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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,
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. 2:13-CV-3017-TOR

ORDER ON CONSENT DECREE
SANCTIONS

BEFORE THE COURT is the matter of sanctions in response to the Court's
prior Order Finding Non-Compliance with Consent Decree. ECF No. 256. This

1 matter was heard with telephonic oral argument on July 14, 2020. Charles M.
2 Tebbutt and Daniel C. Snyder appeared on behalf of Plaintiffs. Kent Krabill,
3 Joshua D. Lang, and James S. Elliott appeared on behalf of Defendants. The Court
4 has reviewed the record and files herein, and is fully informed. For the reasons
5 discussed below, the Court finds Defendants’ non-compliance with the Consent
6 Decree warrants an order of sanctions.

7 **BACKGROUND**

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

17 On May 19, 2015, the parties entered into a Consent Decree approved by the
18 Court. ECF No. 169. On December 2, 2019, Plaintiffs filed a Motion for an Order
19 to Show Cause, alleging Defendants repeatedly violated the Consent Decree over a
20 more than four-year period. ECF No. 231. On January 15, 2020, the Court

1 granted Plaintiffs’ Motion for Order to Show Cause and set a future hearing on the
2 issue of non-compliance. ECF No. 252. On April 14, 2020, the Court entered an
3 Order finding Defendants in non-compliance with the terms of the Consent Decree
4 and requesting further briefing on the issue of appropriate sanctions and dates
5 certain for full compliance. ECF No. 256.

6 DISCUSSION

7 A. Type of Sanctions

8 Having already determined that Defendants are not in compliance with the
9 Consent Decree, the question presently before the Court is what type of sanction to
10 impose for the non-compliance. “Courts have the ability to address the full range
11 of litigation abuses through their inherent powers.” *F.J. Hanshaw Ent., Inc. v.*
12 *Emerald River Dev., Inc.*, 244 F.3d 1128, 1136 (9th Cir. 2001). “The finding of
13 contempt and the imposition of monetary sanctions are independent inquiries.”
14 *Puget Soundkeeper All. v. Rainier Petroleum Corp.*, No. C14-0829JLR, 2017 WL
15 6515970, at *10 (W.D. Wash. Dec. 19, 2017). A court may impose sanctions that
16 are either civil or criminal in nature. “To distinguish civil from criminal contempt,
17 the focus of the inquiry is often ‘not [upon] the fact of punishment, but rather its
18 character and purpose.’” *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d
19 770, 778 (9th Cir. 1983) (quoting *Shillitani v. United States*, 384 U.S. 364, 369
20 (1966)).

1 “Civil contempt is characterized by the court’s desire to compel obedience to
2 a court order ... or to compensate the contemnor’s adversary for the injuries which
3 result from the noncompliance.” *Falstaff*, 702 F.2d at 778 (internal citations
4 omitted). “A court’s power to impose coercive civil contempt depends upon the
5 ability of the contemnor to comply with the court’s coercive order.” *Id.* “[I]n
6 determining the amount and duration of a coercive fine, [the court] must ‘consider
7 the character and magnitude of the harm threatened by continued contumacy, and
8 the probable effectiveness of any suggested sanction in bringing about the result
9 desired.’” *Whittaker Corp. v. Execuair Corp.*, 953 F.2d 510, 516 (9th Cir. 1992)
10 (quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 304
11 (1947)). The contemnor’s ability to become compliant with the court’s order and
12 therefore “purge” itself of conditional sanctions “is perhaps the most definitive
13 characteristic of coercive civil contempt.” *Shell Offshore Inc. v. Greenpeace, Inc.*,
14 815 F.3d 623, 629 (9th Cir. 2016). When a civil contempt sanction is
15 compensatory, it is awardable to the prevailing party in the litigation and generally
16 not to non-parties. *Ahearn ex rel. N.L.R.B. v. Int’l Longshore & Warehouse Union,*
17 *Locals 21 & 4*, 721 F.3d 1122, 1131 (9th Cir. 2013). “Compensatory sanctions
18 should be payable to the aggrieved party on evidence of the amount of losses.”
19 *Puget Soundkeeper*, 2017 WL 6515970 at *10 (citing *Gen. Signal Corp. v.*
20 *Donallco, Inc.*, 787 F.2d 1376, 1380 (9th Cir. 1986)).

1 In contrast, “[t]he primary purpose of criminal contempt is to punish past
2 defiance of a court’s judicial authority, thereby vindicating the court.” *Falstaff*,
3 702 F.2d at 778. “The principal beneficiaries of such an order are the courts and
4 the public interest.” *Id.* “Criminal contempt is appropriate where the actor ‘defies
5 the public authority and willfully refuses his obedience.’” *Whittaker Corp.*, 953
6 F.2d at 517 (quoting *United Mine Workers*, 330 U.S. at 303). “[W]hen a court uses
7 its inherent powers to impose sanctions that are criminal in nature, it must provide
8 the same due process protections that would be available in a criminal contempt
9 proceeding,” including the right to be advised of the charges, the right to a
10 disinterested prosecutor, proof beyond a reasonable doubt, and the right to a jury
11 trial if the fine or sentence imposed will be serious. *F.J. Hanshaw*, 244 F.3d at
12 1138-39.

13 **B. Findings**

14 *1. Proposed Consent Decree Modifications*

15 In response to the Court’s Order Finding Non-Compliance, Plaintiffs have
16 submitted proposed modifications to the Consent Decree terms as a proposed
17 remedy for Defendants’ non-compliance. ECF No. 261-1. Although a consent
18 decree is contractual in nature, it is also “a judicial decree that is subject to the
19 rules generally applicable to other judgments and decrees.” *Rufo v. Inmates of*
20 *Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992). “[A] party may obtain relief from a

1 court order when ‘it is no longer equitable that the judgment should have
2 prospective application,’ not when it is no longer convenient to live with the terms
3 of the consent decree.” *Id.* at 383 (quoting Fed. R. Civ. P. 60(b)(5)). “[A] party
4 seeking modification of a consent decree must establish that a significant change in
5 facts or law warrants revision of the decree and that the proposed modification is
6 suitably tailored to the changed circumstance.” *Id.* at 393.

7 Plaintiffs propose a series of modifications to the Consent Decree terms,
8 including requiring the more comprehensive “WET design” lagoon liners over the
9 design originally agreed to in the Consent Decree and modifying the previously
10 agreed-upon field nutrient levels. ECF No. 261 at 2-13. Defendants oppose
11 Plaintiffs’ proposals as an improper attempt to modify the Consent Decree. ECF
12 No. 273 at 5-15. The Plaintiffs point to paragraph 1 of the Consent Decree
13 allowing modification “if necessary”. ECF No. 169 at 3, ¶ 1. The Court finds that
14 Defendants’ non-compliance with the Consent Decree does not establish a
15 “significant change in facts” that would justify rewriting the Consent Decree to
16 impose more burdensome terms on Defendants than those to which the parties
17 previously agreed. *Rufo*, 502 U.S. at 393. Accordingly, Plaintiffs’ request to
18 modify the Consent Decree terms is denied, at this time.

1 2. *Compensatory and Coercive Sanctions*

2 Plaintiffs request the Court award compensatory monetary sanctions in the
3 amount of \$250,000, to be awarded to the Clean Drinking Water Project. ECF No.
4 261 at 13-16. Defendants oppose this request as unlawful and excessive. ECF No.
5 273 at 15-17. Compensatory sanctions are intended to compensate the prevailing
6 party for a specific injury and are generally not awardable to outside parties.

7 *Ahearn*, 721 F.3d at 1131; *Puget Soundkeeper*, 2017 WL 6515970 at *10.

8 Plaintiffs' requested compensatory sanctions are not tied to any monetarily
9 quantifiable and specific injury suffered by Plaintiffs, and Plaintiffs' request to
10 award sanctions to a non-party to benefit the public interest would not serve the
11 purpose of a civil sanction. Accordingly, Plaintiffs' request for a \$250,000
12 compensatory sanction is denied.

13 Instead, the Court finds it appropriate to impose coercive sanctions to
14 compel Defendants' compliance with the Consent Decree terms to which the
15 parties have already agreed. The Court's Order Finding Non-Compliance
16 identified five areas of Defendants' non-compliance: (1) lagoon lining and
17 maintenance; (2) underground conveyance inspection; (3) compost area
18 management; (4) manure application and field management; and (5) records
19 disclosure. ECF No. 256 at 6-15. Defendants represent that they are presently in
20 compliance with the Consent Decree terms governing compost areas on

1 Defendants' properties. ECF No. 273 at 14-15; ECF No. 280. Plaintiffs contend
2 the compost area on the GDS property is not compliant. Plaintiffs represent that
3 this issue was briefed, but was not addressed by the Defendants or the Court in its
4 finding of contempt.

5 The Consent Decree required Defendants to complete their lagoon lining
6 obligations by December 31, 2018. ECF No. 169 at 10. Defendants were subject
7 to ongoing manure application limitations based on a tapering maximum nutrient
8 level limitation. ECF No. 169 at 17-23. And although the underground
9 conveyance inspection was not required to be completed by a certain date,
10 Defendants are not in compliance with this requirement over five years after the
11 parties' initial agreement. ECF No. 169 at 14. Because Defendants have not been
12 in compliance with the Consent Decree for several years, the Court finds it
13 appropriate to order Defendants' immediate or short-term compliance with the
14 Consent Decree subject to coercive monetary sanctions as detailed below.

15 *3. Attorney's Fees*

16 Plaintiffs seeks attorney's fees and costs associated with the current
17 contempt proceedings and for ongoing monitoring of Defendants' ongoing
18 compliance. ECF No. 261 at 15-16. Defendants urge the Court to decline to
19 award fees. ECF No. 273 at 18-19. Courts have discretion to award attorney's
20 fees and costs as a remedial measure in response to civil contempt. *Perry v.*

1 *O'Donnell*, 759 F.2d 702, 704 (9th Cir. 1985). The contempt need not be willful in
2 order to justify an award of fees and costs. *Id.* The Court finds it appropriate to
3 award Plaintiffs' fees and costs associated with the proceedings on contempt and
4 sanctions. Although this award need not be justified by a finding of willfulness or
5 bad faith, the Court notes that the duration of Defendants' non-compliance and
6 Defendants' conscious choices to prioritize other projects over its Consent Decree
7 obligations support the award.

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

9 1. Defendants are sanctioned as follows:

- 10 a. Defendants must **complete six out of the 10 remaining lagoon**
11 **lining and maintenance obligations** as described in the Consent
12 Decree by **December 31, 2020** or otherwise abandon each lagoon
13 not in compliance. Lagoon abandonment means termination of its
14 use and evacuation and proper disposal of all existing manure and
15 wastewater. In the event that Defendants fail to complete their
16 lagoon lining and maintenance obligations or abandon their
17 lagoons by **December 31, 2020**, Defendants shall incur a **\$10,000**
18 fine, per lagoon, per calendar month (pro rata for each day),
19 payable to the Court.

1 b. Defendants must **complete the remaining four lagoon lining**
2 **and maintenance obligations** as described in the Consent Decree
3 by **December 31, 2021** or otherwise abandon each lagoon not in
4 compliance. Lagoon abandonment means termination of its use
5 and evacuation and proper disposal of all existing manure and
6 wastewater. In the event that Defendants fail to complete their
7 lagoon lining and maintenance obligations or abandon their
8 lagoons by **December 31, 2021**, Defendants shall incur a **\$10,000**
9 fine, per lagoon, per calendar month (pro rata for each day),
10 payable to the Court.

11 c. Defendants are **immediately enjoined from applying any liquid**
12 **or solid manure or commercial fertilizers** to its fields until the
13 nutrient levels in its fields are compliant with the Consent Decree
14 limitations for the present date for both nitrates and phosphorus.
15 Once Defendants' fields are compliant with the present-date
16 nutrient limits as specified in the Consent Decree, Defendants will
17 be permitted to resume applications of manure or commercial
18 fertilizers subject to the agronomic rate and other restrictions
19 specified in the Consent Decree. Each application of either
20 manure or commercial fertilizer in violation of this Order will

1 result in a **\$5,000** fine per field for each such violation, payable to
2 the Court.

3 d. Defendants must **complete the inspection and repairs to the**
4 **underground conveyance systems** as required by the Consent
5 Decree, ECF No. 169, ¶ 28, by **December 31, 2020**. Failure to
6 timely comply with this Order will result in a \$1,000 fine per day
7 until compliance is achieved, payable to the Court.

8 e. Defendants shall not conduct composting operations (i.e., the
9 production or storage of compost) at the D&A facility; this is not
10 to be construed as limiting the use of compost-based animal
11 bedding provided that bedding staging, storage and use locations
12 are either under roof, or on top of a paved surface with drainage to
13 a proper collection pond.

14 f. Defendants are **ordered to pay Plaintiffs' attorney's fees and**
15 **costs** resulting from the present proceedings on contempt and
16 sanctions, after substantiation and in a reasonable amount as
17 determined by the Court.

18 2. **Within 14 days**, Plaintiffs shall file its substantiation of attorney's fees
19 and costs resulting from the present proceedings on contempt and
20

1 sanctions. The deadlines for responses and replies are governed by
2 LCivR 7.

3 3. Defendants shall timely provide records as proscribed in paragraphs 17
4 and 44 of the Consent Decree. ECF No. 169. The parties have agreed
5 that Defendants will provide all available records by the 12th day of each
6 month.

7 4. Defendants shall review and promptly comply (within 60 days) with all
8 outstanding requirements of paragraphs 34 and 35 of the Consent Decree,
9 ECF No. 169, concerning the composting at the George DeRuyter &
10 Sons facility.

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

13 **DATED** July 14, 2020.



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A handwritten signature in blue ink that reads "Thomas O. Rice".

THOMAS O. RICE
Chief United States District Judge