

**IN THE COURT OF COMMON PLEAS
ASHTABULA COUNTY, OHIO**

STATE OF OHIO, EX REL. MICHAEL
DEWINE, ET AL.

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CASE NO. 2010 CV 723

Plaintiffs

JUDGE YOST

vs.

JUDGMENT ENTRY

NORFOLK SOUTHERN RAILWAY
COMPANY

Defendant

CAROL A. HEAD
CLERK OF COURTS
COMMON PLEAS COURT
ASHTABULA CO., OH

2011 AUG 11 A 9:29

FILED

PROCEEDING: Hearing on Proposed Consent Order

DATE: August 3, 2011

APPEARANCES: David H. Dokko on behalf of the State of Ohio. Michael Franklin on behalf of the intervening plaintiffs. Martin H. Lewis and David M. Moore on behalf of Norfolk Southern Railway Company.

The Plaintiff, the State of Ohio, and the Defendant, Norfolk Southern Railway Company, have entered into a settlement of all issues raised by the Complaint of the State of Ohio and have submitted a proposed Consent Order, incorporating and implementing their agreement. The Intervening Plaintiffs, have objected to the Consent Order and urge the Court not to approve and adopt the agreed settlement.

All parties were given the opportunity to present evidence, however, no evidence was presented. All parties were given the opportunity to present additional arguments in support of their respective positions. Although a Court possesses inherent power to review and approve the settlement of a civil action, to assure that justice is served, ordinarily, parties to a lawsuit have great latitude to

settle their dispute on whatever terms they deem appropriate and a Court should avoid interfering with settlement agreements. Nevertheless, in a case of this nature, involving matters of significant public import, a more probing independent review and approval by the Court is warranted and, in fact, counsel have agreed on the scope of such a review. "A trial court may review a consent decree to assure that it is fair, adequate, and reasonable, as well as consistent with the public interest. See, e.g., *Williams v. Vukovich*, 720 F.2d 909, 921, 923 (6th Cir.1983)," *United States v. Jones and Laughlin Steel Corp.*, 804 F.2d 348, 351.

On its face, the proposed consent order appears to be fair, adequate, reasonable, and consistent with the public interest. The penalty provision is substantial. In a settlement, the parties to the agreement have wide discretion in the determination of adequacy. The question whether it may nonetheless be inadequate is merely speculative, in the absence of evidence.

The proposed consent order includes a significant supplemental environmental project and mandates compliance with the NPDES permit and development of a General Plan to address the issues raised in the Complaint. The State has determined that these measures are reasonable under the circumstances of this case. Again, in the absence of evidence to the contrary, the Court cannot find that they are unreasonable. Clearly, the proposed order does not grant the Defendant an unrestricted right to pollute the waters of the State. At this juncture, future remediation and cleanup costs are speculative, at best, and a failure of the proposed consent order to particularly address them does not render the settlement unreasonable.

Finally, the question of whether the Defendant should be required to do more, or whether the consent order should include additional terms and requirements that more specifically address the issues raised by the intervening plaintiffs, is perhaps most forceful. On the one hand, the City of Ashtabula is a party to this case, with a number of concerns that overlap those of the State. In general, the Court would prefer a settlement that concludes all of the claims of all of the parties. And of course, the Court would not approve a settlement between two parties that prejudiced the unresolved claims of another party to the case. The intervening plaintiffs contend that they are prejudiced by the consent order proposed in this case. Essentially, the proposed consent order resolves the water pollution claims raised by the State, over which the Environmental Protection Agency has authority. As noted, the Court finds settlement of these claims to be adequate and reasonable. The claims raised by the intervening plaintiffs include violations of city ordinances that prohibit filth or noisome substances from collecting on public and private property, and obstructing or impeding passage of a navigable river and harbor. The City has also alleged specific damage to its catch basins, storm drains and wastewater treatment plant. These claims are not affected by the proposed consent order. The Court finds that the interest of the State of Ohio in resolving its claims and proceeding with the implementation of the settlement, outweighs a preference for an agreement concluding the entire case, and that the intervening plaintiffs' unresolved claims are not prejudiced by the proposed consent order.

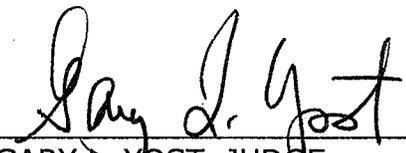
In conclusion, the Court finds that the proposed settlement agreement between the State of Ohio and Norfolk Southern Railway Company is fair, adequate, reasonable, and consistent with the public interest, and therefore should be approved and adopted by the Court.

ORDER: 1. The objections of the Intervening Plaintiffs, to the Consent Order proposed by the Plaintiff, the State of Ohio, and the Defendant, Norfolk Southern Railway Company, are overruled.

2. The Joint Motion for Entry of Consent Order, filed June 22, 2011, is granted.

3. The Consent Order submitted by the Plaintiff, the State of Ohio, and the Defendant, Norfolk Southern Railway Company, is approved and adopted by the Court, as set forth in the separate "Consent Order" prepared by the parties and filed contemporaneously with this judgment entry.

The Clerk is directed to serve notice of this judgment and its date of entry upon the journal upon the following: David H. Dokko, Esq.; Martin H. Lewis, Esq.; David M. Moore, Esq.; and Michael Franklin, Esq.



GARY L. YOST, JUDGE

GLY/sak