

ENTERED

March 21, 2022

Nathan Ochsner, Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
VICTORIA DIVISION

SAN ANTONIO BAY ESTUARINE	§	
WATERKEEPER, <i>et al.</i> ,	§	
	§	
Plaintiffs,	§	
	§	
VS.	§	CIVIL ACTION NO. 6:17-CV-00047
	§	
FORMOSA PLASTICS CORP, TEXAS, <i>et</i>	§	
<i>al.</i> ,	§	
	§	
Defendants.	§	

MEMORANDUM AND ORDER

I.

Now before the Court is the plaintiffs’ motion to enforce the Consent Decree regarding the proper cleanup of plastics in Cox Creek [DE 282]. The defendant has filed its response to the plaintiffs’ motion, and with permission of the Court, filed a sur-reply [DEs 287 and 301, respectively]. The plaintiffs’ motion presents two issues: (a) whether Freese & Nichols, Inc., [“FNI”], an independent contractor or the defendant should manage the interim cleanup contractor, Horizon Environmental; and (b) whether the interim cleanup of plastics inside the containment booms should continue until a permanent contract is in place.

The defendant, while fully accepting the implementation of FNI’s Remediation Plan, asserts that the plaintiffs’ motion to continue cleanup under an

interim remediation plan is outside the Consent Decree. First, the defendant argues that the proposal calls for two remediation plans. The defendant also argues that Global Environmental Assessments and Response (“GEAR”) monitoring plan does not support the relief sought by the plaintiffs. Hence, to follow the plaintiffs’ proposal, the Court must conduct a “cost-benefit analysis” test before deciding whether any remedial benefit would be realized by conducting two remediation plans. In the defendant’s judgment, because only small quantities of plastics remain in the containment boom areas, the interim cleanup should cease because the costs to continue the plan outweighs the benefits that are sought.

The defendant’s arguments fail on all counts. The Consent Decree does not use the term “small” to describe the conditions that must exist in the Cox Creek or Lavaca Bay ecosystems before further remediation is unwarranted. The Consent Decree states:

Cleanup will continue until the Remediation Consultant determine that most plastics have been removed from the environment and that further remediation efforts may harm the Cox Creek and Lavaca Bay ecosystems.

See [Consent Decree; DE 197, C(48)]. The term “most” is used, and it relates to two aspects of the remediation process quantitative and qualitative as envisioned in the Consent Decree. The former, quantitative, relates to the amount of plastics that can be tolerated and governs the extent to which further remediation is possible without

harming the ecosystems at Cox Creek and Lavaca Bay. Therefore, use of the term “small” to describe the quantity of plastics that can be tolerated in the ecosystem, fails to address the equally important qualitative requirements that must also be met pursuant to the Consent Decree.

The Court is of the view that the quantity of plastic remaining inside the containment booms does not dictate conducting a cost-benefit analysis to determine whether an acceptable ecological return has been reached because that determination is relevant only when further removal threatens the ecosystem. This is to say that the costs associated with continuing interim cleanup is tied to whether further removals will harm the Cox Creek and Lavaca Bay ecosystems.

In the Court’s view, it is critical to the Court’s enforcement of the Consent Decree that any plastics found beyond the Containment Boons meet the qualitative and quantitative test. Otherwise, enforcement simply becomes an exercise where enforcement of the remediation process is questionable. The Court, therefore, rejects the defendant’s argument that to continue the interim remediation plans constitutes a dual process and is outside the terms of the Consent Decree. The Court also rejects the argument that GEAR’s report does not support the relief sought by the plaintiffs, or that the cost of continuing interim remediation outweighs the benefit. The following findings of fact also support the Court’s determination:

In support of the Court’s determination and:

- (a) The plaintiffs properly sent Notice of Dispute Resolution regarding these two issues as required by the Consent Decree; hence, the Court has jurisdiction to review any disputes under the Decrees pursuant to paragraph 68 of the Decree.
- (b) The Remediation Consultant is “a qualified external (non-Formosa) remediation firm,” that bears ultimate responsibility for developing a cleanup plan and for determining when cleanup has been completed. Moreover, the Remediation Consultant has proposed interim and Phase I plans for cleanup of plastics in Cox Creek; the Remediation Consultant has recommended that Horizon’s interim cleanup be managed by the Remediation Consultant. A proposed contract between FNI and Horizon for interim cleanup of plastics near the relevant outfalls that discharge into Cox Creek was forward to the parties in April 2021; nevertheless, the defendant has not acted on it. Hence, the Remediation Consultant must serve as the independent expert having been selected by both parties, and must manage the cleanup, as required by the Consent Decree;
- (c) On January 7, 2021, FNI, advised the parties of its recommendation that it “conduct the recommended activities outlined in this guidance within the permanent booms surrounding outfalls in Cox Creek.” This recommendation was reiterated on August 23, 2021.
- (d) On September 13, 2021, FNI responded to the parties’, pursuant to the parties’ request, that cleanup of Plastics inside the containment booms be undertaken by Horizon as part of the interim cleanup. On October 1, 2021, GEAR also recommended that “cleaning of plastics be carried out in the monitoring area of outfall 008, as well as 006 and 009, especially in the area closest to the fence line”. This process is necessary because GEAR must determine whether plastics found inside the containment areas result from a post-Consent Decree discharge.
- (e) In the Court’s view, having plastics cleaned up inside the containment booms will allow the Monitor to more easily determine whether plastics found after a discharge event were

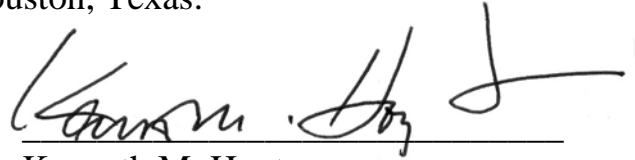
from a post- Consent Decree discharge; therefore,

It is ORDERED that:

The defendant shall, within thirty (30) days: (1) enter into a contract with FNI under which FNI manages Horizon's or, at FNI's discretion, another entity for interim cleanup, where the interim cleanup of Cox Creek is managed by FNI; and (2) immediately, and until the supervision of the interim cleanup contractor passes to FNI, Horizon is DIRECTED to cleanup plastics inside the containment booms at outfalls 006, 008 and 009, and others, if necessary, that discharge into Cox Creek and/or Lavaca Bay.

It is so ORDERED.

SIGNED on March 18, 2022, at Houston, Texas.

A handwritten signature in black ink, appearing to read "Kenneth M. Hoyt", written over a horizontal line.

Kenneth M. Hoyt
United States District Judge