

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources Division
DANIEL PINKSTON
Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
(303) 844-1804
Daniel.pinkston@usdoj.gov

MICHAEL W. COTTER
United States Attorney
District of Montana
901 Front Street, Suite 1100
Helena, MT 59626
(406) 457-5120
Mark.smith3@usdoj.gov

Attorneys for Defendants

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER,)	Case No. 4:16-cv-00052-BMM
)	
Plaintiff,)	
)	DEFENDANTS'
v.)	MEMORANDUM IN
)	OPPOSITION TO PLAINTIFF'S
UNITED STATES ENVIRONMENTAL)	MOTION FOR SUMMARY
PROTECTION AGENCY and SCOTT)	JUDGMENT AND IN SUPPORT
PRUITT, Administrator, United)	OF DEFENDANTS' CROSS-
States Environmental Protection)	MOTION FOR SUMMARY
Agency,)	JUDGMENT
)	
Defendants.)	
_____)	

TABLE OF CONTENTS

INTRODUCTION.....	1
STATEMENT OF UNDISPUTED FACTS	3
BACKGROUND.....	3
A. STATUTORY AND REGULATORY BACKGROUND.....	3
1. Clean Water Act.....	3
a. Water Quality Standards.....	3
i. Designated Uses	6
ii. Water Quality Criteria	7
b. Variances	8
2. Montana State WQS	12
a. The Montana Numeric Nutrient WQS	12
b. Montana Variance for NNC	14
B. FACTUAL BACKGROUND	16
1. MDEQ Submission	16
2. EPA Approval Action.....	26
STANDARD OF REVIEW.....	31
ARGUMENT	33
I. THE GENERAL VARIANCES FROM THE NNC APPROVED BY EPA ARE CONSISTENT WITH THE RELEVANT CLEAN WATER ACT REQUIREMENTS THAT ALLOW STATES TO ACCOUNT FOR ECONOMIC AND SOCIAL IMPACTS.....	34
A. CWA Requirements That Apply to Variances Allow States to Account for Economic and Social Impacts	35

B. Montana’s WQS Were Properly Considered by EPA as Variances That Met CWA Requirements and Appropriately Accounts for Economic and Social Impacts.....	43
II. EPA’S APPROVAL OF THE MONTANA NUTRIENT WQS GENERAL VARIANCE IS SUPPORTED BY THE ADMINISTRATIVE RECORD AND IS NOT ARBITRARY, CAPRICIOUS, OR IN VIOLATION OF LAW	48
A. EPA Appropriately and Reasonably Approved Montana’s Variances Based on “Substantial and Widespread Economic and Social Impact” Pursuant to the Agency’s Interpretation of the Clean Water Act and EPA’s WQS Regulation at 40 C.F.R. Part 131	50
B. EPA Appropriately and Reasonably Approved Montana’s Variances for Both TN and TP Components of the NNC	53
C. EPA Appropriately and Reasonably Approved Montana’s Approach Regarding the Highest Attainable Condition.....	56
CONCLUSION	59

TABLE OF AUTHORITIES

FEDERAL CASES

Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife,
 273 F.3d 1229 (9th Cir. 2001)..... 32

Arkansas v. Oklahoma,
 503 U.S. 91 (1992).....3

Auer v. Robbins,
 519 U.S. (1997) 32

Bahr v. U.S. EPA,
 836 F.3d 1218 (9th Cir. 2016)..... 32

Barnes v. U.S. Dep’t of Transp.,
 655 F.3d 1124 (9th Cir. 2011)..... 32

Chase Bank USA, N.A. v. McCoy,
 562 U.S. 195 (2011) 32

Citizens to Preserve Overton Park, Inc. v. Volpe,
 401 US. 402 (1971) 32

Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.,
 450 F.3d 930 (9th Cir. 2006)..... 33

Decker v. Nw. Env’tl. Def. Ctr.,
 __ U.S. __, 133 S.Ct. 1326 (2013) 33

Forest Serv. Employees for Env’tl. Ethics v. U.S. Forest Serv.,
 726 F.Supp. 2d 1195 (D. Mont. 2010) 33

League of Wilderness Defs. Blue Mountains Biodiversity Proj. v. Allen,
 615 F.3d 1122 (9th Cir. 2010)..... 32

Miss. Comm’n on Nat. Res. v. Costle,
 625 F.2d 1269 (5th Cir. 1980).....38, 39

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,
463 U.S. 29 (1983)..... 31

Natural Resources Defense Council, Inc. v. Pritzker,
828 F.3d 1125 (9th Cir. 2016).....32, 55

Occidental Eng'g Co. v. INS,
753 F.2d 766 (9th Cir. 1985)..... 33

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v.
U.S. Dep't of Agriculture, 415 F.3d. 1078 (9th Cir. 2005)..... 31

Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v.
U.S. Dep't of Agriculture, 499 F.3d 1108 (9th Cir. 2007)..... 32

FEDERAL STATUTES

5 U.S.C. § 706..... 31

33 U.S.C. § 1251(a) 3

33 U.S.C. § 1251(a)(2) 4, 6

33 U.S.C. § 1311(b) 11

33 U.S.C. § 1311(b)(1)(A) 6

33 U.S.C. § 1311(b)(1)(C) 6

33 U.S.C. § 1313 4

33 U.S.C. § 1313(a) 4

33 U.S.C. § 1313(c)..... 1, 4, 35

33 U.S.C. § 1313(c)(1) 5

33 U.S.C. § 1313(c)(2)(A) 4, 6

33 U.S.C. § 1313(c)(2)(B) 7, 13

33 U.S.C. § 1313(c)(3)	5
33 U.S.C. § 1313(c)(4)	5
33 U.S.C. § 1314(a)	7
33 U.S.C. § 1316	11
33 U.S.C. § 1342	5

FEDERAL RULES

Fed. R. Civ. P. 25(d)	1
Fed. R. Civ. P. 56(a).....	33

FEDERAL REGULATIONS

40 C.F.R. § 122.44(d)	6
40 C.F.R. Part 131.....	4, 5, 50
40 C.F.R. § 131.3	10
40 C.F.R. § 131.3(b).....	7, 36
40 C.F.R. § 131.3(f)	7, 49
40 C.F.R. § 131.3(g)	40
40 C.F.R. § 131.3(o).....	9
40 C.F.R. § 131.4(a)	4
40 C.F.R. § 131.6	4
40 C.F.R. § 131.6(a)	6
40 C.F.R. § 131.10(2000)	8, 10, 26, 37
40 C.F.R. § 131.10.....	10, 39

40 C.F.R. § 131.10(a).....	6, 7
40 C.F.R. § 131.10(g)(2000)	17, 36
40 C.F.R. § 131.10(g).....	7, 27, 40, 46, 51
40 C.F.R. § 131.10(g)(6)(2000).....	17
40 C.F.R. § 131.10(g)(6)	11, 40, 53, 54, 55
40 C.F.R. § 131.10(j)(2000)	36
40 C.F.R. § 131.10(j).....	7, 39
40 C.F.R. § 131.10(k)(2000)	36
40 C.F.R. § 131.10(k)	7, 39
40 C.F.R. § 131.11.....	47
40 C.F.R. § 131.11(a).....	7
40 C.F.R. § 131.11(b)	7
40 C.F.R. § 131.13(2000)	8
40 C.F.R. § 131.14(2015)	57
40 C.F.R. § 131.14.....	1, 8, 10, 27
40 C.F.R. § 131.14(b)	57
40 C.F.R. § 131.20(c).....	17
40 C.F.R. § 131.21.....	15
40 C.F.R. § 131.21(c).....	5

FEDERAL REGISTER NOTICES

48 Fed Reg. 51,400 (Nov. 8, 1983)37, 41
63 Fed. Reg. 36,742 (July 7, 1998).....7
78 Fed. Reg. 54,518 (Sept. 4, 2013).....passim
80 Fed. Reg. 51,020 (Aug. 21, 2015)..... 4, 27

STATE RULES

ARM 17.30.619(2) 15
ARM 17.30.637 15
ARM 17.30.660(3) 30
ARM 17.30.660(5) 30
ARM 17.30.660(6) 30

STATE STATUTES

MCA 75-5-103(2)(a)..... 12
MCA 75-5-313 14, 15
MCA 75-5-313(5)(b)..... 14
MCA 75-5-313(7)..... 14
MCA 75-5-313(7)(a)..... 14
MCA 75-5-313(8)..... 14

GLOSSARY

AR	Administrative Record
CWA	Clean Water Act
gpd	Gallons Per Day
HAC	Highest Attainable Condition
MBER	Montana Board of Environmental Review
MDEQ	Montana Department of Environmental Quality
MPS	Municipal Preliminary Screener Test
NNC	Numeric Nutrient Criteria
NPDES	National Pollutant Discharge Elimination System
TBEL	Technology-Based Effluent Limitation
TN	Total Nitrogen
TP	Total Phosphorus
WQBEL	Water Quality-Based Effluent Limitation
WQS	Water Quality Standard

Defendants United States Environmental Protection Agency and Administrator Scott Pruitt¹ (collectively “EPA” or “Defendants”) respond to Plaintiff Upper Missouri Waterkeeper’s (“Waterkeeper”) Motion for Summary Judgment and support their Cross-Motion for Summary Judgment as follows:

INTRODUCTION

In February 2015, pursuant to section 303(c) of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. § 1313(c), EPA approved the State of Montana’s “Base Numeric Nutrient Water Quality Standards” (“numeric nutrient criteria” or “NNC”) for certain waters in the State. The NNC includes criteria for “total nitrogen” (“TN”) and “total phosphorus” (“TP”). At the same time, in accordance with EPA’s interpretation of the CWA and its own water quality standards (“WQS”) regulations at the time,² EPA also approved -WQS variances (“variance”) from the NNC.³

¹ Pursuant to Fed. R. Civ. P. 25(d), Administrator Pruitt is substituted for former Administrator Gina McCarthy.

² On August 21, 2015, after EPA’s action in this case, EPA promulgated “Water Quality Standards Regulatory Revisions,” 81 Fed. Reg. 51,020. The final rule revises EPA’s WQS regulations and includes explicit provisions for variances. 40 C.F.R. § 131.14.

³ EPA’s approval is set forth in a letter dated Feb. 26, 2015, from Martin Hestmark, EPA Region 8 Assistant Regional Administrator, to the Acting Director of the Montana Department of Environmental Quality

Plaintiff does not challenge the NNC – in fact, Waterkeeper applauds Montana’s development and EPA’s approval of the NNC. Nor does Plaintiff challenge EPA’s authority to approve variances as a general matter. Rather, Plaintiff argues that the State variances approved by EPA here, which are expressed as higher effluent conditions for TN and TP in discharge permits for wastewater treatment plants and industries for a time limited period, have improperly supplanted the NNC, and are not protective of the receiving waters. Waterkeeper argues that EPA improperly approved the general variances based on technological and cost constraints. Finally, Waterkeeper claims that even if general variances could be adopted, the variances set forth in Circular DEQ-12B are unlawful because they do not comport with CWA and EPA regulatory requirements, and are not supported by the administrative record.

As described below, EPA’s approval of the State’s general variances was not arbitrary, capricious, or contrary to law, but was

(“MDEQ”) and to the Chairperson of the Montana Board of Environmental Review (“MBER”), Administrative Record (“AR”) 826-860. The NNC is set forth in MDEQ’s Department Circular DEQ-12A, “Montana Base Numeric Nutrient Standards,” AR 1218-1228, and variance provisions are described in Department Circular DEQ-12B, “Nutrient Standards Variances,” AR 1229-1237.

consistent with the CWA requirements regarding variances that existed at the time of EPA's action on Montana's nutrient variances, and is supported by the administrative record. Plaintiff's motion for summary judgment must therefore be denied and EPA's cross-motion for summary judgment must be granted.

STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 26.1(b), Defendants are contemporaneously submitting EPA's Statement of Facts, responding to Plaintiff's statement of undisputed facts and setting forth additional undisputed facts.

BACKGROUND

A. STATUTORY AND REGULATORY BACKGROUND

1. Clean Water Act

a. Water Quality Standards

The ultimate objective of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act establishes a partnership between States, territories and authorized Tribes (collectively, "States") and the federal government to achieve that goal. *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992). One "national goal" to meet the Act's objective is that "wherever

attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water” be achieved. CWA Section 101(a)(2), 33 U.S.C. § 1251(a)(2). These “101(a)(2)” goal uses are referred to in EPA’s regulations as “uses specified in Section 101(a)(2).”

33 U.S.C. § 1313 instructs States to establish WQS for their intrastate and interstate waters. *Id.* at 1313(a). WQS consist of designated uses (*e.g.*, fishable or swimmable uses) for a particular water body or category of water bodies; sufficient numeric and/or narrative criteria to protect those uses; and provisions to minimize or prevent degradation of water quality through a publicly transparent process. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 131.6.⁴ The CWA gives the States the primary role in establishing WQS, subject to EPA review and approval or disapproval, to ensure that CWA requirements are met. 33 U.S.C. § 1313(c); 40 C.F.R. § 131.4(a). States are required to hold public

⁴ References to 40 C.F.R. Part 131, “Water Quality Standards,” are to the current version of those regulations made effective on October 20, 2015, pursuant to the final rule entitled “Water Quality Standards Regulatory Revisions,” 80 Fed. Reg. 51,020 (Aug. 21, 2015). As discussed below, the rule of decision for this case is based on the version of Part 131 that was effective prior to the 2015 revisions. References made specifically to the prior version of Part 131 will be identified as “40 C.F.R. § ___ (2000).”

hearings to review and, as appropriate, revise their WQS at least once every three years. 33 U.S.C. § 1313(c)(1). Any new or revised WQS adopted by the State, including those following a “triennial review,” must be submitted to EPA for review. EPA must approve or disapprove such standards within 60 or 90 days, respectively. 33 U.S.C. § 1313(c)(3). If EPA determines that the new or revised standards meet the requirements of the CWA and EPA’s regulations at 40 C.F.R. Part 131, EPA approves the standards. *Id.* Upon approval by EPA, the State’s WQS become effective for CWA purposes. 40 C.F.R. § 131.21(c). If EPA determines that the new or revised standards are inconsistent with CWA requirements, EPA must notify the State and specify the changes needed to meet such requirements. 33 U.S.C. § 1313(c)(3). If adequate revisions are not adopted by the State within 90 days after notification, EPA must “promptly” prepare and publish proposed WQS for the State. *Id.*; 33 U.S.C. § 1313(c)(4). EPA is required to issue a final WQS within 90 days after proposal unless the State adopts a new or revised WQS in accordance with the Act in the meantime. *Id.*

WQS are implemented to control pollutants through “National Pollutant Discharge Elimination System” (“NPDES”) permits issued to dischargers of pollutants. 33 U.S.C. § 1342. All NPDES permits must

include technology-based effluent limitations (“TBELs”) that reflect the pollutant reductions achievable through particular equipment or process changes, and more stringent water quality-based effluent limitations (“WQBELs”) if meeting TBELs is not enough to attain applicable WQS. 33 U.S.C. § 1311(b)(1)(A) and (C); 40 C.F.R. § 122.44(d).

i. Designated uses

States first identify the “designated uses” of each waterbody, consistent with the purposes of the CWA. 33 U.S.C. § 1313(c)(2)(A); 40 C.F.R. § 131.10(a). In addition to the Section 101(a)(2) uses, the Act states that WQS “shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and also taking into consideration their use and value for navigation.” 33 U.S.C. § 1313(c)(2)(A). Use designations must be consistent with the provisions of 33 U.S.C. §§ 1251(a)(2) and 1313(c)(2)(A). 40 C.F.R. § 131.6(a) (“Minimum requirements for [WQS] submission”). The uses specified in Section 101(a)(2) are presumed attainable and must be designated unless a State affirmatively demonstrates through a “Use Attainability Analysis” (UAA) that such uses are not attainable

consistent with 40 CFR § 131.10(g). 63 Fed. Reg. 36,742, 36,749 (July 7, 1998); 40 C.F.R. § 131.10(a), (g), (j) and (k). A designated use need not be attained in order to be designated. 40 C.F.R. § 131.3(f).

ii. Water Quality Criteria

Water quality criteria are “elements of State WQS, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” 40 C.F.R. § 131.3(b). States must adopt water quality criteria that protect the designated use and which “must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use.” 40 C.F.R. § 131.11(a). Numeric criteria should be based on guidance issued by EPA under 33 U.S.C. § 1314(a), guidance modified to reflect site-specific conditions, or “other scientifically defensible methods.” 40 C.F.R. § 131.11(b).

Except for 33 U.S.C. § 1313(c)(2)(B), relating to toxic pollutants, States should adopt narrative criteria where numeric criteria cannot be established or to supplement numeric criteria unless the Administrator has determined that such criteria are necessary to meet CWA requirements. 33 U.S.C. § 1313(c)(2)(B), (c)(4)(B).

b. Variances

EPA's longstanding interpretation of the CWA and its WQS regulation has been that States or authorized tribes may adopt a variance, where appropriate, to make incremental progress toward attaining an ultimate or "underlying" designated use and criteria. Pursuant to this interpretation, a variance could be approved if the State or authorized tribe could demonstrate that the variance met the same requirements as those necessary to justify a permanent change to a designated use under 40 C.F.R. § 131.10 (2000), although before the adoption of EPA's WQS regulatory revisions in August 2015, the WQS regulation lacked explicit provisions on the issue. "Water Quality Standards Regulatory Clarifications" ("Proposed Rule"), 78 Fed. Reg. 54,518, 54,531 (Sept. 4, 2013), AR 765.⁵

⁵ Prior to October 2015, when 40 C.F.R. § 131.14 ("Water quality standards variances") became effective, EPA's regulations did not contain specific provisions relating to requirements for variances, although 40 C.F.R. § 131.13 (2000) stated that "States may, at their discretion, include in their State standards, policies generally affecting their application and implementation, such as . . . variances." However, EPA had "offered input and support for variances through Office of General Counsel legal decisions, guidance, memoranda, and approval actions for many years." Proposed Rule, 78 Fed. Reg. at 54,531, AR 765.

A variance is described as 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.” “Discharger-Specific Variances on a Broader Scale: Developing Credible Rationales for Variances that Apply to Multiple Dischargers, Frequently Asked Questions” (“FAQ”), March 2013, AR 593, 597.⁶

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, 78 Fed. Reg. at 54,532, AR 766. A variance

... is an environmentally useful tool, because a variance exists only for a designated term and retains designated use protection for all pollutants and sources, with the sole exception of those specified in the variance. Even the discharger with a variance for a particular pollutant is required to meet applicable criteria for all other pollutants. Thus, a variance can result in water quality improvements over time and, in some cases, full attainment of designated uses by maintaining existing water quality protections while allowing time for advances in treatment technologies, control practices, or other changes in circumstances.

⁶ EPA also promulgated this definition in its August 2015 regulatory clarifications at 40 C.F.R. § 131.3(o).

EPA Water Quality Standards Handbook (“WQS Handbook”), AR 825.

In 1977, EPA’s General Counsel issued an opinion stating that EPA would accept variance provisions as long as they were “consistent with the substantive requirements of [the predecessor of 40 C.F.R. § 131.10]. Therefore, variances can be granted by States only when achieving standards is ‘unattainable.’ “Decision of the General Counsel on Matters of Law Pursuant to 40 C.F.R. Section 125.36(m), No. 58” (“1977 GC Decision”), March 29, 1977, AR 19469. Thus, prior to October 2015, when 40 C.F.R. § 131.14 regarding variances became effective, variances were reviewed by EPA in light of the requirements for designated uses at 40 C.F.R. § 131.10.

Before October 2015, 40 C.F.R. § 131.10 (2000), “Designation of uses,” provided that a State may “remove a designated use which is *not* an existing use, as defined in § 131.3 . . . if the State can demonstrate that attaining the designated use is not feasible because,” among other factors, “[c]ontrols more stringent than those required by sections 301(b) and 306 of the Act would result in substantial and widespread

economic and social impact.”⁷ 40 C.F.R. § 131.10(g)(6) (emphasis in original). Therefore, a State could develop a variance if it could demonstrate that the designated use could not be met for the period of the variance due to “substantial and widespread economic and social impact” caused by compliance with WQBELs required to attain the applicable WQS of the receiving water.

In March 1995, EPA issued its “Interim Economic Guidance for Water Quality Standards Workbook” (“Economic Guidance”). AR 11-135. The Economic Guidance was provided “to assist States and applicants in understanding the economic factors that may be considered, and the types of tests that can be used to determine . . . if a variance can be granted” *Id.* at AR 16. The Economic Guidance emphasized that while EPA approves State WQS, “the State is responsible for interpreting the circumstances of each case and determining where there are substantial and widespread economic and social impacts” *Id.* at AR 16-17. The intent of the Economic

⁷ Section 301(b), 33 U.S.C. § 1311(b), relates to TBELs required to be included in NPDES permits, and Section 306, 33 U.S.C. § 1316, concerns “standards of performance” for various categories of dischargers which reflect the greatest degree of effluent reduction achievable. Those two categories are TBELs.

Guidance “is to point States and dischargers in the right direction. It does not give definitive answers as to whether or not an entity has demonstrated substantial, widespread, or important economic and social impacts.” *Id.* at AR 17. The EPA memorandum transmitting the Economic Guidance to EPA regional water management directors, dated April 27, 1995, noted that “[t]he measures outlined in the guidance are not intended to be applied as absolute decision points. States may use other economically defensible approaches in lieu of those suggested in this interim guidance.” AR 12. The Economic Guidance sets forth methods for determining “substantial” impacts on both public and private dischargers and “widespread” impacts on the community.

2. Montana State WQS

a. The Montana Numeric Nutrient WQS

In 2014, the MBER adopted NNC for “base numeric nutrient standards,” defined in the Montana Code as “numeric water quality criteria for nutrients in surface water that are adopted to protect the designated uses of a surface water body.” MCA 75-5-103(2)(a). Circular DEQ-12A, “Montana Base Numeric Nutrient Standards,” sets forth NNC

for “wadeable streams”⁸ and certain large river reaches. AR 1218-28. Table 12A-1 lists the criteria for waters in particular “eco-regions” and “subcoregions” along with site-specific criteria for segments in the Gallatin River basin and for segments of the, Yellowstone River. AR 1222-23. The criteria primarily apply from July to the end of September, and from August 1 through October 31 for the Yellowstone reaches. *Id.* Numeric criteria for TP range from 25 micrograms per liter (“µg/l”) in the Northern Rockies to 110 µg/l in Northwest Glaciated Plains, and TN levels range from 250 µg/l in Absaroka-Gallatin Volcanic Mountains to 1,300 µg/l in the Northern Glaciated Plains eco-region. *Id.*

Montana’s adoption of criteria for TP and TN for waters throughout the State made Montana a leader among States in the adoption of NNC. 33 U.S.C. § 1313(c)(2)(B) requires States to adopt numeric criteria for “toxic” pollutants. Though phosphorus and nitrogen are not toxic pollutants, excess nutrients may cause indirect toxic effects to aquatic life and human health, so EPA recommends that States adopt NNC and supports State efforts to do so, as in the case of

⁸ “Wadeable stream” is defined as “a perennial or intermittent stream in which most of the wetted channel is safely wadeable by a person during baseflow conditions.” Circular DEQ-12A, AR 1220.

Montana. Throughout Montana's process for adoption of the NNC, the potential impacts of the NNC and the need for variances were acknowledged by the State, EPA, and stakeholders as an important consideration in the State's decision whether to adopt NNC.

b. Montana Variance for NNC

The Montana legislature enacted MCA 75-5-313 in 2011. The statute, titled "Nutrient standards variances – individual, general, and alternative," provided for a "general variance:" (a) for those plants discharging more than one million gallons of effluent per day ("gpd"), the limit would be 1,000 µg/l for TP and 10,000 µg/l for TN; (b) for plants discharging less than one million gpd, the limits would be 2,000 µg /l for TP and 15,000 µg/l of TN; and (c) for lagoons not designed to actively remove nutrients, the permittee would be required to maintain the performance of the lagoon at a level equal to the performance as of October 1, 2011. MCA 75-3-313(5)(b). Every three years, the department must revisit and update the concentration levels provided. MCA 75-3-313(7)(a). Variances could last no more than 20 years, and must be reviewed by the Montana Department of Environmental Quality ("MDEQ") every three years. MCA 75-3-313(7), (8).

In 2014, after a formal rulemaking process, MDEQ adopted Department Circular DEQ-12B, “Nutrient Standards Variances,” reflecting the limits specified in MCA 75-3-313, calculated as a monthly average.⁹ AR 1229-37. All concentrations apply at end-of-pipe.¹⁰ Permittees receiving a general variance are required to evaluate facility operations to optimize nutrient reduction using existing infrastructure, which are intended only to be refinements to the wastewater treatment system already in place. AR 1233. The limits expire on July 1, 2017, and they “may be extended without modification or modified and extended in a rulemaking proceeding conducted by” MDEQ. *Id.*, AR 1231. The general variances may last no longer than 20 years, and the limits are included in the discharge permit for the facility. *Id.* MDEQ will review

⁹ Montana’s regulations also includes ARM 17.30.619(2), which states that in the event (a) a court declares MCA 75-5-313 or any part of that statute (requiring the establishment of variances from the NNC) invalid; (b) EPA disapproves MCA 75-5-313 under 40 C.F.R. § 131.21 (relating to EPA review and approval of WQS); or (c) the rules regarding variances adopted pursuant to MCA 75-3-313 expire and general permits are not available, then all references to DEQ-12A, base numeric nutrient standards, and DEQ-12B nutrient standards variances in the regulations “are void, and narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface waters” (except for the Clark Fork River).

¹⁰ In plain language, “end-of-pipe” means that the concentration of the pollutant is measured at the point the effluent is discharged.

the general variance treatment requirements every three years “to determine whether there is new information that supports modifying (e.g., revising the interim effluent treatment requirements) or terminating the variance. The proposal will solicit comments from the public on whether the general variance should be: (1) extended without modification, (2) modified and extended, or (3) allowed to expire. Based on the review and the public comment, the Department will draft final findings and conclusions and will initiate rulemaking if it determines that the variance should be extended, with or without modification.”¹¹ AR 1232. Interim effluent limits adopted in any variance, “. . . general or individual, will be based on achieving the highest attainable condition within the receiving water.” AR 1234.

B. FACTUAL BACKGROUND

1. MDEQ Submission

MBER and MDEQ adopted new and revised WQS for nutrients on July 25, 2014, and submitted the revisions to EPA for review pursuant to

¹¹ Circular DEQ-12B also includes provisions for individual permit variances, which are not at issue in this case. Individual variances from the NNC “may be granted on a case-by-case basis because the attainment of the base numeric nutrient standards is precluded due to economic impacts, limits of technology, or both.” AR 1233.

40 C.F.R. § 131.20(c). EPA received the submission on August 15, 2014, and issued its approval on February 26, 2015, via letter to MBER and MDEQ, AR 827-29, and the attached “Rationale for the EPA’s Action on Montana’s New and Revised Water Quality Standards.” AR 830-60. (“EPA Approval”).

This case does not include a challenge to the NNC themselves, but to EPA’s approval of Montana’s general variances from the NNC. We therefore primarily discuss the factual background leading to the issuance of EPA’s Approval as it relates to Montana’s general variance submissions.

As discussed above, at the time of Montana’s NNC and general variance submission to EPA, a State could adopt a variance if it could demonstrate that one of the factors in 40 C.F.R. § 131.10(g) (2000) was met. Proposed Rule, 78 Fed. Reg. at 54,531, AR 765. One factor allowed for a variance if “[c]ontrols more stringent than those required by sections 301(b) and 306 [*i.e.*, water quality-based effluent limitations] of the Act would result in substantial and widespread economic and social impact.” 40 C.F.R. § 131.10(g)(6) (2000).

EPA provided a conceptual framework for analyzing what may constitute “substantial and widespread economic and social impact,”

though not an exclusive one, in the Economic Guidance issued in 1995. We describe this framework because Montana's analysis of substantial and widespread impacts was expressed in part using these concepts.

As described in the Economic Guidance, review of "substantial" impacts relates to the impacts on the discharger, as opposed to impacts on the community. The first step is to estimate the capital and operation/maintenance costs ("O&M") of the pollution control at issue (here, compliance with the NNC) for the entity, and the second step is to determine how the entity will finance those costs. AR 22. For publicly-owned entities, households in the community will bear the costs through increases in user fees or taxes, or both. *Id.* For privately-owned dischargers, "the analysis should consider factors such as the entity's ability to secure financing and the degree to which it will be able to pass the cost of pollution control on to its customers in the form of higher prices." *Id.*

With regard to substantial effects on public sector entities, the following steps were suggested: (a) calculate the annualized capital and annual O&M costs of the required pollution control project; (b) calculate the total annual pollution control cost per household (current costs and additional costs due to the new project); (c) utilize the "Municipal

Preliminary Screener” (“MPS”) test, which is the average total pollution control cost per household divided by the median household income; (d) apply the “Secondary Test” which describes the community’s ability to obtain financing and its socioeconomic health; and (e) determine whether the community is expected to incur “substantial” impacts due to the proposed pollution control project. *Id.*, AR 28-41. If the MPS test indicates that total costs of the current and additional pollution controls are greater than one percent of median household income, the impact may be substantial and the Secondary Test should be used. The Secondary Test assigns scores (1.0 for “weak” to 3.0 for “strong”) to a number of factors, such as median household income, unemployment rate, and property tax collection rates. The Secondary Test scores are averaged, and the average Secondary score, along with the MPS, is applied to a matrix to determine whether the pollution control project would result in “substantial” impact *Id.*, AR 41.

As to private-sector entities, substantial impact on the firm is determined by reviewing various tests regarding profit, liquidity, solvency, and leverage. *Id.*, AR 45. No single test is conclusive and all tests should be considered jointly to obtain “an overall picture of the

economic health of the applicant and the impact of the water quality standards requirement on the applicant's health." *Id.*

To show widespread impacts, a public-sector entity must examine the estimated change in socioeconomic conditions (*e.g.*, changes to median household income, unemployment) resulting from compliance. *Id.*, AR 64. As to private entities, the impacts of a reduction in business activity or closure on employment in the community, loss of tax revenues, and other factors should be analyzed. *Id.*, AR 66-67. None of these measures are determinative but the factors "evaluate how the proposed project will affect the socioeconomic well-being of the community." *Id.*, AR 63.

MDEQ relied on two studies to show substantial and widespread impacts resulting from the NNC in order to justify the variances. The first was dated April 26, 2012, entitled "Demonstration of Substantial and Widespread Economic Impacts to Montana That Would Result if Base Numeric Nutrient Standards had to be Met in 2011/2012" ("MDEQ Public Study"), AR 1547-88, and the second was from December 2012, "Demonstration of Substantial and Widespread Economic Impacts to Montana that Would Result if Base Numeric Nutrient Standards had to

be Met by Entities in the Private Sector in 2011/2012” (“MDEQ Private Study”), AR 1589-1635.

MDEQ used a modified version of the substantial and widespread impact analyses contained in the EPA Economic Guidance. MDEQ concluded that “affected communities across Montana would bear substantial and widespread economic impacts (i.e., economic hardship) if they had to meet base numeric nutrient standards today.” MDEQ Public Study at 1, AR 1553. MDEQ determined that many waste water treatment plants (“WWTP”) in Montana would have to meet the NNC at “end-of-pipe,” because they discharge into wadeable streams without in-stream dilution. *Id.*, AR 1554. It further assumed for the analysis that costs for meeting the NNC should be based on the use of “reverse osmosis” technology because reverse osmosis was the only treatment technology that could likely achieve the NNC. *Id.*, AR 1559, 1561. MDEQ identified 107 WWTPs affected by the NNC. *Id.*, AR 1555. It then chose 24 publicly-owned WWTPs as a “representative subset” of the 107 affected WWTPs, which included 12 dischargers with advanced treatment systems discharging more than 1 million gpd, 4 advanced dischargers discharging under 1 million gpd, and 8 lagoons. *Id.*, AR 1558-59. The 24 WWTPs chosen deliberately included towns likely *not*

to experience economic hardship from complying with the NNC. “This was done to err on the side of being conservative in attaining a hardship finding for the state as a whole.” *Id.*, AR 1559.

MDEQ generally followed EPA’s Economic Guidance process to determine substantial impacts and performed additional analysis regarding widespread impacts. *Id.* at 4, AR 1556.

MDEQ performed the MPS test, using a number of alternate assumptions, including different discount rates, labor costs, and reverse osmosis costs. *Id.*, AR 1563-65. The lowest cost/mean household income ratio in the sample was 1.47% (Missoula), and the highest among non-lagoon facilities was 5.44% (Hamilton). *Id.*, AR 1562. MDEQ then applied a Secondary Test to all of the WWTP communities, considering measures of poverty rate, low and moderate income rate, unemployment rate, median household income, and current local tax and fee burden, applying a score of 1.0 (weak) to 3.0 (strong) for each category. *Id.* AR 1557, 1583-87. The average Secondary Test scores for the studied towns ranged from 1.6 (Livingston) to 3.0 (Highwood). *Id.*, AR 1569. Based on the results of the MPS screener test and the Secondary Test, MDEQ concluded that “substantial impacts” had been

shown for publicly owned WWTPs, and continued on to the “widespread” portion of the analysis.

EPA’s 1995 Economic Guidance does not provide determinative tests or ratios for demonstrating widespread impact. Among the factors Montana considered in the widespread impact analysis were Montana’s relatively low per capita income; greatly increased wastewater bills for affected communities; effects of costs on small communities with non-diverse economies; need to find qualified wastewater engineers; Montana’s aging population; and the disposal costs of brine wastes from reverse osmosis *Id.*, AR 1571-72. In summary, MDEQ stated that “if 95% of the communities demonstrate Substantial and Widespread impacts . . . then DEQ has shown hardship at the statewide scale.” *Id.*, AR 1572.

MDEQ took a similar analytic approach for the private sector analysis of the economic impacts associated with treatment technologies required to comply with the NNC. MDEQ noted that the Economic Guidance regarding private entities “is not as straightforward and does not provide direct thresholds for the ‘substantial’ determination, as does the public guidance.” *Id.* Thus, “this demonstration takes parts of the EPA Guidance and makes it part of a

larger evaluation for assessing substantial and widespread impacts for private businesses in Montana.” *Id.*

MDEQ first identified 51 private Montana discharge permit holders that would be subject to the NNC in different sectors, including metal mining (6), coal mining (9), electricity generation (3), oil and gas production (5), refineries (4), manufacturing (13), and 11 “other businesses.” *Id.*, AR 1591. MDEQ and a contractor examined each of the MDEQ permits and statements of basis for those permits to determine current treatment levels, effluent data, receiving waters, and dilution potential for the waste stream. *Id.*, AR 1597-98. MDEQ estimated the current treatment costs for each of the businesses and then compared those costs to the estimated costs for each business to meet the NNC criteria without a variance. The analysis assumed that reverse osmosis would be required and that the businesses would be required to absorb the costs, rather than passing them on. *Id.*, AR 1599-1600. MDEQ then estimated the average capital and O&M costs for compliance with the NNC for each of the businesses, using a number of different discount rate and labor cost scenarios. *Id.*, AR 1601-02.

From there, MDEQ looked at the impacts of immediate compliance with the NNC on the largest affected businesses in Montana: “If the

largest businesses are significantly impacted, then it is very likely that smaller businesses will also be impacted significantly due to the ‘economies of scale’ advantage of larger businesses and their deeper pockets of available financial resources.” *Id.*, AR 1604. MDEQ reviewed costs on metals mining, coal mines, refineries, power generation, manufacturing, and sugar and confectionary manufacturing. AR1604-1606 All of the costs of the main sectors would exceed 1% and probably total more than 2% of annual revenue. AR 1606 “Thus, these costs are likely to be significant to Montana’s affect[ed] businesses sectors and thus to Montana business overall.” *Id.*, AR 1606.

With regard to widespread impacts in the private sector, MDEQ stated that “Montana’s manufacturing, mining, and energy production sectors are the areas most affected by nutrient standards and their associated costs. They are also among the areas that were hit hardest during the recession, and could have special challenges taking on significantly more costs.” *Id.*, AR 1612. Also, these businesses pay higher wages than the Montana average, so loss of jobs from these sectors would have a more significant effect. *Id.*, AR 1612-13.

In conclusion, MDEQ stated that

It is DEQ's best professional judgment that the resulting costs of complying with the base numeric nutrient criteria today would result in substantial costs beyond what individual firms can internalize. This would result in some businesses closing and a scaling down in economic activity in particular economic sectors of Montana. Energy production (electricity and fossil fuel), metals mining and certain manufacturing businesses would be hit the hardest. At this point in time, using reverse osmosis on 100% of effluent flow is simply too expensive for businesses to operate, and comes with a host of technical problems given Montana's winters and the business operations of affected companies (such as highly variable water flows at certain mines and greatly fluctuating annual revenues).

Id., AR 1613.

2. EPA Approval Action

On February 26, 2015, EPA issued a letter and enclosure approving Montana's revised NNC for wadeable streams, the use of ecoregions, the NNC for specific reaches set forth in Circular DEQ-12A, and the NNC for the Yellowstone River. AR 828-42. EPA's approval of the NNC themselves is not at issue in this case.

In addition to approving the NNC, EPA also approved Montana's general variances from the NNC. EPA determined that it could approve a variance "for a specific discharger or group of dischargers where the state satisfies the requirements" of 40 C.F.R. § 131.10 (2000) "for removing a designated use." *Id.*, AR 843. Therefore, at the time of the

Approval, Montana was required to show that it is not feasible for a discharger or group of dischargers to attain the NNC during the term of the variances due to at least one of the factors included in 40 C.F.R. § 131.10(g), including subsection (g)(6) (requiring such attainment would result in “substantial and widespread economic and social impacts”).¹² *Id.*, AR 843-44.

EPA first analyzed Montana’s basis, set forth in the MDEQ Public Study, AR 1589-1635, and the MDEQ Private Study, AR 1589-1635, for determining that compliance with the NNC would result in statewide substantial and widespread economic and social impacts. AR 844. EPA described Montana’s economic analysis with regard to publicly owned treatment works and private firms. *Id.*, AR 844-47. It found that approximately 30 of the dischargers included in the State’s economic analysis actually discharge into non-wadeable waters that would not be subject to the NNC, and that a number of dischargers were covered by a general permit for domestic sewage lagoons, also not covered by the

¹² As indicated above, EPA issued a final regulation specifically relating to variances after the date of the Approval. 40 C.F.R. § 131.14, 80 Fed. Reg. at 51,020.

NNC.¹³ *Id.*, AR 847. However, EPA found that including those facilities in the State economic analysis did not affect or undermine Montana's final conclusion that meeting the NNC would result in substantial and widespread economic and social impacts for all dischargers on a Statewide basis that are subject to the NNC. *Id.*, AR 847-48. EPA concluded that Montana was reasonable in its examination of a subset of communities most likely to be able to afford to meet the NNC rather than all public sector dischargers. AR 848. EPA also determined that (1) Montana was reasonable in assuming that NNC criteria would have to be met at the end-of-pipe; (2) that both TN and TP criteria components of the NNC must be met to attain the aquatic life use; and (3) that there is no existing technology currently available that would reliably meet both the TN and TP criteria of the NNC. *Id.*, AR 848-49. As a result, EPA agreed with Montana that attaining the NNC, and therefore the designated use, "is infeasible until treatment methods improve or ambient levels of nutrients in the streams decrease to the point that effluent concentrations do not need to be equal to the NNC," and that

¹³ EPA's additional analysis is described in a February 26, 2015, memorandum, "August 2014 Montana Nutrient Water Quality Standards Submission, Additional Analysis Regarding Individual Dischargers," AR 11019-22.

otherwise, substantial and widespread economic and social impacts will occur. *Id.*, AR 849-50. “Montana’s variance provisions provide needed time to determine how to achieve compliance with necessary effluent limits based on the NNC, and ensure that progress toward that goal will continue in a timely manner.” *Id.*, AR 850.

EPA noted that Circular DEQ-12B sets forth interim end-of-pipe treatment requirements that expire on July 1, 2017; a requirement to complete an optimization study within two years of receiving a variance; a maximum 20-year duration for the variance; and a commitment that the interim requirements would be applied through permits made available for public comment. *Id.*, AR 850-51, 853. Circular DEQ-12B also requires that Montana will review the economic justification for the general variances and the costs and effluent concentrations associated with available treatment technologies every three years, and provide its findings for public comment. The first set of interim milestones set forth in Table 12B-1 of DEQ-12B expire on July 1, 2017, “after which Montana will go through a public rulemaking process

to establish the next set of interim treatment requirements.”¹⁴ *Id.*, AR 852. EPA’s approval letter noted that since the State plans to conduct a rulemaking on whether or not to modify the interim requirements, “Montana will submit a new WQS rule package including the interim milestones applicable for the next three-year period to the EPA for review and approval.” *Id.* EPA found Montana’s “general variances for public and private dischargers to be reasonable and consistent with CWA requirements.” *Id.*, AR 851.

Montana’s approach facilitates long-term facility planning by defining

the NNC as the highest attainable condition (HAC) for its waters and establishing a maximum of 20 years to achieve that HAC. Given the current lack of existing treatment technologies that can reliably achieve effluent limits based on the NNC . . . the variance process provides time for dischargers to identify and implement the most cost effective method for making progress towards meeting the NNC while also assuring that the NNC remains the goal.

Id., AR 852.¹⁵

¹⁴ This quotation included a typographical error. In fact, the State rulemaking process would occur before the July 1, 2017, expiration of interim treatment requirements.

¹⁵ EPA also approved Montana’s individual variances from the NNC as set forth in ARM 17.30.660(3), (5), (6) and Section 3.0 of Circular DEQ-12B. AR 856-59. Plaintiff does not challenge EPA’s approval of Montana’s authorizing provisions for individual variances.

EPA also stated that “[i]t is clear from Montana’s response to public comments that the state recognizes its obligation to protect existing uses, and that variances are not authorized for new or increased dischargers if existing use(s) would be impacted.” *Id.*, AR 854.

STANDARD OF REVIEW

Judicial review of EPA’s approval of Montana’s variances is governed by the principles of the Administrative Procedure Act (“APA”). The APA provides that a court, when reviewing final agency action, shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706. Agency action violates this standard if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *see also Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agriculture*, 415 F.3d. 1078, 1093 (9th Cir. 2005). The APA standard is “highly deferential, presuming the

agency action to be valid and affirming the agency action if a reasonable basis exists for its decision.” *Bahr v. U.S. EPA*, 836 F.3d 1218, 1229 (9th Cir. 2016), quoting *Ranchers Cattlemen Action Legal Fund United Stockgrowers of Am. v. U.S. Dep’t of Agriculture*, 499 F.3d 1108, 1115 (9th Cir. 2007). An agency action will be upheld “as long as there is a rational connection between the facts found and the conclusions made.” *Barnes v. U.S. Dep’t of Transp.*, 655 F.3d 1124, 1132 (9th Cir. 2011). The standard of review “is a narrow one,” and the court should not substitute its judgment for that of the agency. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 US. 402, 416 (1971); *Arizona Cattle Growers’ Ass’n v. U.S. Fish & Wildlife*, 273 F.3d 1229, 1236 (9th Cir. 2001). The courts owe their “highest deference” to the agency’s “technical analyses and judgments within its area of expertise.” *Natural Resources Defense Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016), quoting *League of Wilderness Defs. Blue Mountains Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1131 (9th Cir. 2010).

Courts “defer to an agency’s interpretations of its own regulation, advanced in a legal brief, unless that interpretation is ‘plainly erroneous or inconsistent with the regulation.’” *Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 208 (2011), quoting *Auer v. Robbins*, 519 U.S.452, 461 (1997).

“It is well established that an agency’s interpretation need not be the only possible reading of a regulation – or even the best one – to prevail.” *Decker v. NW. Env’tl. Def. Ctr.*, 133 S.Ct. 1326, 1337 (2013).

Rule 56(a), Fed. R. Civ. P., states in part that “[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” APA review is limited to the administrative record. *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Serv.*, 450 F.3d 930, 943 (9th Cir. 2006). Summary judgment is appropriate in judicial review of final agency action cases because “the issues presented address the legality of the [agency’s] actions based on the administrative record and do not require resolution of factual disputes.” *Forest Serv. Employees for Env’tl Ethics v. U.S. Forest Service*, 726 F. Supp. 2d 1195, 1207 (D. Mont. 2010); *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 770 (9th Cir. 1985).

ARGUMENT

Plaintiff Waterkeeper first argues that the general variances and interim treatment requirements set forth in Circular DEQ-12B replaced the NNC adopted by Montana, based on consideration of costs and technical feasibility that are not allowed under the CWA. It then argues that even if a general variance could be lawfully adopted, EPA’s

approval of Montana’s variances was arbitrary and capricious because Montana failed to demonstrate that substantial and widespread social and economic impacts would result from compliance with the NNC. As we demonstrate below, the NNC remain applicable water quality criteria that support the designated uses for Montana’s wadeable streams and portions of the Yellowstone River, while the general variances establish time-limited interim treatment requirements for TN and TP in accord with long-standing EPA regulation and policy. There are no disputed issues of material fact, and Defendants are entitled to judgment on the merits of the Plaintiff’s claims in this case.

I. THE GENERAL VARIANCES FROM THE NNC APPROVED BY EPA ARE CONSISTENT WITH THE RELEVANT CLEAN WATER ACT REQUIREMENTS THAT ALLOW STATES TO ACCOUNT FOR ECONOMIC AND SOCIAL IMPACTS

Plaintiff concedes that the NNC are compliant with the CWA, and therefore does not challenge EPA’s approval of Circular DEQ-12A.

Memorandum in Support of Plaintiff’s Motion for Summary Judgment

(“Pltf. Mem.”) at 22. It argues instead that the general variances set

forth in Circular DEQ-12B are essentially a replacement for the NNC:

“This is not a ‘variance’ under a policy or rule, this is simply a substitute cost, as opposed to science-based water quality standard for Montana

waters that EPA approved.” Pltf. Mem. at 26-27. Waterkeeper then argues that WQS, and specifically water quality criteria, may not be derived based upon considerations of cost or affordability, *id.* at 16-24, and completes its syllogism by concluding that the general variances do not comply with the CWA because it is based on cost or affordability. *Id.* at 27. Plaintiff’s argument is invalid because it fundamentally misunderstands the legal construct for variances, which under EPA’s long-standing regulations can be approved based on economic and social impacts, and the general purpose of variances as a tool to achieve incremental progress towards meeting long-term water quality goals.

A. CWA Requirements That Apply to Variances Allow States to Account for Economic and Social Impacts

The CWA directs States to adopt uses, and criteria “based upon such uses,” for waters of the United States. 33 U.S.C § 1313(c). Generally speaking, designated uses apply to the entire waterbody segment and “communicate a state’s or tribe’s environmental management objectives for its waters and drive on-the-ground water quality decision-making and improvements.” Proposed Rule, 78 Fed. Reg. at 54522, AR 756. “Designated uses” consist of narrative descriptions of water quality goals; States have “broad discretion to

determine the appropriate level of specificity to use in identifying and defining designated uses.” *Id.* In adopting designated uses, States are authorized to consider whether or not attaining the use is feasible. *See* 40 C.F.R. § 131.10(g), (j), and (k) (2000). EPA’s regulations provide specific considerations, including economic and social impacts, to determine whether a use specified in Section 101(a)(2) is feasible to attain. *Id.* Water quality “criteria” can be “expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use.” 40 C.F.R. § 131.3(b). “When criteria are met, water quality will generally protect the designated use.” *Id.* EPA agrees that costs and technological feasibility may not be used to justify adoption of criteria that do not protect the designated use adopted by the State. That is not what Montana has done. Montana adopted a *variance*, which in principle establishes a time-limited designated use and the associated criterion that applies to a discharger, consistent with CWA requirements and EPA’s implementing regulations.

A variance is a “time-limited designated use and water quality criterion for a specific pollutant(s) or water quality parameter(s) that reflect the highest attainable condition during the term of the WQS variance.” WQS Handbook, AR 824. Since 1977, EPA consistently has

taken the position that a State may adopt a variance as long it satisfies the same substantive and procedural requirements that apply to adoption or designated use removal under 40 C.F.R. § 131.10 (2000). *See* 1977 GC Decision, AR 19478; “Water Quality Standards Regulation,” 48 Fed. Reg. 51,400, 51,403 (Nov. 8, 1983); Economic Guidance, AR 16; FAQ, AR 593, 594; Proposed Rule, 78 Fed. Reg. at 54,531, AR 765; EPA Approval, AR 843; “Water Quality Standards Regulation,” 48 Fed Reg. 51,400, 51,403 (Nov. 8, 1983). EPA reasoned that a State’s adoption of a narrowly tailored variance is “environmentally preferable” to “downgrading the standard for an entire stream.” 1977 GC Decision, AR 19477. EPA has also recognized that a State may streamline its administrative process by adopting one variance that applies to multiple dischargers where it can be demonstrated that the designated use and criterion is unattainable as it applies to multiple permittees experiencing the same challenge in meeting their WQBELs for the same pollutant regardless of whether they are on the same water body. AR 596-99, 843.

A variance is different from a permanent designated use and associated criteria change because a variance “provide[s] 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.” Proposed Rule, 78 Fed. Reg. at 54,531, AR 765. EPA has explained that “[t]he practical effect of the variance is an NPDES permit containing a WQBEL that complies with a less stringent criterion than would otherwise be in effect in the absence of the variance.” AR 823. Contrary to Plaintiff’s argument that Montana’s NNC have been supplanted, EPA has made clear that “the underlying designated use and criteria remain in effect for Section 303(d) listing and total maximum daily load development regardless of whether the variance is for a single discharger, multiple dischargers, or a waterbody/waterbody segment. At the end of the variance term, the discharger’s WQBEL must ensure compliance with the underlying designated use and criterion or the state or tribe must obtain a new variance.” AR 823; Proposed Rule, 78 Fed. Reg. at 54,531, AR 765 .

Waterkeeper relies on *Miss. Comm’n on Nat. Res. v. Costle*, 625 F.2d 1269 (5th Cir. 1980), and other cases involving other provisions of the CWA and Clean Air Act to generically argue that the “standards” for water quality cannot account for economic impacts. Pltf. Mem. at 21.

Waterkeeper's characterization of a variance is inaccurate, and reliance on these cases here is misplaced. *Costle* recognized the important distinction between designating uses and setting water quality criteria. *Id.* at 1277. Waterkeeper fails to recognize that variances involve the adoption of a time-limited designated use as it applies to a specific discharger and that EPA's regulations allow states to remove and revise designated uses based on economic impacts. Criteria are then developed to protect that time-limited use.

Prior to the 2015 revisions, EPA's implementing regulations at 40 C.F.R. § 131.10 provided the requirements that apply when a State adopts new or revised designated uses or the adoption of a narrower variance. 40 C.F.R. §131.10(j) and (k) interpret and implement the Act through requirements that WQS provide for the protection and propagation of fish, shellfish, and wildlife, and recreation in and on the water, as specified in CWA section 101(a)(2), unless States and authorized tribes show those uses are unattainable through a "use attainability analysis" ("UAA"). Practically speaking, this means that a State must adopt a use that provides for the full protection and propagation of aquatic life use unless it can show through a UAA that such uses are not feasible to attain. A UAA is "a structured scientific

assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g).” 40 C.F.R. § 131.3(g).

Section 131.10(g)(6) allows States to remove a use specified in CWA section 101(a)(2) or a subcategory of such use (*e.g.*, limited aquatic life use) for an entire waterbody permanently, based on economic and social impacts. By extension, the regulation allows States to establish a time-limited variance based on economic and social impacts consistent with § 131.10(g)(6). Specifically, EPA’s regulations allow such actions if the State can demonstrate that “controls more stringent than those required by section 301(b) and 306 of the Act would result in substantial and widespread economic and social impact.” 40 C.F.R. § 131.10(g)(6). CWA sections 301(b) and 306 represent CWA technology-based requirements, as opposed to water quality-based requirements. When promulgating this factor, EPA explained as follows:

Historically, economic considerations have been a part of water quality standards decisions. Senate Report No. 10 on the Federal Water Pollution Control Amendments of 1965, 89th Congress, 1st Session, included the statement that “Economic, health, esthetic, and conservation values which contribute to the social and economic welfare of an area must be taken into account in determining the most

appropriate use or uses of a stream." Section 303(c)(2) of the Act provides that "... standards shall be established taking into consideration their use and value for ..." various water uses. Under the 1975 regulation governing the establishment of standards in Part § 35.1550(c)(1), States were to "... take into consideration environmental, technological, social, economic, and institutional factors" in determining the attainability of standards for any particular water segment ... The Agency recognizes that there are inherent difficulties in a balancing of the benefits of achieving the Section 101(a)(2) goals of the Act with the costs. As a result, the Agency was persuaded that the provision in the existing rule allowing changes in designated uses where there would be substantial and widespread economic impact better reflected the process required by the Act. For these reasons, the wording of the existing regulation has been retained.

48 Fed. Reg. at 51,400-01. As applied in the discharger-specific variance context, the State must demonstrate that during the term of the variance the financial costs of additional treatment for the point source to comply with water quality based requirements necessary to attain WQS would be "substantial" (*e.g.*, that the discharger is unable to afford the necessary pollutant reduction) and that requiring the owner of the point source to incur those costs would have economic and social impacts on the surrounding community that would be "widespread" (*e.g.*, increased sewer rates on a community that cannot afford them).

In the context of revising designated uses, once a State has made the requisite demonstration to “remove” a use specified in CWA section 101(a)(2) or a subcategory of such use, it will need to adopt a replacement designated use that “continue[s] to serve the 101(a)(2) goal by protecting for the highest attainable use,” unless the State has shown that no such use is attainable. Proposed Rule, 78 Fed. Reg. at 54523, AR 757; FAQ, AR 598. In the variance context, EPA explained that once a State makes the requisite demonstration that a use specified in CWA section 101(a)(2), or a subcategory of such use, is not feasible to attain for a particular discharger or group of dischargers for a period of time, the State will have to adopt interim requirements as part of a variance that will “reflect[] the highest attainable condition that applies during the term of the variance.” AR 593, 594, 824; Proposed Rule, 78 Fed. Reg. at 54,532, AR 766.

At the time EPA took its approval action in 2015, it did not have specific requirements regarding exactly how states must identify and define the “highest attainable condition.” In its 2013 FAQ guidance, EPA explained that the highest attainable condition “may be expressed as the highest attainable interim use and criterion or highest attainable effluent condition for a permittee(s) during the term of the variance”

and represents “the condition that is both feasible to attain and is closest to the protection afforded by the designated use and criteria.”¹⁶ AR 594. EPA explained that an effluent condition “is a reasonable alternative to adopting an interim designated use and criterion because the resulting instream concentration reflects the highest attainable interim use and interim criterion.” *Id.* In other words, the highest attainable effluent condition is acting as a “surrogate” for a revised designated use and criterion. Proposed Rule, 78 Fed. Reg. at 54,534, AR 768.

B. Montana’s WQS Were Properly Considered by EPA as Variances that Met CWA Requirements and Appropriately Account for Economic and Social Impacts

Montana adopted multiple discharger variances for both public and private dischargers subject to the NNC. It employed a unique approach with a number of features to help drive progress during the term of the variance towards meeting the NNC. Circular DEQ-12B

¹⁶ An “effluent condition” is a numeric description of the discharger’s effluent. One way the effluent condition can be expressed is as a concentration of a pollutant in the discharge (*e.g.*, 25 µg/L for Total Phosphorus).

(explaining that the purpose of the variance is to “allow[] for the achievement of the [NNC] standards over time.”), AR 843-44.

Montana identified an initial set of treatment requirements, expiring on July 1, 2017, that effectively serve as initial WQS that apply and must be met while dischargers conduct “optimization studies” to identify water quality improvements that can be made in the short term without substantial investment (such as through greater efficiencies, etc.), AR 843; AR 1229-32. EPA’s Approval explained that “[b]y coupling the interim treatment requirements with an optimization requirement, Montana’s approach facilitates short-term nutrient reductions from dischargers that will inform future interim treatment requirements.” AR 843. The variance then included a binding process to establish new interim milestones every three years after July 1, 2017, through a rulemaking process. *Id.*; Circular DEQ-12B, AR 1231-32.

While the State did not identify specific milestones that would be met at specific times, because of the need to account for new information that may arise or technologies that may become feasible in the future, it did explicitly recognize the importance of considering “whether there is new information that supports modifying (*e.g.*, revising the interim effluent treatment requirements) or terminating the variance every

three years.” Circular DEQ-12B, AR 1232. The State also explicitly acknowledged that the future interim treatment requirements could become more stringent and generally would be based on “achieving the highest attainable condition within the receiving water.” Circular DEQ-12B, AR 1231-34. Consistent with Montana’s statements in Circular DEQ-12B, EPA explained that these future interim requirements “should themselves, reflect the best that dischargers can achieve during that time period and be based on 1) information collected during optimization studies completed during the first phase of the general variances; and 2) additional analyses about what is affordable for facilities under the substantial and widespread economic and social test.” AR 843. The requirement to complete a study that evaluates opportunities for optimization coupled with a binding process to establish interim milestones applicable during the term of the variance were essential features underlying EPA’s approval of the general variances. AR 843-44.

Waterkeeper characterizes the general variances differently. It focuses solely on the initial set of interim treatment requirements, which it refers to as a “replacement technology-and cost-based variance standard.” Plaintiff completely ignores Montana’s explicit statements

that “[t]he requirements in Table 12B-1 expire on July 1, 2017,” and Montana’s clear intent to use opportunities for optimization in the short term and future interim milestones to be adopted every three years based on new information as mechanisms to drive water quality progress towards the long term HAC (*i.e.*, the NNC) through the course of the variance. Ultimately, Waterkeeper’s argument is that EPA inappropriately approved water quality criteria to replace the NNC based on cost. Plaintiff’s argument misconstrues the legal framework for variances discussed above, that allows the variance to reflect a time-limited less stringent designated use as it applies for particular dischargers that will, in turn, necessitate less stringent but attainable water quality criteria to protect that use.

As discussed below, Montana adequately demonstrated that the aquatic life use is not fully attainable because the NNC cannot be immediately attained and may not be for up to 20 years. Therefore, the State effectively showed, consistent with 40 C.F.R. § 131.10(g), that some level of limited aquatic life use is attainable during the variance period until the NNC can be achieved. In the case of Montana, the State identified the NNC as the highest attainable condition and adopted an initial effluent condition, a requirement to complete an optimization

study within two years of receiving the general variance, and a binding process to adopt subsequent milestones that will generally reflect the “highest attainable condition” every three years as a surrogate for explicitly identifying a downgraded limited aquatic life use and criterion to protect that use. When viewed in terms of designated uses and criteria, the State’s variances represent an adaptive approach to establishing the interim criteria that protects the broad “limited aquatic life use” consistent with 40 C.F.R. § 131.11. This approach provides a system of ratcheting down the interim criteria over time based on what is attainable in each three-year period and thus ensures that dischargers covered by the general variance are making incremental progress towards the HAC (*i.e.*, NNC) and protecting the aquatic life use that is feasible along the way. Since the purpose of the variance is to achieve progress towards the NNC, and in consideration of the fact that EPA did not, at the time of approval, have prescriptive requirements for how the State is required to reflect the highest attainable condition that applies during the term of the variance, Montana’s approach to the variances was consistent with the applicable requirements for a variance at the time of EPA’s approval. EPA’s approval of the general variances was reasonable and consistent with law.

II. EPA'S APPROVAL OF THE MONTANA NUTRIENT WQS GENERAL VARIANCES IS SUPPORTED BY THE ADMINISTRATIVE RECORD AND IS NOT ARBITRARY, CAPRICIOUS, OR IN VIOLATION OF LAW

EPA's approval of Montana's general variances was not arbitrary, capricious, or in violation of the law. EPA reasonably approved the variance in accordance with the CWA and EPA's WQS regulation regarding the adoption of variances applicable at the time of EPA's action.

Waterkeeper argues that EPA and DEQ had "predetermined" the result by pointing to communications between EPA and the State during the standards development process. Pltf. Mem. at 26-27. Plaintiff's description of correspondence, studies and meeting summaries regarding the development of Circular DEQ-12B, Pltf. Mem. at 27-30, is immaterial. Waterkeeper's focus on these communications fails to recognize the CWA's cooperative federalism approach for WQS. While EPA has an oversight role, it works closely with States during the WQS development process to ensure that States understand CWA requirements and what is necessary to meet them. Proposed Rule, 78

Fed. Reg. at 54,521, AR 755.¹⁷ As such, it would be odd indeed if there were no interactions between MDEQ, EPA, and stakeholders regarding the effects of the NNC and the social and economic impacts of compliance with that WQS. EPA acted on the materials presented to it by MDEQ in reaching its approval decision regarding the general variances, as evidenced at length in the Approval, and that determination stands on its own merits.

Waterkeeper's argument also fails to recognize that the State chose to develop and adopt NNC designed to protect an aquatic life use that was not immediately attainable, but which reflect the State's ultimate desired condition for the water and may be attainable in the future. EPA's own definition of "designated uses" at 40 C.F.R. § 131.3(f) states that designated uses are those uses specified "whether or not they are being attained." It is therefore reasonable to expect that a designated use might be unattainable for a period of time but attainable

¹⁷ "In order to ensure effective implementation of the national WQS program, to provide direct, clear, and transparent feedback on state and tribal actions, and to maintain an open and constructive dialogue with states, tribes, and stakeholders on important water quality issues, it is essential that the EPA have the ability to provide feedback, and states and tribes have the opportunity to consider and evaluate the Agency's views" *Id.*

in the future. This general approach is permissible under the CWA and is in fact consistent with the national goal to restore the chemical, physical and biological integrity of water bodies.

A. EPA Appropriately and Reasonably Approved Montana's Variances Based on "Substantial and Widespread Economic and Social Impact" Pursuant to the Agency's Interpretation of the Clean Water Act and EPA's WQS Regulation at 40 C.F.R. Part 131

Contrary to Plaintiff's assertions, Montana undertook a reasonable analysis, consistent with EPA's 1995 Economic Guidance, to determine whether public and private dischargers and the State itself would suffer substantial and widespread economic and social impacts in order to immediately meet the NNC. As described above, Montana reviewed the likely effects of compliance on dischargers, cities and towns, and Montana as a whole, in making a reasonable and factually supported determination that a variance was necessary for a period of time to facilitate progress towards the HAC (*i.e.*, the NNC).

Early in the State's rulemaking process, MDEQ recognized that meeting the NNC to protect the aquatic life upon adoption would be challenging, if not impossible, for most dischargers. AR 1351. In 2008-09, MDEQ convened an "affordability workgroup" that explored options for granting a variance to individual dischargers. AR 11321-34, 11606-

13). Between 2010 and 2012, EPA worked with MDEQ to apply EPA's 1995 Economic Guidance to specific public and private dischargers and to evaluate preliminary results and issues. AR 12446, 14466.

EPA worked with MDEQ to examine the available treatment technologies and the associated cost and final effluent concentrations. AR 5061-5144; 7721-32. Based on the information compiled in developing the economic and technical analyses, EPA agreed with the State's conclusion that the final economic demonstrations show that meeting the NNC, which would require the installation of reverse osmosis, was not affordable and would result in economic hardship for Montana communities consistent with EPA's regulation at 40 C.F.R. § 131.10(g). AR 843-53.

Waterkeeper argues that there is no basis to support EPA's statement that "[i]f at the time of permitting, Montana determines that, based on site-specific facts and details (e.g., dilution, alternatives to discharge, installing less expensive treatment technology), an individual discharger can meet the NNC-based limits, then the discharge permit would include such limits." EPA Approval, AR 850. Waterkeeper ignores evidence in the record demonstrating that MDEQ made clear throughout its workgroup process that the general variances were only

available to dischargers that could not meet the NNC. For example, in its response to public comment on the 2012 draft rules, MDEQ noted that if facilities were able to achieve the NNC for one parameter, they would not need a general variance for that parameter. AR 2974. In addition, guidance developed by MDEQ's permitting section states that general variance limits would only be developed "if compliance with WQBELS or TMDL-based effluent limits appear unachievable." AR 19340. These documents demonstrate that where limits based on the NNC did not cause substantial and widespread economic impacts, then coverage under the general variances would not be required and thus not granted.

In addition, Montana's variance rule requires the State to review the general variance justification, including the economic demonstration, every three years to evaluate what technologies will be available in the future and whether communities will be able to afford them. This information will then inform the State's conclusion as to whether to extend the variance without modification, with modification, or to allow the variance to expire as described in Circular DEQ-12B, AR 1232.

In approving Montana's general variance, EPA reviewed the economic analyses for both public and private dischargers submitted by the State in support of its variance and provided a detailed discussion of the analyses in EPA's decision document approving the general variance. AR 843-853. EPA also undertook an independent analysis of the list of specific individual dischargers provided by Montana as being covered by the general variances, to determine which dischargers would actually be subject to the variance. AR 11019-22.

Based on its review, EPA appropriately concluded the facilities subject to WQBELs based on the NNC would need a variance, because installing reverse osmosis to meet WQBELs based on the NNC would cause substantial and widespread economic and social impact, consistent with 40 C.F.R. § 131.10(g)(6). EPA's approval of the variance was reasonable, supported by the administrative record and is entitled to deference.

B. EPA Appropriately and Reasonably Approved Montana's Variances for Both TN and TP Components of the NNC

EPA's approval of Montana's dual nutrient control approach for justifying general variances was reasonable. Plaintiff mischaracterizes Montana's analysis and EPA's technical review of this issue. Plaintiff

asserts that “EPA’s sole rationale for not requiring better treatment where possible, is an assertion that controlling phosphorus alone down to background levels (10 µg/L) would skew the nitrogen to phosphorus ratio (N:P), which might lead to a particularly bad form of algae, *Didymosphenia geminata*, becoming more prevalent in Montana’s waters.”¹⁸ Pltf. Mem. at 39. Plaintiff argues that EPA included this reference as the basis for “EPA’s claim that more advanced control of phosphorus could harm Montana waters.” *Id.*

This misrepresents EPA’s basis for including the *Didymosphenia geminata* citation. The example was included to demonstrate why both phosphorus and nitrogen limits are important to protect water quality and specifically why the State was reasonable in assuming that reverse osmosis would be required to reliably meet both TN and TP. AR 849.

The State’s 40 C.F.R. § 131.10(g)(6) economic demonstration determined that reverse osmosis was required to meet *both* the nitrogen and phosphorus criteria, because it was the only available treatment technology that could “reliably” meet the numeric nutrient

¹⁸ This is based on a citation from Suplee, M. and V. Watson, 2013. Scientific and Technical Basis of the Numeric Nutrient Criteria For Montana’s Wadeable Streams and Rivers – Update 1. Helena, MT.

criteria for *both* nutrient components. AR 843-44. Waterkeeper goes to great lengths to use the *Didymosphenia geminata* example as a basis for justifying more stringent interim milestones for phosphorus. In doing so, Waterkeeper conflates EPA's discussion of the nutrient ratios as part of the § 131.10(g)(6) demonstration justifying the variance, with EPA's approval of the variance approach itself.

When considering the State's assumption that reverse osmosis was necessary, EPA recognized that there may be certain technologies available to achieve lower TP levels, but that those techniques would not also control TN. EPA Approval, AR 849. "Determining the cost of compliance with Montana's NNC requires identification of treatment technologies that will meet both the TN and TP criteria. Treatment options that meet one criteria[ion] but not the other would not ensure protection of the aquatic life designated use." *Id.*

EPA's scientific and technical judgment regarding available methods of controlling TP and TN is reasonable, is entitled to substantial deference, and should be upheld. *NRDC v. Pritzker*, 828 F.3d at 1139.

C. EPA Appropriately and Reasonably Approved Montana's Approach Regarding the Highest Attainable Condition

Plaintiff asserts that Circular DEQ-12B is unlawful because “it does not require protection of the highest attainable condition or use, but allows pollution and damage to Montana water bodies that is completely avoidable.” Pltf. Mem. at 35. Plaintiff inappropriately focuses on an initial set of interim milestones. *Id.* at 36. Montana did not identify those initial interim milestones as the HAC. As explained above, Montana describes the NNC as the “highest attainable condition,” with required interim short-term “milestones” that “allow for the base numeric nutrient standards to be met in a staged manner over time, as alternative effluent management methods are considered, nutrient removal technologies become more cost-effective and efficient, and nonpoint sources of nutrients are addressed.” MDEQ Notice of Public Hearing on Proposed Adoption, AR 1199, *quoted* in EPA Approval at 22, AR 852.

The State explicitly recognized that the interim treatment requirements could become more stringent and generally would be based on “achieving the highest attainable condition within the receiving water.” AR 1234. The first set of milestones adopted by the

State are set out in Table 12B-1 in Circular DEQ-12B and expire on July 1, 2017. AR 1233. MDEQ “must review the general variance treatment requirements every three years to assure that the justification for their adoption remains valid . . . The purpose of the review is to determine whether there is new information that supports modifying (e.g., revising the interim effluent treatment requirements) or terminating the variance.” Circular DEQ-12B, AR 1232.¹⁹

In 2010, the MDEQ Director stated in a letter to EPA that

. . . it became clear that scientifically-based criteria in some areas of Montana would be quite stringent and difficult to achieve (e.g., 0.03 mg/L TP and 0.3 mg/L TN in the Middle Rockies ecoregion). Therefore, MDEQ began considering a means by which the criteria could be implemented in a more staged manner, allowing time for our communities to upgrade their wastewater treatment and for nutrient removal technologies to improve and become less expensive. This approach would maintain the designated recreational and aquatic life uses while incorporating variances to make incremental progress towards achieving the water quality standards goal.

¹⁹ EPA’s consideration of the next round of interim milestone submissions by Montana, due by July 1, 2017, will be governed by the provisions of 40 C.F.R. § 131.14 (2015). 40 C.F.R. § 131.14(b) states that requirements of the variance that apply through the period of the variance “shall represent the highest attainable condition of the water body or waterbody segment applicable through the term of the WQS variance based on the documentation required in (b)(2) of this section.”

AR 11825. Ultimately, Montana finalized this approach in Circular DEQ-12B through describing the NNC as the highest attainable condition and setting up a process for the short-term interim milestones to ensure that incremental progress toward the highest attainable condition is being made.

EPA determined that Montana's practical approach to meeting its highest attainable condition, the NNC, through short-term interim milestones, adopted on a triennial basis, was appropriate. AR 852. As EPA stated in its Approval Document,

The procedure established in Montana's regulations provides accountability that dischargers will make progress toward meeting the NNC by the end of the general variance provided that the triennial review process is implemented appropriately and effectively. This process should ensure that the water quality protection requirements imposed by the variances keep pace with what is feasible to achieve.

Id., AR 852. In addition, the approach gives the public an opportunity to comment on the proposed interim milestones, since the milestones will be proposed and adopted through a rulemaking process. *Id.* EPA's approval of Montana's approach to the HAC was reasonable under the regulatory regime in effect at the time of EPA's approval discussed above and should be upheld by the Court.

CONCLUSION

For the reasons set forth above, the Court should deny the Plaintiff's motion for summary judgment and grant the Defendants' cross-motion for summary judgment on the merits.

Respectfully submitted,

JEFFREY H. WOOD
Acting Assistant Attorney General
Environment and Natural Resources
Division

Dated: March 3, 2017 By: /s/ Daniel Pinkston
DANIEL PINKSTON
Environmental Defense Section
Environment and Natural Resources
Division
U.S. Department of Justice
999 18th Street, South Terrace, Suite 370
(303) 844-1804
Daniel.pinkston@usdoj.gov

MICHAEL W. COTTER
United States Attorney
District of Montana
901 Front Street, Suite 1100
Helena, MT 59626
(406) 457-5120
Mark.smith3@usdoj.gov

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief is proportionally spaced, uses 14-point type, and contains 11,909 words, excluding those parts of the brief exempted by D. Mont. L.R. 7.1(d)(2)(E), and the glossary of acronyms.

Dated: March 3, 2017

By: /s/ Daniel Pinkston
Environmental Defense Section
United States Department of Justice

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing **Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in support of Defendants' Cross-Motion for Summary Judgment** by Notice of Electronic Filing using the Court's CM/ECF system, which will send notice of such filing via email to all counsel of record.

Said filing was made on or before the date set forth below.

Dated: March 3, 2017

By: /s/ Daniel Pinkston
Environmental Defense Section
United States Department of Justice