


RECEIVED

Judgment Book

AUG 31 1990
KENNETH J. MURPHY, Clerk
DAYTON, OHIO

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

STATE OF OHIO, ex rel.	:	CIVIL ACTION NO. C-3-89-277
ANTHONY J. CELEBREZZE, JR.	:	
ATTORNEY GENERAL OF OHIO,	:	JUDGE WALTER H. RICE
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
CSX TRANSPORTATION, INC.,	:	
	:	
and	:	
	:	
UNION TANK CAR CO.	:	
	:	
Defendants.	:	


 AUG 16 1990
 U.S. DISTRICT COURT
 SOUTHERN DISTRICT OF OHIO
 WESTERN DIVISION
 DAYTON, OHIO

CONSENT ORDER

WHEREAS, the Plaintiff State of Ohio on the relation of its Attorney General, Anthony J. Celebrezze, Jr., filed a Complaint and a First Amended Complaint against CSX Transportation, Inc. ("CSXT") and a First Amended Complaint against Union Tank Car Co. ("Union Tank Car"), (hereinafter sometimes collectively "the Defendants") seeking, inter alia, reimbursement of past response costs, civil penalties, and injunctive relief, under the following: the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 as amended, 42 U.S.C. Sections 9601 et seq.; Ohio Revised Code Chapters 3704, 3734 and 6111; and Ohio and federal common law; and

WHEREAS, the parties now desire to settle the following

50

claims of the State of Ohio brought in its Complaint and First Amended Complaint with respect to the July 8, 1986 CSXT derailment and resulting release of phosphorus in Miamisburg, Ohio: reimbursement of costs incurred by the State of Ohio through the date of this Consent Order, any claims, including but not limited to claims for civil penalties, which the State has made or could have made, as well as all claims for injunctive relief; and

Whereas, the State of Ohio reserves its right to make claims for response costs, if any, incurred by it after the date of this Consent Order; and

Whereas, Defendants CSXT and Union Tank Car reserve all their rights, claims and defenses with respect to any future claims for response costs incurred after the date of this Consent Order which might be made by the State of Ohio; and

Whereas, this Consent Order was negotiated and executed by the parties in good faith to avoid expensive and protracted litigation and is a settlement of claims which were contested, denied and disputed as to validity and amount; and

Whereas, this settlement is entered into between the parties without trial or disposition by the Court of any issue of law or fact, without any admission of liability by Defendants, and without waiver of any defenses available to the Defendants, and upon the consent of the parties hereto; and

Whereas, the parties agree that this settlement may not be used in evidence by any person or party in this or any other

matter, other than in an action to enforce or implement the terms of this Consent Order, and that this settlement is not intended to create any right in any person not a party hereto nor waive any rights against any person or entity not a party hereto;

Therefore, it is hereby ORDERED, ADJUDGED and DECREED as follows:

I.

A. For the purposes of this Consent Order and for no other purpose, the parties agree that this Court has jurisdiction over the subject matter of this Consent Order, the parties hereto, and that venue is proper in this Court. Defendants expressly reserve their right to contest the jurisdiction of this Court with respect to any matter not made the basis of this Consent Order.

B. Terms of the Order and Persons to Whom Consent Order Applicable.

1. All provisions of this Consent Order shall apply to and be binding upon the parties to this action, their assigns and successors in interest, the parties' officers, directors, agents, servants, employees, and consultants. CSXT shall provide copies of this Order to Geraghty & Miller or any other general contractors or consultants charged with overseeing any work called for by this Order.

2. Continuing Jurisdiction. This Court shall retain

jurisdiction of this action to oversee the implementation of this Consent Order.

3. Right of Entry. During the effective time of this Consent Order, the State of Ohio and its agents and employees shall have authority to enter, without a search warrant, at any reasonable time, onto the phosphorus spill area in Miamisburg, Ohio ("the Site") to inspect, to take appropriate samples and/or to observe work conducted by CSXT or its contractor as required by this Consent Order. This provision in no way limits the State's statutory authority to conduct inspections and/or to take appropriate samples. The State agrees to split samples with CSXT.

II.

A. In settlement, compromise and final satisfaction of all monetary claims made by the State of Ohio in this matter, within ten (10) days of the entry of this Consent Order, Defendant CSXT shall remit 2 checks in the total amount of \$185,000.00 and Defendant Union Tank Car shall remit 1 check in the total amount of \$20,000.00 in full settlement and compromise and satisfaction of the monetary claims in this matter made by the State of Ohio against Defendants CSXT and Union Tank Car.

CSXT shall remit one check in the amount of \$2,499.62, payable to the Air Resources Study Trust Fund. CSXT shall remit a second check in the amount of \$182,500.38, payable to

the Treasurer, State of Ohio. This second check is for deposit into the following funds/accounts in the following amounts:

Hazardous Waste Cleanup Fund	\$21,498.03
Immediate Removal Fund	\$75,000.00
Ohio Department of Natural Resources, Division of Wildlife	\$50,000.00
Highway Safety Fund	\$ 6,508.89
Preventive Health Block Grant	\$16,860.07
General Revenue Fund	\$12,633.39

Union Tank Car shall remit one check in the amount of \$20,000.00, payable to the Treasurer, State of Ohio. \$5,000.00 of this check is for deposit in the State Treasury Hazardous Waste Cleanup Fund, and \$15,000.00 is for deposit in the State Treasury Immediate Removal Fund.

B. All checks shall be forwarded to Frances L. Figetakis at the Attorney General's Office, Environmental Enforcement Section, 30 East Broad Street, 25th Floor, Columbus, Ohio 43266-0410. A copy of the transmittal letters shall be forwarded by the Defendants to Ohio EPA, P. O. Box 1049, Columbus, Ohio 43266-0410, Attn: Pat Campbell, DERR.

III. Injunction

In settlement, compromise and final satisfaction of all claims for injunctive relief made by the State of Ohio in this case, Defendant CSXT shall undertake the following:

A. CSXT shall sample all existing monitoring wells at the Site (except as provided in III. A. 1 and 2 below) and a new well to be installed next to GM-1 that screens the top ten feet of the aquifer. This sampling shall occur on a semi-annual basis, in the spring and fall of each year. The sampling may cease if, after three years, results from the wells other than GM-1 show no sustained increase in total phosphate concentrations and, with regard to GM-1, no sustained increase over the highest concentrations presently found in the plume area. At the same time it submits the final sample results to Ohio EPA, CSXT shall propose a statistical method to use in determining whether there has been a sustained increase. Once the parties have agreed on the appropriate statistical method, that method will be used to determine whether there has been a sustained increase. If further sampling is required, and if the parties cannot agree on the frequency of such sampling after three years, the State reserves all rights it may have to require CSXT to monitor thereafter and CSXT reserves all rights to oppose additional monitoring. If, at any time before sampling ceases pursuant to this Order, Ohio EPA determines that sampling results indicate an environmental or human health threat, the State may seek further injunctive relief in this case from CSXT. CSXT shall submit all raw data and reports to Ohio EPA.

1. CSXT need not conduct any further monitoring of OW-5.

2. If, after the first semi-annual sampling event, neither OW-3 nor OW-4 shows a level of total phosphate in excess of 4 mg/L, CSXT may discontinue monitoring one or more of OW-2, OW-3 or OW-4, as determined by Ohio EPA. If samples from OW-3 or OW-4 show a level of total phosphate in excess of 4mg/L, CSXT shall resample to confirm the results and, if confirmed, shall perform further investigation in accordance with a plan approved by Ohio EPA.

3. CSXT shall notify Ohio EPA in advance of all sampling events, in order to give the State an opportunity to obtain split samples.

B. Within thirty (30) days of the date of this Order, CSXT shall submit a sediment sampling plan to Ohio EPA for approval. The plan will be designed to allow CSXT to determine whether the area around stream sediment sampling location SS-1 contains significant concentrations of elemental phosphorus or whether the SS-1 sample reported in the May 1990 Hydrogeologic Assessment to have a concentration of elemental phosphorus of 20.1 mg/L was an isolated incident. After the work plan has been approved by Ohio EPA, CSXT shall undertake the sediment sampling in accordance with the approved plan. Once the sediment samples are obtained, if elemental phosphorus is found, the leachable concentration of phosphorus shall be contoured and compared to background levels. These results shall then be used to estimate the contaminant mass potentially available to migrate to the groundwater. CSXT shall provide all results to Ohio EPA.

C. Within thirty (30) days of the date of this Order, CSXT shall submit an addendum to the May 1990 Hydrogeologic Assessment explaining why, in Figures 18-21 and Plate 1, both the OW and GM monitoring well results were included on both the shallow and deep drive-point contour maps.

D. After the three years of semi-annual monitoring end, CSXT shall update the Figure 4 found in the May 1990 Hydrogeologic Assessment to reflect all data collected to that point. In addition, the scale between 0 and 5 mg/L shall be expanded from that used in the existing Figure 4.

E. Within 7 days of the date of this Order, CSXT shall provide Ohio EPA with documentation of the location of the spill, reaction pad area, diversion of Bear Creek, and all soil and sediment removal. This documentation shall include an overlay or new map corresponding to the well and soil and sediment sampling locations map in the May 1990 Hydrogeologic Assessment. If Ohio EPA is not satisfied with this documentation, CSXT and Ohio EPA will confer to determine whether any additional soil sampling is necessary. If it is determined that soil sampling is needed, CSXT shall perform additional soil sampling in accordance with a plan approved by Ohio EPA.

IV. Potential Force Majeure Defense

In any action to enforce any provision of this Consent Order, CSXT may raise at that time the question of whether it

is entitled to a defense that its conduct was caused by reasons beyond its control such as, by way of example and not limitation, act of God, unusually severe weather conditions, strikes, acts of war or civil disturbances, or conflicting orders of any regulatory agency. While the State of Ohio does not agree that such a defense exists, it is, however, hereby agreed upon by the parties that it is premature at this time to raise and adjudicate the existence of such a defense and that the appropriate point at which to adjudicate the existence of such a defense is at the time that an enforcement action, if any, is commenced. Acceptance of this Consent Order without a force majeure clause does not constitute a waiver by CSXT of any rights or defense it may have under applicable law.

V.

A. Except as expressly provided in this Consent Order, compliance with this Consent Order constitutes full and complete satisfaction of the claims alleged in the Complaint relating to or arising out of the 1986 Miamisburg derailment which the State has made or could make as to the following: (1) claims for injunctive relief or civil penalties for violation of R.C. Chapters 3704, 3734 and 6111; (2) claims for reimbursement of past response costs through the date of this Consent Order under the Comprehensive Environmental Response Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq.; (3) claims pursuant to R.C. Chapter

3734.20, 3734.28, 3745.12, or 3745.13; and (4) claims for injunctive relief, damages or reimbursement of past response costs pursuant to Ohio and federal common law. Compliance with this Consent Order also constitutes full satisfaction for the State's claims for recovery of the value of the fish killed as a result of the derailment and phosphorus release.

B. Nothing in this Consent Order shall be construed to limit the authority of the State to seek relief for claims for natural resource damages under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, 42 U.S.C. Sections 9601 et seq., except that the State may not seek to recover the value of the fish killed as a result of the derailment and phosphorus release.

C. Nothing herein shall limit the authority of the State to undertake any action against any entity, including CSXT and Union Tank Car, to eliminate or control a change in Site conditions or presently existing but unknown Site conditions, if such change or existing but unknown condition presents an imminent and substantial endangerment to the public health, welfare, or the environment.

D. This Consent Order provides CSXT and Union Tank Car with contribution protection with regard to matters addressed by CSXT and Union Tank Car in complying with this Consent Order, as provided in Section 113(f) of CERCLA, 42 U.S.C. §9613(f) and, as applicable, O.R.C. §§2307.31 and 2307.32 and Ohio and federal common law; provided, however, that the

contribution protection afforded under this Section V, Paragraph D, as it applies between and among the Defendants, shall be limited in its application to CSXT's and Union Tank Car's compliance with Section II, Section III and Section VI of this Consent Order and all other rights, claims, causes of action or defenses between and among CSXT and Union Tank Car are reserved.

E. Except as expressly set forth in this Consent Order, Defendants reserve any and all of their rights, claims, causes of action or defenses against each other, any person not a party hereto and with respect to any future claim by the State of Ohio, Ohio EPA, and the Ohio Attorney General.

VI.


CSXT shall pay court costs.

Entered this 4th day of September, 1990.



JUDGE WALTER H. RICE

ANTHONY J. CELEBREZZE, JR.
ATTORNEY GENERAL OF OHIO

BY: 

FRANCES L. FIGETAKIS [0039109]
Trial Attorney
Assistant Attorney General
Environmental Enforcement
30 East Broad Street, 25th Fl.
Columbus, Ohio 43266-0410
Telephone: (614) 466-2766

Counsel for Plaintiff
State of Ohio

CSX Transportation, Inc.

By: Richard A. Fliess

Name: Richard A. Fliess

Title: VP-Operating Practices

Approved by:

Sidley & Austin

Peggy L. O'Brien

PEGGY L. O'BRIEN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 429-4000

Bieser, Greer & Landis

A. Mark Segreti, Jr.

A. MARK SEGRETI, JR.
400 Gem Plaza
Third and Main Streets
Dayton, Ohio 45402-1908
(513) 223-3277

Counsel for Defendant
CSX Transportation, Inc.

Union Tank Car Company

By: Sidney H. Bonser

Name: Sidney H. Bonser

Title: President

Approved by:

Johnson & Bell, Ltd.

Frederick S. Mueller

FREDERICK S. MUELLER
(Pro Hac Vice)
FRANK S. CAPUANI
(Pro Hac Vice)
222 North LaSalle Street
Suite 2200
Chicago, Illinois 60601
(312) 372-0770

Freund, Freeze & Arnold

Gordon D. Arnold

GORDON D. ARNOLD (0012195)
1000 Talbott Tower
131 North Ludlow Street
Dayton, Ohio 45402
(513) 222-2424

Counsel for Defendant
Union Tank Car Company

0144E