

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

PATRICK JOSEPH TURNER, ET AL. * **CIVIL ACTION**
VERSUS * **NO. 05-4206**
MURPHY OIL USA, INC. * **CONSOLIDATED CASE**
SECTION "L" (2)

THIS DOCUMENT RELATES TO ALL CASES

ORDER AND REASONS

Before the Court is Murphy Oil USA, Inc.'s ("Defendant's") Motion Pursuant to Rule 23(d)(2) for an Order Granting Access to the Court's Certified Class Area to Implement the EPA-LDEQ-ATSDR-LDHH-Approved Remediation Plan (Rec. Doc. No. 437). For the following reasons, the motion is GRANTED under Rule 23(d) and the Court's inherent power to manage its docket.

I. Factual and Procedural Background

This certified class action complaint seeks damages that resulted sometime in the first week of September 2005, shortly after Hurricane Katrina, when an oil tank on Defendant's property allegedly discharged approximately 25,100 barrels of crude oil into the surrounding neighborhood. The Plaintiffs, several thousand homeowners and residents of St. Bernard Parish Louisiana, claim that they suffered damage as a result of the oil spill.¹ On January 30, 2006, this

¹A more detailed factual and procedural background may be found in this Court's prior orders concerning the litigation. These statements should not be understood to be a determination of facts, nor should they be construed as findings regarding the Defendant's negligence, fault, or lack thereof.

Court certified the Plaintiffs' claims as a class action under Rule 23 of the Federal Rules of Civil Procedure, and after an examination of evidence, the Court designated a class boundary based upon its conclusion of how the oil flowed after it escaped from Defendant's property. The Court established the western boundary of the class at Paris Road, the northern boundary at 40 Arpent Canal, the southern boundary at St. Bernard Highway, and found that the eastern boundary included the trailer park immediately adjacent to the Defendant's refinery, on Mary Ann Drive, and extended in a northerly direction to the 40 Arpent Canal.

Since the oil spill occurred, Defendant claims that it has worked with federal and state health and environmental agencies to determine the extent of damage and to devise a plan or procedure to recover the discharged oil and clean the area. Defendant has begun clean-up and remediation efforts in public spaces and on the properties of those homeowners who have settled their claims with the Defendant. However, no clean-up and remediation efforts have been undertaken on the properties of the class members who reside within the area certified by the Court. Thus, remediation efforts have been carried out on a "patchwork" or property by property basis, with much of the affected area remaining untouched since the spill occurred. Such a method has proven unsatisfactory at best or ineffective at worst.

On July 12, 2006, the Defendant filed this motion requesting the Court to grant it access to the certified class area under Rule 23(d)(2) of the Federal Rules of Civil Procedure in order to begin implementation of an area-wide remediation plan which includes all or portions of the class area. The Court received opposition to this motion from the Plaintiffs' Steering Committee (the "PSC") (Rec. Doc. No. 454). After the Court heard oral argument from both parties on July 28, 2006, it requested that the parties provide additional briefing regarding the impact on their

positions of a recent case decided by the United States Court of Appeals for the District of Columbia Circuit (“D.C. Circuit”), *Cobell v. Kempthorne*, ___F.3d___, 2006 WL 1889150 (D.C. Cir. July 11, 2006). The Court is now ready to rule on the motion.

II. The Defendant’s Motion to Access Class-Wide Area to Begin Remediation

In its motion, the Defendant states that its plan has been approved by all relevant environmental and public health regulatory agencies, including the Environmental Protection Agency (the “EPA”), the Louisiana Department of Environmental Quality (the “LDEQ”), the Agency for Toxic Substances (“ATSDR”) and the Louisiana Department of Health and Hospitals (“LDHH”). The Defendant claims that its remediation plan analyzes potential human exposure pathways, including dermal, inhalation and ingestion exposure, and addresses remediation of soils, exterior surfaces, interior surfaces, debris and air in the impacted areas. The Defendant states that in order for the plan to be effective and prevent migration of oil from one property to another, remediation must be undertaken as soon as possible on an area-wide basis rather than through a property-by property approach. Thus, it requests a right of access to the entire certified class area to begin immediate remediation efforts as provided in the plan. The Defendant contends that Rule 23(d)(2) explicitly provides the Court with the authority to grant access because the plan is designed to protect human health and the environment, and Rule 23(d)(2) permits the Court to issue such orders as necessary for the protection of class members.

The PSC has so far refused the Defendant access to the certified class area to begin implementation of the Defendant’s remediation plan, and it vigorously opposes the Defendant’s motion. The PSC claims that in its experts’ view, the Defendant’s plan is a flawed proposal and not designed to protect the health and safety of class members, notwithstanding the fact that the

plan has been approved by federal and state regulators. While all parties agree that a comprehensive, class-wide remediation procedure is necessary, the PSC claims that the Defendant's current proposal fails to take into account many of the health and safety concerns the PSC voiced at prior meetings regarding remediation of the certified class area. The PSC argues that the Court should deny the Defendant's motion to begin implementation of the plan until the Court can determine that the remediation plan adequately protects class interests and permits safe habitation for homeowners. Finally, the PSC argues that if the Court allows the Defendant's plan to go forward, it will be misinterpreted by property owners as an official declaration that it is safe to return and live on the premises.

Regarding the Court's power to issue orders under Rule 23(d)(2), the PSC contends that Rule 23(d)(2) is a notice provision, which gives a district court discretion to notify class members of "important developments" during the pendency of the class action. Thus, the PSC contends that due process requires, and Rule 23(d)(2) allows at the most, notice to class members, followed by an evidentiary hearing to determine if the Defendant's proposal is acceptable or deficient. Lastly, the PSC requests that the Court appoint an expert under Rule 706 of the Federal Rules of Evidence to assist the Court in making its determination.

On July 31, 2006, the Court requested the parties to submit supplemental briefs in light of the D.C. Circuit's decision in *Cobell* (Rec. Doc. No. 484). In that case, the D.C. Circuit held that Rule 23(d)(2) authorizes notice to protect class members' right to participate in the litigation, but it does not authorize substantive orders protecting the rights class members seek to vindicate. *Cobell*, 2006 WL 1889150, at *7.

In its supplemental brief addressed to the Court (Rec. Doc. No. 495), the PSC reiterates

its experts' view that the Defendant's remediation plan is inadequate, and thus not an action "for the protection of class interests" under Rule 23(d)(2). Additionally, it states that *Cobell* supports its assertion that Rule 23(d)(2) affords discretionary authority to give notice to class members regarding a hearing to determine the sufficiency of the Defendant's remediation plan, but it does not grant the Court authority to issue a substantive order allowing the Defendant access to private property to begin implementation efforts.

In the Defendant's supplemental brief (Rec. Doc. No. 490), it states that the *Cobell* case does not impact its position as that case is distinguishable and limited to its facts and holdings. Specifically, it contends that the purpose of the requested order in *Cobell* was unrelated to litigation, in direct contrast to the present case, in which remediation is directly related to litigation. Moreover, the Defendant claims that the order here is not substantive in nature as in *Cobell*, but rather it is a procedural measure, merely a "legal mechanism to secure area-wide access to all properties requiring sampling or response." Def.'s Mem. Resp. Ct.'s Req. at 4.

Furthermore, the Defendant contends that the Court is authorized to grant access under Rules 23(d)(1) and 23(d)(3) of the Federal Rules of Civil Procedure. The Defendant claims that the PSC's denial of access to the class-wide area introduces a mitigation of damages issue that could potentially overwhelm other issues in the case and hamper proceedings. An order for access to begin remediation is appropriate under Rule 23(d)(1) to prevent the mitigation issue from arising, thereby thwarting unnecessary complication or delay in the litigation. The Defendant claims that the order is also appropriate under Rule 23(d)(3) because the plaintiff class constitutes the representative party, and access to the class area is an appropriate condition on such representative party. Lastly, the Defendant states that the Court may issue the order

under Rule 23(d) in general and through its inherent power to manage class actions.

III. Applicable Law

Rule 23(d)(2) of the Federal Rules of Civil Procedure provides that a district court may issue orders

for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members at any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action.

Fed. R. Civ. P. 23(d)(2). The Court agrees with the determination in *Cobell* that Rule 23(d)(2) is a notice provision only. *See Cobell*, 2006 WL 1889150, at *6-7. Though Rule 23(d)(2) authorizes notice of procedural matters to protect class members rights, it does not authorize the Court to grant substantive measures seeking to protect these rights. The examples enumerated in Rule 23(d)(2) aid a district court in determining when it should authorize notice, but they do not represent an exhaustive list. 7B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1793 (3d ed. 2005). Nevertheless, it is clear from the plain language of the provision and the advisory committee's note that the provision concerns orders that are procedural, rather than substantive in nature.² The phrase regarding "the protection of members of the class or otherwise for the fair conduct of the action" in Rule 23(d)(2) explains when an order requiring notice is appropriate and elucidates the purpose of the provision, but it cannot be construed as independently providing the Court with the authority to issue an order providing for

² "Subdivision (d)(2) sets out a non-exhaustive list of possible occasions for orders requiring notice to the class." Fed. R. Civ. P. 23 advisory committee's note (1966 amendment). The entire advisory committee note regarding Rule 23(d)(2) proceeds to discuss circumstances where orders requiring notice may be appropriate or useful.

more than notice.

In this case, the right to access class members' land in order to alleviate damage that has occurred is not a procedural measure. It is an order that is substantive in nature that affects the conduct of parties and directly impacts the safety and health of class members and the environment. Thus, the Court cannot grant access to the Defendant under Rule 23(d)(2) specifically because it is not a provision that explicitly authorizes the Court to grant orders dealing with substantive rights.³

However, the Court does have the power to issue the order under Rule 23(d) in general and through its inherent power to manage class actions. This Court previously stated this principle when it granted the PSC's motion to set aside attorney fees for class counsel. *Patrick Joseph Turner, et. al v. Murphy Oil USA, Inc.*, 422 F. Supp. 2d. 676, 681 (E.D. La. 2006) (stating authority to grant such motion "derives from the court's inherent power to manage its own docket and its power under Rule 23(d)...to make such orders as necessary to manage the class action" (citing *In re Air Crash Disaster at Fla. Everglades*, 549 F.2d 1006, 1012-13 (5th Cir. 1977))); *see also Peoples v. Wainwright*, 325 F. Supp. 402, 403 (M.D. Fla. 1971) (stating concept of court's inherent power embodied in Rule 23(d)); *In re Nissan Motor Corp. Antitrust Litig.*, 552 F.2d 1088, 1102 (5th Cir. 1977) (declaring Rule 23(d) confers on district court, as

³The Court is also not persuaded by the argument that the order may be granted specifically under Rule 23(d)(3). Rule 23(d)(3) provides that the Court has the power to issue orders "imposing conditions on the representative parties or on intervenors." Fed. R. Civ. P. 23(d)(3). However, the order in this case seeks to impose a condition on the entire class, not just the class representatives, who are the designated "representative parties" in this action.

manager of class action, authority to enter whatever orders necessary).⁴

The purpose of Rule 23(d) is to ensure “the fair and efficient conduct of the action.” Fed. R. Civ. P. 23 advisory committee’s note (1966 amendment). To maintain this function, Rule 23 gives the “certifying court specific authority to devise and issue appropriate orders necessary for the protection of class members.” *In re Domestic Air Transp. Antitrust Litig.*, 1992 WL 357433, at *1 (N.D.Ga. Nov. 2, 1992); *see also* Wright & Miller, *supra*, § 1791 (stating “Rule 23(d)...gives the trial court extensive power to control the conduct of a class action.”). Rule 23(d) enumerates types of orders that may be necessary when a district court encounters problems that may threaten the fair and efficient conduct of the action. The district court, however, is not limited to these specifically enumerated examples:

A Rule 23(d) order will depend on the circumstances of the particular case and precise rules are impossible to arrive at and probably are undesirable. The important point, therefore, is that the rule does not limit the court either with regard to when or how subdivision (d) may be invoked or applied.

Id.; *see also* Fed. R. Civ. P. 23 advisory committee’s note (stating that Rule 23(d) lists *some* types of orders which may be appropriate) (emphasis added).

Here, the order to grant access to the class-wide area is necessary to ensure the fair and efficient conduct of the litigation and is in the best interest of class members. As mentioned previously, nearly a year has passed since the oil spill occurred, but much of the affected area remains virtually untouched. The trial is currently scheduled to begin little more than a month from the date of this order. All parties agree that the current piecemeal remediation efforts

⁴Indeed, both parties cite the Court’s broad, discretionary authority in Rule 23 class actions for support of their positions. *See* Pls.’ Mem. Resp. Opp’n Def.’s Mot. at 13; Def.’s Mem. Supp. Mot. at 8.

providing for clean-up on a property by property basis are not sufficient. Creating “islands” of unpolluted land within a “sea” of contamination does little to solve the problem at large. Moreover, even previously cleaned areas will likely become contaminated again due to migration caused by rain water or traffic by vehicles or people.

The Court views the Defendant’s remediation plan as a step towards the recovery of the certified class area and the protection of human health and environment, and it sees no reason not to allow the Defendant access to the class area to begin implementation of its plan. A delay in remediation efforts only impedes or further delays recovery of the affected area. With each passing day, contaminants are more likely to seep below and throughout the class members’ property. Any clean-up effort, rather than none, is in the best interests of class members and the St. Bernard community as a whole.

Additionally, the remediation plan proposed by the Defendant does not require class members to sign any waivers or releases dispensing with their right to contest or challenge the sufficiency of the Defendant’s remediation efforts after implementation. It is important to note that the Court makes no findings at this stage as to whether the Defendant’s remediation plan is adequate or inadequate, nor does it place a stamp of approval on the Defendant’s plan. If it is determined at a later date that the Defendant’s attempts at remediation are not sufficient, then the PSC can seek additional remedies.

Furthermore, though the Court possesses the power to issue the order under Rule 23(d) in general, Rule 23(d)(1) specifically speaks to the issue at hand. Rule 23(d)(1) states that the Court is authorized to issue orders “prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument at trial.” Fed. R. Civ. P. 23(d)(1). If

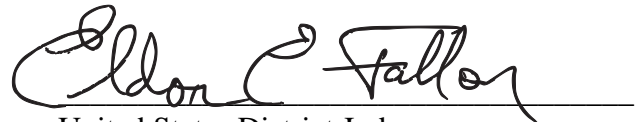
the Defendant is not permitted to begin implementation of its remediation plan, property damage may well worsen. A claim for failure to mitigate damages or even a motion for dismissal of remediation claims present real and tangible threats to these proceedings. The mitigation issue could potentially overwhelm and subsume other issues in the case and jeopardize the fair and efficient administration of the litigation. Thus, immediate implementation of a remediation plan is in the best interests of class members to preserve their claims for damages and to prevent any complication in the presentation of evidence or argument at trial.

Again, the Court makes no findings at this stage as to whether the Defendant's remediation plan is sufficient. It by no means determines or endorses the view at this point in time that it is safe for class members to reoccupy homes after the Defendant implements its current remediation plan. The Defendant shall advise the PSC within a reasonable time in advance as to where remediation efforts are to be undertaken so that the PSC may monitor the clean-up and examine homes before and after they have been subject to remediation efforts.

IV. Conclusion

Accordingly, as the Court believes that immediate implementation of the remediation plan is in the best interests of class members and ensures the fair and efficient conduct of the action, the Defendant's Motion for Access to the Certified Class Area to Implement the Remediation Plan is hereby GRANTED under Rule 23(d) and the Court's inherent power to manage its docket.

New Orleans, Louisiana, this 9th day of August, 2006.


United States District Judge