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APR 04 2005

STATE OF ILLINOIS
Pollution Control Board

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

GRAND PIER CENTER LLC
AMERICAN INTERNATIONAL
SPECIALTY LINES INSURANCE CO.
as subrogee of GRAND PIER CENTER LLC

Complainants,

v.

RIVER EAST LLC
CHICAGO DOCK AND CANAL TRUST
CHICAGO DOCK AND CANAL COMPANY
KERR-McGEE CHEMICAL LLC

Respondents.

PCB 05-157
(Enforcement)

TO:	Frederick S. Mueller Daniel C. Murray Garrett L. Boehm, Jr. JOHNSON & BELL, LTD. 55 East Monroe Street Suite 4100 Chicago, IL 60603-5803	
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NOTICE OF MOTION

PLEASE TAKE NOTICE that on the 4 day of April, 2005, at Filed before .m. I shall appear before the Illinois Pollution Control Board in the James R. Thompson Center, Chicago, Illinois and present **KERR-McGEE CHEMICAL LLC'S MOTION TO DISMISS THE COMPLAINT.**

Kerr-McGee Chemical LLC

By:

One of its attorneys

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KERR-McGEE CHEMICAL LLC'S MOTION TO DISMISS THE COMPLAINT

Respondent, Kerr-McGee Chemical LLC ("Kerr-McGee"), respectfully asks the Illinois Pollution Control Board ("the Board") to dismiss the Complaint brought by Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC (collectively, "Grand Pier"). Grand Pier's Complaint is duplicitous and frivolous and thus should be dismissed pursuant to Ill. Admin. Code tit. 35, § 104.414.¹ Grand Pier's Complaint is duplicitous because it is substantially similar to a civil action that Grand Pier filed in the United States District Court for the Northern District of Illinois. Grand Pier's Complaint is frivolous because it seeks relief that the Board does not have the authority to grant and it fails to state a cause of action upon which the Board can grant relief.

¹ Section 103.212(b) of Title 35 of the Illinois Administrative Code provides that a respondent may, within 30 days after service, move to dismiss a complaint as duplicitous or frivolous. Kerr-McGee received service of the Complaint on March 3, 2005.

I. Grand Pier's Complaint is duplicitous

“‘Duplicitous’ or ‘Duplicative’ means the matter is identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202; see also Brandle v. Ropp, PCB 85-68, 1985 WL 21380, *1 (Ill. Pol. Control Bd., June 13, 1985) (Ex. ‘C’) (noting that a complaint is duplicitous if it is identical or substantially similar to one brought in another forum). Grand Pier’s Complaint is duplicitous because it is substantially similar to Grand Pier’s Second Amended Complaint in an identically captioned action that is before the United States District Court for the Northern District of Illinois.² A copy of Grand Pier’s Second Amended Complaint in that action is attached as Exhibit ‘A.’ A copy of Grand Pier’s Complaint with the Board is attached as Exhibit ‘B.’ The two actions are against the same parties, are based on the same contaminant, are premised on the same site, and demand the same relief. In both actions, Grand Pier seeks recovery of “any costs incurred by [Grand Pier], or to be incurred by [Grand Pier], in performing response activities at the site identified by [EPA] as the RV3 North Columbus Drive Site (the RV3 Site) in Chicago, Illinois.” (Ex. A at ¶ 1; Ex. B at ¶ 1.) Because Grand Pier pursues a substantially similar action before the United States District Court for the Northern District of Illinois, the Board should dismiss Grand Pier’s Complaint as duplicitous.

II. Grand Pier's Complaint is frivolous

“‘Frivolous’ means a request for relief that the Board does not have the authority to grant, or a complaint that fails to state a cause of action upon which the Board can grant relief.” 35 Ill.

² On March 1, 2005, counsel for Grand Pier informally notified Counsel for Kerr-McGee that Grand Pier was filing (1) a Second Amended Complaint in federal district court to add state law claims for negligence, strict liability, and contribution and (2) a Complaint before the Illinois Pollution Control Board. Those papers were filed on February 25, 2005 and February 28, 2005, respectively. Grand Pier filed its First Amended Complaint in the federal district court on February 4, 2005.

Adm. Code 101.202. Grand Pier's Complaint is frivolous because it seeks relief that the Board does not have the authority to grant and it fails to state a cause of action upon which the Board can grant relief.

A. The Board is not authorized to award the relief that Grand Pier demands

Grand Pier alleges in its Complaint that its action is to enforce Sections 12(a), 12(d) and 21(e) of the Illinois Environmental Protection Act ("the Act").³ (Ex. 'B' at ¶ 1.) The penalties for violations of Sections 12(a), 12(d) or 21(e) of the Act are set forth and limited by 415 ILCS 5/42(a). That Section of the Act provides, in pertinent part, as follows:

Except as provided in this Section, any person that violates any provision of this Act or any regulation adopted by the Board, or any permit or term or condition thereof, or that violates any order of the Board pursuant to this Act, shall be liable for a civil penalty of not to exceed \$50,000 for the violation and an additional civil penalty of not to exceed \$10,000 for each day during which the violation continues

Grand Pier does not seek the imposition of the penalties referred to in the Act. Instead, Grand Pier seeks to recover its own attorney fees, expert witness fees, and past and future response costs with interest. (Ex. 'B' at 8-9.)⁴ None of the relief sought by Grand Pier is authorized by the

³ Section 12(a) provides that no person shall "[c]ause or threaten or allow the discharge of any contaminants into the environment in any State so as to cause or tend to cause water pollution in Illinois, either alone or in combination with matter from other sources, or so as to violate regulations or standards adopted by the Pollution Control Board under this Act." 415 ILCS 5/12(a).

Section 12(d) provides that no person shall "[d]eposit any contaminants upon the land in such place and manner so as to create a water pollution hazard." 415 ILCS 5/12(d).

Section 21(e) provides that no person shall "[d]ispose, treat, store or abandon any waste, or transport any waste into this State for disposal, treatment, storage or abandonment, except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder." 415 ILCS 5/21(e).

⁴ Grand Pier also asks the Board to rule that Respondents are responsible for any future remediation. Grand Pier's request is pointless in light of Grand Pier's own allegation that Letters of Completion were issued by the United States Environmental Protection Agency with respect to the site at issue. (Ex. 'B' at ¶¶ 22-23.)

Act for the violations of Sections 12(a), 12(d) or 21(e). Indeed, the only provision of the Act that contemplates the reimbursement of response costs does so only with respect to response costs incurred by Illinois or a unit of local government. See 415 ILCS 5/22.2(f) (“Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (j) of this Section, the following persons shall be liable for all costs of removal or remedial action *incurred by the State of Illinois or any unit of local government* as a result of a release or substantial threat of a release of a hazardous substance or pesticide”) (emphasis added).

B. Grand Pier fails to state a cause of action upon which the Board can grant relief

Grand Pier’s claims are premised on activities that it alleges occurred in the first third of the twentieth century, decades before Illinois enacted the statutory bases upon which Grand Pier relies. The only contamination-activity alleged by Grand Pier is that described in paragraph 14 of its Complaint, wherein Grand Pier alleges that “[b]etween at least 1915 and 1933, Lindsay Light Company operated its incandescent gaslight mantle manufacturing business at the Lindsay Light II Site, and arranged for the disposal of hazardous substances at . . . the parcel pertinent to this citizen suit.” Sections 12(a), 12(d) and 21(e) of the Act do not provide Grand Pier a cause of action for activities that occurred decades before their enactment. Indeed, liability under Section 21(e) for activities prior to the Act is a logical impossibility, as liability under that Section is explicitly premised on the failure to dispose of waste “except at a site or facility which meets the requirements of this Act and of regulations and standards thereunder.” 415 ICLS 5/21(e).

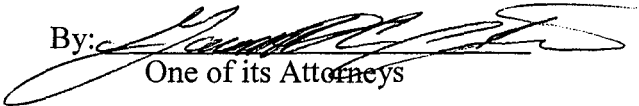
CONCLUSION

Grand Pier’s Complaint is duplicitous because it is substantially similar to Grand Pier’s action against Respondents before the United States District Court for the Northern District of Illinois. Grand Pier’s Complaint is frivolous because it request relief that the Board is not

authorized to grant and fails to state a cause of action upon which the Board may grant relief. For these reasons, Kerr-McGee respectfully asks the Board to dismiss Grand Pier's Complaint.

Dated: April 4, 2005

Respectfully submitted,
Kerr-McGee Chemical LLC

By: 
One of its Attorneys

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CERTIFICATE OF SERVICE

I, Lynne Pudlo, a non-attorney, being first sworn on oath, depose and state that I served the attached document on the attorneys of record by mailing true and correct copies in a properly addressed, sealed envelope with appropriate postage affixed and depositing same in the U.S. mail located at One North Franklin Street, Chicago, Illinois, before 5:00 p.m. on April 4, 2005.

Lynne Pudlo

Subscribed and sworn to
before me April 4, 2005.

Michelle M. Patterson
Notary Public



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