

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

**IN RE: SOUTHDOWN, INC. LITIGATION** :  
: **Case No. C-3-93-270**  
:  
: **Judge Rice**

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**USX'S REQUEST FOR CONSIDERATION OF PENDING  
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

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In light of the motion for summary judgment recently filed by Defendant Southdown, Inc. ("Southdown"), Third-Party Defendant USX Corporation ("USX") hereby requests that its July 1, 1994 motion to dismiss the third-party complaint, which was effectively put "on hold" during the lengthy stay of proceedings granted to facilitate settlement discussions, be placed back on the Court's active docket. If Southdown's motion for summary judgment is granted, then all third-party claims against USX (as well as USX's pending motion) will be moot. If, on the other hand, Southdown's motion is denied, then USX's motion to dismiss will be ripe for decision and should be considered by the Court inasmuch as the previous stay of proceedings has effectively expired.

A short memorandum supporting this request is attached.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

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As the Court is well aware, this is a consolidated action which formerly consisted of two different lawsuits: (1) Case No. 93-270, which was brought by Plaintiff Greene Environmental Coalition (“GEC”) against Southdown under the Clean Water Act (“CWA”), and which included Southdown’s third-party claims for contribution against USX; and (2) Case No. 93-354, which was brought by Southdown against USX under CERCLA. The CERCLA-related claims between Southdown and USX which formerly comprised Case No. 93-354 have now been

voluntarily dismissed, thereby leaving only the CWA-related claims originally filed in Case No. 93-270.

Prior to consolidation of these cases in 1994, USX filed a motion to dismiss Southdown's third-party complaint in Case No. 93-270.<sup>1</sup> For the Court's convenience, a copy of this motion is attached as Exhibit A. The motion, though fully briefed and technically ripe for decision, was never addressed by the Court, in part because the two cases were consolidated shortly after the motion was filed. The consolidated cases were then stayed for a lengthy period of time to facilitate the parties' protracted settlement efforts. As a result, USX's motion was effectively placed "on hold".

Although, to USX's knowledge, the stay was never formally lifted, it now appears that settlement discussions between Southdown and GEC have ceased, and that GEC has elected to proceed with its CWA claims. Both GEC and Southdown have, within the last year or so, filed motions and briefs on a number of issues, and at least some of those motions have been decided. Accordingly, it appears that, as a practical matter, the stay is no longer in effect.

On or about March 9, 1999, Southdown moved for summary judgment on GEC's claims. Among other things, Southdown argues that GEC's claims under the CWA must be dismissed because Southdown is no longer the current owner of the site at issue. This argument brings to mind similar issues raised by USX's 1994 motion to dismiss. In that motion, USX pointed out, among other things, that because it had not owned the property at issue for more than 15 years, Southdown had no legal basis upon which to maintain third-party claims against it for indemnity or contribution on the underlying CWA liability, if any.

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<sup>1</sup> Before the cases were consolidated, USX also moved to dismiss Southdown's CERCLA-based claims in Case No. 93-354. This motion was denied. As noted above, though, all of Southdown's claims in Case No. 93-354 have now been dismissed voluntarily.

If, in fact, the stay of proceedings in this case is no longer in effect and the Court intends to entertain Southdown's recently filed motion for summary judgment, then it should also give due consideration to USX's pending motion to dismiss. As a practical matter, if Southdown is granted summary judgment, then by definition, Southdown's third-party claims against USX are moot. *Faser v. Sears, Roebuck & Co.*, 674 F.2d 856, 860 (11<sup>th</sup> Cir. 1982) ("if the defendant has no liability to the plaintiff, then the third party defendant has no liability to the defendant-third party plaintiff"); see also, *STACO Energy Products Co. v. Driver-Harris Co.*, 578 F.Supp. 700 (S.D. Ohio, 1983) (per Rice, J.). If, on the other had, the Court determines that Southdown's motion for summary judgment should be denied, in whole or in part, then some of Southdown's third-party claims may survive, and it will thus be appropriate to consider USX's pending motion to dismiss.

To USX's knowledge, the principal cases and other authorities cited in the original memorandum in support are still good law and have not otherwise been superseded.<sup>2</sup> If the Court wishes, however, USX will submit a short, supplemental memorandum discussing any relevant cases and/or authorities decided after its original filings.

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<sup>2</sup> While the leading cases cited by USX in 1994 remain good law, the Court may want to note two minor updates. First, R.C. 2307.31, cited in pages 7 and 12 of USX's original motion, was amended and renumbered in 1997. Former R.C. 2307.31, which deals with contribution amongst joint tortfeasors, is now R.C. 2307.32, and its masculine gender references have been neutralized. Otherwise, though, its operative language remains the same, at least for purposes of this motion. Second, *Travelers Indem. Co. v Trowbridge*, 41 Ohio St.2d 11 (1975), cited for the proposition that indemnity generally arises from contract, was overruled on other grounds by the Supreme Court of Ohio in *Motorists Mutual Ins. Co. v. Huron Road Hospital*, 73 Ohio St.3d 391, 653 N.E.2d 235, 1995 Ohio LEXIS 1877 (1995). USX respectfully submits, however, that the general proposition for which *Trowbridge* was cited is still valid.

For all the foregoing reasons, Third-Party Defendant USX Corp. respectfully requests that its July 1, 1994 motion to dismiss the third-party claims against it be placed back upon the Court's active docket for consideration in due course.

Respectfully submitted,



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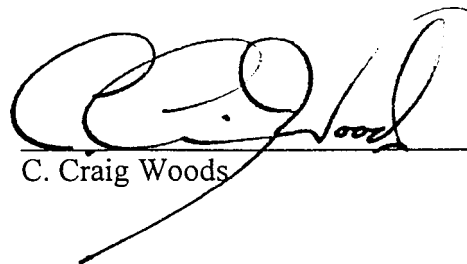
CERTIFICATE OF SERVICE

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The undersigned hereby certifies that a true and correct copy of the foregoing Request of Third-Party Defendant USX for Consideration Pending Motion to Dismiss Third-Party Complaint was served by regular U.S. mail, postage prepaid, on the following parties and/or counsel of record this 12<sup>th</sup> day of April, 1999:

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

**FILED**

**JUL -1994-**

G R E E N E ENVIRONMENTAL :  
COALITION, INC., :

v. :

SOUTHDOWN, INC., :

Defendant and :  
Third-Party Plaintiff, :

v. :

u s x C O R P . , :

Third-Party Defendant. :

KENNETH J. MURPHY, CLERK  
DAYTON, OHIO

Case No. C-3-93-270

Judge Walter H. Rice

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MOTION OF **THIRD-PARTY** DEFENDANT **USX**  
TO DISMISS THIRD-PARTY COMPLAINT

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Pursuant to Federal Rule of Civil Procedure 12(b)(6), Third-Party Defendant USX Corporation hereby moves for dismissal of the Third-Party Complaint on the grounds that it fails to state a cause of action upon which relief can be granted. Neither Plaintiff nor Third-Party Plaintiff have any direct cause of action against USX under the Clean Water Act. Third-Party Plaintiff's attempt to bootstrap a cause of action under state law theories of contribution and indemnity must therefore fail as a matter of law.

A memorandum in support follows.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a citizen suit brought by Plaintiff Greene Environmental Coalition ("GEC") against Defendant Southdown, Inc. ("Southdown") pursuant to §505 of the Clean Water Act ("CWA"), 33 U.S.C. §1365. GEC contends, in essence, that from 1991 to the present, Southdown has, without obtaining the necessary permit, discharged or allowed the discharge of leachate from its Landfill No. 1 in Clark County, Ohio in violation of the CWA. GEC seeks