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SEP 14 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
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**Bradley Halloran
Hearing Officer
Illinois Pollution
Control Board
James R. Thompson
Center – Suite 11-500
Chicago, IL 60601**

NOTICE OF FILING

PLEASE TAKE NOTICE that on September 14, 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 TO DISMISS COMPLAINANTS' COUNTER-COMPLAINT AND TO STRIKE COMPLAINANTS' AFFIRMATIVE DEFENSES**, copies of which are served upon you along with this notice.

Kerr-McGee Chemical LLC

By: 

One of its attorneys

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SEP 14 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/)
Counter-Complaint Respondents,)
)
v.)
)
RIVER EAST LLC)
CHICAGO DOCK AND CANAL TRUST)
CHICAGO DOCK AND CANAL COMPANY)
)
Respondents,)
)
KERR-McGEE CHEMICAL LLC,)
)
Respondent/)
Counter-Complaint Complainant)
)

PCB 2005-157
(Enforcement)

**KERR-McGEE CHEMICAL LLC'S MOTION TO DISMISS
COMPLAINANTS' COUNTER-COMPLAINT AND TO
STRIKE COMPLAINANTS' AFFIRMATIVE DEFENSES**

Respondent/Counter-Complaint Complainant, Kerr-McGee Chemical LLC
("Kerr-McGee"), by its attorneys, Connelly, Roberts & McGivney LLC and Covington &
Burling, respectfully requests that the Illinois Pollution Control Board (the "Board")
Strike Complainants'/Counter-Complaint Respondents', Grand Pier Center, LLC, and
American International Specialty Lines Insurance Co., as subrogee of Grand Pier Center
LLC (collectively "Grand Pier"), Affirmative Defenses pursuant to 735 ILCS 5/2-615

and Dismiss the “Counterclaim”¹ pursuant to Ill. Admin. Code tit. 35, § 103.206(d) and Ill. Admin. Code tit. 35, § 104.414.

INTRODUCTION

Grand Pier filed its Complaint on February 25, 2005. The Complaint seeks damages relating to the operations to remove the contamination at the Chicago property referred to in the Complaint as the RV3 site. The Complaint contains one count of waste disposal violations pursuant to 415 ILCS 5/21(e), one count of contaminant threat to groundwater pursuant to 415 ILCS 5/12(a), and one count of contaminants upon land pursuant to 415 ILCS 5/12(d). Reimbursement of the response costs that Grand Pier allegedly incurred during the remediation of the RV3 site is specified among the relief Grand Pier seeks in its Complaint.

On April 4, 2005, Kerr-McGee filed a Motion to Dismiss the Complaint pursuant to Ill. Admin. Code tit. 35, § 104.414. On June 13, 2004, following the denial of Kerr-McGee’s motion to dismiss Grand Pier’s Complaint as duplicative of ongoing litigation in the United States District Court for the Northern District of Illinois, Kerr-McGee filed its Answer and Affirmative Defenses to Grand Pier’s Complaint. On that same day, as required by Ill. Admin. Code tit. 35, § 103.206(d), Kerr-McGee filed a motion for leave to file a Counter-Complaint together with a Counter-Complaint. Kerr-McGee’s Counter-Complaint alleges that Grand Pier violated 415 ILCS 5/21(e) and seeks reimbursement

¹ Ill. Admin Code tit 35, § 104.414 does not identify “counterclaims” as referred to in Grand Pier’s Pleading. A counter-complaint, as defined in the Illinois Administrative Code, and a counterclaim, as defined by 735 ILCS 5/2-608, are substantially similar. For purposes of this motion, we will assume that Grand Pier erroneously used the term “counterclaim” rather than “counter-complaint” and, to remain consistent with the language in the Code, refer to the claim as a counter-complaint throughout this motion.

for the response costs that Kerr-McGee incurred in completing the remediation of the RV3 site. On July 21, 2005, the Board issued its Order accepting Kerr-McGee's Counter-Complaint for hearing. (A copy of the Board's July 21, 2005 Order is attached as Exhibit A.)

On July 5, 2005, Grand Pier filed a motion to dismiss Kerr-McGee's affirmative defenses. On August 12, 2005, Grand Pier filed its Answer and Affirmative Defenses to Kerr-McGee's Counter-Complaint. Additionally, Grand Pier, without seeking leave from the Board as required by Ill. Admin. Code tit. 35, § 104.414, filed a Counter-Complaint against Kerr-McGee sounding in contribution and, again, seeking to recover its cleanup costs.

ARGUMENT

I. Grand Pier Fails to Allege Sufficient Facts to Support its Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth and Ninth Affirmative Defenses.

Illinois is a fact pleading jurisdiction and a plaintiff must allege facts sufficient to bring its claim within the realm of the cause of action asserted. *Sklodowski v. Countrywide Home Loans, Inc.* 832 N.E.2d 189, 195 (1st Dist. 2005). 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, 843 (1st Dist. 1993). Affirmative defenses that do not comply with Illinois pleading requirements are substantially insufficient in law and may be stricken. 735 ILCS 5/2-615.

Grand Pier's second affirmative defense alleges that Kerr-McGee's claims are barred because Kerr-McGee acted as a volunteer. The third affirmative defense alleges that Kerr-McGee is estopped from asserting its counter-complaint because Kerr-McGee

“acquiesced in and ratified the alleged conduct of Grand Pier.” The fourth affirmative defense alleges that Kerr-McGee waived its claim under 415 ILCS 5/21(e). The fifth affirmative defense alleges that Kerr-McGee’s counter-complaint is barred by the doctrine of unclean hands. The sixth affirmative defense claims that Kerr-McGee’s injuries were caused by its own negligence. The seventh affirmative defense alleges that Grand Pier’s acts and omissions were not the proximate cause of Kerr-McGee’s damages. The eighth affirmative defense alleges that Kerr-McGee’s damages were caused by acts and omissions of third parties. Finally, the ninth affirmative defense alleges that Kerr-McGee failed to mitigate its damages.

Grand Pier’s above-mentioned affirmative defenses are not pled with the same degree of specificity required by a plaintiff to establish a cause of action. *Sargent & Lundy*, 609 N.E.2d at 843. Grand Pier fails to include facts to support its allegations that Kerr-McGee was a volunteer, that Kerr-McGee assumed the risk or waived its claim, why Kerr-McGee’s claim is barred by the unclean hands doctrine, how Kerr-McGee’s own negligence caused its injuries, how the injuries were caused by third parties or how Kerr-McGee failed to mitigate its damages. Factual support for these affirmative defenses is absent and, as such, the Board should grant the motion to strike these affirmative defenses.

II. Grand Pier’s Counter-Complaint Should Be Dismissed Pursuant to Ill. Admin. Code tit. 35, § 103.206(d).

Section 103.206(d) of the Illinois Administrative Code states, in pertinent part, that “[i]f a party wishes to file a counter-complaint, cross-complaint, or third-party complaint, *the party must move the Board for leave to file the pleading.*” (Emphasis added). A “Counter-Complaint,” as defined by Section 101.202 of the Illinois

Administrative Code, is “a pleading that a respondent files setting forth a claim against a complainant.” Grand Pier filed its Counter-Complaint without having moved the Board for leave to file its pleading and therefore its Counter-Complaint must be dismissed pursuant to Section 103.206(d) of the Illinois Administrative Code.

III. Alternatively, if the Board Accepts Grand Pier’s Counter-Complaint Notwithstanding Ill. Admin. Code tit. 35, § 103.206(d), the Board should Dismiss Grand Pier’s Counter-Complaint as Duplicative of its Complaint.

If the Board does not dismiss Grand Pier’s Counter-Complaint pursuant to Section 103.206(d) of the Illinois Administrative Code, the Board should dismiss the Counter-Complaint as duplicative of Grand Pier’s Complaint. Under Section 103.212(b) of the Illinois Administrative Code, a respondent may, within 30 days after service, move to dismiss a complaint that is duplicative or duplicitous. A complaint is duplicative or duplicitous “if it is identical or substantially similar to one brought before the Board or another forum.” 35 Ill. Adm. Code 101.202.

Grand Pier’s Complaint specifically seeks reimbursement for the costs that Grand Pier allegedly incurred in the cleanup of the RV3 site. The Counter-Complaint seeks reimbursement of these same costs and, therefore, should be dismissed as duplicative of the Complaint.

Grand Pier’s Counter-Complaint also is duplicative of its eleventh Affirmative Defense. Grand Pier’s Counter-Complaint requests that, in the event Kerr-McGee receives a judgment in its favor, the Board award “contribution” against Kerr-McGee in an amount commensurate with its proportion of liability as determined by the trier of fact. The Illinois Joint Tortfeasor Contribution Act (the “Contribution Act”) provides that

“when 2 or more persons are subject to liability in tort arising out of the same injury to person or property...there is a right of contribution among them.” 740 ILCS 100/2(a).

Grand Pier’s eleventh affirmative defense asserts that, in the event Grand Pier is found liable to Kerr-McGee, then Kerr-McGee’s recovery “must be limited to that portion of damages attributable to the conduct of Grand Pier, and which exceeds those portions of damages attributable to all other persons, including Kerr-McGee. This defense is essentially a claim for contributory fault. “Contributory fault” is any fault on the part of the plaintiff which is a proximate cause of the death, bodily injury or property damages for which recovery is sought. 735 ILCS 5/2-116(b). The plaintiff is barred from recovering damages if the trier of fact finds that the contributory fault of the plaintiff is more than 50% of the proximate cause of the injury or damage for which recovery is sought. 735 ILCS 5/2-116(c). Grand Pier has already pleaded an affirmative defense for contributory fault. Thus, its Counter-Complaint for contribution is duplicative and should be dismissed.

CONCLUSION

WHEREFORE, the Illinois Pollution Control Board should Strike Complainants’/Counter-Complaint Respondents’, Grand Pier Center, LLC, and American International Specialty Lines Insurance Co., as subrogee of Grand Pier Center LLC, Affirmative Defenses pursuant to 735 ILCS 5/2-615 and Dismiss the Counter-Complaint pursuant to Ill. Admin. Code tit. 35, § 103.206(d) and Ill. Admin. Code tit. 35, § 104.414., with prejudice.

Respectfully submitted,

Kerr-McGee Chemical LLC

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ILLINOIS POLLUTION CONTROL BOARD

July 21, 2005

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

KERR-MCGEE CHEMICAL, LLC)	
)	
Cross-Complainants,)	
)	
v.)	
)	
GRAND PIER CENTER LLC, and)	
AMERICAN INTERNATIONAL)	PCB 05-157
SPECIALTY LINES INSURANCE CO., as)	(Citizens Enforcement - Land)
subrogee of Grand Pier Center LLC,)	
)	
Cross-Respondents.)	

ORDER OF THE BOARD (by G.T. Girard):

On June 13, 2005, Kerr-McGee Chemical, LLC (Kerr-McGee) filed a counter-complaint against Grand Pier Center, LLC and American International Specialty Lines Insurance Co. (complainants). Kerr-McGee alleges that complainants violated Section 21(e) of the Environmental Protection Act (Act) (415 ILCS 5/21(e) (2004)). Kerr-McGee alleges that complainants violated the Act by removing asphalt, concrete and overburden at the site located at 200 East Illinois, in Chicago, Cook County.

Section 31(d) of the Act (415 ILCS 5/31(d) (2004)) allows any person to file a complaint with the Board. Section 31(d) further provides that "[u]nless the Board determines that such complaint is duplicative or frivolous, it shall schedule a hearing." *Id.*; see also 35 Ill. Adm. Code 103.212(a). A complaint is duplicitous if it is "identical or substantially similar to one brought

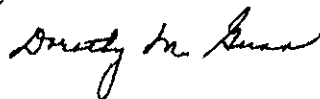


before the Board or another forum.” 35 Ill. Adm. Code 101.202. A complaint is frivolous if it requests “relief that the Board does not have the authority to grant” or “fails to state a cause of action upon which the Board can grant relief.” *Id.* Within 30 days after being served with a complaint, a respondent may file a motion alleging that the complaint is duplicitous or frivolous. 35 Ill. Adm. Code 103.212(b). Complainants have not filed motion and there is no evidence before the Board which indicates that the cross-complaint is duplicative or frivolous.

The Board accepts the cross-complaint for hearing. *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.212(a). On May 19, 2005, the Board accepted the complaint for hearing. *See* 415 ILCS 5/31(d) (2004); 35 Ill. Adm. Code 103.212(a). The Board directs the hearing officer to proceed expeditiously to hearing.

IT IS SO ORDERED.

I, Dorothy M. Gunn, Clerk of the Illinois Pollution Control Board, certify that the Board adopted the above order on July 21, 2005, by a vote of 5-0.

A handwritten signature in cursive script, appearing to read "Dorothy M. Gunn", written in black ink.

Dorothy M. Gunn, Clerk
Illinois Pollution Control Board

CERTIFICATE OF SERVICE

I, Lynne Pudlo, a non-attorney, being first sworn on oath, depose and state that I served the attached documents 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 September 14, 2005.

Lynne Pudlo

Subscribed and sworn to
before me September 14, 2005.

Gabriela A. Banat
Notary Public

