

On March 5, 1997, the stay was extended to May 12, 1997, to allow for the issuance of a report by the environmental consultant, Panterra Corporation of Texas, retained by Southdown and USX.

On April 4, 1997, Panterra issued its report entitled "Alternatives feasibility evaluation" to Southdown and USX. Plaintiff's counsel was informed of the report and provided a copy on April 18, 1997.

On July 1, 1997, all of the parties, their respective counsel, and environmental consultants met at the offices of Bricker & Eckler in Columbus and engaged in settlement discussions. An offer to settle was proposed by GEC which was taken into consideration by Southdown and USX. Discussions continued over the summer with status conferences with the Court from time to time. An impasse lead to the scheduling of a settlement conference with the Court on September 23, 1997. Due to a conflict in Plaintiff's counsel's schedule, the September 23rd conference was rescheduled for October 6, 1997, which was later rescheduled for October 16, 1997, as a telephone conference. On October 16, 1997, during the status conference, the Court set a settlement conference for November 13, 1997, with an exchange of settlement letter by November 11, 1997.

On November 7, 1997, at 5:21 p.m., Frank Merrill, counsel for Southdown, faxed a letter to GEC's counsel informing that the tract of land containing the landfill had been sold to Dirtvest, Ltd., and 444 Sandhill, Inc. A copy of that letter is attached as Exhibit A. The

Court was informed of the matter by letter dated November 11, 1997. At a telephone status conference with the Court on November 25, 1997, the Court allowed Plaintiff time to consider, evaluate, and present appropriate motions addressing the legal issues presented by the transfer of ownership. Hence the instant motion.

II. UNDERLYING FACTS RELEVANT TO THE TRANSFER OF OWNERSHIP

Southdown owns hundreds of acres near the city of Fairborn upon which it conducts its portland cement production plant and several limestone quarries from which it gets the raw materials to produce portland cement. In addition, Southdown and the predecessor owner of the property, USX, operated several landfills in which they disposed of the industrial wastes of the operation. Indeed, as noted above, after Southdown received GEC's notice of intent to sue, Southdown determined to bring its own claims against the prior owner, Atlas Cement Company, and its parent, USX Corporation. The Court and parties have been informed that Southdown and USX have reached a settlement of their litigation and the *Southdown v. USX* litigation has been dismissed.

On November 7, 1997, Plaintiff was informed by Frank Merrill, counsel for Southdown, that the properties at issue in the GEC case, the landfill and discharge point, had been sold. See letter attached hereto as Exhibit A. Upon its own investigation, Plaintiff has learned that Southdown has sold parts of its property to two separate entities, namely 444 Sandhill, Inc. ("444") and Dirtvest, Ltd. ("Dirtvest"). These transfers occurred on

September 30, 1997. A copy of the deed to 444 is attached hereto as Exhibit B and the deed to Dirtvest is attached as Exhibit C.

Plaintiff's investigation has revealed that Dirtvest, Ltd., is an Ohio limited liability company registered with the Ohio Secretary of State's office on August 8, 1997, I.D. #988373. Its office address is listed as 18 West First Street, Suite 200, Dayton, Ohio 45402. Its agent for service of process is Jacob Myers. See Affidavit of Susan Lanning attached hereto as Exhibit D.

444 Sandhill, Inc., is an Ohio corporation incorporated with the Ohio Secretary of State's office on September 26, 1997. The agent for service of process is Adam J. Biehl, 18 West First Street, Suite 200, Dayton, Ohio 45402. See Affidavit of Susan Lanning attached hereto as Exhibit D.

The records of the County Auditor's office reveal that Kohner Assoc., c/o Robert L. Kohner, P.O. Box 250, Dayton, Ohio 45449, are to receive the tax billings for 444 Sandhill, Inc. See Exhibit E.

In its 1997 Regulation Q filing with the Federal Securities and Exchange Commission (see Exhibit F), at Part II, pp. 17-18, Southdown states:

On September 30, 1997, the Company sold the property that is the subject of these lawsuits to independent third parties. The property was sold "as is, where is" and the Company assumed no obligations to remediate the property. Because of the transaction, the Company is negotiating a stipulated dismissal of this lawsuit with USX Corporation. Also, since the

Company no longer owns this property, the Company believes it should have no ongoing obligation under the Clean Water Act to obtain a permit for the alleged discharge from the property, which is the sole allegation in the GEC Case. The Court has ordered the parties to attend a settlement conference with the Court. A date for this conference has not been established as of this writing. The Company intends to move the Court for a dismissal of the GEC Case based on the recent transaction.

To the best of Plaintiff's ability, it appears that the part of the landfill from which the pollution discharge emanates was sold to Dirtvest. However, 444 owns part of the landfill which contributes to the discharge. Thus, both parties have an interest in the outcome of the pending litigation.

III. DISCUSSION

A. Joinder of Parties

Rule 19(A) reads in relevant part:

Persons to be joined if feasible. 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.

Rule 19 requires a two-step analysis to determine when persons should be joined to pending litigation. The first step requires a determination of whether an absent