for all 12 publicly-owned treatment works that discharge more than 1 million gallons per day (MGD); four of the 12 facilities that discharge less than 1 MGD; and eight of the 83 lagoon systems. *Id.* at 14. Upon review of Montana's analysis, EPA identified the following potential adverse impacts to Montana permittees of not allowing for a variance, including: 1) expenses associated with implementing new technology or replacing lagoons with mechanical treatment plants for the majority of communities, 2) the state's current ranking as 41st in the nation in per capita income; 3) impacts to struggling small

towns lacking diversified economies, 4) challenges with finding qualified wastewater treatment plant operators, and 5) impacts to other community infrastructure needs. *Id.* at 16. Additionally, EPA cited the environmental consequences associated with building new treatment systems, including brine disposal and increased greenhouse gas emissions. *Id.* Accordingly, EPA accepted Montana's conclusion that communities would experience widespread economic impacts if they were required to implement the necessary pollution control costs without the added flexibility of staging attainment by dischargers over up to 20 years. *Id.*

The adverse impacts that MDEQ identified and EPA adopted in its rationale are not mere economic costs that would be recoverable from a party to this litigation if the revised rule is reversed on appeal. Once MDEQ promulgates a revised rule on or before November 13, 2019 in accordance with this Court's Orders, permittees will be required to act immediately by making significant investments to comply with the technically-flawed and economically infeasible variance timeline. Such investments will require expenditures, such as the hiring of consultants and purchase of equipment, that will not be recoverable from any party even if the revised variance rule is overturned. Additionally, the increased costs of complying with the revised variance rule are likely to result in water rate increases for residents and businesses (*i.e.*, the "public," which is a critical factor weighing in favor of the stay). These

immediate investment costs and increased burdens on ratepayers are not simple monetary damages that can be recovered from any party or reversed on appeal. These substantial expenditures would be sunk costs that will result in irreparable harm to both permittees and the public, which an expedited stay is necessary to prevent.

For example, modification of the Current Variance Standard to require compliance with the NNC over the term of variance will directly impact the City of Bozeman (the "City"), Montana, a NACWA member and Cities and Towns member. Notably, MDEQ's submission documents to EPA showed that compliance with NNC in the near term would require installation of reverse osmosis (RO) technology in larger facilities, like Bozeman. *See, e.g.*, "Demonstration of Substantial and Widespread Economic Impacts to Montana That Would Result if Base Numeric Nutrient Standards had to be Met in 2011/2012" (Blend and Suplee, 2012). MDEQ's economic analysis demonstrated that communities would incur substantial and widespread economic and social impacts if dischargers were required to install RO to meet the base numeric nutrient standards approved by the EPA as the applicable water quality criteria. *Id.* The City of Bozeman would face a heavy development and construction burden in trying to meet Montana's strict nutrient criteria in the near term—and may be unable to meet these criteria at all, resulting in significant economic impact to the City and the state. As it works to meet these criteria, Bozeman could be subject to enforcement by federal and state regulators and citizen

groups for failing to comply with the nutrient criteria, violations that could result in substantial litigation costs and civil penalties. These costs and adverse impacts will not be reversed or easily recovered even if the Court's Orders are overturned on appeal.

Additionally, this predetermined rule based on this Court's judgment rather than the Agencies' expertise will significantly limit EPA's ability to authorize not only general variances, but discharger-specific variances as well, which will make it substantially more difficult for NACWA members in other states to obtain such NPDES permit conditions in the future. The availability of NPDES permit variances is of paramount importance to NACWA members throughout the nation, as regulators routinely use variances to allow dischargers to work toward meeting stringent discharge limits when immediate compliance cannot be achieved due to economic or technological limitations. The availability of variances in turn impacts the ratepayers who fund NACWA member operations, as increased compliance costs result in greater utility costs.

Even if this Court's opinions are ultimately affirmed, a stay will maintain the *status quo* pending appeal and ensure that neither the regulators nor permittees expend unnecessary resources. Importantly, irreparable harm will result if the stay does not become effective prior to the date that MDEQ promulgates the new variance rule, which is anticipated to become effective on or before November 13, 2019.

C. Neither the Plaintiff nor the Public Will Suffer Injury if an Expedited Stay is Granted Pending Appeal.

To successfully oppose a stay pending appeal, the opposing party must show that the stay will cause it to be "substantially" injured during the pendency of the appeal. *Leiva-Perez*, 640 F.3d at 964. The Plaintiff cannot make that showing here. Nor can it show the public interest will be harmed by a stay. *See Leiva-Perez*, 640 F.3d at 970 ("although petitioners have the ultimate burden of justifying a stay of removal, the government is obliged to bring circumstances concerning the public interest to the attention of the court."). Here, a stay pending appeal will maintain the *status quo*, which will not harm the Plaintiff or the public interest. In fact, an expedited stay may protect the public interest by preventing rate increases during the pendency of the appeal. Maintaining the *status quo* will not result in increased water pollution or decreased water quality and, indeed, will set permittees on an economically feasible path toward compliance with the stringent NNC.

Accordingly, all of the factors weigh strongly in favor of an expedited stay pending appeal.

IV. IN THE ALTERNATIVE, THIS COURT SHOULD GRANT A BRIEF STAY TO ALLOW DEFENDANT-INTERVENORS TIME TO SEEK A STAY FROM THE NINTH CIRCUIT.

If this Court denies the requested stay, Defendant-Intervenors respectfully ask that it grant a brief stay of thirty (30) days to permit Defendant-Intervenors to seek a stay from the Ninth Circuit Court of Appeals.

CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court stay of the judgment pending appeal, or, in the alternative, a brief stay of thirty (30) days to allow Defendant-Intervenors to seek a stay in the Ninth Circuit Court of Appeals. Further, Defendant-Intervenors request that this Court issue an expedited ruling on the Motion for Stay prior to the November 13, 2019 deadline by which MDEQ is anticipated to promulgate the revised variance rule. Accordingly, Defendant-Intervenors request that this Court enter a briefing schedule ordering that Plaintiff's response to the Motion be due on or before October 31, 2019, and Defendant-Intervenors' reply be due on or before November 6, 2019, thereby allowing the Court to issue a ruling prior to MDEQ's promulgation of the new variance rule on or before November 13, 2019. Alternatively, Defendant-Intervenors request that the Court rule on this Motion in an expedited manner absent hearing, including ruling on an *ex parte* expedited basis or following an expedited conference with all parties, if the Court finds that appropriate.

Dated this 25th day of October, 2019.

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CERTIFICATE OF COMPLIANCE

This brief contains 5,075 words, excluding the items exempted by Montana District Local Rule 7.1(d)(2)(E). The brief's type size and typeface comply with Montana District Local Rule 1.5(a). I certify that this brief complies with the word limit of Montana District Local Rule 7.1(d)(2)(A).

CERTIFICATE OF SERVICE

I hereby certify that on October 25, 2019, I electronically filed the foregoing Memorandum in Support of Defendant-Intervenors National Association of Clean Water Agencies' and The Montana League Motion Cities and Towns' Motion to Stay Judgment Pending Appeal with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ *Murry Warhank*
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