

**E. To The Extent Southdown's Third-Party Complaint Seeks Something More Than Contribution Or Indemnity For The Civil Penalties And Attorney Fees, If Any, For Which It May Be Liable To GEC, It Is Outside The Proper Scope Of Rule 14(a).**

In responding to USX's argument regarding the proper scope of the third-party complaint under Fed.R.Civ.P. 14(a), Southdown seems to concede that notwithstanding the broad language of its pleading, "its claims against USX are contingent to the Clean Water Act claims brought against it by the Plaintiff [GEC] ." Mem. Contra at 14. Southdown also seems to concede that GEC's remedy under the CWA is limited to injunctive relief and/or an award of civil penalties and attorney fees. If this is truly Southdown's position, then its third-party complaint is probably not, at least in spirit, outside the proper scope of Rule 14(a).

Southdown, though, makes a number of inconsistent statements on this point. Notwithstanding the apparent concession quoted above, Southdown devotes much of its memorandum contra to a discussion of the broader "environmental harm" for which it claims USX is responsible, at least in part. Southdown also states somewhat cryptically that "its common law claim for indemnity need not be pinned to USX's liability arising out of the Clean Water Act. " Mem. Contra at 7.

Southdown cannot have it both ways. Fed.R.Civ.P. 14(a) only authorizes a defendant to add a third-party defendant under certain limited 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.*

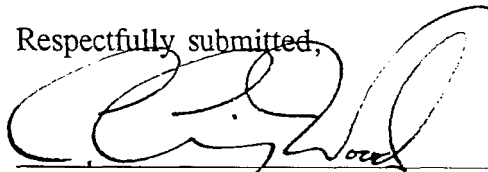
(Emphasis added.) To the extent that Southdown is seeking only contribution and indemnity for any civil penalties and attorney fees which may be imposed by this Court, such claims would

probably fall within the purview of Fed.R.Civ.P. 14(a), but are without legal basis as discussed above. To the extent Southdown is seeking contribution and indemnity for costs associated with site remediation, such claims are clearly not contingent on or related to the CWA claims made by GEC and are duplicative of those contained in Southdown's pending CERCLA action. Regardless of how Southdown chooses to characterize its common law claims, the result is the same. Narrowly construed, the Third-Party Complaint should be dismissed for failure to state a claim upon which relief can be granted. Construed more broadly, the Third-Party Complaint is both legally deficient and well outside the scope of third-party pleading allowed by Rule 14(a).

#### IV. CONCLUSION

For all the foregoing reasons, as well as the reasons presented in its Motion to Dismiss, Third-Party Defendant USX Corporation respectfully prays that the Third-Party Complaint be dismissed in its entirety.

Respectfully submitted,



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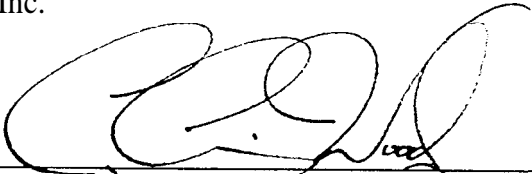
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Reply Memorandum in Support of Third-Party Defendant's Motion to Dismiss was served by regular United States mail, postage prepaid, on the following parties and/or counsel of record this 23<sup>rd</sup> day of September, 1994:

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