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, a Washington, D.C. Non-Profit Corporation, Plaintiffs, v. GEORGE & MARGARET, LLC, a Washington Limited Liability Company, GEORGE DERUYTER & SON DAIRY, LLC, a Washington Limited Liability Company, and D&A DAIRY and D&A DAIRY LLC, a Washington Limited Liability Company, Defendants.	NO. 1:13-CV-3017-TOR ORDER FINDING NON-COMPLIANCE, SETTING BRIEFING ON SANCTIONS AND FULL COMPLIANCE

BEFORE THE COURT is Plaintiffs' allegations of Defendants' non-compliance with the Consent Decree and request for sanctions. This matter was

submitted for consideration without oral argument. The Court has reviewed the record and files herein, and is fully informed. For the reasons discussed below, the Court finds Defendants have not complied with the Consent Decree in part. Accordingly, the Court sets this matter for further briefing to address the appropriate sanctions to be imposed and dates certain for full compliance.

BACKGROUND

This case arises out of the dairy operation practices of Defendants George & Margaret LLC, George DeRuyter & Son Dairy LLC, D&A Dairy, and D&A Dairy LLC (collectively, "the Dairies") and their impact on the environmental health of the surrounding community. Plaintiffs Community Association for Restoration of the Environment, Inc. ("CARE") and Center for Food Safety ("CFS") brought this suit under the citizen suit provision of the Solid Waste Disposal Act, also known as the Resource Conservation and Recovery Act ("RCRA"), alleging improper manure management practices constituting "open dumping" of solid waste. *See generally* ECF No. 80.

A. May 2015 Consent Decree

On May 19, 2015, the parties entered into a Consent Decree approved by the Court. ECF No. 169. The parties stipulated that to the extent agreed to by the United States Environmental Protection Agency ("EPA"), the EPA would oversee implementation and enforcement of the terms of the Consent Decree. ECF No.

169 at 8, ¶ 14. The Consent Decree outlined a number of environmental improvement initiatives Defendants were obligated to undertake on their dairy properties and timelines for doing so, including lining manure storage lagoons and a catch basin on the properties, monitoring of groundwater for contaminants, maintaining a Dissolved Air Filtration System ("DAF"), inspection of underground conveyance systems, installation of concrete aprons along water troughs within cow pens, ensuring silage areas are located along impervious surfaces, removing all compost from the facility, regrading and compacting existing compost areas, applying liquid and solid manure to agricultural fields at agronomic rates and in conjunction with a nutrient management budget, and providing clean drinking water to nearby residences. ECF No. 169 at 9-25. The Court expressly retained jurisdiction to interpret and enforce the Consent Decree. *Id.* at 3.

B. Motion to Show Cause

On December 2, 2019, Plaintiffs filed a Motion for an Order to Show Cause, alleging Defendants repeatedly violated the Consent Decree over a more than four-year period. ECF No. 231. On January 7, 2020, Defendants filed their response and supporting declarations. ECF Nos. 242-248. On January 15, 2020, the Court held a telephonic hearing to discuss the status of the case. The Court granted the Plaintiffs' Motion for an Order to Show Cause and indicated that it would "consider the parties briefing in formulating a procedure and decision to resolve

the issues, including, if necessary an evidentiary hearing to be scheduled." ECF No. 252.

DISCUSSION

A. Civil Contempt Standard

"A consent decree is a judgment, has the force of res judicata, and it may be enforced by judicial sanctions, including … citations for contempt." *S.E.C. v. Randolph*, 736 F.2d 525, 528 (9th Cir. 1984). "Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms…[T]he scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it." *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). "[A] federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland*, 478 U.S. 501, 525 (1986). "[T]he parties have themselves created obligations and surrendered claims in order to achieve a mutually satisfactory compromise." *Id*. at 524. "To be sure, consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts." *Id*. at 519.

"Civil contempt occurs when a party fails to comply with a court order." *General Signal Corp. v. Donallco, Inc.*, 787 F.2d 1376, 1379 (9th Cir. 1986). "It is well established that the district court has the inherent authority to enforce compliance with a consent decree that it has entered in an order, to hold parties in contempt for violating the terms therein, and to modify a decree." *Nehmer v. U.S. Dep't of Veterans Affairs*, 494 F.3d 846, 860 (9th Cir. 2007). "The district court has 'wide latitude in determining whether there has been a contemptuous defense of its order.'" *Stone v. City & Cty. of San Francisco*, 968 F.2d 850, 856 (9th Cir. 1992), *as amended on denial of reh'g* (Aug. 25, 1992) (citing *Gifford v. Heckler*, 741 F.2d 263, 266 (9th Cir. 1984)). "If an injunction does not clearly describe prohibited or required conduct, it is not enforceable by contempt." *Gates v. Shinn*, 98 F.3d 463, 468 (9th Cir. 1996).

In seeking a finding of civil contempt, "[t]he moving party has the burden of showing by clear and convincing evidence that the contemnors violated a specific and definite order of the court." *Stone*, 968 F.2d at 856 n.9 (citing *Balla v. Idaho St. Bd. of Corrections*, 869 F.2d 461, 466 (9th Cir. 1989)). "The burden then shifts to the contemnors to demonstrate why there were unable to comply." *Id.* (citing *Donovan v. Mazzola (Donovan II)*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984)). "Intent is irrelevant to a finding of civil contempt and, therefore, good faith is not a defense." *Id.* However, "[i]f a violating party

has taken 'all reasonable steps' to comply with the court order, technical or inadvertent violations of the order will not support a finding of civil contempt." *General Signal Co.*, 787 F.2d at 1379 (citation omitted). "'Substantial compliance' with the court order is a defense to civil contempt." *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 10 F.3d 693, 695 (9th Cir. 1993).

B. Lagoon Lining and Maintenance

The Consent Decree provides for Defendants to double line twelve lagoons (which include two catch basins and a take-up pond) by December 31, 2018. ECF No. 169 at 9-12. Defendants have only completed the Consolidated Lagoon 3 lining project (Lagoons 3 and 4) and the Stormwater Catch Basin as of December 31, 2018. *See* ECF Nos. 231 at 6; 232-1; 245 at ¶¶ 27, 35. The undisputed evidence shows that Defendants have failed to comply with the remaining lagoon lining provisions of the Consent Decree, without valid justification.

In summary, Defendants contend the wording of the Consent Decree allows their non-compliance with the timeline for implementing the lagoon lining. First, Defendants highlight the wording that the lagoon work will be performed according to the Dairy Lagoon Work Plan, "*or as may reasonably be modified through the discussions of Plaintiffs, Defendants, and the EPA.*" ECF No. 248 at 10 (citing Consent Decree, ECF No. 169 at ¶ 18). Yet, Defendants cite to no

agreement or discussion between the parties and EPA that modifies the Dairy Lagoon Work Plan. This exception does not apply.

Next, Defendants cite to the same paragraph providing that "the lining shall occur at a rate of at least two per year, according to the schedule set forth in the Lagoon work Plan *and any modification required by EPA*." ECF No. 248 at 10. Without documentation, Defendants contend "the EPA refused to approve the lagoon design upon which the parties agreed." *Id*. at 8, 11 (citing to Larsen Declaration, ECF No. 245 at ¶ 20 (merely stating that "EPA did not approve the April 20, 2015 Dairy Lagoon Work Plan that IES prepared, but rather raised additional questions and concerns.")). Significantly, Defendants do not cite to any "*modification required by EPA*" that would absolve them from complying with the lagoon lining timeline. Defendants then cite to a letter dated August 1, 2018, from the EPA that clearly concerns the Administrative Order on Consent (AOC) and *allows* the delay of lining D&A Lagoons 1 and 2 until 2020. ECF No. 245-8. This delayed implementation of the AOC primarily for financial reasons, did not pertain to the Parties' Consent Decree, nor was it a "*modification required by the EPA*."

Defendants contend the lagoon lining timeline was "subject to" such things as unanticipated weather, unanticipated site conditions, as well as the EPA's ability to "approve lagoon installation plans" in a timely manner. ECF No. 248 at 11 (*see* ECF No. 169 at ¶ 18). Yet, Defendants cite to no weather, site conditions, or EPA

delay (as opposed to Defendants' delay) that would warrant wholesale non-compliance with the lining program.

Finally, Defendants contend that Plaintiffs have not submitted these complaints to the dispute resolution process. Plaintiffs have cited and attached numerous letters sent to Defendants complaining of non-compliance and allowing for the dispute resolution process to be invoked by the Defendants, which Defendants did not initiate.

The only issue remaining is what sanction the Court should impose for failure to timely comply and the imposition of a future date certain to comply.

C. Dissolved Air Flotation System (DAF)

Plaintiffs contend Defendants have failed to timely and fully provide the nutrient data from the DAF according to the Consent Decree. ECF No. 231 at 30. Defendants responded that after some negotiations as to what type of "data" was envisioned by this provision, Defendants agreed to collect the data twice annually and provide it to Plaintiffs. ECF No. 248 at 27. Plaintiffs concede that Defendants have now produced DAF information for 2016 through 2018, but maintain that production was untimely and they should not have to request the information.

Defendants appear to concede the information was not timely provided, but the information has now been produced. No prejudice or material breach of the

Consent Decree warrants sanctions at this time. Defendants are reminded to fully comply with these terms of the Consent Decree in the future.

D. Underground Conveyance Inspection

The Consent Decree required Defendants to inspect all underground conveyance systems, pressure test transmission lines, document underground structures, and provide the inspection results to Plaintiffs within five days of completion. ECF No. 169 at ¶ 28. It also required leaks and improper piping to be fixed so that all wastes are appropriately directed to lined lagoons. *Id*.

Defendants admit they have not complied with this provision even though there is no express deadline. ECF No. 248 at 26. Defendants now complain that the inspection may be too expensive and also question whether the inspection is reasonable or necessary. *Id*. at 26-27.

Defendants voluntarily entered into the Consent Decree and are bound by its terms. The only issue remaining is what sanction the Court should impose for failure to timely comply and the imposition of a future date certain to comply.

E. Compost Area

Plaintiffs contend that the Defendants have not complied with the composting requirements of the Consent Decree. Specifically, Plaintiffs contend Defendants failed to re-grade and compact its compost area in one-third increments of the area annually, starting in the year 2016. ECF Nos. 231 at 26; 169 at ¶ 34.

Additionally, Plaintiffs assert Defendants have failed to "remove all compost from the current location at D & A facility by December 31, 2017." ECF Nos. 231 at 28; 169 at ¶ 33.

Defendants admit that no compaction or regrading work was done in 2016 or 2017. ECF No. 248 at 24. However, Defendants explain that their consultant indicated that no regrading was required and only a few areas needed compaction ("a few areas below the required compaction"). ECF No. 247-13. Defendants then provided Plaintiffs with a final "compaction letter, confirming full compliance" on September 25, 2018. *Id*. at 25; ECF No. 247-14.

Defendants contend they also complied with the removal of all compost in 2017 and are not storing compost at the facility. ECF No. 248 at 25. Defendants contend the alleged compost that was photographed is bedding for the cows, not compost. *Id*. Defendants explain that what was photographed "is post-composted material that we bring in from the northern compost operation to use as bedding for our cows. We deliver it from GDS, and then we spread it in the pens for our cows. It is totally dry material which is why we use it for bedding." ECF Nos. 243 at 8 (Dan DeRuyter Declaration); 243-6 (photograph).

Plaintiffs contend that this post-composted material is still compost and is highly nitrogenous as indicated by the EPA's testing and data. ECF No. 254-8 at 4. The only issue remaining is what sanction the Court should impose for failure

to timely comply and the imposition of a future date certain to comply with the removal of all compost.

F. Manure Application & Field Management

Plaintiffs contend Defendants have exceeded the nitrate and phosphorus manure application restrictions of the Consent Decree for each of the last four years on multiple fields. ECF No. 231 at 13. In summary, Plaintiffs contend at ECF No. 231 at 14-17 that the following nitrate overapplication has occurred in the following fields:

Field	Year	Nitrate Level	Gallons Applied	in Year
GDS-SU04	2015	86.5	9,000	2016
	2016	80.2	2,676,707	2017
	2017	30.2	1,533,507	2018
GDS-SU05	2016	89.5	227,000	2017
		47.4	627,380	2018
GDS-SU06	2018	64.5	420,158	2019
GDS-SU07	2018	53	428,592	2019
GDS-SU08	2015	93.5	1,507,236	2016
	2016	76.1	829,683	2017
	2017	63.1	152,000	2018
	2018	58.1	6,327,000	2019

Defendant's Response and accompanying Table of nitrogen field sampling and manure application confirms these apparent violations of the Consent Decree.

ECF No. 246-1 at 23 (Table 4, SS-22). Defendants do not directly contest that they violated the Consent Decree, but rather contend that they have "functioned in a manner consistent with meeting the intent of their DNMP, AOC, CAFO, and Consent Decree requirements." ECF No. 248 at 18. Defendants explain that Plaintiffs seized on instances where they have "technically not complied" rather than looking at the "huge improvement in soil quality." *Id*. at 22. Defendants concede that millions of gallons of manure were applied to fields, although they explain that it was justified "during the historic winter weather of 2016-17 in order to avoid a catastrophic outcome." *Id*. at 19. Indeed, Defendants' consultant acknowledges that "in some instances" these emergency applications "resulted in applications to fields that would not have qualified for applications under the Consent Decree." ECF No. 246 at ¶ 18.2 (Stephen's Declaration). Defendants' consultant also attempts to justify the over-applications by explaining that the manure was applied to the corners of some fields which have not received the same level of historical application. *Id*. at 12, 14. However, the Consent Decree does not allow for such. Defendants also contend Plaintiffs' "claims are a result of lack of understanding of the data and wrong interpretations." ECF No. 248 at 21. Defendants contend most of this misunderstanding is caused by "a crop year basis versus a calendar year basis." *Id*. Yet, Defendants' Table of nitrogen field

sampling and manure application confirms these obvious violations of the Consent Decree. ECF No. 246-1 at 23 (Table 4, SS-22).

Plaintiffs also contend that Defendants have violated the Consent Decree phosphorus restrictions by continuing to apply manure to fields that testing showed far exceeded the phosphorus limitations (manure cannot be applied to fields until below 40 ppm of phosphorus in the upper foot of soil, unless applied based upon nutrient budget that seeks to reduce phosphorus application to less than 66.66 percent of crop removal (ECF No. 169 at ¶ 38). ECF No. 231 at 18-21 and specifically Table 2 as shown here:

George DeRuyter & Sons Application Field Soil Sampling Results:										
Phosphorous (ppm) in top foot of soil w/ Liquid Manure Applications (gallons)										
Application Field	2015 PH	2016 App.	2016 PP	2016 PH	2017 App.	2017 PP	2017 PH	2018 App.	2018 PP	2018 PH
GDS-SU01A	141	121,500	137	147	804,000	176	114	462,000	131	91
GDS-SU02A	112	2,308,500	168	220	3,091,000	173	151	1,966,500	131	104
GDS-SU03A	113	567,000	132	168	0	172	111	0	115	92
GDS-SU04A	294	9,000	262	398	2,676,707	325	262	1,533,507	294	355
GDS-SU05A	352	0	369	233	227,000	441	324	627,380	340	339
GDS-SU06A	132	1,384,866	143	151	3,962,603	192	112	806,613	124	110
GDS-SU07A	75	1,384,866	58	70	3,962,603	65	59	806,613	76	66
GDS-SU08A	223	1,507,236	249	144	829,683	225	227	152,000	259	162
GDS-SU09A	142	0	139	134	123,500	154	163	616,300	127	77
GDS-SU010A	37	574,256	45	41	85,500	44	23	1,053,500	45	30
GDS-SU011A	135	76,500	165	147	290,000	192	162	290,000	151	150
GDS-SU012A	101	2,632,500	99	125	1,611,337	120	156	801,973	86	70
GDS-SU013A	125	0	203	155	1,273,946	142	94	986,733	57	128
GDS-SU014A	88	1,624,500	129	103	4,693,500	107	112	3,321,000	75	102
A=0-12" Sample										
CD Application Threshold = 40 ppm in top foot; PP=Pre-Plant Sample; PH=Post-Harvest Sample										

Defendants do not directly contest the phosphorus violations, but rather assert that there is "a positive data trend on both a weighted average and an individual field basis." ECF No. 248 at 19-20. Defendants' consultant spends

considerable time explaining that the "Plaintiffs have focused exclusively on the recommendations and the application process, but have studiously avoided addressing the outcomes." ECF No. 246 at 16-27. Apparently conceding certain over-applications, Defendants' consultant indicates field testing clearly shows a downward trend of phosphorus levels. *See e.g.*, *id*. at 23.

The Consent Decree specifically provided that "all future applications of manure are to be based upon the nutrient management budget. . . . Defendants to determine all future manure application rates based on residual soil . . . phosphorus levels, ensuring that manure is applied in agronomic quantities and rates as defined" therein. ECF No. 169 at 17. Essentially, "for fields with more than 40 ppm phosphorus in the upper foot, based on a valid sample obtained during the calendar year at issue, manure may only be applied in a manner that, based upon a nutrient budget, seeks to reduce phosphorus application to less than 66.66 percent of crop removal until such time as phosphorus levels are reduced to 40 ppm or less phosphorus in the upper foot of the soil column, based on a valid sample obtained during the calendar year of planting. Once 40 ppm is achieved, no applications of manure will be allowed that cause residual phosphorus levels to once again exceed 40 ppm." *Id*. at 20.

Generally, Defendants' data shows downward phosphorus trending, but it also shows violations of the Consent Decree by overapplying manure to several of the fields. *See* ECF No. 246-1 at SS-13 and SS-22.

Finally, Plaintiffs complain that Defendants have violated the Consent Decree by providing incomplete and incorrect records as compared to the records provided to the State Department of Ecology. ECF No. 231 at 21-23. Specifically, Plaintiffs complain that Defendants' 2018 Annual Report shows that they applied 13,424,119 gallons of liquid manure to its fields when records provided to Plaintiffs show less than half of that manure application total – 5,757,387 gallons. *Id*. at 22.

Defendants explain that some differences are attributed to "calendar year" as opposed to "crop year basis," and others were "simply related to records not making it to DeRuyter's office for entry in a timely manner. Once the original records made it to the office, the numbers were entered promptly." ECF No. 246 at 27-28.

The Court will entertain what sanction and corrective action need be taken for the nitrate, phosphorus and records violations. In any event, Defendants are reminded to fully comply with these terms of the Consent Decree in the future.

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ACCORDINGLY, IT IS HEREBY ORDERED:

1. The Court finds Defendants have not complied with the Consent Decree as indicated above. Accordingly, the Court sets this matter for further briefing to address the appropriate sanctions to be imposed and dates certain for full compliance.
2. Plaintiffs shall file a brief addressing proposed sanctions and justification for such, as well as proposed future compliance deadlines for each violation outlined above, on or before **May 12, 2020**.
3. Defendants shall file a brief in response to each of Plaintiffs' proposals no later than **June 2, 2020**.
4. Plaintiffs may file a reply no later than **June 9, 2020.**
5. Unless the parties demand oral argument no later than **June 2, 2020** using the procedures set forth at LCivR 7(i)(3), the Court will hear this matter without oral argument on June 12, 2020.

The District Court Executive is directed to enter this Order and furnish copies to counsel.

DATED April 14, 2020.

THOMAS O. RICE
Chief United States District Judge