

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

**IN RE:
SOUTHDOWN, INC., LITIGATION.**

Case No. C-3-93-270

Judge Walter Herbert Rice

**REPLY MEMORANDUM OF DEFENDANT SOUTHDOWN, INC. TO PLAINTIFF
GREENE ENVIRONMENTAL COALITION'S RESPONSE IN OPPOSITION TO
MOTION OF DEFENDANT SOUTHDOWN, INC. FOR SUMMARY JUDGMENT**

I. INTRODUCTION

In Greene Environmental Coalition's ("GEC") Response in Opposition to Defendant Southdown, Inc.'s ("Southdown") Motion for Summary Judgment, GEC argues that its claim for injunctive relief against Southdown is not moot; that even if its claim for injunctive relief is moot, GEC's requests for civil penalties, declaratory relief, and attorneys' fees and costs are not moot; and lastly, that all of GEC's claims are saved by Rule 25(c) of the Federal Rules of Civil Procedure. As the following will demonstrate, GEC's arguments are without merit and GEC's Complaint should be dismissed.

Initially, it is important to note that GEC does not claim that there exists a genuine issue of material fact which would preclude summary judgment in favor of Southdown. While GEC argues that its claim for injunctive relief against Southdown is not moot, GEC does not dispute that Southdown no longer owns Landfill No. 1, the property at issue in this case. Further, GEC does not dispute that the current owners of Landfill No. 1, Dirtvest Ltd. and 444-Sandhill, Inc., are independent third parties with no affiliation to Southdown whatsoever. Instead, GEC merely asserts that Southdown has failed to carry its heavy burden. GEC's argument is without merit.

II. DISMISSAL OF GEC'S CLAIMS WOULD NOT BE CONTRARY TO THE PURPOSES OF THE CLEAN WATER ACT OR BE AGAINST PUBLIC POLICY.

GEC appears to argue that it is somehow “unfair” that Southdown can escape liability by selling Landfill No. 1 after the initiation of this lawsuit. A similar sentiment was expressed in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998) to which the United States Supreme Court responded as follows:

By the mere bringing of his suit, every plaintiff demonstrates his belief that a favorable judgment will make him happier. But although a suitor may derive great comfort and joy from the fact that the United States Treasury is not cheated, that a wrongdoer gets his just deserts, or that the nation’s laws are faithfully enforced, that psychic satisfaction is not an acceptable Article III remedy because it does not redress a cognizable Article III injury. *** Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.

Steel Co., 118 S.Ct. at 1018-19 (citations omitted), The federal court system is designed to redress a cognizable Article III injury. If a plaintiff fails to maintain standing to bring such a suit, the dismissal of the case is not contrary to public policy but actually promotes the public policy set forth in the United States Constitution, i.e., that the federal court system has been established to redress actual cases and controversies.

More importantly, dismissal of GEC's claims would not be contrary to the purposes of the Clean Water Act. GEC conveniently fails to acknowledge that there exists a viable party liable for any alleged claims GEC presently has against Southdown. If GEC legitimately believes that there exists an ongoing discharge from Landfill No. 1 which is allegedly in violation of the Clean Water Act, then GEC can amend its complaint or file a new complaint against the current owner of Landfill No. 1, i.e., Dirtvest, Ltd., and 444-Sandhill, Inc. GEC would presumably have standing to bring a claim for injunctive relief, declaratory relief, civil penalties, and attorneys’ fees and costs in such action. Since there still exists a viable party from which to seek relief, the

dismissal of the claims against Southdown will not contravene the purposes of the Clean Water Act. GEC appears upset not because there exists an alleged discharge from Landfill No. 1 but because GEC cannot go after Southdown to remedy the alleged violation. While GEC may not cherish the fact that it must pursue someone other than Southdown, nevertheless the purposes of the Clean Water Act and public policy are not affected by the dismissal of the claims against Southdown.

III. GEC'S CLAIM AGAINST SOUTHDOWN FOR INJUNCTIVE RELIEF IS MOOT.

“[A] case is moot when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” Powell v. McCormack, 395 U.S. 486,496 (1969). While voluntary cessation of allegedly illegal conduct does not necessarily moot a case, United States v. Concentrated Phosphate Export Association, 393 U.S. 199,203 (1968); United States v. W. T. Grant Co., 345 U.S. 629,632 (1952), “[a] case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” Concentrated Phosphate Export Association, 393 U.S. at 203.

Even assuming that Southdown has previously violated the Clean Water Act, as GEC has alleged in its Complaint, the undisputed facts have made it absolutely clear that the allegedly wrongful conduct by Southdown cannot reasonably be expected to recur. It is not now possible for Southdown to discharge pollutants or any other substance from Landfill No. 1 without a permit, which is the sole allegation in GEC's Complaint. The only parties who have the ability to discharge pollutants or any other substance from Landfill No. 1 without a permit are Dirtvest Ltd. and 444-Sandhill, Inc. Southdown no longer has any control of, or right to control, Landfill

No. 1. Therefore, it is meaningless for this Court to enjoin Southdown from conducting an activity that Southdown is incapable of conducting.

Moreover, GEC has made no attempt whatsoever to demonstrate that the alleged wrongful conduct of Southdown is reasonably expected to recur. In fact, GEC has not made any attempt to demonstrate that the allegedly wrongful conduct of Southdown has even the possibility of recurring.

Thus, the undisputed facts show that it is absolutely clear that the allegedly wrongful conduct by Southdown cannot reasonably be expected to recur. Therefore, GEC's claim against Southdown for injunctive relief is moot and must be dismissed.

IV. GEC'S REQUESTS FOR CIVIL PENALTIES, DECLARATORY RELIEF, AND ATTORNEYS' FEES AND COSTS ARE ALSO MOOT.

GEC argues that even if its claim for injunctive relief is moot, its requests for civil penalties, declaratory relief, and attorneys' fees and costs are not. In support of this argument, GEC attempts to distinguish the recent United States Supreme Court decision in Steel Co. v. Citizens for a Better Environment, 523 U.S. 83 (1998). In addition, GEC cites as support federal case law that was decided before and conflicts with Steel Co.' GEC's argument is without merit.

For purposes of this motion, even if one assumes that GEC had standing when this action was brought, that is not sufficient. The requisite elements for standing must exist at every stage of the proceedings. Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303,306 (4th Cir. 1998). Even if the elements of standing exist when a complaint is filed, but subsequently disappear, the case has become moot. Id. (citing U.S. Parole Com'n v.

¹ One of the cases cited by GEC is Comfort Lake Association, Inc. v. Dresel Contracting, Inc., 138 F.3d 351 (8th Cir. 1998). Since Comfort Lake was decided the day after Steel Co., Comfort Lake neither refers to nor even mentions Steel Co.

Geraghty, 445 U.S. 388,397, 100 S.Ct.1202, 63L.Ed.2d 479 (1980)). The Supreme Court has described the mootness doctrine as “the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).” DuBois v. U.S. Dept. of Agriculture, 20 F.Supp. 2d 263, 267 (D.N.H. 1998) (quoting Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S. Ct. 1055, 1069 n. 22, 137 L.Ed. 2d 170 (1997)). Thus, even if one assumes that GEC possessed standing when this action was brought, if the sale of Landfill No. 1 has rendered GEC’s claim for injunctive relief moot, GEC must still demonstrate that it has standing to pursue its claims ‘for civil penalties, declaratory relief and costs or risk its action being dismissed as moot.

The United States Supreme Court’s decision in Steel Co. is directly applicable to the instant case. In Steel Co., the plaintiffs complaint alleged violations of the Emergency Planning and Community Right-To-Know Act (“EPCRA”) and sought, among other things, declaratory relief, the imposition of civil penalties, and investigation and prosecution costs. Since the defendant was in compliance with EPCRA before the complaint was filed, plaintiffs claims related solely to past violations and not injunctive relief. In light of the defendant’s present compliance with EPCRA and the fact that any civil penalty would be paid to the United States government, the Supreme Court held that none of the requested relief would redress any alleged injury of the plaintiff. Accordingly, the Supreme Court found that the plaintiff did not have standing to bring the action.

Applying the holding of Steel Co. to the current status of this litigation, it is readily apparent that GEC cannot satisfy the requisite elements for standing. Just as the Steel Co. plaintiff’s requests for declaratory relief, civil penalties, and investigation and prosecution costs did not provide standing to bring an action for past violations of EPCRA, GEC’s requests for

declaratory relief, civil penalties, and attorneys' fees and costs do not satisfy the elements of standing to maintain an action for past violations of the Clean Water Act that have no reasonable likelihood of recurring.

Further, whether or not the elimination of defendant's violations has occurred after or before the filing of a complaint does not change the application of the standing requirements. The only difference is in name. A plaintiff who cannot satisfy the elements of standing prior to bringing an action is said to lack standing. While the United States Supreme Court did not address this issue in Steel Co., at least one lower court has held that a plaintiff who can no longer satisfy the elements of standing after a complaint has been filed has claims that have become moot. See DuBois v. U.S. Dept. of Agriculture, 20 F. Supp. 2d at 267. Either way, no action can be maintained.

Still, GEC cites federal case law that attempts to create a difference in the standing inquiry depending upon when the inquiry is conducted. However, all of these cases were, in effect, decided before Steel Co., and thus were decided without the benefit of the Steel Co. analysis. Since the holdings of these cases are inconsistent with the logical application of Steel Co., which was subsequently decided by the U.S. Supreme Court, their holdings should not be followed.

All of the federal case law decided subsequent to Steel Co., however, supports Southdown's position. See Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 149 F.3d 303, 306-7 (4th Cir. 1998); Dubois v. U.S. Dep't. of Agricultural, 20 F.Supp.2d 263,267 (D.N.H. 1998). Moreover, both of these cases involve claims brought pursuant to the 'Clean Water Act.

In Friends of the Earth, the Fourth Circuit applied Steel Co. and found that the case was moot. The Fourth Circuit stated:

Applying the reasoning of Steel Co., we conclude that this action is moot because the only remedy currently available to Plaintiffs—civil penalties payable to the government—would not redress any injury Plaintiffs have suffered. We therefore vacate the order of the district court and remand with instructions to dismiss this action. Id. at 306-7 (citing Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S.Ct. 1055, 1071, 137 L.Ed.2d 170 (1997)).

In Dubois, the plaintiffs brought a citizen suit under the Clean Water Act seeking equitable relief and an assessment of civil penalties. Dubois, 201 F.Supp.2d at 264-5. The district court denied the request for injunctive relief, the plaintiffs appealed and the First Circuit reversed directing the district court to grant the request. Id. at 265. Upon remand, while neither the district court nor the First Circuit had even addressed the merits of the plaintiffs' claim for civil penalties, the district court granted the defendant's motion to dismiss said claim on the grounds that it was no longer justiciable. The district court, relying upon Steel Co. and Friends of the Earth, held that in light of the injunction and in the absence of any evidence of continuing misconduct, there were no imminent violations of the Clean Water Act for civil penalties to deter. Id. at 267-8.

GEC attempts to distinguish these cases upon their facts because the district court in both cases entered a decision on the plaintiffs' requests for injunctive relief prior to dismissing the cases as moot. This fact is immaterial, and even GEC fails in its Response to explain how this factual distinction affects the legal analyses of these cases when compared to the case at bar. Regardless of what occurrence renders the case moot, whether by the court or by the parties, that does not change the fact that the case is in fact moot.

Therefore, as a result of the mootness of GEC's claim for injunctive relief, GEC cannot satisfy the requisite elements for standing in regard to its requests for civil penalties, declaratory relief, and attorneys' fees and costs. As such, GEC's entire Complaint is moot and must be dismissed.

V. RULE 25(C) OF THE FEDERAL RULES OF CIVIL PROCEDURE DOES NOT SAVE GEC'S CLAIMS.

GEC argues that regardless of the transfer of Landfill No. 1 by Southdown and the effect that such transfer has had on this action, GEC may still maintain this action against Southdown pursuant to Rule 25(c) of the Federal Rules of Civil Procedure. This argument, however, like the others forwarded in GEC's response, ignores the United States Supreme Court's holding in Steel Co. and is without merit.

As a rule of civil procedure, Rule 25(c) cannot confer standing under Article III, §2 of the Constitution of the United States where it does not otherwise exist. Will v. Coastal Corporation, 503 U.S. 131, 135 (1992) ("The Rule [of Civil Procedure], then, must be deemed to apply only if their application will not impermissibly expand the judicial authority conferred by Article III."); see also Raines v. Byrd, 521 U.S. 811, 177 S.Ct. 2312, 2318 n.3 (1997) ("It is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing,"). Accordingly, since the test for mootness incorporates the test for standing, Rule 25(c) cannot create a live case or controversy when a case would otherwise be moot.

The transfer of Landfill No. 1 has mooted GEC's claims for injunctive relief against Southdown. Thus, only GEC's requests for civil penalties, declaratory relief, and attorneys' fees and costs remain. In Steel Co., the United States Supreme Court held that the plaintiff did not