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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 GINA McCARTHY, Administrator, United States Environmental Protection Agency,	Cause No. 16-cv-00052-BMM **MEMORANDUM IN SUPPORT OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' UNOPPOSED MOTION FOR LEAVE TO INTERVENE**

Defendants. MONTANA LEAGUE OF CITIES AND TOWNS; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; TREASURE STATE RESOURCES ASSOC. OF MONTANA; and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES; Defendant Intervenors.	

The National Association of Clean Water Agencies ("NACWA"), by its attorneys, and pursuant to Federal Rule of Civil Procedure 24(a) and 24(b) and Local Rule 7.1(c), submits its Memorandum of Law in support of its motion for leave to intervene as an Intervenor-Defendant and states as follows:

I. BACKGROUND

A. NACWA Represents Municipal Wastewater and Stormwater Utilities Nationwide.

NACWA is the leading national advocacy association for public stormwater utilities and wastewater treatment agencies. NACWA is a non-profit trade association representing the interests of publicly owned wastewater and stormwater utilities across the United States. NACWA's members include nearly 300 municipal clean water agencies that own, operate, and manage publicly owned treatment works (POTWs), wastewater sewer systems, stormwater sewer systems,

water reclamation districts, and all aspects of wastewater collection, treatment, and discharge.

NACWA has members in 46 states, covering every U.S. Environmental Protection Agency ("EPA") Region. NACWA's members operate in accordance with federal and state laws and regulations in cities and towns across the United States, including Bozeman, Montana. NACWA routinely advocates for its members' interests in District Courts throughout the country, as both plaintiff and intervenor.

NACWA's members discharge into waters of the United States subject to the statutory requirements of the Clean Water Act ("CWA"). 33 U.S.C. § 1311(a). Section 402 of the CWA authorizes the Administrator for the EPA to issue National Pollution Discharge Elimination System ("NPDES") permits for the discharge of pollutants, provided the discharge meets statutory requirements. 33 U.S.C. § 1342(a). EPA delegates the implementation and administration of the NPDES permit program to approved states (33 U.S.C. § 1342(b)) and also requires states to develop water quality standards for all waterbodies within the state's border to further the goals of the CWA. 33 U.S.C. § 1313(a).

B. The General Variance Provides a Reasonable Framework for Nutrient Pollution Reductions.

Pursuant to the CWA, in 2000, EPA directed states, including Montana, to develop nutrient criteria. "Nutrients" refer to phosphorus and nitrogen. High

levels of nitrogen and phosphorus in water may contribute to the growth of algae, bacteria, and plants, which in turn may deplete oxygen levels and cause other detrimental effects in those areas. Given the risks high levels of these nutrients can pose to waterbodies and related ecosystems, EPA emphasized the need for states to make greater progress in creating numeric nutrient criteria to reduce nitrogen and phosphorus in the nation's waters. *See* U.S. Environmental Protection Agency, Working in Partnership with States to Address Phosphorus and Nitrogen Pollution through use of a Framework for State Nutrient Reductions, (Mar. 16, 2011)(https://www.epa.gov/sites/production/files/documents/memo_nitrogen_framework.pdf)(accessed on Oct. 6, 2016). EPA specifically recommended that states prioritize the "effectiveness of [nutrient criteria in] point source permits" for municipal and industrial wastewater treatment facilities and urban stormwater sources which discharge into nutrient-impaired waters. *Id.* at pg. 1.

But EPA has recognized that certain groups of dischargers may have difficulty meeting required criteria, and therefore endorses "multiple discharger variances," or a time-limited exception to water quality standards for which similarly-situated dischargers may apply. *See* U.S. Environmental Protection Agency, EPA-820-F-13-012, Discharger-specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers,

pg. 4 (March 2013)

(http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060j.pdf) accessed on Oct. 6, 2016). EPA has recognized the utility of multiple discharger variances since 1995. *Id.* at pgs. 4–5. EPA will approve a multiple discharger variance when the state can demonstrate that a group of similarly-situated dischargers will be unable to attain the designated criteria. *Id.* at pg. 5. As part of this analysis, the state must show—with backup data—that technical, economic, or social factors make it infeasible for the permittee group to attain the criteria.

Pursuant to EPA's directive, Montana spent several years developing nutrient criteria for its waters. Montana created a Nutrient Work Group to advise the state Department of Environmental Quality ("MDEQ"), which included publicly owned and privately owned facilities which discharge into Montana's waters (hereafter, "dischargers") and other interested parties. After careful analysis of EPA's guidance—as well as scientific literature and public comments—MDEQ and the Nutrient Work Group submitted final nutrient water quality standards to the EPA on August 15, 2014.

As MDEQ has stated, these standards are stringent and will likely be difficult for many permit-holders to meet in the short term. See MT Dept. of Environmental Quality, DEQ-12B, Nutrient Standards Variances (July 2014). EPA approved the numeric nutrient criteria on February 26, 2015. Because the

final nutrient water quality standards were so stringent, however, MDEQ also submitted—and EPA approved—a multiple discharger variance, or general variance, from these standards to allow permittees to remain in compliance while they worked to achieve the more stringent nutrient limits. Permittees may apply for this variance for phosphorus, nitrogen, or both nutrients, and MDEQ can only grant this variance to permittees for a maximum of twenty years. The general variance also provides for reevaluation by MDEQ every three years in the event dischargers develop technology to meet Montana's stringent nutrient standards. During the reevaluation period, MDEQ will solicit public comment regarding whether the general variance should be: (1) extended without modification, (2) modified and extended, or (3) allowed to expire.

Montana is the first state in the nation to synthesize EPA's emphasis on reducing nutrient pollution through numeric criteria with its long-standing policy of approving multiple discharger variances to address widespread problems as to compliance with water quality standards. Therefore, other states and industry stakeholders are watching the adjudication and implementation of Montana's general variance for use in their own jurisdictions. If EPA's approval of the general variance is upheld, other states will consider the general variance approach. Should EPA's approval be overturned, however, this decision will have a chilling effect on other states that are contemplating general variances—for both nutrient

criteria and other pollutants, such as toxics. Striking down EPA's approval would essentially foreclose states from using this scheme of nutrient regulation, causing a slow-down in states' issuance and implementation of water quality regulations across the board. Finally, an adverse decision in this case could impact the availability of individual variances from stringent water quality standards because challenges to EPA's rationale in this case may apply to individual dischargers, limiting states' granting of individual variances. Therefore, although the adjudication of MDEQ's issuance and EPA's approval of the general variance may appear—at first blush—to apply only in Montana, this case has national consequences for nutrient reduction regulation and implementation of the CWA in all states.

C. NACWA's Interest in this Litigation.

Upper Missouri Waterkeeper ("Plaintiff"), an environmental advocacy organization, filed the instant lawsuit against EPA on May 31, 2016, arguing that EPA failed to comply with the CWA by approving Montana's general nutrient variance. Specifically, Plaintiff alleges that EPA should not have approved Montana's general nutrient variance, because it is not scientifically based and wrongly considers the possible economic impact to the state.

NACWA now seeks to intervene in this proceeding as an Intervenor-Defendant to protect its members' interests. The legality of NPDES permit

variances is of paramount importance to NACWA's POTW operators throughout the nation, as variances are regularly used by regulators to allow dischargers to work toward meeting stringent discharge limits when immediate compliance cannot be achieved due to economic or technological limitations. EPA will not adequately represent the interests of NACWA's members in this case. Therefore, NACWA should be able to present its own arguments and defenses in response to Plaintiff's claims, which would have a direct impact on its members' operations as well as the POTW ratepayers in affected communities across the country. NACWA has conferred with counsel for Plaintiff, Defendants EPA and Gina McCarthy, and Intervenor-Defendants Treasure State Resources Assoc. of Montana, MDEQ, and Montana League of Cities and Towns regarding NACWA's proposed intervention. None of these parties oppose NACWA's intervention in this case.

II. ARGUMENT

A. NACWA may intervene as of right pursuant to Federal Rule of Civil Procedure 24(a).

Fed. R. Civ. P. 24(a) ("Rule 24(a)") provides that "the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest." Fed. R. Civ. P.

24(a)'s criteria for what constitutes an "interested party" as it pertains to intervention are intentionally broad, and therefore the rule is generally interpreted in favor of intervening applicants. *Arakaki v. Cayetano*, 324 F.3d 1078, 1082-83 (9th Cir. 2003); *Forest Conservation Council v. U.S. Forest Serv.*, 66 F.3d 1489, 1493 (9th Cir. 1999). Pursuant to Rule 24(a), a party may intervene as of right if:

> (1) it has a significant protectable interest relating to the subject of the action; (2) the disposition of the action may, as a practical matter, impair or impede its ability to protect its interest; (3) the application is timely; and (4) the existing parties may not adequately represent its interest.

Peruta v. County of San Diego, 824 F.3d 919, 940 (9th Cir. 2016). NACWA satisfies all of these requirements and it should therefore be granted intervention as of right.

NACWA is a trade association that is entitled to intervene on behalf of its members, which is the appropriate focus of this Court's Rule 24 analysis. *See Utahns for Better Transp. v. U.S. Dept. of Transp.*, 295 F.3d 1111, 1115 (10th Cir. 2002) (*citing Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 343 (1977)). "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple*

Advertising Commission, 435 U.S. at 343. Circuit courts have repeatedly found that trade associations such as NACWA satisfy these criteria to intervene on behalf of their members in challenges to environmental regulations. In *S.W. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810 (9th Cir. 2001), the Ninth Circuit specifically held that a group of associations had standing to intervene on behalf of their members in environmental groups' challenge of San Diego's endangered species protection program. *Id.* at 822 n. 3. NACWA may intervene to protect its members' interests, and therefore those interests control the analysis below, rather than the interests of NACWA as a trade association.

1. NACWA has a significant protectable interest in this litigation.

NACWA has a significant interest in the outcome of this litigation because its members will be significantly impacted if the Court finds EPA's approval of the general variance was improper. Courts do not require any specific legal or equitable interest for a motion to intervene, and interpret this requirement very broadly: "Whether an applicant for intervention as of right demonstrates sufficient interest in an action is a practical, threshold inquiry, and no specific legal or equitable interest need be established. To demonstrate a significant protectable interest, an applicant must establish that the interest is protectable under some law and that there is a relationship between the legally protected interest and the claims

at issue." *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 897 (9th Cir. 2011).

NACWA members, both in Montana and nationwide, will be significantly impacted by resolution of the issues in this case. Plaintiff seeks to eliminate a key aspect of NPDES permits in Montana: the general variance. Without access to the general variance, utilities across the State of Montana would be required to comply with the state's strict nutrient criteria, with disastrous results. For example, the City of Bozeman (the "City"), Montana, a NACWA member, would be directly impacted by elimination of the general variance. The City of Bozeman would face a heavy development and construction burden in trying to meet Montana's strict nutrient criteria—and may be unable to meet these criteria at all, resulting in significant economic impact to the City and the state. As they work to meet these criteria, Bozeman would also potentially be subject to enforcement by federal and state regulators and citizen groups for failing to comply with the nutrient criteria, violations for which they could be subject to substantial civil penalties.

The decision would also impact the availability of variances as NACWA members work to comply with new regulatory mandates across the country. Montana is the first state in the nation to pair strict nutrient criteria—which it knows most dischargers will be unable to meet with current technology—with a general variance that gives dischargers the opportunity to work toward compliance

over a reasonable time period. Should Plaintiff prevail in this suit, the case will call into question EPA's ability to authorize such general variances, which will make it substantially more difficult for NACWA members in other states to obtain such NPDES permit conditions in the future. Without these variances, NACWA members will face enormous costs to attempt to comply with permit limits that are ultimately not attainable, and may face litigation and substantial civil penalties for failing to meet the stringent limits in the interim. Consequently, NACWA (through its members) has a significantly protectable interest in the subject matter of this proceeding for intervention as of right under Fed. R. Civ. P. 24(a)(2). *See, e.g.*, *Wildearth Guardians v. Salazar*, 272 F.R.D. 4, 16 (D.D.C. 2010) (holding that industry trade association's interest in impact on coal leasing nationally would be negatively impacted if plaintiff prevailed in its suit, justifying, in part, intervention as of right).

2. The disposition of this suit may impair or impede NACWA's interests.

NACWA seeks to intervene in this matter to protect its members' direct and substantial interests in the outcome of this proceeding. As the advisory committee explained in adopting Fed. R. Civ. P. 24, courts should permit intervention where the litigation would have a substantial practical effect on the party: "If an absentee would be substantially affected in a practical sense by the determination made in

an action, he should, as a general rule, be entitled to intervene." Fed. R. Civ. P. 24 advisory committee note.

No clear definition has been established by the Supreme Court or the lower courts for the "interest relating to the property or transaction which is the subject of the action" described by Rule 24 for intervention of right. However, several courts, have implicitly rejected the notion that Rule 24(a)(2) requires 'a specific legal or equitable interest.'" *Blake v. Pallan,* 554 F.2d 947, 952 (9th Cir. 1977), (citing *Cascade Natural Gas Co. v. El Paso Natural Gas Co.*, 386 U.S. 129, 133-135 (1967)). Instead, when a Court finds that an intervenor has a significant protectable interest, the Court will have "little difficulty concluding that the disposition of the case may, as a practical matter, affect it." *Citizens for Balanced Use*, 647 F.3d at 897.

NACWA has a clear stake in this litigation because its members are affected by the legality of NPDES permits variances in Montana and nationally. As stated above, the relief Plaintiff seeks will increase the regulatory compliance burden already placed on NACWA's members to the point, in certain cases, where adherence is economically or technologically infeasible. The precedent this case sets will have immediate impacts on the availability of variances nationwide, as well as on NACWA's member in Montana, the City of Bozeman.

NACWA's interest in this litigation is more than sufficient to support intervention as of right. The interests of NACWA's members in the outcome of this case fall within the recognized "cognizable interest" that may be "impaired or impeded" as a result of this litigation, thereby meeting additional criteria for intervention under Fed. R. Civ. P. 24(a).

3. NACWA's motion is timely.

Courts determine the timeliness of a motion to intervene by analyzing "the totality of the circumstances facing would-be intervenors, with a focus on three primary factors: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Smith v. Los Angeles Unified Sch. Dist.*, 14-55224, 2016 WL 4011195, at *9 (9th Cir. July 27, 2016). This motion has been filed early in these proceedings, less than one month after defendant EPA filed its answer to Plaintiff's complaint. The existing parties will not be prejudiced by NACWA's intervention given the early stage of this case and the lack of any substantive issues having been decided by the Court. Finally, if NACWA is not permitted to intervene, the potential prejudice would be substantial as its members have significant operational, compliance, and economic interests at stake, which will not be adequately protected by any other party in this matter.

4. Plaintiff, Defendant, and the other Intervenor-Defendants cannot adequately represent NACWA's interests.

No party in this case can adequately represent NACWA's interests. Courts interpret this element of intervention of right very broadly, explaining that "the burden of showing inadequacy is 'minimal,' and the applicant need only show that representation of its interests by existing parties 'may be' inadequate." *S.W. Ctr. for Biological Diversity v. Berg*, 268 F.3d 810, 823 (9th Cir. 2001). NACWA's interests are clearly adverse to Plaintiff's, as NACWA supports EPA's position that its approval of Montana's general nutrient variance was proper under the CWA.

As to the defendants in this case, neither EPA nor the Intervenor-Defendants can adequately represent the interests of NACWA and its members. Although NACWA and EPA may share certain positions in this case, it is a matter of long-standing precedent that "the government's representation of the public interest may not be 'identical to the individual parochial interest' of a particular group just because 'both entities occupy the same posture in the litigation.'" *Citizens for Balanced Use v. Montana Wilderness Ass'n*, 647 F.3d 893, 899 (9th Cir. 2011) (*citing WildEarth Guardians v. U.S. Forest Serv.*, 573 F.3d 992, 996 (10th Cir. 2009)). NACWA seeks to advance the specific operational, compliance, and economic concerns of its members, whereas EPA "must represent the broad public interest, not just the economic concerns of [one] industry." *Sierra Club v.*

Glickman, 82 F.3d 106, 108 (5th Cir. 1996), *citing Sierra Club v. Espy*, 18 F.3d at 1208. As regulated entities and as holders of NPDES permits, NACWA members may incur damages and expenses that are unique to their status and separate from those of the general public.

As to the other Intervenor-Defendants, those parties all represent Montana-based entities. Therefore, they cannot defend or represent NACWA members' particular interests in the national consequences of this case. For these reasons, only NACWA can adequately respond to Plaintiffs' claims as they affect the interests of the NACWA members.

B. Alternatively, the Court should permit NACWA to intervene in this action.

If the Court finds that NACWA does not meet the criteria for intervention as of right, alternatively, it should be permitted to intervene pursuant to Fed. R. Civ. P. 24(b)(2). A party requesting permissive intervention must have a claim or defense in common with the claim or defense in the suit. *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1108 (9th Cir. 2002) (quoting Fed. R. Civ. P. 24(b)(2)). In addition, courts consider whether the intervention will unduly delay or prejudice the adjudication of rights of the original parties. *United States v. Pitney Bowes, Inc.*, 25 F.3d 66 (2d Cir. 1994) (the "principal consideration in ruling on a Rule

24(b) motion is whether the proposed intervention would unduly delay or prejudice the adjudication.").[1]

As outlined more fully above, NACWA satisfies all requirements for permissive intervention in this action. NACWA intends to assert defenses concerning the validity of EPA's consideration of economic factors in approving Montana's general nutrient variance. These arguments are both legally and factually related to the claims and defenses set forth by Plaintiff and EPA. Further, NACWA's intervention would in no way unduly delay or prejudice the other parties or the adjudication process, given the early stage of this matter. NACWA does not intend to expand the scope of this proceeding beyond the issues raised by Plaintiff's Complaint and will work with other parties in this case to avoid duplication in briefing. NACWA's involvement promotes judicial efficiency by bringing the national interests of regulated POTW operators to bear on the issues presented in this case, and so serves the purpose that the liberal intervention rules were designed to achieve. Therefore, NACWA should be permitted to intervene in this action pursuant to Fed. R. Civ. P. 24(b)(2).

[1] Although the Ninth Circuit sometimes considers a third factor, whether the intervenor has an independent basis for federal jurisdiction, "in federal-question cases, the identity of the parties is irrelevant and the district court's jurisdiction is grounded in the federal question(s) raised by the plaintiff." *Freedom from Religion Found., Inc. v. Geithner*, 644 F.3d 836, 844 (9th Cir. 2011).

III. CONCLUSION

WHEREFORE, for all the foregoing reasons, NACWA respectfully requests that this Court grant its motion for leave to intervene in this matter, and grant all relief it deems fair and just.

Respectfully submitted this 11th day of October, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of October, 2016, I served a copy of the foregoing in the above-captioned matter by sending a copy via First Class Mail to each of the following addresses:

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