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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER,

Plaintiff,

vs.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY and GINA
McCARTHY, Administrator, United
States Environmental Protection Agency,

Cause No. 16-cv-00052-BMM

**ANSWER TO COMPLAINT FOR
DECLARATORY AND
INJUNCTIVE RELIEF**

<p>Defendants.</p> <p>MONTANA LEAGUE OF CITIES AND TOWNS; MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; TREASURE STATE RESOURCES ASSOC. OF MONTANA; and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES;</p> <p>Defendant Intervenors.</p>	
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National Association of Clean Water Agencies (“NACWA”), defendant intervenor files this Answer to Upper Missouri Waterkeeper’s Complaint for Declaratory and Injunctive Relief (“Complaint”). This answer shall serve as NACWA’s answer in intervention.

NACWA responds to the individually-numbered allegations in the Complaint as follows:

1. NACWA denies the allegations contained in Paragraph 1.
2. The allegations of Paragraph 2 contain a description of the Clean Water Act and legal conclusions to which no answer is required.
3. NACWA admits that Montana promulgated numeric nutrient criteria. NACWA denies all other allegations contained in Paragraph 3.
4. NACWA admits the allegations contained in Paragraph 4.
5. NACWA denies the allegations contained in Paragraph 5.

6. NACWA denies the allegations contained in Paragraph 6.

7. NACWA admits that EPA approved Montana's issuance of the general variance. NACWA denies the remaining allegations contained in Paragraph 7.

8. NACWA denies the allegations contained in Paragraph 8.

9. Paragraph 9 represents a prayer for relief to which no answer is required.

10. NACWA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph 10.

11. NACWA admits the allegations contained in Paragraph 11.

12. NACWA admits the allegations contained in Paragraph 12.

13. NACWA lacks knowledge or information sufficient to form a belief as to the truth of the allegations related to Waterkeeper in Paragraph 13. NACWA denies the remaining allegations contained in Paragraph 13.

14. The first sentence of Paragraph 14 contains legal conclusions to which no answer is required. NACWA denies the remaining allegations contained in Paragraph 14.

15. The first sentence of Paragraph 15 contains legal conclusions to which no answer is required. NACWA denies the remaining allegations contained in Paragraph 15.

16. Paragraph 16 contains a legal conclusion to which no answer is required.

17. Paragraph 17 contains a legal conclusion to which no answer is required.

18. Paragraph 18 contains a legal conclusion to which no answer is required.

19. NACWA admits the allegations contained in the first sentence of Paragraph 19. NACWA admits that nutrient pollutants may, sometimes, negatively impact water systems and their designated uses. NACWA denies the remaining allegations contained in Paragraph 19.

20. NACWA admits that nutrients are sometimes referred to as “conservative” or “cumulative” pollutants. NACWA admits that nutrient pollutants can cause some damage to aquatic systems in certain cases. NACWA denies the remaining allegations contained in Paragraph 20.

21. NACWA admits that, in 2000, EPA issued guidance to states to develop numeric nutrient criteria. NACWA admits that EPA provided states with guidance on standards development and a set of standards, developed by ecoregion, that the states could adopt if they chose not to develop their own nutrient criteria or until they developed their own. NACWA denies all remaining allegations in Paragraph 21.

22. NACWA admits that certain levels of nitrogen and phosphorus may negatively impact Montana waterways. NACWA lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained the second sentence of Paragraph 22. NACWA denies all remaining allegations contained in Paragraph 22.

23. Paragraph 23 contains legal conclusions to which no answer is required.

24. Paragraph 24 contains legal conclusions to which no answer is required.

25. Paragraph 25 contains legal conclusions to which no answer is required.

26. NACWA affirmatively states that 40 C.F.R. § 131.14 was not effective until after EPA approved the general variance and is not applicable to this action. The remaining allegations in Paragraph 26 are legal conclusions to which no answer is required.

27. NACWA affirmatively states that 40 C.F.R. § 131.14 was not effective until after EPA approved the general variance and is not applicable to this action. The remaining allegations in Paragraph 27 are legal conclusions to which no answer is required.

28. NACWA admits the allegations contained in Paragraph 28.

29. NACWA denies the allegations contained in Paragraph 29.

30. NACWA admits the allegations contained in the first sentence of Paragraph 30. NACWA admits that EPA approved Montana's numeric nutrient criteria on February 26, 2015. NACWA denies the remaining allegations contained in Paragraph 30.

31. NACWA admits that Montana developed a variance from its nutrient water quality standards. NACWA admits that the variance applies to most wadeable streams of the state, with either 1.0 mg/L (1000 µg/L) total phosphorus and 10.0 mg/L (10,000 µg/L) total nitrogen, or 2.0 mg/L (2000 µg/L) phosphorus and 15 mg/L (15,000 pg/L) nitrogen, but denies Waterkeeper's characterizations regarding the stringency of the variance. NACWA admits that the variance may be renewed after twenty years. NACWA denies the remaining allegations contained in Paragraph 31.

32. NACWA denies the allegations contained in Paragraph 32.

33. NACWA denies the allegations contained in Paragraph 33.

34. NACWA lacks knowledge or information sufficient to form a belief regarding what data Montana did not analyze or consider. NACWA denies any remaining allegations contained in Paragraph 34.

35. Paragraph 35 consists of legal conclusions to which no answer is required.

36. NACWA admits that Montana submitted its numeric nutrient criteria and the variance to EPA for review and approval. NACWA admits that EPA approved both by approving Montana's numeric nutrient water quality rule standards package on February 26, 2015. NACWA denies the remaining allegations in Paragraph 36.

37. NACWA admits that Montana may review the variance every three years and that the variance may be renewed after twenty years. NACWA states that the sections of MCA § 75-5-313(8) speak for themselves. NACWA denies the remaining allegations contained in Paragraph 37.

38. NACWA denies the allegations contained in Paragraph 38.

39. NACWA admits the allegations contained in Paragraph 39.

40. NACWA admits that attachment A is a true and correct copy of Montana Department of Environmental Quality's Circuit DEQ-12A. NACWA admits the first sentence of Paragraph 40. NACWA admits that Montana adopted a variance with effluent limits of 1.0 mg/L total phosphorus and 10.0 mg/L total nitrogen (or even higher for certain facilities). NACWA denies the remaining allegations of Paragraph 40.

41. Paragraph 41 contains a legal conclusion to which no answer is required.

42. NACWA denies the allegations contained in Paragraph 42.

43. NACWA denies the allegations contained in Paragraph 43.

44. NACWA denies the allegations contained in Paragraph 44.

45. NACWA affirmatively states that 40 C.F.R. § 131.13 was not effective until after EPA approved the general variance and is not applicable to this action. Paragraph 45 contains legal conclusions to which no answer is required.

46. Paragraph 46 contains legal conclusions to which no answer is required.

47. NACWA affirmatively states that 40 C.F.R. § 131.14 was not effective until after EPA approved the general variance and is not applicable to this action. Paragraph 47 contains legal conclusions to which no answer is required.

48. NACWA affirmatively states that 40 C.F.R. § 131.14 was not effective until after EPA approved the general variance and is not applicable to this action. NACWA denies the allegations contained in Paragraph 48.

49. NACWA denies the allegations contained in Paragraph 49.

50. NACWA affirmatively states that 40 C.F.R. § 131.14 was not effective until after EPA approved the general variance and is not applicable to this action. NACWA denies the allegations contained in Paragraph 50.

51. NACWA denies the allegations contained in Paragraph 51.

52. NACWA admits that Montana developed the numeric nutrient criteria for wadeable streams and specific river reaches found in Montana's Department

Circular DEQ-12A are scientifically-based. NACWA denies the remaining allegations contained in Paragraph 52.

53. NACWA denies the allegations contained in Paragraph 53.

54. NACWA denies the allegations contained in Paragraph 54.

55. NACWA denies the allegations contained in Paragraph 55.

56. NACWA denies the allegations contained in Paragraph 56.

Prayer

NACWA requests:

1. That the Court deny Waterkeeper's request for a declaration that EPA acted in violation of the Clean Water Act and applicable regulation in approving Montana's variance water quality standard for nutrients;

2. That the Court deny Waterkeeper's request for a declaration that EPA's approval of Montana's variance water quality standard for nutrients is arbitrary and capricious and an abuse of discretion;

3. That the Court deny Waterkeeper's request for vacatur of EPA's approval of that portion of Montana's water quality standards that is the variance water quality standard for nutrients found in DEQ Circular 12B;

4. That the Court deny Waterkeeper's request for costs and attorneys' fees as determined appropriate under the Equal Access to Justice Act; and

5. Such other and further relief as the Court deems just and equitable.

Respectfully submitted this 20th day of October, 2016.

JACKSON, MURDO & GRANT, P.C.

/s/ Murry Warhank

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