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UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency, Defendants, and STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY, TREASURE STATE RESOUCES ASSOCIATION OF MONTANA, MONTANA LEAGUE OF CITIES AND TOWNS, and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Intervenor-Defendants.	Case No. 4:16-CV-00052-BMM Case No. 4:20-CV-00027-BMM MEMORANDUM IN SUPPORT OF INTERVENOR DEFENDANT STATE OF MONTANA, DEPARTMENT OF ENVIRONMENTAL QUALITY'S MOTION TO STAY RULEMAKING PENDING APPEAL

Intervenor-Defendant State of Montana, Department of Environmental Quality ("Montana"), hereby files its Memorandum in Support of its Motion to Stay Rulemaking Pending Appeal. Montana respectfully requests the District Court to stay rulemaking on Montana's general nutrient standards variance, as directed by the Court's Consolidated Order (October 30, 2020), ECF No. 224. Montana requests a stay of the rulemaking requirement until the ongoing appeal of Case No. 4:16-CV-00052-BMM is resolved. Unless otherwise specified herein, all references to the CM/ECF filing system docket numbers correspond to the docket in Case No. 4:16-CV-00052-BMM, and all references to the Administrative Record ("AR") correspond to EPA's record in Case Nos. 4:16-CV-00052-BMM and 4:20-CV-00027-BMM.

SUMMARY OF RELEVANT PROCEDURAL BACKGROUND

Following briefing on EPA's October 31, 2017- approval of Montana's general nutrient standards variance, this Court found that EPA properly interpreted its regulations to allow for the consideration of economic and social impacts when it approved Montana's general variance. *See* Order 20-22 (March 25, 2019) ("March 2019 Order") (ECF No. 177). The Court further found that EPA's approval of the interim water quality standards, contained within Montana's general variance (which the Court refers to as the "Current Variance Standard'), was supported by the record and did not violate the Clean Water

Act. March 2019 Order at 28. This included all of EPA's findings related to the substantial and widespread economic and social impacts, which Montana demonstrated would occur should the 36 identified municipal dischargers be required to immediately comply with Montana's base numeric nutrient standards ("Base WQS"). *See* March 2019 Order at 22 (noting that Waterkeeper did not "challenge EPA's conclusion that Montana's Base WQS would cause widespread economic and social impacts to communities across Montana").

Nonetheless, the Court took issue with how the term of the variance was established and found the definition of a water quality standards variance at 40 C.F.R. § 131.3(o) in conflict with the specific variance term language of 40 C.F.R. § 131.14(b)(1)(iv). The Court viewed EPA's regulations to be arbitrary and capricious because they contradicted the term "attainable" in setting the term of the variance to be "only as long as necessary to achieve the highest attainable condition." March 2019 Order at 29 (quoting 40 C.F.R. § 131.14(b)(1)(iv)). The Court then determined that the general variance must "begin with compliance with the Current Variance Standard and then work toward attainment of Montana's Base WQS," *Id.* at 31. In doing so, this Court plainly recognized that "dischargers throughout the State of Montana currently stand at different levels of attainment" and that "economic factors may constrain immediate compliance with the Current Variance Standard for certain

dischargers." *Id.* at 33-34. The Court also found that the seventeen-year timeline "permissibly could be used to meet the criteria in Montana's Base WQS." *Id.* 29.

Following the parties' simultaneous submissions on remedy, the Court ordered Montana to set forth a timeline "that begins with the Current Variance Standard and works towards Montana Base WQS" and "to allow a discharger to make progress toward achieving Montana's Base WQS in the range proposed by Plaintiffs." Order 6 (July 7, 2019) ("Remedy Order") (ECF No. 184). Pursuant to the Court's Remedy Order, Montana proceeded to revise its general nutrient standards variance. *See* 22 Mont. Admin. Reg. 2100 (Nov. 22, 2019), AR 39093. Montana revised its general nutrient standards variance to require all dischargers in the ≥1MGD and <1MGD discharge categories to meet the Current Variance Standard as soon as possible, but in no case later than July 1, 2027. Montana identified that several of these facilities were already meeting the Current Variance Standard and expected most of the remaining dischargers in these categories would achieve the Current Variance Standard well before July 1, 2027. *See* 17 Mont. Admin. Reg. 1443, 1445 (Aug. 27, 2019), AR 38826. However, it was determined that the Town of Manhattan could require up to July 1, 2027 to achieve the Current Variance Standard. *Id.* As with any rulemaking, Montana must demonstrate the reasonable necessity for any rule

amendment, and must also address the reasonableness component of that requirement. *See* Mont. Code Ann. § 2-4-305(6). Montana viewed its accelerated compliance schedule approach to be consistent with the Court's orders because the Court recognized that not all Montana facilities could immediately meet the Current Variance Standard. March 2019 Order at 33-34.

The overall term of Montana's revised variance was also consistent with the Court's expressed permission to allow a 17-year term, and was so specified for both mechanical plants and lagoons to be up to, but no longer than, August 7, 2034. AR 39008-009. This term is also consistent with Montana's unique 20-year time limitation for variances. *See* Mont. Code Ann. § 75-5-313(8). Because the general nutrient standards variance was originally adopted on August 8, 2014, *see* 15 Mont. Admin. Reg. 1805 (Aug. 7, 2014), the term of the general variance could not extend beyond August 7, 2034. AR 39013. The revised variance also required dischargers to make additional progress toward meeting the Base WQS by the end of the variance's term, through the implementation of additional pollution minimization activities and continued the requirement to update the Current Variance Standard, should reductions prove feasible. AR 39007-009.

The revised variance stressed its end goal was for all dischargers to achieve the Base WQS by the end of the variance term, but Montana also

recognized that if substantial and widespread economic impacts continued to be unavoidable, it may have no choice but to change uses and criteria if attainment was not feasible. AR 39007. Although it recognized the Court's orders could be subject to different interpretations, EPA disapproved the revisions to Montana's 2019 general variance as inconsistent with the "more prescriptive language in the court's various orders, including the Court's December 20, 2019 order denying EPA's Motion to Alter or Amend the Judgment (which was issued after MDEQ's development and adoption of the revised rule) that EPA is bound to follow." *See* U.S. EPA, EPA Action in Response to Court Order 5 (Feb. 24, 2020) <https://www.epa.gov/sites/production/files/2020-03/documents/mt-approval-022420.pdf > (accessed Dec. 1, 2020); AR 39252.

EPA concluded the Court's orders mandated any revision to the variance required all dischargers to meet the Current Variance Standard immediately, regardless of the individual economic circumstances the Court had recognized. *See* U.S. EPA, EPA Action in Response to Court Order at 8, AR 39255. EPA also concluded that the Court's orders required full attainment at the end of the variance term, regardless of any substantial or widespread social or economic impacts caused by requiring communities to treat their wastewater to the Base WQS. *Id.* Because the Court acknowledged those significant impacts had been established, Montana concluded the court-ordered revisions necessarily included

a continuing respect and concern for those impacts, provided those impacts could not be overcome. *See* 22 Mont. Admin. Reg. at 2111 (Comment No. 35 and Response). Montana designed its revised variance with a fail-safe, to protect its communities from the substantial and widespread economic impacts proven to occur - should economic conditions and the cost of technology fail to provide a feasible means to achieve the Base WQS. This distinction appears to be a significant reason why EPA disapproved of Montana's revised variance.

Currently, the Judgment in Case No. 4:16-CV-00052-BMM in on appeal at the Ninth Circuit. *See* Montana's Notice of Appeal (Feb. 13, 2020), ECF No. 212. Plaintiffs, Defendants, and Defendant-Intervenors have filed appeals. *See* Ninth Circuit Case Nos. 19-35898, 19-35899, 20-35135, 20-35136, and 20-35137. The appeals have been fully briefed and oral argument is expected during the winter or spring of 2021.

On October 30, 2020, this Court issued its Consolidated Order, ECF No. 224, which, among other things, ordered Montana to once again engage in rulemaking on its general nutrient standards variance. Montana now seeks a stay of that rulemaking, pending a decision from the Ninth Circuit Court of Appeals.

ARGUMENT

I. The District Court Should Stay Its Rulemaking Requirement Until the Ninth Circuit Rules on the Pending Appeal

A district court has broad power to stay cases to promote the efficient use

of judicial resources and to control its docket. *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936). A stay is an exercise of judicial discretion used to prevent irreparable harm to the parties or to the public. *Nken v. Holder*, 556 US. 418, 432 (2009). When determining to stay an order pending appeal, the following factors are considered: (1) if the applicant has made a showing to succeed on the merits; (2) if the applicant will be irreparably injured absent a stay; (3) if the stay will substantially injure the other parties interested in the proceeding; and (4) the public interest. *Id.* at 434 (citation omitted).

The Ninth Circuit has also used a "sliding scale" approach such that the showing of a strong factor may offset the weaker showing of another. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1137-1132 (9th Cir. 2011). This more flexible approach also applies to stays pending appeal and, in the context of a stay, is "even more appropriate". *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

A. The State of Montana and its Communities Will Likely Suffer Irreparable Harm and Hardship Should Montana be Required to Proceed with Rulemaking

Should the stay not be granted, Montana and its communities will likely suffer irreparable harm and hardship. As EPA's disapproval of Montana's revised nutrient standards variance demonstrates, EPA interprets the Court's orders to require it to disapprove any revision of the general variance that does

not require all facilities to immediately comply with the Current Variance Standard or disapprove any revision that fails to mandate full attainment with the Base WQS at the end of the variance term. *See* U.S. EPA, EPA Action in Response to Court Order at 8, AR 39255. Montana does not interpret the Court's orders in this fashion; however, the authority to approve state water quality standards for purposes of the Clean Water Act rests with EPA. *See* 33 U.S.C. § 1313(c). Should rulemaking proceed, the ultimate result would necessarily cause the substantial and widespread economic and social impacts Montana sought to avoid when it adopted its general nutrient standards variance. The Base WQS are presently not attainable -- because they are infeasible -- and Montana cannot now predict when those circumstances will change. In any revised variance, Montana must continue to provide an allowance for the substantial and widespread economic impacts demonstrated to occur, should its communities be required to comply with the Base WQS. Montana cannot, therefore, mandate its communities meet the Base WQS on a date certain or construct the term of the variance based on EPA's expressed rationale. Doing so would trigger the substantial and widespread economic and social impact Montana sought to avoid. *See* 2019 Order at 5 (stating "[Montana] DEQ and EPA determined that the cost of implementing the technology required to meet Montana's Base WQS would cause these widespread and social impacts").

With a second rulemaking conducted under this scenario, EPA would once again disapprove Montana's revisions to its general variance. Under 33 U.S.C. § 1313(c), EPA would then direct Montana to adopt a revised variance commensurate with its interpretations of the Court's orders – allowing no consideration for economic and social impacts in constructing the variance's term and providing no relief for those facilities that need additional time to comply with the Current Variance Standard. Because Montana cannot adopt a variance that ignores substantial and widespread economic impacts on a statewide basis, *see* Mont. Code Ann. § 75-5-313, EPA would then promulgate a variance causing the very harm Montana sought to prevent in the first place. *See* 33 U.S.C. § 1313(c)(3). A federal promulgation would unquestionably cause irreparable harm and hardship to Montana and its communities – because communities would be forced to expend resources beyond the amounts needed to achieve the currently recognized highest attainable condition (i.e., the Current Variance Standard). Indeed, the foundation of that highest attainable condition is built upon recognized economic and social harm. *See* March 2019 Order at 20-22.

Furthermore, rulemaking also requires significant agency time and other resources to complete, including necessary consultation with the Nutrient Work Group. *See* Mont. Code Ann. § 75-5-313(2). Should the Ninth Circuit Court of

Appeals reverse in whole or in part the decisions of this Court, yet another revision of the general variance may be required. The time and resources spent to revise the variance now would be wasted. Under these circumstances as well, the recently ordered rulemaking constitutes an unnecessary hardship for Montana and a stay should be granted.

B. Serious Legal Questions are Raised by Mandating a Second Rulemaking and the Orderly Course of Justice will be Served if the Court Grants a Stay Pending Resolution of the Appeal

The District Court should stay the ordered rulemaking until the Ninth Circuit Court of Appeals has issued its decision on appeal. Montana has already attempted to revise its general nutrient standards variance to comply with the terms of the Court's orders, EPA has acted to disapprove that revision, and Montana has received no indication EPA would act differently a second time. While EPA may well heed the Court's Consolidated Order and provide a more detailed review of any revision, fundamental issues will remain, and these issues are on appeal. At this point of the proceedings, further rulemaking is futile, would be a waste of resources, and could divest the Court of Appeals of jurisdiction by eliminating all or a portion of the pending controversy. Such an approach is inappropriate because, as to the fundamental issues involved in the variance's term, this Court has been divested of jurisdiction. *See McClatchy Newspapers v. Central Valley Typographical Union No. 46*, 686 F.2d 731, 734

(9th Cir. 1982). Indeed, the rule of divestment on appeal seeks to promote judicial economy and to avoid the confusion that results from having two courts addressing the same issue at the same time. *Kern Oil Co. v. Tenneco Oil Co.*, 840 F.2d 730, 734 (9th Cir. 1988). While Montana endeavored to make the term of the revised variance adhere to the Court's orders, it also sought to respect the substantial and widespread economic harm shown to result from any mandated (and infeasible) compliance with the Base WQS. In consideration of the Court's 2019 orders, EPA concluded Montana's approach was not possible. AR 39252.

Based upon the results of the initial rulemaking, it is clear the controversy on appeal must be heard, because the appeal presents unique and serious legal questions. *See Leiva-Perez v. Holder,* 640 F.3d at 967 (finding a party seeking a stay may either demonstrate a fair probability of success on the merits or show serious legal questions are raised). Persisting in rulemaking when fundamental aspects of Montana's general variance are before the Ninth Circuit does not serve the interests of justice or judicial economy. *See Natural Resources Defense Council v. Southwest Marine, Inc.* 242 F.3d 1163, 1166 (9th Cir. 2001). Granting a stay also provides the means to ensure the Ninth Circuit "can responsibly fulfill their role in the judicial process." *See Nken v. Holder,* 556 US. at 427. The matters concerning the construct of the variance's term are squarely before the Ninth Circuit and have been fully briefed. Further confusion

can only result should the rulemaking be required to proceed without any clarity from the Ninth Circuit.

C. No Harm Will Result to Plaintiff Should the Court Grant a Stay

Plaintiffs have not requested a second round of rulemaking and even agreed the Court's partial vacatur was no longer in effect. Consolidated Order at 14. Plaintiffs, therefore, can hardly claim they require further rulemaking from the District Court to prevent any injury. Montana is merely requesting a stay of the rulemaking until the Ninth Circuit rules on the pending appeal, and Plaintiffs would not be harmed should the Court grant the requested stay.

D. A Stay Does No Harm and Serves the Public Interest

Because the Court's 2019 orders only concern the implementation of the general variance's term, there is no harm to the interests of the public in waiting for a decision from the Ninth Circuit Court of Appeals. EPA's approval of Montana's 2017 general variance – for the most part – has been upheld by this Court. *See* March 2019 Order at 11-34. This Court has also recognized the substantial and widespread economic and social impacts caused by the independent enforcement of the Base WQS – that harm will not occur during the interim period. The public interest is not harmed, but rather served, if communities in Montana are not required to expend resources beyond the economic thresholds established through the highest attainable condition.

Furthermore, the 2017 version of the general nutrient standards variance remains in effect for purposes of the Clean Water Act. Consolidated Order at 15 (noting "the original variance timelines at issue in *Waterkeeper I* will remain in place until the Court lifts the stay of the partial vacatur"). Thus, permitting decisions that incorporate Clean Water Act requirements may continue to use the Current Variance Standard (i.e., Table 12B-1 from the 2017 version of the general variances). *See* AR 20650. As discharge permits are renewed, many of the 36 identified permittees will be required to meet or do better than the requirements contained in Table 12B-1 (i.e., the Current Variance Standard). For example, the 2017 general variance states, "[f]or permittees whose effluent concentrations were, before July 1, 2017, lower than the concentrations in Table 12B-1, the general variance must be based on the actual total N and/or total P concentrations of their effluent . . . [f]or permittees who, after July 1, 2017, attain or do better than the Table 12B-1values, the Table 12B-1 values must be used to establish the permit limit," until a revision to those values occurs. *Id.*

The permitting process also limits the impact of the general variance and its present term construction. A variance must be incorporated into a discharge permit to provide any relief from an applicable water quality standard, and discharge permits may only be issued for a fixed term, not to exceed five years. Admin. R. Mont. 17.30.1346(1). The application of any variance is effectively

limited to the term of a discharge permit and is re-examined during the required permit renewal process – where any regulatory changes must be applied. *See* Admin. R. Mont. 17.30.1342(2). This would include any future court-ordered changes and necessary triennial revisions to the Current Variance Standard.

Finally, matters in the pending appeal are nearing resolution. Briefing is complete at the Ninth Circuit, and the appellate court is currently scheduling oral argument. *See Upper Mo. Waterkeeper v. U.S. EPA*, No. 20-35135 (9th Cir.), ECF No. 63. Should the Court grant Montana's motion, a protracted period of stay is unlikely.

CONCLUSION

Staying rulemaking pending appeal promotes the orderly course of justice by allowing important appeal matters to be decided, averts irreparable harm to Montana and its communities, causes no injury to Plaintiffs, and is in the public interest. Montana respectfully requests the Court stay the ordered rulemaking pending resolution of the on-going appeal.

Respectfully submitted this 10th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief is proportionately spaced, uses 14-point type, and contains 3,175 words, excluding those parts of the brief exempted by D. Mont. L.R. 7.1(d)(2)(E).

Dated: Dec. 10, 2020

/s/ *Kurt R. Moser*
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CERTIFICATE OF SERVICE

I certify that on this date I electronically filed the foregoing document with the Clerk of Court for the United States District Court for the District of Montana, Great Falls Division, by using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

Dated: December 10, 2020

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