

MONTANA EIGHTEENTH JUDICIAL DISTRICT COURT, GALLATIN COUNTY

UPPER MISSOURI WATERKEEPER,

Plaintiff,

v.

MONTANA DEPARTMENT OF WATER
QUALITY, an agency of the State of
Montana

Defendant.

Cause No. DV-23-262D

ORDER RE DEFENDANT'S 12(b)(6)
PARTIAL MOTION TO DISMISS

BEFORE THE COURT is DEQ's Rule 12(b)(6) Motion for Partial Dismissal.

LEGAL STANDARD

A claim is subject to Rule 12(b)(6) dismissal if it either fails to state a cognizable legal theory for relief or states a valid legal claim but fails to state sufficient facts to sustain it.

Anderson v. ReconTrust Co., N.A., 2017 MT 313, ¶ 8 citing M.R.Civ.P. Rule 12(b)(6).

Under Rule 12(b)(6), the Court must take all well-pled factual assertions as true and view them in the light most favorable to the pleader, drawing all reasonable inferences in favor of the claim. M.R.Civ.P. Rule 12(b)(6).

The Montana Supreme Court has observed that a 12(b)(6) motion to dismiss is "viewed with disfavor and rarely granted". *Fennessy v. Dorrington*, 2001 MT 204, ¶ 9 (citing *Steele v. McGregor*, 1998 MT 85, ¶ 9).

DISCUSSION

This case arises out of DEQ's review of Phase 1 of the Quarry Subdivision's proposed discharge application.

DEQ reviews proposed subdivisions under the Sanitation Act as found in Title 76, Chapter 4 of the Montana Code Annotated (MCA).

DEQ's review under the Sanitation Act is limited to proposed facilities for water, wastewater, storm water, and solid waste. MCA § 76-4-104(2).

In its Sanitation Act review, DEQ ensures that wastewater facilities comply with the nondegradation provisions of the Montana Water Quality Act (MWQA).

Under these provisions, a discharge is either exempt from review under MCA § 75-5-317 and ARM 17.30.716; is nonsignificant under MCA § 75-5-301 and ARM 17.30.707-08; or is required to obtain an authorization to degrade from DEQ under MCA § 75-5-303 and ARM 17.30.202-08.

Here, DEQ reviewed the proposed facilities for Phase 1 of the subdivision and determined that the proposed discharge would be nonsignificant under MWQA.

Waterkeeper challenges that decision.

Constitutional challenges and MCA § 75-1-107

Waterkeeper's first, second and third claims for relief allege that DEQ failed to take a hard look at potential degradation to the Gallatin River from cumulative impacts under ARM 17.30.715(2) (First Claim for Relief); failed to perform a default non-degradation policy analysis of new pollution sources to high quality water pursuant to MCA § 75-5-303 (Second Claim for

Relief); and failed to take a hard look at record evidence in determining that new pollution discharges were nonsignificant under MCA § 75-1-208(11) and ARM 17.4.608(1) (Third Claim for Relief).

DEQ argues that Waterkeeper improperly invokes Article II, § 3 and Article IX, § 1 of the Montana Constitution in support of its claims.

Citing MCA § 75-1-107, DEQ argues that any action challenging the constitutionality of a licensing or permitting decision must first challenge the unconstitutionality of the underlying statute.

DEQ concludes that since Waterkeeper does not challenge the lawfulness of the nondegradation provisions of the Water Quality Act, Waterkeeper's constitutional claims are barred.

However, the Court does not believe Waterkeeper's first, second and third claims contain the kind of constitutional challenges prohibited by MCA § 75-1-107.

Based on the plain language of the complaint, Waterkeeper challenges DEQ's alleged legal error in failing to take a "hard look" at potential degradation from cumulative effects (Count I); DEQ's failure to perform a nondegradation policy analysis (Count II); and DEQ's failure to take a "hard look" at record evidence in determining whether new pollution discharges are nonsignificant (Count III).

The complaint provides the statutory and regulatory basis for each aforementioned claim.

Neither counts 1-3 nor the request for relief raise a challenge to DEQ's decision making authority under the Montana Constitution.

Therefore, the Court finds that the complaint does not allege improper claims under the Montana Constitution as prohibited by MCA § 75-1-107.

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Order re Motion to Dismiss

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Rule 12(b)(6) and sufficiency of Waterkeeper's allegations in claims 1-3

Waterkeeper's second claim for relief alleges that DEQ erred in determining that the proposed discharges for the subdivision's wastewater systems would be nonsignificant within the meaning of the MWQA and applicable administrative rules.

DEQ moves the Court to dismiss the second claim because Waterkeeper offers only nonconclusory allegations in support of it.

Further, DEQ argues that the claim is not yet ripe.

The Court disagrees with DEQ as to both assertions.

First, under the standard of review applicable here, the Court looks not to the merits of Waterkeeper's claims, but to whether Waterkeeper has pled a short and plain statement that, if taken as true, gives rise to relief.

Waterkeeper has.

The complaint alleges that new pollution discharge flows into the Gallatin River and that the Gallatin River is already degraded by algal blooms.

Under these allegations, Waterkeeper alleges that, pursuant to MCA § 75-5-303, DEQ was obligated to perform a nondegradation policy analysis and failed to do so.

The Court finds that, taken as true, these allegations viewed in the light most favorable to Waterkeeper, give rise to a cognizable legal theory under which Waterkeeper is entitled to relief.

Ripeness and Waterkeeper's Second Claim for Relief

DEQ argues that Waterkeeper's Second Claim for Relief is unripe.

Under the ripeness doctrine "a court will not act when the legal issue raised is only hypothetical or the existence of a controversy merely speculative." *Qwest Corp. v. Mont. Dep't*

of Pub. Serv. Regul., 2007 MT 350, ¶ 19.

The question of ripeness has both a constitutional and prudential component. *Reichert v. State*, 2012 MT 111, ¶ 56 citing *Portman v. County of Santa Clara*, 995 F.2d 898, 902-03 (9th Cir. 1993).

Constitutional component of ripeness

The constitutional component asks whether the issues presented are definite and concrete. *Reichert*, ¶ 56.

DEQ argues that Waterkeeper's second claim is not ripe under the constitutional component because a determination that DEQ's finding was arbitrary and capricious would require remand for DEQ's reconsideration.

DEQ also argues that Waterkeeper's claims are largely hypothetical and thus, do not present concrete and definite issues.

The Court disagrees with DEQ.

Claim two is not entirely hypothetical and is supported by the allegations that Gallatin River surface water is already suffering degradation.

These facts, when taken as true, create a concrete and definite controversy which will be impacted by DEQ's decision.

Waterkeeper has met the M.R.Civ.P. Rule 12(b)(6) standard's constitutional component for ripeness.

Prudential component of ripeness

The prudential component of ripeness involves a weighing of the fitness of the issues for

judicial review. *Reichert*, at ¶ 56.

The principal consideration under the fitness inquiry is whether there is a factually adequate record upon which to base effective review. *Reichert*, ¶ 56 citing *Havre Daily News, LLC v. City of Havre*, 2006 MT 215, ¶ 20.

DEQ argues that the claim is not ripe under the prudential analysis of ripeness because Waterkeeper has not suffered a particularized injury and its claims are based on potential future impacts.

DEQ argues that Waterkeeper would not suffer undue hardship if the Court stayed consideration of Waterkeeper's second claim pending the occurrence of an actual injury.

Again, the Court disagrees with DEQ and believes the prudential analysis for ripeness is met.

While it is true that much scientific inquiry into the water conditions and the impact of the subdivision remain, Waterkeeper has pled sufficient facts under the M.R.Civ.P., Rule 12(b)(6) standard to survive the motion to dismiss.

The matter is ripe for judicial review.

Rule 12(b)(6) and failure to state a claim under Waterkeeper's Third Claim for Relief

DEQ moves to dismiss Waterkeeper's Third Claim for Relief which alleges that DEQ's environmental assessment for the subdivision's wastewater facilities was insufficient under the Montana Environmental Policy Act (MEPA) because DEQ failed to examine "growth inducing potential of the Quarry Project and how its approval sets a precedent for future development."

DEQ cites to *Bitterrooters for Planning, Inc. v. DEQ*, where the Court held that DEQ's MEPA review should extend to the facilities subject to DEQ's review authority, not the overall

development which is subject to local permitting authorities. 2017 MT 222, ¶ 24.

Similarly, DEQ argues that Waterkeeper's allegation that DEQ failed to consider how the subdivision's approval sets a precedent for future development fails because Waterkeeper only offers a conclusory basis to support its claim.

The Court disagrees.

The Court notes that the case law cited by DEQ, particularly *Bitterrooters*, disposed of the plaintiff's claims at the summary judgement stage, not on a Rule 12(b)(6) motion.

The Court finds that under a plain reading of the complaint, Waterkeeper's Third Claim for Relief is focused on DEQ's alleged failure to apply its own criteria in support of its conclusion that the Subdivision's impacts on the Gallatin River would be insignificant.

At this stage, the Court finds that Waterkeeper has pled a short and plain statement which, viewed in the light most favorable to Waterkeeper, withstands a Rule 12(b)(6) motion.

Standing

Waterkeeper's Fourth Claim for Relief alleges that DEQ adopted a de facto rule in violation of the Montana Administrative Procedure Act, Title 2, Chapter 4, MCA (MAPA) by using a guidance manual in the DEQ's review of subdivision applications.

DEQ alleges that this claim should be dismissed because Waterkeeper has failed to allege facts that would support that Waterkeeper has standing to review it.

Standing is a threshold requirement that must be evaluated for all claims. *Larson v. State*, 2019 MT 28, ¶ 45.

DEQ argues that Waterkeeper lacks both organizational and associational standing.

Organizational Standing

Organizational standing allows an organization to file suit on its own behalf. *Heffernan v. Missoula City Counsel*, 2011 MT 91, ¶ 42.

If the organization's opposition is part of its normal day-to-day operations and is no different than its ordinary litigation or lobbying activities, the organization has not demonstrated sufficient injury to establish organizational standing. *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942 (9th Cir. 2021).

DEQ argues that Waterkeeper fails to assert organizational standing because Waterkeeper pled allegations that relate to Waterkeeper's abstract social interests and not a demonstrable injury to Waterkeeper itself.

At the pleading stage, general factual allegations of injury suffice to support a particularized injury-in-fact because courts "presume that general allegations embrace those facts that are necessary to support the claim." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

Waterkeeper alleges that if DEQ authorizes new and increased pollution discharges from the subdivision based on the guidance manual, but not in compliance with requirements of the MWQA and MEPA, Waterkeeper's mission in the Big Sky Valley will be adversely affected.

Specifically, Waterkeeper argues that the act of sanctioning potential river degradation and potentially exacerbating existing river impairment requirements of the MWQA and MEPA harms Waterkeeper and its member's particularized interest of conserving river health in the Gallatin.

Therefore, on its face, Waterkeeper's claims allege a specific injury in fact that is not a part of its day-to-day lobbying or abstract social agenda.

Associational Standing

Similarly, DEQ argues that Waterkeeper fails to assert associational standing.

An association may bring suit on behalf of its members without a showing of injury when 1) at least one member would have standing to sue in their own right, 2) the interests the association seeks to protect are germane to its purpose, and 3) neither the claim asserted, nor the relief requested, requires the individual participation of parties to the suit. *Heffernan*, ¶ 43.

DEQ argues that Waterkeeper has failed to assert how one of its members has suffered a particularized injury from the de facto rule.

At the pleading stage, general factual allegations of injury resulting from defendant's conduct may suffice to support standing. *Bennett v. Spear*, 520 U.S. 154, 168 (1997).

Waterkeeper alleges its members' recreational and aesthetic enjoyment of waterways is diminished when DEQ fails to utilize its own standards to protect Gallatin waters through its legislative powers.

Moreover, the pleadings reflect a personal stake in the outcome of the controversy and particularized injury to protected interests of Waterkeeper and its members.

Further, conserving river health is germane to Waterkeeper's purpose.

Waterkeeper has also plausibly alleged that at least some of its injuries will likely be redressed by a favorable decision---a relevant component of standing. *Heffernan*, ¶ 32.

Waterkeeper argues that, if the Court vacates the guidance manual as illegal, Waterkeeper's injuries will be redressed.

Thus, the Court finds that, subject to M.R.Civ.P. Rule 12(b)(b), Waterkeeper has pled facts sufficient to support standing for its fourth claim.

ORDER

For all the aforementioned reasons, it is hereby ordered that DEQ's Rule 12(b)(6) motion for partial dismissal is DENIED.

ELECTRONICALLY SIGNED AND DATED BELOW.

cc: Guy Alsentzer, Esq. []
Kurt Moser, Esq. []