

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

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**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

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UPPER MISSOURI WATERKEEPER,  
*Plaintiff/Appellee/Cross-Appellant,*

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY,  
ANDREW R. WHEELER, Administrator, U.S. Environmental Protection Agency,  
*Defendants/Appellants/Cross-Appellees,*

STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY,  
NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES,  
THE MONTANA LEAGUE OF CITES, and  
TREASURE STATE RESOURCES ASSOCIATION OF MONTANA,  
*Intervenor-Defendants/Appellants/Cross-Appellees.*

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Appeal from the United States District Court for the District of Montana  
No. 4:16-cv-0052-BMM (Hon. Brian Morris)

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**THIRD BRIEF ON CROSS-APPEALS FOR**  
**INTERVENOR-DEFENDANT STATE OF MONTANA,**  
**DEPARTMENT OF ENVIRONMENTAL QUALITY**

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## GLOSSARY

1 E.R.	Excerpts of Record for Appellant EPA -- Volume One
2 E.R.	Excerpts of Record for Appellant EPA -- Volume Two
Base WQS	Base Numeric Nutrient Criteria found in DEQ-12A
DEQ-12A	Montana Department of Environmental Quality Circular DEQ-12A, Base Numeric Nutrient Standards
DEQ-12B	Montana Department of Environmental Quality Circular DEQ-12B, Water Quality Standards Variances
CWA	Federal Clean Water Act
EPA	U.S. Environmental Protection Agency
HAC or Current Variance Standard	Highest Attainable Condition (Table 12B-1 in DEQ-12B)
MCA	Montana Code Annotated
MPDES	Montana Pollutant Discharge Elimination System
Mont. E. R.	Montana's Excerpts of Record
Waterkeeper	Upper Missouri Waterkeeper

## **INTRODUCTION**

This Court may provide effective relief to the Appellants and this matter is not moot. EPA's determination to approve Montana's general nutrient standards variance complied with the Federal Clean Water Act ("CWA"), its related regulations, and should have been upheld in its entirety.

### **STATEMENT OF THE ISSUES (CROSS-APPEAL)**

In addition to the issues previously raised by EPA and Montana in this appeal, the following issues are raised by Waterkeeper in its cross-appeal:

1. Does this court retain jurisdiction over the appeals, notwithstanding administrative actions taken by Montana and EPA to comply with the district court's judgment, which Waterkeeper contends have rendered the appeals moot?

(Yes.)

2. Does EPA reasonably construe the CWA as authorizing states, as Montana did here, to consider costs in establishing water quality standards or variances therefrom by also considering whether designated uses are attainable?

(Yes.)

### **PERTINENT STATUTES AND REGULATIONS**

Pertinent statutes and regulations are set forth in the Addendum to the First Brief on Cross-Appeals for Intervenor- Defendant State of Montana, Department of Environmental Quality, ECF No. 25 ("Montana's First Brief").

## STATEMENT OF THE CASE

### A. Proceedings and decision an appeal

The proceedings relevant to the issues on appeal are set forth in Montana's First Brief at 4-10.

### B. Post-judgment proceedings

Montana's First Brief described post-judgment proceedings, *see id.* at 9-10. Montana provides the following supplemental statement as pertinent to Waterkeeper's arguments concerning mootness.

As required by the district court's Remedy Order, 1 E.R. 23-24, Montana revised its general nutrient standards variance, contained within Montana Department of Environmental Quality Circular DEQ-12B ("DEQ-12B"). 22 Mont. Admin. Reg. 2100 (Nov. 22, 2019), <<https://sosmt.gov/arm/register/#190-257-2019>> (accessed Oct. 4, 2020). Montana attempted in good faith to comply with the district court's orders and revised its general variance to require dischargers make additional progress toward the ultimate attainment of the base numeric nutrient standards ("Base WQS"), while ensuring communities would not incur substantial and widespread economic and social impacts. *Id.* at 2111. Even though EPA acknowledged parties may interpret the district court's orders differently, EPA ultimately concluded the orders required it to disapprove of Montana's revisions. *See* U.S. EPA, *EPA Action in Response to Court Order* at 5 (Feb. 24, 2020) <[2](https://www.epa.gov/sites/production/files/2020-03/documents/mt-</a></p></div><div data-bbox=)

approval-022420.pdf > (accessed Sept. 30, 2020). EPA stated its decision was based upon the “more prescriptive language” in the various district court orders, and specifically noted the court's December 20, 2019 denial of the EPA's Motion to Alter or Amend the Judgment (which was issued after MDEQ's development and adoption of the revised rule). *Id.*

EPA’s February 24, 2020 action and the related district court proceedings then triggered Montana’s non-severability provisions, voiding the Base WQS and restoring the narrative water quality standards contained in Mont. Admin. R. 17.30.637 (regulating total nitrogen and total phosphorus in those waters where the Base WQS had previously applied). *See* Mont. Admin. R. 17.30.619(2) and 17.30.715(4). The non-severability provisions had been adopted by Montana in 2014 to ensure that Base WQS and the related variances would always “remain together as a package.” 3 Mont. Admin. Reg. 280, 286-87 (Feb. 13, 2014), <<https://sosmt.gov/arm/register/#190-195-2014>> (accessed Oct. 4, 2020). EPA approved Montana’s non-severability provisions on February 24, 2020. *EPA Action in Response to Court Order* at 10-11.

At the same time Montana adopted the court-ordered revisions to its general variance, it also adopted a provision in its variance rules to address the on-going variance litigation as follows:

If a court of competent jurisdiction determines that the United States Environmental Protection Agency's October 31, 2017 approval of the

general variance is valid and lawful, then the incorporations by reference of the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be void, and the May 2018 edition of Department Circular DEQ-12B shall contain the applicable general variance. If such contingency occurs, all references to the November 2019 edition of Department Circular DEQ-12B contained in this rule shall be stricken and shall be considered as replaced with the May 2018 edition.

Mont. Admin. R. 17.30.660(9).<sup>1</sup> On February 24, 2020, EPA also approved this provision for CWA purposes. *See* U.S. EPA, *EPA Action in Response to Court Order* at 9-10. Although Waterkeeper has specifically challenged EPA's recent approval of Montana's non-severability provisions in district court, *see Upper Mo. Waterkeeper v. U.S. EPA*, No. 4:20-cv-00027 (D.Mont.), Waterkeeper has not challenged EPA's approval of Mont. Admin. R. 17.30.660(9).

### **SUMMARY OF ARGUMENT**

Montana incorporates and adopts the summary of argument set forth in EPA's Third Brief on Cross-Appeals, ECF No. 47, and supplements the summary of argument as set forth below.

There remains a live controversy before this Court. Should the Court determine that EPA's October 31, 2017 approval of the general variance is valid and lawful, Montana's rules will operate as a matter of law to restore the general

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<sup>1</sup> The May 2018 edition of DEQ-12B contains the version of Montana's general nutrient standards variance that is the subject of this appeal, adopted in 2017.

nutrient standards variance, making the variance available for the use of eligible nutrient dischargers. Montana's Board of Environmental Review, which adopted the stringent Base WQS contained in Montana Department of Environmental Quality Circular DEQ-12A ("DEQ-12A"), adopted the non-severability provisions and intended the Base WQS and related variances to remain together "as a package." Should the general variances in DEQ-12B become available, Montana's Base WQS in DEQ-12A would once again become effective. Thus, this appeal is not moot, because the Court can grant effective relief.

At the same time Waterkeeper is asking this Court to dismiss the appeal as moot, it is challenging Montana's non-severability provisions at the district court. Assuming, *arguendo*, Waterkeeper is successful at the district court, the Base WQS would again be applicable for federal law purposes, also defeating Waterkeeper's mootness arguments.

Waterkeeper's additional cross-appeal arguments are also without merit. EPA has long found that designated uses (or beneficial uses in Montana) may be removed for various reasons, including when necessary controls would cause substantial and widespread economic and social impacts. Waterkeeper did not challenge Montana's findings concerning such impacts at the district court, yet continues to argue that unattainable uses must be achieved at all costs, regardless of the effect on local communities. EPA's variance construct allows states to make

progress toward ultimate attainment of underlying uses, while protecting the integrity of local economies and maintaining and improving water quality. EPA's interpretation that considerations of attainability may include costs and support a temporary variance is lawful under the CWA and should be upheld.

### **STANDARD OF REVIEW**

Montana incorporates and adopts the standard of review as set forth in EPA's Third Brief on Cross-Appeals, ECF No. 47.

### **ARGUMENT**

Montana incorporates and adopts the legal arguments as set forth in EPA's Third Brief on Cross-Appeals, ECF No. 47, and supplements these arguments as set forth below.

#### **A. The Appeals are Not Moot**

Waterkeeper claims that the operation of Montana's non-severability provisions has effectively mooted the appeals, because the restrictive Base WQS found at DEQ-12A are now void, obviating the need for any variances. Second Brief on Cross-Appeal of Plaintiff-Appellee Upper Missouri Waterkeeper ("Waterkeeper's Second Brief") 17-20 (July 23, 2020). Yet this Court can provide effective relief to Montana; overturning the district court's ruling will restore both the 2017 version of Montana's general variance and the underlying Base WQS.

## 1. The Court Can Grant Effective Relief

An appeal is only moot when the appellate court cannot grant any effective relief. *Motor Vehicle Cas. Co. v. Thorpe Insulation Co. (In re Thorpe Insulation Co.)*, 677 F.3d 869, 880 (9th Cir. 2012). Thus, the party moving for dismissal on mootness grounds bears a heavy burden. *Northwest Env'tl. Def. Ctr. v. Gordon*, 849 F.2d 1241, 1244 (9th Cir. 1988) (citing *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979)).

Montana's Legislature, as well as its Board of Environmental Review, recognized that adopting the Base WQS would not be possible without a general variance in place. See Mont. Code Ann. § 75-5-313; 3 Mont. Admin. Reg. 280, 286-87 (Feb. 13, 2014), <<https://sosmt.gov/arm/register/#190-195-2014>> (accessed Oct. 4, 2020). Had a variance not been available, Montana would not have adopted its Base WQS. 15 Mont. Admin. Reg. 1815, 1820 (Aug. 7, 2014), <<https://sosmt.gov/arm/register/#190-195-2014>> (accessed Oct. 4, 2020). The two non-severability provisions were adopted to ensure that Base WQS and the related variances would always "remain together as a package." 3 Mont. Admin. Reg. 280, 286-87 (Feb. 13, 2014), <<https://sosmt.gov/arm/register/#190-195-2014>> (accessed Oct. 4, 2020). Under Mont. Admin. R. 17.30.619(2), should Montana's general nutrient standards variance expire and become unavailable, the Base WQS and all references to DEQ-12A become void and Montana reverts to the use of its

narrative criteria to regulate discharges of total nitrogen and total phosphorus. The rule found at Mont. Admin. R. 17.30.715(4) contains similar language, reverting Montana's nondegradation provisions to narrative criteria requirements for total nitrogen and total phosphorus in surface water. Both rules are self-executing.

Because of EPA's disapproval action in February 2020, which was based upon the orders of the district court, general variances are no longer available and DEQ-12A is void. However, if the Court reverses and vacates the district court's orders, upholding EPA's October 31, 2017 approval of Montana's general nutrient standards variance, then, pursuant to Mont. Admin. R. 17.30.660(9)<sup>2</sup>, the 2017 version of the general variance would be reinstated. Because the general variance would be effective and available, and because Montana intended its general variance and its Base WQS to remain together, the Base WQS in DEQ-12A would once again be effective. Thus, the Court can grant effective relief to Appellants.

This Court "ordinarily grants substantial deference" to a state's interpretation of its own regulations; and, provided an agency's interpretation presents a reasoned and consistent view, the court will not substitute its own interpretation for that of the agency's. *Idaho Dept. of Health and Welfare v. U.S.*

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<sup>2</sup> EPA has approved this rule for purposes of the CWA and this approval has not been challenged. See *U.S. EPA, EPA Action in Response to Court Order 9-10* (Feb. 24, 2020) <<https://www.epa.gov/sites/production/files/2020-03/documents/mt-approval-022420.pdf> > (accessed Sept. 30, 2020).

*Dept. of Energy*, 959 F.2d 149, 152 (9th Cir. 1992). The Court should defer to Montana's interpretation of its rules and reject Waterkeeper's mootness claims.

## **2. Waterkeeper's New Lawsuit in District Court**

As Waterkeeper presents its arguments concerning mootness, it concurrently asks the district court to vacate EPA's approval of Montana's non-severability provisions. *See Upper Mo. Waterkeeper v. U.S. EPA*, No. 4:20-cv-00027 (D.Mont.) (Compl. for Declaratory and Injunctive Relief, District Court ECF No. 1, filed March 31, 2020).<sup>3</sup> If Waterkeeper were to prevail in the district court, its mootness arguments fail for this reason as well.

### **B. The Court Must Reject Waterkeeper's Cross-Appeal that Designated Uses Must Be Met in All Circumstances, Regardless of Cost**

EPA regulations have long held that states may *permanently remove* uses if certain circumstances exist. 40 C.F.R. 131.10(g). If controls "would result in substantial and widespread economic and social impact" states may downgrade uses. *Id.* EPA's variance regulations at 40 C.F.R. 131.14 reference the factors found in 40 C.F.R. § 131.10(g), but instead of using these factors to permanently remove uses, EPA has constructed a variance rule that allows states to temporarily modify a use while retaining the ultimate goal of attaining the underlying use and

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<sup>3</sup> The new case has been submitted for decision to the district court following oral argument on September 24, 2020. No. 4:20-cv-00027 (D.Mont.) (Dist. Court-ECF No. 68).

water quality criterion. *See* 40 C.F.R. 131.14(a)(2). Waterkeeper makes no challenge to a regulation that permanently removes uses, but seeks to effectively eliminate a rule that allows the temporary modification of uses – a rule that also allows states to delay the much more drastic step of permanent removal. *See* Waterkeeper’s Second Brief at 20-33.

Throughout the development of the Base WQS and the general variance, Montana knew that controls necessary to meet its Base WQS would cause substantial and widespread economic impacts.<sup>4</sup> These impacts were proven by Montana, approved by EPA, unchallenged by Waterkeeper, and affirmed by the district court. *Upper Mo. Waterkeeper v. U.S. EPA*, 377 F. Supp. 3d 1156, 1166-67 (D. Mont. 2019).

The CWA considers the concept of attainability when establishing uses, and EPA’s regulations at 40 C.F.R. § 131.10 and § 131.14 reasonably incorporate this consideration. *See* 33 U.S.C. § 1251(a)(2) (establishing the “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”). Waterkeeper’s goal of forcing Montana’s communities to incur substantial and widespread economic and social harm, is also inconsistent with a

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<sup>4</sup> When adopting water quality standards, Montana must give “consideration to the economics of waste treatment and prevention.” Mont. Code Ann. § 75-5-301(2).

state’s lawful considerations of “use and value” when setting water quality standards and designating related uses. *See* 33 U.S.C. § 1313(c)(2)(A). EPA’s regulations reasonably incorporate concerns of social and economic harm when such harm is shown to be substantial and widespread.

The district court was right to conclude that 33 U.S.C. § 1313(c)(2)(A) does not demonstrate clear Congressional intent that water quality standards be only science-based. *Upper Mo. Waterkeeper*, 377 F. Supp. 3d at 1164. In like manner, this Court must also reject Waterkeeper’s argument that costs may never be considered in the development of water quality standards and their related designated uses.

**C. The District Court Erred to the Extent It Required Montana’s General Nutrient Standards Variance to Compel Compliance with the Base WQS at the End of the Variance Term**

The district court ignored the plain language of EPA’s variance rule which is not ambiguous as to the construct of a variance’s term. EPA’s regulations are clear, “[t]he term of the variance must only be as long as necessary to achieve the highest attainable condition.” 40 C.F.R. § 131.14(b)(1)(iv).

**1. The General Variance is Time-Bounded**

Waterkeeper’s arguments that the variance does not provide an “end goal” and is not “time-bounded” should be rejected. *See* Waterkeeper’s Second Brief at 42- 47. State water quality standards, through the designation of uses, provide

specific goals for attainment. *See* 33 U.S.C. § 1251(a)(2). Where applicable and attainable, Montana’s Base WQS provided the underlying end goal for the control of nutrient discharges in Montana. 2 E.R. 246-47.

Waterkeeper’s argument that the variance will be in place “perpetually” wholly ignores Montana’s vigorous general variance reevaluation process, as well as the discharge permitting process -- processes that are on-going and will ensure progress is made toward the underlying Base WQS. 2 E.R. 192-93.

The variance-based water quality standards in DEQ-12B are implemented for purposes of regulating point source dischargers under the Montana Pollutant Discharge Elimination System Program (“MPDES”) and related MPDES discharge permits. 2 E.R. 192. Although Montana’s general variance now allows *up to* the year 2034 to reach the highest attainable condition (“HAC”), the HAC must recurrently undergo a three-year reevaluation to determine if the variance is still justified, i.e., if the HAC values<sup>5</sup> need to become stricter, stay the same, or if a variance is no longer needed at all. 2 E.R. 192-93. These procedures are subject to public comment and the results of such reevaluations must be submitted to EPA within 30 days of their completion. 40 C.F.R. § 131.14(b)(1)(v). Unless and until this triennial review is completed, the general variance cannot be used to issue MPDES permits. 2 E.R. 193; 40 C.F.R. § 131.14(b)(1)(vi).

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<sup>5</sup> The district court also refers to these values as the Current Variance Standard.

Each permittee's eligibility for the general variance will also be treated on a case-by-case basis during the MPDES permitting process, which occurs on a five-year cycle. *See* Mont. Admin. R. 17.30.1346(1). If Montana determines, during periodic permit review, that the general variance is no longer necessary, its use may not be granted. Indeed, no permittee is guaranteed to have the use of the general variance or the entire term of the variance to reach the HAC values, as listed on Table 12B-1 of the variance. 2 E.R. 192. The district court specifically recognized that the general variance was not broadly guaranteed to all permittees. *See Upper Mo. Waterkeeper*, 377 F. Supp. 3d at 1168 (finding "DEQ's and EPA's interpretation of the variance rule properly requires a case-by-case analysis of dischargers that qualify for the variance."). While *Waterkeeper* tries to convince the sky is falling, the checks and balances built into Montana's general variance process and EPA's regulations ensure that progress will continue toward the HAC and the underlying WQS.

The district court also erred when it concluded EPA's interpretation of its regulations established a variance without any time-limited designation. *See Upper Mo. Waterkeeper*, 377 F. Supp. 3d at 1169. The district court's error essentially nullifies variances and converts them into compliance schedules. The district's court's flawed determination that EPA's construction of its rule creates a "variance from a variance," also ignores the obvious detail that progress toward the HAC

naturally provides progress toward meeting the Base WQS. Furthermore, the HAC represents a condition beyond which additional wastewater treatment expenditures would cause substantial and widespread social and economic impacts. Provided HAC levels are properly based upon such impacts – a determination that goes unchallenged here – any decision requiring a permittee to meet the Base WQS by a certain date is unquestionably arbitrary and capricious. That is because the Base WQS are unattainable.

Furthermore, the fact that EPA's rule could allow a future variance after the present variance expires is a case for another day. If EPA should choose to approve an additional variance in the future, EPA would need to make a proper record to demonstrate that variance was justified. That future action is not before the Court, and regardless, Montana's variance is time-bounded. Each portion of the general variance EPA approved on October 31, 2017, whether for mechanical treatment systems (17 years) or lagoons (10 years), ends on a date certain. *See Upper Mo. Waterkeeper*, 377 F. Supp. 3d at 1167-68. The notion that EPA's regulation *could* be used to grant an additional variance beyond the approved term is not ripe and certainly does not involve the application of EPA's rule to the challenged general variance.

Waterkeeper's concern, i.e., EPA's rule allows for an additional variance in the future, can only be addressed through a frontal challenge of the rule.

Waterkeeper only challenged the application of the rule. *Id.* at 1163. Thus, the district court was limited to EPA's application of its variance rule to Montana's 2017 version of its general variance and should not have engaged in a prospective analysis. EPA's application of its rule was reasonable and complied with both the CWA and the plain term language of 40 C.F.R. § 131.14.

Waterkeeper also dismisses Montana's own variance statute, which specifically limits the general variance to a maximum term of twenty years. Mont. Code Ann. § 75-5-313(8). *See* Waterkeeper's Second Brief at 21, n. 4.

Waterkeeper claims Montana's arguments here are "specious" and then provides three citations, purportedly showing that Montana "can and will" renew the variance. *Id.* Yet the cited documents only concern Montana's three-year reevaluation of the variance that occurs *during its overall term* - not an extension beyond the original twenty years. *See* Waterkeeper E.R. 79, 293-04, and 300.<sup>6</sup> Montana's law provides yet another backstop to the variance and contradicts Waterkeeper's characterization that the variance has no end.

Waterkeeper's alarms of a perpetual variance are easily dismissed by the limitations of EPA's approval, the vigorous variance reevaluation and permit review requirements, and Montana's own variance statute.

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<sup>6</sup> The citation at Waterkeeper E.R. 79 is the 2014 version of the Montana's general variance, which is not the subject of this litigation and was adopted by Montana and approved by EPA prior to the adoption of 40 C.F.R. § 131.14.

## **2. Permittees Are Not Simply Provided 17 Years to Reach the HAC Values**

During the term of the variance, Montana's general variance requires compliance with the HAC as soon as possible. 2 E.R. 193. The variance also recognizes that individual permittees may be at different stages of compliance. If permittees can meet the HAC treatment requirements sooner than 17 years, they must maintain those treatment requirements. 2 E.R. 195. Permittees that were achieving treatment levels better than the HAC values listed on Table 12B-1 as of July 1, 2017 (i.e., the effective day of the variance), are additionally held to those levels. 2 E.R. 192.

If a permittee achieves the treatment levels in Table 12B-1 before the end of the variance's term, they must, at a minimum, maintain those levels and implement a pollutant minimization program to improve their existing processes and controls. Montana must review and approve these plans and incorporate these individualized programs as binding requirements into MPDES permits. 2 E.R. 195-96. These programs are designed to continually make progress toward the Base WQS, once the specific HAC values are achieved. Of course, while this is occurring, the HAC values are periodically being reevaluated and more stringent requirements must be adopted if they become attainable. 2 E.R. 192-93; 40 C.F.R. § 131.14(b)(1)(v). When permittees achieve the required HAC values and implement pollutant minimization programs, existing water quality is maintained and improved.

Waterkeeper's assertion that during the variance period "pollution continues unabated" simply does not square with the clear language of the general variance. *See* Waterkeeper's Second Brief at 40.

Montana's general variance recognizes that certain dischargers may be at different stages of compliance, and, if permittees are able to meet the HAC values before the end of the variance term, they are required to maintain those treatment requirements. Waterkeeper's claim the variance allows "pollution to continue unabated" misrepresents the requirements of Montana's variance regulation -- eligible permittees are not simply provided 17 years to meet the HAC values found at Table 12B-1. Once these values are achieved, permittees must continue to optimize and improve their facilities' operations through the implementation of pollutant minimization programs, individually reviewed by Montana and incorporated into MPDES permits.

## **CONCLUSION**

EPA has interpreted the Clean Water Act to allow for water quality standards variances. EPA's long-held interpretations should be deferred to. Working with its federal partner EPA, Montana communities, local environmental organizations, and industry groups, Montana moved ahead with its Base WQS and took a progressive step toward the control of nutrients. Montana could move

forward with its Base WQS because it knew a variance would be in place to protect its communities from significant and widespread harm. Such considerations were properly upheld by the district court.

The district court erred to the extent it concluded a variance must prescribe a date certain for permittees to meet the unattainable Base WQS. EPA's regulation concerning a variance's term are specific and unambiguous. To the extent there is any ambiguity, EPA's interpretation should be deferred to.

The judgment of the district court vacating EPA's October 31, 2017 approval of Montana's general nutrient standards variance should be reversed.

DATED this 5<sup>th</sup> day of October, 2020.

/s/ Kurt R. Moser  
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**FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS**

**9th Cir. Case Number 20-35135**

I am the attorney or self-represented party.

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Signature    */s/ Kurt R. Moser*

Date            October 5, 2020

## CERTIFICATE OF SERVICE

I certify that on October 5, 2020, I electronically filed the foregoing Third Brief on Cross-Appeals with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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

DATED this 5<sup>th</sup> day of October, 2020.

/s/ Kurt R. Moser  
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