

Allstate, 11 Ohio App. 3d at 246. In *Allstate*, a homeowner's insurance company was held liable for a dog-related injury inflicted upon a prospective home buyer. The homeowner's insurance company sought indemnification from the real estate company for its failure to notify prospective purchasers about the dog in accordance with prior instructions. *Id.* The court noted that one who is at fault is primarily liable, while one "who, by reason of his relationship with the wrongdoer or by operation of law, has incurred tort liability without personal fault for the acts committed by such wrongdoer" is secondarily liable, and may recoup any losses from the primarily liable party. *Id.* at 246. Inherent in this concept of primary and secondary liability is the notion that each party must have some degree of liability attached to their respective conduct before the party primarily liable will be required to indemnify the party secondarily liable.

Because USX is without liability under the CWA, the concept of primary and secondary liability is inapplicable here. Simply put, USX had neither the obligation nor the authority to apply for or obtain an NPDES permit in 1991 and thereafter. As a matter of Ohio law, therefore, it cannot be primarily liable for Southdown's alleged failure to comply with the CWA.⁶

Additionally, in the absence an express contract providing otherwise, indemnity is only available to a "party wholly innocent of wrongdoing." *State ex rel. Celebrezze v. Specialized*

⁶In the CERCLA action, Magistrate Judge Merz has recommended that Southdown be permitted to pursue a state law indemnity claim on the theory that USX could be found primarily liable for Southdown's alleged CERCLA violation. Report and Recommendations, filed 3/11/94 (Case No. C-3-94-354) at p. 15. This recommendation has been challenged by USX and is currently before Magistrate Merz on referral by Judge Beckwith. See USX objections filed 3/30/94 and order of referral filed 4/11/94. Even if Magistrate Judge Merz's recommendation is ultimately upheld, though, its reasoning does not extend to contribution and indemnity claims arising from alleged violations of the CWA. In the CERCLA action, USX arguably may have liability under the statute as a former owner. See 42 U.S.C. §9607. Here, though, USX has no direct liability under the CWA. In no sense, then, could the Court ultimately find it primarily liable for Southdown's alleged violations.

Finishers, Inc., 62 Ohio Misc. 2d 516 (Cuyahoga Cty. 1991). In *Specialized Finishers*, the property owner's knowledge of on-site contamination caused by lessees defeated a claim for indemnification. In the instant case, Southdown appears to have been aware of the alleged discharge from its site from at least 1991 onward. Although Southdown was, and remains, obligated by statute to obtain an NPDES permit for discharges of pollutants from its property, Southdown has apparently failed to do so. Inasmuch as it was, for all periods relevant to the GEC claims, both: (1) the present owner of the site; and (2) the party in control of the alleged discharge, it can hardly claim to be "wholly innocent of wrongdoing" under the CWA.

Southdown's claim for contribution must similarly fail. Under Ohio law, contribution is "the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice." *Travelers Zndem.*, 41 Ohio St. 2d 11 (Syllabus 2). Ohio common law regarding contribution among joint tortfeasors was replaced in 1976 with R.C. 2307.31, which provides:

¶ If two or more persons are jointly and severally liable in tort for the same injury or loss to person or property ... there is a right of contribution among them even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability.

R.C. 2307.31(A).

Common liability is regarded as the crucial element of a right to contribution. 18 O. Jur. 3d Contribution, Indemnity and Subrogation, § 8 (1980). It is, therefore, essential that the party claiming contribution and the party from whom contribution is sought both be liable. Only upon a determination that the contribution defendant is also liable for the underlying claim can a right

awarded under the Clean Water Act. In addition, the penalties are designed to punish violators for their noncompliance and to serve the goal of retribution.

897 F.2d at 1141. The *Tull Court* stated that “Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties, ” and noted that courts could “seek to deter future violations by basing the penalty on its economic impact. ” *Tull*, 481 U.S. at 422-23.

The Ohio Supreme Court has also recognized that deterrence is an important policy basis for civil penalties in environmental cases. In *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St. 3d 151 (1982), a water enforcement case brought under Ohio law, the state supreme court aligned itself with federal courts by noting that civil penalties serve to deter future violations:

[B]ecause the function of a monetary penalty is to deter the polluting activity altogether and thus not give rise to the penalty at all, the amount of the penalty must be greater than abatement or compliance costs.

Dayton Malleable, 1 Ohio St.3d at 157, citing Notes, *Assessment of Civil Monetary Penalties for Water Pollution: A Proposal For Shifting The Burden of Proof Regarding Damages*, 30 Hastings L.J. 651, 670. See also, *State, ex rel. Celebrezze v. Thermal-Tron, Inc*, 71 Ohio App. 3d 11, 14 (Cuyahoga Cty. 1992) (“[M]onetary penalties are designed to deter conduct which is contrary to a regulatory scheme”).

By filing its third-party complaint, Southdown is essentially seeking to shift its liability for civil penalties and attorney fees to USX. If allowed to proceed along these lines, Southdown will have successfully thwarted one of the most important policy objectives of the CWA’s citizen suit provisions, namely deterrence. If the current owner and “person” in control of an unpermitted discharge is able to obtain indemnification or contribution for its ongoing statutory

violations and any or all penalties flowing from it, the incentive to comply with the permit requirement is diminished correspondingly. USX cannot discharge Southdown's obligation to obtain the necessary NPDES permit. USX should not, therefore, be compelled to accept Southdown's penalty indirectly.

District courts are directed by statute to consider a number of factors in assessing a civil penalty. In accordance with 33 U.S.C. § 1319(d), courts must consider:

the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Accordingly, Southdown may raise equitable issues with this Court which could, in turn, affect the amount of any civil penalty, including the acts or omissions of third parties. Southdown's interests are adequately protected by the consideration of equitable factors pursuant to 33 U.S.C. § 1319(d). Additionally, even in cases where the CWA expressly reserves the right of a violator "against any third party whose acts may in any way have caused or contributed to" the discharge:

it appears to be the better course not to recognize a right to indemnity and, instead, to permit the absence of culpability to mitigate the amount of the fine.

Tug Ocean Prince, Inc. v. United States, 436 F. Supp. 907, 926 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 584 F. 2d 1151 (2d Cir. 1978), cert. **denied**, 440 U.S. 959 (1979); see also, *United States v. General Motors*, 403 F. Supp. 1151 (D. Conn. 1975) (imposing only a nominal

fine of one dollar for defendant site owner's Federal Water Pollution Control Act violation, where violation was caused by vandalism and defendant completely lacked culpability).⁷

In defending against GEC's claims for civil penalties and attorney fees, therefore, Southdown will not be prejudiced by its inability to bring indemnity or contribution claims against USX. If, as Southdown claims, the alleged groundwater contamination at Landfill No. 1 is caused solely by materials deposited there prior to 1976, and if Southdown is able to establish that there is **nothing** it could have done after buying the property to mitigate, or at least obtain a permit for, the purported discharge, then the Court will undoubtedly take such factors into consideration. The relief accorded to GEC and against Southdown will presumably reflect such consideration.

D. To The Extent Southdown's Third-Party Claims Are Designed To Address **Something More** Than **Southdown's** Liability To GEC Under The CWA, They Are Outside The Scope Of Rule **14(a)** And Otherwise Duplicative Of The CERCLA Action.

Southdown may argue that dismissal of all its third-party claims is inappropriate because such claims encompass much more than just reimbursement for civil penalties and GEC's attorney fees. **To the extent** Southdown's claims are broader than that, though, they clearly do not arise out of "the transaction or occurrence that is the subject matter of [GEC's] claim" and are thus outside the scope of permissible third-party practice under Rule 14(a). In addition, such claims overlap considerably those raised by Southdown in the CERCLA action. As such, they are abated by the first action.

⁷As noted above, the CWA citizen suit provisions in 33 U.S.C. § 1365 do not expressly envision third-party claims by the alleged violator. Such a reservation of rights does exist elsewhere in the CWA, though. See, e.g. 33 U.S.C. § 1321. This adds further support to the argument that Congress did not intend to allow third-party claims, in cases such as this.

Fed.R.Civ.P. 14(a) authorizes a defendant to add a third-party defendant under certain circumstances:

At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff.

Third-party practice is generally permitted when the "third-party's liability is dependent upon the outcome of the main claim" and such liability "must not arise out of a separate and independent claim." *Blais Const. Co. v. Hanover Square Associates-I*, 733 F.Supp. 149 (N.D.N.Y. 1990); see also *Kenneth Leventhal & Co. v. Joyner Wholesale Co.*, 736 F.2d 29, 31 (2d Cir. 1984); *Fanners Prod. Credit Association of Oneonta v. Whiteman*, 100 F.R.D. 310, 312 (N.D.N.Y. 1983). Moreover, "the mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough." *Blais Const.*, 733 F.Supp. at 152, citing 6 Wright & Miller, Federal Practice and Procedure, §1446 at 257 (1971).

To the extent Southdown's claims in this action seek reimbursement of remediation costs or other expenses not sought by GEC, they are not dependent upon the adjudication of GEC's CWA claims. Rather, these claims are independent of a determination of liability under the CWA and are not the proper subject of a third-party action.

As noted above, the doctrine of abatement also applies here. Dismissal of an action is appropriate "provided that an identity of issues exists and the controlling issues in the dismissed action will be determined in the other lawsuit." 5A Wright and Miller, Federal Practice and Procedure: Civil 2d §1360 (2d ed. 1990); see also *Sutcliffe Storage & Warehouse Co. v. U.S.*, 162 F.2d 849 (1st Cir. 1947). In *Sutcliffe*, the plaintiff filed four actions over a ten-day period in the district court, each claiming sums due for the use and occupancy of the same real estate

over different periods of time. The district court dismissed the three latter actions on the ground they were inseparable parts of the claim set forth in the first action. In affirming the district court's dismissal, the Second Circuit stated:

The pendency of a prior pending action in the same federal court is ground for abatement of the second action. [Citations omitted.] There is no reason why a court should be bothered or a litigant harassed with duplicating lawsuits on the same docket; it is enough if one complete adjudication of the controversy is had . . . *the* test as ordinarily stated is whether the claims set up are legally the same so that judgment in one is a bar to the others.

Sutcliffe Storage, 162 F.2d at 851. See also, *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3rd Cir. 1977) (citing *Sutcliffe Storage* in dicta for the for the proposition that a plaintiff has "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant."); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985) (citing *Walton and* holding that "when a plaintiff files a second complaint alleging the same cause of action as a prior, pending, related action, the second complaint may be dismissed. "); and *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 232 (D.C. Cir. 1980) (citing *Walton* for the proposition that the plaintiff had "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant. ").

Here, in addition to its claims for reimbursement of civil penalties and attorney fees, Southdown alleges broadly that USX is liable for any contamination to Landfill No. 1 and must indemnify Southdown for any present and future costs Southdown incurs in investigating, assessing, and remediating the site. (Third-Party Complaint at 7, 8). Southdown further alleges that it is entitled to contribution from USX for all present and future costs it incurs in investigating, assessing, and remediating the site (Third-Party Complaint at 9). In this respect,