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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency, Defendants, and STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY, TREASURE STATE RESOURCE ASSOCIATION OF MONTANA, MONTANA LEAGUE OF CITIES AND TOWNS, and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Intervenor-Defendants.	)	No. 4:16-cv-00052-BMM **DEFENDANTS' MEMORANDUM IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

REGULATIONS

FEDERAL REGISTER NOTICES

INTRODUCTION

Defendants United States Environmental Protection Agency ("EPA") and Administrator Andrew Wheeler request, in accordance with Fed. R. Civ. P. 59(e), that the Court alter or amend its final judgment, Doc No. 187, to deny in full, rather than in part, Upper Missouri Waterkeeper's Motion for Summary Judgment, Doc. 148. The Court entered Final Judgment in this matter "in accordance with the Court's Orders dated March 25, 2019 (Doc. 177) and July 16, 2019 (Doc. 184)." The Court's Order dated March 25, 2019, granted in part Upper Missouri Waterkeeper's ("Waterkeeper") motion for summary judgment. Doc. 177 at 35. The Order dated July 16, 2019, established remedies that reflected the Court's determination to grant in part Waterkeeper's motion for summary judgment. Doc. 184 at 6.

The Court identified two flaws in the Montana variance approved by EPA that supported its grant in part of Waterkeeper's motion for summary judgment: one regarding the endpoint of the variance and the other the starting point of the variance. *See Upper Missouri Waterkeeper v. EPA*, 377 F. Supp. 3d 1156 (D. Mont. 2019). First, the Court held that Defendants "must set forth a timeline that ends with the ultimate attainment of the Montana's Base WQS . . . ." *Id.* at 1171. Second, the Court held that "Defendants must

begin with a program that complies with the relaxed criteria of the Current Variance Standard." *Id.* at 1170.

EPA respectfully suggests that the Court misunderstood EPA's lawful regulation governing variances from water quality standards ("WQS") under the Clean Water Act. As a result, the Court's determinations are inconsistent with the unambiguous language of EPA's regulation. For the reasons explained below, the Court should correct its clear error and alter or amend its judgment to deny in full Waterkeeper's motion for summary judgment.

BACKGROUND

I. Relevant Regulatory Provisions

The Court's misunderstanding may arise from the variance regulation's use of the concept of "highest attainable condition." Although this term is not expressly defined in the regulation, the regulation instructs States to specify the "highest attainable condition" based on three available options. 40 C.F.R. § 131.14(b)(1)(ii)(A). Montana chose, and EPA approved, use of two of the options. Montana set numerical interim effluent conditions in Table 12B-1 of the variance that reflected the greatest pollutant reduction achievable that results from the installation of feasible pollutant control technologies, *i.e.,* those technologies that do not result in substantial and widespread economic and social impact. AR 20403; AR 20650; *see* 40 C.F.R. § 131.14(b)(1)(ii)(A)(2).

For dischargers not meeting the numeric Table 12B-1 values at the time the variance issued, these numeric values are the highest attainable condition that apply during the variance. AR 20650. For dischargers meeting the numeric values in Table 12B-1 at the time the variance issued, the highest attainable condition is derived from the facility's actual effluent concentrations plus the discharger's future implementation of a Pollutant Minimization Program. AR 20404; AR 20658; 40 C.F.R. § 131.14(b)(1)(ii)(A)(3); *see* AR 20653-54 (describing Pollutant Minimization Program).

The regulation states that the term of the variance "must only be as long as necessary to achieve the highest attainable condition." 40 C.F.R. § 131.14(b)(1)(iv).

II. The Court's Decision on Motions for Summary Judgment

The Court's Order dated March 25, 2019, addressed the parties' motions for summary judgment. The Court first rejected Waterkeeper's contention that the Clean Water Act's plain language precluded the consideration of costs when setting WQS. *Waterkeeper*, 377 F. Supp. 3d at 1163-65. Having found ambiguity in the Act, the Court held that EPA's variance rule represents a permissible interpretation of the statute and comports with the Act's requirements. *Id.* at 1165-66.

Waterkeeper did not challenge EPA's approval of the "highest attainable condition." *Id.* at 1167. The Court concluded that the Defendants' adoption of the "Current Variance Standard," which includes Montana's determination of highest attainable condition, comports with the evidence, finds support in the record, and does not violate the Act. *Id.* at 1171. However, the Court found two flaws with the approval of the timeline of the variance.

First, the Court held that the variance must result in compliance with the numeric nutrient criteria ("Base WQS") by the end of the variance term. *Id.* at 1169. The Court opined that a "variance should allow a discharger sufficient time to reach the stricter criteria contained in Montana's Base WQS." *Id.* Therefore, the Court held that Montana must adopt and EPA must approve a timeline that "ends with the ultimate attainment of Montana's Base WQS rather than simply improving water quality to the level of the relaxed criteria of the Current Variance Standard." *Id.* at 1171.

Second, the Court was concerned by Montana's use of the variance to provide the discharger time to achieve one of the two highest attainable conditions in the variance, described as the "relaxed criteria of the Current Variance Standard." *Id.* at 1168-69. The Court interpreted "attainable" as the condition that presently can be attained. *Id.* at 1169. The Court found that the "regulations prove arbitrary and capricious, however, when they contradict

the term "attainable" in setting forth the term of the variance as 'only as long as necessary to *achieve* the highest attainable condition.'" *Id.* at 1170 (emphasis in original). As a result, the Court held that "EPA's approval of the current seventeen-year timeline to allow dischargers to meet the relaxed Current Variance Standards runs counter to the CWA's requirements and cannot stand." *Id.* at 1171. The Court directed Defendants to "begin with a program that complies with the relaxed criteria of the Current Variance Standard." *Id.* at 1170.

III. The Court's Decision on Remedy

The Court remanded the case to the Montana Department of Environmental Quality with instructions to set forth "a reasonable timeline that begins with the relaxed criteria of the Current Variance Standard and leads to compliance with Montana's Base WQS in the time range proposed by Plaintiffs." Doc. No. 184 at 5. The Court vacated the portion of the variance containing a 17-year timeline to reach the Current Variance Standard, but stayed the vacatur until EPA acts on a replacement variance in accordance with the Court's Order.

LEGAL STANDARD

A court may in its discretion alter or amend a judgment to correct clear error. *Indigenous Envt'l Network v. U.S. Dept. of State*, 369 F. Supp. 3d 1045,

1048 (D. Mont. 2019). One purpose of Rule 59(e) is "to allow the district court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings." *Bank of Bozeman v. BancInsure, Inc.*, No. CV-08-05-BU-CSO, 2009 WL 10677366 at *2 (D. Mont. Oct. 8, 2009).

A Rule 59(e) motion is a proper vehicle to seek reconsideration of a summary judgment. *Id.* Nevertheless, reconsideration of a judgment is an extraordinary remedy that should be used sparingly, and not used to relitigate old matters or issues that could have been raised earlier. *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003); *Mid Continent Casualty Co. v. Engelke*, No. CV-17-41-BLG-SPW, 2018 WL 4078358 (D. Mont. Aug. 27, 2018).[1]

[1] This motion does not seek to relitigate old matters. As the Court recognized, the "core issue" in this case involved whether the Clean Water Act requires water quality standards to be "science based." *Waterkeeper*, 377 F. Supp. 3d at 1163. The Court's discussion of timelines relied upon its identification of a contradiction between 40 C.F.R. § 131.3(o) and 40 C.F.R. § 131.14(b)(1)(iv). *Id.* at 1169. This issue was not briefed by any party in the numerous summary judgment briefs, and EPA had no reason to raise it at that time. Waterkeeper in its two briefs on summary judgment did not cite to either of these regulatory provisions, much less argue that they presented a basis to challenge the variance timeline. Doc. Nos. 150 at v, 167 at iii. EPA's first brief on summary judgment (but not its second) cited to the two regulatory provisions for general background but not in connection with arguments regarding the timeline of the variance. Doc. Nos. 152, 172. EPA cited to the two regulatory provisions in its remedy brief to explain that the deficiencies in the variance identified by the Court were not so egregious as to support vacatur. Doc. No. 181 at 11.

ARGUMENT

A. The Court's Mandate that Defendants Adopt a Variance that Ends with Attainment of Base WQS is Clear Error.

Nothing in the Clean Water Act nor in EPA's regulation requires that a discharger attain the underlying water quality standard at the end of the variance term. In fact, the plain language of EPA's regulations states otherwise. Moreover, a critical document in the administrative record – EPA's responses to comments on the variance rule – explains that attainment of underlying water quality standards is not required at the end of the variance term. AR 20063 at 20077. Thus, both the regulatory text and EPA's supporting statements in the record expressly undercut, rather than support, the Court's interpretation of EPA's regulations.

Contrary to the Court's opinion, the relevant regulatory provision makes clear that the "highest attainable condition," not Base WQS, is the water quality to be achieved by the end of the variance. Specifically, 40 C.F.R. § 131.14(b)(1)(iv) states that the term of the variance be "expressed as an interval of time" that "must only be as long as necessary to *achieve the highest attainable condition*." (emphasis added). The Court's Orders read this emphasized text out of EPA's regulation.

Beyond this explicit regulatory text, the structure of EPA's variance regulation[2] does not require a state to adopt a timeline to comply with Base WQS. EPA's regulation provides that a "State may adopt a subsequent WQS variance consistent with this section" upon the expiration of a prior variance. *Id.* § 131.14(b)(1)(iv); 80 Fed. Reg. 51,020, 51,035-36 (Aug. 21, 2015) ("[i]f, at the end of the WQS variance, the underlying designated use remains unattainable, the state or authorized tribe may adopt a subsequent WQS variance(s), consistent with the requirements of § 131.14."); *see id.* at 51,039-40 (same). By providing for subsequent variances, the regulation does not require that the discharger attain the Base WQS at the end of the term of the initial variance.

The plain meaning of EPA's regulation is further confirmed by EPA statements in the record from the variance rulemaking. EPA expressly rejected the recommendation of some commenters on the proposed variance regulation that the final regulation should include a "requirement that the original water quality standard must be attained by a date certain." AR 20063 at 20077. Consistent with the regulatory text, EPA responded that the

[2] The Supreme Court recently stated in *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), that discerning the plain language of a regulation includes an examination of "all the traditional tools of construction" *e.g.*, the "text, structure, history, and purpose of a regulation."

purpose of a variance is to allow progress toward meeting the underlying designated use and criterion even if the time required to attain the underlying designated use and criterion is uncertain. AR 20063 at 20077. Further, EPA explained that a variance will often set a highest attainable condition that is short of full attainment of the underlying designated use and criterion; when the variance expires, the state can assess the attainability of the underlying designated use and criterion and either adopt another variance using a new, more stringent highest attainable condition, or it can allow the underlying designated use and criterion to resume as the applicable water quality standard. *Id.* These statements align with the language of the regulation, which gives the states flexibility to establish variance terms and conditions that facilitate progress towards meeting the base WQS, but plainly do not mandate that base WQS standards be achieved by the end of the variance term.

The Court also committed clear error because its interpretation of the regulation does not comport with the evidence in the administrative record for EPA's approval. Montana's adoption and EPA's approval of the Current Variance Standard were based on determinations in documents in the administrative record that it was infeasible for dischargers to meet Base WQS

at *any* time during the term of the variance.[3] *See* AR 20386 (stating EPA's conclusion that "attaining [Base WQS] is not feasible *throughout the term of the variance."* (emphasis added)). Thus, the administrative record undercuts, rather than supports the Court's conclusion.

In sum, nothing in the Clean Water Act or EPA's variance regulation requires attainment of Base WQS at the end of the variance term. The Court's creation of such a requirement when clear regulatory language and associated statements in the administrative record provide otherwise is clear error.

B. The Court's Mandate that Defendants Adopt a Variance that Begins with Compliance with the Current Variance Standard is Clear Error.

The Court also misunderstood EPA's regulatory program in finding that "EPA's regulations contradict themselves when they allow a discharger time to 'achieve' the currently attainable condition." *Waterkeeper*, 377 F. Supp. 3d at 1171. This misunderstanding led to determinations that are clear error. *See Defenders of Wildlife v. Salazar,* 842 F. Supp. 2d 181, 184-85 (D.D.C. 2012)

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[3] As explained above, *supra* at 8, and in the Federal Register notice accompanying the final regulation, the appropriate time to make a determination about whether Base WQS are attainable upon the expiration of the variance is "at the *end of the variance*" because that is the point in time when the state will decide whether to adopt a subsequent variance or allow the Base WQS to resume as the applicable standard. *See* 80 Fed. Reg. at 51,035-36 (emphasis added)

(granting motion under Rule 59(e) when prior decision was based on misunderstanding of the agency's rationale for decision); *Atlantic States Legal Found., Inc. v. Karg Bros., Inc.*, 841 F. Supp. 51, 55 (N.D.N.Y. 1993) (Rule 59(e) relief warranted where earlier ruling was premised upon a misunderstanding of relevant regulatory scheme).

The Court incorrectly determined that "EPA's regulations contemplate that the 'highest attainable condition' could be attained now." *Waterkeeper*, 377 F. Supp. 3d at 1171. Rather, the variance "must only be as long as necessary to *achieve the highest attainable condition*." 40 C.F.R. § 131.14(b)(1)(iv) (emphasis added). Under EPA's regulations, this condition is achieved at the end of the variance.

The history of the regulation demonstrates that the "highest attainable condition" is the improved water quality condition that is not presently attained, but is expected (based on the documentation provided to EPA under 40 C.F.R. § 131.14(b)(2)) to be attainable by the end of the variance term. EPA explained during the variance rulemaking that the highest attainable condition requirement was both "quantifiable and *future reaching* to drive progress towards" the Base WQS. AR 20063 at 20114 (emphasis added).

EPA also explained during the variance rulemaking that the variance rule requires "states and authorized tribes to identify what is incrementally

attainable in the time period the state or authorized tribe specifies will be the term of the WQS variance, and to set it as the goal of the WQS variance. The final rule refers to this incremental goal as the [highest attainable condition]." AR 20063 at 20114-15. The variance rule requires a state to specify "in the WQS variance the [highest attainable condition] as the water or effluent quality goal to be achieved by the *end* of the WQS variance term." *Id.* (emphasis added).

While the Court correctly observed that the highest attainable condition is "applicable throughout the term of the WQS variance," 40 C.F.R. § 131.14(b)(1)(ii), this does not create a contradiction. Although the highest attainable condition applies at the beginning of the variance for purposes of developing permitting limits, dischargers cannot achieve the condition upon issuance because the variance must include measures beyond current conditions that allow progress toward attaining Base WQS.[4] In the case of Montana, if a discharger cannot meet the relaxed criteria of the Current Variance Standard, then the variance gives the discharger only as long as necessary to meet those values. If a discharger can meet the relaxed criteria

[4] If at the time of permit issuance the discharger cannot meet the numeric effluent limitations included in the permit that are derived from the highest attainable condition, the permitting authority may include a compliance schedule. 80 Fed. Reg. at 51,036-37; 33 U.S.C. § 1362(17); 40 C.F.R. § 122.47.

of the Current Variance Standard, the discharger is required to implement the elements of a Pollutant Minimization Program established at permitting and "*that will prevent and reduce pollutant loadings*." *See supra* at 3; 40 C.F.R. §131.3(p)(emphasis added); *see* AR 20063 at 20151 (a Pollutant Minimization Program helps ensure variances "are utilized to make progress toward the underlying designated use and not to simply maintain the status quo"). Therefore, the highest attainable condition in either case does not merely reflect what can be attained now, and EPA's regulations are not contradictory by providing time "as long as necessary to achieve the highest attainable condition." 40 C.F.R. § 131.14(b)(1)(iv).

The absence of a contradiction is further demonstrated by the structure of the regulation for variances longer than five years. Under the regulation, variances must be re-evaluated every five years, and contain a statement that the "requirements of the WQS variance are either the highest attainable condition identified at the time of the adoption of the WQS variance, or the highest attainable condition later identified during any reevaluation . . . , whichever is more stringent." 40 C.F.R. § 131.14(b)(1)(iii). A discharger cannot attain the highest attainable condition at the time of variance issuance if the highest attainable condition is later modified after issuance of the

variance. *See* AR 20650 (describing Montana's re-evaluation every three years to determine if the variance should be modified or terminated).

The Court incorrectly stated that "[n]othing in EPA's regulations, or the terms of the variance that it approved, allows a discharger time to meet merely the relaxed criteria of the Current Variance Standard." *Waterkeeper*, 377 F. Supp. 3d at 1169. In fact, both EPA's regulation and Montana's variance expressly do so. As explained above, *supra* at 8-13, numerous provisions of the variance regulation provide the discharger time to meet the Current Variance Standard. Montana's variance clearly allows dischargers using mechanical plants up to 17 years and operators of lagoons up to 10 years to meet the Current Variance Standard. AR 20651. The Court's mandate that the variance begin with the relaxed criteria of the Current Variance Standard is clear error.

CONCLUSION

For the reasons set forth above, the Court should alter or amend its judgment and deny in full Waterkeeper's motion for summary judgment.

Respectfully submitted,

Dated: October 18, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2019, the undersigned caused DEFENDANT'S MOTION TO ALTER OR AMEND JUDGMENT to be served by filing it through the Court's ECF system.

s/ Alan D. Greenberg

CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 7.1(d)(2), I certify that this brief contains 3,106 words, excluding caption, certificates of service and compliance, table of contents and authorities, as determined by the word counting feature of Microsoft Word, and therefore complies with the limit of 6,500 words established by Local Rule 7.1(d)(2).

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