

of the third-party complaint are virtually identical (and sometimes verbatim) to the allegations made in the CERCLA action. The causes of action alleged here, though, appear to be substantially narrower than the CERCLA and common law claims made in the CERCLA action. The third-party complaint asserts only two claims, one for implied indemnity under Ohio common law, and one for contribution under R.C. 2307.3 1. The gist of both claims is that if Southdown is ultimately adjudged liable for civil penalties and/or attorney fees under the CWA, then USX must indemnify such losses or at least pay a proportionate share of them.

III. ARGUMENT

A. Liability Under the Clean Water Act For Failing To Obtain A NPDES Permit 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). To effectuate the purpose of the CWA,⁴ Congress has placed liability with those in control of the pollutants being discharged. “*Friends of Sakonnet v. Dutra*, 738 F.Supp. 623, 629 (D.R.I. 1990).

In the absence of certain state or federal enforcement actions, § 1365 of the CWA authorizes citizen suits against violators of effluent standards or pollutant discharge limitations. Like other environmental statutes, § 1365 attaches liability to persons “alleged to be in violation of” the statute (emphasis added). This use of the present tense by Congress has been interpreted by the Supreme Court to authorize citizen suits only for on-going violations, not for those which

⁴The purpose of the Clean Water Act is to restore and maintain the chemical, physical and biological integrity of the nation’s waters and to eliminate the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a)(1).

are “wholly past.” **Gwaltney v. Chesapeake Bay Foundation, Inc., 484 U.S. 49, 57 (1987)**. Utilizing this reasoning, other federal courts have consistently held “that the Act cannot be applied to ... past violators.” **Brossman Sales, Inc. v. Broderick, 808 F.Supp. 1209, 1214 (E.D. Pa. 1992)**; **Friends of Sakonnet, supra**. The courts have reasoned that by relinquishing ownership of the source of the alleged violation, the former owner “no longer [has] control to abate” the discharge, and thus cannot be held liable under the CWA. **Brossman** at 1214. Under **Gwaltney** and its progeny, therefore, neither past site owners nor present owners with “wholly past” violations are subject to the citizen suit provisions of the statute.

In **Friends of Sakonnet, supra**, a citizen group attempted to hold past owners of a site liable for present violations of NPDES permit conditions. The court’s review focused on:

whether a person who has violated the Clean Water Act may avoid liability by relinquishing ownership of the polluting source although the violation continues. .

Friends of Sakonnet, 738 F. Supp. at 633. The court answered the question affirmatively, noting the unreasonableness of holding a past owner liable for failure to obtain a permit which it could not possibly obtain. The court went on to explain that:

The phrase “any person ... who is alleged to be in violation” is clearly directed to a present violation by the person against whom the citizen suit is brought ... [T]he court cannot graft exceptions onto the law.

Id. at 632-33. Thus, the court held that under the express language of the CWA, past owners may not be held liable for failing to obtain a permit even though their previous actions may have contributed to the present violation. **Id. at 632-33**.

Brossman, supra, is also directly on point. There the court dismissed a citizen suit brought against past owners of a site for failure to obtain a permit under the CWA,

notwithstanding that the ongoing violations were allegedly due to the past owners' actions. Again, the court focused on the former owners' inability to control or abate the discharge after selling the property. *Id.* at 1214.

Accordingly, even if this Court assumes the truth of the allegation that USX's past actions have contributed to the current discharge, USX is not liable for that discharge under the CWA. There is no question that USX relinquished any ownership or control over Landfill No. 1 in 1976 when it sold the site to Southdown. Indeed, the contract of sale expressly states that, after inspecting the premises, the buyer (Southdown) takes title to the premises in the physical condition existing at the time of the inspection, (Third-Party Complaint, Exhibit B at 6.) USX retained no rights whatsoever with respect to the site. Consequently, USX has not had any legal right to control or abate any discharge from the site or to secure a NPDES permit for such alleged discharge for more than 15 years. Nowhere has GEC or Southdown alleged, moreover, that USX ever prevented Southdown from applying for or obtaining a NPDES permit or otherwise coming into compliance with the CWA.

As a matter of law, Southdown is, and for more than 15 years has been, the only "person"⁵ able to obtain a NPDES permit for the alleged discharge. As is demonstrated by its own pleadings, moreover, Southdown has done little or nothing during its ownership of the property to assure its compliance with the CWA. (Third-Party Complaint at 5.) ("[C]onditions at Landfill No. 1 have remained virtually unchanged from conditions left by USX.") Southdown appears to have been aware of the possible discharge of pollutants from Landfill No. 1 as early

⁵The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body. 33 U.S.C. §1362(5).

as 1991 when Ohio EPA undertook sampling activities in Mud Run Creek. **Id.** There is nothing in the Third-Party Complaint to suggest that Southdown has done anything other than groundwater studies since then to address the situation. (Third-Party Complaint at 5, 6.) In addition to being contrary to the CWA, therefore, it would be fundamentally unfair to hold USX liable for any civil penalties or attorney fees arising from statutory violations which allegedly were first discovered 15 years after USX sold the site to Southdown.

B. Absent Liability Under the CWA, USX is Not Subject to State Law Claims For Contribution or Indemnity.

Southdown should not be allowed to accomplish under state law contribution and indemnity theories what it plainly cannot do under the CWA. Under Ohio law, indemnity “arises from contract, express or implied, and is the right of a person, who has been compelled to pay what another should have paid, to require complete reimbursement.” **Travelers Indem. Co. v. Trowbridge**, 41 Ohio St. 2d 11 (1975) (Syllabus 2). Where no express agreement for indemnification exists, an implied contract for indemnification is sometimes inferred from the notion of primary and secondary liability. **Krasny-Kaplan Corp. v. Flo-Tork, Inc.**, 66 Ohio St. 3d 75, 78 (1993); **Allstate Ins. Co. v. U.S. Assoc. Realty Co.**, 11 Ohio App. 3d 242 (Summit Cty. 1983). As explained by the court in **Allstate**:

where a person secondarily liable is compelled to respond in damages to an injured party, he may recoup his loss for the entire amount upon the basis of an implied contract of indemnity from the one who is actually at fault, and who, in fact caused the injuries. This implied contract of indemnity arises only in the case of primary and secondary liability and not in the case of joint or concurrent tortfeasors.

Allstate, 11 Ohio App. 3d at 246. In *Allstate*, a homeowner's insurance company was held liable for a dog-related injury inflicted upon a prospective home buyer. The homeowner's insurance company sought indemnification from the real estate company for its failure to notify prospective purchasers about the dog in accordance with prior instructions. *Id.* The court noted that one who is at fault is primarily liable, while one "who, by reason of his relationship with the wrongdoer or by operation of law, has incurred tort liability without personal fault for the acts committed by such wrongdoer" is secondarily liable, and may recoup any losses *from the* primarily liable party. *Id.* at 246. Inherent in this concept of primary and secondary liability is the notion that each party must have some degree of liability attached to their respective conduct before the party primarily liable will be required to indemnify the party secondarily liable.

Because USX is without liability under the CWA, the concept of primary and secondary liability is inapplicable here. Simply put, USX had neither the obligation nor the authority to apply for or obtain an NPDES permit in 1991 and thereafter. As a matter of Ohio law, therefore, it cannot be primarily liable for Southdown's alleged failure to comply with the CWA.⁶

Additionally, in the absence an express contract providing otherwise, indemnity is only available to a "party wholly innocent of wrongdoing." *State ex rel. Celebrezze v. Specialized*

⁶In the CERCLA action, Magistrate Judge Merz has recommended that Southdown be permitted to pursue a state law indemnity claim on the theory that USX could be found primarily liable for Southdown's alleged CERCLA violation. Report and Recommendations, filed 3/11/94 (Case No. C-3-94-354) at p. 15. This recommendation has been challenged by USX and is currently before Magistrate Merz on referral by Judge Beckwith. See USX objections filed 3/30/94 and order of referral filed 4/11/94. Even if Magistrate Judge Merz's recommendation is ultimately upheld, though, its reasoning does not extend to contribution and indemnity claims arising from alleged violations of the CWA. In the CERCLA action, USX arguably may have liability under the statute as a former owner. See 42 U.S.C. §9607. Here, though, USX has no direct liability under the CWA. In no sense, then, could the Court ultimately find it primarily liable for Southdown's alleged violations.

Finishers, Inc., 62 Ohio Misc. 2d 5 16 (Cuyahoga Cty . 1991). In **Specialized Finishers**, the property owner's knowledge of on-site contamination caused by lessees defeated a claim for indemnification. In the instant case, Southdown appears to have been aware of the alleged discharge from its site from at least 1991 onward. Although Southdown was, and remains, obligated by statute to obtain an NPDES permit for discharges of pollutants from its property, Southdown has apparently failed to do so. Inasmuch as it was, for all periods relevant to the GEC claims, both: (1) the present owner of the site; and (2) the party in control of the alleged discharge, it can hardly claim to be "wholly innocent of wrongdoing" under the CWA.

Southdown's claim for contribution must similarly fail. Under Ohio law, contribution is "the right of a person who has been compelled to pay what another should have paid in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice." **Travelers Indem.**, 41 Ohio St. 2d 11 (Syllabus 2). Ohio common law regarding contribution among joint tortfeasors was replaced in 1976 with R.C. 2307.3 1, which provides:

[I]f two or more persons are jointly and severally liable in tort for the same injury or loss to person or property ... there is a right of contribution among them even though judgment has not been recovered against all or any of them. The right of contribution exists only in favor of a tortfeasor who has paid more than his proportionate share of the common liability.

R.C. 2307.31(A).

Common liability is regarded as the crucial element of a right to contribution. 18 O. Jur. 3d Contribution, Indemnity and Subrogation, § 8 (1980). It is, therefore, essential that the party claiming contribution and the party from whom contribution is sought both be liable. Only upon a determination that the contribution defendant is also liable for the underlying claim can a right

of contribution be found to exist. See e.g., *Stover v. Auto & Home Center, Inc.*, Williams App. No. WMS-87-1, slip **op.** (Nov. 27, 1987).

Southdown and USX do not share a common liability for failing to secure a permit for discharging pollutants into Mud Run Creek. In 1991, when the alleged discharge was first discovered by environmental officials, only Southdown had the authority and the obligation to bring the site into compliance with the CWA. In no sense was USX jointly or severally liable for any statutory liability. Even if the facts alleged in the Third-Party Complaint are true, therefore, Southdown cannot establish a crucial element of its contribution claim under R.C. 2307.31.

C. Allowing Contribution And/Or Indemnity Claims Here Would Undermine The Deterrent Provided By The Citizen Suit Provisions Of The CWA.

In a citizen suit under the CWA, the district court may award civil penalties, as appropriate. Such penalties are payable to the U.S. Treasury. *Gwaltney*, 484 U.S. 49. Courts considering the imposition of civil penalties generally have noted:

the judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury. Such penalties can be an important deterrence against future violations.

Sierra Club v. Simkins Industries, Inc., 847 F.2d 1109, 1113, **reh'g en banc denied**, 1988 U.S. App. LEXIS 12617 (4th Cir. 1988), cert. **denied**, 491 U.S. 904 (1989); see **also Atlantic States Legal Foundation v. Tyson Foods, Inc.**, 897 F.2d 1128, 1136 (11th Cir. 1990). In *Tyson Foods*, the court, citing *Tull v. United States*, 481 U.S. 412 (1987), stated:

, the Supreme Court made clear that economic gain and restoration of the status quo is not the only basis on which penalties should be

awarded under the Clean Water Act. In addition, the penalties are designed to punish violators for their noncompliance and to serve the goal of retribution.

897 F.2d at 1141. The *Tull Court* stated that “Congress wanted the district court to consider the need for retribution and deterrence, in addition to restitution, when it imposed civil penalties,” and noted that courts could “seek to deter future violations by basing the penalty on its economic impact.” *Tull*, **481** U.S. at **422-23**.

The Ohio Supreme Court has also recognized that deterrence is an important policy basis for civil penalties in environmental cases. In *State ex rel. Brown v. Dayton Malleable*, 1 Ohio St. 3d 15 1 (1982), a water enforcement case brought under Ohio law, the state supreme court aligned itself with federal courts by noting that civil penalties serve to deter future violations:

[B]ecause the function of a monetary penalty is to deter the polluting activity altogether and thus not give rise to the penalty at all, the amount of the penalty must be greater than abatement or compliance costs.

Dayton Malleable, 1 Ohio St.3d at 157, *citing* Notes, *Assessment of Civil Monetary Penalties for Water Pollution: A Proposal For Shifting The Burden of Proof Regarding Damages*, 30 Hastings L.J. 651, 670. See *also, State, ex rel. Celebrezze v. Thermal-Tron, Inc*, 71 Ohio App. 3d 11, 14 (Cuyahoga Cty. 1992) (“[M]onetary penalties are designed to deter conduct which is contrary to a regulatory scheme”).

By filing its third-party complaint, Southdown is essentially seeking to shift its liability for civil penalties and attorney fees to USX. If allowed to proceed along these lines, Southdown will have successfully thwarted one of the most important policy objectives of the CWA’s citizen suit provisions, namely deterrence. If the current owner and “person” in control of an unpermitted discharge is able to obtain indemnification or contribution for its ongoing statutory