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/Cross-Appellant,

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

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

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

THIRD BRIEF ON CROSS-APPEALS FOR DEFENDANT U.S. ENVIRONMENTAL PROTECTION AGENCY

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GLOSSARY

Circular 12A	Department Circular DEQ-12A
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CWA	Clean Water Act
EPA	U.S. Environmental Protection Agency
MGD	million gallons per day
MDEQ	Montana Department of Environmental Quality
MPDES	Montana pollutant discharge elimination system
NPDES	national pollutant discharge elimination system
PMP	pollutant minimization program
POTW	publicly owned treatment work
Waterkeeper	Plaintiff Upper Missouri Waterkeeper
WQS	water quality standard
µg/L	micrograms per liter

INTRODUCTION

In these consolidated appeals, Upper Missouri Waterkeeper (Waterkeeper) challenges nutrient water quality standards (WQS) adopted by the State of Montana under the Clean Water Act (CWA). The standards include "base" numeric nutrient criteria for specified streams and "variances" therefrom. The U.S. Environmental Protection Agency (EPA) approved the base standards and the variances (as revised by Montana in 2017) for 36 named publicly-owned treatment works (POTW). Waterkeeper challenged EPA's 2017 approval decision on the grounds that the variances do not protect designated uses and were justified by allegedly improper cost considerations. The district court correctly rejected these arguments. But the court incorrectly invalidated EPA's approval for a different reason: because the variances do not require the subject dischargers to achieve the base criteria for the subject streams within the designated variance time periods.

As explained in EPA's initial brief, this feature of the variances is not a bug: it accords with both the CWA and EPA's regulation. The variance regulation allows states to make incremental progress toward an interim "highest attainable condition," where designated aquatic-life uses and recreational uses are not "attainable" for specified reasons, including when pollution controls would result in "substantial and widespread economic and social impact." The district court's contrary interpretation of relevant statutory and regulatory requirements is not

compelled by the text of the CWA. And it is at odds with the plain language of EPA's variance regulation.

In response to these points, Waterkeeper raises three arguments. *First*, Waterkeeper contends that all appeals in this case are now moot as a result of administrative actions taken by Montana and EPA to comply with the district court's judgment during the pendency of their appeals. *Second*, Waterkeeper reprises its claim (rejected by the district court) that states may never consider costs in establishing WQS. And *third*, Waterkeeper attempts to defend the district court's judgment that variances must result in compliance with base WQS, even though Waterkeeper never made such argument below. For reasons stated herein and in EPA's opening brief, each of Waterkeeper's arguments should be rejected.

STATEMENT OF THE ISSUES (CROSS-APPEAL)

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

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

2. Does EPA reasonably construe the CWA as authorizing states to consider costs—in establishing WQS or variances therefrom—for the purpose of determining whether designated uses are attainable? (Yes.)

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the Addendum to the First Brief on Cross-Appeal for Defendant U.S. EPA (EPA's First Brief) or in the Addendum to this brief.

STATEMENT OF THE CASE

A. Proceedings and decision on appeal

The proceedings relevant to the issues on appeal are fully described in EPA's First Brief at 5-25.

B. Post-judgment proceedings

EPA's First Brief also briefly described the post-judgment proceedings by MDEQ and EPA on remand from the district court's remedy order. *Id.* at 25. The following supplemental statement is for purposes of responding to Waterkeeper's mootness argument.[1]

1. 2019 variances

As previously explained, *id.* at 23-24, the district court invalidated EPA's approval of the 2017 general variances on the grounds that the variances were not designed to achieve the base numeric nutrient criteria for the subject streams by the end of the variance time periods. 1 E.R. 47-56. In its remedy order, the court vacated the "term[s]" of the variances; however, at Montana's request, the court stayed the vacatur. It provided Montana 120 days to develop, and EPA 90 days to

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[1] This Court may consider post-judgment (extra-record) events for purposes of determining whether the case has become moot. *Lowry v. Barnhart*, 329 F.3d 1019, 1024 (9th Cir. 2003) (citing *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68 n. 23 (1997)). The agency and court records described herein and in Waterkeeper's brief are undisputed and subject to judicial notice. *See, e.g.*, *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727 n.3 (9th Cir. 2015); *United States v. Aguilar*, 782 F.3d 1101, 1103 n.1 (9th Cir. 2015); Fed. R. Evid. 201(b).

approve, replacement general variances "in accordance with" the district court's interpretation of CWA regulatory requirements. 1 E.R. 24.

In November 2019, in an effort to comply with the district court's order, Montana adopted replacement variances (2019 variances). Montana did so by amending Montana Department of Environmental Quality (MDEQ) Circular DEQ-12B (Circular 12B), which sets out the terms of the variances, *see* http://deq.mt.gov/Portals/112/Water/WQInfo/Documents/Circulars/DEQ12B_Nov2019_FINAL.pdf; and by amending the state administrative rule that adopts Circular 12B as state law, *see* Mont. Admin. R. 17.30.660 (effective Nov. 23, 2019); *see also* EPA's First Brief at 13 (describing Circular 12B and rule). But in the amended rule, Montana also specified that if "a court of competent jurisdiction" were to determine that EPA's approval of the 2017 variances was "valid and lawful," the preexisting edition of Circular 12B (dated May 2018) would be the applicable rule. *See* Mont. Admin. R. 17.30.660(9), http://www.mtrules.org/gateway/RuleNo.asp?RN=17%2E30%2E660. In accordance with the district court's order, 1 E.R. 24, and with the requirements of the CWA, 33 U.S.C. § 1313(c)(2)(A), Montana then submitted the 2019 variances to EPA for its review.

2. EPA's 2020 decision

In February 2020, EPA issued a decision on review *disapproving* the 2019 variances. *See* Letter from Gregory Sopkin, EPA Regional Administrator, to

Shaun McGrath, Director MDEQ (Feb. 24, 2020) (Sopkin Letter), *reproduced in* DktEntry 34-3, Exhibit A (July 27, 2020)) *see also* https://www.epa.gov/sites/production/files/2020-03/documents/mt-approval-022420.pdf. Specifically, EPA determined that the MDEQ's changes to Circular 12B did not include a "timeline to meet" the base numeric nutrient criteria, as required by the district court's interpretation of CWA regulatory requirements. *Id.* at 7-8. EPA stressed its disagreement with that interpretation. *Id.* at 1, 3, 5, 8. But EPA was "bound to follow" the "prescriptive language" of the court's opinion, pending the outcome of the present appeal. *Id.* at 5, 8.

Though disapproving the 2019 amendments to Circular 12B, EPA expressly approved the new rule provision—set out in Mont. Admin. R. 17.30.660)(9)—that would restore the 2017 variances under state law, should EPA's approval of the 2017 variances be upheld by the courts. Sopkin Letter at 9-10. EPA determined that this provision was consistent with CWA requirements. *Id.* And EPA explained that the "scope" and "content" of its approval of the 2017 variances remained unchanged. *Id.* at 10.

In addition, EPA also took action to approve Mont. Admin. R. 17.30.619(2) and Mont. Admin. R. 17.30.715(4), two similar non-severability provisions adopted by Montana in 2014. In relevant part, the former provision states:

> If a court of competent jurisdiction declares [Mont. Code Ann. 75-5-313] or any portion of that statute invalid, or if the United States Environmental Protection Agency disapproves [Mont. Code Ann. 75-5-313] or any portion of that statute, under 30 CFR. 131.21], or if rules adopted pursuant to [Mont. Code Ann. 75-5-313(6) or (7)] expire and general variances are not available, then (l)(e) and all references to DEQ-12A, base numeric nutrient standards and nutrient standards variances in [Mont. Admin. R.] 17.30.201, 17.30.507, 17.30.516, 17.30.602, 17.30.622 through 17.30.629, 17.30.635, 17.30.702, and 17.30.715 are void, and the narrative water quality standards contained in [Mont. Admin. R. 17.30.637] are the standards for total nitrogen and total phosphorus in surface water . . . .

See Sopkin Letter at 10. Although Montana adopted these non-severability provisions as an "integral" part of its WQS for nutrients (base numeric criteria and variances), EPA declined to act on the provision when first approving the WQS (in 2015). *Id.* at 10-11.

In its 2020 decision, EPA determined that it should have acted on the non-severability provisions when they were first presented, and that the provisions were consistent with CWA requirements. *Id.* at 11. EPA took no position on what events would "trigger" the non-severability provisions. *Id.*

3. Montana's interpretation of the non-severability provision

On May 1, 2020, MDEQ sent an email to all members of the "Nutrient Workgroup" concerning the status of the WQS for nutrients, in light of the present litigation and EPA's disapproval of the 2019 replacement variances. *See* Email from Myla Kelly (May 1, 2020) (Kelly Email), *reproduced in* DktEntry 34-2,

Exhibit A (July 27, 2020). The Nutrient Workgroup is an advisory committee of stakeholders—including Waterkeeper—who advise MDEQ on matters relating to the establishment and implementation of nutrient standards. *See* https://deq.mt.gov/Water/Resources/nutrientworkgroup. The email explained that the non-severability provision means "essentially that there can be no [Circular] 12A (numeric nutrient criteria) without [Circular] 12B (nutrient variances)." Kelly Email at 1. The email concluded that "EPA's 2020 disapproval of Montana's nutrient variance 12B, which followed litigation challenging those variances, triggers the removal of 12A."

4. Waterkeeper's new lawsuit

On March 31, 2020, Waterkeeper filed a new action in the District of Montana—separate and apart from the present action—challenging EPA's approval of the two non-severability provisions, namely, Mont. Admin. R. 17.30.619(2) and Mont. Admin. R. 17.30.715(4)). *See Upper Missouri Waterkeeper v. U.S. EPA*, No. 4:20-cv-00027 (D. Mont.). That new action remains pending.

SUMMARY OF ARGUMENT

A. The consolidated appeals are not moot.

Waterkeeper contends that the appeals are moot. It observes that EPA's disapproval of Montana's 2019 nutrient standards variances left the state without general nutrient standards variances, triggering the non-severability provision in Montana's nutrient WQS. According to Waterkeeper, because the state is

presently without numeric nutrient criteria, there is no need for regulatory variances from the criteria. Thus, Waterkeeper argues, this Court need not review the district court's order invalidating the 2017 nutrient standards variances.

Contrary to Waterkeeper's argument, this Court can grant effective relief. EPA disapproved the 2019 variances only because they do not meet the district court's interpretation of CWA regulatory requirements. EPA disagrees with that interpretation and pursues this appeal to challenge it. Moreover, EPA's disapproval of the 2019 variances, while preventing those variances from taking effect, did not invalidate the 2017 variances. The *district court* invalidated the 2017 variances. Accordingly, Montana is presently without nutrient variances as a direct result of the district court's decision. Should this Court reverse and vacate the district court's order, the ruling would restore the status quo ante (the 2017 variances), providing meaningful relief for EPA and the other appellants in this case.

Alternatively, if this Court determines that it lacks jurisdiction to review EPA's appeal and those of the other appellants due to mootness, this Court should nonetheless vacate the district court's judgment. As a matter of equity, when an appeal becomes moot for reasons outside the control of an appellant, this Court will vacate the district court's judgment to prevent it from having unfair collateral consequences. The post-judgment actions by EPA and Montana in this case were undertaken in good faith in accordance with the agencies' respective obligations

under the CWA and the district court's order. If the post-judgment administrative actions somehow led to mootness (as Waterkeeper contends) and the appellants are therefore unable to prosecute their appeals, vacatur of the district court's opinion is dictated as a matter of equity.

B. Waterkeeper's cross-appeal lacks merit.

In its cross-appeal, Waterkeeper contends that EPA's approval of Montana's nutrient standards variances contravenes the CWA because all WQS under the Act must protect designated uses without regard to implementation costs. The district court's judgment rejecting this claim should be affirmed for three reasons.

First, as a threshold matter, Waterkeeper disregards the specific content and manner of EPA's approval decision. For decades, EPA has interpreted the CWA to authorize states to consider costs in determining whether aquatic-life uses and recreational uses are attainable for particular waterbodies. Specifically, under longstanding EPA regulations, a state may remove or modify an aquatic-life or recreational use designation if the state demonstrates, through a use-attainability analysis, that the controls needed to achieve criteria protective of such uses would result in "substantial and widespread economic and social impact." 40 C.F.R. § 131.10(g)(6). In 2015, EPA issued a variance regulation to codify the agency's practice of approving WQS variances (in lieu of downgrading designated uses) under essentially the same standard. Id., 131.14(b)(2)(i)(A)(1). EPA approved

Montana's 2017 nutrient standards variances under the 2015 regulation. Yet in its cross-appeal, Waterkeeper does not once cite the regulation, much less challenge its rationale or EPA's findings under the regulation. Because Waterkeeper does not challenge the regulation or EPA's rulemaking authority, this Court may affirm EPA's decision as compliant with the unchallenged regulation.

Second, to the extent that Waterkeeper impliedly challenges the regulation as contrary to CWA requirements, Waterkeeper's argument must be rejected as lacking textual support. The CWA authorizes states to consider implementation costs for purposes of determining whether aquatic-life and recreational uses are attainable. In relevant part, CWA § 303(c)(2)(A) provides that WQS must be "such as to . . . enhance the quality of the water and *serve the purposes of* [*the Act*]" and "shall be established *taking into consideration* the use and value" of the subject water for various purposes, including for aquatic-life and recreational uses. 33 U.S.C. § 1313(c)(2)(A) (emphasis added). In turn, CWA § 101(a)(2) specifies a "national goal" of achieving aquatic-life uses and recreational uses "wherever attainable." 33 U.S.C. § 1251(a)(2). Congress did not specify that states must achieve water quality protective of aquatic life and recreational uses without regard to implementation costs. Nor did Congress define "wherever attainable" to mean "wherever attainable—with cost as no object." Rather, as used in the Act, the term "wherever attainable" plainly authorizes the consideration of any factor that might

make it infeasible for a state to achieve aquatic-life uses or recreational uses in a particular waterbody. To the extent that the statute is ambiguous, EPA reasonably construes "wherever attainable" as allowing consideration of economic impacts.

Indeed, Waterkeeper does not contend that it is unreasonable to construe "wherever attainable" as admitting economic considerations. Instead, Waterkeeper argues that the phrase is irrelevant for construing WQS requirements under CWA § 303(c)(2)(A), because the phrase appears in an "interim" water quality goal that Congress hoped to meet by 1983. But the passing of this date does not mean that the goal no longer applies. In any event, Waterkeeper's argument proves too much: if the national goal in § 101(a)(2) has somehow expired, there is no statutory basis for the regulatory mandate that WQS must include designated aquatic-life and recreational uses. EPA derived this mandate specifically by reference to the national goal in § 101(a)(2), which is prefaced by the disclaimer "wherever attainable."

Third, in arguing that § 303(c)(2)(A) by itself "plainly" mandates WQS that protect designates uses no matter the cost, Waterkeeper confuses the relevant regulatory terms. "Water quality standards" is an umbrella term that refers to designated uses and water quality criteria. The CWA and EPA regulations direct states to adopt water quality criteria that are protective of designated uses based on scientific considerations. But as just explained, the CWA and EPA regulations allow states to consider economic attainability in designating uses. Waterkeeper

fails to acknowledge that a variance is a time-limited alteration of both the designated use and the corresponding water quality criteria. Because variance requirements represent both modified uses and modified criteria, EPA regulations reasonably authorize states to adopt variances based on the same attainability considerations that are relevant for designating uses.

C. The district court erred in holding that WQS variances must include a timeline for achieving base WQS.

For the foregoing reasons, the district court correctly rejected Waterkeeper's claim that the CWA prohibits states from considering economic factors relating to the attainability of aquatic-life and recreational uses when adopting WQS or WQS variances. But the district court invalidated EPA's approval decision for a different reason: because Montana's nutrient standards variances do not include timelines for achieving the base WQS.

As explained in EPA's First Brief at 30-52, this aspect of the State's variances is not a flaw. It is the result of the CWA's allowance for economic factors and the fact of uncertainty about when it is economically feasible to install technology that allow attainment of base WQS. A variance is an "interim" standard representing the "highest attainable condition" that can be achieved by dischargers, in light of regulatory considerations that make it infeasible to achieve the base WQS. Under the plain terms of the variance regulation, the variance period must be no longer than necessary to attain the interim "highest attainable

condition," 40 C.F.R. § 131.14(b)(1)(iv), (2)(ii), which is necessarily short of the base WQS. If the base WQS were "attainable," there would be no need or basis for a variance. Conversely, the regulation cannot reasonably be construed as requiring the attainment of standards shown to be unattainable.

Waterkeeper tries to defend the district court's interpretation—that a variance must lead to compliance with the base WQS—by focusing almost exclusively on a different provision of the variance regulation. That provision specifies: (1) variances must include requirements that "represent" the "highest attainable condition" "throughout" the variance period; and (2) such requirements are to "apply throughout" such period. Waterkeeper argues that this language "plainly" means that the highest attainable condition must be *achieved* from the outset of a variance and that the end goal of the variance must be to achieve the base WQS. But this construction is flatly contradicted by the regulatory language just noted, which specifically states that the variance term is to be no longer than needed to achieve the highest attainable condition.

The language on which Waterkeeper relies plainly serves other purposes. It simply means that the variance requirements apply from the outset (upon EPA approval), for purposes of setting permit limits and thus establishing the conditions to be achieved by permittees within the variance period, and that the specified requirements must continue to represent the highest attainable condition over the

course of the variance. Moreover, even if Waterkeeper has identified a genuine ambiguity in the regulatory terms specifying the objective and requirements for variances, EPA's continuous, longstanding, reasonable interpretation is entitled to deference.

Waterkeeper also contends that if WQS variances are not designed to achieve compliance with base WQS, they will become open-ended exemptions, forestalling any progress toward CWA goals. But in so arguing, Waterkeeper misconstrues Montana's variances and disregards applicable requirements. Under 40 C.F.R. § 131.14, variances are time-limited requirements that must result in improved water quality conditions representing the highest attainable condition that feasibly can be achieved. Subsequent variances can be adopted under the variance regulation only if, upon the expiration of a variance, a new highest attainable condition is identified and all other requirements are met. In this manner, variances ensure continuous incremental progress toward the base WQS. This is entirely reasonable, consistent with the statute, and advances the goal of achieving water quality protective of aquatic life and recreational uses wherever attainable.

D. The district court abused its discretion in dictating time ranges for replacement variances.

If this Court determines that the district court correctly construed the variance regulation as requiring all variances to have timelines for achieving

compliance with the base WQS, the court's remedy order still must be reversed. The court improperly required Montana, when adopting any replacement variance, to adopt a time limit for achieving the base WQS within the "time range proposed" by Waterkeeper. 1 E.R. 23. The time that subject dischargers reasonably need to meet permit limits based on Montana's base numeric nutrient criteria is a factual question that MDEQ and EPA (upon review of any MDEQ proposal) must determine in the first instance in duly initiated administrative proceedings. The district court abused its discretion in predetermining the proper outcome of such proceedings, based on an improper extra-record proffer of evidence by Waterkeeper. Under the APA, the court sits in review of factual findings and legal determinations made by agencies, not to hear evidence and make de novo determinations for an agency.

STANDARD OF REVIEW

Whether a case is moot is a question of law that this Court reviews de novo. *Oregon Natural Desert Ass'n v. U.S. Forest Service*, 957 F.3d 1024, 1032 (9th Cir. 2020). The standards of review for all issues on appeal are set forth in EPA's First Brief at 28-30. Waterkeeper's cross-appeal raises a question of interpretation of the CWA. This Court reviews the district court's summary judgment on this issue de novo, *Gill v. U.S. Department of Justice*, 913 F.3d 1179, 1184 (9th Cir. 2019), under the two-step framework of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837

(1984). Under that framework, where the statute speaks to the "precise question" at issue, the "unambiguously expressed intent of Congress" controls. *Yazzie v. U.S. EPA*, 851 F.3d 960, 968 (9th Cir. 2017) (quoting *Chevron*, 467 U.S. at 842-43). Where the statute is "silent or ambiguous," EPA's interpretation must be upheld if it is a "permissible construction." *Id.* (quoting *Chevron*, 467 U.S. at 843).

ARGUMENT

I. The appeals are not moot.

A. This Court can provide effective relief.

Under Article III of the Constitution, "a live controversy [must] persist throughout all stages of the litigation." *Gator.com Corp. v. L.L. Bean, Inc.*, 398 F.3d 1125, 1128-29 (9th Cir. 2005) (en banc). If a case becomes moot during the pendency of an appeal, this Court loses jurisdiction and may not render a judgment on the merits. *In re Burell*, 415 F.3d 994, 998 (9th Cir. 2005). But an appeal becomes moot only if intervening circumstances prevent the Court from granting the appellant "effective relief." *Id.*

Waterkeeper argues that this Court cannot provide any effective relief to EPA or to the other appellants because actions by Montana and EPA in response to the district court's remedy order "triggered" the non-severability provision in Montana's nutrient WQS, thereby voiding the base numeric nutrient criteria in addition to the variances. *See* Second Brief on Cross-Appeal of Plaintiff-Appellee

Upper Missouri Waterkeeper (Waterkeeper's Second Brief) at 3, 18-19. According to Waterkeeper, because the base WQS for which the variances were developed "no longer exist[]," a judgment from this Court reversing the district court's order invalidating the 2017 variances "would not matter." *Id.* at 19. This conclusion is based on a misunderstanding of the administrative proceedings on remand.

Waterkeeper relies on the rule that when a challenged statutory or regulatory provision is repealed, rescinded, or expires during the pendency of a suit, the suit is presumed to be moot, unless the challenger can show a "reasonable expectation" "founded in the record" that the statute or regulation will be re-enacted or re-promulgated. *See id.* at 18 (discussing *Board of Trustees v. Chambers*, 941 F.3d 1195, 1198-99 (9th Cir. 2019) (en banc)). The present appeals are not moot under this rule for two reasons.

First, when adopting the 2019 variances in response to the district court's remedy order, *see supra* p. 5, Montana did so *provisionally*, expressly providing in its regulation that the preexisting variances would be in effect in the event they were determined to be "valid and lawful" by a "court of competent jurisdiction"—e.g., by this Court in the present appeal. *See* Mont. Admin. R. 17.30.660(9). If EPA had *approved* the 2019 variances—which it did not because it considered the variances to be inconsistent with the district court's opinion—the approval decision would have effected a replacement of the 2017 variances for CWA

purposes. *See* 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.14(a)(3). But even then, the appeals by EPA, MDEQ, and the other intervenor defendants would not have been moot. This is so because a favorable decision in the present appeal—i.e., a decision affirming EPA's approval of the 2017 variances—will reinstate the 2017 variances. *See* Mont. Admin. R. 17.30.660(9). This is more than a "reasonable expectation of reenactment." *Cf. Board of Trustees*, 941 F.3d at 1199.

Second, EPA did not approve the 2019 variances. The CWA provides that only after EPA determines that new WQS meet the requirements of the Act do they become the applicable WQS. 33 U.S.C. § 1313(c)(3) (upon EPA approval, WQS "shall thereafter be the [WQS] for the applicable waters"); *see also* 40 C.F.R. § 131.14(a)(3) ("A WQS variance, once adopted by the State and approved by EPA, shall be the applicable standard . . . ") By *disapproving* the 2019 variances and thus preventing them from displacing the 2017 variances for CWA purposes, EPA did not invalidate the prior 2017 variances. *See* 33 U.S.C. § 1313(c)(3). Rather, the 2017 variances are no longer in effect because they were invalidated and set aside by the district court. *See* 1 E.R. 23.

The district court initially "stayed" its "vacatur" of the terms of the 2017 variances "until EPA approves . . . replacement general variance[s]." 1 E.R. 24. But that event that never occurred. And Waterkeeper does not contend that the stay remains in effect. The court gave Montana and EPA a specified deadline

within which to adopt and approve, respectively, replacement variances conforming to the court's interpretation of CWA regulatory requirements. *Id.*; *see also* EPA's First Brief at 25. Montana and EPA did not meet the court's deadline and have not sought any extension, choosing instead to accept vacatur. With the terms of the 2017 variances vacated, the variances are now void. Waterkeeper agrees that the district court "invalidated" the 2017 variances and that they are no longer in effect. Waterkeeper's Second Brief at 19. Accordingly, this case is no different from any other case in which a federal agency appeals from a district court decision setting aside that agency's decision. This Court can provide effective relief by reversing the district court's remedy order and thereby restoring the 2017 variances.

Contrary to Waterkeeper's argument, *see id.* at 18-19, Montana's non-severability provision (Mont. Admin. R. 17.30.619(2)) makes no difference to the mootness analysis. As a threshold matter, Waterkeeper's reliance on the non-severability provision (as allegedly rendering the present appeals moot) is inconsistent with Waterkeeper's separate and pending lawsuit challenging EPA's approval of the non-severability provision. *See supra* p. 8. If Waterkeeper were to prevail in that lawsuit, its mootness argument here could not stand.

In any event, Montana adopted the non-severability provision in 2014 as part of its original WQS for nutrients (which included the numeric nutrient criteria and

variances)—not during the pendency of this case and not for purposes of rescinding the WQS for nutrients. Nor did EPA take action to disapprove or rescind Montana's WQS for nutrients as a whole. In approving the non-severability provision in 2020, EPA simply corrected its prior inaction on that provision, which Montana had adopted as an "integral part" of nutrient WQS. Sopkin Letter at 10-11. EPA's 2020 decision confirmed that the non-severability provision is consistent with the CWA and is operative for CWA purposes. *Id.*; *see also* 33 U.S.C. § 1313(c)(3).

As acknowledged by Montana and EPA, the non-severability provision means that "there can be no . . . numeric nutrient criteria without . . . nutrient variances." Kelly Email at 1. Waterkeeper agrees that this provision is "self-executing" and has been triggered. Waterkeeper's Second Brief at 19. But the post-judgment administrative actions by Montana and EPA did not effect a change in the law that would have to be undone by Montana or EPA to restore the status quo ante. EPA's disapproval of the 2019 variances prevented them from taking effect for CWA purposes. 33 U.S.C. § 1313(c)(3); 40 C.F.R. § 131.14(a)(3). That decision did not impact the 2017 variances, and it was based solely on the district court's interpretation of CWA regulatory requirements, which EPA is challenging in the present appeal. Sopkin Letter at 1, 3, 5, 8.

Accordingly, the fundamental reason that there are no general nutrient standards variances in Montana is the district court's order invalidating EPA's

approval of the 2017 variances. If this Court reverses the district court's judgment and vacates the court's remedy order as void ab initio, EPA's approval of the 2017 variances would be reinstated. And that approval would be treated, as a matter of law, as though it never had been set aside. *See Kilgore v. Key Bank, National Ass'n*, 673 F.3d 947, 964-65 (9th Cir. 2012) (reversed judgment is a "nullity"); *Sudan Drilling, Inc. v. Anacker*, 320 P.3d 977, 981 (Mont. 2014) (citation omitted) (reversed judgment is a "nullity" and "the matter stands as if no judgment had ever been rendered"). Under that circumstance, the triggering of the non-severability provision likewise would become a non-event. *See* Mont. Admin. R. 17.30.660(9). Thus, because this Court can grant effective relief by vacating the district court's judgment and reinstating the preexisting regulatory regime, the appeals by EPA and the other appellants are not moot. *In re Burell*, 415 F.3d at 998.

Waterkeeper's cross-appeal—seeking to invalidate EPA's approval of the 2017 variances for reasons rejected below—is not moot for the same reason.

B. If the consolidated appeals are moot, the district court's judgment should be vacated.

Alternatively, if this Court determines that the appeals are moot and must be dismissed, this Court should also order the district court's judgment vacated. As a matter of equity, if an appellant is unable to seek appellate relief from an adverse decision due to intervening events that have rendered the case moot, the established practice of this Court is to vacate the decision below to prevent it from "spawning

any legal consequences." *Log Cabin Republicans v. United States*, 658 F.3d 1162, 1167 (9th Cir. 2011) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 40-41 (1950)); *In re Burrell*, 415 F.3d at 999. This Court will depart from such practice only in the "rare situation" in which an appellant has voluntarily forfeited appeal rights, e.g., by settling a case in lieu of pursuing an appeal. *Log Cabin Republicans*, 658 F.3d at 1168; *In re Burrell*, 415 F.3d at 999.

Here, the appellants have not taken any voluntary action to forfeit their appeal rights. Rather, the administrative actions that Waterkeeper cites as the cause of mootness were actions taken in good faith by EPA and Montana to comply with the district court's orders and their respective obligations under the CWA, while both agencies acted diligently to preserve and pursue their appeals. These are the very circumstances for which the vacatur rule was designed. *Log Cabin Republicans*, 658 F.3d at 1167-68; *In re Burrell*, 415 F.3d at 999; *see also Board of Trustees*, 941 F.3d at 1199-1200.

II. EPA properly considered economic impacts in this case pursuant to the express terms of longstanding regulations, which are consistent with the CWA.

Waterkeeper argues that EPA contravened the CWA in approving Montana's general variances because the variances are based on economic considerations. Waterkeeper's Second Brief at 20-33. The key question raised by this argument is whether, under the familiar *Chevron* framework, EPA's WQS

regulations reasonably construe the statutory term "attainable" to include economic considerations. *See infra* pp. 30-42. In arguing that EPA's interpretation is not permissible, Waterkeeper completely disregards the specific variance regulation applied by EPA. *See* 40 C.F.R. § 131.14. It likewise disregards the related WQS regulations that for decades have allowed states to consider economic impacts for purposes of determining whether water quality goals for aquatic-life and recreational uses are "attainable." Viewed in context of the relevant regulations and statutory provisions, Waterkeeper's arguments are readily dismissed.

A. EPA reasonably acted in accordance with its longstanding regulations, which allow states to consider economic impacts to determine if designated uses are attainable.

As explained in EPA's First Brief at 5-6, Section 303 of the CWA requires states to adopt WQS, 33 U.S.C. § 1313(c)(2)(A), which are implemented through the Act's permitting programs and for other purposes, *id.* §§ 1311(b)(1)(C), 1342(a). The CWA tasks EPA with the obligation to ensure that state WQS "meet the requirements" of the CWA, *id.* § 1313(c)(3), and the Act gives EPA authority to promulgate regulations for carrying out this task, *id.* § 1361(a).

The principal statutory requirements for WQS are as follows. *First*, WQS must be sufficient "to protect the public health or welfare, enhance the quality of water and *serve the purposes of this* [*Act*]." 33 U.S.C. § 1313(c)(2)(A) (emphasis added). *Second*, in adopting WQS, states must "take into consideration" the "use

and value" of their waters for specified purposes, including "for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other purposes, and . . . navigation." *Id.* *Third*, WQS "shall consist of the designated uses of the navigable waters involved and the water quality criteria for such waters based upon such uses." *Id.*

The other CWA provision relevant here is § 101, which sets out the purposes of the Act, as referenced in § 303(c)(2)(A). Section 101(a)(2) specifically addresses water quality, highlighting a subset of the uses enumerated in § 303(c)(2)(A). *See* 33 U.S.C. § 1251(a)(2). It declares the "national goal" of achieving "*wherever attainable* . . . water quality [that] provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water." *Id.* (emphasis added). EPA reasonably looks to this national water quality goal in interpreting the requirements for WQS under § 303(c)(2)(A).

In 1975, EPA promulgated regulations to implement § 303(c)(2)(A). *See* 40 Fed. Reg. 55,334 (Nov. 28, 1975). Echoing the language of § 101(a)(2), the 1975 regulations provided that states "shall establish [WQS] which will result in the achievement of the national water quality goal specified in section 101(a)(2) . . . wherever attainable." *Id.* at 55,341 (adopting 40 C.F.R. § 130.17(c)(1)). To determine whether such WQS "are attainable" for any particular waterbody or

segment, the 1975 regulations directed that "states should take into consideration environmental, technological, social, economic, and institutional factors." *Id.*

In 1983, EPA issued replacement WQS regulations that remain in effect today (with amendments). *See* 48 Fed. Reg. 51,400 (Nov. 8, 1983) (adopting 40 C.F.R. Part 131). In promulgating the 1983 regulations, EPA reaffirmed its "commitment to have [WQS] move toward the Section 101(a)(2) goals." *Id.* at 51,400. The current regulations construe the phrase "serves the purposes of the Act" as used in § 303(c)(2)(A) to "mean[] that water quality standards should, wherever attainable, provide water quality" to meet the § 101(a)(2) goals. 40 C.F.R. § 131.2. And the current regulations contains detailed direction as to how economic and other factors are to be considered in determining such attainability. *See id.* § 131.10.

Specifically, the current regulations specify that a state must adopt WQS that meet the § 101(a)(2) aquatic-life and recreational-use goals for all covered waters, unless the state affirmatively demonstrates, through a "use attainability analysis" that "attaining the use" for a particular waterbody is "not feasible." 40 C.F.R. § 131.10(a), (g), (j). And the regulations enumerate the grounds that states must demonstrate in a use-attainability analysis for purposes of "remov[ing]" or modifying an aquatic-life or recreational use. *See id.* § 131.10(g). As relevant here, EPA specified that states may show that achieving such use is not feasible by

demonstrating that "controls" needed to achieve such use (if not otherwise required by the CWA) "would result in substantial and widespread economic and social impact." *Id.* § 131.10(g)(6).

EPA "retained" this standard from a similar provision in the 1975 regulations. 48 Fed. Reg. 51,400, 51,401 (Nov. 8, 1983); *see also* 40 C.F.R. § 130.17(c)(3) (1978). In the preamble to the 1983 rule, EPA explained that "economic considerations" had long "been a part of water quality standards decisions," and that "[e]conomic, health, esthetic, and conservation values which contribute to the social and economic welfare of an area must be taken into account in determining the most appropriate use of a stream." 48 Fed. Reg. at 51,400-01 (quoting S. Rep. No. 89-10 (1965)).

In adopting the 1975 and 1983 regulations, EPA did not include procedures for approving WQS variances. But EPA long had an informal policy of approving use variances for individual dischargers or pollutants—in lieu of removing or modifying a use for an entire waterbody—so long as a state adopted the variance "consistent with the substantive and procedural requirements for permanently downgrading a designated use." 78 Fed. Reg. 54,518, 54,531 (Sept. 4, 2013); *see also* EPA's First Brief at 8. In the preamble to the 1983 regulations, EPA specifically advised that it would approve discharger-specific "variances" duly adopted by a state, "on a demonstration that meeting the [base WQS] would cause

substantial and widespread economic and social impact, the same test as if the State were changing a use based on substantial and widespread social and economic impact." 48 Fed. Reg. at 51,403.

EPA's 2015 variance regulation, now at 40 C.F.R. § 131.14 codifies this pre-existing policy. *See* 80 Fed. Reg. 51,020, 51,035 (Aug. 21, 2015). Under the 2015 regulation, a state may adopt a "variance to a use specified under Section 101(a)(2)" of the CWA if the state demonstrates that the use is not attainable by the subject discharger or waterbody, for any one of the same reasons that would justify removing or modifying the designated use. 40 C.F.R. § 131.14(b)(2)(i)(A)(1). These reasons include the situation in which controls necessary to achieve the base WQS "would result in substantial and widespread economic and social impact." *Id.* § 131.10(g)(6)). In addition, a state must show that the variance requirements (which apply in lieu of the base WQS) reflect the "highest attainable" water quality conditions that feasibly can be achieved by the discharger, *id.* § 131.14(b)(1)(ii); that the term of the variance term is only so long as necessary for the discharger to achieve that highest attainable condition, *id.* § 131.14(b)(1)(iv), (2)(ii); and that other requirements are satisfied, *see* EPA's First Brief at 9-11.

B. Waterkeeper does not challenge the variance regulation.

In approving Montana's 2017 nutrient standards variances for 36 named POTWs, EPA applied the 2015 regulation, finding that all applicable requirements

had been met. *See* EPA's First Brief at 14-21; 2 E.R. 138-81. Specifically, based on Montana's evidentiary submission and on its own independent analysis, EPA found (1) that requiring the subject POTWs to meet the base criteria would result in "substantial and widespread economic and social impact," 2 E.R. 155-58 (applying 40 C.F.R. §131.14(b)(2)(i)(A)(1)); (2) that the interim requirements imposed in the 2017 variances represent the highest attainable condition for all 36 POTWs and are the greatest water quality improvements that feasibly can be achieved within the variance terms, 2 E.R. 165-80 (applying *id.* § 131.14(b)(1)(ii)); and (3) that the variance time periods are "only as long as necessary to achieve the highest attainable condition," 2 E.R. 178-79 (applying *id.* § 131.14(b)(1)(iv), (2)(ii)).

Waterkeeper does not challenge any of these findings. *See* Waterkeeper's Second Brief at 20-33. Accordingly, Waterkeeper's argument—that costs can *never* be considered when adopting WQS—can only be construed as a challenge to the variance regulation itself, i.e., 40 C.F.R. § 131.14. But Waterkeeper also does not expressly challenge the variance regulation as promulgated or as applied. *See* Waterkeeper's Second Brief at 20-33; *see also* 2 E.R. 133-36 (operative complaint); 2 E.R. 127 (motion for summary judgment) ("Waterkeeper is not challenging EPA's variance rule on its face"). Indeed, in its cross-appeal argument concerning whether economic impacts may be considered in establishing WQS, Waterkeeper does not even cite the variance regulation. *See* Waterkeeper's Second Brief at

20-33; *cf. id.* at 33-52 (citing 40 C.F.R. § 131.14 not to argue that the regulation is contrary to the CWA, but only that EPA failed to comply with it); *infra* pp. 44-50.

This Court has repeatedly "admonished" that it "cannot 'manufacture arguments for an appellant.' " *Independent Towers of Washington v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)). This Court need not consider an argument that would effectively invalidate EPA's variance regulation, where Waterkeeper has failed entirely to consider the relevant aspects of the regulation, much less to articulate how the regulation allegedly contravenes the CWA. *Id.* Rather, this Court may simply affirm EPA's approval decision as compliant with the relevant and unchallenged regulation. In any event, to the extent that this Court does consider Waterkeeper's cross-appeal to be an implied challenge to the variance regulation, it must do so mindful of the actual regulatory basis and rationale for EPA's decision.

C. EPA's longstanding interpretation is consistent with the terms of the CWA.

The Supreme Court has held that where the terms of a statute permit a regulating agency to consider the economic costs of a regulatory mandate, a failure to consider such costs would be unreasonable. *See Michigan v. EPA*, 576 U.S. 743, 754-760 (2015). Consistent with this view, for decades EPA regulations have expressly authorized states to remove or modify designated aquatic-life uses and recreational uses, or to issue WQS variances from such designated uses, if a state

demonstrates (for a particular waterbody or dischargers) that these uses are not attainable due to "substantial and widespread economic and social impacts." 40 C.F.R. §§ 131.10(g), 131.14(b)(2)(i)(A)(1). This longstanding interpretation of WQS requirements is consistent with the ordinary meaning of the statutory term "attainable," and it is a reasonable and permissible interpretation of the relevant CWA text. *See Yazzie*, 851 F.3d at 968 (citing *Chevron*, 467 U.S. at 842-43).

As explained above (pp. 24-25), Congress specified that states shall "take into consideration" aquatic-life and recreational uses in adopting WQS, and that WQS shall "serve the purposes" of the CWA. 33 U.S.C. § 1313(c)(2)(A). And Congress specified a "national goal" of providing for the protection of aquatic-life use and recreational use in all water bodies, "wherever attainable." *Id.* § 1251(a)(2). But Congress did not specifically mandate that states must adopt and implement WQS that achieve the § 101(a)(2) goals for all water bodies, notwithstanding costs or other feasibility concerns. *Id.* § 1313(c)(2)(A). Nor did Congress specify what factors are to be considered in determining whether and when the prescribed aquatic-life and recreational-use goals are "attainable" for any particular water body. *Id.* § 1251(a)(2).

As used in § 101(a)(2), the phrase "wherever attainable" is open-ended. As a matter of ordinary usage, this unmodified phrase invites consideration of any factor—chemical, physical, technological, economic, social, or other—that might

impede a state in achieving the prescribed goals. *Id.* As a general proposition, moreover, the economic costs imposed by regulations are reasonably considered in determining whether regulatory goals are attainable. *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 217-27 (2009) (EPA may consider costs when determining, under CWA § 1326(b), the "best technology available for minimizing adverse environmental impact.").

This is not to argue that states may utilize any cost analysis of their own devising to establish WQS. As described above, the statutory touchstone for WQS is *attainability*. As relevant here, the WQS regulations require states to adopt WQS that achieve the § 101(a)(2) goals for all covered waters—notwithstanding pollution control costs—unless a state demonstrates, through a use attainability analysis or through the similar analysis set out in the variance regulation that the necessary controls would cause "substantial and widespread economic and social impacts." 40 C.F.R. §§ 131.10(g)(6), 131.14(b)(2)(i)(A). This is a reasonable interpretation of "wherever attainable." *See Chevron*, 467 U.S. at 842-43; *Yazzie*, 851 F.3d at 968.

D. Waterkeeper's arguments lack merit

1. EPA reasonably relies on § 101(a)(2) to interpret the requirements of § 303(c)(2)(A)

Waterkeeper does not contend that EPA's construction of "attainable" is unreasonable. Rather Waterkeeper argues that the national goal set out in CWA

§ 101(a)(2) and the phrase "wherever attainable" are irrelevant for purposes of adopting WQS under § 303(c)(2)(A) of the Act. Waterkeeper's Second Brief at 28-30. Waterkeeper observes that § 101(a)(2) expresses an "interim goal of water quality" to "be achieved by July 1, 1983," 33 U.S.C. § 1251(a)(2), and that Congress simultaneously declared the "national goal" to "eliminate" "the discharge of pollutants into the navigable waters" by 1985, *id.* § 1251(a)(1). Because § 101(a)(2) expresses an "aspirational . . . interim goal," Waterkeeper argues that this provision cannot reasonably be construed to "modify in any way the express requirements" of § 303(c)(2)(A). Waterkeeper's Second Brief at 29-30.

This argument does not survive scrutiny. Although Congress expressed a desire to achieve the prescribed "interim" water quality goals by 1983, Congress prefaced this goal with the phrase, "wherever attainable." 33 U.S.C. § 1251(a)(2). Thus, the aspirational date (of 1983) for achieving the aquatic life and recreational use goals "wherever attainable" was not an intended deadline for achieving this goal in all covered waters. *Id.*

Further, Congress did use the modifier "interim" in declaring the water quality goal in § 101(a)(2) and not in declaring the separate goal of "eliminating" pollutant discharges by 1985 in § 101(a)(1). But this usage does not suggest an expiration date for the water quality goal. The two goals are different in kind. The elimination of pollutant "discharges" (as defined in the CWA) might not achieve

the water quality goals, in light of nonpoint pollution. *See Pronsolino v. Nastri*, 291 F.3d 1123, 1128-29 (9th Cir. 2002). And the water quality goals might be achieved without eliminating all point-source discharges. *Id.* at 1127-28 (noting need to control, but not necessarily eliminate, point source pollution). For this reason, the goal of eliminating pollutant discharges by 1985 cannot reasonably be construed as an expiration date for the water quality goal. To the contrary, as long as the interim water quality goal remains unmet, EPA reasonably looks to the goal as the polestar of its WQS regulations. *See* 40 C.F.R. § 131.2.

Moreover, Waterkeeper's argument proves too much. As explained above (pp. 24-25, 31), § 303(c)(2)(A) does not specifically require states to adopt WQS that protect aquatic-life and recreational uses in all covered waters, except by reference to the "purposes" of the Act and to the national goal specified in § 101(a)(2). *See* 40 C.F.R. § 131.2; *Mississippi Natural Resources Commission v. Costle*, 625 F.2d 1269, 1277 (5th Cir. 1980). Waterkeeper contends that EPA should instead give preeminence to the declared statutory "objective . . . . to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." Waterkeeper's Second Brief at 29 (citing 33 U.S.C. § 1251(a)). But this overarching objective is too broad by itself to give rise to any particular statutory mandate for water quality purposes.

And this objective does not stand alone. Congress declared the water quality goal in § 101(a)(2) as a means to "achieve" the broader "objective" in § 101(a). *See* 33 U.S.C. § 1251(a). For this reason, EPA reasonably looks to the goal that Congress specifically declared for water quality in determining whether state WQS "serve the purposes" of the Act. *Id.* § 1313(c)(2)(A); 40 C.F.R. § 131.2. If that water quality goal has expired due to the passage of the statutory dates, there is no source for the statutory mandate to achieve the aquatic-life and recreational use goals "wherever attainable." *See Mississippi Natural Resources Commission*, 625 F.2d at 1277.

2. The CWA's requirement that water quality criteria protect designated uses is not implicated here.

Waterkeeper supposes that there is a different enforceable mandate within the "plain" terms of § 303(c)(2)(A), namely, a requirement that WQS must protect "designated uses." Waterkeeper's Second Brief at 23-24, 30, 32. But there is no such requirement per se. Rather, Waterkeeper conflates the statutory requirements for water quality *criteria* with the requirements for water quality *standards*. As noted above (p. 25), the CWA directs that standards "shall consist" of two parts: (1) "the designated uses of the navigable waters involved"; and (2) "the water quality criteria for such waters based upon such uses." 33 U.S.C. § 1313(c)(2)(A).

The task of designating waterbody uses is akin to establishing land-use designations under zoning rules. *See Mississippi Natural Resources Commission*,

625 F.2d at 1276. Multiple factors, including economic and social considerations, are potentially relevant to use designations. *Id.* at 1277; *see also* 44 Fed. Reg. 25,223, 25,224 (April 30, 1979) (issuing WQS for Mississippi). In contrast, once uses are designated, determining the criteria that protect the designated uses is largely a "scientific" and "technical" question. *Id.* at 25,224.

EPA's WQS regulations reflect this distinction. *See* EPA's First Brief at 7-8. As part of the rules for designating uses, states may look to whether "substantial and widespread economic and social impact[s]" make prescribed aquatic-life uses or recreational uses unattainable. 40 C.F.R. §§ 130.10, 131.14(b)(2)(i)(A). In contrast, water quality criteria "must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use." *Id.* § 131.11(a)(1); *see also* EPA's First Brief at 7-8. In other words, EPA construes the statutory phrase "water quality criteria . . . based upon such uses," 33 U.S.C. § 1313(c)(2)(A), to mean that the criteria must be established on a "sound scientific rationale." 40 C.F.R. § 131.11(a)(1); *see also* 44 Fed. Reg. at 25,224.

As Waterkeeper observes, the Fifth Circuit affirmed this interpretation. Waterkeeper's Second Brief at 25 (describing *Mississippi Natural Resources Commission*, 625 F.2d at 1277-78). But Waterkeeper errs in presuming that the Fifth Circuit's holding controls the present case. *Mississippi Natural Resources Commission* affirmed EPA's interpretation that costs are irrelevant for determining

the *criteria* that protect aquatic-life and recreational uses. 625 F.2d at 1277-78. But in so holding, the Fifth Circuit also recognized that economic considerations are permissibly considered in circumstances like those at issue in the present case. Specifically, the court explained that EPA had "determined that . . . economic factors are to be considered in designating uses." *Id.* at 1277. The Fifth Circuit also observed that, where the criteria dictated by a designated use would result in "substantial and widespread adverse economic and social impact," such use could be downgraded. *Id.* (quoting 40 C.F.R. § 130.17(c)(3) (1978)).

Waterkeeper provides no support for its oft-repeated assertion that "water quality *standards*" must "protect designated uses." Waterkeeper's Second Brief at 2, 13, 23, 24, 26-29, 31-32. Properly considered, designated uses are part of the standards. Water quality *criteria* must protect designated uses based on scientific considerations. *See* 40 C.F.R. § 131.11(a)(1). But designated *uses*—and, by extension, the criteria that meet those uses—may be based on broader factors, including economic attainability. *Id.* §§ 131.10(a), (g). Stated differently, when a state modifies a designated use after demonstrating that such use is not attainable based on widespread and substantial economic and social impacts, the state may adopt modified water quality criteria based on the modified designated use.

In the same way, EPA regulations reasonably authorize states to consider economic considerations in adopting WQS variances, which are regulatory variances

from designated uses and associated criteria. As defined by regulation, a WQS variance is a "time limited *designated use and criterion*." 40 C.F.R. § 131.3(o) (emphasis added). And the variances here are "variance[s] to a *use* specified in section 101(a)(2) of the Act," *see* 40 C.F.R. § 131.14(b)(2)(i)(A), namely, the aquatic-life uses for the streams in Montana that the base numeric criteria (Circular 12A) are designed to protect. *See* EPA's First Brief at 12-17. Because the WQS variances are themselves WQS, consisting of both time-limited designated uses and time-limited criteria, the variance requirements need not protect the designated uses that would apply in the absence of a variance. Those designated uses are modified by the variances, consistent with requirements applicable to designating uses. *See* 80 Fed. Reg. at 51,035-41; *Mississippi Natural Resources Commission*, 625 F.2d at 1277.

To be sure, as Waterkeeper notes, Waterkeeper's Second Brief at 41, n.12, the variances in this case do not specify, for the subject streams, "highest attainable interim uses" or "highest attainable interim criteria." *See* EPA's First Brief at 16-17. But such elements are not required under the variance regulation for discharger-specific variances. *See id.* at 10; 40 C.F.R. § 131.14(b)(1)(ii). Rather, for such variances, states may instead impose discharger-specific requirements, i.e., interim effluent conditions or pollutant minimization programs, subject to specified regulatory conditions. *See id.* § 131.14(b)(1)(ii)(A)(2)-(3); EPA's First Brief at

10. As EPA explained, these requirements serve as a "reasonable surrogate" for a designated interim use and interim criterion by effecting the highest attainable water quality conditions during the term of the variance. *See* 80 Fed. Reg. at 51,037 (preamble to 2015 regulation); 78 Fed. Reg. 54,518, 54,536 (Sept. 4, 2013) (proposed rule).

In its 2017 approval decision, EPA determined that Montana's variances satisfy all regulatory conditions. *See* EPA's First Brief at 16-17. Waterkeeper does not challenge EPA's determinations or the regulatory conditions, explicitly or implicitly.[2] Instead, Waterkeeper argues solely that the "plain language" of the CWA "makes no allowance for costs to drive [the] development" of any "*water quality standard*." Waterkeeper's Second Brief at 23 (emphasis added). As already explained, this argument fails because water quality *standards* (including WQS variances) consist of water quality criteria *and* designated uses, because states may consider "attainability" when designating uses (which drive the associated criteria), and because economic considerations are relevant in

[2] Waterkeeper notes that Montana's WQS variances do not specify designated uses and water quality criteria for the subject waterbodies. Waterkeeper's Second Brief at 41, n.12. But Waterkeeper did not challenge the regulatory provision that allows other requirements to serve as surrogates for interim uses and criteria. *See id.*; *see also id.* at 20-33. In any event, the "summary mention of an issue in a footnote, without reasoning in support of the [party's] argument, is insufficient to raise the issue on appeal." *United States v. Strong*, 489 F.3d 1055, 1060 n.4 (9th Cir. 2007). And the argument is forfeited because Waterkeeper did not raise it below. *See In re Mercury Interactive Corp. Securities Litigation*, 618 F.3d 988, 992 (9th Cir. 2010).

determining attainability. 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A); *Mississippi Natural Resources Commission*, 625 F.2d at 1277-78.

3. *American Trucking* is inapposite.

As part of its "plain language" argument, Waterkeeper also cites *Whitman v. American Trucking Ass'n*, 531 U.S. 457 (2001), for the proposition that statutory provisions mandating "protective environmental standards" will not be construed as allowing cost considerations unless Congress has "clearly directed" that costs may be considered. Waterkeeper's Second Brief at 25. But *American Trucking* did not announce a rule of construction for any and every statutory provision concerning the establishment of environmental standards. 531 U.S. at 464-68. Rather, *American Trucking* simply articulated a rule for construing a particular provision of the Clean Air Act. *Id.*

American Trucking addressed § 109(b)(1) of the Clean Air Act, which directs EPA to establish national ambient air quality standards "the attainment and maintenance of which . . . are requisite to protect the public health" with an "adequate margin of safety." 531 U.S. at 465 (quoting 42 U.S.C. § 7409(b)(1)). Citing Congress's "explicit" reference to implementation costs in "many" other parts of the Clean Air Act, the Supreme Court determined that it could not infer an agency obligation to consider costs in setting the national ambient air quality

standards, absent "a textual commitment of authority to the EPA," which the Court could not find in the "absolute" language of § 109(b)(1). *Id.* at 465-68.

Similar to § 109(b)(1) of the Clean Air Act, § 304(a)(1) of the CWA directs EPA to "develop and publish . . . *criteria* for water quality accurately reflecting the latest scientific knowledge" on the effects of water pollution on "health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation." 33 U.S.C. § 1314(a)(1) (emphasis added). But unlike the CAA, which directs EPA to establish national ambient air quality standards to be implemented by the states, *see American Trucking*, 531 U.S. at 470, the CWA gives states the primary role in setting water quality standards, and does not require states to adopt the § 304(a) criteria set by EPA, *Mississippi Natural Resources Commission*, 625 F.2d at 1272; *see also* 33 U.S.C. § 1313(c)(2)(A). WQS regulations specify that, in adopting criteria, states should adopt numerical values based on § 304(a) guidance; on § 304(a) guidance "modified to reflect site-specific conditions"; or on any other "scientifically defensible methods." 40 C.F.R. § 131.11(b)(1). Here, Montana adopted its numeric nutrient criteria based in part on EPA's § 304(a) guidance for nutrients. *See* 2 E.R. 235-43; 65 Fed. Reg. 46,167 (July 27, 2000)).

More to the point, contrary to Waterkeeper's representation, Waterkeeper's Second Brief at 24, CWA § 304(a)(1) does not govern the designation of uses or

use variances. *See* 33 U.S.C. §§ 1313(c)(2)(A), 1314(a)(1). As explained, designating waterbody uses is akin to land-use planning, a task the CWA leaves to the states, subject to the broad outlines of the Act and the requirement to achieve the aquatic-life and recreational uses prescribed in § 101(a)(2) "wherever attainable." 33 U.S.C. § 1251(a)(2); 40 C.F.R. § 131.2; *Mississippi Natural Resources Commission*, 625 F.2d at 1277. As further explained, implementation costs are reasonably considered in the context of determining attainability. *Cf. Entergy Corp.*, 556 U.S. at 217-27. *American Trucking* does not hold otherwise. 531 U.S. 467-68.

* * *

In sum, EPA acted in accordance with the CWA and applicable regulations in approving the WQS variances for the 36 POTWs, based on Montana's showing —not challenged by Waterkeeper—that requiring the POTWs to meet permit limits based on the Circular 12A numeric nutrient criteria would result in "substantial and widespread economic and social impact."

III. Where base WQS are not attainable, EPA permissibly construes the CWA as allowing WQS variances for purposes of achieving the highest attainable condition.

EPA also acted in accordance with the CWA and applicable regulations in approving Montana's WQS variances aimed at a water quality target short of achieving Montana's base WQS. As explained in EPA's First Brief at 8-11, 30-33,

WQS variances are a regulatory tool that apply in circumstances in which the base WQS for a particular pollutant or pollutants both have not been attained and are not attainable by subject dischargers, e.g., because the implementation of needed controls would result in "substantial and widespread economic and social impacts." *See* 40 C.F.R. § 131.14(b)(2)(i)(A)(1) (referring to § 131.10(g)). The variance requirements are an interim goal—also not yet attained—representing the highest attainable condition, i.e., the best water quality condition that can be achieved without causing "substantial and widespread economic and social impacts." *Id.* § 131.14(b)(1)(ii). The variance term is the time reasonably needed to achieve this condition—*i.e.*, to reach the *interim goal*. *Id.* §§ 131.14(b)(1)(iv), 131.14(b)(2)(ii). The objective of the variance is thus to make *incremental* progress toward the base WQS within the variance term, not to *achieve* the base WQS itself within the term. 80 Fed. Reg. at 51,035-41.

In invalidating Montana's variances for failing to dictate a timeline for meeting the base WQS, the district court misconstrued the variance regulation and the CWA's requirements. In the proceedings below, Waterkeeper did not even urge the regulatory interpretation the district court adopted *sua sponte*. *See* 2 E.R. 92-111, 116-32; EPA's First Brief at 40. Waterkeeper's belated attempts (as appellee) to defend that interpretation are unavailing. The relevant terms of the variance regulation are unambiguous, and EPA applied the variance regulation in

accordance with those plain terms. *See* EPA's First Brief at 36-43. Even if Waterkeeper could demonstrate genuine ambiguity (which it cannot), EPA's reasonable interpretation of its regulations is entitled to deference under *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415-16 (2019). *See* EPA's First Brief at 50-51.

A. The mandate that variance requirements apply "throughout" a variance period does not mean that they must be immediately achieved.

Waterkeeper attempts to defend the district court's ruling by relying almost exclusively on one part of the variance regulation. That part describes some of the necessary elements of a WQS, namely, the rule that a "WQS variance must include . . . requirements that *apply throughout* the term of the WQS variance," which requirements "shall *represent* the highest attainable condition . . . *throughout* the term of the WQS variance." Waterkeeper's Second Brief at 34 (emphasis altered) (quoting 40 C.F.R. § 131.14(b)(1)(ii)). According to Waterkeeper, this provision "plain[ly]" mean that the "highest attainable condition" must be *achieved* from the beginning of a variance term. *Id.* at 33-37, 39.

In its decision below, the district court drew a similar conclusion from the regulatory definition of "WQS variance." That definition describes a variance as a time-limited WQS reflecting the "highest attainable condition *during* the term of the . . . variance." 1 E.R. 7, 50 (emphasis added) (quoting 40 C.F.R. § 131.3(o)) . While not deeming this language "plain," the district court construed "during the

term" as suggesting that the "highest attainable condition" is to be achieved from the outset. *Id.*; *see also* EPA's First Brief at 23-24.

As explained in EPA's First Brief at 37-40, no part of the above language supports the district court's interpretation that WQS variances must "begin" with the "highest attainable condition" and "lead to compliance" with the base WQS. 1 E.R. 23. The variance regulation must be construed as a whole, and all parts thereof must be given effect if reasonably possible. *United States v. Thomsen*, 830 F.3d 1049, 1057-58 (9th Cir. 2016); *Center for Biological Diversity v. Salazar*, 706 F.3d 1085, 1092 (9th Cir. 2013). Significantly, the variance contains provisions that directly address the time periods for *variances*. They mandate that the "term of the WQS variance must only be as long as necessary to achieve the highest attainable condition," 40 C.F.R. § 131.14(b)(1)(iv), and that when a state submits a variance for approval, it must document that that fact, *id.* § 131.14(b)(2)(ii).

This language is unambiguous. It leaves no doubt that "highest attainable condition" refers to a condition short of the base WQS that has not yet been achieved, and that the purpose of a WQS variance is to achieve this interim condition. *See* EPA's First Brief at 31, 50. Moreover, contrary to Waterkeeper's contention, Waterkeeper's Second Brief at 43-44, this unambiguous statement—that WQS variances are tools for achieving an interim goal (the highest attainable condition) short of the base WQS—is "easily reconcile[d]" with the foregoing

rules that variance requirements must "*apply* throughout" the variance term, and that they must "*represent*" the highest attainable condition "throughout" such term. 40 C.F.R. § 131.14(b)(1)(ii); *see also* EPA's First Brief at 38-40.

Under the variance regulation, the "highest attainable condition" for a subject waterbody may be represented in several ways, including by an "interim effluent condition that reflects the greatest pollutant reduction achievable" by the subject dischargers. 40 C.F.R. § 131.14(b)(1)(ii)(A)(2). If, for example, such an interim effluent condition is based on a pollution-control technology not yet in use, the relevant variance may specify a timeframe that provides dischargers sufficient time—but no more time than necessary—for designing, funding, and installing the identified technology. *Id.* § 131.14(b)(1)(iv); *see also* 2 E.R. 178-79, 193-94.

Setting the term of a variance in relation to the time reasonably needed to achieve an interim effluent condition or other variance requirement is not contrary to the rule that the variance requirements must "apply" from the beginning of the variance term. 40 C.F.R. § 131.14(b)(1)(ii). Once approved by EPA, a variance "applies" for the specified regulatory purpose of setting permit conditions, *id.* § 131.14(c), thereby ensuring permittees achieve an improved highest attainable condition and incremental progress toward the base WQS. *See* 80 Fed. Reg. at 51,022, 51,035. But this immediate applicability does not mean that the specified requirements must be (or can be) immediately achieved. Rather, where a discharger

reasonably needs time to achieve permit conditions derived from a WQS or WQS variance—due to the need to implement new technologies or for similar reasons—a state may issue a permit compliance schedule. *See* 40 C.F.R. §§ 122.47, 131.15. Compliance schedules require permittees to meet permit conditions "as soon as possible." *Id.* § 122.47(a)(1). Where permit requirements are derived from a WQS variance, the compliance schedule would match the variance term. *See* 80 Fed. Reg. at 51,036-37, 51,039-41; EPA's First Brief at 32-33.

Similarly, establishing an interim goal or a highest attainable condition that discharges need time to achieve is not inconsistent with the rule that requirements must "represent" the "highest attainable condition" "throughout" the stated variance term. *See* EPA's First Brief at 39-40. As Waterkeeper acknowledges, pollution control technologies, implementation costs, and other factors that are relevant to "attainability" can change during a variance period. Waterkeeper's Second Brief at 34, 39-40. For this reason, the variance regulation requires states to periodically reevaluate variances with terms longer than five years. 40 C.F.R. § 131.14(b)(1)(v). If, during a reevaluation, a new "highest attainable condition" associated with some "more stringent" requirement is identified, the variance must reflect the "later identified" requirement. *Id.* § 131.14(b)(1)(iii). In other words, the rule that the variance requirements must "represent the highest attainable condition" "*throughout* the term of the WQS variance" is part of a policy that variance

requirements must remain current over time. *Id.* § 131.14(b)(1)(ii). It does not mean that the "highest attainable condition" (the interim goal) must be achieved at the outset of a variance term. *Id.*

At bottom, neither Waterkeeper nor the district court identifies any textual support for the district court's conclusion that variances must "begin" with the "highest attainable condition" and "lead to compliance with" the base WQS. 1 E.R. 23. Under the plain terms of the variance regulations, the purpose of a variance is to "*achieve* the highest attainable condition"—an interim goal short of the base WQS. 40 C.F.R. §§ 131.14(b)(1)(iv), (b)(2)(ii) (emphasis added).

B. EPA cannot reasonably require a timeline for dischargers to achieve an unattainable condition.

In addition to contravening the plain language of the variance regulation, the district court's understanding of variance requirements is self-contradictory. *See* EPA's Brief at 43. As explained above (pp. 27-28), a state may adopt WQS variances only if the state can demonstrate that the base WQS are unattainable for subject dischargers, e.g., because imposing necessary controls would result in "substantial and widespread economic and social impact." 40 C.F.R. §§ 131.10(g)(6), 131.14(b)(2)(i)(A)(1). A non-attainability determination is not tantamount to a determination that the base WQS are attainable over a period of time. If the record here showed that the base WQS were attainable by the subject dischargers within the period of the variances—because the POTWs could be made

to install necessary pollution controls within such period without "substantial and widespread economic and social impact"—variances would not be warranted. Montana could adopt compliance schedules to provide the 36 POTWs time required to achieve permit limits derived from the base WQS. *See* 40 C.F.R. §§ 122.47, 131.15.

In the present case, EPA confirmed Montana's determination that the base WQS are not attainable for the 36 POTWs because necessary pollutant controls cannot be implemented without causing "substantial and widespread economic impacts." 2 E.R. 148-58. Waterkeeper never challenged this test for attainability, the evidence compiled by Montana to meet the test, or any of EPA's methodologies or findings in applying the test. *See* 2 E.R. 133-36 (complaint); 2 E.R. 89-132 (summary judgment briefs). Thus, the district court had no basis for concluding that the POTWs feasibly can achieve the base WQS over any period of time.

Nonetheless, the district court concluded that the variances "prove arbitrary and capricious" because the variances do not include a timeline designed to achieve compliance with the base WQS. 1 E.R. 23, 53. This conclusion cannot hold. If the base WQS are unattainable—which in this case is uncontroverted—there can be no reasonable timeline for achieving the base WQS.

Waterkeeper has no response to this point whatsoever. Instead, Waterkeeper simply attempts to disparage EPA's construction—that the highest attainable

condition is the end goal of a WQS variance—by asserting that such construction would create a variance *from* the highest attainable condition. Waterkeeper's Second Brief at 41. In so arguing, Waterkeeper refuses to acknowledge that both the highest *attainable* condition and the base WQS represent *improved* future conditions. Nothing in the CWA precludes EPA from establishing interim attainable WQS, where the water quality goals prescribed in § 101(a)(2) are not attainable. *See* 33 U.S.C. §§ 1251(a)(2), 1313(c)(2)(A).

C. Waterkeeper misconstrues the subject variances.

Unable to find any textual support in the variance regulation or the CWA for the district court's ruling, Waterkeeper resorts to mischaracterizing the approved variances. It portrays them as open-ended exemptions without "goal post[s]," during which time pollution will "continue[] unabated." Waterkeeper's Second Brief at 40. These broadsides echo earlier ones, *see id.* at 20-23, all of which misconstrue the variances and applicable regulatory requirements in several ways.

First, although the variances will operate in lieu of the base numeric nutrient criteria for purposes of determining permit limits for the 36 subject POTWs, the variances do not "replace[]" the base numeric nutrient criteria, as Waterkeeper asserts. *Id.* at 20; *see also* 40 C.F.R. §§ 131.14(a)(3), (c). Under the variance regulation, the base criteria remain applicable to permitting decisions for other dischargers and for other CWA purposes, including for assessing the attainment of

designated uses, for listing waters as impaired, and for establishing total maximum daily loads. *See* 40 C.F.R. § 131.14(a)(2); 80 Fed. Reg. at 51,036; *see also* EPA's First Brief at 32, 46.

Second, it is not "undisputed," as Waterkeeper contends, that the variances will remain in place for a "period of at least 20 years." Waterkeeper's Second Brief at 20, 40. The decision before the Court is EPA's approval of the 2017 variances, which have varying time periods. *See* EPA's First Brief at 14-21. The general variances for mechanical plants will apply up to 17 years from the date of variance approval (or until 2034) depending upon the circumstances at each plant. *Id*. at 19; 2 E.R. 193. The general variances for lagoons apply only through 2027 (or for ten years). *See* EPA's First Brief at 19; 2 E.R. 193. In the coming years, moreover, Montana must periodically review these variances, through public notice-and-comment proceedings. *See* 2 E.R. 192-93 (citing Mont. Code Ann. 75-5-313(7), which requires review every three years). Montana must ensure that they continue to represent the "highest attainable condition" for the subject permittees. 40 C.F.R. § 131.14(b)(1)(v). If along the way conditions change and such review proceedings demonstrate that the base WQS or other requirements "more stringent" than the present variance requirements have become attainable, Montana must implement the more stringent requirements. This obligation arises whether or not the variance time periods have run. 40 C.F.R. § 131.14(b)(1)(iii).

Third, EPA was not "silent" concerning what happens when the variance periods expire. Waterkeeper's Second Brief at 22. EPA explained in its approval decision, in the text of the variance regulation, and in the regulation's preamble that Montana may adopt subsequent variances, but only if the regulatory requirements then can be met. 2 E.R. 176; 40 C.F.R. § 131.14(b)(1)(iv); 80 Fed. Reg. at 51,036, 51,039-40. Variances are designed to compel progress toward an interim water quality goal representing the "highest attainable condition." *See* 40 C.F.R. § 131.14(b)(1)(ii); 80 Fed. Reg. at 51,035. Because the rule limits variances to the time states and permittees reasonably need to achieve the interim goal, 40 C.F.R. §§ 131.14(b)(1)(iv), 131.14(b)(2)(ii), Montana may adopt a subsequent variances only if, upon the expiration of initial variances, Montana identifies a new "highest attainable condition" that provides for further incremental progress toward the base WQS. *See* 40 C.F.R. §131.14(b)(1)(iv); EPA's First Brief at 32.

Fourth, Waterkeeper errs in arguing that the "vast majority" of the 36 POTWs for which the variances were approved "have no obligation to reduce their nutrient pollution at all unless pollutant 'minimization' can be done without substantial investment or additional study." Waterkeeper's Second Brief at 22. As noted above (pp. 38-39, 46), the variance regulation allows state to adopt different types of variance requirements (as circumstances warrant) for purposes of expressing the "highest attainable condition" that permittees must achieve over the

course of a variance term. *See* 40 C.F.R. § 131.14(b)(1)(ii)(A). Consistent with this rule, Montana adopted interim effluent conditions for total phosphorous and nitrogen, based on the best-performing pollution control technology determined to be feasible for each category of mechanical plant. 2 E.R. 160-70 (applying 40 C.F.R. § 131.14(b)(1)(ii)(A)(2). For mechanical plants already meeting these conditions for one or both pollutants, and for wastewater treatment lagoons, Montana was unable to identify "additional feasible pollutant control technolog[ies]." 2 E.R. 158-74. Accordingly, instead of requiring these permittees to install and operate new pollution control technologies, the variances facilitate water quality progress by requiring the permittees to meet effluent conditions reflecting the greatest pollutant reduction achievable with the existing technologies, and to implement "pollutant minimization programs," or "PMPs" 2 E.R. 170, 172-74, 177-78 (applying 40 C.F.R. 131.14(b)(1)(ii)(A)(3)).

But this does not mean, as Waterkeeper argues, that the PMPs will not require "substantial investment or additional study" or will not result in water quality improvements. *See* Waterkeeper's Second Brief at 22. For lagoons, for example, Montana committed to a specific state-led pilot study and performance review of existing plants, to identify innovative strategies for reducing nutrient discharges. 2 E.R. 174, 177-78, 195-96. Waterkeeper simply ignores the stated terms of the PMPs and EPA's findings.

At bottom, it is undisputed that the variances will operate in lieu of the base criteria, for the applicable time periods, for the purpose of establishing CWA permit requirements for the 36 POTWs. But that is the very definition of a variance. *See* 40 C.F.R. §§ 131.3(o), 131.14(c). The variance regulation includes multiple requirements to ensure that WQS variances make the maximum feasible progress toward the base WQS and the "national goal" of achieving water quality that protects aquatic-life and recreational uses. *See* EPA's First Brief at 8-11. Waterkeeper's attempt to portray the variances as open-ended exemptions that will make no progress toward CWA goals, Waterkeeper's Second Brief at 20-23, 40, is belied by the specific terms of the variances, the relevant regulatory requirements, and EPA's findings with respect to those requirements. EPA's First Brief at 8-11.

D. *Miccosukee Tribe* is inapposite.

Finally, Waterkeeper errs in continuing to rely on *Miccosukee Tribe of Indians v. Florida*, No. 04-21448-CIV, 2008 WL 2967654 (S.D. Fla. July 29, 2008). The district court cited *Miccosukee Tribe* for the proposition that WQS variances must lead to compliance with base WQS to avoid being improper "replacement" standards. 1 E.R. 11-12, 54. This reliance was in error principally because *Miccosukee Tribe* did not involve a WQS variance. EPA's First Brief at 48-49. Rather, it involved a Florida legislative effort to effectively replace base WQS for the Everglades (which were protective of aquatic-life uses) with a less

stringent standard, "*without . . . first performing a 'use attainability analysis*.' " 2008 WL 2967654 at *1, 29. In Waterkeeper's words, Florida was not "ready" and its dischargers were not "willing" to meet the "science-based criteria" protective of the designated uses. Waterkeeper's Second Brief at 45. But Florida had not demonstrated that such criteria were unattainable. 2008 WL 2967654 at *1, 29.

For this reason, *Miccosukee Tribe* did not address issues "very similar to those in this case." Waterkeeper's Second Brief at 44. Rather, the two cases are a study in contrasts. Here, Montana conducted an attainability analysis under the variance regulation, demonstrating (with EPA's approval) that the base WQS are not attainable for subject dischargers because they would result in "substantial and widespread economic and social impact." 2 E.R. 148-58. Moreover, the subject variances are closely circumscribed by the variance regulation, which requires Montana to make all feasible progress toward its base WQS. *See* 40 C.F.R. § 131.14(b)(2)(ii)-(vi). Therefore, the variances here (unlike the legislation in *Miccosukee*) are in accordance with the statutory requirement that WQS must be "such as to . . . serve the purposes" of the CWA, including the goal of providing for water quality protective of aquatic-life uses and recreational uses, "wherever attainable." 33 U.S.C. §§ 1251(a)(1), 1313(c)(2)(A).

E. EPA's regulatory interpretation is entitled deference.

As noted, if there is "genuine ambiguity" in the variance regulation regarding the requirements for a WQS variance, EPA's interpretation of the variance regulation is entitled to "controlling weight." *Kisor*, 139 S. Ct. at 2415-16. The "character and context" of EPA's decision here support deference to the agency, for all of the reasons identified as relevant by the Supreme Court. *Id.*; EPA's First Brief at 50-51. Waterkeeper does not argue otherwise. Rather, Waterkeeper only argues (erroneously) that EPA's interpretation is contrary to the "plain" language of the regulations or plain terms of the CWA. *See* Waterkeeper's Second Brief at 36, 42.

* * *

In sum, the WQS variances at issue here are intended to achieve, over the course of the relevant time periods, interim goals (highest attainable conditions) that are short of achieving Montana's base WQS. Contrary to the district court's holding, this is not a regulatory flaw. As EPA properly determined, the variances are consistent with the plain language of the variance regulation (and as reasonably construed by EPA) and all applicable statutory requirements.

IV. The district court abused its discretion by not remanding factual questions under its CWA interpretation to EPA and Montana

Finally, even if this Court affirms the district court's holding that WQS variances must lead to compliance with base WQS, the Court must reverse the

district court's order directing Montana to adopt replacement variances with timelines for achieving the state's base numeric nutrient criteria "in the time range proposed" by Waterkeeper. 1 E.R. 22, 24. In developing, reviewing, and approving the 2017 variances, Montana and EPA assumed—consistent with 40 C.F.R. §§ 131.14(b)(1)(iv) and 131.14(b)(2)(ii)—that the objective of a WQS variance is to achieve the interim requirements (reflecting the "highest attainable condition") and that the time period for a variance is the time needed (and no more) to achieve those requirements. *See* 2 E.R. 175-79.

If this Court determines that this is the wrong legal standard, and thus that variances must instead contain requirement requiring dischargers to achieve the base WQS within a variance period, then the agencies must be given the opportunity to develop, review, and approve replacement variances under the correct legal standard in the course of new administrative proceedings. *See* EPA's First Brief at 53-54. The district court abused its discretion in predetermining a critical portion of the possible replacement variances—the timeframe reasonably required for achieving the base WQS—before the agencies had an opportunity to compile an administrative record on that issue. *Id.*

Contrary to Waterkeeper's argument, EPA does not contend (for purposes of the present argument) that the district erred in declining to defer to EPA's findings in its 2017 approval decision. *See* Waterkeeper's Second Brief at 48 (citing EPA's

First Brief at 53). In challenging the substance of the district court's remedy order, EPA accepts arguendo the court's ruling that EPA applied the wrong legal standard in the 2017 approval decision and therefore that the factual findings therein are irrelevant. The point here is one of regular administrative order. Montana and EPA have not developed a factual record on the legal question deemed controlling by the district court concerning the time reasonably needed by the 36 POTWs to implement controls that can achieve Montana's base numeric nutrient criteria. Until the agencies develop such a record—in public notice and comment proceedings with opportunities for Waterkeeper to present its own evidence—it is premature for the district court to confine the agencies to a particular timeline, however reasonable Waterkeeper's proffer on that point might seem on its own.

This is so because the district court does not sit as a finder of fact in exercising review under the Administrative Procedure Act, 5 U.S.C. § 706(2). Rather, the court reviews the legal determinations and factual findings that a federal agency (here, EPA) makes in the first instance. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985). Waterkeeper misses the point in observing that the district court "did not prohibit" Waterkeeper from presenting expert evidence during the post-judgment brief on remedies. *See* Waterkeeper's Second Brief at 51. That is precisely the problem. The court abused its discretion in considering and relying on evidence proffered by Waterkeeper outside of the

administrative proceedings in order to predetermine a legal issue that belongs to the agencies in the first instance. *See UOP v. United States*, 99 F.3d 344, 350-51 (9th Cir. 1996).

Accordingly, if this Court affirms the district court's decision invalidating the 2017 variances, this Court should vacate the district court's remedy order except to the extent that the order sets aside the 2017 variances.

CONCLUSION

For the foregoing reasons and the reasons set out in EPA's First Brief, the judgment of the district court remanding Montana's general variances to cure perceived infirmities should be reversed, and EPA's decision approving Montana's 2017 nutrient standards variance for 36 POTWs should be upheld in its entirety.

Respectfully submitted,

s/ *John L. Smeltzer*

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ADDENDUM

Clean Water Act

Clean Water Act Regulations

Clean Water Act

33 U.S.C.A. § 1314 – Information and guidelines

(a) Criteria development and publication

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

(4) The Administrator shall, within 90 days after December 27, 1977, and from time to time thereafter, publish and revise as appropriate information identifying conventional pollutants, including but not limited to, pollutants classified as biological oxygen demanding, suspended solids, fecal coliform, and pH. The thermal component of any discharge shall not be identified as a conventional pollutant under this paragraph.

(5)(A) The Administrator, to the extent practicable before consideration of any request under section 1311(g) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(B) The Administrator, to the extent practicable before consideration of any application under section 1311(h) of this title and within six months after December 27, 1977, shall develop and publish information on the factors necessary for the protection of public water supplies, and the protection and propagation of a balanced indigenous population of shellfish, fish and wildlife, and to allow recreational activities, in and on the water.

(6) The Administrator shall, within three months after December 27, 1977, and annually thereafter, for purposes of section 1311(h) of this title publish and revise as appropriate information identifying each water quality standard in effect under this chapter or State law, the specific pollutants associated with such water quality standard, and the particular waters to which such water quality standard applies.

(7) Guidance to states

The Administrator, after consultation with appropriate State agencies and on the basis of criteria and information published under paragraphs (1) and (2) of this subsection, shall develop and publish, within 9 months after February 4, 1987, guidance to the States on performing the identification required by subsection (l)(1) of this section.

(8) Information on water quality criteria

The Administrator, after consultation with appropriate State agencies and within 2 years after February 4, 1987, shall develop and publish information on methods for establishing and measuring water quality criteria for toxic pollutants on other bases than pollutant-by-pollutant criteria, including biological monitoring and assessment methods.

* * *

(b) Effluent limitation guidelines

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall--

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants; and

(4)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best conventional pollutant control technology (including measures and practices) for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best conventional pollutant control technology measures and practices to comply with section 1311(b)(2)(E) of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best conventional pollutant control technology (including measures and practices) shall include consideration of the reasonableness of the relationship between the costs of attaining a reduction in effluents and the effluent reduction benefits derived, and the comparison of the cost and level of reduction of such pollutants from the discharge from publicly owned treatment works to the cost and level of reduction of such pollutants from a class or category of industrial sources, and shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate.

* * *

Clean Water Act Regulations

40 C.F.R. § 131.11 – Criteria.

(a) Inclusion of pollutants:

(1) States must adopt those water quality criteria that protect the designated use. Such criteria must be based on sound scientific rationale and must contain sufficient parameters or constituents to protect the designated use. For waters with multiple use designations, the criteria shall support the most sensitive use. States may adopt WQS variances, as defined in § 131.3(o). Such a WQS variance is subject to the provisions of this section and public participation requirements at § 131.20(b). A WQS variance is a water quality standard subject to EPA review and approval or disapproval.

(2) Toxic pollutants. States must review water quality data and information on discharges to identify specific water bodies where toxic pollutants may be adversely affecting water quality or the attainment of the designated water use or where the levels of toxic pollutants are at a level to warrant concern and must adopt criteria for such toxic pollutants applicable to the water body sufficient to protect the designated use. Where a State adopts narrative criteria for toxic pollutants to protect designated uses, the State must provide information identifying the method by which the State intends to regulate point source discharges of toxic pollutants on water quality limited segments based on such narrative criteria. Such information may be included as part of the standards or may be included in documents generated by the State in response to the Water Quality Planning and Management Regulations (40 CFR part 130).

(b) Form of criteria: In establishing criteria, States should:

(1) Establish numerical values based on:

(i) 304(a) Guidance; or

(ii) 304(a) Guidance modified to reflect site-specific conditions; or

(iii) Other scientifically defensible methods;

(2) Establish narrative criteria or criteria based upon biomonitoring methods where numerical criteria cannot be established or to supplement numerical criteria.

40 C.F.R. § 131.15 – Authorizing the use of schedules of compliance for water quality-based effluent limits in NPDES permits.

If a State intends to authorize the use of schedules of compliance for water quality-based effluent limits in NPDES permits, the State must adopt a permit compliance schedule authorizing provision. Such authorizing provision is a water quality standard subject to EPA review and approval under section 303 of the Act and must be consistent with sections 502(17) and 301(b)(1)(C) of the Act.