

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

GREENE ENVIRONMENTAL	:	
COALITION, INC.,	:	
	:	
v.	:	Case No. C-3-93-270
	:	
SOUTHDOWN, INC.,	:	Judge Walter H. Rice
	:	
Defendant and	:	
Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
USX CORP.,	:	
	:	
Third-Party Defendant.	:	

REPLY MEMORANDUM IN SUPPORT OF THIRD-PARTY
 DEFENDANT’S MOTION TO DISMISS

I. INTRODUCTION

The memorandum filed by Third-Party Plaintiff Southdown, Inc. in opposition to Third-Party Defendant USX’s motion to dismiss is more significant for the issues it avoids than those it addresses. Southdown, for instance, struggles mightily to sidestep USX’s argument that it has no direct liability under the Clean Water Act (“CWA” or “Act”), diverting attention instead to a district court opinion which concedes the point but bemoans this supposed “defect” in the statute. Likewise, Southdown does everything possible to avoid addressing USX’s argument that no common law claim for indemnity and/or contribution can lie where the alleged indemnitor has no liability as a matter of law on the underlying claim. Instead, Southdown attempts to

characterize the issue as a pre-emption problem, and it analogizes to a number of authorities which have little, if any, relevance to the case. The end result is that Southdown fails to cite a single case or other authority in which a previous property owner has been held liable to the current owner under Ohio indemnity or contribution law for the current owner's violations of the CWA. Ohio law simply does not support such a claim.

II. ARGUMENT

A. Clean Water Act Liability Rests Solely With Southdown.

The CWA provides that “the discharge of any pollutant by any person [without a permit] shall be unlawful.” 33 U.S.C. § 1311(a). The statute goes on to define “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). Prior owners cannot be held liable in a CWA citizen suit, even where such owners' past actions have allegedly caused or contributed to a current violation. See *Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 632-33 (D.R.I. 1990); *Gwaltney v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 57 (1987). The CWA is not remedial in nature; instead, its focus is on the regulation of present discharges of pollutants to navigable waters.

Southdown fails to recognize this distinction and instead argues that, because USX disposed of CKD at Landfill No. 1 and such CKD may be the source of surface water contamination, principles of equity require USX to step into Southdown's shoes and assume responsibility for Southdown's current CWA liability. However, even as Southdown attempts to craft this argument, it concedes, as it must, that its own “potential liability arises solely by operation of the citizen suit provision which, by statute, does not expose USX to liability.”

Mem. Contra at 10. Whatever superficial appeal this equity argument may have, it is in direct conflict with the unambiguous wording of the CWA.

Southdown also cites *Friends of Sakonnet, supra*, in which the court bemoaned the so-called statutory “defect” which places liability only on the current owner. Notwithstanding its criticism of the statute, however, the court properly recognized that the citizen suit provision of the CWA has no application to former owners. 738 F. Supp. at 632-33. The court suggested that a current owner may, under some circumstances, have a common law remedy against the seller under state law, but it did not even address the type of derivative indemnity claim which Southdown has brought here. *Friends of Sakonnet*, therefore, gives no comfort to Southdown. If anything, it only underscores the conclusion that USX has no liability to Southdown, GEC, or anyone else on the underlying CWA claim.

This result is hardly inequitable, at least on the facts presented here. The CWA imposes an affirmative obligation on owners and operators of property from which a discharge of pollutants emanates to secure a permit authorizing and regulating such discharge. Notwithstanding this statutory requirement, Southdown effectively admits in its third-party complaint that it has taken no action relative to the site for more than fifteen years. Because Southdown alone has the responsibility and the authority to apply for and obtain a permit, Southdown alone is liable for any violations of the CWA resulting from its failure to act. USX cannot discharge Southdown’s obligation to obtain the necessary permit. Therefore, as a matter of law, USX cannot be liable for the alleged CWA violations.

B. Absent Liability Under the CWA, USX Is Not Subject To The State Law Claim Of Indemnity.

Under *Ohio* law, when a party secondarily liable is compelled to pay damages to an injured party, he may recover the amount paid from the party who is primarily liable for the injury. See *Allstate Ins. Co. v. U.S. Associates Realty, Inc.*, 11 Ohio App. 3d 242 (Summit Cty. 1983). The foundation for an indemnity claim, therefore, is the notion that the indemnitor would necessarily be liable to the plaintiff in the underlying claim. In the present case, however, USX has no liability to GEC for Southdown's CWA violations. Consequently, Southdown cannot establish the threshold liability requirement necessary to support its common law claim of indemnity.

In its memorandum contra, Southdown argues that an implied right of indemnity arises from the "relationship" between Southdown and USX. Any relationship which may have existed between the parties pursuant to the sale of Landfill No. 1 was terminated more than 15 years ago, however. Southdown nonetheless attempts to resurrect this relationship, citing two cases which are factually distinguishable from and clearly inapplicable to the case at bar. *Fireman's Ins. v. Antol*, 14 Ohio App. 3d 428 (Franklin Cty. 1984) involved an employment contract which was found to contain an implied agreement by an employee to indemnify his employer against losses caused by the employee's bad faith. Obviously, Southdown and USX do not have an employer/employee relationship, nor has Southdown pointed to any continuing contractual duty which USX owes Southdown. In fact, there are none.

Similarly, *Caldwell v. Gurley Rejining Co.*, 755 F.2d 645 (8th Cir. 1985) involved an assessment of the residual liability of a lessee who had created a dangerous condition on land and then prematurely terminated the lease after representing to the lessor that the site had been

rendered safe. Southdown and USX are not, nor have they ever been, in a lessor/lessee relationship regarding Landfill No. 1. Additionally, as discussed in the Motion to Dismiss, the 1976 sale agreement contained no provision indemnifying Southdown for physical conditions at the site, and no representations regarding its condition. Instead, the sale agreement contained an “Inspection and Entry” clause by which the Buyer (Southdown) warranted that it had inspected the site and agreed to take title to the premises in the physical condition existing at the time of sale. Motion to Dismiss at 4. Neither of the cases cited by Southdown provides this Court with legal support for the proposition that an implied contract of indemnity existed between Southdown and USX.

Finally, Southdown offers this Court the curious argument that, at the time of transfer, Landfill No. 1 was subject to “dormant” CWA liability due to the presence of alleged contamination at the property. According to Southdown, this “dormant liability” and alleged vulnerability of the site to a citizen suit somehow translates into an “encumbrance” giving rise to a right of indemnity. As creative as this argument may be, it is factually inconsistent with Southdown’s other allegations and finds no support in case law. Southdown has admitted that Landfill No. 1 was not subject to any existing charges or penalties at the time of the transfer. Mem. Contra at 10. Additionally, neither Southdown nor GEC have ever alleged that unpermitted discharges were occurring at the time of the transfer. Instead, both have alleged actions indicating the discharge of pollutants only in 1991, approximately fifteen years after Southdown assumed control of the site. Third-Party Complaint at 5. Based on Southdown’s own admissions and allegations, therefore, this fictional “encumbrance” could not have existed in 1976.

Furthermore, Southdown's position is contrary to case law *on the subject*. The mere presence of a hazardous substance on land at the time of conveyance does not constitute an encumbrance. See *U.S. v. Allied Chemical Cop.*, 587 F.Supp. 1205 (N.D. Cal. 1984) (holding that the term "encumbrance" does not extend to the alleged presence of a hazardous substance on land, and that the presence of alleged contamination at the time of transfer, even if proven, does not establish a cause of action for breach of a covenant for conveyance free of encumbrances); *Cameron v. Martin Marietta Corp.*, 729 F.Supp. 1529 (E.D.N.C. 1990) (refusing to extend the definition of encumbrance to include chemical contamination and alleged violations of state and federal regulations at issue, and dismissing plaintiff's breach of warranty claim). Clearly, this nonexistent encumbrance falls short of establishing any liability on the part of USX under the CWA and cannot support an action for indemnity. Nothing in the relationship between Southdown and USX gives rise to an implied contract for indemnity.

C. Absent Liability Under The CWA, USX Is Not Subject To The State Law Claim Of Contribution.

Southdown's claim for contribution against USX must fail for the same reasons. Under the plain language of Ohio's contribution statute, the right of contribution among joint tortfeasors arises only where "two or more persons are jointly *and severally liable* in tort for the same injury or loss." R.C. 2307.31(A) (emphasis added). Because Southdown was the only party with the authority and obligation to obtain an NPDES permit when the discharges from Landfill No. 1 were discovered, only Southdown can be liable for failure to secure such a permit. Southdown argues that the "single result" test should be used to determine the existence of joint and several liability, and claims that because USX allegedly caused the contamination at the site,

it has also caused the “single result.” However, Southdown fails to realize that the “result” or “harm” at issue under the CWA is *not the* presence of contamination, but rather the discharge of pollutants without a permit. Southdown remains the only party with the obligation and the authority to comply with CWA requirements at Landfill No. 1, and is therefore the only party responsible for the harm at issue.

D. The CWA Citizen Suit “Savings Clause” Does Not Authorize Southdown’s Common Law Claims Against USX.

In its memorandum contra, Southdown attempts to cloud the issue by arguing that the “savings clause” contained within the CWA’s citizen suit provision protects its common law claims from pre-emption. However, regardless of whether Southdown’s indemnity and contribution claims are pre-empted by federal law,² Southdown has no right under state law to indemnity or contribution because USX has no liability under federal law for the acts complained of in the underlying claim.

There is nothing in the “savings clause” of the CWA’s citizen suit provision which provides support for Southdown’s third-party claims. Southdown cites *International Paper Co.*

¹This savings clause provides:

Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief (including relief against the Administrator or a State agency).

33 U.S.C. §1365(e).

²*International Paper* leaves open the possibility of pre-emption outside the context of Section 505(e) specifically noting:

Section 505(e) merely says that ‘[n]othing *in this section*,’ *i.e.*, the citizen-suit provisions, shall affect an injured party’s right to seek relief under state law; it does not purport to preclude pre-emption of state law by other provisions of the Act.

International Paper, 479 U.S. at 493 (emphasis in original).

v. *Ouellette*, 479 U.S. 481 (1987) for the proposition that the savings clause contained in the CWA's citizen suit provision prevents the Act from preempting state common-law claims brought against polluters. *International Paper*, however, involved a nuisance suit brought under Vermont law by Vermont landowners against a company discharging in New York. The Court held that, although the CWA preempted suits not expressly preserved by its provisions (and therefore pre-empted actions brought under the common law of affected states), the savings clause of the Act's citizen suit provision permitted aggrieved individuals to bring nuisance claims under the law of the source state. *International Paper*, 479 U.S. at 497.

Although *International Paper* confirms that the savings clause allows citizens to bring common-law actions against polluters, it is inapplicable to this third-party action. At best, *International Paper* supports the proposition that GEC is authorized to bring a common-law nuisance action against Southdown; however, it does not authorize or otherwise support Southdown's Third-Party Complaint against USX. As noted in *Conservation Law Foundation of New England v. Browner*, 840 F. Supp. 171, 176 (D. Mass. 1993), "although citizens may bring suits under the [CWA] citizen suit provisions, *the same individuals* are not barred from bringing another suit under a different law or statute." (Emphasis added.) Even if the CWA's citizen suit provision somehow did authorize third-party common-law actions, the provisions of the CWA itself prevent Southdown from establishing the crucial element of liability necessary to maintain an action for contribution or indemnity against USX. Southdown's common-law claims therefore must fail as a matter of law.