Fredric P. Andes (*admitted pro hac vice*)
BARNES & THORNBURG LLP
1 North Wacker Drive, Suite 4400
Chicago, Illinois 60606
Tel: (312) 357-1313
fredric.andes@btlaw.com

Paul M. Drucker (*admitted pro hac vice*)
BARNES & THORNBURG LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Tel: (317) 231-7710
pdrucker@btlaw.com

Murry Warhank
JACKSON, MURDO & GRANT, P.C.
203 North Ewing Street
Helena, Montana 59601
Tel: (406) 442-1308
mwarhank@jmgm.com

Attorneys for National Association of Clean Water Agencies

Catherine A. Laughner
M. Christy S. McCann
BROWNING, KALECZYC, BERRY & HOVEN, P.C.
801 West Main, Suite 2A
Bozeman, Montana 59715
Tel: (406) 585-0888
cathyl@bkbh.com
christy@bkbh.com

Attorneys for Montana League of Cities and Towns

UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency, Defendants, and STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; TREASURE STATE RESOURCES ASSOCIATION OF MONTANA; MONTANA LEAGUE OF CITIES AND TOWNS; and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Defendant Intervenors.	Consolidated Case Nos.: 4:16-cv-00052-GF-BMM 4:20-cv-00027-GF-BMM **DEFENDANT-INTERVENORS NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' AND THE MONTANA LEAGUE OF CITIES AND TOWNS' BRIEF IN SUPPORT OF MOTION TO STAY CONSOLIDATED ORDER PENDING APPEAL** Judge: Hon. Brian Morris

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Rules

Other Authorities

I. INTRODUCTION

When the parties appealed this Court's summary judgment order (Dkt. No. 177) (March Order), the July 16, 2019 order regarding remedies (Dkt. No. 184) (July Order or Remedies Order), and the September 20, 2019 final judgment entering the March and July Orders (Dkt. 187) (collectively, "2019 Orders") in "*Waterkeeper I*," (CV-16-52-GF-BMM) to the Ninth Circuit, this Court was divested of jurisdiction over the issues that were appealed. This "divesture rule" is black-letter law in the Ninth Circuit, with narrow exceptions that are not applicable here. Its purposes include promoting judicial economy and avoiding the confusion of having the same issues addressed simultaneously in two different courts. Indeed, the appeal of the 2019 Orders in *Waterkeeper I* is fully briefed before the Ninth Circuit and oral argument is currently being scheduled.[1]

Notwithstanding the divestiture rule, and without any of the *Waterkeeper I* parties filing any motion or seeking any relief from the District Court, on October 30, 2020, the Court, *sua sponte*, and without advance notice to any party, entered an order in *Upper Missouri Waterkeeper v. U.S. Envtl. Protection Agency*, Case No. CV-20-27-GF-BMM (D. Mont. 2020) ("*Waterkeeper II*") (Dkt. 72) ("Consolidated

[1] The other parties have been contacted regarding their position on the Motion that is supported by this Brief. Treasure State Resources Association of Montana concurs in the Motion, U.S. EPA and Wheeler support the stay of the Consolidated Order requested in the Motion, the Montana Department of Environmental Quality does not oppose the motion, and Plaintiff will object to the Motion.

Order") that: (1) consolidated *Waterkeeper I* with *Waterkeeper II*; and (2) required actions to be taken by the *Waterkeeper I* defendants that are directly related to the same issues currently on appeal before the Ninth Circuit. Specifically, the District Court ordered the Montana Department of Environmental Quality ("MDEQ") to engage in a new round of rulemaking to adopt revised general variance timelines within 120 days of the Consolidated Order, and for EPA to complete its review of these new timelines, as incorporated into MDEQ's Water Quality Standards ("WQS") submission, within 90 days of receipt of the WQS from MDEQ. The District Court stated that these actions were necessary to comply with the Court's previous 2019 Orders and its interpretation of the Clean Water Act ("CWA"). Yet, the 2019 Orders and the District Court's interpretation of the CWA are exactly what is currently being appealed by the *Waterkeeper I* parties. This Court's Consolidated Order thus ignores the divestiture rule in an attempt to force MDEQ to affirmatively issue a new variance both MDEQ and EPA contend would be based on an inappropriate application of the requirements of the CWA and its implementing regulations before the Ninth Circuit can rule on the issues relating to the legality of the variance on appeal, thus causing irreparable harm to the Defendant-Intervenors.

The Consolidated Order, moreover, was a result of proceedings in the *Waterkeeper II* case, a matter in which not all Defendant-Intervenors are parties. The Court's *sua sponte* order denied the affected parties in *Waterkeeper I* notice and

opportunity to be heard and, thereby, violated procedural due process requirements. *See, e.g., Cole v. U.S. Dist. Court for Dist. of Idaho*, 366 F.3d 813, 821 (9th Cir. 2004) ("procedural due process requires notice and an opportunity to be heard"). Providing the minimal procedural requirements of notice and opportunity to be heard would have allowed the parties to come before the Court and explain their positions on the status of implementation of the orders. *See id*. Instead, the Court relied on information discerned in *Waterkeeper II* and ordered new relief in *Waterkeeper I*, without making any factual findings or providing notice and opportunity to be heard to all affected parties. In addition to violating the divestiture rule, the Court's failure to provide notice and opportunity to be heard violated procedural due process, and, as such, the Consolidated Order should be stayed. *See id*.

This Court noted that MDEQ conducted rulemaking following the Remedies Order in *Waterkeeper I* and submitted the new general variance timelines to EPA for approval. However, EPA did not approve the new variance and engaged in certain other actions related to non-severability regulations and vacatur that the District Court characterized as a failure by EPA to "uphold its end of the bargain" from *Waterkeeper I*. Consolidated Order at p. 16. The Court was displeased with EPA's actions, leading it to order MDEQ and EPA to engage in a new round of rulemaking and review to purportedly comply with the Court's previous 2019 Orders and the

requirements of the CWA. The Court reset the schedule from the 2019 Remedies Order to run from the date of the Consolidation Order (October 30, 2020). The Court ordered: "MDEQ shall be given 120 days from the date of the Consolidated Order to adopt revised general variance timelines that comply with the CWA. MDEQ shall then submit to EPA its proposed general variance timelines as part of its WQS. EPA shall be given 90 days to complete its review of MDEQ's submission." *Id.* at 17 (citation omitted). The Court also held in this separate litigation that the non-severability regulation had *not* been triggered, despite contentions to the contrary by MDEQ and EPA.

Defendant-Intervenors intend to appeal the Consolidated Order and now move to stay the Consolidated Order pending appeal. The Consolidated Order will unfairly require municipal CWA permittees to comply with a new variance rule that will be predetermined by the 2019 Orders and premised on an incorrect interpretation of the Clean Water Act. A stay pending appeal of the Consolidated Order is warranted to prevent these permit holders from suffering irreparable harm by having to expend significant and unrecoverable resources to comply with the revised variance being forced by the Court before the salient issues can be decided by the Ninth Circuit, in addition to other irreparable harm discussed below. The expenses associated with compliance are ultimately borne by ratepayers of affected communities throughout Montana. Therefore, a stay will serve the public interest

by allowing the issues appealed to the Ninth Circuit to be resolved before permit holders are forced to comply with a new variance–a variance which may become wholly irrelevant depending on how the Ninth Circuit resolves the appeal in *Waterkeeper I*–and pass those costs on to the public.

The legal issue on appeal of the Consolidated Order is whether this Court had jurisdiction to order the new relief directed in the Consolidated Order. The divesture rule makes clear it did not and thus, Defendant-Intervenors are likely to succeed on the merits of its appeal. As set forth below, a stay pending appeal is necessary to prevent irreparable harm to NACWA and Cities and Towns members and will not harm the Plaintiff or the public. Therefore, this Court should grant a stay of its Consolidated Order pending appeal.

II. LEGAL STANDARD

"[A]s part of its traditional equipment for the administration of justice, a federal court can stay the enforcement of a judgment pending the outcome of an appeal." *Nken v. Holder*, 556 U.S. 418, 421 (2009) (citing *Scripps-Howard Radio v. FCC*, 316 U.S. 4, 9–10 (1942) (citation omitted)); *see also* Fed. R. Civ. P. 62(c) (providing that a district court may "suspend, modify, restore, or grant an injunction" during the pendency of an appeal). Courts consider four factors in determining whether to issue a stay pending appeal: (1) whether the stay applicant has made a strong showing on the merits; (2) whether the applicant will be irreparably injured

absent a stay; (3) whether a stay will substantially injure other parties; and (4) the public interest. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987); *Golden Gate Rest. Ass'n v. City & Cnty. of S.F.*, 512 F.3d 1112, 1115 (9th Cir. 2008).

Courts in this Circuit apply a "sliding scale" approach to stay requests as they do to preliminary injunction requests. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). Indeed, the Ninth Circuit has recognized that "a flexible approach is even *more* appropriate in the stay context." *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). "Whereas the extraordinary remedy of injunction is the means by which a court directs the conduct of a party . . . with the backing of its full coercive powers, a stay operates only upon the judicial proceeding itself . . . . either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability." *Id.* (citation and internal quotations omitted).

Under the sliding scale approach, "the elements of the preliminary injunction are balanced, so that a stronger showing of one element may offset a weaker showing of another." *Alliance*, 632 F.3d at 1131. Accordingly, a motion for stay pending appeal should be granted when there is either: (1) a substantial case for relief on the merits and the possibility of irreparable injury; or (2) serious legal questions and balance of hardships tipping sharply in the movant's favor. *Leiva-Perez*, 640 F.3d at 967; *Golden Gate*, 512 F.3d at 1115–16.

III. THIS COURT SHOULD GRANT A STAY OF THE CONSOLIDATED ORDER PENDING APPEAL WITH REGARD TO *WATERKEEPER I*.

A. Defendant-Intervenors Have a Substantial Case on the Merits and Will Raise Important Legal Questions on Appeal.

The Ninth Circuit has explained that "[t]here are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' . . . 'a substantial case on the merits,' . . . or . . . that 'serious legal questions are raised.'" *Leiva-Perez*, 640 F.3d at 967 (citations omitted). "We think these formulations are essentially interchangeable, and that *none of them demand a showing that success is more likely than not*." *Id*. (emphasis added) (internal quotations omitted) (citing *Hilton*, 481 U.S. at 778; *Hollingsworth v. Perry*, 130 S. Ct. 705, 710 (2010) (per curiam); *Abassi*, 143 F.3d at 514; *Indiana State Police Pension Trust v. Chrysler LLC*, __ U.S. __, 129 S. Ct. 2275, 2276 (2009) (per curiam)). Here, Defendant-Intervenors have a substantial case on the merits and will raise the following serious legal questions on appeal.

1. The District Court Lacked Jurisdiction to Order the New Relief Directed in the Consolidated Order.

This Court exceeded its jurisdiction by entering the Consolidated Order. Once a notice of appeal is filed, the district court is divested of jurisdiction over the matters being appealed. *See Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58, 103 S.Ct. 400, 74 L.Ed.2d 225 (1982) (per curiam); *McClatchy Newspapers v. Central Valley *24 Typographical Union No. 46*, 686 F.2d 731,734 (9th Cir. 1982).

The purpose of this rule is to "promote judicial economy and avoid the confusion that would ensue from having the same issues before two courts simultaneously." *See Natural Resources Defense Council, Inc. v. Southwest Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001); *In re Bialac*, 15 B.R. 901, 903 (B.A.P. 9th Cir. 1981) ("It is a well-established rule that a properly filed notice of appeal immediately acts to transfer jurisdiction from the trial court to the court of appeals with regard to any matters involved in the appeal, and divests the lower court of jurisdiction to proceed further with such matters.").

Defendant-Intervenors' argument in this regard is simple. The parties to *Waterkeeper I* appealed to the Ninth Circuit on February 14, 2020. The Ninth Circuit docketed the appeals on February 18, 2020, effectively divesting this Court of jurisdiction over the issues appealed. The issues addressed in the Consolidated Order relating to *Waterkeeper I* are identical to the issues addressed in Defendant-Intervenors' appeal pending before the Ninth Circuit. Specifically, Defendant-Intervenors appealed the 2019 Orders misinterpreting the CWA and directing MDEQ to take a specific approach to revising the variance that ultimately predetermines the final rule. Without affording the Ninth Circuit adequate time to hear the issues on appeal (the case is fully briefed and oral argument is currently being scheduled), this Court *sua sponte* entered a new order directing MDEQ to affirmatively engage in rulemaking to issue a variance, and EPA to review and

approve the variance, in accordance with the Court's prior Orders that are being appealed. No party to *Waterkeeper I* filed any motion with the District Court requesting this relief. This Court nevertheless set new deadlines for these agency actions in an attempt to force MDEQ to issue a new variance before the Ninth Circuit can rule on whether the District Court's interpretation of the CWA and remedy were valid in the 2019 Orders. This plainly contravenes the Ninth Circuit's well-established rule regarding divestiture.

2. No Exceptions to the Divestiture Rule Apply to the Court's Consolidated Order.

Courts have recognized exceptions to the divestiture rule to allow district courts to correct clerical errors or clarify its judgment, to supervise the *status quo* during the pendency of an appeal, or to aid in execution of a judgment. *See Stone v. INS*, 514 U.S. 386, 401-02 (1995) (stating that district courts retain jurisdiction to decide Rule 60(b) motions even after appeal is taken). This Court did not invoke any of these exceptions, nor would any apply under the facts of this case.

The exception to the divestiture rule for maintaining the *status quo* is based in Federal Rule of Civil Procedure 62. "While an appeal is pending from an interlocutory order or final judgment that grants, dissolves, or denies an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." Fed. R. Civ. P. 62(c). Rule 62 codifies a district court's inherent power "to preserve the *status quo* where, in its

sound discretion the court deems the circumstances so justify." *Christian Science Reading Room Jointly Maintained v. City & Cty. of San Francisco*, 784 F.2d 1010, 1017 (9th Cir. 1986) (citation omitted), *amended by* 792 F.3d 124 (9th Cir. 1986).

The status quo is that MDEQ promulgated a new variance as directed by the 2019 Order which was disapproved by EPA, and under the Court's 2019 Order, the 2017 variance remains in place until EPA approves a new variance. In addition, the appeal before the Ninth Circuit has been fully briefed by all parties and oral argument is anticipated to be scheduled for March. No party to *Waterkeeper I* filed a motion or sought relief before this Court regarding compliance with the 2019 Orders. Accordingly, the Consolidated Order does not preserve the *status quo* or preserve opposing parties' rights. It does the opposite. It disturbs the *status quo* by requiring MDEQ and EPA to take specific actions without the Court having provided the *Waterkeeper I* parties notice or making any findings regarding (1) the validity of MDEQ's first promulgated variance or (2) the appropriateness of the 120 day timeline for promulgating at new variance at this juncture of the case. Should EPA approve the new variance this Court ordered MDEQ to promulgate, the stay of the vacatur of the 2017 variance will be lifted, and the *status quo* will change. The Court's disapproval of EPA's handling of the non-severability regulations does not provide a justification at this time to attempt to force compliance with the 2019 Orders that are under appeal.

In addition, rather than preserving the appealing parties' rights, the Consolidated Order seeks to force application of the Court's interpretations and directives in its 2019 Orders in a manner that could produce confusing and potentially irreconcilable results with the Ninth Circuit's resolution of the pending appeal. *See, e.g., Big Sky Sci. LLC v. Idaho State Police*, Case No.: 1:19-cv-00040-REB, at *5 (D. Idaho Sep. 3, 2019) (Granting stay pending appeal and explaining: "[I]f the Court were to agree with…Defendants and dismiss the action on either (or both) of these bases, and the Ninth Circuit were then to hold otherwise, the two results would be confusing at best and irreconcilable at worst. Additionally, granting the…Defendants' Motion to Dismiss on *any* of the proffered arguments would most definitely upend the status quo as of the time the appeal was filed and materially alter the case on appeal—precisely what the divestiture rule aims to avoid.").

Regarding the exception to the divestiture rule for corrections or clarifications, a district court can retain jurisdiction to make certain clarifications and corrections even after a notice of appeal is filed. The Ninth Circuit has made clear that the divesture doctrine is "designed to avoid the confusion and waste of time that might flow from putting the same issues before two courts at the same time. It should not be employed to defeat its purposes nor to induce needless paper shuffling." *Kern Oil & Ref. Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988) (following notice of appeal from final judgment, district court retained jurisdiction to enter

findings of fact and conclusions of law where it was clear district court intended that they be filed at same time as final judgment) (citation omitted); *see also Fed. Trade Comm'n. v. Enforma Natural Prods., Inc.*, 362 F.3d 1204, 1216 n.11 (9th Cir. 2004) (explaining that district court retained jurisdiction to make findings five days after injunction was granted where the additional findings served to facilitate review); *Silberkraus v. Seely Co. (In re Silberkraus)*, 336 F.3d 864, 869 (9th Cir. 2003) (concluding that bankruptcy court retained jurisdiction to publish written findings of fact and conclusions of law where they were consistent with the court's oral findings and they aided in review of the decision); *Morris v. Morgan Stanley & Co.*, 942 F.2d 648, 654-55 (9th Cir. 1991) (following notice of appeal from dismissal for failure to prosecute, district court retained jurisdiction to clarify that appealed order dismissed both state and federal claims with prejudice).

In this case, the Consolidated Order provides no corrections or clarifications of the type deemed permissible by Ninth Circuit case law. Instead, based on the District Court's disapproval of EPA's actions since final judgment was entered, the Consolidated Order directs the State and EPA to disturb the *status quo* and approve a new variance timeline during the pendency of an appeal *that concerns the variance timeline*. In other words, the District Court's actions put the same issues before two courts at the same time–the exact scenario the divesture rule is intended to prevent. The examples of clarifying orders described above demonstrate the difference

between an allowable correction or clarification to benefit the parties or the appellate court and the Consolidated Order here, which is a new order containing new requirements issued *eleven months* after final judgment was entered in *Waterkeeper I.*

Finally, there is also no indication that the Consolidated Order was issued to aid in the execution of a judgment. That exception typically arises where a party files a motion seeking court assistance to enforce a monetary judgment. *See* Fed. R. Civ. P. 69; *Labertew v. Langemeier*, 846 F.3d 1028 (9th Cir. 2017). Accordingly, no exceptions to the divesture rule are applicable, and the District Court should let the Ninth Circuit resolve the issues pending before it in the appeal without the confusion of additional District Court orders covering the same issues.

B. A Stay of the Consolidated Order is Necessary to Prevent Irreparable Harm to NACWA Members, Cities and Towns Members, and Permittees.

The potential irreparable harm to members of NACWA and Cities and Towns is threefold: (1) the Consolidated Order sets timelines for action by the agencies that will likely result in the issuance of a new variance prior to the Ninth Circuit's decision, potentially producing confusing and irreconcilable results with the Ninth Circuit's resolution of the pending appeal.; (2) based on the Court's disapproval of EPA's handling of the non-severability regulations, the Consolidated Order will require the parties to participate, *once again*, in a rulemaking process, which is a

significant investment of time and resources, and which may be rendered completely unnecessary by the Ninth Circuit's decision; and (3) upon issuance of the new variance rule, permittees will have to conform their actions and make significant and unrecoverable expenditures to comply with a rulemaking based on the Consolidated Order, which directs a predetermined outcome that is contrary to the CWA and ignores the Agencies' administrative expertise – the exact issues that are currently under appeal before the Ninth Circuit.

First, under the Consolidated Order, MDEQ must proceed through rulemaking and adopt new variance timelines consistent with the 2019 Orders by February 27, 2021 and EPA must complete its review by May 28, 2021. If EPA approves the variance, then it will replace the one at issue before the Ninth Circuit, potentially prior to the court's decision on appeal. Oral argument before the Ninth Circuit is currently anticipated to be held in March 2021. Thus, under the current timeline, the requirements of the new Consolidated Order creates a strong potential for confusing and irreconcilable results with the Ninth Circuit's resolution of the *Waterkeeper I* appeal. There is no sound legal or practical reason for this result. Given that the appeal is briefed and ready for argument, there is certainty regarding the duration of requested stay of the Consolidation Order. *See Big Sky Sci. LLC v. Idaho State Police*, Case No.: 1:19-cv-00040-REB, at *7 (D. Idaho Sep. 3, 2019) ("Moreover, oral argument on Big Sky's appeal took place on August 28, 2019; because any

stay's duration is necessarily bookended by the appeal itself, its duration is likewise understood and limited."). Thus, a stay pending appeal will be of definite duration and will avoid negation of the *Waterkeeper I* appeal which addresses the same issues as the Consolidated Order. *See id*. ("In particular, the issues currently on appeal are not only similar, but potentially dispositive of Big Sky's entire case—if the proceedings are not stayed, Big Sky will be forced to expend resources to litigate duplicative matters that may ultimately prove irrelevant (while potentially adversely affecting its rights in the meantime))." Accordingly, a stay should be granted to prevent this form of irreparable harm.

Second, the Consolidated Order will result in Defendant-Intervenors, EPA, MDEQ, and Plaintiff all expending significant resources to negotiate, draft, and review new variance regulations that, should the Ninth Circuit overturn this Court's 2019 Orders, will be rendered irrelevant. Requiring the parties to participate in what is potentially a purely academic exercise pending the resolution of an appeal that has been fully briefed contravenes the divesture rule's fundamental purposes of promoting judicial economy and preventing confusing results that arise when the same issues are being addressed by two courts.

Third, MDEQ's promulgation of a revised variance based on the Consolidated Order will cause permittees to suffer irreparable harm in terms of the unrecoverable costs of complying with an invalid rule that is based on a fundamental

misunderstanding and misapplication of the CWA. If MDEQ is forced to proceed in promulgating a predetermined rule as this Court directs, NACWA's and Cities and Towns' members and ratepayers in affected communities will be adversely impacted, including, in particular, NACWA's Montana members and Cities and Towns' members. According to the 2019 Orders, MDEQ must promulgate a variance that (1) requires compliance with the Highest Achievable Condition standards immediately, and (2) requires compliance with the underlying WQS at the end of the variance term.

Requiring those elements in MDEQ's variance would eviscerate most of the benefits of issuing a variance in the first instance. EPA has articulated such benefits. In its 2015 letter approving MDEQ's nutrient criteria and variance provisions as representing "significant progress towards addressing nutrient pollution issues in the state," EPA included its rationale describing the potential cumulative adverse impacts facing POTWs absent a variance. EPA Region 8, "Rationale for the EPA's Action on Montana's New and Revised Water Quality Standards" (February 2, 2015).

EPA based its rationale, in part, on Montana's analysis of economic impacts for 24 of the 107 dischargers across Montana. *Id.* at 14-16. Montana's analysis examined effluent data and financial information for all 12 publicly-owned treatment works that discharge more than 1 million gallons per day (MGD); four of the 12

facilities that discharge less than 1 MGD; and eight of the 83 lagoon systems. *Id.* at 14. Upon review of Montana's analysis, EPA identified the following potential adverse impacts to Montana permittees of not allowing for a variance, including: (1) expenses associated with implementing new technology or replacing lagoons with mechanical treatment plants for the majority of communities; (2) the state's current ranking as 41st in the nation in per capita income; (3) impacts to struggling small towns lacking diversified economies; (4) challenges with finding qualified wastewater treatment plant operators; and (5) impacts to other community infrastructure needs. *Id.* at 16.

Additionally, EPA cited the environmental consequences associated with building new treatment systems, including brine disposal and increased greenhouse gas emissions. *Id.* Accordingly, EPA appropriately accepted Montana's conclusion that communities would experience widespread economic impacts if they were required to implement the necessary pollution control costs without the added flexibility of staging attainment by dischargers over up to 20 years. *Id.*

The adverse impacts that MDEQ identified and EPA adopted in its rationale are not mere economic costs that would be recoverable from a party to this litigation if the revised rule is reversed on appeal. Once MDEQ promulgates a revised rule in accordance with the Consolidated Order, permittees will be required to act immediately by making significant investments to comply with the technically-

flawed and economically infeasible variance timeline. Such investments will require expenditures, such as the hiring of consultants and purchase of equipment, that will not be recoverable from any party even if the revised variance rule is overturned.

Additionally, the increased costs of complying with the revised variance rule are likely to result in water rate increases for residents and businesses (*i.e.*, the "public," which is a critical factor weighing in favor of the stay). These immediate investment costs and increased burdens on ratepayers are not simple monetary damages that can be recovered from any party if the rule is reversed on appeal. They are also especially significant at this point in time given the economic challenges the COVID-19 pandemic has created, which have made it harder for many ratepayers to afford their existing water and sewer bills. These substantial expenditures would be sunk costs that will result in irreparable harm to both permittees and the public, which a stay is necessary to prevent. Moreover, if a stay is not granted and the EPA and MDEQ must follow the Consolidated Order, the permittees will be forced to comply with the new variance and bear the full costs of the new requirements, potentially without any avenue for relief whatsoever.

For example, modification of the Current Variance Standard to require compliance with the NNC over the term of variance will directly impact the City of Bozeman (the "City"), Montana, a NACWA member and Cities and Towns member. Notably, MDEQ's submission documents to EPA showed that compliance with

NNC in the near term would require installation of reverse osmosis (RO) technology in larger facilities, like Bozeman. *See, e.g.*, "Demonstration of Substantial and Widespread Economic Impacts to Montana That Would Result if Base Numeric Nutrient Standards had to be Met in 2011/2012" (Blend and Suplee, 2012). MDEQ's economic analysis demonstrated that communities would incur substantial and widespread economic and social impacts if dischargers were required to install RO to meet the base numeric nutrient standards approved by the EPA as the applicable water quality criteria. *Id.* The City of Bozeman would face a heavy development and construction burden in trying to meet Montana's strict nutrient criteria in the near term—and may be unable to meet these criteria at all, resulting in significant economic impact to the City and the state. As it works to meet these criteria, Bozeman could be subject to enforcement by federal and state regulators and citizen groups for failing to comply with the nutrient criteria, violations that could result in substantial litigation costs and civil penalties. These costs and adverse impacts will not be reversed or easily recovered if a new variance is forced to be implemented by the Consolidated Order.

Additionally, this predetermined rule based on this Court's judgment rather than the Agencies' expertise could set dangerous precedent that will significantly limit EPA's ability to authorize discharger-specific variances in other states as well, which will make it substantially more difficult for NACWA members nationwide to

obtain such NPDES permit conditions in the future. The availability of NPDES permit variances is of paramount importance to NACWA members throughout the nation, as regulators routinely use variances to allow dischargers to work toward meeting stringent discharge limits when immediate compliance cannot be achieved due to economic or technological limitations. The availability of variances in turn impacts the ratepayers who fund NACWA member operations, as increased compliance costs result in greater utility costs.

C. Neither the Plaintiff nor the Public Will Suffer Injury if a Stay is Granted Pending Appeal of the Consolidated Order.

To successfully oppose a stay pending appeal, the opposing party must show that the stay will cause it to be "substantially" injured during the pendency of the appeal. *Leiva-Perez*, 640 F.3d at 964. In this case, where no party even asked the District Court to issue the Consolidated Order, it appears evident that neither the Plaintiff nor any other party can make that showing. The public interest will also not be harmed by a stay. In fact, a stay pending appeal will protect the public interest by preventing the unnecessary expenditure of unrecoverable municipal resources during the pendency of the appeal and beyond. Maintaining the *status quo* will not result in increased water pollution or decreased water quality. "These realities combine to reflect that staying this action in favor of first resolving [the] appeal promotes the orderly course of justice because it will provide guidance and clarity about the continuing viability of [the] claims and remaining issues, if any, going

forward." *Big Sky Sci. LLC* Case No.: 1:19-cv-00040-REB, at *7 (D. Idaho Sep. 3, 2019).

IV. CONCLUSION

For the foregoing reasons, Defendant-Intervenors respectfully request that the Court stay of the Consolidated Order pending appeal.

Dated this 10th day of December, 2020.

/s/ *Fredric P. Andes*
Fredric P. Andes
BARNES & THORNBURG LLP
1 North Wacker Drive, Suite 4400
Chicago, Illinois 60606
Tel: (312) 357-1313
fredric.andes@btlaw.com

Paul M. Drucker
BARNES & THORNBURG LLP
11 S. Meridian St.
Indianapolis, IN 46204
Tel: (317) 231-7710
pdrucker@btlaw.com

/s/ *Murry Warhank*
Murry Warhank
JACKSON, MURDO & GRANT, P.C.
203 North Ewing Street
Helena, Montana 59601
Tel: (406) 442-1308
Fax: (406) 447-7033
mwarhank@jmgm.com

Attorneys for National Association of Clean Water Agencies

/s/ M. Christy S. McCann
M. Christy S. McCann
Browning, Kaleczyc, Berry & Hoven, P.C.
801 West Main, Suite 2A
Bozeman, Montana 59715
Tel: (406) 585-0888
christy@bkbh.com

Attorneys for Montana League of Cities and Towns

CERTIFICATE OF COMPLIANCE

This brief contains 5,018 words, excluding the items exempted by Montana District Local Rule 7.1(d)(2)(E). The brief's type size and typeface comply with Montana District Local Rule 1.5(a). I certify that this brief complies with the word limit of Montana District Local Rule 7.1(d)(2)(A).

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2020, I electronically filed the foregoing Memorandum in Support of Defendant-Intervenors National Association of Clean Water Agencies' and The Montana League Motion Cities and Towns' Motion to Stay Consolidated Order Pending Appeal with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ *Murry Warhank*
Murry Warhank