

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

**GREENE ENVIRONMENTAL COALITION'S REPLY MEMORANDUM
TO OBJECTIONS TO JOIN CLAIMS AND PARTIES**

Defendant Southdown and potential Defendants 444 Sandhill, Inc., and Dirtvest, Ltd., object to joinder of claims and parties because a proposed Amended Complaint was not attached to Plaintiffs Motion. An Amended Complaint is attached hereto.

Further, Defendants object because they say Plaintiff is not a "creditor" under the Ohio fraudulent conveyance statute. That argument ignores the *qui tam* nature of this action. Plaintiffs are suing as private attorneys general on behalf of the United States to assess and collect a civil penalty and in their own right to collect their attorney and expert witness fees. The Act at 33 USC § 1365(a) explicitly provides that any citizen may commence a civil action against any person in violation of the Act or an effluent standard and the strict courts are empowered to enforce the Act and applicable effluent standards and apply appropriate civil penalties under § 1319(d) of the Act. Moreover, for the Protection of the Interests of the United States, § 1365(b)(3) requires notice of the complaint and of a proposed consent judgment to the Attorney General and the Environmental Protection

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Agency Administrator. Plaintiff, acting to collect money damages for the United States pursuant to statutory authorization, is clearly a “creditor” within the meaning of the statute, just as much as the United States would be if it had initiated this action.

Defendants also ignore the language of the fraudulent conveyance statute which declares a transfer unlawful and allows a property transfer to be set aside “if made with the intent to hinder or delay such creditor.” *Stein v. Brown*, 18 Ohio St. 305, 307, 480 N.E.2d 1121, 1123 (1985). In this case, there is no question Southdown’s disingenuous real estate deal with 444 and Dirtvest is to escape liability and “hinder and delay” Greene Environmental Coalition’s (“GEC”) efforts to remediate the discharge and impose civil penalties on Southdown. Southdown admits as much in its SEC filing where it states “the company believes it should have no ongoing obligation under the Clean Water Act to obtain a permit...[and] the company intends to move the Court for a dismissal of the GEC case based on the recent transaction.”

This Court cannot allow long-time polluters to escape the requirements of law through such clever antics as transferring polluted property to some recently formed entities whose finances and capabilities may be nonexistent. It is especially egregious when done surreptitiously without notice to the Court or parties at a time when Defendant is under the jurisdiction of the Court and the matter is stayed for more than two years upon a representation to the Court by Defendant that time is needed to study the problem and come

up with a solution. We hope it was not the real plan all along to continue to pollute, to defraud the Plaintiff, to mislead the Court, and to escape punishment. We hope the Court does not allow that to be the result of this case. Plaintiffs Motion should be granted and discovery into the transaction allowed to proceed.

Respectfully submitted:



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing Greene Environmental Coalition's Reply Memorandum to Objections to Join Claims and Parties was served on Quintin Lindsmith, Esq., and Frank L. Merrill, Esq., Attorney for Southdown, Inc., at Bricker & Eckler, 100 South Third Street, Columbus, Ohio 43215-4291; and Jacob A. Myers, Esq., Attorney for 444 Sandhill, Inc., and Dirtvest, Inc., at Myers & Frayne Co., L.P.A., 18 West First Street, Suite 200, Dayton, Ohio 45402, by Regular U.S. Mail, this 10th day of April, 1998.



Robert J. Shostak
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

**GREENE ENVIRONMENTAL
COALITION, INC.,**
100 Corry Street
P.O. Box 266
Yellow Springs, Ohio 45387,

Case No. **C-3-93-270**

Judge Walter Herbert Rice

Plaintiff,

vs.

FIRSTAMENDED COMPLAINT

**SOUTHDOWN, INC., Successor by
Merger of Southwestern Portland
Cement Co.,**
P.O. Box 191
506 East Xenia Drive
Fairborn, Ohio 45324,

and

444 SANDHILL, INC.,
18 West First Street
Suite 200
Dayton, Ohio 45402,

and

DIRTVEST, LTD.,
18 West First Street
Suite 200
Dayton, Ohio 45402,

Defendants.

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I. STATEMENT OF THE CASE

1. This is a citizens suit brought under § 505 of the Clean Water Act (herein referred to as “the Act”), 33 USC § 1365, together with a supplemental claim to set aside a fraudulent conveyance. Plaintiff seeks injunctive and equitable relief, the imposition of civil penalties, and an award of litigation costs, including attorney fees and expert witness fees. At issue is the Defendants’ ongoing discharge of pollutants from their property/facility in Greene County, Ohio, and into waters of the United States without a permit in violation of § 301(a) (33 USC § 1331(a)) and § 402 of the Act (33 USC § 1342), the Federal -Water Pollution Prevention and Control Act (herein referred to as “the Act”).

II. JURISDICTION AND VENUE

2. This Court has subject matter jurisdiction over the claims set forth in this Amended Complaint under § 505(a)(1) of the Act, 33 USC § 1365(a)(1) and its authority to hear related claims pursuant to 28 USC § 1367(a).

3. On January 31, 1992, Plaintiff gave notice of violation of the Act and of Plaintiff’s intention to bring this lawsuit to Defendant Southdown, Inc. (“Southdown”), the United States Environmental Protection Agency (“USEPA”), and the Ohio Environmental Protection Agency (“OEPA”), as required by § 505(b)(1)(A) of the Act, 33 USC § 1365(b)(1)(A). A copy of the notice letter is attached to Plaintiffs original Complaint as Exhibit A and incorporated herein. More than sixty (60) days have elapsed since the service

of the Notice of Intent to Sue and Plaintiff is informed that neither the USEPA or the OEPA have commenced and diligently prosecuted a court action to redress Defendant Southdown's violations of the Act.

4. Defendants 444 Sandhill, Inc., and Dirtvest, Ltd., acquired the property on which the violation of the Act exists on September 30, 1997, after commencement of this lawsuit and with actual notice of the pendency of this lawsuit.

5. Since the violations set forth in this Complaint have occurred and continue to occur within the judicial district of the United States District Court for the Southern District of Ohio, Western Division, venue is proper in this Court pursuant to §505(c)(1) of the Act (33 USC § 1365(c)(1)).

III. PARTIES

6. Plaintiff Greene Environmental Coalition, Inc. ("GEC"), is a not-for-profit Ohio corporation comprised of citizens who reside, work, and recreate in Greene County, Ohio. Members of GEC own property near or recreate on, in, or near Mud Run Creek watershed into which Defendants are discharging unpermitted pollutants. The interests of GEC and its members have been, are being, and will be adversely affected by Defendants' unpermitted discharge of pollutants into Mud Run Creek and Defendants' failure to comply with the requirements of the Act. In particular, Defendants' unpermitted discharge of pollutants into Mud Run Creek and the water system of which it is a part directly affects the

health, economic, recreational, aesthetic, and environmental interests of GEC and its members. GEC maintains its office at 100 Corry Street, P.O. Box 266, Yellow Springs, Ohio 45387.

7. Defendant Southdown, which acquired by merger Southwestern Portland Cement Co., owns and operates a cement manufacturing facility and landfills located on lands in Fairborn, Greene and Clarke Counties, Ohio. Upon information and belief, Southdown is a Louisiana corporation. Southdown's mailing address is P.O. Box 191, Fairborn, Ohio 45324.

8. Defendant 444 Sandhill, Inc. ("444"), is an Ohio corporation incorporated on September 26, 1997, with its principle office at 18 West First Street, Suite 200, Dayton, Ohio 45402.

9. Dirtvest, Ltd. ("Dirtvest"), is an Ohio limited liability company organized under Ohio law on or about August 15, 1997, with its principle office at 18 West First Street, Suite 200, Dayton, Ohio 45402.

IV. -THE VIOLATION — FIRST CLAIM

-10. § 301(a) of the Act, 33 USC § 1311(a), prohibits the discharge of any pollutants into navigable waters of the United States, except as authorized by permit issued under the National Pollutant Discharge Elimination System ("NPDES Permit").

11. Prior to September 30, 1997, Defendant Southdown owned hundreds of acres

of land upon which it operated several landfills for the disposal of wastes generated by its cement manufacturing facility. One of these landfills, which Southdown has designated as Landfill No. 1, is located near Haddix Road in Clark County, Ohio. Landfill No. 1 is discharging a liquid known as "leachate" into Mud Run Creek. Leachate is produced by water percolating through the waste deposited in the landfill.

12. On June 12, 1991, OEPA and the Clarke County Health Department obtained samples of the leachate discharging from Southdown's Landfill No. 1 into Mud Run Creek and had a chemical analysis conducted on those samples. A copy of a memo from Louise T. Snyder, which contains the results of the analysis, is attached to Plaintiffs original Complaint as Exhibit B and is incorporated herein.

13. Landfill No. 1 is located adjacent to Mud Run Creek and is hydrologically upgradient from Mud Run Creek.

14. Plaintiff believes and, therefore, alleges that Southdown's Landfill No. 1 discharges leachate, which contains toxic pollutants, including copper, lead, zinc, aluminum, and selenium, as well as other pollutants, through a discernible, confined, and discrete rivulet into Mud Run Creek. Photographs and verified Affidavit depicting the discharge are attached to Plaintiffs original Complaint as Exhibit C and are incorporated herein.

15. Plaintiff believes and, therefore, alleges that Defendant Southdown does not and did not possess a NPDES permit authorizing the discharge of pollutants from Landfill