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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

COMMUNITY ASSOCIATION
FOR THE RESTORATION OF
THE ENVIRONMENT, a
Washington nonprofit corporation,

Plaintiff,

v.

NELSON FARIA DAIRY, INC.,

Defendant.

No. CV-04-3060-LRS

**ORDER DENYING MOTION
TO SUSPEND ORDER ON
RELIEF PENDING APPEAL**

BEFORE THE COURT is the Defendant's Motion To Suspend Order On Relief Pending Appeal (ECF No. 251). The motion was heard on an expedited basis with telephonic oral argument on April 23, 2012. Charles M. Tebbutt, Esq., argued for Plaintiff. Jeremy A. Fielding, Esq., argued for Defendant.

Defendant seeks to stay the court's January 12, 2012 Order On Relief (ECF No. 207) entered in conjunction with this court's December 30, 2011 Memorandum Of Decision (ECF No. 201) finding Defendant in contempt for a near total, if not total, non-compliance with the Consent Decree (ECF No. 40). On February 3, Defendant filed a Motion To Alter Or Amend Judgment (ECF No. 220) seeking to alter or amend certain paragraphs of the Order On Relief,

1 including Paragraphs 11, 12, 13, 30, 35, 40, 45, 46, 47, 48, 49, 62 and 63. The
2 parties eventually negotiated a stipulation, which was incorporated into an
3 order, modifying Paragraphs 12, 30, 35, 40, 45, 47, 49(b) and 63. (ECF Nos.
4 242 and 243). They also agreed to add a force majeure provision to the Order
5 On Relief. An Amended Judgment was entered on March 9, 2012 (ECF No.
6 245). On March 14, 2012, the parties filed a stipulation regarding sampling of
7 the B & G wells and implementation of groundwater monitoring requirements
8 set forth in Paragraphs 60-62 of the Order On Relief (ECF No. 247). On March
9 29, Defendant filed its Notice of Appeal (ECF No. 248), along with the Motion
10 To Suspend Order On Relief Pending Appeal. This motion asks the court to
11 stay Paragraphs 16, 28, 35, 42-49, and 60-63 of the Order On Relief pending
12 appeal.¹

13 “A stay is not a matter of right, even if irreparable injury might otherwise
14 result.” *Nken v. Holder*, _____ U.S. _____, 129 S.Ct. 1749, 1761 (2009). The
15 decision to grant or deny a stay is committed to the trial court’s sound
16 discretion. *Id.* Triggering exercise of that discretion requires the moving party
17 to demonstrate that circumstances justify a stay. *Id.* Four factors are considered
18 in determining whether a stay is appropriate: “(1) whether the stay applicant has
19 made a strong showing that he is likely to succeed on the merits; (2) whether the
20 applicant will be irreparably injured absent a stay; (3) whether issuance of the
21 stay will substantially injure the other parties interested in the proceeding; and
22 (4) where the public interest lies.” *Id.* at 1756. The first two factors- likelihood
23 of success on the merits and irreparable injury- are the “most critical” in
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25 ¹ Although the proposed Order On Relief was available to Defendant prior
26 to trial (ECF No. 179), no attack on specific provisions thereof was made until
27 the pending motion.
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1 evaluating a request for a stay. *Id.* at 1761. A party seeking a stay must show
2 more than “some possibility” of each of the first two factors. *Id.* The final two
3 factors- harm to the opposing party and the weight of the public interest- are
4 considered only if the movant satisfies the first two factors. *Id.* at 1762.

5 While no court can predict with absolute accuracy the outcome of a case
6 on appeal, Defendant has not made a strong showing that it will likely succeed
7 on the merits of its appeal. District courts properly “stay their own orders when
8 they have ruled on an admittedly difficult legal question and when the equities
9 of the case suggest that the status quo should be maintained.” *Pacific Merchant*
10 *Shipping Ass’n v. Cackette*, 2007 WL 2914961 at *2 (E.D. Cal. 2007). Based
11 on the proof presented at trial, the court had little difficulty in deciding
12 Defendant failed to comply with the Consent Decree from the very outset of its
13 operation of the dairy in 2006, and that this non-compliance continued unabated
14 through the date on which this court found Defendant in contempt. The equities
15 of the case do not suggest the status quo should be maintained pending appeal.
16 This is because the status quo for in excess of five years has been that
17 Defendant did essentially nothing to comply with the Consent Decree.

18 Defendant contends the Order On Relief imposes “supplementary
19 obligations” on Defendant which are outside the terms of the Consent Decree
20 and therefore, not authorized under the law. *Perez v. Danbury Hosp.*, 347 F.3d
21 419, 424 (2nd Cir. 2003). Defendant contends this court abused its discretion to
22 craft equitable remedies to enforce the Consent Decree because the Order On
23 Relief “improperly expands” the terms of the Decree and “imposes obligations”
24 on Defendant that are beyond the scope of the Consent Decree. *Id.* at 425.
25 Defendant suggests that, at most, this court was authorized to temporally extend
26 the Consent Decree, but was not authorized to modify any of the terms of the
27 Consent Decree.

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**ORDER DENYING MOTION TO
SUSPEND ORDER ON RELIEF- 3**

1 Asked at oral argument what the court could have done to remedy
2 Defendant's non-compliance with the Consent Decree, counsel for Defendant
3 suggested imposition of a fine would have been appropriate. In its trial brief
4 (ECF No. 181), Defendant argued that imposition of monetary penalties for past
5 violations would be punitive in nature, rather than remedial, and constitute
6 criminal contempt sanctions. The court declined to impose such penalties and
7 also declined to award other monetary sanctions against Defendant for injuries
8 sustained by Plaintiff as a result of Defendant's non-compliance with the
9 Consent Decree. Indeed, the court did not impose any monetary sanctions on
10 the Defendant, other than awarding Plaintiff reasonable fees and costs it
11 incurred in litigating this matter to judgment.²

12 Perhaps a potential alternative would have been to impose a coercive civil
13 contempt sanction in the form of a substantial daily fine on the Defendant
14 commencing on January 12, 2012 (the date judgment was entered). The total
15 amount of the fine would have continued to accrue until it was established that
16 Defendant was in full compliance with the terms of the Consent Decree. This
17 would have been very costly to Defendant because not only would it have had to
18 pay the fine, it would also have had to do what was necessary to become fully
19 compliant with the Consent Decree. Exercising its equitable discretion, the
20 court concluded that rather than imposing a costly coercive sanction, a
21 modification of certain provisions of the decree by way of the Order On Relief
22 was an appropriate way to remedy Defendant's five year period of contempt and
23 the resulting environmental injury. While these modifications may cost the
24 Defendant some money, significant expense would have also been incurred by

26 ² Defendant has also indicated its intention to appeal the court's order
27 awarding fees and costs. (ECF No. 307).

1 Defendant in bringing the dairy into full compliance with the existing decree.
2 Moreover, the funds Defendant would have been required to pay as a fine are
3 available to Defendant to comply with the Order On Relief. This is a better use
4 of those funds. Finally, the Defendant has benefitted economically over the past
5 five years by not complying with the Consent Decree. As such, requiring him to
6 now incur expenses to comply with the Order On Relief is hardly inequitable.

7 “Once a court has determined that changed circumstances warrant a
8 modification in a consent decree, the focus should be on whether the proposed
9 modification is tailored to resolve the problems created by the change in
10 circumstances.” *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 391, 112
11 S.Ct. 748 (1992). Here, the modifications of the Consent Decree by way of the
12 Order On Relief are clearly justified because of Defendant’s noncompliance
13 with the decree. These modifications resolve the problems created by
14 Defendant’s non-compliance because, as the court pointed out in its
15 Memorandum Decision, “they insure greater accountability and better oversight
16 of Defendant.” (ECF No. 201 at p. 19). Of course, the purpose of this greater
17 accountability and better oversight is to remedy the air and water pollution
18 caused by Defendant.³ In this regard, it is noted that Defendant itself has
19 asserted the terms of the original Consent Decree would not remedy the
20 pollution concerns. Prior to Plaintiff filing its petition for contempt (ECF No.
21 76) however, Defendant did not negotiate any modifications with the Plaintiff
22 and unilaterally decided what it deemed was appropriate, and no changes were
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24 ³ At trial, Plaintiff’s experts, Dr. Bell and Dr. Shaw, testified how the
25 provisions in the proposed Order On Relief would remedy Defendant’s previous
26 non-compliance with the Decree and prevent future soil and groundwater
27 contamination. Defendant offered no rebuttal expert testimony in this regard.
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1 achieved thereafter. The Order On Relief is a reasonable effort to prevent a
2 reoccurrence of this. Not only do the modifications deter the Defendant from
3 unilateral action, they encourage Defendant to work with Plaintiff in reaching
4 solutions acceptable to both sides.⁴ The Order On Relief contains a “Dispute
5 Resolution” provision (Paragraph 66) which requires the parties to engage in
6 informal negotiations before filing a petition with the court for judicial
7 resolution of a dispute relating to the meaning, application or enforcement of
8 the Order On Relief. Giving the Defendant yet another opportunity to comply
9 with the original Consent Decree which it essentially ignored for five years
10 simply makes no sense and is not in best interest of the Plaintiff, or the
11 Defendant for that matter, as discussed above.

12 The Order On Relief accounts for the changed circumstances and
13 achieves the objectives of the original Consent Decree. *Holland v. New Jersey*
14 *Dept. of Corrections*, 246 F.3d 267, 288 (3rd Cir. 2001). The Order On Relief
15 “operates along the lines” of the original Consent Decree. *Vanguards of*
16 *Cleveland v. City of Cleveland*, 23 F.3d 1013, 1020 (6th Cir. 1994). It does not
17 improperly expand the terms of the original Decree, nor does it impose
18 obligations which are inconsistent with the scope and intent of the original
19 Decree.

20 Because the Defendant has not made a strong showing that it is likely to
21 succeed on the merits of its appeal, the court need not determine whether
22 Defendant will be irreparably injured absent a stay. Consistent therewith is the
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24 ⁴ Evidence of this is the two stipulations which have already been reached
25 by the parties regarding the Order On Relief. Those stipulations address some
26 of the very paragraphs of the Order On Relief which Defendant now seeks to
27 stay pending appeal.

1 Supreme Court's statement that "[a] stay is not a matter of right, even if
2 irreparable injury might otherwise result." *Nken*, 129 S.Ct. at 1761. Complying
3 with the Order On Relief will certainly involve some expense for the Defendant,
4 but so would have compliance with the terms of the original Consent Decree. In
5 any event, the court is not persuaded that Defendant will be irreparably injured
6 absent a stay. For example, Paragraph 28 of the Order On Relief recognizes it is
7 not a certainty that the lagoons can be completely cleaned out without damaging
8 or compromising the lagoon liners. The parties experts are to confer as to
9 whether a complete clean out is feasible. If it is not feasible, it is not required.
10 If it is feasible, a complete clean out is not required until October 2012.⁵ The
11 lagoon evaluation called for by Paragraph 35 of the Order On Relief is not due
12 until 18 months after January 12, 2012, the effective date of the Order On
13 Relief. Paragraphs 42-49 relating to "Solid and Liquid Manure Field
14 Application" do not, contrary to Defendant's erroneous assertion, apply to
15 acreage located "anywhere in the world." Inherent in the provisions are that
16 they pertain only to acreage located in Washington. The court understands that
17 at least six of the environmental monitoring wells called for by Paragraph 60 of
18 the Order On Relief have already been completed at Defendant's expense and
19 water sampling has taken place per Paragraph 62, also at Defendant's expense.
20 (See also "Joint Stipulation Re: Sampling Of B & G Wells And Implementation
21 Of Groundwater Monitoring Requirements" at ECF No. 247). Considering the
22 Defendant did essentially nothing to comply with the original Consent Decree,
23 the \$58,000 Defendant estimates it will cost it to install the wells cannot be

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26 ⁵ Paragraph 28 is currently the subject of a pending Petition For Judicial
27 Resolution filed by Plaintiff (ECF No. 276).

1 considered inequitably burdensome⁶. Defendant says it currently is “expending
2 thousands of dollars a month on attorneys and expert consultants as part of its
3 efforts to comply with” specific terms of the Order On Relief. Defendant could
4 have avoided this had it complied with the original Consent Decree and
5 expended the funds necessary to insure such compliance. As evidenced by this
6 court’s order awarding fees and costs to Plaintiff, the Plaintiff expended
7 hundreds of thousands of dollars on attorneys and expert consultants over a five
8 year period in seeking to enforce compliance with the original Consent Decree
9 and remedy that non-compliance.⁷

10 Because Defendant has not satisfied the first two factors (likelihood of
11 success on the merits and that there will be irreparable injury), the court need
12 not consider the final two factors (harm to the opposing party and the weight of
13 the public interest). Nevertheless, there is little doubt Plaintiff has experienced
14 harm in that there has been no compliance with the Consent Decree entered
15 over five years ago. Plaintiff successfully proved at trial that Defendant was
16 responsible for soil and groundwater contamination during that five year period.
17 Because there was no compliance, the Consent Decree did not abate and/or

19 ⁶ Trial testimony reveals that the Defendant generates \$15,000,000.00 or
20 more in yearly revenue in the ongoing dairy operation, the herd size of
21 which has been significantly expanded since Defendant acquired the dairy
22 in 2006.

23 ⁷ Non-expert costs were also incurred by Plaintiff. Some of those costs
24 presumably included the copying of documents made available by Defendant.
25 (See Paragraph 8 of Consent Decree at ECF No. 39). Accordingly, the
26 requirement in the Order On Relief that Defendant now bear the cost of copying
27 those documents is justified.

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1 prevent the environmental harm the Plaintiff sought to abate and/or prevent. It
2 is contrary to the public interest to stay the Order On Relief which is intended to
3 remedy Defendant's past non-compliance with the Consent Decree. Paragraph
4 28 of the Order On Relief is intended to determine whether and to what extent
5 the Defendant's lagoons are leaking and remedies Defendant's failure to
6 conduct water balances and promptly repair tears in the lagoon liners as
7 required by the Consent Decree. Paragraphs 42-49 are designed to prevent
8 Defendant from making future over-applications of manure and is intended to
9 remedy the Defendant's past application practices which caused soil and
10 groundwater contamination. Paragraphs 60-63, containing the ground and tile
11 drain monitoring provisions, will assess how Defendant's dairy impacts local
12 groundwater.

13 There was no testimony presented at trial suggesting that the fertilizer
14 application standards for the fields of Defendant and nearby farmers will be
15 inadequate to raise crops or require supplementation with commercial fertilizer.
16 Moreover, if such a problem arises, the dispute resolution process can be
17 initiated by either party under the terms of the order.

18 For all of the reasons set forth above, Defendant's Motion To Suspend
19 Order On Relief Pending Appeal (ECF No. 251) is **DENIED**.

20 **IT IS SO ORDERED.** The District Court Executive is directed to enter
21 this order and provide copies of the same to counsel of record.

22 **DATED** this ___1st___ day of May, 2012.

23 *s/Lonny R. Suko*

24 _____
25 LONNY R. SUKO
26 United States District Judge
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**ORDER DENYING MOTION TO
SUSPEND ORDER ON RELIEF- 9**