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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION FOR RESTORATION OF THE ENVIRONMENT, INC, a Washington Non-Profit Corporation; and CENTER FOR FOOD SAFETY, INC., a Washington, D.C. Non-Profit Corporation,

Plaintiffs,

v.

COW PALACE, LLC, a Washington Limited Liability Company, et al.,

Defendants.

NO: 2:13-CV-3016-TOR

ORDER DENYING DEFENDANT COW PALACE, LLC'S MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL AND TO STAY PROCEEDINGS

BEFORE THE COURT are Defendant Cow Palace, LLC's Motion for Certification for Interlocutory Appeal of Order Re: Cross Motions for Summary Judgment and Motion to Stay Proceedings Pending Interlocutory Appeal (ECF No. 322) and Motion to Expedite (ECF No. 323). These matters were submitted for

1 consideration without oral argument. The Court has reviewed the briefing and the
2 record and files herein, and is fully informed.

3 **BACKGROUND**

4 On January 14, 2015, this Court issued its Order Re: Cross Motions for
5 Summary Judgment (“Order”). ECF No. 320. In its Order, this Court found, *inter*
6 *alia*, no genuine issue of material fact that Defendants’ application, storage, and
7 management of manure at Cow Palace Dairy violated RCRA’s substantial and
8 imminent endangerment and open dumping provisions. *Id.* at 109. Trial regarding
9 several other issues of liability and remedies is currently set to begin March 23,
10 2015, for this matter. Multiple other dairies face proceedings before this Court
11 involving the same or similar issues. *See CARE v. George & Margaret LLC*, No.
12 13-cv-3017-TOR; *CARE v. Henry Bosma Dairy*; No. 13-cv-3019.

13 In the instant Motion, Defendant Cow Palace seeks certification for
14 interlocutory appeal and a stay of these proceedings pending appeal. ECF No. 322.
15 If the Court grants this Motion, Defendant seeks final resolution from the Ninth
16 Circuit regarding whether RCRA applies to dairies’ manure management
17 operations. *Id.* at 2. Plaintiffs oppose both certification for interlocutory appeal
18 and a stay of these proceedings. ECF No. 325.

19 Given the quickly-approaching trial date, this Court will first consider
20 whether, if it were to grant certification for interlocutory appeal, it would stay these

1 proceedings pending resolution by the Ninth Circuit. After all, an interlocutory
2 appeal makes little sense with final resolution of this case less than two months
3 away, unless this Court also stays these proceedings.

4 **DISCUSSION**

5 **A. Stay of Proceedings**

6 If a party successfully appeals under 28 U.S.C. § 1292(b), such application
7 “shall not stay proceedings in the district court unless the district judge or the
8 Court of Appeals or a judge thereof shall so order.” 28 U.S.C. 1292(b). “The
9 district court has broad discretion to stay proceedings as an incident to its power to
10 control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706 (1997). Courts
11 traditionally consider four factors when determining whether to grant a stay
12 pending the appeal of a civil order: (1) the likelihood of the moving party’s success
13 on the merits; (2) whether the moving party will be irreparably injured if a stay is
14 not granted; (3) whether a stay will substantially injure the opposing party; and (4)
15 the public interest. *See Nken v. Holder*, 556 U.S. 418, 426 (2009) (citing *Hilton v.*
16 *Braunskill*, 481 U.S. 770, 776 (1987)).

17 Here, this Court finds the public interest in addressing current levels of
18 contamination and minimizing any further risk of harm immeasurably outweighs
19 any argument in favor of staying these proceedings pending appeal. As this Court
20 determined in its previous Order, the Dairy’s operations may currently be

1 presenting an imminent and substantial engagement to the nearby residents who
2 are consuming the nitrate-contaminated groundwater. ECF No. 320 at 104-05.
3 Any delay in these proceedings only increases the already-present risk to the public
4 health. Accordingly, this Court declines to stay these proceedings if it grants
5 certification for interlocutory appeal.

6 **B. Certification for Interlocutory Appeal**

7 Pursuant to 28 U.S.C. § 1292(b), an otherwise non-final order may be
8 subject to interlocutory appeal if the district court certifies, in writing, the
9 following: (1) the order involves a “controlling issue of law,” (2) the controlling
10 issue of law is one to which there is a “substantial ground for difference of
11 opinion,” and (3) “an immediate appeal from the order may materially advance the
12 ultimate termination of the litigation.” 28 U.S.C. § 1292(b). If permission for
13 interlocutory appeal is required, “the district court may amend its order, either on
14 its own or in response to a party’s motion, to include the required permission or
15 statement.” Fed. R. App. Proc. 5(a)(3). As the Ninth Circuit has noted “the
16 legislative history of 1292(b) indicates that this section was to be used only in
17 *exceptional* situations in which allowing an interlocutory appeal would avoid
18 protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d 1020,
19 1026 (9th Cir. 1982) (emphasis added); *see also Coopers & Lybrand v. Livesay*,
20 437 U.S. 463, 474 (1978) (“[E]ven if the district judge certifies the order under

1 § 1292(b), the appellant still ‘has the burden of persuading the court of appeals that
2 exceptional circumstances justify a departure from the basic policy of postponing
3 appellate review until after the entry of a final judgment.’”).

4 Here, this Court declines to certify its Order for interlocutory appeal.

5 Although the first two factors are arguably satisfied, this Court finds that an
6 immediate interlocutory appeal will not materially advance the termination of
7 litigation, even considering the lenient “may” standard afforded by the statutory
8 text. Trial is scheduled to begin in less than two months. Defendant’s Motion
9 comes after two years of extensive discovery and dispositive motion practice and
10 immediately before final resolution of this matter at trial. Without a stay of
11 proceedings, which this Court declines to grant as discussed above, an
12 interlocutory appeal cannot materially advance this litigation: even if the Ninth
13 Circuit were to grant Defendant the relief it seeks, such a ruling could not possibly
14 come into effect before trial has concluded and the remaining liability and remedy
15 issues resolved. Therefore, because granting certification for appeal would not
16 materially advance termination of litigation or otherwise “avoid protracted and
17 expensive litigation,” *In re Cement Antitrust Litig.*, 673 F.3d at 1026, this Court
18 **DENIES** Defendant Cow Palace’s motion for certification for interlocutory appeal.

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1 **ACCORDINGLY, IT IS HEREBY ORDERED:**

- 2 1. Defendant Cow Palace, LLC's Motion for Certification for Interlocutory
3 Appeal of Order Re: Cross Motions for Summary Judgment and Motion to
4 Stay Proceedings Pending Interlocutory Appeal (ECF No. 322) is **DENIED**.
5 2. Defendant's Motion to Expedite (ECF No. 323) consideration of the
6 following motion is **GRANTED**.

7 The District Court Executive is hereby directed to enter this Order and
8 provide copies to counsel.

9 **DATED** January 28, 2015.



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Thomas O. Rice
THOMAS O. RICE
United States District Judge