Daniel R. Dertke
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0994
Daniel.Dertke@usdoj.gov
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

FRIENDS OF THE WILD SWAN INC., *et al.*,	)	CV 97-35-M-DWM
	)	
Plaintiffs,	)	
	)	UNOPPOSED
v.	)	JOINT MOTION FOR
	)	SECOND AMENDED
U.S. ENVIRONMENTAL	)	JUDGMENT
PROTECTION AGENCY, *et al.*,	)	
	)	
Defendants,	)	
	)	
and	)	
	)	
STATE OF MONTANA, ex rel.	)	
DEPARTMENT OF ENVIRONMENTAL	)	
QUALITY, *et al.*,	)	
Intervenors.	)	

INTRODUCTION

Plaintiffs, EPA, and the State of Montana (the "parties") jointly move to amend Paragraph 1 of the Court's November 18, 2004, Amended Judgment. The proposed amendments are consistent with, and respectful of, the judgments entered

by this Court in the underlying case. The Amended Judgment requires that by December 31, 2012, EPA shall approve or establish Total Maximum Daily Loads ("TMDLs") for all waterbodies in Montana identified as impaired in 1996 and still identified as impaired as of 2006 (the "1996/2006 list"). Although Montana and EPA have made significant progress toward meeting that requirement, and are fully prepared to meet it,[1] the agencies have developed a more efficient and effective system for addressing Montana's impaired waterbodies. Rather than address in a piecemeal fashion those waterbodies listed as impaired as of 1996, which are scattered throughout the state, Montana and EPA propose to organize their efforts around watersheds. The Plaintiffs support this proposal, and believe that it furthers the purposes of the TMDL program and the Court's original Order requiring compliance with Section 303(d) of the Clean Water Act.

The parties therefore request the Court to change the Amended Judgment so that Montana and EPA must address the attached list of waterbodies, instead of only those that were identified as impaired fourteen years ago. The parties agree that this amendment would enable Montana and EPA to implement a watershed approach that is more efficient, more likely to encourage stakeholder involvement, and more effective in advancing the parties' common goal of improving water quality throughout the state. A proposed Second Amended Judgment is attached.

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[1] Plaintiffs take no position on this representation by EPA and Montana.

STANDARD

Under Federal Rule of Civil Procedure 60(b)(6), the Court may grant a party relief from a judgment for any reason that justifies relief.

STATUTORY AND REGULATORY BACKGROUND

The oft-stated over-arching purpose of the Clean Water Act, 33 U.S.C. § 1251 et seq. ("CWA" or "Act"), is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). The Act divides responsibility for clean water protection between the states and the federal government. As relevant to this case, the CWA directs each state, with federal approval and oversight, to promulgate water quality standards for its waters. *Id.* § 1313(a), (b), (c)(1). These water quality standards include a determination of the "designated uses" of the relevant waters and "water quality criteria" that are intended to render the waters suitable for their designated uses. *Id.* § 1313(c)(2)(A). Designated uses include drinking water, recreation, and protection of cold-water fisheries, among others.

Under the CWA, no person may discharge any pollutant into waters of the United States except in compliance with the Act, which usually means pursuant to a National Pollutant Discharge Elimination System ("NPDES") permit. *Id.* § 1311(a). EPA or a duly authorized state may issue such permits, which limit the amount of pollutants that may be discharged by a "point source," such as a pipe.

Id. §§ 1342(a), (b); 1362(14). Those permits establish effluent limitations for point sources to ensure that water quality standards will be attained or maintained in the relevant water. *Id.* § 1311(b)(1)(C). At a minimum, such effluent limitations must be based upon any nationally applicable technology-based requirements that may be appropriate for the point source in question, but they must be more stringent than such technology-based requirements would dictate if necessary to meet water quality standards. *Id.*

The CWA also requires each State to determine whether any of its waters do not meet water quality standards, and are not expected to do so even after technology-based limitations are implemented. *Id*. § 1313(d)(1)(A). If not, then the waters are considered "impaired," and are identified or listed pursuant to Section 303(d). *Id.* Impairments are typically addressed by a "total maximum daily load," or "TMDL," for the pollutant that causes the impairment. *Id.* § 1313(d)(1)(C).

A TMDL represents the maximum amount of a pollutant the particular segment of water can receive from all combined sources and still meet water quality standards. *Id.* Specifically, the CWA provides that

> [s]uch load shall be established at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.

Id. *See generally Sierra Club v. Meiburg*, 296 F.3d 1021, 1025-26 (11th Cir. 2002) (describing the process of listing impaired waters and developing TMDLs); see also 40 C.F.R. § 122.44(d)(1)(vii)(A), (B) (water quality-based effluent limits must derive from and comply with all applicable water quality standards and be "consistent with the assumptions and requirements of any available wasteload allocation for the discharge prepared by the State and approved by EPA pursuant to 40 C.F.R. § 130.7"). Because states typically divide waterbodies within their state boundaries into multiple segments, and because multiple pollutants may impair each segment, one "water quality limited segment" ("WQLS") may require multiple TMDLs.[2] The number of impairments is often accounted for in terms of waterbody/pollutant combinations. For example, if one stream segment is impaired by sediments, copper and iron, then that segment has three waterbody/pollutant combinations which must be addressed.

A waterbody/pollutant combination may be addressed by a TMDL, and once EPA has approved a TMDL that waterbody/pollutant combination can be removed from a State's 303(d) list. A waterbody/pollutant combination may also be addressed if it is determined that no TMDL is required. For example, a waterbody/pollutant combination can be delisted if new data and information show

[2] A water quality limited segment is a segment of a waterbody where water quality "does not meet applicable water quality standards, and/or is not expected to meet applicable water quality standards, even after the application of technology-based effluent limitations." 40 C.F.R. § 130.2(j).

that water quality standards are being met or if there is a change in the applicable standards. A waterbody/pollutant combination can also be delisted if it is demonstrated that the impairment is not caused by the excess loading of that pollutant, because if a pollutant is not responsible for the impairment then no load can be calculated.[3]

TMDL development can be a complex and technical process. Pollutants may enter a waterbody from both "nonpoint sources" (which the CWA does not directly regulate), such as unchanneled surface runoff of sediment or nutrients from agriculture or through "point sources" (which the CWA directly regulates) such as pipes and other discrete conveyances.[4] According to EPA's regulations, the total maximum daily load that applies to an impaired water segment is the sum of the "load allocations" of pollutants from nonpoint sources, the "wasteload allocations" of pollutants from point sources, and natural background levels of the

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[3] For example, if a waterbody segment fails to meet water quality standards due to habitat modification, there is no loading of a pollutant, either from point sources or nonpoint sources, and thus no level that can be established that will attain the standard. In these situations the waterbody would be placed in a separate category of the state's biennial Integrated Water Quality Report, required by CWA section 305(b), 42 U.S.C. § 1315(b), indicating that identified threats or impairments result from activities such as dewatering or habitat modification and, thus, a TMDL is not required.

[4] The CWA defines "point source" as "any discernible, confined and discrete conveyance," such as a "pipe, ditch, [or] channel . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14).

pollutant. *See* 40 C.F.R. § 130.2(g)-(i). The TMDL and its constituent load and wasteload allocations are therefore generally developed simultaneously, often using computer models that simulate the natural background levels of a pollutant and the amount of pollutants entering a waterbody segment at a variety of points along its course. This process allows States and EPA to account for the accumulation of pollutants from individual sources or groups of sources over the length of a waterbody segment.

TMDLs are not self-executing, and often function as "information tools." *Pronsolino v. Nastri*, 291 F.3d 1123, 1129 (9th Cir. 2002). The TMDL sets a pollutant reduction goal to be implemented through individual NPDES permits or through nonpoint source controls. *Meiburg*, 296 F.3d at 1025. Water quality improves when point sources and nonpoint sources reduce the amount of pollutants to the levels established in the TMDL.

For point sources, NPDES permits must be "consistent with the assumptions and requirements" of a TMDL's wasteload allocations. 40 C.F.R. § 122.44(d)(1)(vii)(B). In contrast, nonpoint sources of pollutants are not required to obtain an NPDES permit. Nonpoint sources implement TMDL load allocations through a variety of programs, which in Montana are largely based on voluntary action by interested citizens. It is therefore important to have stakeholders (*e.g.*, local landowners, watershed groups, Conservation Districts, etc.) who are willing

and able to carry out the TMDL's recommended nonpoint source reductions, closely involved in the TMDL development process.

FACTUAL BACKGROUND

Five Montana public interest groups filed this lawsuit alleging that EPA arbitrarily approved Montana's 1996 list of impaired waterbodies, and failed to promptly establish TMDLs for the waterbodies that were listed. The State of Montana and several industry groups intervened, and after Plaintiffs amended the complaint to add a challenge to EPA's approval of the 1998 list, the Court granted in part Plaintiffs' motion for summary judgment, finding that EPA's approval of the pace at which Montana was submitting TMDLs was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2). *Friends of the Wild Swan v. EPA*, 130 F. Supp. 1184 (D. Mont. 1999). A primary concern of Plaintiffs in filing the original lawsuit was to establish TMDLs for the many impaired waterbodies that provide cold-water fishery habitat for Montana's native trout, such as bull trout and westslope cutthroat trout. As this Court found, the pace and scope of the Montana TMDL program was lagging, and judicial intervention was required to insure timely establishment of TMDLs.

In a separate lawsuit, three of the Plaintiffs in this case challenged EPA's approval of Montana's decision in 2000 to de-list certain WQLSs. *American Wildlands v. EPA*, No. CV-02-197-M-DWM (D. Mont.) In a consent decree

settling that case Montana and EPA agreed to re-assess the delisted waters, a task they completed in 2006. *See* Docket # 53. As a result of that re-assessment, Montana and EPA determined that 484 WQLSs on Montana's 1996 impaired waters list should be retained on the 2006 list. The 484 WQLSs contained 904 waterbody/pollutant combinations that still needed to be addressed.

In this case, the Court amended its judgment in 2000, at Plaintiffs' request, to clarify that neither Montana nor EPA shall issue new permits or increased permitted discharges under NPDES or MPDES permits for waterbodies on the 1996 list until all necessary TMDLs are established for the particular water-body. The Court again amended its judgment in 2004, at the request of all of the parties, to extend to December 31, 2012, the deadline for EPA to approve or establish TMDLs for waters on the 1996 list. Paragraph 1 of the Amended Judgment currently provides that

> By December 31, 2012, the USEPA shall approve or establish TMDLs for WQLSs identified on Montana's 1996 list submitted under section 303(d) of the Clean Water Act, and are still identified as impaired on Montana's 2006 list.

The parties now respectfully request the Court to amend Paragraph 1 to read as follows:

By December 31, 2014, the USEPA shall address each of the 664 waterbody/pollutant combinations identified in Attachment A, by either (a) approving or establishing a TMDL, or (b) determining after further assessment that the waterbody/pollutant combination is not impaired, in which case the USEPA shall approve or establish a TMDL for a different impaired waterbody/pollutant combination in Montana. In addition, by December 31, 2014, USEPA shall prepare and provide to plaintiffs a report detailing USEPA's monitoring and assessment work on the 12 additional waterbodies identified in Attachment B.

ARGUMENT

THE COURT SHOULD AMEND THE JUDGMENT TO ALLOW EPA TO ADDRESS THE 664 PRIORITY WATERBODY/POLLUTANT COMBINATIONS LISTED IN ATTACHMENT A TO THE PROPOSED SECOND AMENDED JUDGMENT.

The parties share the common goal of preparing high-quality TMDLs for Montana's impaired waters. In addition, the parties seek a comprehensive approach that is based upon watersheds rather than individual water segments and that incorporates the most current data. All the parties agree that shifting the emphasis of TMDL development away from the current segment-by-segment approach based on the 1996 list to a watershed-based approach is reasonable and

consistent with the CWA's goal to protect and restore the quality of our nation's waters. It is also consistent with this Court's original rulings in this case that recognize the importance of the TMDL program as part of the CWA's overall goal of maintaining and restoring the aquatic health of our nation's waters. The parties believe that the ecological health of waterbodies in Montana is best restored by focusing on the entire watershed, rather than on discrete segments within a watershed. Plaintiffs also believe that this settlement will ensure that TMDLs are developed in waters designated as bull trout critical habitat by the U.S. Fish and Wildlife Service thereby facilitating recovery of this threatened species. Relief under Fed. R. Civ. P. 60(b)(6), in the form of the proposed Second Amended Judgment, is therefore justified.

Montana and EPA have made significant progress in implementing Montana's TMDL program since 2004, though the task of completing TMDLs on impaired watersheds is not complete. Montana has improved its TMDL program by increasing resources, including four new staff positions since 2004, and reorganizing the staff devoted to TMDL development. EPA has hired three full-time staff members specifically devoted to the Montana TMDL Program. Montana has also updated and integrated its data management systems to more efficiently store and access water quality data, which is the starting point for the TMDL process, and has completed a re-assessment of 462 water bodies that in 2000 were

removed from the 1996 list. The re-assessment effort allowed Montana to develop a more thorough understanding of the water quality problems in the State, to identify and prioritize the sources of the water quality problems, and to work with the public to implement voluntary nonpoint source measures to restore water quality. Since 2004, the last amendment to the Court's order, Montana and EPA have completed TMDLs for 602 waterbody/pollutant combinations, although not all of these waterbody/pollutant combinations are on the1996/2006 list.

Montana continues to evaluate water quality limited segments using newly collected data and information, both identifying newly impaired segments and removing segments that its assessment reveals are not impaired. Multiple federal, state, and local agencies collect water quality data and submit that data to Montana for review and assessment. EPA also receives input from citizen-based organizations, scientific groups and other local stakeholders through the TMDL process. Based on its assessment of the new data, Montana updates that status of impairment in waterbodies throughout the state, and reports this information every two years in its list of impaired waters under CWA Section 303(d), 33 U.S.C. § 1313(d). Therefore, the Section 303(d) list of impaired waterbodies changes every two years when waterbodies are added or deleted. Also, waterbodies are removed from the Section 303(d) List when TMDLs are completed.

As the parties reported in 2004, another aspect of Montana's improved TMDL program is the State's adoption of a watershed-scale approach for the development of TMDLs. Instead of considering water quality on a stream-by-stream, segment-by-segment basis, and preparing TMDLs one at a time, Montana now examines all waterbody/pollutant combinations within a watershed and bundles TMDLs into a single planning document. This allows Montana to address similar water quality issues in multiple streams together, within the context of the watershed in which they occur. Montana staff typically begin the watershed study process with a field season of supplemental data collection to verify impairments, diagnose problems, identify sources, and quantify the pollutant loads from each source. They then prepare TMDLs for all of the impaired segments and, potentially, for any other waters in the watershed discovered to be impaired by the same pollutant. This watershed process generally takes one to five years to complete, depending on the complexity of the system, available data, and available resources.

The watershed approach ensures all water quality problems that may be contributing to impairment are adequately understood and helps create a TMDL that focuses on restoration of the ecological health of the entire watershed. It allows Montana and EPA to focus time, resources, and effort on developing TMDLs within a specific environmentally-related area. The agencies can then

coordinate the data collection and field activities for multiple impairments in that watershed. Since 2000, EPA and Montana have learned that the efficiencies gained through this coordination makes it possible to collect a greater amount of data and conduct a more detailed watershed analysis than if efforts were spread across the state and analyses were conducted to address state impairments identified by an initial listing date.

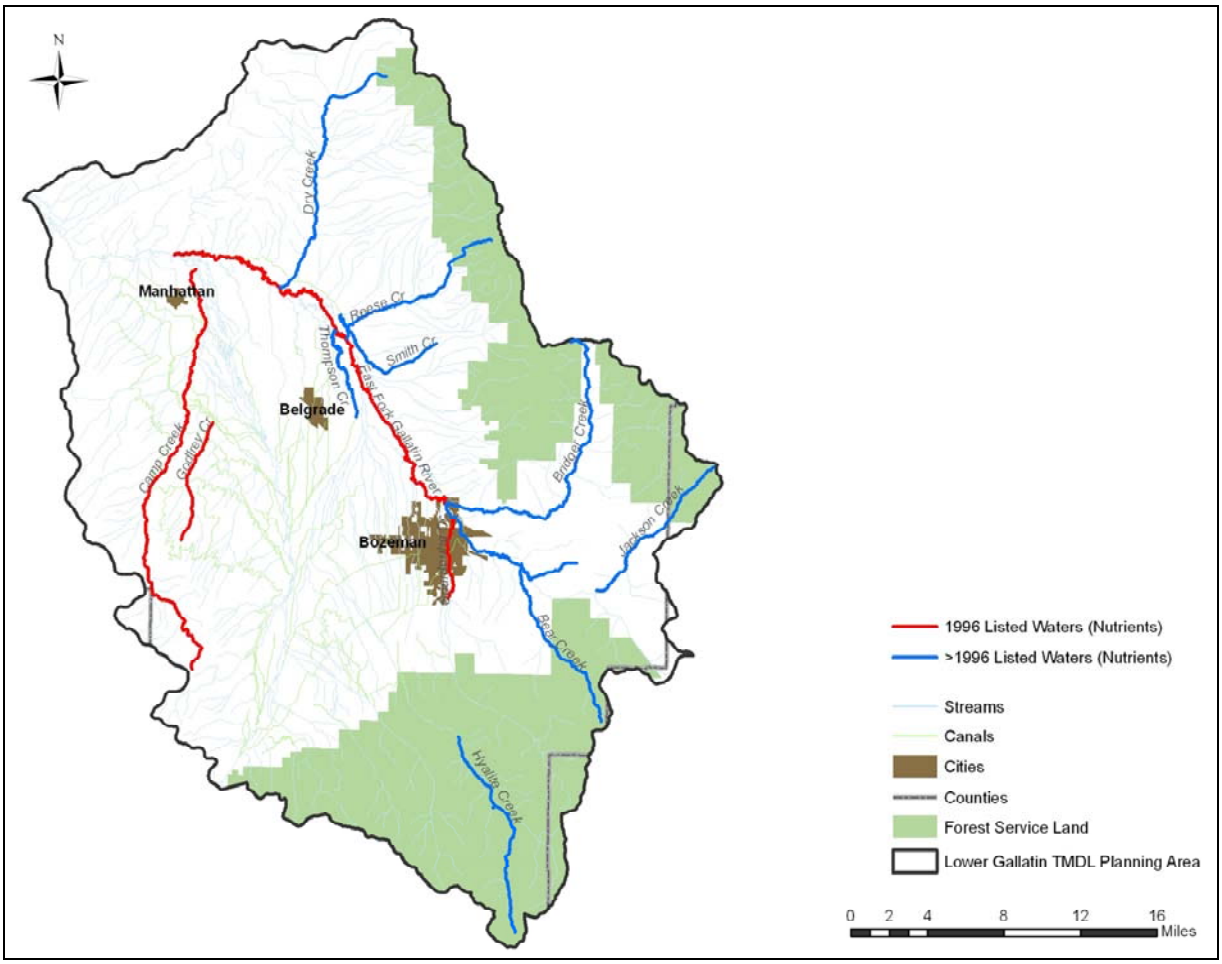
In addition to allowing for an improved level of depth and accuracy in the scientific analysis of the TMDLs in a watershed, coordination of stakeholder involvement for multiple TMDLs also allows for an increased level of public participation. For example, Montana and EPA can hold multiple meetings addressing all of the watershed impairment issues instead of fewer meetings addressing individual listings spread out across a larger geographical area. Additional opportunities for more meaningful public involvement of this sort, in conjunction with a more detailed watershed analysis, often leads to greater stakeholder interaction and acceptance of the results of the TMDL study. Reducing pollutant loads from nonpoint sources of pollutants is largely voluntary. The involvement of watershed stakeholders is essential to the success of the nonpoint source reductions specified in the TMDL, and TMDLs developed using this watershed approach are more likely to be successfully implemented.

The 997 square mile Lower Gallatin watershed illustrates the watershed approach. A total of fourteen stream segments within the Lower Gallatin TMDL Planning Area are listed as impaired on Montana's current Section 303(d) list for nutrients (Table 1 and Figure 1). Of those, only five appeared on Montana's 1996 list, and remained listed in 2006, while the remaining nine were first listed after 1996. All fourteen stream segments are tributaries of the mainstem East Fork Gallatin River, and based on the information developed to date using the watershed approach, Montana and EPA believe that all fourteen segments likely contribute to the nutrient problem in the mainstem. However, if Montana and EPA must focus their resources on addressing waterbody/pollutant combinations first listed in 1996, then by 2012 Montana and EPA would be able to develop TMDLs for only the five earliest listed segments and would leave the remaining nine to be addressed at some point after 2012.

Table 1. Nutrient Impaired Water Quality Limited Segments in the Lower Gallatin TMDL Planning Area

Name	Listed in 1996	First Listed Post-1996
Bear Creek		X
Bridger Creek		X
Camp Creek	X	
Dry Creek		X
East Gallatin River (Confluence of Rocky and Bear Creeks to Bridger Creek)		X
East Gallatin River (Bridger Creek to Smith Creek)	X	
East Gallatin River (Smith Creek to the Mouth [Gallatin River])	X	
Godfrey Creek	X	
Hyalite Creek		X
Jackson Creek		X
Reese Creek		X
Smith Creek		X
Sourdough Creek	X	
Thompson Creek		X

Figure 1. Nutrient Impaired Water Quality Limited Segments in the Lower Gallatin TMDL Planning Area



The proposed revision to the 2004 Amended Judgment would allow Montana and EPA to address impairments on a watershed basis, using a list-neutral approach. The proposed revision also allows Montana and EPA to address and prioritize which watersheds and associated WQLSs should be addressed first. Montana's 2010 Integrated Report presents a prioritization strategy for addressing impairments, which is based on protecting and restoring native fish such as bull

trout and westslope cutthroat, stakeholder interest, significant new pollutant sources, linkage to discharge permits, data availability, and funding. Plaintiffs also believe the amendment helps further their goals of emphasizing the prompt development of high-quality TMDLs in key watersheds that are critical to the recovery of native cold-water fish, particularly in the western and southwestern part of Montana.

The waterbodies presented in Attachment A to this Joint Motion reflect this prioritization strategy, which has been mutually agreed upon by the Montana, EPA, and the Plaintiffs. Montana, EPA, and the Plaintiffs also request an extension of the court-ordered deadline to December 31, 2014, to ensure that there is adequate time to address the priority impairments presented in Attachment A to the proposed Second Amended Judgment. This will result in addressing roughly the same number of waterbody/pollutant combinations (*i.e.*, 1404 versus 1428) as required by the current Court order, and will leave 360 water body/pollutant combinations from the 1996/2006 list to be completed after 2014. These 360 waterbody/pollutant combinations will be addressed after 2014 as part of the agencies' continuing list-neutral, watershed approach to TMDL development.

In addition, the parties agree that the agencies should complete additional monitoring and assessment work for 12 additional waterbodies by 2014, as set forth in Attachment B to the proposed Second Amended Judgment. After

addressing the waterbody/pollutant combinations listed in Attachment A, these 12 additional waterbodies represent the remaining impairments in the Flathead River watershed. Insufficient data are currently available to initiate the TMDL process for these waterbody/pollutant combinations, and the additional monitoring and assessment will provide EPA and Montana with the data needed to facilitate the development of all necessary TMDLs for the Flathead River watershed.

Although the parties' proposal will require an additional two years, and result in the agencies deferring until after 2014 some of waterbody/pollutant combinations on the 1996/2006 list, it will produce more comprehensive and therefore more beneficial TMDLs. Allowing Montana and EPA to address impairments on a watershed basis, as opposed to initiating a new information-gathering process for each individual impaired waterbody listed in 1996, would be a more effective use of resources and yield a better environmental result. As described above, the TMDLs would include greater input from stakeholders; would be based on a greater body of data, including upstream and downstream effects; would incorporate a more refined level of analysis and restoration planning; and consequently would be more likely to be successfully implemented to restore water quality.

The waterbody/pollutant combinations listed in Attachments A and B to the proposed Second Amended Judgment reflect the parties' agreement that TMDL

development should be prioritized by a number of factors, and not just when a waterbody was first identified as impaired (*i.e.*, 1996). The Court's order freezes the prioritization of TMDLs as of 1996. However, the date on which an impairment was identified does not necessarily correlate with the date on which the impairment first developed, the severity of the impairment, or the priority Montana places on the waterbody. Depending on the nature of the impairment and other factors specific to the waterbody, the later discovered impairment may be of a more critical nature and merit attention sooner than earlier-listed impairments. Further, Montana has developed improved methods for identifying and prioritizing water quality impairments. As a result, the current list of impaired waterbodies better reflects the overall condition of the State's waterbodies and the priority for addressing the problems identified.

Under Section 303 of the Clean Water Act, Montana is required to develop TMDLs for all impaired waterbodies and will do so in a timely manner for those impairments not addressed by this proposed amendment. EPA and Montana remain committed to addressing impairments and developing TMDLs for all impaired waters beyond 2014. This proposed amendment prioritizes which watersheds will have TMDLs completed or assessed by 2014.

Taking all of these factors into consideration, the parties agree that the proposed amendment allows Montana and EPA to better analyze, protect, and

restore Montana's waters. The parties also agree that Plaintiffs are entitled to reasonable attorneys' fees incurred in developing this joint proposal, in the amount of $3,740.00. The parties have agreed upon this lump sum for settlement purposes, based upon unique and case-specific factors, and it is not an acknowledgment by either Montana or EPA that Plaintiffs' counsel is entitled to compensation at a particular hourly rate.

CONCLUSION

For the foregoing reasons, the Court should grant the parties' motion to amend the Amended Judgment, to require EPA: to approve or establish by December 31, 2014, TMDLs for the 664 waterbody/pollutant combinations listed in Attachment A to the proposed Second Amended Judgment; to prepare and submit to Plaintiffs a report describing the results of EPA's monitoring and assessment work on the additional 12 waterbodies listed in Attachment B to the proposed Second Amended Judgment; and to pay Plaintiffs $3,740.00. The undersigned counsel for EPA has contacted counsel for Intervenors Montana Stockgrowers Association and Montana Farm Bureau Federation, and those have taken no position on this motion.

Respectfully submitted,

For Plaintiffs:

/s/ Jack Tuholske
JACK TUHOLSKE

For Defendants:

IGNACIA S. MORENO
Assistant Attorney General

Tuholske Law Office, P.C.
234 E. Pine Street
P.O. Box 7458
Missoula, MT 59807
Telephone: (406) 721-6986

For Montana:

/s/ Claudia Massman
CLAUDIA MASSMAN
Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(406) 444-4222

Date: September 23, 2011

Environment & Nat. Res. Div.

/s/ Daniel R. Dertke
DANIEL R. DERTKE
U.S. Department of Justice
Environment & Nat. Res. Div.
Environmental Defense Section
P.O. Box 23986
Washington, D.C. 20026-3986
(202) 514-0994

CERTIFICATE OF SERVICE

I hereby certify that, on 09/23/2011 , a copy of the foregoing document was served on the following persons by the following means:

1, 2, 3, 4 CM/ECF
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1. Clerk, U.S. District Court

2. Jack Tuholske, Tuholske Law Office, P.C.
234 E. Pine Street
P.O. Box 7458
Missoula, MT 59807
(406) 721-6986
jtuholske@gmail.com
Attorney for Plaintiffs

3. Claudia Massman, Department of Environmental Quality
1520 East Sixth Avenue
P.O. Box 200901
Helena, MT 59620-0901
(406) 444-4222
clmassman@mt.gov
Attorney for Intervenor State of Montana

4. John E. Bloomquist, DONEY, CROWLEY, PAYNE, BLOOMQUIST P.C.
P.O. Box 1185
Helena, MT 59624-1185
(406) 443-2211
john@doneylaw.com
Attorney for Intervenors Montana Stockgrowers Association and Montana Farm Bureau Federation

/s/ Daniel R. Dertke
Attorney for Defendants