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

vs.

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

Defendant-Appellant;

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

Intervenor-Defendants;

and

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

Intervenor-Defendant-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

THIRD BRIEF ON CROSS-APPEAL FOR INTERVENOR-DEFENDANT APPELLANTS NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES AND MONTANA LEAGUE OF CITIES AND TOWNS

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APA	Administrative Procedure Act
CWA	Clean Water Act
EPA	United States Environmental Protection Agency
MDEQ	Montana Department of Environmental Quality
NACWA	National Association of Clean Water Agencies
NPDES	National Pollutant Discharge Elimination System
WQS	Water Quality Standards

INTRODUCTION

Variances, like the 2017 Variance at issue in this case, are critically important regulatory compliance tools that Municipal Appellants'[1] members in Montana and across the country routinely use to promote Clean Water Act (CWA) compliance and improve water quality. In its brief on cross-appeal, Upper Missouri Waterkeeper (Waterkeeper) attempts to prevent this Court from addressing important issues regarding water quality standards variances by asserting that the case is moot. Waterkeeper also reiterates its failed argument from the lower court that the CWA does not allow for consideration of costs in setting water quality standards, and in so doing now also claims that water quality standards variances, including the 2017 Variance, do not protect designated uses as required by the CWA. Waterkeeper is wrong on all counts. Municipal Appellants submit this brief in further support of the United States' arguments on mootness and the legitimacy of water quality standards variances, including the 2017 Variance, and to emphasize certain points of particular importance to Municipal Appellants' members.

This Court should affirm the judgment below as to the ability of states to adopt, and EPA to approve, water quality standards variances. Further, this Court should reverse and vacate the judgment below as to the District Court's rulings on

[1] Municipal Appellants refers to Defendant-Intervenor-Appellants, the National Association of Clean Water Agencies and the Montana League of Cities and Towns.

the need for variances to require compliance with the "highest attainable condition" at the beginning of the variance term, and the need for variances to require compliance with underlying water quality standards at the end of the variance term.

STATEMENT OF ISSUES

In addition to the issues raised by Municipal Appellants in their appeal, Waterkeeper raised the following issues in its cross-appeal:

Issue 1: Whether this Court retains jurisdiction over the appeals, notwithstanding Waterkeeper's claim that administrative actions taken as a direct result of the District Court's judgment have rendered this appeal moot.

Issue 2: Whether the CWA allows for the use of water quality standards variances such as the 2017 Variance.

STATEMENT OF THE CASE

The proceedings relevant to the issues on appeal are fully described in Municipal Appellants' First Brief on Cross-Appeal (filed June 23, 2020), at pp. 5–9. Additionally, Municipal Appellants incorporate by reference the United States' discussion of the proceedings in EPA's Third Brief on Cross-Appeal (filed June 9, 2020), at pp. 4–8.

SUMMARY OF ARGUMENT

Waterkeeper cannot meet the heavy burden of establishing mootness on appeal. First, this Court can grant effective relief by overturning the District Court's

ruling. Overturning the District Court's ruling will restore both the 2017 Variance and the underlying water quality standards, which is the relief Municipal Appellants seek. Second, the incompatible positions that Waterkeeper has taken regarding the effect of the "non-severability provision" in this case versus its newly-filed litigation seeking to overturn that same provision belie Waterkeeper's mootness arguments. Additionally, the principle of judicial estoppel should apply to such gamesmanship.

Municipalities in Montana and across the nation rely on CWA variances to provide time to implement adaptive management approaches to improve water quality where immediate achievement of otherwise-applicable stringent standards is either technologically infeasible or would result in substantial and widespread economic and social harm. Montana is the first state in the nation to promulgate strict numeric nutrient criteria in conjunction with water quality standards variances, and the State appropriately adopted a narrowly-tailored water variance that provides a specific set of dischargers—namely, public clean water utilities—the opportunity to work toward attainment over time.

Of particular concern to Municipal Appellants is that Waterkeeper's broad challenges not only call into question the legitimacy of the 2017 Variance at issue here, but also EPA's ability to *ever* authorize water quality standards variances. Absent the availability of these variances, the communities served by Municipal Appellants' members, including those outside of Montana, would face enormous

costs and undue burdens while being placed in the untenable position of having to comply with permit limits that are currently technologically or economically unattainable. Such an outcome, which could place municipalities in an endless cycle of CWA noncompliance, is contrary to the purpose and objectives of the Clean Water Act and is in fact exactly what EPA's water quality standards variance regulations are designed to prevent.

As correctly explained by the United States, water quality standards variances, and use attainability analyses, are lawful and necessary regulatory compliance mechanisms that appropriately allow for consideration of widespread economic and social impacts in the determination of applicable water quality standards. Contrary to Waterkeeper's assertions, water quality standards variances also fully comply with the CWA requirement that water quality criteria be protective of designated uses. As articulated in the federal water quality standards regulations, Waterkeeper has inexplicably failed to reference, water quality standards variances include for a specific pollutant both: (1) a temporarily modified designated use based on a duly completed analysis of use attainability; and (2) a temporarily modified criterion that is protective of that use.

EPA provided a detailed rationale describing how the 2017 Variance meets each of these CWA regulatory requirements, and Waterkeeper has not challenged either EPA's findings supporting its approval of the 2017 Variance or the underlying

water quality standards regulations upon which EPA's approval was based. Nevertheless, the District Court declined to defer to EPA's reasoned decision-making, and inappropriately substituted its own judgment on the technical workings of the variance process for EPA's longstanding expertise. This Court should overturn that aspect of the District Court's ruling.

The water quality standards variance process utilized here by EPA and Montana allows for the temporary modification of a designated use and criterion associated with a specific pollutant to avoid unacceptable widespread economic and societal impacts. This process fully complies with all requirements of the CWA and constitutes a reasonable exercise of regulatory authority that serves the purposes of the Act to achieve meaningful water quality improvements and support (as required by CWA Section 101(a)(2)) "the protection and propagation of fish, shellfish, and wildlife and provide for recreation" wherever attainable. Public clean water agencies have relied on water quality standards variances for decades to significantly improve water quality nationwide in a manner that does not unduly burden the communities they serve. This Court should overturn the portion of the District Court's decision that would upend this vital CWA tool.

STANDARD OF REVIEW

This court reviews *de novo* a district court's interpretation of the CWA and its rulings. *Nw. Envtl. Def. Ctr. v. Brown*, 640 F.3d 1063, 1069 (9th Cir. 2011), *rev'd*

on other grounds, 133 S. Ct. 1326 (2013) (citing *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2002)) (holding that an appellate court "reviews *de novo* a district court's interpretation of the CWA and its implementing regulations."). *De novo* review of a district court judgment concerning the decision of an administrative agency means an appellate court views the case from the same position as the district court. *Ka Makani 'O Kohala Ghana. Inc. v. Water Supply*, 295 F.3d 955, 959 (9th Cir. 2002). The court reviews "the district court's application of law to facts for clear error where it is 'strictly factual,' but *de novo* where application of law to fact requires 'consideration of legal principles.'" *Masayesva v. Zah*, 65 F.3d 1445, 1453 (9th Cir. 1995) (citing *United States v. McConney*, 728 F.2d 1195, 1202–04 (9th Cir. 1984) (en banc)).

A court may set aside an agency action under the Administrative Procedure Act (APA) only if the court determines that the action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Nat'l. Wildlife Fed'n.*, 384 F.3d at 1170 (quoting 5 U.S.C. § 706(2)(A)). This standard "is a narrow one," under which the court is not "to substitute its judgment for that of the agency." *Bowman Transp. Inc. v. Arkansas-Best Freight System, Inc.* 419 U.S. 281, 285 (1975) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). Rather, the court must ensure that the agency based the decision upon relevant factors and not a "clear error of judgment." *NRDC v. EPA*, 966 F.2d 1292,

1297 (9th Cir. 1992). Greater deference is given to an agency with regard to factual questions involving scientific matters in its own area of technical expertise. *See Baltimore Gas & Electric Co. v. NRDC*, 462 U.S. 87, 103 (1983); *United States v. Alpine Land & Reservoir Co*., 887 F.2d 207, 213 (9th Cir. 1989).

Judicial deference to an agency's decision extends to an agency's interpretation of a statute it administers. *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842–45 (1984). In reviewing an agency's construction of such a statute, a court must first decide "whether Congress has directly spoken to the precise question at issue." *Id*. at 842-43. "[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency's answer is based on a permissible construction of the statute." *Id*. at 843. To uphold EPA's interpretation of the Act, a court need not find that EPA's interpretation is the only permissible construction that EPA might have adopted, but only that EPA's interpretation is reasonable. *Chemical Mfrs. Ass'n. v. NRDC*, 470 U.S. 116, 125 (1985). When the interpretation involves reconciling conflicting policies committed by the statute to an agency's expertise, deference is particularly appropriate. *Chevron U.S.A.*, 467 U.S. at 844.

In view of this highly deferential standard, this Court should reject Waterkeeper's challenges and uphold EPA's approval of the 2017 Variance.

ARGUMENT

I. The Appeals Are Not Moot.

A. Effective Relief

A party bears a "heavy burden" to establish mootness at the appellate stage. *Ctr. for Biological Diversity v. Export-Import Bank of the U.S.*, 894 F.3d 1005, 1011 (9th Cir. 2018) (citation omitted). To establish mootness, a party must show that "there is no longer a possibility that [Plaintiffs] can obtain relief for [their] claim." *Id.* (citing *Timbisha Shoshone Tribe v. U.S. Dep't. of the Interior*, 824 F.3d 807, 812 (9th Cir. 2016)). "Put another way, a case is moot on appeal only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Ctr. for Biological Diversity* 894 F.3d at 1011 (citing *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (citation and internal quotation marks omitted)).

In support of its mootness claim, Waterkeeper inexplicably asserts that the events undertaken as a *direct result* of the District Court's ruling invalidating the 2017 Variance—the ruling Municipal Appellants are appealing here—negate any possibility of relief from this Court. Specifically, Waterkeeper argues that there is no underlying case or controversy because the self-executing provisions of ARM § 17.30.619(2) have been triggered, which effectively invalidated the underlying numeric nutrient criteria that the 2017 Variance was designed to address. According to Waterkeeper's tortured logic, because the underlying criteria from which the 2017

Variance granted relief are no longer in effect, this Court cannot provide any viable remedy. Waterkeeper Second Brief on Cross-Appeal (filed July 27, 2020), at p. 12.

This position is both disingenuous and incorrect as a matter of law. Municipal Appellants support and incorporate by reference EPA's response to Waterkeeper's mootness argument found in Section I of EPA's Third Brief on Cross Appeal. EPA Third Brief on Cross-Appeal (filed September 21, 2020), at pp. 17–23. There is simply no question that this Court can provide effective relief in this matter. *But for* the District Court's ruling negating the 2017 Variance, the cascade of events which followed would not have occurred and Montana would not currently be devoid of its numeric nutrient criteria or the 2017 Variance. Were this Court to grant the relief sought by Municipal Appellants to reverse that judgment and vacate the District Court's remedy order as void *ab initio*, the 2017 Variance and the numeric nutrient criteria would be automatically reinstated as though they had never been set aside.

Accordingly, notwithstanding Waterkeeper's assertions to the contrary, this Court's reasoning in *Bd. of Trs. of Glazing Health & Welfare Tr. v. Chambers*, 941 F.3d 1195 (9th Cir. 2019) supports a finding that this matter is *not* moot. In that case, this Court held that a court should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot *unless* there is a reasonable expectation that the legislative body will reenact the challenged

provision or one similar to it.[2] Here, the 2017 Variance is *only* invalid because of the District Court's decision, and it will be reinstated if this appeal is successful. Indeed, in the EPA-approved amendment to Mont. Admin. R. 17.30.660(9), Montana specified in relevant part that if "a court of competent jurisdiction" were to determine that EPA's approval of the 2017 Variance was "valid and lawful," the 2017 Variance would be the applicable rule.[3] A determination from this Court that EPA's approval of the 2017 Variance was valid and lawful would therefore provide effective relief to the Municipal Appellants and the other challenging parties.

B. Non-Severability Provision Litigation and Judicial Estoppel

Waterkeeper's mootness argument is premised on the legal validity and effectiveness of ARM § 17.30.619(2), which is a non-severability provision. In this case, Waterkeeper takes the position that the non-severability provision is not only valid, but that once it was triggered by the District Court's ruling, it eliminated any potential for effective relief on appeal by negating the underlying numeric nutrient criteria and eliminating any ongoing case or controversy.

But, unfortunately, Waterkeeper wants to have it both ways. On March 31, 2020, Waterkeeper filed a new lawsuit in the District of Montana claiming that EPA's approval of the non-severability provision of ARM §§ 17.30.619(2) and

[2] This mootness analysis is equally applicable to administrative rules. *See, e.g.*, *Bradley v. Nooth*, No. 2:16-cv-1377-PK, at *15 (D. Or. Mar. 27, 2018).
[3] *See* http://www.mtrules.org/gateway/RuleNo.asp?RN=17%2E30%2E660.

17.30.715(4) was improper and illegal. As a legal matter, were Waterkeeper to prevail in its separate litigation over the non-severability provision, the foundation of its mootness argument—namely, the negation of the underlying numeric criteria triggered by the non-severability provision—would itself be negated. Put another way, Waterkeeper's mootness argument in this case is entirely premised on the legality of a provision it is challenging as illegal in front of another court in this circuit. *See* EPA Third Brief on Cross-Appeal (filed September 21, 2020), at pp. 4 n.1, 8.

Although the District Court has not yet ruled on Waterkeeper's new claim that EPA's approval of the non-severability provision was invalid, were it to do so, the numeric nutrient criteria upon which the 2017 Variance was premised would presumably be reinstated. However, Waterkeeper is also simultaneously attempting to deprive Municipal Appellants of their ability to appeal the District Court's decision on the 2017 Variance addressing those very criteria to this Court by claiming that the non-severability provision makes this case moot. In doing so, Waterkeeper is seeking to impose an unfair detriment on Municipal Appellants and the other parties to this case. This kind of disingenuous legal conduct should not be allowed.

Not only do Waterkeeper's assertions in the non-severability provision litigation dramatically undercut Waterkeeper's mootness argument in this case, they

also provide a basis for this Court to strike Waterkeeper's mootness arguments under the doctrine of judicial estoppel. "Judicial estoppel, sometimes also known as the doctrine of preclusion of inconsistent positions, precludes a party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position." *Rissetto v. Plumbers Steamfitters Local* 343, 94 F.3d 597, 601 (9th Cir. 1996). "The application of judicial estoppel is not limited to bar the assertion of inconsistent positions in the same litigation, but is also appropriate to bar litigants from making incompatible statements in two different cases." *Hamilton v. State Farm Fire Cas. Co.*, 270 F.3d 778, 783 (9th Cir. 2001) (citing *Rissetto*, 94 F.3d at 605). "This Court invokes judicial estoppel not only to prevent a party from gaining an advantage by taking inconsistent positions, but also because of general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings, and to protect against a litigant playing fast and loose with the courts." *Hamilton*, 270 F.3d at 782 (citations and internal quotation marks omitted).

As this Court has explained, three factors typically inform a decision to apply the doctrine of judicial estoppel: (1) Whether the party's positions in each case are clearly inconsistent; (2) Whether the party has succeeded in persuading a court to accept its inconsistent position indicating the first or second court was misled; and (3) Whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose and unfair detriment on the opposing party if not

estopped. *Id*. at 782-83 (citing *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001)).

The first and third factors identified above are clearly satisfied here, especially given Waterkeeper's reliance on the non-severability provision to support its mootness arguments in this case. Although at the time of this briefing Waterkeeper has not yet succeeded in persuading the District Court that EPA's approval of the non-severability provision was invalid, it may do so during the course of this appeal. Given that judicial estoppel is a discretionary equitable remedy, it is also possible for this Court to apply it *prior* to Waterkeeper "succeeding" on its diametrically inconsistent argument in its other lawsuit. This Court has recognized that a number of Circuits hold that the doctrine applies even if the litigant was unsuccessful in asserting the inconsistent position, if by its change of position it is playing "fast and loose" with the court. *Rissetto*, 94 F.3d at 601 (citations and quotation marks omitted). Waterkeeper is engaging in such gamesmanship here, and as a result, should be estopped from asserting mootness by relying on the non-severability provision that it is simultaneously arguing is invalid before the District Court.

II. Water Quality Standards Variances Are Critical CWA Tools for Municipal Appellants' Members.

Water quality standards variances are of paramount importance to Municipal Appellants' members throughout Montana and the nation, as they provide critical flexibility to communities when immediate attainment of certain stringent standards

is either technically infeasible or would lead to widespread social and economic harm. Waterkeeper's broad and unfounded assertions about the legality of variances call into question not only Montana's nutrient variance, but all variances, and indeed all potential modifications of designated uses based on economic, technical, and societal impacts. Rejection of those claims is critical for clean water utilities both in Montana and nationwide.

By way of example, the City of Bozeman is a member of both NACWA and the League. Bozeman would face significant development and construction burdens in trying to meet Montana's strict nutrient criteria in the foreseeable future, and the City may in fact be unable to ever meet these criteria at all. Without a variance temporarily modifying the standards applicable to Bozeman, the City could be subject to enforcement actions, penalties, and litigation for failing to meet standards it objectively cannot feasibly meet without overburdening its citizens through untenable rate increases. Instead, the variance allows the City to focus its municipal resources on meaningful water quality improvements that will improve the health and well-being of its communities. The administrative record in this case is full of examples of other communities across Montana that face similar hurdles. *See* EPA Excerpts of Record (filed June 9, 2020), 2 E.R. 183–188. This record evidence forms the foundation of EPA's approval of the 2017 Variance, for it establishes the substantial and widespread social and economic impacts that would result absent a

water quality standards variance.

Water quality standards variances are also critical to NACWA members who are working to comply with new regulatory mandates across the country. In particular, other states are working to develop stringent numeric nutrient criteria, and it is critical that they have a tailored mechanism to allow public clean water utilities time where appropriate to make water quality improvements and maintain CWA compliance even where those numeric limits are not yet achievable. Should Waterkeeper prevail in this appeal, the case will call into question EPA's ability to authorize such variances. It is critical to Municipal Appellants' members, who are dedicated to ensuring the highest and most effective levels of environmental and public health protection, that this Court acknowledge the important policy goals served by water quality standards variances and uphold their validity.

III. Variances Protect Designated Uses.

As explained by EPA, water quality standards variances establish temporarily applicable water quality standards—designated uses and criteria—for specified pollutants. *See* Proposed Rule on Water Quality Standards Regulatory Clarifications, 78 Fed. Reg. 54517, 54532 (September 4, 2013) ("Variances are WQS subject to EPA review and approval or disapproval. . . ."). Water quality standards variances can either apply to an entire waterbody or waterbody segment, or, as is the case with the 2017 Variance, can be more narrowly tailored to only apply

to specific dischargers within a waterbody while the underlying water quality standards continue to apply to all other dischargers.

EPA's water quality standards rules outline the use of water quality standards variances. As EPA explained, "[v]ariances can be appropriate to address situations where it is known that the designated use and criterion are unattainable today (or for a limited period of time) but feasible progress could be made toward attaining the designated use and criterion." *Id*. Importantly, a variance reflects a temporarily modified designated use—which must be based on a duly completed analysis of use attainability—and a temporary criterion that is protective of that use upon which permitting requirements will be based. In other words, while variances temporarily change the applicable designated use if the requisite analysis of use attainability is performed, the modified criterion set by the variance must still be fully protective of that use. In turn, the permit limits set according to the variance fully comply with the CWA's requirements.

This process of establishing lawful temporary water quality standards—which, notably, Waterkeeper neither references nor challenges—is straightforward for variances that modify a designated use and criterion for a waterbody or waterbody segment. As EPA notes, waterbody or waterbody segment water quality standards variances "must explicitly articulate the highest attainable condition as the

highest attainable interim designated use and interim criterion." 80 Fed. Reg. 51020, 51037 (August 21, 2015).

Discharger-specific variances, however, are more limited in nature and only temporarily alter the designated use and criterion for specific permittees, not for the entire waterbody. They are the most narrowly tailored type of water quality standards variance. As EPA has explained, the water quality standards regulations "provide states and authorized tribes with different options to specify the highest attainable condition depending on whether the variance applies to a specific discharger(s) or to a water body or waterbody segment." *Id*.

Importantly, for discharger-specific variances such as the 2017 variance, EPA's regulations provide as follows:

> [T]he rule allow states and authorized tribes to express the highest attainable condition as an interim criterion without specifying the designated use it supports. . . [as] the level of protection afforded by meeting the highest attainable criterion in the immediate area of the discharge(s) results in the highest attainable interim use at that location. Therefore, the highest attainable interim criterion is a reasonable surrogate for both the highest attainable interim use and interim criterion when the water quality standards variance applies to a specific discharger(s). For similar reasons. . . states and authorized tribes may choose to articulate the highest attainable condition as the highest attainable effluent condition.

Id. In this way, EPA has ensured that when discharger-specific variances are issued, the designated use is fully protected.

As detailed in Municipal Appellants' First Brief on Cross-Appeal, the District Court upheld as reasonable EPA's variance regulations, which allow for consideration of practical factors such as "substantial and widespread economic and social impact" in setting modified water quality standards. Variances issued under these rules do ensure the protection of designated uses. The District Court's holding with respect to the reasonableness of EPA's variance regulations should be affirmed, and this Court should decline to entertain Waterkeeper's challenge to the 2017 Variance.

IV. The 2017 Variance Complies with the Clean Water Act and EPA's Implementing Regulations; the District Court Erred in Striking Down EPA's Approval.

As with all water quality standards, a state's decision to adopt a variance is subject to EPA review for and approval or disapproval. *Id.* at 54533. In turn, a court reviewing EPA's action approving or disapproving a variance—an area squarely within the agency's expertise—should afford the "highest deference" to the agency's "technical analyses and judgments." *Natural Resources Defense Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016) (quoting *League of Wilderness Defs. Blue Mountains Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1131 (9th Cir. 2010)).

Here, EPA approved the state's decision to grant a variance to specified dischargers for nutrients, and Waterkeeper has not challenged either the underlying factual bases supporting EPA's approval of the 2017 Variance or the regulations

upon which EPA's approval was based. Rather, Waterkeeper alleged that the 2017 Variance contravenes the CWA because all water quality standards must be developed without regard to implementation costs, despite the fact—and indeed failing to even acknowledge the fact—that EPA's regulations expressly provide for cost considerations in the adoption of designated uses. Accordingly, this case involves issues relating to EPA's regulatory interpretation and the District Court's judicial review of that interpretation. The District Court erred by substituting its own judgment for that of the Agency's and by failing to afford appropriate deference to the Agency's interpretations of its own water quality standards rules.

EPA's approval of the 2017 Variance explains how the variance meets the requirements of the CWA. Specifically, EPA's approval letter outlines how the 2017 Variance meets each of the variance requirements contained in EPA's duly promulgated water quality standards regulations found at 40 C.F.R. § 131.14(a–b). EPA Excerpts of Record (filed June 9, 2020), 2 E.R. 138–188.

In satisfaction of 40 C.F.R. § 131.14(a)(2–4), EPA found that the State retained its aquatic life uses and the numeric criteria that were adopted to protect those uses during the term of the variance. 2 E.R. 146. EPA also acknowledged the State's statement that the general variance was applicable for the limited purposes of developing NPDES permit limits. *Id*. And, EPA approved the State's demonstration that the underlying designated use and criteria addressed by the

general variance cannot be achieved by implementing the National Secondary Treatment Standards limits required by Clean Water Act sections 301(b) and 306. *Id*. With respect to 40 C.F.R. §§ 131.14(a)(1) and 131.14(b)(1)(i), EPA relied upon MDEQ's "statement in rule that describes specific binding conditions that identify the characteristics of dischargers that are within the scope of the state's submitted variance," as well as a public list of dischargers likely to need a variance. 2 E.R. 147–152.

Most importantly for the present case, EPA's letter approving the variance explains how MDEQ's economic analysis adequately demonstrated that "communities would incur substantial and widespread economic and social impacts if dischargers were required to install [reverse osmosis] to meet the underlying standards approved by the EPA as the applicable water quality criteria in 2015." 2 E.R. 152–162. To meet the requirements of 40 C.F.R. § 131.14(b)(2)(i)(A), MDEQ appropriately analyzed data for classes of dischargers and evaluated both public wastewater discharges and private, non-POTW permittees. *Id*.

EPA likewise reasonably approved MDEQ's expressions of the highest attainable condition for the three categories of discharges to which the general variance applies. 2 E.R. 162–179. EPA also detailed its approval of MDEQ's specified term for the variance, as required pursuant to 40 C.F.R. § 131.14(b)(1)(iv), finding that the term was only as long as necessary to achieve the highest attainable

condition consistent with the documentation MDEQ provided. 2 E.R. 179–183. Finally, EPA approved MDEQ's triennial review process for reevaluation of the highest attainable condition, and determined that it satisfied the requirements of 40 C.F.R. § 131.14(b)(1)(iii), (v), and (vi). 2 E.R. 179–185. None of these findings by the State, or EPA's approval of the findings, have been challenged by Waterkeeper. The District Court committed clear error by nevertheless overruling EPA's approval of the 2017 Variance, and that holding should be overturned.

CONCLUSION

For the foregoing reasons, Municipal Appellants respectfully request that this Court affirm the judgment below as to the ability of States to adopt, and EPA to approve, water quality standards variances. We respectfully request that this Court reverse and vacate the judgment below as to the District Court's rulings on the need for variances to require compliance with the "highest attainable condition" at the beginning of the variance term, and the need for variances to require compliance with underlying water quality standards at the end of the variance term.

Respectfully submitted,

Dated: October 5, 2020

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CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s) 20-35136

I am the attorney or self-represented party.

This brief contains 4,808 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).

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Signature /s/ *Fredric P. Andes*

Signature /s/ *Catherine A. Laughner*

Date: October 5, 2020

CERTIFICATE OF SERVICE

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

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Dated: October 5, 2020

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