BEFORE THE ILLINOIS POLLUTION CONTROL BOARD

GRAND PIER CENTER LLC **AMERICAN INTERNATIONAL** **SPECIALTY LINES INSURANCE CO.** ***as subrogee of* GRAND PIER CENTER LLC**	)	
Complainants,	)	**PCB 05-157** **(Citizens Enforcement – Land)**
v.	)	
RIVER EAST LLC **CHICAGO DOCK AND CANAL TRUST** **CHICAGO DOCK AND CANAL COMPANY** **KERR-McGEE CHEMICAL LLC**	)	
Respondents.	)	

PLAINTIFF'S MOTION TO DISMISS AFFIRMATIVE DEFENSES

Complainants Grand Pier LLC and American International Specialty Lines Insurance Co., move, pursuant to Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615, for an order dismissing, with prejudice, Defendant Kerr-McGee's affirmative defenses to Complainants' Complaint.

Introduction

On February 25, 2005, Complainants filed a three-count Complaint against Defendants seeking reimbursement of clean-up costs at the RV3 Site in Chicago according to Sections 12(a), 12(d), and 21(e) of the Environmental Protection Act (415 ILCS 5/1 *et seq.*). Respondent Kerr-McGee answered the Complaint on June 13, 2005, and asserted enumerated affirmative defenses. Service of the Answer and affirmative defenses was received on June 16, 2005.

Standard

The test for whether a defense is affirmative and must be pled by the defendant is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated. *Ferris Elevator Co., Inc. v. Neffco, Inc.*, 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3d Dist. 1996); *Condon v. American Telephone and Telegraph Co., Inc.*, 210 Ill.App.3d 701, 709, 569 N.E.2d 518, 523 (2d Dist. 1991).

In other words, an affirmative defense confesses or admits the cause of action alleged but seeks to avoid the cause of action by asserting new matter not contained in the Complaint or Answer. The issue raised by an affirmative defense must be one outside the four corners of the Complaint. *See Corbett v. Devon Bank*, 12 Ill.App.3d 559, 569-70, 299 N.E.2d 521, 527 (1st Dist. 1973). Finally, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *International Ins. Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993).

ARGUMENT

I. KERR-MCGEE'S FIRST AFFIRMATIVE DEFENSE SHOULD BE DISMISSED: THIS BOARD HAS JURISDICTION OVER THE COMPLAINT.

Kerr-McGee's first asserted affirmative defense alleges that "[t]he Board does not have jurisdiction to award cleanup costs to a private party for violations of Sections 21(e), 12(a), and 12(d) of the Illinois Environmental Protection Act."

It is now the law of the case that this Board does indeed have the jurisdiction and authority to award cleanup costs to a private party for violations of the Act. On May 19, 2005, the Board issued an order in this case holding the following:

> "Since 1994, the Board has consistently held that pursuant to the broad language of Section 33 of the Act (415 ILCS 5/33 (2002)), the Board has the authority to award cleanup costs to private parties for a violation of the Act....[T]he Board finds that the Board does have the authority to grant cost recovery and a cease and desist order."

Consequently, it is the law of the case that this Board has the jurisdiction and authority to award a private party cleanup costs for violation of the Act. Kerr-McGee's first affirmative defense should be dismissed with prejudice. *See Weiss v. Waterhouse Securities*, 208 Ill.2d 439, 448, 804 N.E.2d 536, 541 (2004) (law of the case doctrine precludes relitigation of issue previously decided).

II. KERR-MCGEE'S SECOND, THIRD, AND FOURTH AFFIRMATIVE DEFENSES SHOULD BE DISMISSED: FAILURE TO STATE A CLAIM IS AN INVALID AFFIRMATIVE DEFENSE.

Kerr-McGee's second, third, and fourth affirmative defenses all allege "failure to state a claim" as to Plaintiffs' first, second, and third counts of the Complaint. However, if the pleading does not admit the apparent right to the claim and instead merely attacks the sufficiency of the claim, it is not a valid affirmative defense. *Worner Agency, Inc., v. Doyle*, 121 Ill.App.3d 219, 222-23, 459 N.E.2d 633 (4th Dist. 1984). By contending that the Complaint fails to state a claim for which relief can be granted, Kerr-McGee fails to admit the apparent right to the claim. If Kerr-McGee wishes to attack the sufficiency of the claim, it should do so properly, through a motion to strike or dismiss, rather than through the improperly pled so-called affirmative defense of failure to state a claim.

Kerr-McGee's second, third, and fourth affirmative defenses should be dismissed with prejudice.

III. KERR-MCGEE'S FIFTH, SIXTH, AND SEVENTH AFFIRMATIVE DEFENSES SHOULD BE DISMISSED FOR FAILURE TO ALLEGE SUFFICIENT FACTS.

Kerr-McGee's fifth affirmative defense alleges that its liability "should be proportionally reduced because Complainants' own fault contributed to" the contamination of the Site. The sixth affirmative defense alleges in a conclusory manner that Complainants' claims are barred due to acts of third parties or due to events out of Respondent's control. The seventh affirmative defense asserts Complainants "knowingly and voluntarily assumed the risk" of incurring damages for which Complainants now seek recovery. Kerr-McGee has failed to allege sufficient facts to support these alleged affirmative defenses which amount to nothing more than unsubstantiated legal conclusions.

As previously stated, the facts establishing an affirmative defense must be pled with the same degree of specificity required by a plaintiff to establish a cause of action. *Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d at 853. Here, Kerr-McGee has completely omitted any facts to support its sundry legal conclusions including that Complainants may be proportionally liable for the cleanup costs at the Site, actions of third parties bars Complainants' cause of action, and Complainants voluntarily assumed the risk of damages at the Site. Consequently, these affirmative defenses should be dismissed.

IV. KERR-MCGEE'S EIGHTH AFFIRMATIVE DEFENSE SHOULD BE DISMISSED AS THE AFFIRMATIVE DEFENSE IS LEGALLY INSUFFICIENT.

Kerr-McGee's Eighth Affirmative Defense alleges Complainants' claims are preempted by federal law. The scope of Kerr-McGee's allegation is unclear. Due to the vague and ambiguous nature of the purported affirmative defense, it should be summarily dismissed. In any event, taken generally, Kerr-McGee may be arguing that the entire Environmental Protection Act is preempted by federal law (Kerr-McGee does not indicate what federal law in particular). Taken narrowly, Kerr-McGee may be arguing that Sections 12(a), (d), and 21(e) of the Act are preempted by federal law (again, Kerr-McGee does not indicate what federal law in particular). In either instance, Kerr-McGee is mistaken and this purported affirmative defense should be dismissed with prejudice.

There is absolutely no precedent indicating that Sections 12(a), (d), and 21(e) are preempted by any federal law. "Implied field preemption occurs where Congress has implemented a comprehensive regulatory scheme in a particular area, thus removing the entire field from the state realm." *Dickey v. Connaught Labs., Inc.*, 334 Ill.App.3d 1048, 1051, 777 N.E.2d 974, 977 (3d Dist. 2002).

The Northern District of Illinois federal district court has previously addressed the allegations of preemption with regard to private cost recovery under the Environmental Protection Act. *See People v. Northbrook Sports Club*, 1999 WL 1102740 (N.D. Ill. Nov. 24, 1999) (attached as Exhibit 1). In that case, the federal district court concluded that CERCLA does not preempt the cost recovery provision in the Act. Specifically, the court stated: "Environmental law . . . remains an area of at least equal importance to the state, and CERCLA expressly left an avenue open to states to enact their own legislation

and stated Congressional intent not to supersede such actions." *Id.* at *4. The court concluded by holding: "After a careful reading of the statutory language of CERCLA, including the cost recovery provisions, I conclude that Congress did not intend to preempt Illinois environmental legislation providing for a private cost recovery action." *Id.*

V. KERR-MCGEE'S NINTH AFFIRMATIVE DEFENSE SHOULD BE DISMISSED AS CONTRIBUTION PROTECTION UNDER CERCLA IS INAPPLICABLE TO PLAINTIFFS' PENDING CLAIMS.

Kerr-McGee claims that it is entitled to contribution protection under Section 113(f)(2) of CERCLA. Again, due to Kerr-McGee's failure to plead with particularity any facts in support of its asserted affirmative defense, the affirmative defense should be dismissed as factually insufficient.

Furthermore, there has been no settlement at the RV3 Site concerning any performance of any cleanup. Although a settlement has been previously reached between Kerr-McGee and the United States Environmental Protection Agency for USEPA's oversight costs, that settlement includes specific language limiting contribution protection. *See* Exhibit 2 (June 8, 2004 Consent Decree). Specifically, the Consent Decree entered into between the United States of America and Kerr-McGee defines "Past Response Costs" as:

> "all costs, including but not limited to direct and indirect costs, that EPA has paid at or in connection with Operable Units 00, 01, 02, and 03 through December 31, 2003, and all costs, including but not limited to direct and indirect costs, that DOJ on behalf of EPA, has paid at or in connection with DJ Numbers 90-11-3-1313, 90-11-3-1313/1, and 90-11-3-1313/2 through May 29, 20034, plus accrued Interest on all such costs through those dates."
> Exhibit 2, pg. 6-7.

Moreover, the Consent Decree limits contribution protection as follows:

> "The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs."
> *Id.*, pg. 13.

In this pending cause, Complainants do not seek reimbursement of any costs within the "matters addressed" by the Consent Decree. Consequently, the ninth affirmative defense is frivolous and should be dismissed with prejudice.

VI. KERR-MCGEE'S TENTH AFFIRMATIVE DEFENSE SHOULD BE DISMISSED FOR FAILURE TO ALLEGE ADEQUATE FACTS.

Kerr-McGee's final affirmative defense seeks reduction of Kerr-McGee's liability for Kerr-McGee's costs, services, or benefits incurred, or agreed to incur, that will cause an increase in the value of Complainants' properties. This affirmative defense is fatally flawed: Complainants no longer own the RV3 Site. Consequently, any costs, services, or benefits now or in the future that Kerr-McGee will not enhance the value of the property to the advantage of Complainants. Furthermore, once again Kerr-McGee has failed to allege adequate facts to support its purported affirmative defense. For these reasons, Kerr-McGee's final affirmative defense should be dismissed.

CONCLUSION

As Kerr-McGee's affirmative defenses as pled are not proper affirmative defenses, fail to allege adequate facts, or are legally insufficient, each and every affirmative defense should be dismissed.

July 5, 2005

Respectfully submitted

GRAND PIER CENTER LLC and
AMERICAN INTERNATIONAL
SPECIALITY LINES INSURANCE CO.

By: _____
One of Complainants' attorneys

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C

Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, N.D. Illinois, Eastern Division.
PEOPLE of the State of Illinois ex rel. James E. Ryan Plaintiff
v.
NORTHBROOK SPORTS CLUB Defendant.
No. 99 C 4038.

Nov. 24, 1999.

Gerald T. Karr, Assistant Attorney General, Chicago, IL, for Plaintiff.

Frederick S. Mueller, Johnson & Bell, Ltd., Chicago, IL, for Defendant.

MEMORANDUM OPINION AND ORDER

BUCKLO, J.

*1 The State of Illinois moves to remand this case to Illinois state court based on lack of subject matter jurisdiction. Defendant objects, claiming that the plaintiff's state law claim is completely preempted by federal law and, as such, subject matter jurisdiction is proper in federal court. Because I conclude that Congress did not intend to completely preempt state legislation in environmental cost recovery actions, the plaintiff's motion to remand is granted.

I.

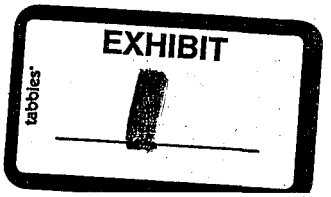
The State of Illinois filed this action on May 4, 1999, in the Circuit Court of Cook County, Illinois, pursuant to the Illinois Environmental Protection Act, 415 ILCS 5/22.2(f), in order to recover costs incurred by the Illinois Department of Transportation ("IDOT") to remediate the contaminated property formerly owned by the defendant Northbrook Sports Club ("Northbrook"). The State alleges that Northbrook owned a trap and skeet shooting operation which contaminated the property with hazardous levels of lead.

On August 9, 1999, the defendant removed the case to federal court pursuant to 28 U.S.C. § 1441 on the grounds that this court has exclusive original jurisdiction pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 and its amendments, 42 U.S.C. § 9601 et seq. ("CERCLA").

II.

Under 28 U.S.C. § 1441, a defendant may remove an action from state court to federal court if the federal court would have had jurisdiction over the lawsuit as originally filed by the plaintiff. The burden of establishing federal jurisdiction rests on the party seeking to preserve removal. *Shaw v. Dow Brands, Inc.*, 994 F.2d 364, 366 (7th Cir.1993). Courts should interpret the removal statute narrowly and presume that the plaintiff may choose his or her forum. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir.1993). Any doubts regarding jurisdiction should be resolved in favor of remanding the action to state court. *Jones v. General Tire & Rubber Co.*, 541 F.2d 660,664 (7th Cir.1976).

Ordinarily, federal question jurisdiction is determined "by examining the plaintiff's well-pleaded complaint, for '[i]t is long-settled law that a cause of action arises under federal law only when the plaintiff's well-pleaded complaint raises issues of federal law.' " *Rice v. Panchal*, 65 F.3d 637, 639 (7th Cir.1995) (quoting *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987)). However, "the Supreme Court has fashioned an exception to this rule where Congress has completely preempted a given area of state law." *Lister v. Stark*, 890 F.2d 941, 943 (7th Cir.1989); *accord Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed.2d 126 (1968) (state law claims within the scope of § 301 of the Labor Management Relations Act were removable to federal court). This jurisdictional doctrine provides that "to the extent that Congress has displaced a plaintiff's state law claim, that intent informs the well-pleaded complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law." *Rice*, 65 F.3d at 640 n. 2 (*citing Taylor*, 481 U.S. at 64). Federal subject matter jurisdiction therefore exists if the complaint concerns an area of law "completely preempted" by federal law, even if the complaint does not state a federal basis of jurisdiction. *Rice*, 65 F.3d at 642; *Jass v. Prudential Health Care Plan, Inc.*, 88 F.3d 1482, 1487 (7th



Cir.1996).

*2 On the other hand, the existence of a federal question "in a defensive argument does not overcome the paramount policies embodied in the well-pleaded complaint rule--that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court." *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987). Thus, federal preemption that merely serves as a defense to a state law action, i.e. "conflict preemption," cannot alone confer federal question jurisdiction. *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 9-12, 25-27, 103 S.Ct. 2841, 77 L.Ed.2d 420 (1983); *Lister v. Stark*, 890 F.2d 941, 943 & n. 1 (7th Cir.1989), cert. denied, 498 U.S. 1011, 111 S.Ct. 579, 112 L.Ed.2d 584 (1990). Thus the defendant cannot remove to federal court simply by asserting a federal question in his responsive pleading. Otherwise, the plaintiff's choice of law and forum would be illusory.

III. *Analysis*

This decision whether to remand this case to state court turns on whether CERCLA completely preempts the cost recovery provision in the Illinois Environmental Protection Act. Since the parties are not diverse, I can only hear this case based on federal question subject matter jurisdiction. The State of Illinois makes no federal law claims on the face of its well-pleaded complaint, which seeks recovery only under the Illinois Act. However, the defendant argues that the Illinois statute under which the plaintiff seeks recovery is completely preempted because it fails to meet the minimum standard for cost recovery established under the federal environmental statutes of CERCLA. Therefore, the defendant contends that the complaint should be recharacterized as a CERCLA claim over which the district courts of the United States have exclusive jurisdiction.

Section 107(a)(4)(A) of CERCLA allows any person to recover from "responsible" persons any response costs, including costs of removal or remedial action, incurred by them as a result of a release or escape of hazardous substances into the environment. Section 22.2(f) of the Illinois Environmental Protection Act, 415 ILCS 5/22.2(f) (1996) employs nearly identical language and similarly provides that a list of enumerated responsible 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."

On their face, the CERCLA and Illinois cost recovery provisions are very similar--indeed, the Illinois statute was patterned after CERCLA. The defendants argue that there is one key difference which demands complete preemption of the statute under which the State of Illinois seeks recovery: the additional language in CERCLA's § 107(a)(4)(A) which provides liability for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe *not inconsistent with the national contingency plan*" ("NCP"). From the lack of corresponding language in the state statute, the defendants assert that state law does not meet the so-called CERCLA floor because it eliminates the NCP requirements for cleanup and recovery. [FN1]

> FN1. I am dubious about the defendant's concern about meeting the "CERCLA floor" and so preventing the quality of environmental cleanup from being compromised by state law. It would be a rare situation indeed when a polluter desires to be subject to a more stringent law. I suspect the defendant is more likely concerned about being forced to reimburse the state for additional costs than it might have had to do under CERCLA. This result is exactly what Congress anticipated and intended to promote by its savings clause.

*3 As a preliminary matter, upon a closer review of the Illinois Act, it is not clear that the statutes differ in any material respect. Section § 22.2 expressly provides defendants a defense for compliance with the NCP or the directives of federal laws and officials. *See* 415 ILSC 5/22.2(j)(2), (3). Additionally, the state legislature expressed its intent not to venture beneath the so-called CERCLA floor by declaring that "it would be inappropriate for the State of Illinois to adopt a hazardous waste management program that is less stringent than or conflicts with federal law." 415 ILCS 5/20(a)6 (1998). Therefore, it is likely that the statute, when applied, will have identical results to its CERCLA cost recovery counterpart.

In any event, it is premature to gauge conflict preemption at this juncture. As the Seventh Circuit has noted, the "complete preemption doctrine" is actually a misnomer because it is not a preemption doctrine but, rather, a federal jurisdiction doctrine.

Jass v. Prudential Health Care Plan, Inc., 88 F.3d 1482, 1486-87 (7th Cir.1996). The real issue is not whether CERCLA will preempt state law should a direct conflict between the two arise, but whether Congress intended that CERCLA so completely cover the field of environmental legislation that it completely preempts state law such that no state claim can even be pled.

Whether a state law is completely preempted is a matter of Congressional intent, as gleaned through express language and statutory structure. CERCLA does not expressly preempt state law or occupy the field of environmental contamination. *See, e.g., Bedford Affiliates v. Sills*, 156 F.3d 416, 426 (2d Cir.1998). In fact, CERCLA section 107(e) clearly preserves some state law causes of action for indemnity. CERCLA sections 114(a), 302(d) and 106(a) support the proposition that CERCLA does not presumptively preempt state or local law. For example, CERCLA provides at 42 U.S.C. § 9614(a):

> Nothing in this Act shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

Section 9614(b) also provides:

> Any person who receives compensation for removal costs or damages or claims pursuant to this Act shall be precluded from recovering compensation for the same removal costs or damages or claims pursuant to any other State or Federal law. Any person who receives compensation for removal costs or damages or claims pursuant to any other Federal or State law shall be precluded from receiving compensation for the same removal costs or damages or claims as provided in this Act.

Thus, CERCLA encourages state relief and only prohibits compensatory recovery for the same response costs under both CERCLA and state or other federal laws. In this case, the State's restitution claim is not duplicative of a CERCLA private cost recovery cause of action since none is presented.

***4** The ERISA cases cited by the defendant are inapposite. Unlike CERCLA, ERISA intended to "occupy" its field and several provisions expressly state this intent. *See, e.g., Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987); *Bartholet v. Reishauer A.G.*, 953 F.2d 1073 (7th Cir.1992). Environmental law, however, remains an area of at least equal importance to the state, and CERCLA expressly left an avenue open to states to enact their own legislation and stated Congressional intent not to supersede such actions. *See e.g. National Solid Wastes Management Association v. Killian*, 918 F.2d 671 (7th Cir.1991) (en banc) ("Congress has in some specific instances expressed its intent to preempt particular kinds of state and local legislation, but it has not yet declared (or implied) its intention to occupy the entire field of environmental regulation").

The defendant's reliance on *PMC, Inc. v. Sherwin-Williams, Inc.*, 151 F.3d 610, 617 (7th Cir.1998) is also mislaced. In *PMC*, the Seventh Circuit refused to allow plaintiff to recover costs under a common law contribution theory when plaintiff could not recover those costs under CERCLA, because they were inconsistent with the NCP. Thus, unlike here, there was a clear conflict with the application of federal and state law. Therefore, the court held that CERCLA preempted Illinois contribution law. However, the court did not hold that there was complete preemption by CERCLA. This issue of preemption was before the court due to federal question jurisdiction because other federal claims were being litigated. Neither did the court challenge the power of states to enact their own environmental laws. The court stated that the "purpose of CERCLA's savings clause is to preserve to victims of toxic wastes the other remedies they may have under federal or state law." *PMC*, 151 F.3d at 617. This would seemingly include the right to recover under the Illinois statute. *See e.g. Manor Care, Inc. v. Yaskin*, 950 F.2d 122 (3d Cir.1991) (CERCLA did not preempt New Jersey environmental law requiring responsible party to pay for state's share of cleanup costs); *Boone v. DuBose*, 718 F.Supp. 479 (M.D.La.1988) (complaint alleging state environmental claims did not "arise under" CERCLA). Furthermore, the case at bar is not a common law restitution action which might disrupt the "carefully crafted settlement system" established by CERCLA but instead is an environmental statute specifically enacted by the legislature of Illinois and patterned after the corresponding CERCLA provision.

I will not preempt a state provision which mirrors its federal counterpart because the defendant anticipates that some inconsistency with CERCLA might exist in its application. The Supreme Court has declared it "settled law" that a federal defense to a state law cause of action, including the defense of preemption, is insufficient to establish federal question jurisdiction under the well pleaded complaint rule. *Caterpillar*, 482 U.S. at 392-3. Unless Congress unmistakably manifests an intent to make a cause of

action removable to federal court, a defense of federal preemption is insufficient to create federal subject matter jurisdiction. *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 66-68, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). After a careful reading of the statutory language of CERCLA, including the cost recovery provisions, I conclude that Congress did not intend to preempt Illinois environmental legislation providing for a private cost recovery action. Therefore, the plaintiff's motion to remand is GRANTED.

1999 WL 1102740 (N.D.Ill.)

Motions, Pleadings and Filings **(Back to top)**

- 1:99CV04038 (Docket) (Jun. 17, 1999)

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

KERR-MCGEE CHEMICAL LLC,
(on behalf of itself and its predecessors Lindsay Light Company, Lindsay Light & Chemical Company, American Potash & Chemical Corporation, Kerr-McGee Chemical Corporation),

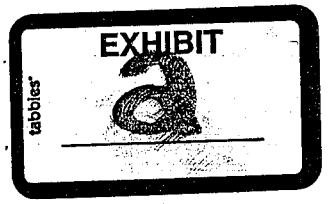
Defendant.

CIVIL ACTION NO. 04 C 2001

JUDGE GETTLEMAN

MAGISTRATE JUDGE LEVIN

CONSENT DECREE



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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. KERR-MCGEE CHEMICAL LLC, (on behalf of itself and its predecessors Lindsay Light Company, Lindsay Light & Chemical Company, American Potash & Chemical Corporation, Kerr-McGee Chemical Corporation), Defendant.	CIVIL ACTION NO. 04 C 2001 JUDGE GETTLEMAN MAGISTRATE JUDGE LEVIN

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint and an amended complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9607, as amended ("CERCLA"), seeking reimbursement of response costs incurred or to be incurred for response actions taken at or in connection with the release or threatened release of hazardous substances at certain Operable Units ("OUs") associated with the Lindsay Light II Superfund Removal Site in Chicago, Cook County, Illinois ("the Site").

B. The defendant that has entered into this Consent Decree ("Settling Defendant") does not admit any liability to Plaintiff arising out of the transactions or occurrences alleged in the complaint and amended complaint.

C. The United States and Settling Defendant agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in good faith, that settlement of this matter will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345 and 42 U.S.C. §§ 9607 and 9613(b) and also has personal jurisdiction over Settling Defendant. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendant waives all objections and defenses that it may have to jurisdiction of the Court or to venue in this District. Settling Defendant shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and upon Settling Defendant and its successors and assigns. Any change in ownership or corporate or other legal status, including but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendant under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided herein, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree, the following definitions shall apply:

a. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

b. "Consent Decree" shall mean this Consent Decree.

c. "Day" shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "DOJ" shall mean the United States Department of Justice and any successor departments, agencies or instrumentalities of the United States.

e. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies or instrumentalities of the United States.

f. "EPA Hazardous Substance Superfund" shall mean the Hazardous Substance Superfund established by the Internal Revenue Code, 26 U.S.C. § 9507.

g. "Interest" shall mean interest at the rate specified for interest on investments of the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded annually on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.

h. "Operable Unit 00" of the Lindsay Light II Superfund Removal Site or "OU 00" shall mean the property known as 316 E. Illinois St. and which is bounded by North McClurg Court, East Illinois Street, North Columbus Drive and East Grand Avenue in the City of Chicago, Cook County, Illinois.

i. "Operable Unit 01" of the Lindsay Light II Superfund Removal Site or "OU 01" shall mean property located at 200 East Illinois St. that bears the Cook County Assessor's Parcel Number 17-10212019 that is bounded by East Illinois Street, North Columbus Drive, East Grand Avenue, and St. Clair Street in the City of Chicago, Cook County, Illinois. The buildings located on the northwest corner of Grand Avenue are not a part of Parcel 17-10212019 and are not a part of OU 01.

j. "Operable Unit 02" associated with the Lindsay Light II Superfund Removal Site or "OU 02" shall mean a portion of the Beverly Sand and Gravel pit located in the southwest quarter of Section 30 and the northwest quarter of Section 31, T42N, R9E, Elgin, Cook County, Illinois.

k. "Operable Unit 03" associated with the Lindsay Light II Superfund Removal Site or "OU 03" shall mean property known as 341 E. Ohio St. that is bounded on three sides by Grand Avenue, McClurg Court and Ohio Street in the City of Chicago, Cook County, Illinois.

l. "Paragraph" shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

m. "Parties" shall mean the United States and Settling Defendant.

n. "Past Response Costs" shall mean all costs, including but not limited to direct and indirect costs, that EPA has paid at or in connection with Operable Units 00, 01, 02, and 03

through December 31, 2003, and all costs, including but not limited to direct and indirect costs, that DOJ on behalf of EPA, has paid at or in connection with DJ Numbers 90-11-3-1313, 90-11-3-1313/1, and 90-11-3-1313/2 through May 29, 2004, plus accrued Interest on all such costs through those dates.

o. "Plaintiff" shall mean the United States.

p. "Section" shall mean a portion of this Consent Decree identified by a Roman numeral.

q. "Settling Defendant" shall mean Kerr-McGee Chemical LLC.

r. "Site" shall mean the Lindsay Light II Superfund Removal Site, located in the Streeterville neighborhood of downtown Chicago, Cook County, Illinois. The Site is comprised of the properties at OU 00 and OU 01.

s. "United States" shall mean the United States of America, including its departments, agencies and instrumentalities.

V. PAYMENT OF RESPONSE COSTS

4. Payment of Past Response Costs to EPA. Within 30 days of entry of this Consent Decree, Settling Defendant shall pay to EPA $640,000.

5. Payment shall be made by FedWire Electronic Funds Transfer ("EFT") to the U.S. Department of Justice account in accordance with EFT instructions provided to Settling Defendant by the Financial Litigation Unit of the U.S. Attorney's Office in the Northern District of Illinois following entry of the Consent Decree.

6. At the time of the payment, Settling Defendant shall also send notice that the payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions).

Such notices shall reference the EPA Region and Site/Spill Identification Number 05 YT, DOJ case numbers 90-11-3-1313, 90-11-3-1313/1, 90-11-3-1313/2, and the civil action number.

7. The total amount to be paid pursuant to Paragraph 4 shall be deposited in the Lindsay Light II Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

VI. FAILURE TO COMPLY WITH CONSENT DECREE

8. Interest on Late Payments. If Settling Defendant fails to make the payment under Paragraph 4 (Payment of Response Costs) by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

9. Stipulated Penalty.

a. If any amounts due under Paragraph 4 are not paid by the required date, Settling Defendant shall be in violation of this Consent Decree and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 8, $1,000 per violation per day that such payment is late.

b. Stipulated penalties are due and payable within 30 days of the date of the demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as "stipulated penalties" and shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of the party making payment, the Site name, the EPA Region and

Site Spill ID Number 05YT, DOJ Case Numbers 90-11-3-1313, 90-11-3-1313/1, 90-11-3-1313/2, and the civil action number. Settling Defendant shall send the check (and any accompanying letter) to:

EPA Hazardous Substances Superfund
U.S EPA Superfund Accounting
P.O. Box 70753
Chicago, IL 60673

c. At the time of the payment, Settling Defendant shall also send notice that payment has been made to EPA and DOJ in accordance with Section XIII (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID Number 05YT, DOJ Case Numbers 90-11-3-1313, 90-11-3-1313/1, 90-11-3-1313/2, and the civil action number.

d. Penalties shall accrue as provided in this Paragraph regardless of whether EPA has notified Settling Defendant of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment is due and shall continue to accrue through the date of payment. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

10. If the United States brings an action to enforce this Consent Decree, Settling Defendant shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

11. Payments made under this Section shall be in addition to any other remedies or sanctions available to Plaintiff by virtue of Settling Defendant's failure to comply with the requirements of this Consent Decree.

12. Notwithstanding any other provision of this Section, the United States may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Consent Decree. Payment of stipulated penalties shall not excuse Settling Defendant from payment as required by Section V or from performance of any other requirements of this Consent Decree.

VII. COVENANT NOT TO SUE BY PLAINTIFF

13. Covenant Not to Sue by United States. Except as specifically provided in Section VIII (Reservations of Rights by United States), the United States covenants not to sue or to take administrative action against Settling Defendant pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to recover Past Response Costs. This covenant not to sue shall take effect upon receipt by EPA of all payments required by Section V, Paragraph 4 (Payment of Response Costs) and any amount due under Section VI (Failure to Comply with Consent Decree). This covenant not to sue is conditioned upon the satisfactory performance by Settling Defendant of its obligations under this Consent Decree. This covenant not to sue extends only to Settling Defendant and does not extend to any other person.

VIII. RESERVATIONS OF RIGHTS BY UNITED STATES

14. The United States reserves, and this Consent Decree is without prejudice to, all rights against Settling Defendant with respect to all matters not expressly included within the Covenant Not to Sue by Plaintiff in Paragraph 13. Notwithstanding any other provision of this Consent Decree, the United States reserves all rights against Setting Defendant with respect to:

a. liability for failure of Settling Defendant to meet a requirement of this Consent Decree;

b. liability for costs incurred or to be incurred by the United States that are not within the definition of Past Response Costs;

c. liability for injunctive relief or administrative order enforcement under Section 106 of CERCLA, 42 U.S.C. § 9606;

d. criminal liability; and

e. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments.

IX. COVENANT NOT TO SUE BY SETTLING DEFENDANT

15. Settling Defendant covenants not to sue and agrees not to assert any claims or causes of action against the United States or its contractors or employees, with respect to Past Response Costs or this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the Hazardous Substance Superfund based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of the response actions at OUs 00, 01, 02, or 03 for which the Past Response Costs were incurred, including any claim under the United States Constitution, the Constitution of the State of Illinois, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to Past Response Costs.

16. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or

40 C.F.R. 300.700(d).

17. Settling Defendant agrees not to assert any claims and to waive all claims or causes of action that it may have for all matters relating to OUs 00, 01, 02, and/or 03, including for contribution, against any person where the person's liability to Settling Defendant with respect to OUs 00, 01, 02, and/or 03 is based solely on having arranged for disposal or treatment, or for transport for disposal or treatment, of hazardous substances at OUs 00, 01, 02, and/or 03, or having accepted for transport for disposal or treatment of hazardous substances at OUs 00, 01, 02, and/or 03, if all or part of the disposal, treatment, or transport at the OU in question occurred before April 1, 2001, and the total amount of material containing hazardous substances contributed by such person to the OU in question was less than 110 gallons of liquid materials or 200 pounds of solid materials.

18. The waiver in Paragraph 17 shall not apply with respect to any defense, claim, or cause of action that Settling Defendant may have against any person meeting the above criteria if such person asserts a claim or cause of action relating to OUs 00, 01, 02, and/or 03 against Settling Defendant. This waiver also shall not apply to any claim or cause of action against any person meeting the above criteria if EPA determines:

a. that such person has failed to comply with any EPA requests for information or administrative subpoenas issued pursuant to Section 104(e) or 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) or 9622(e), or Section 3007 of the Solid Waste Disposal Act (also known as the Resource Conservation and Recovery Act or "RCRA"), 42 U.S.C. § 6927, or has impeded or is impeding, through action or inaction, the performance of a response action or natural resource restoration with respect to OUs 00, 01, 02, and/or 03, or has been convicted of a criminal violation

for the conduct to which this waiver would apply and that conviction has not been vitiated on appeal or otherwise; or

b. that the materials containing hazardous substances contributed to the OU in question by such person have contributed significantly, or could contribute significantly, either individually or in the aggregate, to the cost of response action or natural resource restoration at the OU in question.

X. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

19. Except as provided in Paragraph 17 (Non-Exempt De Micromis Waiver), nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree. Except as provided in Paragraph 17 (Non-Exempt De Micromis Waiver), the Parties expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that they may have with respect to any matter, transaction, or occurrence relating in any way to OUs 00, 01, 02, and/or 03 against any person not a Party hereto.

20. The Parties agree, and by entering this Consent Decree this Court finds, that Settling Defendant is entitled, as of the date of entry of this Consent Decree, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), for "matters addressed" in this Consent Decree. The "matters addressed" in this Consent Decree are Past Response Costs.

21. Settling Defendant agrees that, with respect to any suit or claim for contribution brought by it for matters related to this Consent Decree, it will notify EPA and DOJ in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendant also agrees that,

with respect to any suit or claim for contribution brought against it for matters related to this Consent Decree, it will notify EPA and DOJ in writing within 10 days of service of the complaint or claim upon it. In addition, Settling Defendant shall notify EPA and DOJ within 10 days of service or receipt of any Motion for Summary Judgment, and within 10 days of receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

22. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site and/or any areas where hazardous substances from Lindsay Light's operations at 316 E. Illinois St. have come to be located, Settling Defendant shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by Plaintiff set forth in Section VII.

XI. ACCESS TO INFORMATION

23. Settling Defendant shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as "records") within its possession or control or that of its contractors or agents relating to activities at OUs 00, 01, 02, and/or 03, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to OUs 00, 01, 02, and/or 03.

24. Confidential Business Information and Privileged Documents.

a. Settling Defendant may assert business confidentiality claims covering part or all of the records submitted to Plaintiff under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA or if EPA has notified Settling Defendant that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Defendant.

b. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege in lieu of providing records, it shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

25. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions relating to the Site.

XII. RETENTION OF RECORDS

26. Until 10 years after the entry of this Consent Decree, Settling Defendant shall preserve and retain all records now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at OUs 00, 01, 02, and/or 03 or the liability of any person under CERCLA with respect to OUs 00, 01, 02, and/or 03, regardless of any corporate retention policy to the contrary.

27. After the conclusion of the 10-year document retention period in the preceding paragraph, Settling Defendant shall notify EPA and DOJ at least 90 days prior to the destruction of any such records, and, upon request by EPA or DOJ, Settling Defendant shall deliver any such records to EPA. Settling Defendant may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Defendant asserts such a privilege, they shall provide Plaintiff with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to Plaintiff in redacted form to mask the privileged information only. Settling Defendant shall retain all records that it claims to be privileged until the United States has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Defendant's favor. However, no records created or generated

pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

28. Settling Defendant hereby certifies that, to the best of its knowledge and belief, after reasonable inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6972.

XIII. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, DOJ, and Settling Defendant, respectively.

As to the United States:

As to DOJ:

Chief, Environmental Enforcement Section
Environment and Natural Resources Division
U.S. Department of Justice (DJ # 90-11-3-1313/2)
P.O. Box 7611
Washington, D.C. 20044-7611

As to EPA:

Mary L. Fulghum
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5 C-14J
77 West Jackson Boulevard
Chicago, Illinois 60604

Verneta S. Simon
OnScene Coordinator
U.S. Environmental Protection Agency
Region 5 Mail Code SE-6J
77 West Jackson Boulevard
Chicago, Illinois 60604

Fredrick A. Micke
OnScene Coordinator
U.S. Environmental Protection Agency
Region 5 Mail Code SE-6J
77 West Jackson Boulevard
Chicago, Illinois 60604

Regional Financial Management Officer
U.S. Environmental Protection Agency
Region 5 Mail Code MF-10J
77 West Jackson Boulevard
Chicago, Illinois 60604

As to Settling Defendant:

T.L. Cubbage, Esq.
Kerr-McGee Corporation
123 Robert S. Kerr Ave.
Oklahoma City, OK 73102

XIV. RETENTION OF JURISDICTION

30. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XV. INTEGRATION

31. This Consent Decree constitutes the final, complete and exclusive agreement and understanding with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XVI. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

32. This Consent Decree shall be lodged with the Court for a period of not less than 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendant consents to the entry of this Consent Decree without further notice.

33. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XVII. SIGNATORIES/SERVICE

34. The undersigned representative of Settling Defendant to this Consent Decree and the Deputy Chief, Environmental Enforcement Section, Environment and Natural Resources Division, United States Department of Justice certify that they are authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

35. Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendant in writing that it no longer supports entry of the Consent Decree.

36. Settling Defendant shall identify, on the attached signature page, the name and address of an agent who is authorized to accept service of process by mail on behalf of Settling Defendant with respect to all matters arising under or relating to this Consent Decree. Settling Defendant hereby agrees to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. The Parties agree that Settling Defendant need not file an answer to the complaint or amended complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XVIII. FINAL JUDGMENT

37. Upon approval and entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between the United States and Settling Defendant. The Court finds that there is no just reason for delay and therefore enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS 8TH DAY OF JUNE, 2004.

United States District Judge

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Kerr-McGee Chemical LLC, relating to OUs 00, 01, 02, and 03 associated with the Lindsay Light II Superfund Removal Site.

FOR THE UNITED STATES OF AMERICA

THOMAS L. SANSONETTI
Assistant Attorney General
Environment and Natural Resources
Division
United States Department of Justice

W. BENJAMIN FISHEROW
Deputy Section Chief
Environment Enforcement Section
Environment and Natural Resources
Division
United States Department of Justice

ANNETTE M. LANG
Trial Attorney
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Environment and Natural Resources
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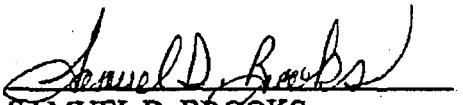
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-4213

PATRICK J. FITZGERALD
United States Attorney
Northern District of Illinois

By: 

SAMUEL D. BROOKS
Assistant United States Attorney
219 South Dearborn Street
Chicago, Illinois 60604
(312) 353-5342

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Kerr-McGee Chemical LLC, relating to OUs 00, 01, 02, and 03 associated with the Lindsay Light II Superfund Removal Site.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

RICHARD C. KARL
Acting Director, Superfund Division, Region 5
U.S. Environmental Protection Agency
77 West Jackson Boulevard
Chicago, Illinois 60604

MARY L. FULGHUM
Associate Regional Counsel
U.S. Environmental Protection Agency
Region 5 C-14J
77 West Jackson Boulevard
Chicago, Illinois 60604

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Kerr-McGee Chemical LLC, relating to OUs 00, 01, 02, and 03 associated with the Lindsay Light II Superfund Removal Site.

FOR DEFENDANT KERR-MCGEE CHEMICAL LLC (on behalf of itself and its predecessors Lindsay Light Co., Lindsay Light & Chemical Co., American Potash & Chemical Corp., and Kerr-McGee Chemical Corp.)

Date: 3/29/04

GEORGE CHRISTIANSEN
Vice President
Kerr-McGee Chemical LLC
123 Robert S. Kerr Avenue
Oklahoma City, OK 73125

Approved by Law Dep't TC

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Thomas L. Cubbage III

Title: Counsel

Address: Kerr-McGee Corporation
P.O. Box 25861
Oklahoma City, OK 73125

CERTIFICATE OF SERVICE

I, the undersigned, on oath, state that I have served on the date of July 5, 2005, the attached Plaintiff's Motion to Dismiss Affirmative Defenses, by U.S. mail, upon the following persons:

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

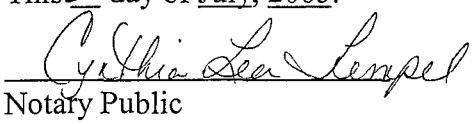
Attorney for River East LLC and Chicago Dock and Canal Trust

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 5th day of July, 2005.



Notary Public

My commission expires: Oct. 20, 2005