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# Nutrients/Clean Water Act: National Association Clean Water Agencies Granted Intervention to Oppose Environmental Organization's Challenge to EPA Approval of Montana Variance

## Arkansas Environmental, Energy, and Water Law Blog

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The United States District Court for the District of Montana ("Court") in an October 13 order granted the National Association of Clean Water Agencies ("NACWA") Motion to Intervene in the litigation styled Upper Missouri Waterkeeper v. United States Environmental Protection Agency and Gina McCarthy CV-16-52-GF-BMN.

The Upper Missouri Waterkeeper previously filed a lawsuit against the United States Environmental Protection Agency ("EPA") arguing that the agency failed to comply with the Clean Water Act by approving Montana's general nutrient variance.

The NACWA is a national advocacy association for public stormwater utilities and wastewater treatment agencies. The organization's members include nearly 300 municipal clean water agencies that own, operate, manage publicly owned treatment works, wastewater sewer systems, stormwater sewer systems, water reclamation districts, and all aspects of wastewater collection, treatment and discharge.

Montana had submitted Clean Water Act nutrient criteria to EPA as required by the agency. The reference to "nutrients" includes phosphorus and nitrogen.

Montana's final nutrient water quality standards were submitted to EPA on August 15, 2014. EPA approved the numeric nutrient criteria on February 26, 2015. The approval included a multiple discharger variance which is stated to allow permittees to remain in compliance while working to achieve more stringent nutrient limits.

Section 303 of the Clean Water Act requires that each state develop water quality standards for jurisdictional waters of the United States within their borders. They establish the water quality goals for a specific body of water and also serve as the regulatory basis for the development of water-quality based effluent limits and strategies for individual point source discharges.

A water quality standard consists of three parts:

- The designated uses of the waterbody

- The water quality criteria that are necessary to protect existing uses and to attain the beneficial uses designated by the state
- An anti-degradation statement or policy to protect existing uses in high quality water

Water quality criteria are ambient water quality conditions that are deemed protective uses as established for a waterbody. The states are required to adopt water quality criteria protective of the designated uses. The water quality criteria may specify the maximum concentration of pollutants that may be present in the water without impairing its suitability for certain uses.

The NACWA applied for intervention in the Upper Missouri Waterkeeper's challenge to EPA's approval of the Montana variance. The organization's application outlines Montana's efforts to develop its Clean Water Act nutrient criteria and the associated variance noting that it is:

...the first state in the nation to synthesize EPA's emphasis on reducing nutrient pollution through numeric criteria with its long-standing policy of approving multiple discharger variances to address widespread problems as to compliance with water quality standards. Therefore, other states and industry stakeholders are watching the adjudication and implementation of Montana's general variance for use in their own jurisdictions. If EPA's approval of the general variance is upheld, other states will consider the general variance approach. Should EPA's approval be overturned, however, this decision will have a chilling effect on other states for contemplating general variances – for both nutrient criteria and other pollutants, such as toxics. Striking down EPA's approval would essentially foreclose states from using this scheme of nutrient regulation, causing a slow-down in states' issuance and implementation of water quality regulations across the board.

The Upper Missouri Waterkeeper has argued that EPA failed to comply with the Clean Water Act by approving the general nutrient variance, alleging that it is not scientifically based and wrongly considers the possible economic impact to the state.

[A copy of the United States District Court Order granting NACWA's application for intervention and the Memorandum filed in support of NACWA's unopposed Motion to Intervene can be downloaded here.](#)