

their property should the Court order Southdown to remediate the pollution.

Rule 19(A) provides, in pertinent part:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Fed. R. Civ. P. 19(A). In its proposed First Amended Complaint, GEC asserts two claims against 444 Sandhill and Dirtvest. In Count Two, GEC alleges that 444 Sandhill and Dirtvest are violating the Clean Water Act by discharging pollutants into Mud Run Creek without an NPDES permit. In Count Three, Plaintiff contends that the transfer of property from Southdown to 444 Sandhill and Dirtvest was a fraudulent conveyance. In its prayer for relief, GEC requests that this Court enjoin Defendants from committing future violations of the CWA. Because abatement of the pollution of Mud Run will likely require access to and handling of the property formerly owned by Southdown and now owned by 444 Sandhill and Dirtvest, 444 Sandhill and Dirtvest are necessary parties in this litigation.

However, the Court cannot permit joinder of 444 Sandhill and Dirtvest at this time. In order to maintain a citizen suit under the Clean Water Act, plaintiffs are required to provide a sixty-day notice of their intent to sue to the alleged

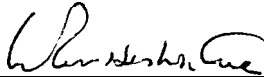
violator and to the government. 33 U.S.C. § 1365(b)(1)(A). Nowhere in GEC's proposed First Amended Complaint does it assert that 444 Sandhill and Dirtvest were given the statutorily required notice.⁵ Without such notice to those proposed defendants, this Court would be constrained to grant a dismissal of the suit against them should they present such a motion. Accordingly, it is not appropriate for this Court to permit the joining of 444 Sandhill and Dirtvest to this litigation at this time (Doc.#69-1), or permit it to amend its Complaint accordingly (Doc.#69-3). Plaintiff's Motions are Overruled, subject to renewal upon the issuance of appropriate notice.

In summary, because this Court has concluded that GEC is not a creditor within the meaning of Ohio's Fraudulent Conveyance Act, the addition of such a claim would be futile. Furthermore, because GEC has not alleged that it has satisfied the CWA's statutory prerequisites to bring suit against 444 Sandhill and Dirtvest, it is inappropriate, at this time, to permit their joinder or to allow amendment of GEC's Complaint to include them as parties. However, GEC may renew its requests should those prerequisites be satisfied.

⁵ GEC's proposed First Amended Complaint states that 444 Sandhill and Dirtvest had actual notice of the pendency of this lawsuit. (Proposed 1st Am. Compl. ¶ 4) Such an allegation is insufficient, because there is no indication that the proposed additional defendants had notice of GEC's intent to sue them for violations of the CWA, as required by 33 U.S.C. § 1365(b)(1)(A).

For the foregoing reasons, GEC's Motion to amend its Complaint is Overruled as to joining a claim for fraudulent conveyance (Doc. #69-2). Plaintiff's Motion to amend its Complaint to add 444 Sandhill and Dirtvest as parties (Doc. #69-1, #69-3) is Overruled, subject to renewal.

January 12, 1999



WALTER HERBERT RICE, CHIEF JUDGE
UNITED STATES DISTRICT COURT

Copies to:

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