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UNITED STATES DISTRICT COURT DISTRICT OF MONTANA, GREAT  
FALLS DIVISION

UPPER MISSOURI WATERKEEPER,  
  
Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY and Scott  
Pruitt, Administrator, United States  
Environmental Protection Agency,

Cause No. 16-cv-00052-BMM

**MEMORANDUM IN SUPPORT  
OF THE NATIONAL  
ASSOCIATION OF CLEAN  
WATER AGENCIES' CROSS-  
MOTION FOR SUMMARY**

<p>Defendants.</p> <p>MONTANA LEAGUE OF CITIES AND TOWNS;</p> <p>MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY;</p> <p>TREASURE STATE RESOURCES ASSOC. OF MONTANA; and</p> <p>NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES;</p> <p>Defendant Intervenors.</p>	<p><b>JUDGMENT AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT</b></p>
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**Table of Contents**

**Table of Authorities .....4**

**Introduction.....5**

**Standard of Review .....8**

**Argument .....9**

    A. The Resolution of Plaintiff’s Claims Will Have Far-Reaching Impacts on NACWA Members Throughout the Country and Their Ability to Comply with the Clean Water Act. ....9

    B. Establishment of Nutrient Criteria and General Variance .....10

    C. The General Variance is a Compliance Tool and Recognized by EPA Rules and Guidance .....13

    D. Plaintiff’s Claims Would Eviscerate Variance Programs as a Key Compliance Tool for Dischargers .....17

**Conclusion.....19**

**Certificate of Compliance.....20**

**Certificate of Service.....21**

**TABLE OF AUTHORITIES**

**Cases**

*Bahr v. U.S. Env'tl. Protec. Agency*, 836 F.3d 1218 (9th Cir. 2016).....8

*Occidental Engr. Co. v. I.N.S.*, 753 F.2d 766 (9th Cir. 1985) .....8

*San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216 (9th Cir. 2017), as corrected (Mar. 23, 2017) .....8

**Statutes**

33 U.S.C. § 1311(a) .....5

33 U.S.C. § 1313(a) .....6

33 U.S.C. § 1342(a) .....6

33 U.S.C. § 1342(b) .....6

**Regulations and Guidance**

*MT Dept. of Environmental Quality, DEQ-12B, Nutrient Standards Variances* (July 2014) AR 1229–1237. ....13

U.S. E.P.A., Letter Approving Wisconsin’s Multi-Discharger Variance, (February 6, 2017)  
[ftp://dnrftp01.wi.gov/geodata/water\\_division/phosphorus/mdv/EPA\\_approval/EP\\_A\\_approval\\_ltr\\_WI\\_P\\_MDV\\_020617.pdf](ftp://dnrftp01.wi.gov/geodata/water_division/phosphorus/mdv/EPA_approval/EP_A_approval_ltr_WI_P_MDV_020617.pdf) (accessed April 10, 2017).....16

*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*, (March 2013)  
<http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060j.pdf> (accessed on April 10, 2017) ..... 12, 15

*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*, (March 16, 2011)  
[https://www.epa.gov/sites/production/files/documents/memo\\_nitrogen\\_framework.pdf](https://www.epa.gov/sites/production/files/documents/memo_nitrogen_framework.pdf) ) (accessed on April 10, 2017).....11

Defendant-Intervenor the National Association of Clean Water Agencies (“NACWA”), by its undersigned counsel hereby files its Memorandum in Support of its Cross-Motion for Summary Judgment and in Opposition to Plaintiff’s Motion for Summary Judgment. NACWA also supports and joins in the arguments of Intervenor-Defendant State of Montana and Defendants U.S. Environmental Protection Agency and U.S. EPA Administrator Scott Pruitt (collectively, “EPA”) as set forth in their Memorandums in Support of their respective Cross-Motions for Summary Judgment.

## **INTRODUCTION**

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 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’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)).

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. These claims are thoroughly refuted in the briefs filed by EPA and Montana. In this brief, NACWA focuses on legal issues more specific to its members’ interests including the use of such variances as a critical compliance tool as water quality standards become more stringent without commensurate economically feasible compliance technology.

Plaintiff’s claims in this matter, if successful, would have a direct impact on NACWA’s members’ operations as well as the POTW ratepayers in affected

communities across the country. Should Plaintiff prevail in this suit, the case will call into question EPA's ability to authorize not only general variances, but discharger-specific variances as well, which will make it substantially more difficult for NACWA members in other states to obtain such NPDES permit conditions in the future. The legality of NPDES permit variances is of paramount importance to NACWA members 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. The availability of variances in turn impacts the ratepayers who fund NACWA member operations, as increased compliance costs result in greater utility costs.

As discussed below, and in detail in the briefs filed by EPA and Montana, which NACWA supports, EPA's approval of Montana's general variance was not arbitrary, capricious, or contrary to law. There is no genuine issue of material fact that Montana's general variance was consistent with the CWA's requirements regarding variances that existed at the time EPA approved it, and its approval is supported by the administrative record. Plaintiff's Motion for Summary Judgment should therefore be denied, and NACWA's Cross-Motion for Summary Judgment should be granted.

## STANDARD OF REVIEW

As a request for this Court to review EPA's approval of Montana's general variance, the Administrative Procedure Act ("APA") governs this Court's review of NACWA's motion for summary judgment. Under the APA, courts ruling on summary judgment motions review the administrative record to determine whether the record shows that the agency's decision was not "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Occidental Engr. Co. v. I.N.S.*, 753 F.2d 766, 769 (9th Cir. 1985). Under this standard, courts must consider whether "agency has articulated a rational connection between the facts found and the conclusions made." *San Luis & Delta-Mendota Water Auth. v. Haugrud*, 848 F.3d 1216, 1227 (9th Cir. 2017), as corrected (Mar. 23, 2017). Review under the APA 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. Env'tl. Protec. Agency*, 836 F.3d 1218, 1229 (9th Cir. 2016).

## STATEMENT OF UNDISPUTED FACTS

Pursuant to Local Rule 56, NACWA is contemporaneously submitting its Statement of Undisputed Facts, responding to Plaintiff's Statement of Undisputed Facts and incorporating Defendants' Statement of Facts and Intervenor Defendant State of Montana Department of Environmental Quality's Statement of Facts.



## ARGUMENT

### **A. The Resolution of Plaintiff's Claims Will Have Far-Reaching Impacts on NACWA Members Throughout the Country and Their Ability to Comply with the Clean Water Act.**

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. Therefore, 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 in the near term—and may be unable to meet these criteria at all, resulting in significant economic impact to the City and the state. As it works to meet these criteria, Bozeman 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 litigation costs and 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 implement Federal policy set by EPA by pairing 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 either simply not attainable or not attainable without causing widespread economic and social harm. Further, the communities could face litigation and substantial civil penalties for failing to meet the stringent limits in the interim.

**B. Establishment of Nutrient Criteria and General Variance**

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*, (March 16, 2011).<sup>1</sup> 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 p. 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*,

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<sup>1</sup>[https://www.epa.gov/sites/production/files/documents/memo\\_nitrogen\\_framework.pdf](https://www.epa.gov/sites/production/files/documents/memo_nitrogen_framework.pdf) (accessed on April 10, 2017)

at p. 4 (March 2013).<sup>2</sup> EPA has recognized the utility of multiple discharger variances since 1995. *Id.* at pp. 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 p. 5. As part of this analysis, the state must show—with supporting 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 that 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 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) AR

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<sup>2</sup> <http://www.ecy.wa.gov/programs/wq/ruledev/wac173201A/comments/0060j.pdf> (accessed on April 10, 2017).

1229–1237. 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 that MDEQ will, every three years, reevaluate the economic justification as well as cost and effluent concentrations of available treatment technologies. 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. As explained in detail in the other briefs, the components of the general variance were carefully crafted by MDEQ to ensure compliance with the CWA, applicable regulations, and EPA guidance documents.

**C. The General Variance is a Compliance Tool and Recognized by EPA Rules and Guidance**

NACWA members and other dischargers need a compliance tool to allow them to proceed down the path to meeting Montana’s strict nutrient criteria so that water quality standards and designated uses may ultimately be achieved. That is the precise purpose of the general variance: to provide short-term relief to

dischargers now, so they may ultimately achieve compliance in a manner that does not result in widespread social and economic impacts. As explained by EPA, consistent with the CWA and EPA regulations, Montana “chose to develop and adopt [nutrient numeric criteria] designed to protect and aquatic life use that was not immediately attainable, but which reflects the State’s ultimate desired condition for the water and may be attainable in the future.” Defendants’ Memorandum in Opposition to Plaintiff’s Summary Judgment and in Support of Defendants’ Cross-Motion for Summary Judgment (Doc. 77) p. 49. It must be emphasized that the purpose of the general variance is to help put dischargers on the pathway to CWA compliance, *not* to circumvent compliance obligations as Plaintiff argues.

This is exactly why variances have been recognized as a compliance tool under EPA rules and guidance:

A water quality standards variance is a time limited designated use and criterion (i.e., interim requirements) that is targeted to a specific pollutant(s), source(s), and/or waterbody segment(s) that reflects the highest attainable condition during the specified time period. As such, a variance requires a public process and EPA review and approval under CWA 303(c). While the designated use and criterion reflect what is ultimately attainable, the variance reflects the highest attainable condition for a specific timeframe and is therefore less stringent.

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Many states and tribes have found that WQS variances are useful to consider when there is a new or more stringent

effluent limit as long as the state or tribe can also provide a demonstration that attaining the designated use and criterion is not feasible for the term of the variance, but the designated use and criterion may be attainable in the longer term.

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Properly applied, a WQS variance can lead to improved water quality over the duration of the variance and, in some cases, full attainment of designated uses due to advances in treatment technologies, control practices, or other changes in circumstances, thereby furthering the objectives of the CWA.

*EPA-820-F-13-012*, at pp. 2–3 (internal footnotes omitted). As explained in the briefs filed by EPA and Montana, the appropriate process for establishing Montana’s general variance was followed and EPA reasonably approved the variance based on “substantial and widespread economic and social impact” criteria consistent with 40 C.F.R. Part 131.

The continued availability of general variances is critical to dischargers as water quality standards continue to become more stringent. For example, EPA in 2010 approved new phosphorus water quality standards for Wisconsin that for many dischargers are more stringent than previous limits and created compliance challenges. On February 6, 2017, EPA approved a 10-year multi-discharger variance from stringent phosphorus water quality standards, after determining that it is consistent with the Clean Water Act and applicable EPA regulations. *See* U.S. E.P.A., Letter Approving Wisconsin’s Multi-Discharger Variance, (February 6,

2017).<sup>3</sup> Wisconsin's multi-discharger variance program provides flexibility and an intelligent pathway to compliance while accounting for the economic and social impacts that immediate compliance would involve. This recent example demonstrates the importance of a carefully constructed variance program and how it is a compliance tool to ultimately meet the goals of the CWA.

This compliance tool will become increasingly critical to NACWA members as additional states adopt stringent nutrient criteria that are not feasible to meet in the near-term. 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 causing widespread social and economic impact—the exact consequence that variances are designed to prevent while simultaneously supporting a path to compliance. And in the instant case, as explained in detail in the briefs filed by Montana and EPA, the record supports the careful analysis that went into EPA's approval of Montana's variance to ensure it was being used as a compliance tool to meet the objectives of the CWA.

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([ftp://dnrftp01.wi.gov/geodata/water\\_division/phosphorus/mdv/EPA\\_approval/EP\\_A\\_approval\\_ltr\\_WI\\_P\\_MDV\\_020617.pdf](ftp://dnrftp01.wi.gov/geodata/water_division/phosphorus/mdv/EPA_approval/EP_A_approval_ltr_WI_P_MDV_020617.pdf)) (accessed April 10, 2017).



**D. Plaintiff's Claims Would Eviscerate Variance Programs as a Key Compliance Tool for Dischargers**

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. If taken seriously, Plaintiff's claims would likely eviscerate variance programs as a compliance tool for discharges.

The briefs filed by EPA and Montana explain in detail how Montana's general variance was both scientifically based and properly considered the widespread social and economic impacts of implementing the nutrient criteria if a general variance was not allowed. As explained by EPA, "Plaintiff's argument misconstrues the legal framework for variances ... 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." Doc. 77 p. 46. This important framework, which is protective of both environmental and societal concerns, could be destroyed if Plaintiff prevails in this case.

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 to apply only in Montana, this case has national consequences for nutrient reduction regulation and implementation of the CWA in all states. 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. EPA's approval of Montana's variance was not arbitrary, capricious, or contrary to law; therefore, no genuine issue of material fact exists and these issues should be resolved in EPA's favor.

**CONCLUSION**

WHEREFORE, for all the foregoing reasons, NACWA respectfully requests that this Court grant its Cross-Motion for Summary Judgment and deny Plaintiff's Motion for Summary Judgment.

Dated this 10th day of April, 2017.

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief is uses a proportionally spaced font, 14-point type, and contains 3,011 words, excluding those portions of the brief exempted by L.R. 7.1(d)(2)(E).

Dated this 10th day of April, 2017.

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**CERTIFICATE OF SERVICE**

I certify that on this date I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the District of Montana, Great Falls Division, by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Any counsel not registered with the Court's CM/ECF system will be served by United States mail.

Dated this 10th day of April, 2017.

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