

IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO

STATE OF OHIO, ex rel.
RICHARD CORDRAY,
OHIO ATTORNEY GENERAL

Plaintiff,

v.

NORFOLK SOUTHERN RAILWAY CO.

Defendant

CASE NO. 2010 CV 00723

JUDGE YOST

2010 OCT 26 A 10:58
CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO. OH

FILED

COPY

CONSENT ORDER FOR PRELIMINARY INJUNCTION

WHEREAS, the Plaintiff, State of Ohio, by its Attorney General Richard Cordray ("Plaintiff"), June 30, 2010, filed its Complaint in the above-captioned case against Norfolk Southern Railway Company ("Defendant") pursuant to Ohio Revised Code ("R.C.") Chapter 6111 and the rules promulgated thereunder (hereinafter "Ohio's Water Pollution Control Laws");

WHEREAS, Plaintiff's Complaint seeks, among other things, injunctive relief and civil penalties for Defendant's alleged violations of Ohio's Water Pollution Control Laws at Defendant's Ashtabula Coal Dock and Transloading Facility, located in the City of Ashtabula, Ashtabula County, Ohio;

WHEREAS, Defendant has agreed to enter into this Consent Order for Preliminary Injunction ("COPI") without the need for hearing;

Now therefore, upon consent of the parties hereto, it is hereby ORDERED as follows:

I. JURISDICTION AND VENUE

1. The Court has both personal and subject matter jurisdiction over the parties. The Complaint states a claim for which relief can be granted against Defendant under R.C. Chapter 6111, and the rules promulgated thereunder, and venue is proper in this Court for the purposes and duration of this COPI.

II. PERSONS BOUND

2. The provisions of this COPI shall apply to and be binding upon Defendant, its agents, officers, employees, assigns, successors in interest and others bound by Rule 65(D) of the Ohio Rules of Civil Procedure. Defendant shall provide a copy of this COPI to each general contractor and/or consultant it employs to perform work itemized herein, and each general contractor and/or consultant shall provide a copy of this COPI to each of its subcontractors for such work.

III. RESERVATION OF RIGHTS

3. Plaintiff reserves the right to seek further relief from this or any other Court including, but not limited to, further preliminary and/or permanent injunctive relief and civil penalties.

4. Nothing herein shall be construed to be a final settlement of the claims raised in Plaintiff's Complaint. Plaintiff retains the right to seek permanent injunctive relief, civil penalties, costs of this action, attorneys' fees, and/or extraordinary litigation costs as demanded in the Complaint.

5. By signing and agreeing to this COPI, Defendant Norfolk Southern Railway Company does not waive any defenses in law or in fact it may have regarding the matters set forth herein including to contest its liability for the violations alleged in Plaintiff's Complaint in any subsequent hearing regarding permanent injunctive relief or

civil penalty for the violations alleged. By signing and agreeing to this COPI, Defendant does not admit any general or specific allegation, fact or finding set forth in this COPI or the Complaint regarding this matter.

IV. PRELIMINARY INJUNCTIVE RELIEF

6. Defendant Norfolk Southern Railway Company is hereby ordered and enjoined to comply with R.C. Chapter 6111 and rules adopted thereunder concerning the Ashtabula Coal Dock and Transloading Facility (“Facility”), and with this COPI and any schedule set forth herein.

7. Defendant is hereby ordered and enjoined to comply with the terms and conditions of NPDES Permit No. 3IT00011*DD and all modifications and renewals thereof in accordance with this COPI and any schedule set forth herein.

8. Defendant has submitted a complete and approvable permit to install (PTI) application and detailed plans for a containment tank and related piping to collect wastewater associated with the conveyor belt and storm water (“Containment Tank”) on the east side of the Facility. EPA issued a PTI for the Containment Tank on June 9, 2009. Defendant issued a Notice to Proceed on February 24, 2010. Defendant is hereby ordered and enjoined to complete installation of the Containment Tank and related piping in accordance with the approved detailed plans and PTI, by no later than November 1, 2010.

9. Within fourteen (14) days of completing the requirements contained in Paragraph 8, Defendant is hereby ordered and enjoined to provide notice in writing to the Ohio EPA and the City of Ashtabula of their completion.

10. By July 1, 2010, Defendant is hereby ordered and enjoined to submit an Environmental Management System (EMS) for Defendant’s Facility to Ohio EPA. The EMS will include the management practices to be undertaken regarding environmental

compliance with the Facility's air and water permits, as well as management practices associated with:

- i. the Containment Tank installed pursuant to Paragraph 8;
- ii. installation and implementation of the Pro Control System for coal piles at the Facility;
- iii. other water application systems for coal piles at the Facility as agreed between Defendant and Ohio EPA, which may include the use of watering trucks; and
- iv. cleaning and maintenance of the covered coal conveyor bridge at the Facility ("Bridge").

11. At the time of entry of this COPI, Defendant washes the bridge approximately every ten (10) days to prevent the buildup of coal dust for safety and fire suppression. The washing frequently results in the unpermitted discharge of wash water to waters of the state. In order to address discharges from the Bridge, Defendant is hereby ordered and enjoined, within ninety (90) days of the effective date of this COPI, to submit to Ohio EPA for approval a General Plan that identifies options for elimination of the discharge of wash water from the Bridge in accordance with (i) through (iv), below. Such options shall be evaluated, and the option(s) to be implemented shall be chosen, in accordance with R.C. Chapter 6111.

- i. The General Plan shall identify options and recommend improvements and/or options requiring further evaluation for achieving the purpose of eliminating the discharge of wash water from the Bridge, including structural modifications and/or improvements to the Bridge, changes in maintenance procedures and practices for operation and cleaning of the Bridge and implementation of any other best management practices ("BMP"). The

Plan shall include a schedule for implementing the recommended improvements. If the schedule is longer than set forth in Paragraph 12, Defendant shall provide justification for a longer schedule. The Plan shall include recommendations as to what BMP(s) should be included into future renewals and/or modifications of the NPDES permit for this facility concerning the operation and maintenance of the Bridge. In addition, the General Plan shall identify how the Bridge will be monitored for any discharges from the Bridge, including but not limited to wash water, during the implementation of the General Plan and subsequently during any Bridge operation and maintenance activities.

ii. After review of the General Plan, or any submission required under this paragraph of the COPI, Ohio EPA shall in writing (a) approve, in whole or in part, the General Plan and its recommendations or any submission; (b) approve the General Plan or submission with specified modifications and/or identifying any option requiring further evaluation; (c) disapprove, in whole or in part, the General Plan or submission, directing Defendant to modify the disapproved portion of the General Plan or submission; or (d) any combination of the above. Action of the Ohio EPA approving or disapproving the General Plan shall not constitute an action of the Director of Ohio EPA approving or disapproving an application for any NPDES permit or application for a permit-to-install.

(a) In the event of Ohio EPA approval of the General Plan and/or submissions required under this paragraph, Defendant shall proceed to take any action required by the approved General Plan or submission.

(b) In the event Ohio EPA disapproves of or modifies all or any portion of the General Plan or submission, Defendant shall have the opportunity to meet or confer with Ohio EPA within twenty (20)

days of receipt of such written notification of disapproval or modification, or such longer time as may be agreed to by the Ohio EPA and Defendant in writing, to discuss and reach agreement concerning the modifications, deficiencies or conditions identified by Ohio EPA. The City of Ashtabula may participate in any such meeting or conference. Based on this meeting or conference, Ohio EPA may, after reasonable opportunity for review and comment by the City of Ashtabula, either decide to revise any such modification, deficiency or condition or decide that its originally proposed modification, deficiency or condition is appropriate. Ohio EPA shall provide Defendant and City of Ashtabula with written notice of its decision.

(c) If Defendant does not exercise the opportunity to meet or confer with Ohio EPA or if Defendant accepts Ohio EPA's final decision, Defendant shall take any action required by the modifications, notice of deficiencies or conditions identified by Ohio EPA in its disapproval or its final decision, whichever is applicable.

iii. If the Director determines the General Plan or submission is incomplete, insufficient, or not approvable, then Defendant is hereby ordered and enjoined to submit to the Director a revised version of the document that addresses the deficiencies noted within fourteen (14) business days of receipt of a deficiency notification from the Ohio EPA.

iv. Defendant is hereby ordered and enjoined to implement the approved General Plan in accordance with the schedule set forth in Paragraph 12.

12. The General Plan shall be implemented as follows:

i. Within ninety (90) days of approval of the General Plan, or as otherwise provided in the approved schedule contained in the General Plan as submitted or modified pursuant to Paragraph 11, Defendant is hereby ordered and enjoined to submit complete and approvable PTI applications and detailed plans, as appropriate, for applicable improvements contained in the General Plan to both the Division of Surface Water and the Division of Air Pollution Control of Ohio EPA as appropriate. Such PTI shall include a proposed schedule for initiation of a bid process for such improvements, initiation of construction, and completion of construction. If the Director determines the PTI applications and detailed plans are incomplete, insufficient, or not approvable, then Defendant is hereby ordered and enjoined to submit to the Director a revised version of the documents that address the deficiencies noted within fourteen (14) business days of receipt of a deficiency notification from the Ohio EPA.

ii. Defendant shall complete construction of improvements to the Bridge in accordance with the approved PTIs and detailed plans.

iii. Three (3) months after completing construction of all Bridge improvements, Defendant is hereby ordered and enjoined to submit a report evaluating the effectiveness of the Bridge improvements in eliminating discharges of wash water from the Bridge into waters of the state.

iv. If the Bridge improvements have not resulted in the elimination of the discharge of wash water from the Bridge into waters of the state and compliance with all NPDES permits terms and conditions for this facility, Defendant is hereby ordered and enjoined to include in its report recommendations for additional improvements to the Bridge to eliminate discharges into waters of the state and to comply with the NPDES permit and

a schedule for implementation of the recommendations based on the study of additional items as identified in the General Plan. Defendant is hereby ordered and enjoined to implement the recommendations for improvements to the Bridge in accordance with the schedule as set forth in the General Plan upon approval by Ohio EPA.

13. Defendant is hereby ordered and enjoined to utilize best management practices in accordance with Ohio Revised Code Chapter 6111 in the operation and maintenance of the Bridge.

14. Within thirty (30) days of the effective date of these Orders, Defendant is hereby ordered and enjoined to install a high level alarm on the sewage pump station located on the east side of the Facility between Ferry Drive and Fourth Street.

15. Defendant is hereby ordered and enjoined to update its Storm Water Pollution Prevention Plan (SWP3) to reflect the current conditions at the Facility, including but not limited to all the improvements required by this Order, as required by Part IV.C. of Defendant's NPDES permit for the Facility. An evaluation of the effectiveness of the Bridge improvements in eliminating the discharge of wash water from the Bridge to waters of the state shall be included in the annual reports under Defendant's SWP3.

16. All documents submitted for approval, pursuant to this COPI, shall be submitted to the Ohio EPA. The City of Ashtabula shall also be provided a copy of documents submitted to Ohio EPA pursuant to this COPI.

V. SUBMISSION OF DOCUMENTS

17. Any document, paper, writing, general plan, or permit application that must be submitted to the Director or to the Ohio EPA pursuant to the terms of this COPI

shall be sent to the following address:

Ohio Environmental Protection Agency
Northeast District Office
Division of Surface Water
Attn: DSW Enforcement Unit Supervisor
2110 East Aurora Road
Twinsburg, Ohio 43402

and

Michael A. Mearini
City of Ashtabula
Waste Pollution Control
303 Woodland Avenue
Ashtabula, Ohio 44004-3500

VI. EFFECT OF COPI

18. This COPI does not constitute authorization or approval for the construction or modification of any physical structure, facility, wastewater system, or treatment works. Authorization or approval for any such construction or modification shall be by approval letter or permit issued by the Director or other such permits as may be required by applicable federal, state, or local laws and regulations.

VII. TERMINATION

19. This COPI shall terminate upon Order of this Court, upon Joint Motion of the parties to this action that all activities required or contemplated under this COPI have been completed, or upon entry of final judgment in this action. Nothing herein shall preclude Plaintiff from seeking further investigatory work in connection with implementation of this COPI or to address an imminent threat of harm to the public health or the environment. This Section, as well as the Section of this COPI on Reservation of Rights, shall survive this termination provision.

VIII. MODIFICATION

20. No modification shall be made to this COPI without the written agreement of the parties to this action and the Court.

IX. RIGHTS OF THIRD PARTIES

21. This COPI shall not be construed so as to provide any rights, duties, or responsibilities to any third parties.

X. RETENTION OF JURISDICTION

22. The Court will retain jurisdiction of this action for the purpose of administering and enforcing Defendant's compliance with this COPI.

XI. COSTS

23. Defendant is hereby ordered to pay the costs of this action incurred by the State.

XII. ENTRY OF COPI

24. The Parties agree and acknowledge that final approval by the State and Defendant, and entry of this COPI is subject to the requirement of 40 C.F.R. § 123.27(d)(2)(iii), which provides for notice of the lodging of this Consent Order, opportunity for public comment, and the consideration of any public comment. The State and Defendant reserve the right to withdraw this COPI based on comments received during the public comment period. Defendant shall pay the cost of publishing the public notice.

XIII. SIGNATORIES

25. The undersigned representative of each Party understands the terms and conditions of this COPI and certifies that he or she is fully authorized to enter into the terms and conditions of the COPI and to execute and legally bind the Party to this document.

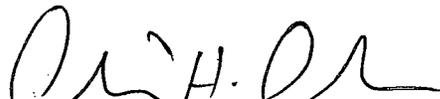
IT IS SO ORDERED.

JUDGE GARY L. YOST

Judge, Ashtabula County
Court of Common Pleas

Approved:

**RICHARD CORDRAY
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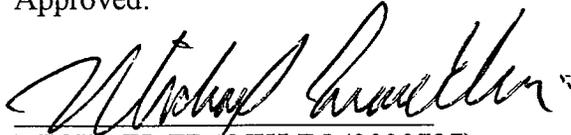
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