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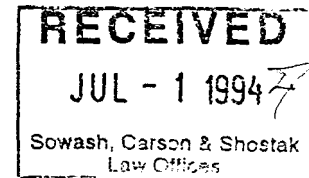
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Mr. Kenneth Murphy, Clerk
United States District Court
for the Southern District of Ohio,
Western Division
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Dayton, Ohio 45402



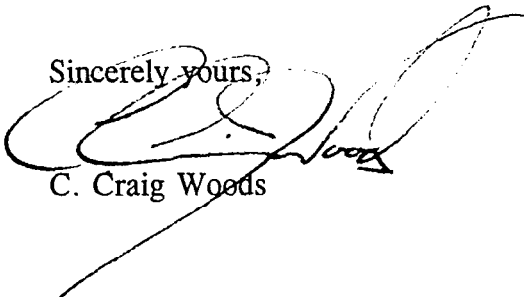
Re: *Greene Environmental Coalition, Inc. v. Southdown, Inc. v. USX Corp.*,
Case No. C-3-93-270 (Judge Rice)

Dear Mr. Murphy:

Enclosed are an original and three copies of: (1) Stipulated Extension of Time to Move or Plead; and (2) Motion of Third-Party Defendant USX to Dismiss Third-Party Complaint. Please file the originals and return a time-stamped copy of each to me in the enclosed self-addressed, stamped envelope.

Thank you for your attention to this matter. Please feel free to call me if you have any questions or comments.

Sincerely yours,


C. Craig Woods

CCW/ejs
Enclosures


cc: Charles F. Freiburger, Esq. (w/encl.)
Robert J. Shostak, Esq. (w/encl.) ✓

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


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

STIPULATED EXTENSION OF TIME TO MOVE OR PLEAD

Pursuant to S.D. Ohio Rule 12.1, it is hereby stipulated and agreed that Third-Party Defendant USX Corporation is granted a seven-day extension of time to serve its pleading or motion in response to the Third-Party Complaint. This is the first extension granted by stipulation to USX in this action, and it does not exceed 20 days.


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A memorandum in support follows.

Respectfully submitted,



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MEMORANDUM IN SUPPORT

I. INTRODUCTION

This is a citizen suit brought by Plaintiff Greene Environmental Coalition ("GEC") against Defendant Southdown, Inc. ("Southdown") pursuant to §505 of the Clean Water Act ("CWA"), 33 U.S.C. §1365. GEC contends, in essence, that from 1991 to the present, Southdown has, without obtaining the necessary permit, discharged or allowed the discharge of leachate from its Landfill No. 1 in Clark County, Ohio in violation of the CWA. GEC seeks

an injunction against future violations of the CWA, an award of civil penalties for past violations, and its reasonable costs and attorney fees. Southdown, in turn, has filed a third-party claim against USX, a former owner of the site. Southdown alleges, in essence, that if it is liable to GEC under the CWA, then USX, who sold the site to Southdown in 1976, is liable to it under state law theories of implied indemnity and contribution.

As shall be shown in greater detail below, Southdown's third-party claims must fail as a matter of law. The citizen suit provisions of the CWA apply only to current violators. A prior owner such as USX cannot be held liable in a citizen suit, even where such owner's past actions have allegedly caused or contributed to a current violation. Accordingly, since USX sold the site to Southdown in 1976-- 15 years before the alleged CWA violations arose-- USX has no direct liability to either GEC or Southdown under the CWA. Southdown's indemnity and contribution claims are likewise without merit, not only because USX has no primary or joint liability for the underlying statutory violation, but also because USX did not (and is not alleged to) have any involvement in Southdown's supposed failure to apply for or obtain a valid permit in 1991 and thereafter.

II. STATEMENT OF THE CASE

A. Allegations Against USX

Southdown's third-party complaint alleges that between February 20, 1945 and December 22, 1976, USX or its predecessors owned and operated a cement manufacturing operation which included what is now known as Landfill No. 1.¹ Southdown alleges further that this

¹For purposes of this motion, USX assumes, as it must, the truth of the allegations contained in the third-party complaint. In the event that further proceedings against USX become necessary, USX reserves the right to contest any and all allegations heretofore made by Southdown in this action.

manufacturing operation generated large quantities of cement kiln dust ("CKD") which was eventually deposited in Landfill No. 1. CKD is the dust entrained in the hot exhaust gas stream exiting the cement kiln. Its chemical composition is determined by the proportions and chemistry of the raw materials and the conditions inside the kiln. Southdown alleges that any contamination present in leachate from Landfill No. 1 is the result of the disposal of CKD at the site by USX. (Third-Party Complaint at 6, 7.)

The pleadings also reflect that on December 22, 1976, Southwest Portland Cement Company, a wholly owned subsidiary of Southdown, purchased the plant from USX. The contract evidencing the sale included an "Inspection and Entry" clause, which provided:

Buyer warrants that it has inspected the Premises and agrees to take title to the Premises in the physical condition existing at the time of said inspection, subject to the provisions of Article 3 herein [regarding the disposition of improvements]. Buyer may, upon the giving of reasonable notice to Seller at any time prior to Closing, enter upon the Premises for any reasonable purpose, including but not limited to the following: surveying; testing; inspecting; cleaning maintaining; dismantling; collecting; or investigating; provided, however, that the Buyer shall hold Seller free and harmless for any loss, damage, claim, suits, or expenses resulting therefrom.

(Third-Party Complaint, Exhibit B at 6.) The sale agreement contained no provision indemnifying Southdown for physical conditions at the Site. Southwest Portland Cement Company subsequently merged with Southdown in 1991.

The third-party complaint alleges further that in June, 1991, Ohio EPA and the Clark County Board of Health collected surface water samples from Mud Run Creek along the north side of Landfill No. 1. (Third-Party Complaint at 5.) These samples purportedly indicated the existence of elevated pH levels and certain metals concentrations in excess of Ohio's surface

water quality standards. Id. Allegedly, Southdown then contracted with Ground Water Associates, Inc. in August 1991 to evaluate surface and ground water in the vicinity of Landfill No. 1. Id. The third-party complaint is silent as to the findings of this latter study.

The third-party complaint is also silent in several other significant respects. It does not, for example, allege any active involvement by USX at the site after 1976. It also does not allege that USX actively prevented or precluded Southdown from applying for or obtaining the necessary discharge permits, either in 1976 when Southdown took over control of the property, or in 1991 and thereafter, when the authorities allegedly uncovered the supposed contamination.

B. Procedural Posture

According to the Complaint, GEC notified Southdown of its intent to bring a citizen suit in early 1992. On July 9, 1993 -- presumably in response to the anticipated filing of GEC's claims-- Southdown commenced a separate suit in this Court against USX, purportedly under the private cost recovery provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§9601, et seq. In that case, captioned as ***Southdown, Inc. v. USX Corp.***, Case No. C-3-93-253 (S.D. Ohio W.D.--Judge Beckwith), Southdown alleged that it had incurred significant response costs at Landfill No. 1 and another site. Faced with a motion to dismiss filed by USX, however, Southdown dismissed the case voluntarily pursuant to Fed.R.Civ.P. 41(a)(1).

GEC filed this action on July 20, 1993, approximately 11 days after Southdown filed its original CERCLA action against USX. GEC's Complaint alleges that from 1991 onward, Southdown, as the owner of Landfill No. 1, has been discharging pollutants into Mud Run Creek without a National Pollutant Discharge Elimination System ("NPDES") permit. Consistent with

the limited relief available in CWA citizen suits generally, GEC's prayer for relief seeks: (1) a declaration that Southdown has violated the permit provisions of the CWA; (2) an injunction "enjoining [Southdown] from any and all future violations of the Act [CWA]"; (3) civil penalties against Southdown under 33 U.S.C. §1319(d); and (4) GEC's "reasonable attorney fees and costs."²

On September 24, 1993, perhaps in recognition of the narrow scope of this action, Southdown refiled some of its CERCLA claims against USX, again in a separate case. This time, though, Southdown did not include claims regarding the other site, and it added a number of state law claims, including claims for unjust enrichment, indemnification and contribution. This third case, captioned as *Southdown, Inc. v. USX Corp.*, Case No. C-3-93-854 (S.D. Ohio, W.D. -- Judge Rice) ("the CERCLA action")³ is still pending. This Court has indicated it may consolidate the CERCLA case and the instant case, at least for purposes of discovery and other pretrial proceedings.

Notwithstanding the obvious overlap with its claims in the CERCLA action, Southdown filed its third-party complaint against USX in this case on April 8, 1994. The factual allegations

²Section 505(a) makes clear that the district court has jurisdiction to: (1) enforce an effluent standard, limitation or an order issued by the Administrator or a state; (2) order the Administrator to perform the challenged act or duty; and (3) apply any appropriate civil penalties under section 309(d). Section 505 also makes clear that the "court in issuing any final order in any action brought pursuant to this section, may award the costs of litigation (including reasonable attorney fees and expert witness fees) to any prevailing or substantially prevailing party, whenever the court determines that such an award is appropriate." 33 U.S.C. §1365(d). Section 505 does not, however, provide for the award of money damages. See e.g. *Middlesex Cty. Sewerage Auth. v. Sea Clammers*, 453 U.S. 1 (1981); *City of Philadelphia v. Stepan Chemical Co.*, 544 F.Supp. 1135 (E.D. Pa. 1982), *reconsid. denied*, 14 Env't'l L. Rep. 20007 (E.D. Pa. 1983)(citing legislative history indicating that Congress did not intend to create a private right of action under the CWA).

³According to the copy of the complaint served on USX, the CERCLA action was initially assigned to Judge Rice. Because it was related to the original CERCLA action, it may have been reassigned to Judge Beckwith, who has entered at least one order therein. See Order referring USX objections to report of Magistrate, dated 4/11/94. As noted above, though, Judge Rice has indicated an interest in consolidating the two pending cases, presumably under his docket.