

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

RECEIVED
CLERK'S OFFICE

JUN 13 2005

STATE OF ILLINOIS
Pollution Control Board

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

Complainants,)

v.)

PCB 05-157
(Enforcement)

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

Respondents.)

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

Donald J. Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601-3242

NOTICE OF FILING

PLEASE TAKE NOTICE that on June 13, 2005, we caused to be filed with the Illinois Pollution Control Board in the James R. Thompson Center, Chicago, Illinois, **KERR-McGEE CHEMICAL LLC'S MOTION FOR LEAVE TO FILE A COUNTER-COMPLAINT** and **COUNTER-COMPLAINT**, copies of which are served upon you along with this notice.

Kerr-McGee Chemical LLC

By:


One of its attorneys

Michael P. Connelly
Garrett C. Carter
Connelly Roberts & McGivney LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
Tele: (312) 251.9600

RECEIVED
CLERK'S OFFICE

JUN 13 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
(Citizens Enforcement - Land)

**KERR-McGEE CHEMICAL LLC'S MOTION FOR LEAVE TO FILE A COUNTER-
COMPLAINT**

Respondent Kerr-McGee Chemical LLC (Kerr-McGee) respectfully asks the Illinois Pollution Control Board (Board) for permission to file a counter-complaint in the above captioned proceeding, initiated by Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC (collectively, Grand Pier).

As required by the Board's procedural rules, 35 Ill. Adm. Code 103.206(d), (e), the attached counter-complaint sets forth a claim that arises out of the occurrences that are the subject of the above captioned proceeding: thorium residues exposed to the environment during construction for commercial development by Grand Pier in the Streeterville District of the City of Chicago.

Respectfully submitted,


Michael P. Connelly
Garrett C. Carter
Connelly Roberts & McGivney LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
(312) 251-9600

Peter J. Nickles
J.T. Smith II
Thomas E. Hogan
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20044-7566
(202) 662-6000

Attorneys for Respondent
Kerr-McGee Chemical LLC

Dated: June 13, 2005

CERTIFICATE OF SERVICE

I, Lynne Pudlo, a non-attorney, being first sworn on oath, depose and state that I served the attached Motion for Leave to File a Counter-Complaint and Counter-Complaint 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 June 13, 2005.

Lynne Pudlo

Subscribed and sworn to
before me June 13, 2005.

Michelle M. Patterson
Notary Public



**BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD**

**RECEIVED
CLERK'S OFFICE**

JUN 13 2005

**STATE OF 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

(Citizens Enforcement - Land)

COUNTER-COMPLAINT

Kerr-McGee Chemical LLC (Kerr-McGee) counterclaims against Grand Pier Center LLC (Grand Pier) and American International Specialty Lines Insurance Co. (AISLI), as subrogee of Grand Pier (Counter-Complaint Respondents), averring as follows:

1. To the extent that the Board has jurisdiction over the Complaint, the Board has jurisdiction over this Counter-Complaint pursuant to 35 IAC 103.200 and Sections 5(d), 31(d) and 33(a) of the Act.
2. In 1997, Grand Pier acquired property in Chicago, Cook County, Illinois bounded by North Columbus Drive, East Grand Avenue, North St. Clair Street and East Illinois Street, which property, at time of acquisition by Grand Pier, was paved and in use as a parking lot. This site is generally denoted by the address 200 East Illinois Street.
3. Before acquiring this property, Grand Pier retained one or more environmental consultants to conduct environmental reviews that included the 200 East Illinois Street site.

4. This environmental review process indicated that a site immediately to the east of 200 East Illinois Street and on the other side of North Columbus Drive at 316 East Illinois Street was undergoing cleanup pursuant to a 1996 unilateral administrative order (UAO) issued by the U.S. Environmental Protection Agency, pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et. seq.*, to address contamination by thorium resulting from the historical operations of the Lindsay Light Co. in this area of Chicago.

5. In April 1999, Grand Pier's environmental consultant offered to conduct a file review to investigate the nature of the environmental concern for an additional cost. Neither Grand Pier nor any consultant to Grand Pier conducted a file search at the EPA to learn the particulars of the then-ongoing cleanup activities.

6. Grand Pier knew or should have known that, until construction of North Columbus Drive in the mid-1980s, the properties at 316 East Illinois Street and 200 East Illinois Street were contiguous. Moreover, a file search at the EPA of the then-ongoing cleanup would have revealed that characterization of the contamination pertaining to the 316 East Illinois Street site indicated that pockets of thorium residues extended beyond the Western property boundary beneath sidewalks and North Columbus Drive.

7. Although Grand Pier and/or its consultants and contractors, conducted subsurface borings at the 200 East Illinois Street site, none was addressed to the possibility of thorium residues despite the fact that Grand Pier knew or should have know of the presence of thorium residues and/or the possibility of the presence of thorium residues.

8. Ray M. Chin, the principal behind Grand Pier and a trained engineer, previously worked for Commonwealth Edison and was involved with one or more nuclear power

generating stations, where he obtained familiarity with radionuclides and the potential human health risks associated with them. Ray M. Chin knew or should have known of the presence of thorium residues at the 200 East Illinois Street site.

9. At the time Grand Pier acquired the property at 200 East Illinois Street site, it knew or should have known of the presence of thorium residues at the site.

10. The pavement covering the 200 East Illinois Street site acted as a shield to prevent human exposure to the "gamma radiation" associated with thorium residues. In a September 1999 Enforcement Confidential Addendum regarding paved areas adjacent to the Lindsay Light II Site, EPA determined that the radioactive material in the soils was not water soluble and thus did not present a water contamination risk and that the shielding effects of the asphalt, concrete, and overburden prevent the release of the radiation to humans or the environment. EPA also determined in the September 1999 Enforcement Confidential Addendum that the radioactive materials would be released to the environment if the shielding materials were disturbed or if a person tunneled into the radioactive materials. The September 1999 Enforcement Confidential Addendum pertains to the Action Memorandum accompanying an Administrative Order on Consent regarding the Lindsay Light II Site.

11. In January 2000, Grand Pier began to remove the pavement on the surface of the 200 East Illinois Street site, to excavate the site, and to dispose of that material at the Beverly Gravel Site, a quarry in Elgin, Illinois. Grand Pier undertook these actions to prepare for construction of a commercial building despite the fact that Grand Pier knew or should have known that its actions would cause a risk to human health and the environment from exposure to gamma radiation.

12. Only by Grand Pier's removal of the pavement and excavation of the site for construction of a commercial development, was the public and the environment exposed to the risks of thorium. Grand Pier undertook the removal of the pavement and excavation of the site for its own economic benefit. Kerr-McGee did not stand to benefit economically from Grand Pier's commercial development activities.

13. In February 2000, EPA directed cessation of these excavation activities pending a survey to determine whether the excavation would expose thorium residues. After a survey by EPA personnel indicated the presence of thorium residues, EPA amended a 1996 unilateral administrative order with respect to the 316 East Illinois Street site to direct thorium removal activities at the 200 East Illinois Street site by Grand Pier. EPA also directed the removal of the thorium residues that Grand Pier had disposed of at the Beverly Gravel Site.

14. In March 2000, Kerr-McGee and Grand Pier reached an agreement by which both parties reserved all rights to seek future reimbursement, but, to enable prompt conduct of removal activities directed by EPA, Kerr-McGee undertook to arrange transportation and disposal of thorium residues to be excavated by Grand Pier's contractor at the 200 East Illinois Street site.

15. As a result of Grand Pier's actions, Kerr-McGee has incurred approximately \$3.6 million of costs.

16. Pursuant to a consent decree under § 107 of CERCLA, 96 U.S.C. § 9607, entered in the United States District Court for the Northern District of Illinois in June 2004, Kerr-McGee has reimbursed EPA approximately \$130,000 for its costs of oversight and response with respect to the 200 East Illinois Street site.

17. Grand Pier has not paid any share of these EPA costs or reimbursed Kerr-McGee for any of the costs incurred by Kerr-McGee.

COUNTER-COMPLAINT COUNT I: 415 ILCS 5/21(e)

18. Kerr-McGee repeats and realleges the allegations of paragraphs of 1-17 of its Counter-Complaint as if fully set forth herein.

19. The Act provides that no person shall dispose, 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 the Act and of regulations and standards thereunder. 415 ILCS 5/21(e).

20. Grand Pier's removal of asphalt, concrete, and overburden at the 200 East Illinois Street site, the excavation of the site, and the subsequent disposal of that material were acts of "disposal," as that term is defined in 415 ILCS 5/3.185, other than at a site or facility which meets the requirements of the Act and of regulations and standards thereunder.

PRAYER FOR RELIEF

WHEREFORE, Kerr-McGee prays for judgment against Grand Pier and AISLI as follows:

A. An order requiring Counter-Complaint Respondents to reimburse Kerr-McGee for the \$3.6 million in response costs that Kerr-McGee has incurred and the \$130,000 Kerr-McGee reimbursed to the United States related to removal of thorium at the 200 East Illinois Street site, together with maximum lawfully allowed interest thereon;

B. An order requiring Counter-Complaint Respondents to pay the maximum civil penalties provided for by the Act;

C. Such other and further relief as the Board may deem just and proper.