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)

COMPLAINANTS' MEMORANDUM IN OPPOSITION TO KERR-MCGEE CHEMICAL LLC'S MOTION TO DISMISS THE COMPLAINT

Respondent Kerr-McGee Chemical LLC (Kerr-McGee) raises three argument to support its motion to dismiss the Complaint: (1) this matter is duplicative of pending litigation between the same parties in federal district court; (2) this matter is frivolous because the Board lacks the authority to grant the relief Complainants seek; and (3) this matter is frivolous because the Illinois Environmental Protection Act (Act) does not apply to contamination which first occurred prior to the effective date of the Act. Complainants Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC respectfully submit that Kerr-McGee's arguments are meritless. Consequently, Complainants request the Board to deny Kerr-McGee's motion to dismiss and to enter an order establishing that the Complaint is neither duplicative (sometimes termed "duplicitous") nor frivolous. This matter should be set for hearing.

I. APPLICABLE PRECEDENT UNDENIABLY SHOWS THAT THIS COMPLAINT IS NOT DUPLICATIVE.

The Complaint pending before the Board is not duplicative of other pending litigation between the parties. To be clear, Complainants' Complaint before the Board and the pending Second Amended Complaint before the federal district court against the same Respondents including Kerr-McGee, arise out of the same operative facts. However, the two Complaints allege different causes of action. The six-count Second Amended Complaint before the federal district court seeks relief under CERCLA pursuant to 42 U.S.C. 9607(a), 42 U.S.C. 9607(a)(4)(B), 42 U.S.C. 9613(f)(1), common law strict liability, common law negligence, and the Illinois Contribution Act, 740 ILCS 100/2. On the other hand, the three-count Complaint before the Board exclusively seeks relief according to the Illinois Environmental Protection Act, sections 12(a), 12(d) and 21(e).

In an analogous circumstance in *Chrysler Realty Corp. v. Thomas Indus., Inc.*, PCB 01-25 (Dec. 7, 2000), this Board held that Chrysler Realty's complaint before the Board seeking relief under the Act and the Leaking Underground Storage Tank Program was not duplicative of pending litigation in the federal court sounding in federal law, negligence, and unjust enrichment. Notably, Chrysler Realty's allegations under the Act sections 12(a), 12(d) and 21(e) were dismissed by the federal court for lack of jurisdiction. *See Chrysler Realty Corp. v. Thomas Indus.*, 97 F.Supp.2d 877 (N.D. Ill. 2000). Accordingly, in this case, seeking relief under the Act in federal court would have been pointless. Thus, Complainants herein filed suit before the Board, rather than the federal court, for relief under the Act. To deny Complainants their day before the Board would require Complainants to elect between asserting their rights in federal court or before the Board, when the law plainly provides that Complainants have viable, but separate, claims in each forum. *See also Dayton Hudson Corp. v. Cardinal Indus., Inc.*, PCB

97-134 at 3-5 (Aug. 21, 1997) (holding Board action sounding in violations of the Act was not duplicitous of similar federal action sounding in violations of CERCLA); *Lake County Forest Preserve Dist. v. Ostro*, PCB 92-80 (July 30, 1992) (holding that Board action was not duplicitous of federal action filed on the same day involving the same parties, the same time frame, and the same actions, because the federal action was based on statutes and legal theories other than the Act). This Board's clear precedent in *Chrysler Realty*, PCB 01-25 (Dec. 7, 2000), established that Complainants' instant cause is not duplicative.

II. THE BOARD HAS REPEATEDLY HELD IT HAS AUTHORITY TO ISSUE ORDERS REQUIRING REIMBURSEMENT OF CLEAN-UP COSTS.

Complainants seek relief for past and future costs of response at the RV3 North Columbus Drive Site, costs of litigation, and an injunction ordering Respondents to complete future remediation if required by administrative order or judicial decree. Kerr-McGee argues that this Board lacks the authority to grant such relief. Kerr-McGee is mistaken.

First, the Board has consistently held that it has the authority to award cleanup costs to private parties for a violation of the Act. *See Chrysler Realty*, PCB 01-25 (Dec. 7, 2000); *Lake County Forest Preserve Dist. v. Ostro*, PCB 92-80 (March 31, 1994). Furthermore, as noted in this Board's *Ostro* decision, the Board's authority to grant such relief is based on the broad language of Section 33(a) of the Act (415 ILCS 5/33(a)) as well as the Illinois Supreme Court decision in *People v. Fiorini*, 143 Ill.2d 318 (1991). *Ostro*, PCB 92-80 at 12-13 (March 31, 1994). Moreover, the Supreme Court in *Fiorini* held that an award of clean-up costs is properly left to the trial court's (or Board's) authority. *Fiorini*, 143 Ill.2d at 350; *Chrysler Realty*, PCB 01-25 at 3 (Dec. 7, 2000).

Second, the Act provides clear authority for the Board to order a party to cease and desist from violations of the Act or of the Board's rules and regulations. *Chrysler Realty*, PCB 01-25 at 3 (Dec. 7, 2000) citing 415 ILCS 5/33(b). Contrary to Kerr-McGee's contention, the Board has injunctive powers. Furthermore, such an injunction would not be "pointless" as Kerr-McGee argues. As stated in the Complaint, Complainants continue to incur additional costs of response. Complaint ¶ 24. The proof of this allegation will be demonstrated at hearing.

Accordingly, there is no merit to Kerr-McGee's claim that the allegations raised by Complainants are frivolous.

III. THE ACT GOVERNS THE CLAIMS AS PLED BY COMPLAINANTS.

Kerr-McGee's final mistaken argument in support of its motion to dismiss is that Complainants cannot seek relief for the clean-up costs of contamination that occurred before the Act was signed into law. Kerr-McGee would strip the Act of any authority over any clean-up operations concerning sites initially contaminated prior to enactment of the Act. Not surprisingly, Kerr-McGee provides no authority for such a startling conclusion. In fact, the legislature intended the Act to have retroactive effect as the appellate court determined in *State Oil Co. v. Pollution Control Board*, 822 N.E.2d 876 (2d Dist. 2004). That opinion held:

> We find indications in section 2 of the Act (15 ILCS 5/2 (West 1996)) that the legislature generally intended the Act to be given retroactive application. Specifically, section 2(a)(vi) states, "despite the existing laws and regulations concerning environmental damage there exist *continuing* destruction and damage to the environment." (Emphasis added.) 415 ILCS 5/2(a)(vi) (West 1996). Section 2(b) states that one of the purposes of the Act is to restore the environment. 415 ILCS 5/2(b) (West 1996). Thus, it is clear that the legislature intended the Act to address ongoing problems, which by definition existed at the time that the Act was enacted. Additionally, the Act calls for liberal construction to effectuate its purposes. 415 ILCS 5/2(c) (West 1996). *Accordingly, we find that the legislature manifested an intent that the Act be generally given retroactive application...*

State Oil, 822 N.E.2d at 882 (Emphasis added).

The wrongful acts of Kerr-McGee over 70 years ago resulted in radioactive thorium contamination that has persisted to the present day. Complaint ¶ 12-14, 17-24. Furthermore, Complainants first incurred costs related to the clean up of the RV3 Site in 2000 and continue to incur costs today. *Id.* These costs were incurred by Complainants subsequent to enactment of the Act, thereby subjecting Respondents to provisions of the Act as alleged in the instant Complaint. Kerr-McGee's final contention is not well-taken.

CONCLUSION

As established by the foregoing, Kerr-McGee's Motion to Dismiss the Complaint lacks any basis in law. Consequently, Complainants request this Board to deny the motion and enter an order finding the Complaint to be neither duplicitous nor frivolous, and to set this matter for hearing.

By _____
One of Complainants' Attorneys

Frederick S. Mueller
Daniel C. Murray
Garrett L. Boehm, Jr.
JOHNSON & BELL, LTD.
Suite 4100
55 East Monroe Street
Chicago, Illinois 60603-5803

Tel. (312) 372-0770

1208576

CERTIFICATE OF SERVICE

I, the undersigned, on oath, state that I have served on the date of April 18, 2005, the attached Complainants' Memorandum in Opposition to Kerr-McGee Chemical LLC's Motion to Dismiss the Complaint by Certified mail, upon the following persons:

Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601-3242

Attorney for River East LLC and
Chicago Dock and Canal Trust

John T. Smith II
COVINGTON & BURLING
1201 Pennsylvania Avenue N.W.
Washington, D.C. 20004-2401

Attorney for Kerr-McGee Chemical LLC

Garrett L. Boehm, Jr.
JOHNSON & BELL, LTD.
55 East Monroe Street, Suite 4100
Chicago, IL 60603
(312) 372-0770

Subscribed to and sworn before me
This 18th day of April, 2005.

Cynthia Lea Tempel
Notary Public

"OFFICIAL SEAL"
CYNTHIA LEA TEMPEL
NOTARY PUBLIC STATE OF ILLINOIS
My Commission Expires 10/20/2005

My commission expires: Oct 20, 2005