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**Case Description: *Upper Missouri Waterkeeper v. EPA, US District Court for the District of Montana (Case 4:16-cv-00052)***

This is a challenge to US Environmental Protection Agency (EPA) final agency action approving a state's general numeric nutrient variance rule, which is alleged to be a violation of the Clean Water Act (CWA) and arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act (APA).

**Background – Montana's General Nutrient Variance**

In 2014, Montana promulgated numeric nutrient criteria (NNC) for phosphorus and nitrogen. Both the US EPA and the Montana Department of Environmental Quality (MTDEQ) understood that most National Pollutant Discharge Elimination System (NPDES) dischargers would be unable to meet the very low in-stream limits. EPA's approach to development of NNC is for states to take the lead on development of criteria and use variances to provide time for implementation. Thus, at the same time MTDEQ submitted the criteria to EPA for approval, the state also submitted an application for a general variance. EPA approved both in February 2015 making Montana the first state in the nation to develop NNC with an approved achievable implementation strategy via a general variance.

The [Montana general nutrient variance](#) (see pp. 13-25) is not waterbody or permittee specific but rather applies to all NPDES permittees discharging to the state's wadeable streams and certain additional specified waters. EPA encourages the use of multiple discharger variances to streamline the process where the state can demonstrate that the designated use or criterion is unattainable as it applies to multiple permittees because they are experiencing challenges in meeting their Water Quality Based Effluent Limits for the same pollutant for the same reasons, regardless of whether or not they are discharging to the same waterbody.

EPA approved Montana's basis for determining that it is reasonable to grant multiple public and multiple private dischargers throughout the state with general variances of up to 20 years "based on demonstration that it is infeasible to meet water quality-based effluent limits based on NNC (and by extension infeasible to attain the designated use for that limited time) 'end-of-pipe' because meeting such limits would cause substantial and widespread economic and social impacts (see 40 CFR §131.10(g)(6)) on a statewide basis" (see [variance](#) p. 14).

Interim limits apply and evolve during the life of the variance. Montana is required to triennially review the economic justification as well as the costs and effluent concentrations associated with various available treatment technologies. Findings from this review will determine the next

set of interim limits. If modification of interim limits is warranted based on the findings, the state will provide for public notice and comment and initiate rulemaking.

### **APA Challenge**

In May 2016 an environmental group – Upper Missouri Waterkeeper - filed litigation against EPA challenging the approval of the variance. Waterkeeper seeks to have EPA's approval overturned as arbitrary and capricious and an abuse of discretion. Waterkeeper argues that "Montana did not analyze data for each specific nutrient pollutant discharger, for classes of dischargers, or the highest attainable condition for each receiving water in deciding to adopt the weaker replacement standard."

The group alleges that Montana did not consider "whether the replacement standard would protect receiving waterways' designated use(s)." As a result of EPA's approval of the variance, Waterkeeper argues "the science-based numeric nutrient criteria are not the actual applicable water quality standards in Montana," but rather, "the actual nutrient standard in Montana is the replacement standard, a standard that is not based on science, but is based solely on the cost of pollutant treatment." The group contends that, therefore, EPA has "authorized the state's use of weaker, less-stringent effluent limits that are not protective of existing uses, and do not reflect the water quality needed to protect attainable uses as shown by best available science."

### **Potential Ramifications**

If the federal district court strikes down EPA's approval of the variance, the precedent will have immediate impacts on NPDES dischargers in Montana and could severely limit or eliminate the availability of water quality variances nationwide.

Moreover, if the variance approval is reversed, it will establish legal precedent that paves the way for successful challenge of similar variances in every state. Thus, the entire viability of EPA's nutrient approach embracing cooperative federalism and acknowledging that states are better suited to develop NNC is at stake, which could result in the development of federal NNC.

### **Status**

The case is pending in federal district court in Montana. EPA's answer to the complaint is due September 15. Several stakeholders including the Montana Department of Environmental Quality, the Montana League of Cities and Towns, and NACWA will likely intervene as parties to the litigation.