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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BUTTE DIVISION

COTTONWOOD
ENVIRONMENTAL LAW
CENTER,

Plaintiff,

v.

CH SP ACQUISITION LLC d/b/a
SPANISH PEAKS MOUNTAIN
CLUB; LONE MOUNTAIN LAND
COMPANY,

Defendants.

2:23-cv-00028-BMM

**PLAINTIFF'S BRIEF IN
SUPPORT OF MOTION FOR
PRELIMINARY INJUNCTION**

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INTRODUCTION

Plaintiff Cottonwood Environmental Law Center (“Cottonwood”) respectfully moves for preliminary injunctive relief to prevent Defendants Spanish Peaks Mountain Club and Lone Mountain Land Company (collectively “Spanish Peaks” or “Defendants”) from continuously discharging pollution in violation the Clean Water Act (“CWA”). Specifically, Cottonwood requests that the Court enjoin Defendants from: 1) spraying treated wastewater from their industrial snow guns, and 2) connecting any sewer within Spanish Peaks Mountain Resort to the Big Sky Water and Sewer District until the September 2024 trial. Enjoining new sewer connections is necessary because Spanish Peaks is not able to lawfully dispose of the treated sewage it is producing. Because it has nowhere else to dispose of its treated sewage, Spanish Peaks is spraying it out of its snow guns, onto its ski runs, and into the Gallatin River and its tributaries violation of the CWA and DEQ standards.¹

¹ Cottonwood filed a complaint with the Montana DEQ asking it to investigate Spanish Peaks for several months, which the agency did not. Exhibit 1. A state court denied a motion earlier this year made by the Montana DEQ to dismiss a Montana Constitutional lawsuit against it for failing to investigate the volume of treated sewage leaking from the Big Sky Water & Sewer District’s leaking holding ponds. *Cottonwood Environmental Law Center, et al. v. Big Sky Water & Sewer District No. 363, et al.*, No. 22-DV-1121A (Gallatin County) (Doc. 56).

Cottonwood is likely to succeed on the merits of this CWA claim because Spanish Peaks is spraying treated sewage onto ski runs that drain into the West Fork of the Gallatin River. Spanish Peaks has acknowledged that it is polluting the West Fork by placing signs that warn the public not to drink the treated sewage in the tributaries of the West Fork, which flows below the ski runs. Cottonwood has collected water samples that show the spraying is causing nitrogen to pollute the West Fork of the Gallatin River. Doc 47-1. Isotopic analysis of these water samples was completed by the University of California Davis Stable Isotope Facility. Exhibit 3 at 4. Patricia “Pat” Glibert, a researcher with a Ph.D in organismal biology from Harvard University that works at the University of Maryland’s Center for Environmental Science, concluded that the algae growing in the West Fork is caused by Spanish Peaks’ spraying of its treated sewage. Exhibit 3 at 13 (Glibert Liability Report)

Cottonwood has suffered and will continue to suffer irreparable harm if the Court does not grant injunctive relief. The West Fork of the Gallatin River has been on the Montana DEQ’s 303(d) list of “water quality impaired” streams because of nitrogen pollution since 2008. Exhibit 2. The Ninth Circuit prevents a polluter from applying for a National Pollution Discharge Elimination System (“NPDES”) Permit when a stream is 303(d) listed. *Friends of Pinto Creek v. U.S. Emtl. Prot. Agency*, 504 F.3d 1007, 1011–12 (9th Cir. 2007). Spanish Peaks’ spraying is contributing to the 303(d) listing and impairment of the West Fork. Exhibit 3 at 13 (Glibert Liability Report). The unlawful spraying is fueling the noxious algae blooms in the Gallatin River.

Exhibit 4 at 15 (Glibert Damages Report). Spanish Peaks' unlawful spraying further exacerbates the harm that the West Fork and Cottonwood's members have suffered. O'Conner Dec. (Doc. 21-4); Mathews Dec. (Doc. 21-3); Nell Dec. (Doc. 21-5).

The public interest and balance of harms tip in favor of enjoining Spanish Peaks from continuing to spray treated sewage into the West Fork of the Gallatin River and connecting any sewer within Spanish Peaks Mountain Resort to the Big Sky Water and Sewer District. Spanish Peaks' discharge of unpermitted nitrogen pollution into the water quality impaired river is causing irreparable harm to the river's ecosystem, while Spanish Peaks has the resources to export its sewage to alternative sites.

FACTUAL BACKGROUND

Spanish Peaks Mountain Club is a private members club and residential community located in Big Sky, Montana. Doc. 40 ("Defendants' Statement of Undisputed Facts," or "SUF") ¶ 1. In addition to luxury single-family residences, the members-only amenities offered on its 3,530-acre property include (but are not limited to) a ski resort, a clubhouse, a hotel, and a golf course. *Id.* ¶ 5. Spanish Peaks uses treated wastewater produced by Big Sky Water & Sewer District No. 363 (BSWSD) to irrigate its golf course. *Id.* ¶ 4. Lone Mountain Land Company is a development and management company. *Id.* ¶ 3. Spanish Peaks is geographically located in the uppermost headwaters of the West Fork of the Gallatin River.

In its 60 Day Notice Letter, Cottonwood provided Spanish Peaks with information describing violations of the CWA: (1) Spanish Peaks is spraying treated sewage out of industrial snow guns into the “Middle Fork/West Fork of the Gallatin River” and (2) Spanish Peaks is “spraying treated sewage into a stream that runs through the golf course.” Doc. 18-2 (“Notice Letter”) ¶¶ 3–5. The Notice Letter provided Spanish Peaks with the GPS coordinates of where samples were taken (“45.26450, -111.38157”) as well as photographs of the alleged point sources (both up close and from a distance). *Id.*

ARGUMENT

I. CLEAN WATER ACT (“CWA”)

Congress enacted the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a) (2018). To accomplish this goal, the CWA “forbids ‘any addition’ of any pollutant from ‘any point source’ to ‘navigable waters’ without” an National Pollutant Discharge Elimination System (“NPDES”) permit. 33 U.S.C. § 1311(a); *see also Cty. of Maui, Haw. v. Haw. Wildlife Fund*, 140 S. Ct. 1462, 1465 (2020) (citations omitted); *see* 33 U.S.C. § 1311(a). The CWA carries strict liability for direct discharges like those in this case. *See Puget Soundkeeper All. v. Cruise Terminals of Am., LLC*, 216 F.Supp.3d 1198, 1205 (W.D. Wash. 2015) (citing *Sierra Club v. Union Oil Co. of Cal.*, 813 F.2d 1480, 1490–91 (9th Cir. 1987); *Haw. Wildlife Fund v. Cty. of Maui*, 886 F.3d 737, 745 n.1 (9th Cir. 2018) (collecting cases) (vacated on other grounds).

The CWA authorizes the U.S. Environmental Protection Agency (“EPA”) or a delegated state agency to issue a NPDES permit to an entity seeking to discharge pollution into navigable waters. *See Emtl. Prot. Agency v. Cal. ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202–03 (1976); *City of Milwaukee v. Ill. and Mich.*, 451 U.S. 304, 310–11 (1981). EPA has authorized DEQ to run its own discharge permit system, known as the Montana Pollutant Discharge Elimination System (“MPDES”).

The CWA discharge prohibition operates primarily through a series of definitions. The CWA defines “pollutant” broadly, but importantly includes “solid waste,” “biological materials,” and “industrial, municipal, and agricultural waste discharged into water.” 33 U.S.C. § 1362(6). “Point source” is broadly defined, in pertinent part, as “any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, [or] well . . . , from which pollutants are or may be discharged.” *Id.* § 1362(14). The CWA defines “navigable waters” to encompass “waters of the United States” (“WOTUS”). *Id.* § 1362(7). Finally, the CWA limits the “discharge of pollutants,” meaning, in relevant part, “any addition of any pollutant to navigable waters from any point source.” *Id.* § 1362(12).

II. INJUNCTION STANDARD

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008). The

Ninth Circuit uses a “sliding scale” approach under which “[a] preliminary injunction is appropriate when a plaintiff demonstrates that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff’s favor.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011) (internal citation omitted). “Of course, plaintiffs must also satisfy the other *Winter* factors.” *Id.* at 1135.

“Likelihood of success on the merits ‘is the most important’ [injunction] factor[.]” *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (citations omitted). “Serious questions” need not show a certainty of success, nor even demonstrate a probability of success, but rather “must involve a ‘fair chance of success on the merits.’” *Republic of the Phill. v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (quoting *Nat’l Wildlife Fed’n v. Coston*, 773 F.2d 1513, 1517 (9th Cir. 1985)).

“Crafting a preliminary injunction is an exercise of discretion and judgment, often dependent as much on the equities of a given case as the substance of the legal issue it presents.” *Trump v. Int’l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017). The CWA affords “[d]istrict courts... ‘broad latitude in fashioning equitable relief when necessary to remedy an established wrong.’” *Nat. Res. Def. Council v. Sw. Marine, Inc.*, 236 F.3d 985, 999–1000 (9th Cir. 2000) (citation omitted). “[T]he district court has discretion to determine which form of relief is best suited, in the particular case, to abate current violations and deter future ones.” *Friends of the Earth, Inc. v. Laidlaw Envtl. Services*, 528 U.S. 167, 192 (2000). In addition to a prohibitory injunction, courts

can also require a “detailed schedule of compliance designed to cure the identified violation of the Act.” *Weinberger v. Romero-Barecelo*, 456 U.S. 305, 318 (1982).

III. PLAINTIFF IS LIKELY TO SUCCEED ON THE MERITS.

Cottonwood is likely to prevail on its claim that Spanish Peaks is violating the CWA by spraying treated sewage out of its industrial snow making guns into a tributary of the West Fork. The CWA “forbids ‘any addition’ of any pollutant from ‘any point source’ to ‘navigable waters’ without” a National Pollutant Discharge Elimination System (“NPDES”) permit. *Cty. of Maui, Haw.*, 140 S. Ct. at 1465 (citations omitted); 33 U.S.C. § 1311(a); *see also City of Milwaukee*, 451 U.S. at 318. (“*Every* point source discharge is prohibited unless covered by a permit.”)

Spanish Peaks is adding pollutants (nitrogen and treated sewage) from its industrial snow guns into a tributary of the West Fork without a NPDES permit. Lab results show nitrogen in a water sample taken from below a ski run. Doc 47-1 at 1. In contrast, a water sample taken from a tributary not located near the ski runs did not detect nitrogen. Doc 47-1 at 2. Plaintiff’s expert, Pat Gilbert (a highly-qualified algae researcher, *see* Paragraph 2, *supra*), noted a wastewater signal can be distinguished from other sources of nitrogen, including precipitation, fertilizer, and mineral weathering. Exhibit 3 at 10. Dr. Glibert then concluded that Spanish Peaks’ spraying is contributing to the water quality impairment of the West Fork and is fueling the noxious algae blooms in the Gallatin River. Exhibit 3 at 13; Exhibit 4 at 15. The sign

warning the public not to drink the treated sewage in the stream below the ski runs further underscores Spanish Peaks CWA violation. Doc. 33 at 10.

Regulatory standards to maintain the integrity of the West Fork prevent Spanish Peaks from spraying its treated sewage on areas that have a slope greater than 15%. Doc. 21-2 at 5 (Table 1-1). Spanish Peaks is violating this standard:

I witnessed the snow-making guns blowing so much treated sewage on the ski runs that small streams of water were flowing down the runs within 100 feet of a Spanish Peaks sign telling people not to drink the water because it was reclaimed wastewater. The ski runs where the treated wastewater was flowing end in a stream. The slope of the ski runs where the treated sewage was being sprayed had a minimum angle of twenty degrees and reached twenty-four degrees in places.

Second Taylor Dec. at 2, ¶4. Cottonwood is likely to prevail on its claim. *See All. for the Wild Rockies*, 632 F.3d at 1134-35.

IV. COTTONWOOD WILL CONTINUE TO SUFFER IRREPARABLE HARM IN THE ABSENCE OF INJUNCTIVE RELIEF.

A plaintiff seeking a preliminary injunction must establish that they are “likely to suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 20. Irreparable harm is determined by the purposes of the statute for which enforcement is sought. *Garcia v. Google, Inc.*, 786 F.3d 733, 744–45 (9th Cir. 2015). The CWA’s purpose “is to restore and maintain national waters and waterways.” *Sierra Club v. Whitman*, 268 F.3d 898, 902 (9th Cir. 2001).

Spanish Peaks’ unlawful discharges are causing irreparable harm to the West Fork by precluding maintenance of the water quality of the stream. Spanish Peaks’

spraying is contributing to the water quality impairment of the West Fork and is fueling the noxious algae blooms in the Gallatin River. Exhibit 3 at 13; Exhibit 4 at 15.

Spanish Peaks' unlawful discharges also cause irreparable harm to Cottonwood member's interests. According to Dr. Glibert, Spanish Peaks' unlawful discharges are causing "harm to aquatic life including aquatic insects and valued fish species."

Exhibit 4 at 15. Cottonwood members have filed declarations stating, for example,

Spanish Peak's unlawful discharge of treated sewage by spraying it directly into the tributaries of the West Fork ... harms my recreational and conservation interests in the West Fork. I don't want to fish streams that are being polluted by Spanish Peaks or other private resorts.

O'Conner Dec., Doc 21-4 at 2, ¶8. Craig Mathews, Cottonwood member and former Sheriff of West Yellowstone, explained:

Nobody, myself included, wants to see more treated wastewater in the Gallatin because Spanish Peaks Mountain Club and Lone Mountain Land Company won't dispose of its treated sewage properly or maintain a transparent accounting system for disposing of the waste water.

Doc 21-3 at 2-3, ¶¶ 11-12.

"Environmental injury . . . is often permanent or at least of long duration, i.e., irreparable." *Amoco Prod. Co. v. Vill. of Gambell, Alaska*, 480 U.S. 531, 545 (1987). The

West Fork has been designated as water quality impaired since 2008. Exhibit 2.

Enjoining the unlawful discharges is needed to begin to restore the Gallatin River and its tributaries. Exhibit 4 at 15.

V. THE BALANCE OF HARMS FAVORS INJUNCTIVE RELIEF.

This Court “must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Amoco Prod. Co.*, 480 U.S. at 542. When environmental injury “is sufficiently likely,” the “balance of harms will usually favor the issuance of an injunction to protect the environment.” *Id.* at 545. The *Amoco Prod. Co.* Court “concluded that the purpose of the FWPCA [Federal Water Pollution Control Act]—to restore and maintain the integrity of the Nation's waters—would not be undermined by allowing the statutory violation to continue during the permit application process because the ordinance was not polluting the water.” *Id.* at 542-43. In contrast, Spanish Peaks’ unlawful discharge is adding pollution (nitrogen and treated sewage) to the water. Exhibit 3 at 13.

Defendants cannot apply for a discharge permit because the West Fork has already been designated as water quality impaired. *E.g., Friends of Pinto Creek*, 504 F.3d at 1011–12. Because the District cannot apply for a discharge permit, and continued environmental injury is sufficiently likely without an injunction, the balance of harms favors injunctive relief to protect the West Fork. *Amoco Prod. Co.*, 480 U.S. at 545.

VI. THE PUBLIC INTEREST FAVORS INJUNCTIVE RELIEF.

“[C]ourts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Weinberger*, 456 U.S. at 312 (citation omitted). A CWA citizen suit is brought not to benefit the private individual

bringing suit, but to benefit the public. *E.g., Pa. Env'tl. Def. Found. v. Bellefonte Borough*, 718 F. Supp. 431, 434 (M.D. Pa. 1989) (citing *Middlesex Cty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 16–17, 17 n. 21, 27 (1981) (“Individuals or groups which bring citizen suits pursuant to the Clean Water Act are acting as private attorneys general and, accordingly, the purpose of such a suit is to protect and advance the public's interest in pollution-free waterways rather than to promote private interests.”). The Ninth Circuit has recognized “the well-established public interest in preserving nature and avoiding irreparable environmental injury.” *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), *overruled on other grounds by Winter*, 555 U.S. at 7. Issuing injunctive relief is in the public interest.

VII. NO BOND SHOULD BE REQUIRED.

Plaintiff Cottonwood Environmental Law Center, a small nonprofit conservation organization, request that this Court dispense with the bond requirement because a security requirement will effectively deny the group's judicial review. *People ex rel. Van De Kamp v. Tahoe Reg'l Planning*, 766 F.2d 1319, 1325–26 (9th Cir. 1985). “[T]he court may elect to require no security at all” in CWA cases. *Bell South Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 971 (11th Cir. 2005); 33 U.S.C. § 1365(d). Courts often do not require posting a bond in citizen suits (even where the cost to the defendant is significant) because it would deter citizens from bringing suits to enforce environmental laws, contrary to the intent of Congress.

Morgan v. Walter, 728 F. Supp. 1483, 1494 (D. Idaho 1989); *Or. State Pub. Int. Rsch. Grp. v. Pac. Coast Seafoods Co.*, 374 F. Supp. 2d 902, 908 (D. Or. 2005) (no bond required in CWA citizen suit even where preliminary injunction required cessation of seafood processing).

CONCLUSION

For the foregoing reasons, this Court should grant the motion and issue an order that enjoins Spanish Peaks from: 1) spraying treated wastewater from their industrial snow guns, and 2) connecting any sewer within Spanish Peaks Mountain Resort to the Big Sky Water and Sewer District until the September 2024 trial has concluded.

Respectfully submitted this 1st day of December, 2023.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served on all registered CM/ECF users on this 1st Day of December, 2023.

/s/ John Meyer
JOHN MEYER

Attorney for Plaintiffs