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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA
GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, vs. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Administrator, United States Environmental Protection Agency, Defendants, and STATE OF MONTANA DEPARTMENT OF ENVIRONMENTAL QUALITY; TREASURE STATE RESOURCES ASSOCIATION OF MONTANA; MONTANA LEAGUE OF CITIES AND TONS; and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Defendant Intervenors.	Consolidated Case Nos.: 4:16-cv-00052-GF-BMM 4:20-cv-00027-GF-BMM **DEFENDANT-INTERVENORS NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES' AND THE MONTANA LEAGUE OF TOWNS AND CITIES' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO STAY CONSOLIDATED ORDER PENDING APPEAL** Judge: Hon. Brian Morris

Defendant-Intervenors, the National Association of Clean Water Agencies ("NACWA") and The Montana League of Towns and Cities ("Cities and Towns"), hereby reply to Plaintiff Upper Missouri Waterkeeper's ("Waterkeeper") response in opposition (Dkt. 237) to NACWA's and Cities and Towns' motion to stay this Court's consolidated order of October 30, 2020 (Dkt. 231) pending appeal.

I. INTRODUCTION

Eleven months after final judgment was entered in *Waterkeeper I*, this court, *sua sponte*, issued a *new* order – the Consolidated Order – containing new requirements and deadlines. Plaintiff Waterkeeper did not ask the court to take this action or otherwise complain that the defendants had not complied with the 2019 Orders. Yet, now, only two months before oral argument will occur before the Ninth Circuit in *Waterkeeper I* (March 4, 2021), Waterkeeper asserts that the requested stay of the Consolidated Order pending appeal of that order[1] is a mere stall tactic rather than a practical approach to maintaining the *status quo* while the Court of Appeals resolves the core issues in the underlying case. Waterkeeper's newfound sense of urgency is disingenuous.

Waterkeeper's arguments in opposition to the stay of the Consolidated Order pending appeal fail for substantive reasons including: (a) no exception to the divestiture rule is applicable; (b) the affected parties did not receive notice and an opportunity to be heard prior to issuance of the Consolidated Order; (c) Waterkeeper's misunderstanding that success on the merits for purposes of this motion relates to appeal of the Consolidated Order (not the underlying appeal in *Waterkeeper I*); (d) the false premise that the 2019 Orders correctly interpreted the

[1] Notices of Appeal of the Consolidated Order were filed by NACWA, Cities and Towns, Treasure State Resources Association, EPA, and DEQ on December 29, 2020.

CWA and that *any* mandate arising out of that interpretation cannot constitute irreparable harm; and (e) the incorrect assumption that only Waterkeeper protects the public interest in this matter. Finally, the requested "protections" Waterkeeper seeks if the stay is granted are unsupported by law or precedent.

II. ARGUMENT

A. No Exceptions to the Divestiture Rule Apply

The issues addressed by the Consolidated Order relating to *Waterkeeper I* are identical to the issues addressed in the appeal pending before the Ninth Circuit. Waterkeeper provides no response to the clear explanation that none of the exceptions to the divestiture rule apply to the Consolidated Order. These two facts alone should be dispositive that the district court did not have jurisdiction under the Ninth Circuit's divestiture rule to enter the Consolidated Order, *sua sponte*, requiring new actions to be taken by the *Waterkeeper I* parties.

Even though Waterkeeper, as plaintiff, did not ask the district court for relief, or assert noncompliance with the 2019 Orders, it now conveniently dismisses divestiture rule concerns by asserting that "[t]he Court is simply enforcing its previous orders and judgment and that action is entirely within this Court's jurisdiction after appeal." Pl.'s Resp. Opp'n Mot. for Stay at 3.

But how can that be? First, the district court never said that was what it was doing in the Consolidated Order. Second, both the district court and Waterkeeper

have expressly stated that DEQ *did* engage in rulemaking and EPA *did* review the new proposed variance as ordered by the court. What both the district court and Waterkeeper are now dissatisfied with is the *result* of this process, specifically, EPA's handling of the non-severability regulations. That alone, however, does not allow the district court to issue a *new* order, with *new* deadlines requiring a do-over. Instead, the well-established divestiture rule should be applied to serve its judicial economy purpose by preventing the same issues from being addressed by the district court and the Ninth Circuit at the same time.

B. Procedural Due Process

Even if the district court or, for that matter, Waterkeeper, believed that the 2019 Orders were not being complied with, the court should have provided *all* of the *Waterkeeper I* parties notice and an opportunity to be heard prior to issuing a new order requiring the parties to take additional actions. No type of motion was filed by plaintiff, nor did the district court issue an order to show cause or similar type of order asserting potential noncompliance with the 2019 Orders, as would typically occur. This would have provided all of the parties notice and an opportunity to be heard on the status of the 2019 Orders and what additional actions, if any, would be appropriate.

Instead, the Court relied on certain information it obtained in *Waterkeeper II* – a case in which not all of the *Waterkeeper I* defendant-intervenors (including

NACWA) are even parties – and issued a new order in *Waterkeeper I*, notwithstanding the pending appeal. NACWA, for example, first learned of the issues before the court, and the actions being ordered, when it received the Consolidated Order. Procedural due process requires notice and an opportunity to be heard. *See, e.g.*, *Briggs v. Gallatin Cnty.*, No. CV 18-10-BU-KLD, 2020 WL 2557740, at *14 (D. Mont. May 20, 2020) ("Fundamentally, procedural due process requires 'some kind of notice' and 'some kind of hearing' before the State can deprive a person of life, liberty, or property.") (citing *Zinermon v. Burch*, 494 U.S. 113, 127-28 (1990)). There is no doubt that the Consolidated Order affects the *Waterkeeper I* movants' members' property interests as discussed in their opening brief. *See* NACWA Br. Supp. Mot. Stay (Dkt. 232) at 15-20. Waterkeeper does not even attempt to refute this position in its response.

C. Movants Have a Substantial Case on the Merits and Raise Serious Legal Questions Regarding the *Consolidated Order*

There are two fundamental problems with Waterkeeper's response on the "success on the merits" consideration for whether a stay pending appeal should be issued. First, Waterkeeper attempts to skew the standard by which the court reviews the merits of the parties' positions. Second, Waterkeeper conflates the substantive arguments that are being made to the Ninth Circuit in the pending appeal with the arguments that *will* be made by NACWA and Cities and Towns in the appeal of the

Consolidated Order. The latter is what is relevant for purposes of this motion to stay.

As noted in the movants' opening brief, the Ninth Circuit has explained that "[t]here are many ways to articulate the minimum quantum of likely success necessary to justify a stay—be it a 'reasonable probability' or 'fair prospect,' . . . 'a substantial case on the merits,' . . . or . . . that 'serious legal questions are raised.'" *Leiva-Perez*, 640 F.3d at 967 (citations omitted). "We think these formulations are essentially interchangeable, and that *none of them demand a showing that success is more likely than not*." *Id*. (emphasis added) (citations omitted). The Ninth Circuit has further recognized that "a flexible approach is even *more* appropriate in the stay context." *Id*. at 966.

Waterkeeper ignores this flexible approach and argues *only* that movants must make a "strong showing" that they will succeed and that their motion should be denied because they are "not likely to succeed on the merits." Pl.'s Resp. Opp'n Mot. Stay at 7-8. This approach is inconsistent with the Ninth Circuit's holdings discussed above.

In any event, NACWA and Cities and Towns do have a substantial case on the merits and raise serious legal questions regarding the *Consolidated Order*. Waterkeeper's response, however, focusses on the merits of the substantive arguments currently on appeal before the Ninth Circuit. Pl.'s Resp. Opp'n Mot. Stay

at 7-8. This conflates the pending appeal with the appeal that was recently filed regarding the Consolidated Order.

As stated in movants' opening brief, the legal issue in *this* appeal is whether the district court had jurisdiction to order the new relief directed in the Consolidated Order and whether procedural due process requirements were satisfied in *Waterkeeper I* when issuing the Consolidated Order. NACWA Br. Supp. Mot. Stay at 2-5. Thus, Waterkeeper's attempted refutations of the underlying *Waterkeeper I* appeal arguments are unresponsive to the merits of movants' legal arguments regarding the Consolidated Order. Those arguments establish a substantial case on the merits and raise serious legal questions regarding the propriety of the Consolidated Order, thus satisfying this factor in the motion to stay analysis.

D. Waterkeeper's Argument to Refute Irreparable Harm is Based on False Premises

Movants provided three bases for demonstrable irreparable harm in its opening brief. Waterkeeper's primary argument in response is that it cannot be irreparable harm to comply with the law. Waterkeeper's position is based on the false premise that the 2019 Orders correctly interpreted the CWA and that *any* mandate arising out of that interpretation cannot constitute irreparable harm. Waterkeeper then claims that the true intent of the intervenors is to indefinitely delay compliance with the Remedies Order. Pl.'s Resp. Opp'n Mot. Stay at 10-11.

First, *all* parties in *Waterkeeper I* have appealed aspects of the 2019 Orders—including Waterkeeper. The defendants, the defendant-intervenors, and even plaintiff believe the district court was incorrect in its interpretation of the CWA in the 2019 Orders. It is clearly in dispute "what the law is." Nevertheless, DEQ and EPA took actions based on those orders during the pendency of the appeal to the Ninth Circuit. Eleven months after the final judgment was entered, the district court, without notice, issued the Consolidated Order requiring additional actions to be taken despite the fact that the underlying legal bases for those actions are the subject of the fully-briefed appeal that is scheduled for oral argument on March 4, 2021. The divestiture rule is designed to prevent these scenarios. *See, e.g.*, *Big Sky Sci. LLC v. Idaho State Police*, No. 1:19-cv-00040-REB, 2019 U.S. Dist. LEXIS 150855, at *5 (D. Idaho Sep. 3, 2019) (granting stay pending appeal and explaining: "[I]f the Court were to agree with … Defendants and dismiss the action on either (or both) of these bases, and the Ninth Circuit were then to hold otherwise, the two results would be confusing at best and irreconcilable at worst."). Further, movants have no interest in an indefinite delay. Movants' only intent in seeking a stay pending appeal is to prevent the problems caused by this situation until resolution of the *Waterkeeper I* appeal by the Ninth Circuit.

Second, Waterkeeper goes on to blithely dismiss the remaining assertions of irreparable harm arising from the Consolidated Order: (a) repetitive rulemaking

requiring large investments of time and resources, and (b) permittees' significant and unrecoverable expenditures to comply with a new variance arising from a rulemaking based on the Consolidated Order, which directs an outcome predetermined by the district court's incorrect interpretation of the CWA. As explained in detail in movants' opening brief, these harms would involve substantial impacts to local communities and ratepayers and significant sunk costs for local governmental entities that would be unrecoverable from any party should the Ninth Circuit reverse the 2019 Orders. *See* NACWA Br. Supp. Mot. Stay at 15-20.

It must be recognized that when evaluating irreparable injury, the Ninth Circuit has directed that "[t]he analysis focuses on irreparability, 'irrespective of the magnitude of the injury.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (citations omitted). Economic harm can be irreparable where it cannot be recovered from the opposing party. *See, e.g.*, *Azar*, 911 F.3d at 581 ("Economic harm is not normally considered irreparable. However, such harm is irreparable here because the states will not be able to recover monetary damages connected to the [interim final rules]."") (citations omitted); *E. Bay Sanctuary Covenant v. Barr*, 964 F.3d 832, 854 (9th Cir. 2020) ("Although the government argues that monetary harms are not irreparable, controlling circuit precedent establishes otherwise."). Accordingly, the movants have carried their burden of demonstrating potential irreparable harm along with the other criteria required for a stay pending appeal.

E. The Public Interest Weighs in Favor of Issuing the Stay

Waterkeeper does not have a monopoly on protecting the public interest in this matter as it seems to assert. Waterkeeper did not even ask the district court to issue the Consolidated Order or make any complaint of noncompliance regarding the 2019 Orders. It simply has found it convenient to agree with the district court's *sua sponte* actions. Further, there has not been any showing that maintaining the *status quo* pending appeal will increase water pollution or decrease water quality.

NACWA and Cities and Towns are, in fact, protecting the public interest in seeking a stay pending appeal of the Consolidated Order. Their members have a duty to be good fiscal stewards of public funds and municipal resources while simultaneously providing safe, clean drinking water and protecting the environment. Ensuring there is clarity on the correct interpretation of the CWA, the proper implementation of variances, and the costs that will be borne by ratepayers are all critical goals of the movants' members. Accordingly, the public interest weighs in favor of issuing the stay.

F. There is No Support in Law or Precedent for Waterkeeper's Requested "Protections" Should a Stay Pending Appeal be Issued

The type of "protections" requested by Waterkeeper should a stay be issued are not supported by law or precedent and cut against the very purpose of stay orders. In granting a motion for stay pending appeal under Fed. R. Civ. P. 62, the district court's objective is to preserve the *status quo* during pendency of appeal. *See, e.g.*,

Armstrong v. Brown, 732 F.3d 955, 959 (9th Cir. 2013) ("The district court exercised its power to 'preserve the status quo' pending the decision of the appellate court under Federal Rule of Civil Procedure 62(c)."). That is what movants have requested with regard to the Consolidated Order.

Contrary to preserving the *status quo*, Waterkeeper seeks special treatment, new remedies, and punitive measures should a stay be issued, especially if movants are unsuccessful on appeal. This is creative, but unsupportable, and Waterkeeper cites to no precedent or authority allowing such measures. Of course, this tactic is designed to discourage parties from seeking a stay pending appeal, no matter how legitimate. In this case, Waterkeeper has never made a showing that a stay pending appeal will cause it to be "substantially" injured during the pendency of the appeal. *See Leiva-Perez*, 640 F.3d at 964. Accordingly, if a stay pending appeal is granted, there is no need to provide unprecedented "protections" to Waterkeeper, especially in light of the fact that it is an engaged participant in the appeal before the Ninth Circuit as both an appellant and appellee.

III. CONCLUSION

For the foregoing reasons, Defendant-Intervenors NACWA and Cities and Towns respectfully request that the court stay the Consolidated Order pending appeal.

Dated this 5th day of January, 2021.

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CERTIFICATE OF COMPLIANCE

This brief contains 2,426 words, excluding the items exempted by Montana District Local Rule 7.1(d)(2)(E). The brief's type size and typeface comply with Montana District Local Rule 1.5(a). I certify that this brief complies with the word limit of Montana District Local Rule 7.1(d)(2)(A).

CERTIFICATE OF SERVICE

I hereby certify that on January 5, 2021, I electronically filed the foregoing Defendant-Intervenors National Association of Clean Water Agencies' and The Montana League of Cities and Towns' Reply Brief in Support of Their Motion to Stay Consolidated Order Pending Appeal with the Clerk of the Court using the CM/ECF system, which will send notification of this filing to the attorneys of record and all registered participants.

/s/ *Murry Warhank*
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