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UNITED STATES DISTRICT COURT
DISTRICT OF MONTANA, GREAT FALLS DIVISION

UPPER MISSOURI WATERKEEPER, Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY and ANDREW WHEELER, Acting 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 TOWNS, and NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, Intervenor-Defendants.	) Consolidated Case Nos.) 4:16-cv-00052-BMM) 4:20-cv-00027-BMM))) PLAINTIFF'S) CONSOLIDATED) RESPONSE IN) OPPOSITION TO MOTIONS) FOR STAY PENDING) APPEAL)))))))))

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Federal Statutes

Rules

Regulations

EXHIBIT INDEX

INTRODUCTION

Plaintiff Upper Missouri Waterkeeper ("Waterkeeper") opposes the Motions for Stay Pending Appeal of all Intervenor-Defendants. First, this Court has jurisdiction to enforce its orders even after appeal. Second, the movants have not and cannot demonstrate the four factors the Ninth Circuit Court of Appeals applies to determine whether a stay pending appeal is warranted. In particular, the movants cannot demonstrate that compliance with the Clean Water Act constitutes irreparable harm and a stay will significantly injure the public interest. Finally, even if this Court determines a stay is warranted, Waterkeeper and the public interest is entitled to protections under Rule 62(d), Fed. R. Civ. P., to ensure that the stay does not further harm the environment and allow the movants to exploit the system for delay, through the use of the stay.

ARGUMENT

I. THIS COURT HAS NOT EXCEEDED ITS JURISDICTION POST-APPEAL.

A. Courts Retain The Authority To Enforce Their Own Orders Even After Appeal.

The case law is plain that divestiture is a "creature of judicial prudence" that is not absolute, *Masalosalo by Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 956 (9th Cir. 1983), and that a district court retains jurisdiction to enforce its own judgment or orders. *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000). *See also, In re Rains*, 428 F.3d 893, 904 (9th Cir. 2005) (emphasizing and applying the

principle from *Padilla*). Movants' claims that divestiture applies here are simply incorrect and fail to acknowledge the case law.

This Court's most recent order serves to enforce the judgment regarding the validity of the Circular 12B variance and simply resets the clock on the remedies order giving Montana Department of Environmental Quality ("DEQ") and the U.S. Environmental Protection Agency ("EPA") another chance to comply. This Court originally held that the Circular 12B variance did not comply with EPA regulations (and ultimately the Clean Water Act) for variances, including the requirement to meet the Highest Attainable Condition ("HAC") throughout the term of the variance. Case No. 4:16-cv-00052, ("Waterkeeper I") Dkt. 177. The Court also held that the failure of the Circular 12B variance to include a schedule for attaining the protective water quality standards in Circular 12A violated the Clean Water Act. *Id.* The Court vacated portions of the Circular 12B variance, but stayed the vacature pending completion of the remedy, a successful revision (under the law) to the Circular 12B variance. *Id.* and Waterkeeper I, Dkt. No. 184. In its July, 2019 order on remedies, the Court set a deadline for DEQ to revise Circular 12B along the lines suggested in Waterkeeper's remedies briefing, to submit that revision to EPA for approval as required under 33 U.S.C. § 1313(c)(2), and for EPA to approve or disapprove the revision in accordance with 33 U.S.C. § 1313(c)(2). Waterkeeper I, Dkt. No. 184 ("Remedies Order").

DEQ has already revised Circular 12B once, changing it only slightly and resubmitting it to EPA as ordered by this Court. Case No. 4:20-cv-00027 ("Waterkeeper II"), Dkt. No. 72 at 12. EPA disapproved the revised Circular 12B, because it was not compliant with this Court's direction in the Remedies Order. *Id.* at 13. EPA did not provide additional detail on how the revised Circular 12B did not comply. *Id.* Rather, EPA simultaneously approved the "Poison Pill" whereupon DEQ announced that the Circular 12A protective water quality standards were "void." *Id.* In its most recent order, October 30, 2020, this Court reset the clock (now a year past the original remedies deadlines) for revisions to Circular 12B in accordance with its Remedies Order, but did not alter or expand the remedies ordered. Waterkeeper II, Dkt. 72 at 17 ("Consolidated Order"). The Court is simply enforcing its previous orders and judgment and that action is entirely within this Court's jurisdiction after appeal.

B. <u>There Is No Danger Of Conflicting Or Confusing Court Decisions.</u>

National Association of Clean Water Agencies and the League of Montana Cities and Towns (collectively "NACWA") argue that either this court lacks jurisdiction, or a stay is needed to forestall the risk of confusing or conflicting court decisions. NACWA Brf. at 16. This is an unfounded concern. The Ninth Circuit will rule on whether the Circular 12B variance met the requirements of the Clean Water Act and EPA regulation. This Court's Consolidation Order does not

address that issue. This Court has already ruled on that issue and this Court's decision on the validity of Circular 12B is now on appeal. The only matter that this Court has addressed in the Consolidation Order is the timing of compliance with its Remedies Order, an issue the Ninth Circuit will not address.

Should the Ninth Circuit affirm this Court's judgment in Waterkeeper I, there will be no conflict in decisions.

Should the Ninth Circuit reverse this Court and find that Circular 12B complies with the Clean Water Act and EPA regulation, DEQ and Intervenors will have the option of reverting back to the original Circular 12B or maintaining the revised version. There is nothing about DEQ choosing among those that is confusing, harmful, or even unusual. In fact, as repeatedly acknowledged by DEQ, the Clean Water Act requires DEQ to assess and potentially revise Circular 12B every three years and DEQ has repeatedly pledged it will do so. 33 U.S.C. § 1313(c)(2)(A). Changes or revisions (or even withdrawal) of Circular 12B is always within the range of options for DEQ, so that result on appeal does not make for a confusing situation.

Finally, there is no conflict with this Court ruling on the Motions for Summary Judgment in Waterkeeper II. EPA's approval of the Poison Pill, the subject of Waterkeeper II, is not before the Ninth Circuit, having occurred after the

filing of the appeals in the Ninth Circuit. There is no potential for conflicting or confusing rulings on the Poison Pill.

II. A STAY PENDING APPEAL IS NOT WARRANTED IN THIS CASE.

A. A Stay Is Warranted Only Where Irreparable Harm Will Occur Without The Stay And Only Where Such Stay Will Not Harm The Public Interest.

Rule 62 Fed. R. Civ. P. provides district courts discretion to stay a judgment or order pending appeal. Where, as here, the parties request a stay from the effect of an injunction (the Remedies and Consolidation Orders), a court may stay or modify the injunction "on terms for bond or other terms that secure the opposing party's rights." Rule 62(d), Fed. R. Civ. P.

A stay is not a matter of right even if irreparable injury might otherwise result. *Nken v. Holder*, 556 U.S. 418, 433 (2009)(citations and quotations omitted); *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). Rather, it is a matter of judicial discretion. *Id.*

In determining whether to stay a judgment or order pending appeal, a court will consider four factors, similar in nature (but not precisely the same) to the considerations a court will apply in considering a request for injunctive relief. *Nken*, 556 U.S. at 434. The requesting party bears the burden of showing the circumstances justify a stay. *Id.* The four factors are:

1) Whether the applicant has made a strong showing that applicant is likely to succeed on the merits on appeal;
2) Whether the applicant will be irreparably injured absent a stay;
3) Whether issuance of the stay will substantially injure other parties interested in the proceeding; and
4) Where the public interest lies.

Nken, 556 U.S. at 434; *Leiva-Perez*, 640 F.3d at 964. Courts have identified the first two factors as particularly important. It is not enough that the chance of success on the merits be "better than negligible". *Id.* Similarly, an applicant must show more than some possibility of irreparable injury. *Id.* Only after all thresholds are met, will the court balance equities among the four factors. *Leiva-Perez*, 640 F.3d at 965-66. For example, even if the irreparable harm threshold is met, a court may decide to not issue a stay because of harms to the public interest or other interested parties. *Id.* Here, none of the factors are met and all weigh against a stay.

B. Movants Have Not Demonstrated Any Of The Four Factors Necessary To Granting A Stay Pending Appeal.

1. Success on the merits.

Movants have not made a "strong showing" that they are likely to succeed on the merits of their appeal. Movants offer no new arguments differing from those made previously to this Court.

Their arguments require a court to ignore the plain language of EPA regulations that HAC must be met throughout the term of the variance. 40 C.F.R. § 131.14(a)(2) and (b)(1)(ii). If, as EPA (and Waterkeeper) argues on appeal, the language of this regulation is unambiguous, then the court owes no deference to EPA's interpretation. *Kisor v. Wilkie*, __ U.S. __, 139 S.Ct. 2400, 2414 (2019); *Sec'y of Labor, U.S. Dep't of Labor v. Seward Ship's Drydock, Inc.*, 937 F.3d 1301, 1307 (9th Cir. 2019). The plain language of EPA's regulation is that the HAC must be met *throughout* the term of the variance, not at the very end of a 20+ year variance.

Alternatively, if, as this Court found, the language of EPA regulations on variances is ambiguous, then the court weighs whether EPA's interpretation is reasonable and does not run afoul of the Clean Water Act. *Kisor*, 139 S. Ct. at 2415. In making that analysis, the court must independently inquire into the overall structure and purpose of the regulations and the Clean Water Act and assess whether the character and context of EPA's interpretation is entitled to controlling weight. *Id.* at 2416. If there is only one reasonable interpretation, a court cannot allow an agency to change the meaning of the regulation under the guise of ambiguity. *Id.* Reading all of EPA's regulations regarding variances with the purpose, intent, and obligations under the Clean Water Act 33 U.S.C. §§ 1251 and 1313(c)(2)(A), the single reasonable interpretation is that HAC must be met as

quickly as possible and throughout the term of the variance, not at some point decades in the future.

Movants also fail to address the fact that, without a timeline for meeting the protective standards of Circular 12A, the Circular 12B variance runs afoul of Clean Water Act requirements that water quality standards protect designated uses and that variances not be indefinite end-runs around that obligation as in *Miccosukee Tribe of Indians of Florida v. United States*, 2008 WL 2967654 (S.D. Fla. July 29, 2008). As this Court recognized, allowing EPA to claim ambiguity in its own regulations and then interpret them as not requiring HAC for 20 years is contrary to the Clean Water Act, and leaving entirely open-ended when the protective standard must be met will accomplish the same unlawful result as in Florida—an off-ramp that allows for less protective water quality standards. This Court correctly interpreted and applied the Clean Water Act, EPA regulations, and applicable case law, and provided a careful balancing to allow DEQ and intervenors the benefits of a variance without opening up an indefinite off-ramp from basic Clean Water Act requirements. Movants are not likely to succeed on the merits of their appeal.

2. It is not irreparable harm to comply with the law.

The Supreme Court and Ninth Circuit have stated that it is critical that movants demonstrate they will suffer irreparable harm absent a stay of this Court's

Remedies and Consolidated Orders pending appeal. Movants' claims of harm fall into two categories: (1) harm to intervenors and other pollutant dischargers should they be required to abide by the Clean Water Act and EPA regulation to not violate nutrient water quality standards or obtain individual variances that meet the requirements of law; and (2) harm to DEQ should it be required to expend resources developing a new general variance that conforms to the requirements of the Clean Water Act and EPA regulation. DEQ Brf. Dkt. No. 234 at 9-10; NACWA Brf, Dkt. 232 at 15-16; TSRA Brf. Dkt. No. 236 at 8. These claims do not show harm, irreparable or otherwise.

First, being required to simply follow the law is not harm and certainly not "irreparable harm." This is an absurd argument. The Circular 12A water quality standards have been promulgated and approved as required by the Clean Water Act. 33 U.S.C. § 1313(c)(2). Discharges of pollution are prohibited absent compliance with the Act and permit requirements. 33 U.S.C. §1311(a) and 40 C.F.R. ch. 122. That is the law and it applies in the absence of a variance. A variance from meeting a water quality standard is a privilege and not a right, and a creation, entirely, of EPA regulation. Nowhere are variances mentioned or provided for in the Clean Water Act itself. Variances from water quality standards *weaken* and delay application of those protective water quality standards for some period of time. The Circular 12B variance at issue in this case will *not* protect

Montana waters for the period of the variance. *See*, AR 849-50. Without the Circular 12B general variance—or without a revised general variance that conforms to the Remedies Order—the intervenors and other polluters in the State of Montana will simply be required to comply with water quality standards that protect designated uses of Montana waters or engage in a process to apply for individual variances. Just like abiding by the speed limit, health and safety codes, consumer protection and banking regulations, criminal statutes, or myriad other examples, obeying the law is not "irreparable harm."

It is of note that the NACWA brief claims, as part of their irreparable harm arguments, that the Remedies Order "eviscerates most of the benefits of issuing a variance," and therefore should be stayed pending it being overturned by the Ninth Circuit. NACWA Brf. Dkt. No. 232 at 16. In so arguing, NACWA and the League show the intervenors' hand regarding the true intent of intervenors and DEQ for any variance from Circular 12A water quality standards.

It is plain that the true intent of intervenors with respect to the Circular 12B variance is to delay HAC as long as possible and avoid the application of Circular 12A indefinitely. The Remedies Order (referencing Waterkeeper's remedies submission) requires DEQ and EPA to revise the variance such that the HAC will be achieved within a roughly five-year period—one full permit term, consistent with EPA regulation. Remedies Order at 6. The HAC is to then apply throughout

the term of the variance (roughly 15 years). Waterkeeper I Judgment and Remedies Order at 6. The Remedies Order also requires DEQ and EPA to develop a timeline as part of the variance, for when the protective water quality standards will start to apply/be met after the term of the variance (as opposed to simply leaving it open-ended). *Id.* Waterkeeper's remedies submission suggests a 15 to 20 year timeline (perhaps staggered for different pollutant dischargers) for application of the Circular 12A criteria. Waterkeeper I, Dkt. No. 180 at 12 and Dkt. No. 180-1 at 13. That NACWA and the League argue that this extended timeline and reasonable requirements to do the best possible during that period "eviscerates" the benefits of a variance confirms that polluters believe the "benefits of a variance" lie in avoiding HAC as long as possible (for 20 years) and in never having to meet the actual protective water quality standard at all.

Second, it is not irreparable harm for DEQ to expend resources revising Circular 12B. It has already done so once and failed to abide by the court's direction in the Remedies Order when it did. That was DEQ's own choice. Further, DEQ is already well on the path to a Circular 12B revision under the recently reset timeline; DEQ has already developed and shared draft Circular 12B language and set a timeline for completion of the revisions. *See*, Affidavit of Guy Alsentzer, served and filed herewith. DEQ has met with stakeholders regarding the revisions to Circular 12B. *Id.* If revising Circular 12B would result in

irreparable harm to DEQ, and it does not, one option is for DEQ to not develop a general variance, apply the protective water quality standards, and address applications for individual discharger variances if and when the occur.[1] Again, variances are applied for and granted under limited circumstances; they are not a right. It is not irreparable harm for DEQ to be required to revise Circular 12B, *if* DEQ chooses to provide a general variance away from protective water quality standards.

The Movants have failed to demonstrate a "critical" factor in obtaining a stay pending appeal, irreparable harm in the absence of a stay. Their only arguments are that it is harmful to have to obey the law, an argument with no support anywhere in the law, and that it is harmful for DEQ to have to engage in rulemaking that has already occurred once and has restarted and is on track with proposed language already drafted. There is no harm to Movants in denying a stay pending appeal and on those grounds alone, their motions should be denied.

[1] Because variances weaken water quality standards, they are never required, and therefore states are not required to develop them. Further, when EPA disapproves a variance for failure to comply with the requirements of the Clean Water Act, EPA is *not* required to promulgate a substitute variance. That is, EPA is not required, or even encouraged, in the Clean Water Act, to create a pathway for *not* meeting water quality standards.

3. Harm to Montana waters and the public interest.

The last two factors for the court to consider, harm to interested parties other than the movants and harm to the public interest, are related in this case and both factors weigh against a stay. Congress dictated that it is in the public interest to restore and protect the chemical, physical and biological integrity of the Nation's waters. 33 U.S.C. § 1251. Congress further directed that to serve that public interest, states, with EPA oversight, must promulgate water quality standards that protect the designated uses of the state's waters. 33 U.S.C. § 1313(c)(2)(A). Congress also directed that discharge of all pollutants to any of the Nation's waters is prohibited absent a permit and that permits must include controls as necessary to protect and restore the waters. 33 U.S.C. § 1311. Courts agree that the public interest lies in strict enforcement of Clean Water Act requirements such as water quality standards and permits that comply with standards. *See, United States v. Akers*, 785 F.2d 814, 823 (9th Cir. 1986) (the public interest requires strict enforcement of the Clean Water Act to effectuate its purpose of protecting aquatic environments); *Fund for Animals, Inc. v. Espy*, 814 F. Supp. 142, 152 (D.D.C. 1993) (there is strong public interest in meticulous compliance with environmental laws by public officials); and *United States v. Ciampitti*, 583 F. Supp. 483, 499 (D.N.J. 1984) (it is "axiomatic" that the public interest is in the strict enforcement of the Clean Water Act).

Waterkeeper works in the public interest to restore and protect all the waters in the Upper Missouri River watershed, and Waterkeeper's work includes ensuring that private and government entities abide by the requirements of the Clean Water Act and applicable regulations. *See*, Affidavit of Guy Alsentzer filed in support of standing, Waterkeeper II, Dkt No. 16). Protecting the public interest in this case means ensuring compliance with the Clean Water Act and protecting the waters of the state.

DEQ and EPA finalized and approved the Circular 12A water quality standards in 2015, more than five years prior to these motions for stay. This Court issued the Remedies Order well over a year ago. To date, there has been no movement to comply with and meet either the HAC set forth in the Circular 12B variance or the Circular 12A water quality standards themselves.[2] Over five years of necessary work to restore and protect Montana's waters have now been lost.[3] Yet movants ask this court to delay their compliance even longer without even interim protections of Montana's waters offered in return, on a claim that abiding

[2] It bears repeating that the HAC in Circular 12B is not actually the highest attainable condition for wastewater treatment plants according to Waterkeeper's expert report, Waterkeeper I, Dkt. No. 180-1 at 1-3, but Waterkeeper was willing to accept and did not challenge the Circular 12B version in order to achieve faster implementation.

[3] It further bears repeating that EPA first instructed states to develop and implement numeric nutrient criteria in early 2000, more than ***twenty*** years ago. AR 228.

by the basics of clean water law is "irreparable harm." The Court's Remedies Order simply tasks DEQ and EPA with developing a reasonable plan that meets the basic legal requirements of the Clean Water Act and EPA regulation and that serves the public purpose of moving Montana waters to meeting standards on a 15 to 20 year timeline. It is in the public interest to ensure compliance with the Clean Water Act and to move in a balanced and reasonable fashion, as outlined in the Remedies Order, to restoring Montana waters.

III. WATERKEEPER AND MONTANA WATERS ARE ENTITLED TO PROTECTIONS SHOULD A STAY ISSUE.

If this Court determines that a stay pending appeal is warranted, Waterkeeper urges the court to include protections for Waterkeeper's and the public's interest in this case. Rule 62(d), Fed. R. Civ. P. Those protections should include measures geared to addressing the specific harms to the public interest from the additional delay in Clean Water Act compliance. Waterkeeper requests, at a minimum, that should the stay issue and movants are unsuccessful in their appeals, the amount of time that pollutant dischargers in Montana have to meet HAC and the Circular 12A criteria should be shortened accordingly. For example, if the Ninth Circuit issues a decision against movants on January 1, 2022, the period of time that dischargers should have to meet HAC and the water quality standards should be shortened by the 2.5 years between the date of the Remedies Order and the date the Ninth Circuit rules. If Waterkeeper and the waters of

Montana do not have that protection, then a stay will have rewarded polluters with what they have tried to get from the outset, which is years of delay in implementing pollutant controls that actually move polluters toward complying with the Clean Water Act and water quality standards that actually protect designated uses of Montana's waters. Moreover, allowing movants to disregard the court's original Remedies Order and then obtain a stay would provide incentives for appeals for the sake of delay.

The Court should also make clear that pollutant dischargers cannot rely on the illegal Circular 12B during the pendency of the appeal. This Court initially stayed the vacatur of Circular 12B pending completion of its replacement. It would be improper for polluters to benefit from that illegal variance while also not complying with the Court's Remedies Order.

Additionally, should this Court determine that a stay is appropriate, Waterkeeper asks the court to move forward and rule on the Motions for Summary Judgment regarding EPA's approval of the Poison Pill. It is important that the status of Circular 12A be abundantly clear and that EPA and DEQ not be allowed to foster a circumstance that appears to void proper, protective water quality standards in the State of Montana. Circular 12A must remain in place and fully applicable, regardless of the outcome in the Ninth Circuit appeals, because that is required by the Clean Water Act.

CONCLUSION

Waterkeeper respectfully requests that this Court deny the Motions for Stay Pending Appeal in their entirety. Movants have failed to demonstrate that this Court either lacks jurisdiction to enforce its own Remedies Order, or any of the four factors necessary to obtaining a stay pending appeal. Waterkeeper further respectfully requests that should this Court determine a stay pending appeal is warranted, that the court, under the direction and authority of Rule 62(d), Fed. R. Civ. P., order relief and protections as necessary to ensure that Montana waters are protected and movants do not unfairly benefit from such a stay during the time it is in effect.

Respectfully submitted this 22nd day of December, 2020.

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CERTIFICATE OF COMPLIANCE

In accordance with Local Rule 7.1(d)(2), I certify that this brief contains 4,025 words, excluding caption, certificate of compliance, and certificate of service, as determined by the word counting feature of Microsoft Word.

DATED: December 22, 2020

/s/ Janette K. Brimmer
Janette K. Brimmer

CERTIFICATE OF SERVICE

I hereby certify that on December 22, 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will cause a copy to be served upon counsel of record.

DATED: December 22, 2020

/s/ Janette K. Brimmer
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