

violations and any or all penalties flowing from it, the incentive to comply with the permit requirement is diminished correspondingly. USX cannot discharge Southdown's obligation to obtain the necessary NPDES permit. USX should not, therefore, be compelled to accept Southdown's penalty indirectly.

District courts are directed by statute to consider a number of factors in assessing a civil penalty. In accordance with 33 U.S.C. § 1319(d), courts must consider:

the seriousness of the violation or violations, the economic benefit (if any) resulting from the violation, any history of such violations, any good faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.

Accordingly, Southdown may raise equitable issues with this Court which could, in turn, affect the amount of any civil penalty, including the acts or omissions of third parties. Southdown's interests are adequately protected by the consideration of equitable factors pursuant to 33 U. S. C. §13 19(d). Additionally, even in cases where the CWA expressly reserves the right of a violator "against any third p&y whose acts may in any way have caused or contributed to" the discharge:

it appears to be the better course not to recognize a right to indemnity and, instead, to permit the absence of culpability to mitigate the amount of the fine.

***Tug Ocean Prince, Inc. v. United States*, 436 F. Supp. 907, 926 (S.D.N.Y. 1977), *aff'd in part, rev'd in part*, 584 F. 2d 1151 (2d Cir. 1978), cert. *denied*, 440 U.S. 959 (1979); see *also*, *United States v. General Motors*, 403 F. Supp. 115 1 (D. Conn. 1975) (imposing only a nominal**

fine of one dollar for defendant site owner's Federal Water Pollution Control Act violation, where violation was caused by vandalism and defendant completely lacked culpability).⁷

In defending against GEC's claims for civil penalties and attorney fees, therefore, Southdown will not be prejudiced by its inability to bring indemnity or contribution claims against USX. If, as Southdown claims, the alleged groundwater contamination at Landfill No. 1 is caused solely by materials deposited there prior to 1976, and if Southdown is able to establish that there is nothing it could have done after buying the property to mitigate, or at least obtain a permit for, the purported discharge, then the Court will undoubtedly take such factors into consideration. The relief accorded to GEC and against Southdown will presumably reflect such consideration.

D. To The Extent Southdown's Third-Party Claims Are Designed To Address Something More Than Southdown's Liability To GEC Under The CWA, They Are Outside The Scope Of Rule 14(a) And Otherwise Duplicative Of The CERCLA Action.

Southdown may argue that dismissal of all its third-party claims is inappropriate because such claims encompass much more than just reimbursement for civil penalties and GEC's attorney fees. To the extent Southdown's claims are broader than that, though, they clearly do not arise out of "the transaction or occurrence that is the subject matter of [GEC's] claim" and are thus outside the scope of permissible third-party practice under Rule 14(a). In addition, such claims overlap considerably those raised by Southdown in the CERCLA action. As such, they are abated by the first action.

⁷As noted above, the CWA citizen suit provisions in 33 U.S.C. § 1365 do not expressly envision third-party claims by the alleged violator. Such a reservation of rights does exist elsewhere in the CWA, though. See, e.g. 33 U.S. C. § 1321. This adds further support to the argument that Congress did not intend to allow third-party claims in cases such as this.

Fed.R.Civ.P. 14(a) authorizes a defendant to add a third-party defendant under certain 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.

Third-party practice is generally permitted when the "third-party's liability is dependent upon the outcome of the main claim" and such liability "must not arise out of a separate and independent claim." *Blais Const. Co. v. Hanover Square Associates-I*, 733 F.Supp. 149 (N.D.N.Y. 1990); see also *Kenneth Leventhal & Co v. Joyner Wholesale Co.*, 736 F.2d 29, 31 (2d Cir. 1984); *Farmers Prod. Credit Association of Oneonta v. Whiteman*, 100 F.R.D. 310, 312 (N.D.N.Y. 1983). Moreover, "the mere fact that the alleged third-party claim arises from the same transaction or set of facts as the original claim is not enough." *Blais Const.*, 733 F.Supp. at 152, citing 6 Wright & Miller, Federal Practice and Procedure, §1446 at 257 (1971).

To the extent Southdown's claims in this action seek reimbursement of remediation costs or other expenses not sought by GEC, they are not dependent upon the adjudication of GEC's CWA claims. Rather, these claims are independent of a determination of liability under the CWA and are not the proper subject of a third-party action.

As noted above, the doctrine of abatement also applies here. Dismissal of an action is appropriate "provided that an identity of issues exists and the controlling issues in the dismissed action will be determined in the other lawsuit." 5A Wright and Miller, Federal Practice and Procedure: Civil 2d §1360 (2d ed. 1990); see also *Sutcliffe Storage & Warehouse Co. v. U.S.*, 162 F.2d 849 (1st Cir. 1947). In *Sutcliffe*, the plaintiff filed four actions over a ten-day period in the district court, each claiming sums due for the use and occupancy of the same real estate

over different periods of time. The district court dismissed the three latter actions on the ground they were inseparable parts of the claim set forth in the first action. In affirming the district court's dismissal, the Second Circuit stated:

The pendency of a prior pending action in the same federal court is ground for abatement of the second action. [Citations omitted.] There is no reason why a court should be bothered or a litigant harassed with duplicating lawsuits on the same docket; it is enough if one complete adjudication of the controversy is had . . . the test as ordinarily stated is whether the claims set up are legally the same so that judgment in one is a bar to the others.

Sutcliffe Storage, 162 F.2d at 851. See also, *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3rd Cir. 1977) (citing *Sutcliffe Storage* in dicta for the proposition that a plaintiff has "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant."); *Oliney v. Gardner*, 771 F.2d 856, 859 (5th Cir. 1985) (citing *Walton* and holding that "when a plaintiff files a second complaint alleging the same cause of action as a prior, pending, related action, the second complaint may be dismissed. "); and *Zerilli v. Evening News Ass'n*, 628 F.2d 217, 232 (D.C. Cir. 1980) (citing *Walton* for the proposition that the plaintiff had "no right to maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant. ").

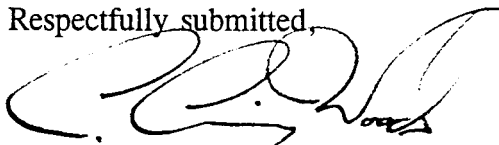
Here, in addition to its claims for reimbursement of civil penalties and attorney fees, Southdown alleges broadly that USX is liable for any contamination to Landfill No. 1 and must indemnify Southdown for any present and future costs Southdown incurs in investigating, assessing, and remediating the site. (Third-Party Complaint at 7, 8). Southdown further alleges that it is entitled to contribution from USX for all present and future costs it incurs in investigating, assessing, and remediating the site (Third-Party Complaint at 9). In this respect,

Southdown's third-party claims are identical to the claims set forth in Southdown's CERCLA suit, and are unrelated to the underlying CWA claims which form the basis for GEC's claims. Accordingly, even if this Court ultimately consolidates this action with the CERCLA case, it should nonetheless dismiss the third-party claims herein. Such a dismissal would not only eliminate the duplication inherent in Southdown's pleadings, but would also make clear that USX cannot be held liable to Southdown for any civil penalties and/or attorney fees awarded against Southdown under the CWA.

IV. CONCLUSION

For all the foregoing reasons, Third-Party Defendant USX Corporation respectfully prays that the Third-Party Complaint be dismissed in its entirety.

Respectfully submitted,



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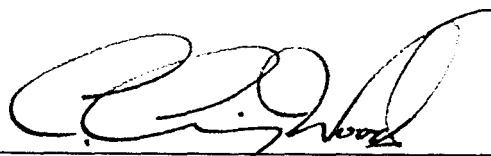
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion of Third-Party Defendant USX to Dismiss the Third-Party Complaint was served by regular United States mail, postage prepaid, on the following parties and/or counsel of record this 30th day of June, 1994:

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