No. 20-35136
(consolidated with Nos. 19-35898, 19-35899, 20-35135, 20-35137)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UPPER MISSOURI WATERKEEPER,

Plaintiff – Appellee,

v.

UNITED STATED ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency,

Defendants – Appellants,

TREASURE STATE RESOURCES ASSOCIATION OF MONTANA and STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY;

Intervenor – Defendants;

NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES and MONTANA LEAGUE OF CITIES AND TOWNS,

Intervenor – Defendants – Appellants.

Appeal from the United States District Court for the District of Montana,
Great Falls Division; Hon. Brian Morris, Chief Judge; Case No. 4:16-cv-00052-BMM

SECOND BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLEE UPPER MISSOURI WATERKEEPER

JANETTE K. BRIMMER
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
(206) 343-7340 | Phone
jbrimmer@earthjustice.org
Attorneys for Plaintiff-Appellees

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INTRODUCTION

Almost fifty years after passage of the Clean Water Act, the easy things have been done. We no longer use our rivers as open sewers or receptacles for industrial waste that makes them burn. But much harder work remains, fifty years on, to restore and protect the chemical, physical, and biological integrity of our Nation's waters, because many of our Nation's waters remain polluted, some significantly so. That work may be difficult and require investment, but it is necessary to achieve the purpose and promise of the Act.

The Clean Water Act provides for and requires the use of two tools in order to achieve its purpose to restore and protect the chemical, physical, and biological integrity of our Nation's waters. 33 U.S.C. § 1251(a)(1). This case is about one of those tools, water quality standards necessary to protect all the uses for which we need clean water and about how long a state can delay implementing protective water quality standards.

Specifically, this case is about whether the core Clean Water Act requirement to promulgate protective water quality standards can be circumvented and indefinitely delayed through cost-based "variances" lasting decades or more; avoiding implementation of the very standards of cleanliness required by Congress. While the State of Montana Department of Environmental Quality ("DEQ") developed, and the U.S. Environmental Protection Agency ("EPA") approved,

science-based criteria for nutrient pollutants phosphorus and nitrogen, Montana also developed and EPA approved a decades-long "variance" from those protective standards, based solely on cost considerations. The variance effectively substituted a weaker standard for the science-based one and, by EPA's and DEQ's own admissions, did not protect designated uses of waters.

The Clean Water Act does not allow cost considerations to drive water quality standards, either directly or indirectly. The district court erred when it ruled that the Clean Water Act does not foreclose cost-based water quality standards that fail to protect designated uses of waters.

The district court did correctly rule that even if cost-based standards and variances are allowed, the variance from nutrient water quality standards represented by Montana DEQ's "Circular 12B" did not meet the basic requirements of EPA's own regulation and that EPA's interpretation of its regulations could not justify the Circular 12B variance, because EPA's interpretation was unreasonable and would result in a violation of the Clean Water Act.

The district court also did not abuse its broad discretion to fashion an equitable remedy designed to ensure ultimate compliance with EPA regulations and the Clean Water Act.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction on the grounds of mootness.

The district court had jurisdiction over this matter based upon Upper Missouri Waterkeeper's ("Waterkeeper") claims under the Clean Water Act, 33 U.S.C. § 1313 and under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A). The district court entered final, appealable judgment as to all claims on September 20, 2019. 1 E.R. 17-18.[1] The district court denied EPA's Motion to Reconsider on December 20, 2019. 1 E.R. 1-16. Waterkeeper timely filed its Notice of Cross Appeal in Case Nos. 19-35898; 19-35899; 20-35135; 20-35136; and 20-35137 on February 14, 2020. Waterkeeper Supplemental Excerpts of Record 1-4 ("Waterkeeper E.R.").

Since the time of filing of these appeals, the underlying facts and circumstances of this case have changed, mooting these appeals and causing this Court to lose jurisdiction. This Court can no longer grant effective relief in this case, because through the actions of EPA and Montana DEQ, the water quality standard to which the variance was supposed to apply has been voided. *See*, communications from State of Montana DEQ attached to Declaration of Guy

[1] For Excerpts of Record filed by EPA, Waterkeeper will use the citing convention used in EPA's brief which is the volume (1 or 2) and the page number. For Waterkeeper's Supplemental Excerpts of Record, which has only one volume, Waterkeeper will cite only the supplemental excerpt page number.

Alsentzer, , ("Alsentzer Dec.") and to the Declaration of Janette K. Brimmer ("Brimmer Dec.") filed with Motion to Supplement Record. Waterkeeper sets forth its arguments regarding mootness in Argument, part I, below.

STATEMENT OF ISSUES ON WATERKEEPER CROSS APPEAL

1. Does this Court lack jurisdiction over these consolidated cases because the issues and cases are moot? (yes)

2. Did the district court err in ruling that cost can be a factor in setting water quality standards under 33 U.S.C. § 1313(c)(2)(A)? (yes)

STATUTE AND REGULATIONS

All pertinent statutes and regulations are included in the Addendum.

STATEMENT OF THE CASE

A. The Nutrient and Variance Water Quality Standards.

The EPA and the states have long understood that nitrogen and phosphorus pollutants ("nutrients") in lakes, rivers, and streams cause serious water quality problems. Accordingly, in 2000 EPA first directed states to adopt water quality standards to address nutrients. EPA, *Nutrient Criteria Development; Notice of Nutrient Criteria Technical Guidance Manual: Rivers and Streams*, 65 Fed. Reg. 46167 (July 27, 2000). *See,* relevant portions, Waterkeeper E.R. 5 *et seq.* At its worst, nutrient pollution can result in toxic or hazardous algal blooms, which can sicken humans and animals. Waterkeeper E.R. 18-26.

In July 2014, the Montana DEQ simultaneously published two sets of water quality standards for nutrients, in DEQ Circulars 12A and 12B. 2 E.R. 246 and Waterkeeper E.R. 76, respectively. Based upon a large body of scientific work, including the extensive work and direction from EPA's nutrient guidance, Circular 12A sets numeric water quality criteria for phosphorus and nitrogen as specified in Mont. Code Ann. § 75-5-103(2), to protect all uses designated by Montana such as public health, fishing, and recreation, in most waters of Western Montana. 2 E.R. 248-253 (12-A). *See, also,* Waterkeeper E.R. 85, 105, and 204. Circular 12A's numeric nutrient standards specify pollutant concentration limits, as well as the geographical areas and the seasonal timeframes to which the standards apply. 2 E.R. 248-253.

Circular 12B, developed and issued in conjunction with Circular 12A, effectively replaced the science-based numeric standards in Circular12A with a much less stringent technology-based performance standard. DEQ identifies the technology-based performance standard in Circular 12B as a "variance," which both EPA and DEQ acknowledged would not be stringent enough to protect all designated uses. Waterkeeper E.R. 85 and 64-65. Rather, Circular 12B was based exclusively on the cost of pollutant removal technology that DEQ and a group of pollutant dischargers decided was affordable for all dischargers of nutrient pollutants. Waterkeeper E.R. 77-78 and 66.

The cost-driven "variance" in Circular 12B supplanted the Circular 12A science-based criteria for a period of at least 20 years, to 2035. Waterkeeper E.R. 78. While reviewed every three years, as required by 33 U.S.C. § 1313(c)(1), Circular 12B specified that in the triennial review DEQ must consider "the aggregate economic impact to dischargers within a category." Waterkeeper E.R. 79. Specifically, DEQ was *permitted* but not required to adopt more protective standards "[i]f a low-cost technological innovation for lowering nitrogen and phosphorus concentrations in effluent were to become widely available in the near future[.]" *Id*.

From early in the process of developing water quality standards, cost and economic considerations were a central part of promulgating the state water quality standards. *See, e.g.,* "Ongoing Discussion of Affordability Assessment Procedure to Accompany Base Numeric Nutrient Standards" (Oct. 2008), Waterkeeper 247 and 211 (DEQ memorandum regarding "nutrient criteria affordability advisory group, dated September 4, 2008). The first meeting of the DEQ nutrient work group, which included pollutant-dischargers, in May 2009 explored "variances" as a means to "*off-ramp from the standards* based on affordability." Mont. E.R. 19 (emphasis added). In response to a workgroup question, DEQ indicated that it would even consider *downgrading designated uses* to allow for *even higher* levels of pollutants if, after time, compliance with the standards that protect designated

uses of water would not be "practical due to affordability or technology[.]" Mont. E.R. 23. Communications between DEQ and EPA also show that cost considerations drove analysis throughout the process. *See, e.g.,* Letter from DEQ to EPA, Feb. 16, 2010, where DEQ suggests that, absent a particular affordability allowance from EPA, "adoption of numeric nutrient criteria for Montana could be in jeopardy." Waterkeeper E.R. 265.

EPA approved the protective standards in Circular 12A on the grounds that the provisions "are based on a sound scientific rationale that is consistent with the EPA guidance on deriving [numeric nutrient criteria] using scientifically defensible methods." Waterkeeper E.R. 52. EPA also stated that approval of a statewide all-discharger general variance "will likely be a difficult Clean Water Act consistency issue." Waterkeeper E.R. 242. Nonetheless, apparently despite that concern, EPA simultaneously approved the Circular 12B "variance" standard that effectively replaced the science-based numeric standard for at least 20 years to 2035. Waterkeeper E.R. 65.

In 2017, during the pendency of the litigation below, DEQ amended Circular12B and submitted it to EPA for approval. 2 E.R. 145 *et seq.* EPA approved, in relevant part, Amended Circular 12B on October 31, 2017. 2 E.R. 138 *et seq.* While Amended Circular 12B imposed a more stringent technology-based standard as the "highest attainable condition" ("HAC") for mechanical

dischargers, Amended Circular 12B was still based on cost and still did not protect designated uses contrary to the requirements of 33 U.S.C. § 1313(c)(2)(A). 2 E.R. 190-93 and 142-48. The Amended Circular 12B cost-based technology standard applied to 36 municipal pollutant dischargers across the state, including 9 mechanical plant systems and 27 lagoon systems, 2 E.R. 190-92, 142-48, 150-51, and 171-73. Further, EPA and DEQ continued to acknowledge that the Circular 12B HAC technology standard was still less stringent than what is needed to protect designated uses. 2 E.R. 190-92 and 142-43, and *see* Waterkeeper E.R. 64-65.[2] Moreover, the cost-based HAC technology standard in Amended Circular 12B was in one important respect less stringent than the original Circular 12B: as reflected in DEQ's own record documents, Amended Circular 12B only required a pollutant discharger to meet the HAC variance standard *at the end* of the timeline, 2035, with no deadline or plan for meeting the actual science-based standard set forth in Circular 12A. 2 E.R. 193. In Contrast, original Circular 12B had contemplated that dischargers would continually move toward meeting the Circular 12A criteria at the end of the 20-year term of the variance in 2035. (*See*

[2] Amended 12B appeared to "shorten" the duration of the variance to 17 years, but given that three years from original 12B had already passed, the end date remained the same, 2035. This brief will refer to a 20-year variance as that is the total amount of time that a 12B variance standard allowed discharger in Montana to avoid application of the protective Circular 12A water quality standards.

Waterkeeper E.R. 303 graph showing brown dashed line representing the Amended Circular 12B cost-based HAC technology standard stopping well short of achieving the Circular 12A standard that will protect designated uses of Montana waters, as compared to the black line which represents original Circular 12B). EPA's approval of Circular 12B was silent on what EPA expects or requires beyond 2035, including whether the actual numeric criteria need be met at any point after 2035.[3]

B. The District Court Ruling.

In an Order on Summary Judgment, March 25, 2019, the district court found that Circular 12B, the variance allowing dischargers of nutrient pollutants to avoid compliance with the Circular 12A numeric nutrient criteria for at least 20 years, violated EPA regulations governing water quality standards and variances therefrom, because the variance would not require polluters to achieve at least the "highest attainable condition" throughout the term of the variance and because Circular 12B effectively allowed dischargers an open-ended way to avoid meeting the Circular 12A water quality standard. 1 E.R. 51-56.

[3] EPA disapproved DEQ's extension of the cost-based technology standard to private industry pollutant dischargers in Amended Circular 12B because DEQ did not obtain financial information to make a cost-based hardship decision. EPA's decision leaves open the ability for DEQ to make a cost-based hardship decision for private industry future EPA approval. AR 20384.

In its remedies order on July 16, 2019, the district court remanded the matter to DEQ and EPA for revision of the Circular 12B variance. 1 E.R. 23-24. The court's remand instructed that a revised Circular 12B variance must ensure that the highest attainable condition was met during the term of the variance, consistent with EPA's regulations, and must ensure that the numeric nutrient criteria would be applied and met within a reasonable time. *Id.* The district court directed that revision of Circular 12B should be informed by Waterkeeper's experts' recommendations made in the remedies briefing. *Id.*

On December 20, 2019, the district court issued a third and final order, addressing EPA's Motion to Reconsider the court's March ruling. 1 E.R. 1. The district court reaffirmed its ruling that the Circular 12B variance did not comply with EPA regulations regarding variances, because it failed to require dischargers to meet HAC during the variance term. 1 E.R. 15-16. The district court further explained that the interpretation of the relevant regulations pressed by EPA was unreasonable because it would result in a variance like that in the *Miccosukee Tribe of Indians of Florida v. United States* case, a variance that would violate the Clean Water Act 33 U.S.C. § 1313(c)(2)(A). *Id.*

C. The "Poison Pill."

While DEQ had worked to develop numeric criteria for nutrient pollutants and the variance, DEQ also promulgated ARM §17.30.619(2) and §17.30.715(4)

("the Poison Pill"). The Poison Pill voids the Circular 12A numeric nutrient standards if any portion of the Circular 12B variance is deemed invalid by the courts or disapproved by EPA. *Id*. Specifically, the Poison Pill states:

> If a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.

ARM §17.30.619(2). This provision is self-executing.

On November 26, 2019, Montana submitted the court-mandated revision of the Circular 12B variance to EPA. Letter from Gregory Sopkin, Regional Administrator for EPA Region 8, to Shaun McGrath, MDEQ Director, Re: EPA Action in Response to Court Order in Upper Missouri Waterkeeper v. EPA 8-9 [2020 EPA Letter] (Feb. 24, 2020). Brimmer Dec.. EPA disapproved the revision on February 24, 2020, stating it did not comply with the Court's Order on remand. *Id., generally. See also,* EPA First Brf. on Cross-Appeal, at 25. ("EPA First Brf.") At the same time, EPA *approved* the Poison Pill Montana initially submitted to EPA in 2015. Brimmer Dec., Letter at 10. The Poison Pill triggered the voiding of

Montana's numeric criteria in Circular 12A, the reason for the Circular 12B variance at issue in this case. Email and attachment from DEQ to Nutrient Workgroup (May 1, 2020, 3:26:20 PM MDT), Alsentzer Dec., Exhibits A and B. As of the date of this brief, the numeric water quality criteria in Circular 12A have been voided by the State of Montana; a situation that then obviates the need for any variance from those same criteria.

SUMMARY OF ARGUMENT

The appeals in this case are moot because there is no longer a live controversy in which the appellants have a 'personal stake in the outcome' of the litigation. The Circular 12B variance which is the subject of this litigation has been invalidated by the district court and its replacement disapproved by EPA, triggering Montana regulation, ARM § 17.30.619(2). Under the self-executing provisions of ARM § 17.30.619(2), the Circular 12A nutrient water quality standards—the underlying reason and need for the Circular 12B variance, are void, a fact confirmed by DEQ. Even if this Court were to rule for appellants and reinstate Circular 12B, Circular 12B has been rendered meaningless and unnecessary by the operation of ARM § 17.30.619(2).

The Clean Water Act requires water quality standards to be comprised of water quality criteria sufficient to ensure that water is clean enough to protect designated uses such as public health, fish, wildlife and other uses such as

irrigation, in order to serve the purpose of the Clean Water Act to restore and protect the chemical, physical, and biological integrity of our Nation's waters. 33 U.S.C. §§ 1313(c)(2)(A) and 1251(a). The Circular 12B variance standard is a cost-based water quality standard that will not protect designated uses. The Act makes no provision for allowing designated uses to not be protected due to cost considerations. The district court erred in finding ambiguity in the Act, 33 U.S.C. § 1313(c)(2)(A), that would allow cost-based standards such as Circular 12B. Congress' silence on whether costs are an allowable basis for water quality standards is not "ambiguous" when Congress spoke clearly that water quality standards must be comprised of criteria that protect designated uses. It was also inappropriate for the district court to lift language regarding "attainability" in interim goals of the Clean Water Act and use it to find ambiguity in 33 U.S.C. § 1313(c)(2)(A) to allow cost-based water quality standards, thereby modifying and detracting from express direction from Congress. Finally, the district court strained in reading 33 U.S.C. § 1313(c)(2)(A) as allowing water quality standards to protect only some designated uses, paving the way for cost-based water quality standards, contrary to the express direction of Congress.

The district court did not err in finding that EPA's approval of Circular 12B was arbitrary and capricious because Circular 12B failed to conform to EPA's own regulations regarding variances. 40 C.F.R. § 131.14. The Circular 12B variance

standard did not require polluters to implement the "highest attainable condition" (a condition significantly less protective than the Circular 12A water quality standard) throughout the term of the variance. Rather, contrary to EPA regulation, it delayed requiring the "highest attainable condition" until 2035, 20 years after the protective Circular 12A water quality standard was finalized. Further, EPA made no provision for when, or even if, the actual protective water quality standards of Circular 12A would be implemented or required, amounting to an indefinite replacement of protective water quality standards with the Circular 12B standard that did not protect designated uses in violation of the Clean Water Act, 33 U.S.C. §1313(c)(2)(A) and the principles espoused by the court in *Miccosukee Tribe of Indians of Florida v. United States*. Even if EPA regulations are ambiguous on when "highest attainable condition" must be met, the district court was correct in resolving that ambiguity in favor or requiring the condition met be met within the term of the variance and requiring the variance provide for ultimately meeting water quality standards in order to ensure that the variance does not run afoul of the Clean Water Act.

Finally, the district court did not abuse its discretion in fashioning a remedy. The remedy in this case was not overly prescriptive, but would still ensure that the violations of EPA regulation and the Clean Water Act identified by the district court, would be addressed, but still allow a reasonable time for dischargers to plan

for an implement the changes necessary to meet water quality standards that will actually protect designated uses of Montana waters. The district court made clear that pollutant dischargers should be required to implement the "highest attainable condition" (the technological standard in the Circular 12B variance) within the shortest time that is reasonable such that it would apply "throughout the variance" and that EPA must set a time at some reasonable point at the end of the variance when pollutant dischargers must expect to implement controls necessary to meet the Circular 12A protective water quality standard, using the information submitted by Waterkeeper in its remedies briefing as a guide. The district court's remedy order was tailored to address the violations the district court had identified and fits squarely within the court's broad equitable authority to fashion a remedy.

STANDARD OF REVIEW

This Court reviews questions of its own subject matter jurisdiction such as whether this case is moot, de novo. *Northwest Environmental Advocates v. U.S. Environmental Protection Agency*, 537 F.3d 1006, 1014 (9th Cir. 2008).

This Court reviews a district court decision on summary judgment de novo. *Id.* Under the Administrative Procedure Act, the court will set aside agency action that was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). An agency acts contrary to the law when it fails to abide by and implement the direction and intent of Congress.

Chevron USA, Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984); *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012). "[A]n agency rule [is] arbitrary and capricious 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 v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *Pac. Coast Fed'n of Fishermen's Ass'ns, Inc. v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, 1034 (9th Cir. 2001). *See also*, *Waterkeeper Alliance, Inc. v. U.S. EPA,* 399 F.3d 486, 498 (2d Cir. 2005).

When Congress' intent in a statute is clear it is the duty of the court to enforce that intent. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). There is no need to defer or look to agency guidance or rule. *Chevron USA, Inc.,* 467 U.S. at 843-44; *Valencia v. Lynch,* 811 F.3d 1211, 1214 (9th Cir. 2016).

As to the appellants' arguments on appeal, courts afford deference under *Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905 (1997) to agency interpretation of their own regulations only when the regulation is ambiguous, and court's must read the regulation as a whole, in context with other regulations, and engage in a searching analysis of whether the regulation is actually ambiguous before affording

the agency interpretation deference. *Kisor v. Wilkie*, __ U.S. __, 139 S.Ct. 2400 (2019); *Sec'y of Labor, U.S. Dep't of Labor v. Seward Ship's Drydock, Inc.* 937 F.3d 1301, 1307 (9th Cir. 2019). Further, even if the regulation is ambiguous, a court shall not defer to the agency interpretation if that interpretation is contrary to a statute or unreasonable. *Id. See also, Stinson v. United States,* 508 U.S. 36, 45, 113 S.Ct. 1913, 1919 (1993) (courts will defer only after ensuring an agency interpretation of its own regulation does not violate the Constitution or a statute).

As to the appellants' arguments challenging remedy, this Court will overturn the district court only if the court has abused its discretion. *Northwest Environmental Advocates,* 537 F.3d at 1015; *Natural Resources Def. Counsel v. Southwest Marine, Inc.*, 236 F.3d 985, 999-1000 (9th Cir. 2000). District courts have broad discretion to fashion equitable remedies, including to address harms to the environment. *Id.*; *See also, Alaska Ctr. For the Environment v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994).

ARGUMENT

I. THE CONSOLIDATED APPEALS SHOULD BE DISMISSED AS MOOT.

The appeals in this case are moot because there is no longer a live controversy in which the appellants have a 'personal stake in the outcome' of the litigation. "The test for mootness of an appeal is whether the appellate court can give the appellant any effective relief in the event that it decides the matter on the

merits in his favor." *Felster Publ'g v. Burrell (In re Burrell)*, 415 F.3d 994, 998 (9th Cir. 2005) (quoting *Garcia v. Lawn*, 805 F.2d 1400, 1402 (9th Cir. 1986)). Courts will not render advisory opinions as to do so is contrary to their Article III jurisdictional requirement that a court decide only an actual case or controversy. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 1253 (1990). *See also, Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000).

While in some instances a court will find a case not moot because it is capable of repetition, in *Board of Trustees of Glazing Health and Welfare Trust v. Chambers*, 941 F.3d 1195 (9th Cir. 2019), this Court held that the repeal, amendment, or expiration of challenged legislation is generally enough to render a case moot and appropriate for dismissal, absent a "reasonable expectation" that the legislative body will reenact the challenged law. *Id.* at 1198-99. A determination that such reasonable expectation exists must, however, be found in the record, not on speculation or possibility alone. *Id.* at 1199.

Here, DEQ's regulations, approved by EPA, have voided the Circular 12A water quality standards and there is no evidence to support an expectation, much less a reasonable one, that Circular 12A and the Circular 12B variance from the standards, can or will be resurrected. Following the filing of these consolidated appeals, EPA approved the Montana Poison Pill which directs that upon a court

overturning or EPA disapproving the Circular 12B variance, the Circular 12A nutrient water quality criteria *are* void. ARM §17.30.619(2). As set forth above, the Circular 12B variance was developed in conjunction with the Circular 12A nutrient water quality standards as a kind of off-ramp from the Circular 12A standards, based upon the perceived costs of complying with the 12A standards.

The current situation is that the Circular 12B variance has been invalidated by the district court and its replacement disapproved by EPA, triggering ARM § 17.30.619(2), the Poison Pill. Under the self-executing provisions of the Poison Pill, the Circular 12A nutrient water quality standards are void, a fact confirmed by DEQ. Alsentzer Decl. Ex's A and B. Because the Circular 12A nutrient water quality standards are void, there is no longer a need for a variance such as the one in Circular 12B. And even if Montana DEQ engaged in a new rulemaking process to develop a new or replacement nutrient water quality standard, any variance from those standards would also have to be promulgated anew and submitted to EPA for review and approval. 33 U.S.C. § 1313(c)(2); 40 C.F.R. § 131.14.

Therefore, appellants currently have no stake in the outcome of these appeals. Even if this Court determined that EPA's approval of Circular 12B was not contrary to EPA's rules, it would not matter; the standard for which the variance was developed no longer exists. No pollutant-discharger needs or qualifies for the variance because the Circular 12A nutrient standards no longer

apply to pollutant discharges in the State of Montana. This Court would be issuing an advisory opinion on the nature of variances and EPA rules. The consolidated appeals should be dismissed as moot.

II. THE DISTRICT COURT ERRED IN RULING THAT WATER QUALITY STANDARDS MAY BE BASED ON COST CONSIDERATIONS.

A. The Circular 12B Variance Is A Cost-Based Water Quality Standard That Effectively Replaced The Circular 12A Science-Based Nutrient Water Quality Standard.

There is no dispute that the Circular 12B variance standard replaced the science-based Circular 12A nutrient water quality standards for a total period of at least 20 years (until 2035), possibly longer. In Circular 12A, DEQ developed numeric nutrient criteria for phosphorus and nitrogen pollutants based on a record that supports the criteria and in keeping with the requirements of the Clean Water Act. 2 E.R. 246; Waterkeeper E.R. 85 *et seq.*, 105 *et seq.*, and 208. *See, also,* EPA First Brf. at 13. DEQ's record and statements, as well as EPA's approval, demonstrate agreement that the numeric criteria in Circular 12A reflect the level of pollution control necessary to protect Montana streams from the adverse effects of nutrient pollution. *Id.*; and Waterkeeper E.R. 826-60. *See also,* EPA original direction on nutrient criteria, Waterkeeper E.R. 18-25. These adverse effects include excessive algal growth, which can lead to the production of toxins, depletion of oxygen, and physical growth that interferes with recreation and fish habitat. *Id.* EPA's approval of the nutrient water quality standards in Circular 12A

is compliant with the Clean Water Act, 33 U.S.C. § 1313(c) and fully supported by the record.

Circular 12B however, the variance from Circular 12A, provides up to a total of 20 years, until 2035, before pollutant dischargers must even meet the less-stringent cost-based technology standard in Circular 12B (the "highest attainable condition" or "HAC").[4] 2 E.R. 191. That is, something even less stringent than the Circular 12B HAC variance standard would actually apply until 2035. Circular 12B includes no plan, deadline, or even discussion about whether or when the water quality-based nutrient criteria in Circular 12A must ever be met. *See,* Circular 12B generally, 2 E.R. 189 and *see, e.g.,* Waterkeeper E.R. 303 (graph from DEQ presentation).[5] According to EPA and Montana DEQ, that means designated uses for the waters receiving those pollutant discharges would not be

[4] DEQ argues that Circular 12B is "limited" to 20 years. While on its face, Circular 12B will expire in 2035, DEQ's argument is specious based on its own statements. DEQ fails to disclose its own statements that the variance can and will be renewed if DEQ has not found an "affordable" pollutant control technology by 2035. Waterkeeper E.R. 79, 293-94, and 300. DEQ also fails to emphasize DEQ's own statements that if affordable technology is not available in 2035, DEQ would consider removing designated uses; that is, DEQ would permanently allow the water to be too dirty to protect, for example, aquatic life or human contact for recreation. Mont. E.R. 23; Mont. First Brf. at 11.

[5] Counting from 2000 when EPA directed states to develop and implement nutrient water quality standards, 65 Fed. Reg. 47167 (July 27, 2000) and Waterkeeper E.R. 5 *et seq*., it will be 35 years before even the under-protective Circular 12B variance standard is implemented, with no timeline for when DEQ and EPA will actually require the Circular12A science-based standards to apply.

protected. 2 E.R. 190-92 and 151-52. EPA was silent on what was supposed to happen in 2035, after the 20 years, but DEQ has stated in the past that the variance could be renewed. 2 E.R. 12 and 14. The weaker Circular 12B variance standard is the effective water quality standard applicable to at least 36 nutrient pollution dischargers in Montana until 2035.[6] The vast majority of those pollutant dischargers have no obligation to reduce their nutrient pollution at all unless pollutant "minimization" can be done without substantial investment or additional study. 2 E.R. 178.

There also has been no dispute that the Circular 12B standard, which replaced the science-based 12A nutrient water quality standard, was based solely on cost; on what was considered "affordable" for the pollutant-dischargers. DEQ worked with one hand to develop protective science-based nutrient criteria, and with the other hand to justify a general variance in order to prevent the numeric nutrient standard from taking effect; over and over, the excuse or rationale given for negating the water quality-based criteria in this fashion was cost or affordability. *See, e.g.,* 2 E.R. 143, 190-91, 193, 247; Waterkeeper E.R. 66, 215 *et seq.,* 265, 277, 281, 292-93, 303, 306.

[6] While the application of Amended 12B does not currently include private pollutant dischargers, EPA's approval allows DEQ to apply Amended 12B to a large number of private dischargers in the future, if DEQ is able to provide more detailed evidence of *cost reasons* for doing so. 2 E.R. 146.

EPA approved a cost-based water quality standard that EPA has always admitted will not protect the designated uses of Montana waters. EPA has previously claimed that despite the fact that Congress did not authorize states to consider costs in establishing water quality standards, *see* 33 U.S.C. § 1313(c)(2)(A), states can consider costs in setting or downgrading the "designated use" of waters. EPA Opp. Brf. ECF Dkt. No. 77, at 36 and 40. This is a distinction without much difference as the end result is still a cost-driven water quality standard, applicable for at least 20 years. That violates the plain language of 33 U.S.C. §1313(c)(2)(A) and the district court erred in finding a cost-based water quality standard was not foreclosed by the Clean Water Act.

B. The Plain Language Of The Clean Water Act Makes No Allowance For Costs To Drive Development Of A Water Quality Standard.

Congress mandated that the Clean Water Act's purpose is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To serve and implement the purpose of the Act, Congress required that states establish water quality standards that "consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A). *See also,* 40 C.F.R. § 131.2. Congress mandated that new and revised water quality standards:

> shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare,

> enhance the quality of water and serve the purposes of this chapter. Such standards 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.

Id. § 1313(c)(2)(A). This language makes clear Congress' intent that water quality standards must protect designated uses of the nation's waters and serve the purposes of restoring and protecting the chemical, physical, and biological integrity of water. Moreover, Congress directed that the protected designated uses must include public water supplies, fish and wildlife, and recreation. *Id.* § 1314(a). *See also, id.* § 1314(b). EPA regulations go on to specify that "[s]uch criteria 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)(1). Plainly, determining the level of pollutants a waterbody can assimilate and still be considered clean enough for public health (drinking and swimming) and fish and wildlife and any other uses, is a scientific inquiry.

The Act does not contemplate or allow for standards to be established based on cost or affordability for dischargers that are subject to water quality-based discharge limits under the Act. *See,* 33 U.S.C. § 1313(c)(2)(A). Water quality criteria must be set at a level that protects the designated use, rendering economic factors irrelevant and states should not take them into account when setting criteria to protect uses.

When Congress' intent is clear it is the duty of the court to enforce that intent. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978). There is no need to defer or look to agency guidance or rule. *Chevron USA, Inc.,* 467 U.S. at 843-44; *Valencia v. Lynch,* 811 F.3d 1211, 1214 (9th Cir. 2016). When a statute's text and thereby Congress' intent is plain, agency guidance, rule, or interpretation will not be allowed to contradict or subvert Congressional text and intent. *See United States v. Maes*, 546 F.3d 1066, 1068 (9th Cir. 2008); *Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9th Cir. 1994). The Fifth Circuit held more than thirty years ago that costs or affordability may play no role in the development of water quality criteria under 33 U.S.C. § 1313(c)(2), finding Congress clear on that point. *Miss. Comm'n on Natural Res. v. Costle,* 625 F.2d 1269, 1277 (5th Cir. 1980).

In a similar inquiry within the context of the Clean Air Act, the Supreme Court has held that courts will not infer that costs be considered in setting protective environmental standards when Congress has not clearly directed the agency to do so. *Whitman v. American Trucking Ass'ns,* 531 U.S. 457 (2001). Justice Scalia relied on the plain language of Clean Air Act directives for setting air standards to reject arguments that EPA must also consider the cost of imposing a particular standard of air quality. *American Trucking*, 531 U.S. at 465. The Court pointed out that Congress plainly directed EPA to identify the maximum

airborne concentration of a pollutant that the public health can tolerate, adding an adequate margin of safety and that "[n]owhere are the costs of achieving such a standard made part of that initial calculation." *Id.* and at 466-67. The Court's conclusion in *American Trucking* that costs cannot be read into a statute where Congress makes no provision for them, applies with equal force to the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A). EPA's authority to approve state standards is cabined by the requirements for water quality standards to protect designated uses and to serve the purposes of the Clean Water Act. *Id*. §§ 1313(c)(2)(A) and (3). Adopting science-based and protective water quality standards is foundational to proper implementation of the purposes of the Clean Water Act and under the statute, costs are not part of that calculation.

C. The District Court Erred In Finding Ambiguity In 33 U.S.C. § 1313(c)(2)(A).

1. Congress need not enumerate all prohibited factors for agency decision-making when Congress is clear in its direction for how an agency must proceed.

The district court was incorrect in ruling that EPA may approve a cost-based standard in Circular 12B because the Clean Water Act does not specifically prohibit promulgating water quality standards based on cost. 1 E.R. 37 and 40. Congress spoke clearly in its direction on the necessary components and results for water quality standards—that the standards must protect designated uses in service

of the purposes of the Act. That purpose is to restore and protect the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251(a).

Section 1313(c)(2)(A) directs that water quality standards must be developed to protect designated uses including public water supplies, propagation of fish and wildlife, and recreation. The statute does not say the listed uses should be protected "to the extent states deem appropriate, taking into account costs," nor does it say "if possible, considering economics," and it does not say "where attainable" or "where practicable." Congress authorized EPA to approve states' water quality standards only if they are sufficient to protect the water *for those uses specified in the text of the Clean Water Act*. 33 U.S.C. § 1313(c)(2)(A).

Nowhere does the law support finding an ambiguity in the statute simply because Congress does not enumerate every factor or method or result that is prohibited in promulgating water quality standards. As with the example from *American Trucking*, courts cannot take Congress' silence on this issue as an "ambiguity" and a reason to add a factor for developing water quality standards into the statute that is simply not there. Yet that is the logical endpoint of the district court's reasoning.

It is axiomatic that an agency has only the authority given by Congress and that an agency's discretion is limited to where Congress plainly leaves a gap for the agency to fill with regulation and where Congress uses mandatory language

such as "shall" agency discretion is sharply-curtailed. *See, e.g., Food and Drug Admin v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 125 and 132 (2000); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife,* 551 U.S. 644, 661 (2007); *City of Arlington, Texas v. Fed'l Comm. Comm'n,* 569 U.S. 290, 317-18 (2013). Here, Congress provided direction that water quality standards shall protect designated uses including public health and wildlife. The fact that Congress did not then specifically list all the factors on which water quality standards should not be based, for example costs, does not "leave a gap" for EPA to fill with a regulation that runs counter to the express direction from Congress. The district court erred in allowing EPA to approve a cost-based water quality standard, in the guise of a "variance," just because such an "off-ramp" was not expressly prohibited by Congress.

2. The district court wrongly elevated language from early interim goals for water over Congress' express direction to develop water quality standards that protect designated uses.

The district court was also wrong to find that the concept of "attainability" introduces some ambiguity into 33 U.S.C. § 1313(c)(2)(A) such that cost-based standards that fail to protect designated uses is allowed. 1 E.R. 41 and 43. EPA cannot gain cover for its actions by claiming that designated uses need to be protected by water quality standards only "where attainable." Neither the word nor the concept of attainability appears anywhere in 33 U.S.C. § 1313(c). Rather, the

Act directs that water quality standards must be sufficient to protect designated uses, period.

The only place the word "attainable" appears in the Clean Water Act is 33 U.S.C. § 1251(a)(2) a general aspirational and early interim goal of the Act. As noted above, the *purpose* of the Clean Water Act is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters[.]" *Id.* at § 1251(a). The *purpose* must not be confused with *interim goals* of the Act where Congress provided that en route to *eliminating* the discharge of pollutants entirely by 1985, it is an *interim* national *goal* that by July 1, 1983, water quality be sufficient to provide for the protection and propagation of fish, shellfish, and wildlife, as well as recreation, where attainable. *Id.* at § 1251(a)(1) and (2).

Even reading this as broadly as possible, the interim goal language must still be read in the context of Congress' specific direction and mandates in 33 U.S.C. § 1313(c)(2)(A) for the promulgation of water quality standards. The district court decision would instead elevate Congress' statement of interim goals to a stature that modifies or detracts from Congress' express direction as to the requirements for one of the Clean Water Act's primary tools—the development and implementation of water quality standards of cleanliness necessary to restore and protect the integrity of our waters for the uses we make of those waters. The

concept of "attainability" does not introduce an ambiguity nor modify in any way the express requirements of 33 U.S.C. § 1313(c)(2)(A).

3. The district court engaged in a strained reading of § 1313(c)(2)(A) direction to protect designated uses, the logical result of which will allow degraded water quality contrary to Congress direction and the purpose of the Act.

Nor is the district court correct that the phrase in 33 U.S.C. § 1313(c)(2)(A) that directs the "taking into consideration" of the uses and values of Montana waters when developing standards, introduces an ambiguity allowing the off-ramp to develop water quality standards that downgrade designated uses of Montana's water. 1 E.R. 38-40. That reading is a tortuous and unreasonable reading of Congress' plain intent that water quality standards actually protect the water.

First, designated uses of Montana's waterbodies are not ambiguous, not in question in this case, and do not serve as a reason to give EPA discretion to develop a cost-based water quality standard when Congress made no provision for such. DEQ long ago adopted designated uses that provide for "fishable and swimmable" water quality, including the protection of public water supplies and aquatic life in Montana waters, ARM § 17.30.601, and those uses remain in place and must be protected by standards.

Second, 33 U.S.C. § 1313 must be read as a whole in conjunction with the purposes of the Act. *Brown and Williamson Tobacco*, 529 U.S. at 132-33. Section 1313(c)(2)(A) uses mandatory language, "shall", multiple times in dictating the

various components of, and requirements for, water quality standards including the designated uses and values that "shall" be protected. The district court suggests that the phrase at the end of the paragraph that lists the uses that "shall" be "considered" in the development of water quality standards, leaves the door open on protecting uses and can be taken as just one of many options for what to protect; that it allows for wholesale discretion on the point of whether water quality standards must protect all designated uses. The district court's reading would eviscerate all of the mandatory language of the section. Under this reasoning, for example, DEQ could have decided to promulgate a water quality standard that only protected industrial uses, leaving state-designated human health and wildlife uses unprotected, and EPA could approve it as long as DEQ at least "considered" uses other than industrial. This makes no sense in light of the entire section's directive to protect public health and wildlife uses, makes no sense in light of the intent and purposes of the Act, and it is not the law.

Nor does the inclusion of "other purposes" near the end of the list of designated uses that should be protected introduce ambiguity as suggested by the district court. 1 E.R. 40. This does not open the door to protecting something other than the *designated uses* identified by Montana in ARM § 17.30.601. Rather, this is language that clearly provides that if the state has designated some use other than those enumerated by Congress in 33 U.S.C. § 1313(c)(2)(A), then those uses

too must be protected by standards. It is utterly unreasonable and contrary to the plain language of the section for the district court to suggest that the directive to protect all other designated uses allows a cost-based water quality standard. Again, such a strained reading would override the mandatory language used throughout the rest of the section, allowing cost to be the overriding consideration in setting standards.

Protection of designated uses is not a "goal"—some kind of aspirational 'nice to have' thing. Protection of designated uses is the statutory requirement for water quality standards. 33 U.S.C. § 1313(c)(2)(A). It is the **point** of the Clean Water Act and indeed the definition of clean water; to protect water and all of the things for which we need clean water including drinking water supplies, recreation such as swimming, boating, and fishing, propagation of fish and shellfish both commercially and for recreation, protection of uses for wildlife both aquatic wildlife or terrestrial, and even protection for other commercial uses such as agriculture or industry. *Id.*

The logical endpoint of the district court's finding of ambiguity in 33 U.S.C. § 1313(c)(2)(A) is that costs would become the driving and determinative factor in the development of water quality standards, not science or public health or what is needed to protect fish and wildlife. This practice would negate the core purpose of the water quality standards requirements in 33 U.S.C. § 1313(c)(2)(A) and

Congress' specific direction to protect human contact, fishing and wildlife. It would ultimately negate the very purpose of the Act itself to restore and protect the chemical, physical, and biological integrity of the Nation's waters. Downgrading a designated use for 20 years or more is not a path to compliance with the Clean Water Act and is not what the Act required.

III. THE DISTRICT COURT DID NOT ERR IN FINDING THE CIRCULAR 12B VARIANCE WAS CONTRARY TO EPA REGULATION.

A. EPA Regulation Requires That Variances From Standards Must Achieve The Highest Attainable Condition Throughout the Term Of The Variance.

The district court was right to read and apply EPA regulations to require the HAC be met throughout the term of the Circular 12B variance. 1 E.R. 7, 51-54, and 58. The HAC in Circular 12B allowed a limit of 300 µg/l of total phosphorus and 6,000 µg/l of total nitrogen for larger pollutant dischargers (mechanical waste treatment plants discharging more than one million gallon per day). 2 E.R. 159, 192. Smaller mechanical waste treatment plants were allowed a relaxed limit of 1,000 µg/l of total phosphorus and 10,000 µg/l of total nitrogen. *Id.* For lagoon systems, no treatment standard was required; only a series of best practices or planning measures. *Id.* The HAC was significantly less stringent than limits necessary to achieve the Circular 12A protective standards. 1 E.R. 5-6. For example, for small treatment plants, the HAC limit was around 10 times greater the amount of pollutants than allowed in streams by the Circular 12A water quality

standards. *Id.* The problem was that pollutant dischargers were given the full total 20 years (after promulgation of Circular 12A) of the variance to meet HAC, the weaker variance standard. *Id.* This is contrary to EPA regulations.

Where a variance from a water quality standard is allowed, designated uses must be maintained, and the variance must ensure that the highest attainable condition is achieved. 40 C.F.R. §131.14(a)(2) and (b)(1)(ii). For any variance submitted to EPA for approval, the variance must include the *requirements that are to apply throughout the term of the variance* and "the requirements *shall* represent the highest attainable condition of the water … *throughout the term of the variance*." *Id.* at 131.14(b)(1)(ii) (emphasis added). The regulations plainly require that the HAC be in effect as a requirement of the variance in order for EPA to approve the variance. EPA also instructs states to review and revise variances to make them more stringent if a state later determines that the HAC should change. This is a one-way ratchet in that it only can be more stringent. *Id.* at 131.14(b)(1)(iii). [7]

[7] EPA used similar language in discussing its variance rule at the time of its publication. *See, e.g.*, 80 Fed. Reg. 51,020, 51037 (Aug. 21, 2015) ("To ensure that a WQS variance reflects the highest attainable condition *throughout the WQS variance term,* states…must adopt a provision specifying that the applicable interim WQS shall be either the highest attainable condition initially adopted, or a higher attainable condition later identified during any reevaluation. The rule requires such a provision only for WQS variance longer than five years.") (emphasis added).

Even in the early guidance document that EPA cited in its approval of the original Circular 12B variance, Waterkeeper E.R. 59, n. 34, EPA stated the requirements that:

> As with any water quality variance, the interim requirements will need to reflect the highest attainable condition *during the term of the variance.* 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*. For example, this could be accomplished by specifying in the variance a numeric value that reflects the highest water quality that a discharger could achieve … *during the term of the variance*.

(emphasis added). *See,* EPA Frequently Asked Questions guidance document, Waterkeeper E.R. 35 (emphasis added). It is noteworthy that while language similar to the guidance document is used in 40 C.F.R. § 131.14, EPA strengthened the term "during" that was used in the guidance, by replacing it with "throughout" the term of the variance, making more clear EPA's requirement that the HAC must apply during, not just at the end of, the variance term. 40 C.F.R. § 131.14(b)(1)(ii). This structure conforms to the Clean Water Act's requirement that water quality continually improve in order to clean up and protect the chemical, physical, and biological integrity of the nation's waters and that water standards ensure cleanliness levels sufficient to protect water quality for all uses, including the most sensitive uses. This language in 40 C.F.R. § 131.14(b)(1)(ii) appears, as the district court noted, 1 E.R. 52 and 10, to be in conflict with EPA's current litigation

position. Yet, EPA argues that it's regulations and positions are not in conflict, but rather clear and unambiguous.

If, as EPA argues, the regulations are clear and unambiguous, EPA is not due any deference; the court can read and apply the regulations itself. *Kisor*, 139 S.Ct. at 2414; *Seward Ship's Drydock*, 937 F.3d at 1307. Further, in determining whether a regulation is truly ambiguous, this Court, following recent Supreme Court precedent, has instructed that a court must "carefully consider the text, structure, history, and purpose of a regulation." *Id.* (citing *Kisor*, 139 S.Ct. at 2415.) If there is only one reasonable construction of a regulation, allowing an agency, under the guise of "ambiguity" to change that regulation, would permit the agency to *de facto* create a new regulation. *Kisor,* 139 S.Ct at 2415. The language in 40 C.F.R. § 131.14(b)(1)(ii) is plain and it says the interim requirements of the variance must be the HAC and the HAC must be expressed as the highest attainable effluent limitation for pollutant dischargers *throughout* the term of the variance.

In addition to the clarity found in the text quoted above, the history and purpose of the variance regulation is, as oft-repeated by all the appellants in this case, to simply provide an "interim" or "limited" weakening of water quality standards and designated uses in order to allow time for water quality standards to be met. EPA First Brf. at 30—31, 35; Mont. First Brf. at 15; Intervenor's Nat'l

Assoc. Clean Water Agencies et al. ("NACWA") First Brf. at 17 and 20. Appellants complain that "during" could be read as "at the end." EPA First Brf. at 38; NACWA First Brf. at 25. They claim that the district court's requirement that HAC apply throughout the variance means "at the beginning" of the variance and they argue this is not grounded in plain meaning. [8] *Id.* Appellants argue that the HAC need only be reached at the end of the variance, regardless of the length of the variance and regardless of the individual status of the pollutant discharger. *Id.* and EPA First Brf. at 30-35. Appellants are simply wrong. EPA regulation plainly states that a state may utilize a variance from a water quality standard promulgated under 33 U.S.C. § 1313(c)(2)(A), but the variance must itself require pollutant dischargers to meet the highest attainable condition and that condition must be met throughout the term of the variance. Appellants' arguments are simply contrary to the plain language of the regulation and EPA is accorded no deference on its litigation interpretation.

[8] EPA claims that Congress put variances "squarely" within EPA oversight. EPA First Brf. at 51. Congress did no such thing. Congress never once references variances in the entirety of 33 U.S.C. § 1313. Congress did not reference variances in the purpose and goals section of the Act either. *Id.* at § 1251(a)(2). What Congress did say is protect the chemical, physical and biological integrity of water and do so by, in part, developing water quality standards that will protect designated uses.

B. Appellants' Various Other Justifications Do Not Dictate A Result Contrary To The District Court's Decision.

EPA, joined by appellants, makes a variety of claims to bolster its argument that the plain language of its regulations allows a variance from Circular 12A protective water quality standards that lasts decades and does not achieve HAC until 2035. None of the justifications regarding the need for or purpose of variances dictate a result that would modify the instruction that an HAC must be met throughout the term of the variance. Moreover, many of appellants' justifications for Circular 12B are simply unreasonable and fly in the face of EPA regulation and the purpose and direction of the Clean Water Act.

EPA and other appellants argue that variances are supposed to be an "interim," "adaptive management tool" that will make "incremental progress" toward meeting water quality standards.[9] EPA First Brf. at 30—31, 35; Mont. First Brf. at 15; NACWA First Brf. at 17 and 20. EPA also argues that the district

[9] Appellants do not explain why a schedule of compliance, an existing tool in the regulations, cannot serve the purpose of setting timelines for "incremental progress" to achieve standards within a reasonable time and without providing an indefinite off-ramp from protective water quality standards. *See*, 40 C.F.R. § 122.47. They only suggest that a schedule of compliance is somehow "different" which appears grounded in the fact that a schedule of compliance actually *does* require incremental progress, with enforceable timelines, to meet water quality standards. *See, e.g.*, NACWA First Brf. at 2 and 10; Mont. First Brf. at 17-18.

court's decision is contrary to the Act's "goal" of only requiring standards to be met when they are "attainable."[10] EPA First Brf. at 37-38.

First, none of these characterizations detract from or conflict with the plain language in EPA's regulation that requires HAC throughout the term of the variance. An HAC and meeting it during the term of the variance, is still an "interim" weakening of the standards that protect designated uses and is the route of "incremental progress" toward meeting the protective standard. Further, as noted in the above-quoted language in 80 Fed. Reg. at 51,037, adaptive management is required to be applied in any variance lasting more than five years in order to *ensure that the HAC is made more stringent during the term of the variance* if a more protective HAC becomes "attainable" during that time. And, in dictating the application of the highest "attainable" condition throughout the term of the variance, the district court conforms to the goals of protecting designated

[10] EPA also presents an argument about two treatment facilities the district court used as examples, Bozeman and Whitefish. EPA First Brf. at 43-45. The district court made no rulings or findings about these examples, merely using them to illustrate the larger issue here--whether EPA's interpretation and application of its variance regulation is reasonable, consistent with the language of EPA's regulations, and in keeping with underlying requirements of the Clean Water Act. 1 E.R. 50-51. The issues decided by the district court are not particular to the use of the specific examples. Waterkeeper fully addresses the issue of EPA's interpretation of its regulations throughout this brief and therefore Waterkeeper will not respond separately to EPA's claims regarding the district court's use of particular examples.

uses "wherever attainable."[11] Appellants' characterizations of the purpose and uses of a variance do not dictate an interpretation of 40 C.F.R. § 131.14(b)(1)(ii) contrary to the plain language requiring that HAC be applicable throughout the term of the variance.

Second, a 20-year period during which pollution continues unabated, with some cost-based standard that will not protect designated uses applied at the end of the 20 years, and with no definite period thereafter where protective water quality standards will be met, does not conform to any vision of a "limited" or "interim" off-ramp from meeting water quality standards. Appellants' assertions that it does are simply unreasonable. For the claims that Circular 12B is just an "interim" "adaptive management tool" for making "incremental progress" to ring true and conform to the law, there must be a goal post that the variance moves toward and the HAC requirement must be the interim adaptive management tool that makes the incremental progress during the variance. Circular 12B lacked both. It required no progress until the end and there was no Circular 12A protective standards goal post.

[11] Again, Waterkeeper strongly disagrees with any argument that the Congressional interim goal that used the words "where attainable" has any place in modifying or detracting from Congress' express direction in 33 U.S.C. § 1313(c)(2)(A) to develop water quality standards consisting of the criteria necessary to protect designated uses. *See*, Argument, Part II.C.2., *supra.*

Finally, EPA boldly argues that the variance is actually a vehicle to reach the less protective HAC, not to reach the protective water quality standard, and therefore the variance need not include any pathway to meeting protective water quality standards. EPA First Brf. at 35-36. *See, also,* NACWA First Brf. at 22. In other words, according to EPA, Circular 12B functions as a "variance" from the weaker HAC itself, not from the Circular 12A standards that protect designated uses. EPA leaves unsaid what the vehicle for reaching the Circular 12A water quality standards is. Again, EPA's reading runs headlong into the plain language of its own regulation—that a variance is a variance from meeting the protective water quality standards developed under 33 U.S.C. § 1313(c)(2)(A) and that a variance must require dischargers to meet HAC throughout the term of the variance. Further, EPA's argument on this point simply serves to emphasize that in fact, Circular 12B is a substitute water quality standard, in place for the long-term if not perpetually, that does not meet the requirements of 33 U.S.C. § 1313(c)(2)(A).[12] EPA's interpretation of its regulation on this point is

[12] EPA makes a strained point about the district court's concern that EPA's interpretation leads to a "permanent replacement standard" in Circular 12B for the protective standard in Circular 12A. EPA notes that 33 U.S.C. § 1313(c)(2)(A) contains no prohibition on standards being "perpetual." EPA First Brf. at 47-48. True, but beside the point, because section 1313(c)(2)(A) also requires that standards include designated uses and the criteria necessary to protect those designated uses, something EPA admits Circular 12B does not do. Circular 12B is a replacement standard for 20 years and with no goal post an apparently "perpetual" one. And, if Circular 12B is indeed "perpetual" then the problem is

unreasonable and either dictates that the district court erred in allowing a cost-based standard or simply leads to the district court's finding that EPA's regulations are in conflict, ambiguous, and the ambiguity must be resolved in light of the purpose and requirements of the Clean Water Act.

C. If EPA's Variance Regulations Are Ambiguous, The District Court Correctly Resolved That Ambiguity To Ensure Compliance With The Clean Water Act.

Even if EPA regulations are truly ambiguous, EPA's interpretation must be reasonable, EPA must interpret and apply its regulations against the backdrop of the Clean Water Act, and a court must independently inquire into whether the character and context of the EPA interpretation entitles it to controlling weight. *Kisor*, 139 S.Ct. at 2516. Here, the district court correctly found that EPA's interpretation of its variance regulation is unreasonable in that it would cause the Circular 12B variance standard to run afoul of the Clean Water Act in much the same way the extended variance in *Miccosukee Tribe of Indians of Florida v. United States* did.

An agency cannot circumvent or subvert the plain direction of Congress through rule, either explicitly or in the manner the agency interprets and applies its rule. *United States v. Maes*, 546 F.3d 1066, 1068 (9th Cir. 2008) (a regulation

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not whether the duration violates the law, but rather that the entire Circular 12B replacement standard itself violates the law.

does not trump an otherwise applicable statute); *United States v. Doe*, 701 F.2d 819, 823 (9th Cir. 1983) (when a regulation conflicts with a statute, the statute controls). As the Florida district court found in the *Miccosukee* case, the agency cannot use a long-term general "variance" to indefinitely substitute for actual protective water quality standards whether EPA does so under guidance (as was the case in *Miccosukee*) or under a rule as with Circular 12B. The result is the same and that result violates the Clean Water Act.

In 40 C.F.R. § 131.14(b)(1)(iv), EPA instructs that the term of a variance is to be only as long as necessary to achieve the HAC. EPA argues that this language modifies or controls the oft-repeated directive earlier in the regulation that HAC must apply "throughout the term of the variance." EPA argues that "only as long as necessary to achieve HAC" should mean that Montana pollutant-dischargers need only take some undefined and unconfined series of steps to get to HAC by the end of the variance term and only then, in 2035, will regulators decide whether to simply give another 20 years on this same HAC, give some undefined amount of time on some different HAC, work toward the actual protective water quality standard on some undefined timeline, or to simply give up and decide not to protect some uses at all. EPA First Brf. at 31-32; Mont. First Brf. at 11. This interpretation does not easily reconcile with the plain language of § 131.14 (b)(1)(ii), leading the district court to find EPA's regulations on variances to be

ambiguous. 1 E.R. 50-52 and 9-10. Moreover, this structure would leave open indefinitely whether EPA would *ever* require compliance with the Clean Water Act mandates that standards must to protect uses and permits must ensure compliance with standards, a situation plainly at odds with the purpose of the Clean Water Act and Congress' express direction in 33 U.S.C. § 1313(c)(2)(A) on how to fulfill that purpose.

In *Miccosukee Tribe of Indians of Florida v. United States*, No. 04-21448-CIV, 2008 WL 2967654 (S.D. Fla. July 29, 2008), the Southern District of Florida addressed issues very similar to those in this case, and its detailed analysis of the situation was instructive for the district court.[13] The Florida court found that weakening water quality standards through the use of extensive variances was an improper end-run around the basic Clean Water Act requirements for water quality standards. In recognition of the need to protect the Everglades, Florida had adopted a phosphorus rule that included a science-based numeric nutrient criteria for phosphorus and that was protective of the designated uses. *Id*. at *27. The phosphorus rule, however, also provided for permits to allow a higher level of

[13] *Miccosukee Tribe of Indians of Florida v. United States* resulted in multiple opinions. The relevant opinions here are the initial Order Granting Summary Judgment (No. 04-21448-CIV, 2008 WL 2967654 (S.D. Fla. July 29, 2008)), and a later Order Granting Plaintiff's Motion to Compel to Comply with Summary Judgment Order (706 F. Supp. 2d 1296 (S.D. Fla. 2010)).

pollutant discharge than would be dictated by the numeric nutrient criteria, because Florida argued it was not ready and dischargers were not willing to meet the science-based criteria that would protect the designated uses of the Everglades. *Id.* As with Montana here, EPA approved both the science-based numeric limit in the phosphorus rule and the amendments that excused meeting the standards, thereby effectively granting a blanket variance and delay very similar to this case. *Id.* at *26, 28-29.

The Florida court found EPA's approval of Florida's actions arbitrary and capricious; that the totality of Florida's actions creating the blanket variance "effectively suspends the enforcement of the narrative and default [numeric] phosphorus criterion and, in lieu, *creates new or revised water quality criterion*[.]" *Id.* at *15 (emphasis added). *See also*, *Id.* At *12. "The 'effect' therefore, is to replace the narrative and numeric phosphorus criterion with an escape clause that allows non-compliance, by virtue of both an extended compliance date, and, during the extension, a **lesser** state water quality standard of compliance[.]" *Id*. at *20 (emphasis in original); *see also, Id.* at *24. Finally, the Florida court found it significant that there was no end date to the variance—that there was no identified date at which time the science-based standards would actually apply. *Id.* at *32.[14]

[14] The court reiterated its findings in a decision enforcing its earlier findings: "the CWA does not allow State water quality standards to be replaced with 'across-the-board' technology based effluent limitations, regardless of results, with an open-

The court notes that "nothing could justify a schedule so slow and 'glacial' as to defeat the CWA's goals." *Id.* at *33 (citing to *Idaho Sportsmen's Coal. v. Browner,* 951 F. Supp. 962, 967 (W.D.Wash. 1996) and quoting *Dubois v. Dep't of Agr*. 102 F.3d 1273, 1300 (1st Cir. 1996) (quote omitted)). As the district court here recognized, allowing EPA to claim ambiguity in its own regulations and then interpret them as not requiring highest attainable condition for 20 years, leaving entirely open-ended when the protective standard must be met, will accomplish the same unlawful result as the state of Florida: it will create an off-ramp that allows for less protective water quality standards, contrary to the Clean Water Act.

EPA argues that it need only make "incremental" progress with no end goal.[15] Nothing that the district court determined or required here runs contrary to that concept---in fact, the court seeks to ensure that the incremental progress in fact occurs and on a timeline that is meaningful to the water, to the fish, and to the people who use and rely on the water.

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ended." *Miccosukee Tribe of Indians of Florida v. United States*, 706 F. Supp. 2d 1296, 1303-4 (S.D. Fla. 2010).

[15] EPA and DEQ actions since the district court remanded Circular 12B belie their claims of intent for steady incremental progress. Rather, actions since remand have been to eliminate entirely the Circular 12A science-based protective water quality standard, not work toward meeting it. *See* actions regarding the Poison Pill voiding the protective Circular 12A standards. Instead of "incremental progress" and "limited term" degradation of designated uses, the intent appears to be to simply avoid application of the Circular 12A protective standard altogether.

A variance must of necessity be the HAC and must be time-bounded. Otherwise, the variance is simply, as originally argued by Waterkeeper, a substitute water quality standard that fails to protect designated uses, is not science based, and does not meet Congress' express direction in the Clean Water Act, 33 U.S.C. § 1313(c)(2)(A). Progress will only be made if the state and EPA set deadlines against which that progress is measured and with the ultimate target to be the water quality standards that actually restore and protect the water. Appellants' claims to the contrary are an unreasonable and ultimately unlawful interpretation and/or resolution of the conflicting language in EPA's regulations and must be rejected.

IV. THE DISTRICT COURT DID NOT EXCEED ITS BROAD EQUITABLE AUTHORITY IN ISSUING A REMEDY GROUNDED IN COMPLIANCE WITH WATER QUALITY STANDARDS.

A. The District Court's Remedy Was Not Overly-Prescriptive And Was Properly Tailored To Ensure The Requirements Of EPA Regulation And The Clean Water Act Are Met.

The district court fashioned a remedy tailored to address the failures of Circular 12B. The district court vacated only the portion of Circular 12B with the extended timeline, remanding with direction to the parties "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 [Circular 12A] in the time range proposed by plaintiffs." E.R. 19 at 5. The district court remedy was not overly-

prescriptive, but sought to ensure that the actual violations of EPA's rules would be addressed and the purposes of the Clean Water Act served while still allowing a cost-based variance to give polluters time to work toward meeting the Circular 12A protective water quality standards. This is entirely within a district court's broad discretion to fashion equitable remedies to right the environmental wrongs identified. *See, Northwest Environmental Advocates*, 537 F.3d at 1015; *Alaska Ctr. for the Environment,* 20 F.3d at 986.

Appellants argue that the district court should have deferred to EPA's "findings" regarding remedy. EPA First Brf. at 53. But, EPA made no such "findings" that were under review. Rather, the district court ruled that the "findings" EPA had made to approve Circular 12B did not comply with the law, both in its failure to require HAC throughout the term of the variance, but also on the point that Circular 12B created an indefinite off-ramp from ever meeting the protective standards in Circular 12A. 1 E.R. 58 and 15-16. The district court asked the parties to submit their respective proposals for a remedy that would address both problems. Specifically the district court asked for "guidance from the parties as to the timing and scope of the appropriate remedies to address the issues identified in this order" and to confer and address "remedies that include a timeline to achieve prompt compliance with the Current Variance Standard [Circular 12B]."

1 E.R. 59. How appellants responded to the court's invitation was entirely within their control.

EPA simply argued that the court remand without vacatur, choosing to offer no proposal for what would happen upon remand and in particular not responding at all to the district court's request for proposed timelines for Circular 12B or application of Circular 12A. EPA Remedies Brf. Dkt. No. 181. DEQ argued for partial vacatur and offered to slightly shorten a few timelines during the term of the variance, but those timelines would not apply until a pollutant discharge was required to get a new permit (meaning up to an additional five years before the timelines would run). DEQ Remedies Brf. Dkt. No. 182 at 9-11. DEQ continued to argue for no timeline for applying the Circular 12A protective standard. *Id.* at 11-12. For the most part, appellants' positions looked the same or very similar to their positions in support of Circular 12B.

In contrast, Waterkeeper consulted experts in the matter in order to propose a remedy both to the other parties and the district court, tailored to the district court's ruling that cost-based variance standards are allowed under the Clean Water Act, but that the variance be reasonable, must achieve HAC throughout the term of the variance and must be aimed at meeting the purpose and direction of the Act. Waterkeeper Remedies Brf. 2 E.R. 62. Waterkeeper heeded the district

court's request for timelines and included them in its proposal. *Id.* The district court did not err in rejecting appellants' 'more of the same'arguments.

Specific to EPA's arguments regarding the Court's instruction that the variance include a pathway to compliance with the Circular 12A water quality standards, nothing in EPA regulations suggests that this is incorrect. Rather, the Court ensured compliance with the Act's requirements that standards be set, and then met. Nothing in the Clean Water Act provides for or contemplates a variance away from protective standards at all, much less one that provides an excuse for not meeting water quality standards for decades.

Indeed, the district court's remedy and instruction fits with what the appellants' consistently claim Circular 12B does, which is to "make progress" toward meeting the Circular 12A standards. But for that statement to be meaningful, there has to be a goal post. The district court required goal posts and set forth parameters for that goal post, but left the precise details to the agencies.

B. The District Court Did Not Deprive Appellants Of A Full Opportunity To Present Their Remedy Proposals.

Finally, the appellants are aggrieved because they did not submit information to the district court to support their claim that they could not impose HAC on a substantially earlier timeline than the original 17 years (2035), and because they did not submit information to the district court to support their claim that they could not possibly set a timeline within which meeting the Circular 12A

water quality standards would be required for pollutant dischargers. EPA First Brf. at 52-53. Appellants were deprived of nothing in presenting on remedy.

First, the district court did not prohibit such information. In fact, the district court asked the parties for proposals on how to fashion a remedy, specifically setting a separate briefing schedule for the express purpose of hearing from the parties about what appropriate time periods for the variance might be. 1 E.R. at 59. Nonetheless, even after the district court ruled that Circular 12B could not stand, appellants submitted remedies briefs largely arguing that Circular 12B was the only route with DEQ proposing some minor modifications. All appellants continued to insist that no timeline be set for achieving the standards in Circular 12A. In response to the district court saying 'tell me something different than Circular 12B that will work for dischargers and get us to the protective standard in a reasonable time' appellants largely responded 'no, thanks.'

Waterkeeper, with the aid of its experts, proposed first, that the mechanical plant pollutant dischargers implement a series of steps, with interim deadlines, to meet the HAC within five years, the length of time for a National Pollutant Discharge Elimination System permit. Waterkeeper Remedies Brf., 2 E. R. 65-66. For lagoon pollutant dischargers, Waterkeeper proposed that existing violations of permits at lagoon facilities must be addressed and then noted that lagoons may differ as to timelines and approaches as they are not as uniform as mechanical

plants. *Id.* Instead, Waterkeeper proposed, again based upon the information and advice of experts, a list of factors that DEQ and EPA should assess and implement where appropriate, using a mix and match approach to achieve nutrient pollutant reductions to a reasonable level within a 7-year timeframe. Waterkeeper Remedies Brf., 2 E.R. 69-72. Waterkeeper's proposal included timelines for interim steps. *Id.* Finally, Waterkeeper's proposal included a discussion and recommendation that reverse osmosis, a currently-available technology that allows the Circular 12A standards to be met, but that is considered expensive, should be required at the end of the 20 year variance timeframe, or in 2035, again with interim milestones to ensure that dischargers stay on track. Waterkeeper Remedies Brf., 2 E.R. 74-75.

Waterkeeper submitted the expert information it relied on for its proposal to demonstrate to the district court that Waterkeeper's proposal was grounded in sound technical information and not just a "wish list." Waterkeeper also provided its proposal and the expert information relied on to appellants in advance of filing its remedy proposal with the district court. Waterkeeper Remedies Brf., 2 E.R. 64, fn. 1. Appellants should not be heard to be wronged by virtue of their own failures and choices.

CONCLUSION

This case presents important issues for ensuring that the purpose and promises of the Clean Water Act continue to move forward and be fulfilled and do

not fall prey to the inertia of status quo. To forestall that outcome, Waterkeeper asks this Court to overturn the district court's legal ruling that cost-based water quality standards are allowed and to affirm the district court's decision to vacate and remand the Circular 12B variance standard and to affirm the district court's order on remedy.

Dated this 23rd day of July, 2020.

Respectfully submitted,

s/ Janette K. Brimmer
JANETTE K. BRIMMER
Earthjustice
810 Third Avenue, Suite 610
Seattle, WA 98104
(206) 343-7340 | Phone
jbrimmer@earthjustice.org

Attorneys for Plaintiff-Appellees Upper Missouri Waterkeeper

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

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9th Cir. Case Number(s) No. 20-35136 (consolidated with Nos. 19-35898, 19-35899, 20-35135, 20-35137)

I am the attorney or self-represented party.

This brief contains 12,936 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

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Signature *s/ Janette K. Brimmer* **Date** July 23, 2020
*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF SERVICE

I hereby certify that on **July 23, 2020**, I electronically filed the foregoing *SECOND BRIEF ON CROSS-APPEAL OF PLAINTIFF-APPELLEE UPPER MISSOURI WATERKEEPER* with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

I further certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I declare under penalty of perjury that the foregoing is true and correct.

s/ Janette K. Brimmer
JANETTE K. BRIMMER

STATUTORY ADDENDUM

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33 U.S.C.A. § 1251

§ 1251. Congressional declaration of goals and policy

Currentness

(a) Restoration and maintenance of chemical, physical and biological integrity of Nation's waters; national goals for achievement of objective

The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter--

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal 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 by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans; and

(7) it is the national policy that programs for the control of nonpoint sources of pollution be developed and implemented in an expeditious manner so as to enable the goals of this chapter to be met through the control of both point and nonpoint sources of pollution.

(b) Congressional recognition, preservation, and protection of primary responsibilities and rights of States

It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is the policy of Congress that the States manage the construction grant program under this chapter and implement the permit programs under sections 1342 and 1344 of this title. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) Congressional policy toward Presidential activities with foreign countries

It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Administrator of Environmental Protection Agency to administer chapter

Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in development, revision, and enforcement of any regulation, etc.

Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) Procedures utilized for implementing chapter

It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government.

(g) Authority of States over water

It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this chapter. It is the further policy of Congress that nothing in this chapter shall be construed to supersede or abrogate rights to quantities of water which have been established by any State. Federal agencies shall co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution in concert with programs for managing water resources.

CREDIT(S)

(June 30, 1948, c. 758, Title I, § 101, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 816; amended Pub.L. 95-217, §§ 5(a), 26(b), Dec. 27, 1977, 91 Stat. 1567, 1575; Pub.L. 100-4, Title III, § 316(b), Feb. 4, 1987, 101 Stat. 60.)

EXECUTIVE ORDERS

EXECUTIVE ORDER NO. 11548

Ex. Ord. No. 11548, July 20, 1970, 35 F.R. 11677, which related to the delegation of Presidential functions, was superseded by Ex. Ord. No. 11735, Aug. 3, 1973, 38 F.R. 21243, set out as a note under section 1321 of this title.

EXECUTIVE ORDER NO. 11742

<Oct. 23, 1973, 38 F.R. 29457>

Delegation of Functions to Secretary of State Respecting Negotiation of International Agreements Relating to Enhancement of Environment

Under and by virtue of the authority vested in me by section 301 of title 3 of the United States Code and as President of the United States, I hereby authorize and empower the Secretary of State, in coordination with the Council on Environmental Quality, the Environmental Protection Agency, and other appropriate Federal agencies, to perform, without the approval, ratification, or other action of the President, the functions vested in the President by Section 7 of the Federal Water Pollution Control Act Amendments of 1972 (Public Law 92-500; 86 Stat. 898) with respect to international agreements relating to the enhancement of the environment.

RICHARD NIXON.

Notes of Decisions (138)

33 U.S.C.A. § 1251, 33 USCA § 1251
Current through P.L. 116-148.

End of Document

United States Code Annotated
Title 33. Navigation and Navigable Waters (Refs & Annos)
Chapter 26. Water Pollution Prevention and Control (Refs & Annos)
Subchapter III. Standards and Enforcement (Refs & Annos)

33 U.S.C.A. § 1313

§ 1313. Water quality standards and implementation plans

Effective: October 10, 2000
Currentness

(a) Existing water quality standards

(1) In order to carry out the purpose of this chapter, any water quality standard applicable to interstate waters which was adopted by any State and submitted to, and approved by, or is awaiting approval by, the Administrator pursuant to this Act as in effect immediately prior to October 18, 1972, shall remain in effect unless the Administrator determined that such standard is not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall, within three months after October 18, 1972, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after the date of such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(2) Any State which, before October 18, 1972, has adopted, pursuant to its own law, water quality standards applicable to intrastate waters shall submit such standards to the Administrator within thirty days after October 18, 1972. Each such standard shall remain in effect, in the same manner and to the same extent as any other water quality standard established under this chapter unless the Administrator determines that such standard is inconsistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972. If the Administrator makes such a determination he shall not later than the one hundred and twentieth day after the date of submission of such standards, notify the State and specify the changes needed to meet such requirements. If such changes are not adopted by the State within ninety days after such notification, the Administrator shall promulgate such changes in accordance with subsection (b) of this section.

(3)(A) Any State which prior to October 18, 1972, has not adopted pursuant to its own laws water quality standards applicable to intrastate waters shall, not later than one hundred and eighty days after October 18, 1972, adopt and submit such standards to the Administrator.

(B) If the Administrator determines that any such standards are consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall approve such standards.

(C) If the Administrator determines that any such standards are not consistent with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, he shall, not later than the ninetieth day after the date of submission of such standards, notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standards pursuant to subsection (b) of this section.

(b) Proposed regulations

(1) The Administrator shall promptly prepare and publish proposed regulations setting forth water quality standards for a State in accordance with the applicable requirements of this Act as in effect immediately prior to October 18, 1972, if--

(A) the State fails to submit water quality standards within the times prescribed in subsection (a) of this section.

(B) a water quality standard submitted by such State under subsection (a) of this section is determined by the Administrator not to be consistent with the applicable requirements of subsection (a) of this section.

(2) The Administrator shall promulgate any water quality standard published in a proposed regulation not later than one hundred and ninety days after the date he publishes any such proposed standard, unless prior to such promulgation, such State has adopted a water quality standard which the Administrator determines to be in accordance with subsection (a) of this section.

(c) Review; revised standards; publication

(1) The Governor of a State or the State water pollution control agency of such State shall from time to time (but at least once each three year period beginning with October 18, 1972) hold public hearings for the purpose of reviewing applicable water quality standards and, as appropriate, modifying and adopting standards. Results of such review shall be made available to the Administrator.

(2)(A) Whenever the State revises or adopts a new standard, such revised or new standard shall be submitted to the Administrator. Such revised or new water quality standard shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses. Such standards shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this chapter. Such standards 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.

(B) Whenever a State reviews water quality standards pursuant to paragraph (1) of this subsection, or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria for all toxic pollutants listed pursuant to section 1317(a)(1) of this title for which criteria have been published under section 1314(a) of this title, the discharge or presence of which in the affected waters could reasonably be expected to interfere with those designated uses adopted by the State, as necessary to support such designated uses. Such criteria shall be specific numerical criteria for such toxic pollutants. Where such numerical criteria are not available, whenever a State reviews water quality standards pursuant to paragraph (1), or revises or adopts new standards pursuant to this paragraph, such State shall adopt criteria based on biological monitoring or assessment methods consistent with information published pursuant to section 1314(a)(8) of this title. Nothing in this section shall be construed to limit or delay the use of effluent limitations or other permit conditions based on or involving biological monitoring or assessment methods or previously adopted numerical criteria.

(3) If the Administrator, within sixty days after the date of submission of the revised or new standard, determines that such standard meets the requirements of this chapter, such standard shall thereafter be the water quality standard for the applicable waters of that State. If the Administrator determines that any such revised or new standard is not consistent with the applicable

requirements of this chapter, he shall not later than the ninetieth day after the date of submission of such standard notify the State and specify the changes to meet such requirements. If such changes are not adopted by the State within ninety days after the date of notification, the Administrator shall promulgate such standard pursuant to paragraph (4) of this subsection.

(4) The Administrator shall promptly prepare and publish proposed regulations setting forth a revised or new water quality standard for the navigable waters involved--

(A) if a revised or new water quality standard submitted by such State under paragraph (3) of this subsection for such waters is determined by the Administrator not to be consistent with the applicable requirements of this chapter, or

(B) in any case where the Administrator determines that a revised or new standard is necessary to meet the requirements of this chapter.

The Administrator shall promulgate any revised or new standard under this paragraph not later than ninety days after he publishes such proposed standards, unless prior to such promulgation, such State has adopted a revised or new water quality standard which the Administrator determines to be in accordance with this chapter.

(d) Identification of areas with insufficient controls; maximum daily load; certain effluent limitations revision

(1)(A) Each State shall identify those waters within its boundaries for which the effluent limitations required by section 1311(b)(1)(A) and section 1311(b)(1)(B) of this title are not stringent enough to implement any water quality standard applicable to such waters. The State shall establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters.

(B) Each State shall identify those waters or parts thereof within its boundaries for which controls on thermal discharges under section 1311 of this title are not stringent enough to assure protection and propagation of a balanced indigenous population of shellfish, fish, and wildlife.

(C) Each State shall establish for the waters identified in paragraph (1)(A) of this subsection, and in accordance with the priority ranking, the total maximum daily load, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation. Such load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

(D) Each State shall estimate for the waters identified in paragraph (1)(B) of this subsection the total maximum daily thermal load required to assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife. Such estimates shall take into account the normal water temperatures, flow rates, seasonal variations, existing sources of heat input, and the dissipative capacity of the identified waters or parts thereof. Such estimates shall include a calculation of the maximum heat input that can be made into each such part and shall include a margin of safety which takes into account any lack of knowledge concerning the development of thermal water quality criteria for such protection and propagation in the identified waters or parts thereof.

(2) Each State shall submit to the Administrator from time to time, with the first such submission not later than one hundred and eighty days after the date of publication of the first identification of pollutants under section 1314(a)(2)(D) of this title, for his approval the waters identified and the loads established under paragraphs (1)(A), (1)(B), (1)(C), and (1)(D) of this subsection. The Administrator shall either approve or disapprove such identification and load not later than thirty days after the date of submission. If the Administrator approves such identification and load, such State shall incorporate them into its current plan under subsection (e) of this section. If the Administrator disapproves such identification and load, he shall not later than thirty days after the date of such disapproval identify such waters in such State and establish such loads for such waters as he determines necessary to implement the water quality standards applicable to such waters and upon such identification and establishment the State shall incorporate them into its current plan under subsection (e) of this section.

(3) For the specific purpose of developing information, each State shall identify all waters within its boundaries which it has not identified under paragraph (1)(A) and (1)(B) of this subsection and estimate for such waters the total maximum daily load with seasonal variations and margins of safety, for those pollutants which the Administrator identifies under section 1314(a)(2) of this title as suitable for such calculation and for thermal discharges, at a level that would assure protection and propagation of a balanced indigenous population of fish, shellfish, and wildlife.

(4) Limitations on revision of certain effluent limitations

(A) Standard not attained

For waters identified under paragraph (1)(A) where the applicable water quality standard has not yet been attained, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section may be revised only if (i) the cumulative effect of all such revised effluent limitations based on such total maximum daily load or waste load allocation will assure the attainment of such water quality standard, or (ii) the designated use which is not being attained is removed in accordance with regulations established under this section.

(B) Standard attained

For waters identified under paragraph (1)(A) where the quality of such waters equals or exceeds levels necessary to protect the designated use for such waters or otherwise required by applicable water quality standards, any effluent limitation based on a total maximum daily load or other waste load allocation established under this section, or any water quality standard established under this section, or any other permitting standard may be revised only if such revision is subject to and consistent with the antidegradation policy established under this section.

(e) Continuing planning process

(1) Each State shall have a continuing planning process approved under paragraph (2) of this subsection which is consistent with this chapter.

(2) Each State shall submit not later than 120 days after October 18, 1972, to the Administrator for his approval a proposed continuing planning process which is consistent with this chapter. Not later than thirty days after the date of submission of such a process the Administrator shall either approve or disapprove such process. The Administrator shall from time to time review each State's approved planning process for the purpose of insuring that such planning process is at all times consistent with this

chapter. The Administrator shall not approve any State permit program under subchapter IV of this chapter for any State which does not have an approved continuing planning process under this section.

(3) The Administrator shall approve any continuing planning process submitted to him under this section which will result in plans for all navigable waters within such State, which include, but are not limited to, the following:

(A) effluent limitations and schedules of compliance at least as stringent as those required by section 1311(b)(1), section 1311(b)(2), section 1316, and section 1317 of this title, and at least as stringent as any requirements contained in any applicable water quality standard in effect under authority of this section;

(B) the incorporation of all elements of any applicable area-wide waste management plans under section 1288 of this title, and applicable basin plans under section 1289 of this title;

(C) total maximum daily load for pollutants in accordance with subsection (d) of this section;

(D) procedures for revision;

(E) adequate authority for intergovernmental cooperation;

(F) adequate implementation, including schedules of compliance, for revised or new water quality standards, under subsection (c) of this section;

(G) controls over the disposition of all residual waste from any water treatment processing;

(H) an inventory and ranking, in order of priority, of needs for construction of waste treatment works required to meet the applicable requirements of sections 1311 and 1312 of this title.

(f) Earlier compliance

Nothing in this section shall be construed to affect any effluent limitation, or schedule of compliance required by any State to be implemented prior to the dates set forth in sections 1311(b)(1) and 1311(b)(2) of this title nor to preclude any State from requiring compliance with any effluent limitation or schedule of compliance at dates earlier than such dates.

(g) Heat standards

Water quality standards relating to heat shall be consistent with the requirements of section 1326 of this title.

(h) Thermal water quality standards

For the purposes of this chapter the term “water quality standards” includes thermal water quality standards.

(i) Coastal recreation water quality criteria

(1) Adoption by States

(A) Initial criteria and standards

Not later than 42 months after October 10, 2000, each State having coastal recreation waters shall adopt and submit to the Administrator water quality criteria and standards for the coastal recreation waters of the State for those pathogens and pathogen indicators for which the Administrator has published criteria under section 1314(a) of this title.

(B) New or revised criteria and standards

Not later than 36 months after the date of publication by the Administrator of new or revised water quality criteria under section 1314(a)(9) of this title, each State having coastal recreation waters shall adopt and submit to the Administrator new or revised water quality standards for the coastal recreation waters of the State for all pathogens and pathogen indicators to which the new or revised water quality criteria are applicable.

(2) Failure of States to adopt

(A) In general

If a State fails to adopt water quality criteria and standards in accordance with paragraph (1)(A) that are as protective of human health as the criteria for pathogens and pathogen indicators for coastal recreation waters published by the Administrator, the Administrator shall promptly propose regulations for the State setting forth revised or new water quality standards for pathogens and pathogen indicators described in paragraph (1)(A) for coastal recreation waters of the State.

(B) Exception

If the Administrator proposes regulations for a State described in subparagraph (A) under subsection (c)(4)(B), the Administrator shall publish any revised or new standard under this subsection not later than 42 months after October 10, 2000.

(3) Applicability

Except as expressly provided by this subsection, the requirements and procedures of subsection (c) apply to this subsection, including the requirement in subsection (c)(2)(A) that the criteria protect public health and welfare.

CREDIT(S)

(June 30, 1948, c. 758, Title III, § 303, as added Pub.L. 92-500, § 2, Oct. 18, 1972, 86 Stat. 846; amended Pub.L. 100-4, Title III, § 308(d), Title IV, § 404(b), Feb. 4, 1987, 101 Stat. 39, 68; Pub.L. 106-284, § 2, Oct. 10, 2000, 114 Stat. 870.)

Notes of Decisions (158)

33 U.S.C.A. § 1313, 33 USCA § 1313
Current through P.L. 116-148.

End of Document

Code of Federal Regulations
Title 40. Protection of Environment
Chapter I. Environmental Protection Agency (Refs & Annos)
Subchapter D. Water Programs
Part 131. Water Quality Standards (Refs & Annos)
Subpart A. General Provisions

40 C.F.R. § 131.3

§ 131.3 Definitions.

Effective: October 20, 2015
Currentness

(a) The Act means the Clean Water Act (Public Law 92–500, as amended, (33 U.S.C. 1251 et seq.)).

(b) Criteria are elements of State water quality standards, expressed as constituent concentrations, levels, or narrative statements, representing a quality of water that supports a particular use. When criteria are met, water quality will generally protect the designated use.

(c) Section 304(a) criteria are developed by EPA under authority of section 304(a) of the Act based on the latest scientific information on the relationship that the effect of a constituent concentration has on particular aquatic species and/or human health. This information is issued periodically to the States as guidance for use in developing criteria.

(d) Toxic pollutants are those pollutants listed by the Administrator under section 307(a) of the Act.

(e) Existing uses are those uses actually attained in the water body on or after November 28, 1975, whether or not they are included in the water quality standards.

(f) Designated uses are those uses specified in water quality standards for each water body or segment whether or not they are being attained.

(g) Use attainability analysis 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).

(h) Water quality limited segment means any segment where it is known that water quality does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of the technology-based effluent limitations required by sections 301(b) and 306 of the Act.

(i) Water quality standards are provisions of State or Federal law which consist of a designated use or uses for the waters of the United States and water quality criteria for such waters based upon such uses. Water quality standards are to protect the public health or welfare, enhance the quality of water and serve the purposes of the Act.

(j) States include: The 50 States, the District of Columbia, Guam, the Commonwealth of Puerto Rico, Virgin Islands, American Samoa, the Commonwealth of the Northern Mariana Islands, and Indian Tribes that EPA determines to be eligible for purposes of the water quality standards program.

(k) Federal Indian Reservation, Indian Reservation, or Reservation means all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation."

(l) Indian Tribe or Tribe means any Indian Tribe, band, group, or community recognized by the Secretary of the Interior and exercising governmental authority over a Federal Indian reservation.

(m) Highest attainable use is the modified aquatic life, wildlife, or recreation use that is both closest to the uses specified in section 101(a)(2) of the Act and attainable, based on the evaluation of the factor(s) in § 131.10(g) that preclude(s) attainment of the use and any other information or analyses that were used to evaluate attainability. There is no required highest attainable use where the State demonstrates the relevant use specified in section 101(a)(2) of the Act and sub-categories of such a use are not attainable.

(n) Practicable, in the context of § 131.12(a)(2)(ii), means technologically possible, able to be put into practice, and economically viable.

(o) A water quality standards variance (WQS variance) is 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.

(p) Pollutant Minimization Program, in the context of § 131.14, is a structured set of activities to improve processes and pollutant controls that will prevent and reduce pollutant loadings.

(q) Non–101(a)(2) use is any use unrelated to the protection and propagation of fish, shellfish, wildlife or recreation in or on the water.

Credits

[56 FR 64893, Dec. 12, 1991; 59 FR 64344, Dec. 14, 1994; 80 FR 51046, Aug. 21, 2015]

SOURCE: 48 FR 51405, Nov. 8, 1983; 57 FR 60910, Dec. 22, 1992, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Notes of Decisions (32)

Current through July 9, 2020; 85 FR 41319.

End of Document

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Title 40. Protection of Environment
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Subchapter D. Water Programs
Part 131. Water Quality Standards (Refs & Annos)
Subpart B. Establishment of Water Quality Standards

40 C.F.R. § 131.11

§ 131.11 Criteria.

Effective: October 20, 2015
Currentness

(a) Inclusion of pollutants:

(1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use.

(2) Toxic pollutants. States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130).

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

(i) 304(a) Guidance; or

(ii) 304(a) Guidance modified to reflect site-specific conditions; or

(iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

Credits

[80 FR 51047, Aug. 21, 2015]

SOURCE: 48 FR 51405, Nov. 8, 1983; 57 FR 60910, Dec. 22, 1992, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Notes of Decisions (51)

Current through July 9, 2020; 85 FR 41319.

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KeyCite Red Flag - Severe Negative Treatment
Unconstitutional or PreemptedHeld Invalid Upper Missouri Waterkeeper v. United States Environmental Protection Agency, D.Mont., Mar. 25, 2019

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Title 40. Protection of Environment
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Subpart B. Establishment of Water Quality Standards

40 C.F.R. § 131.14

§ 131.14 Water quality standards variances.

Effective: October 20, 2015
Currentness

<For statute(s) affecting validity of par. (b)(1)(iv) of this section, see: 33 USCA § 1251 et seq. >

States may adopt WQS variances, as defined in § 131.3(o). Such a WQS variance is subject to the provisions of this section and public participation requirements at § 131.20(b). A WQS variance is a water quality standard subject to EPA review and approval or disapproval.

(a) Applicability.

(1) A WQS variance may be adopted for a permittee(s) or water body/waterbody segment(s), but only applies to the permittee(s) or water body/waterbody segment(s) specified in the WQS variance.

(2) Where a State adopts a WQS variance, the State must retain, in its standards, the underlying designated use and criterion addressed by the WQS variance, unless the State adopts and EPA approves a revision to the underlying designated use and criterion consistent with §§ 131.10 and 131.11. All other applicable standards not specifically addressed by the WQS variance remain applicable.

(3) A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard for purposes of the Act under § 131.21(d) through (e), for the following limited purposes. An approved WQS variance applies for the purposes of developing NPDES permit limits and requirements under 301(b)(1)(C), where appropriate, consistent with paragraph (a)(1) of this section. States and other certifying entities may also use an approved WQS variance when issuing certifications under section 401 of the Act.

(4) A State may not adopt WQS variances if the designated use and criterion addressed by the WQS variance can be achieved by implementing technology-based effluent limits required under sections 301(b) and 306 of the Act.

(b) Requirements for Submission to EPA.

(1) A WQS variance must include:

(i) Identification of the pollutant(s) or water quality parameter(s), and the water body/waterbody segment(s) to which the WQS variance applies. Discharger(s)-specific WQS variances must also identify the permittee(s) subject to the WQS variance.

(ii) The requirements that apply throughout the term of the WQS variance. The requirements shall represent the highest attainable condition of the water body or waterbody segment applicable throughout the term of the WQS variance based on the documentation required in (b)(2) of this section. The requirements shall not result in any lowering of the currently attained ambient water quality, unless a WQS variance is necessary for restoration activities, consistent with paragraph (b)(2)(i)(A)(2) of this section. The State must specify the highest attainable condition of the water body or waterbody segment as a quantifiable expression that is one of the following:

(A) For discharger(s)-specific WQS variances:

(1) The highest attainable interim criterion; or

(2) The interim effluent condition that reflects the greatest pollutant reduction achievable; or

(3) If no additional feasible pollutant control technology can be identified, the interim criterion or interim effluent condition that reflects the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

(B) For WQS variances applicable to a water body or waterbody segment:

(1) The highest attainable interim use and interim criterion; or

(2) If no additional feasible pollutant control technology can be identified, the interim use and interim criterion that reflect the greatest pollutant reduction achievable with the pollutant control technologies installed at the time the State adopts the WQS variance, and the adoption and implementation of a Pollutant Minimization Program.

(iii) A statement providing 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 consistent with paragraph (b)(1)(v) of this section, whichever is more stringent.

(iv) The term of the WQS variance, expressed as an interval of time from the date of EPA approval or a specific date. The term of the WQS variance must only be as long as necessary to achieve the highest attainable condition and consistent with the demonstration provided in paragraph (b)(2) of this section. The State may adopt a subsequent WQS variance consistent with this section.

(v) For a WQS variance with a term greater than five years, a specified frequency to reevaluate the highest attainable condition using all existing and readily available information and a provision specifying how the State intends to obtain public input on the reevaluation. Such reevaluations must occur no less frequently than every five years after EPA approval of the WQS variance and the results of such reevaluation must be submitted to EPA within 30 days of completion of the reevaluation.

(vi) A provision that the WQS variance will no longer be the applicable water quality standard for purposes of the Act if the State does not conduct a reevaluation consistent with the frequency specified in the WQS variance or the results are not submitted to EPA as required by (b)(1)(v) of this section.

(2) The supporting documentation must include:

(i) Documentation demonstrating the need for a WQS variance.

(A) For a WQS variance to a use specified in section 101(a)(2) of the Act or a sub-category of such a use, the State must demonstrate that attaining the designated use and criterion is not feasible throughout the term of the WQS variance because:

(1) One of the factors listed in § 131.10(g) is met, or

(2) Actions necessary to facilitate lake, wetland, or stream restoration through dam removal or other significant reconfiguration activities preclude attainment of the designated use and criterion while the actions are being implemented.

(B) For a WQS variance to a non–101(a)(2) use, the State must submit documentation justifying how its consideration of the use and value of the water for those uses listed in § 131.10(a) appropriately supports the WQS variance and term. A demonstration consistent with paragraph (b)(2)(i)(A) of this section may be used to satisfy this requirement.

(ii) Documentation demonstrating that the term of the WQS variance is only as long as necessary to achieve the highest attainable condition. Such documentation must justify the term of the WQS variance by describing the pollutant control activities to achieve the highest attainable condition, including those activities identified through a Pollutant Minimization Program, which serve as milestones for the WQS variance.

(iii) In addition to paragraphs (b)(2)(i) and (ii) of this section, for a WQS variance that applies to a water body or waterbody segment:

(A) Identification and documentation of any cost-effective and reasonable best management practices for nonpoint source controls related to the pollutant(s) or water quality parameter(s) and water body or waterbody segment(s) specified in the WQS variance that could be implemented to make progress towards attaining the underlying designated use and criterion. A State must provide public notice and comment for any such documentation.

(B) Any subsequent WQS variance for a water body or waterbody segment must include documentation of whether and to what extent best management practices for nonpoint source controls were implemented to address the pollutant(s) or water quality parameter(s) subject to the WQS variance and the water quality progress achieved.

(c) Implementing WQS variances in NPDES permits. A WQS variance serves as the applicable water quality standard for implementing NPDES permitting requirements pursuant to § 122.44(d) of this chapter for the term of the WQS variance. Any limitations and requirements necessary to implement the WQS variance shall be included as enforceable conditions of the NPDES permit for the permittee(s) subject to the WQS variance.

Credits

[80 FR 51048, Aug. 21, 2015]

SOURCE: 48 FR 51405, Nov. 8, 1983; 57 FR 60910, Dec. 22, 1992, unless otherwise noted.

AUTHORITY: 33 U.S.C. 1251 et seq.

Current through July 9, 2020; 85 FR 41319.

End of Document

17.30.619 INCORPORATIONS BY REFERENCE

(1) The board adopts and incorporates by reference the following state and federal requirements and procedures as part of Montana's surface water quality standards:

(a) Department Circular DEQ-7, entitled "Montana Numeric Water Quality Standards" (June 2019 edition), which establishes numeric water quality standards for toxic, carcinogenic, bioconcentrating, radioactive, and harmful parameters and also establishes human health-based water quality standards for the following specific nutrients with toxic effects:

(i) nitrate;

(ii) nitrate + nitrite; and

(iii) nitrite;

(b) the Water Quality Standards Handbook, Second Edition, EPA-823-B-94-005a, August 1994, that sets forth procedures for development of site-specific criteria;

(c) 40 CFR Part 136 (July 1, 2015), which establishes guidelines and procedures for the analysis of pollutants;

(d) 40 CFR 131.10(g), (h) and (j) (2000), which establishes criteria and guidelines for conducting a use attainability analysis;

(e) Department Circular DEQ-12A, entitled "Montana Base Numeric Nutrient Standards" (July 2014 edition), which establishes numeric water quality standards for total nitrogen and total phosphorus in surface waters; and

(f) the provision in ARM 17.30.1350(1) that authorizes compliance schedules contained in the Montana Pollutant Discharge Elimination System Permit regulations.

(2) If a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute, under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, then (1)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in ARM 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in ARM 17.30.637 are the standards for total nitrogen and total phosphorus in surface water, except for the Clark Fork River, for which the standards are the numeric standards in ARM 17.30.631.

(3) Copies of the materials listed in (1) may be obtained from the Department of Environmental Quality, P.O. Box 200901, Helena, MT 59620-0901.

History: 75-5-201, 75-5-301, MCA; IMP, 75-5-301, 75-5-313, MCA; NEW, 2002 MAR p. 387, Eff. 2/15/02; AMD, 2002 MAR p. 2196, Eff. 8/16/02; AMD, 2003 MAR p. 217, Eff. 2/14/03; AMD, 2004 MAR p. 725, Eff. 4/9/04; AMD, 2006 MAR p. 528, Eff. 2/24/06; AMD, 2008 MAR p. 946, Eff. 5/9/08; AMD, 2010 MAR p. 1796, Eff. 8/13/10; AMD, 2012 MAR p. 2060, Eff. 10/12/12; AMD, 2014 MAR p. 1815, Eff. 8/8/14; AMD, 2017 MAR p. 602, Eff. 5/13/17; AMD, 2019 MAR p. 826, Eff. 6/22/19.

17.30.715 CRITERIA FOR DETERMINING NONSIGNIFICANT CHANGES IN WATER QUALITY

(1) The following criteria will be used to determine whether certain activities or classes of activities will result in nonsignificant changes in existing water quality due to their low potential to affect human health or the environment. These criteria consider the quantity and strength of the pollutant, the length of time the changes will occur, and the character of the pollutant. Except as provided in (2), changes in existing surface or ground water quality resulting from the activities that meet all the criteria listed below are nonsignificant, and are not required to undergo review under 75-5-303, MCA:

(a) activities that would increase or decrease the mean monthly flow of a surface water by less than 15 percent or the seven-day ten-year low flow by less than 10 percent;

(b) discharges containing carcinogenic parameters or parameters with a bioconcentration factor greater than 300 at concentrations less than or equal to the concentrations of those parameters in the receiving water;

(c) discharges containing toxic parameters, which will not cause changes that equal or exceed the trigger values in Department Circular DEQ-7. Whenever the change exceeds the trigger value, the change is not significant if the resulting concentration outside of a mixing zone designated by the department does not exceed 15 percent of the lowest applicable standard;

(d) changes in the concentration of nitrate in ground water which will not cause degradation of surface water if the sum of the predicted concentrations of nitrate at the boundary of any applicable mixing zone will not exceed the following values:

(i) 7.5 mg/L for nitrate sources other than domestic sewage;

(ii) 5.0 mg/L for domestic sewage effluent discharged from a conventional septic system;

(iii) 7.5 mg/L for domestic sewage effluent discharged from a septic system using level two treatment, as defined in ARM 17.30.702; or

(iv) 7.5 mg/L for domestic sewage effluent discharged from a conventional septic system in areas where the ground water nitrate level exceeds 5.0 mg/L primarily from sources other than human waste.

For purposes of this subsection (d), the word "nitrate" means nitrate as nitrogen; and

(e) changes in concentration of total inorganic phosphorus in ground water if water quality protection practices approved by the department have been fully implemented and if an evaluation of the phosphorus adsorptive capacity of the soils in the area of the activity indicates that phosphorus will be removed for a period of 50 years prior to a discharge to any surface waters;

(f) changes in the quality of water for any harmful parameter, nutrients listed at ARM 17.30.631, and parameters listed in Department Circular DEQ-12A, except as specified in (1)(g), for which water quality standards have been adopted other than carcinogenic, bioconcentrating, or toxic parameters, in either surface or ground water, if the changes outside of a mixing zone designated by the department are less than ten percent of the applicable standard and the existing water quality level is less than 40 percent of the standard;

(g) for nutrients in domestic sewage effluent discharged from a septic system that does not require an MPDES or MGWPCS permit, except as specified in (1)(d) and (e), which will not cause changes that equal or exceed the trigger values in Department Circular DEQ-7. Whenever the change exceeds the trigger value, the change is not significant if the changes outside of a mixing zone designated by the department are less than ten percent of the applicable standard and the existing water quality level is less than 40 percent of the standard;

(h) changes in the quality of water for any parameter for which there are only narrative water quality standards if the changes will not have a measurable effect on any existing or anticipated use or cause measurable changes in aquatic life or ecological integrity.

(2) Notwithstanding compliance with the criteria of (1), the department may determine that the change in water quality resulting from an activity which meets the criteria in (1) is degradation based upon the following:

(a) cumulative impacts or synergistic effects;

(b) secondary byproducts of decomposition or chemical transformation;

(c) substantive information derived from public input;

(d) changes in flow;

(e) changes in the loading of parameters;

(f) new information regarding the effects of a parameter; or

(g) any other information deemed relevant by the department and that relates to the criteria in (1).

(3) The department may determine that a change in water quality resulting from an activity or category of activities is nonsignificant based on information submitted by an applicant that demonstrates conformance with the guidance found in 75-5-301(5)(c), MCA. In making a determination under this subsection, the department shall allow for public comment prior to a decision pursuant to the public notice procedures in ARM 17.30.1372.

(4) If a court of competent jurisdiction declares 75-5-313, MCA, or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves 75-5-313, MCA, or any portion of that statute under 30 CFR 131.21, or if rules adopted pursuant to 75-5-313(6) or (7), MCA, expire and general variances are not available, then the significance criteria contained in (1)(g) are the significance criteria for total nitrogen and total phosphorus in surface water.

History: 75-5-301, 75-5-303, MCA; IMP, 75-5-303, MCA; NEW, 1994 MAR p. 2136, Eff. 8/12/94; AMD, 1995 MAR p. 1040, Eff. 6/16/95; AMD, 1995 MAR p. 2256, Eff. 10/27/95; TRANS, from DHES, 1996 MAR p. 1499; AMD, 2002 MAR p. 387, Eff. 2/15/02; AMD, 2003 MAR p. 217, Eff. 2/14/03; AMD, 2004 MAR p. 725, Eff. 4/9/04; AMD, 2006 MAR p. 528, Eff. 2/24/06; AMD, 2014 MAR p. 1815, Eff. 8/8/14; AMD, 2017 MAR p. 602, Eff. 5/13/17.