

**BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD**

GRAND PIER CENTER LLC)	
AMERICAN INTERNATIONAL)	
SPECIALTY LINES INSURANCE CO.)	
<i>as subrogee of</i> 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)	

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

Complainants Grand Pier LLC and American International Specialty Lines Insurance Co. (collectively "Grand Pier"), submit this response to Kerr-McGee's motion to dismiss Complainants' Counterclaim and to strike Complainants' Affirmative Defenses.

I. Complainants Have Alleged Specific Facts to Support Asserted Affirmative Defenses Two Through Nine

Complainants agree with Kerr-McGee's contention that 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). However, contrary to Kerr-McGee's motion arguments, Complainants have satisfied this standard. Kerr-McGee fails to consider that Complainants have explicitly and specifically incorporated, in

support of the asserted affirmative defenses, the averments contained in their Complaint against Defendants including Kerr-McGee. *See* Counterclaim at 7.

Facts supporting affirmative defenses two through six include the following: In paragraphs 16, 17, and 19 of the Complaint, Grand Pier specifically alleges that Kerr-McGee performed removal actions at the Lindsay Light II and RV3 Sites in accord with USEPA administrative orders. By acquiescing in USEPA's orders to remove and dispose of soil, and not seeking reimbursement from USEPA for its costs, Kerr-McGee effectively conceded that the thorium contamination was generated by its corporate predecessor, Lindsay Light Company. These facts are indicative, and support the affirmative defense of, acting as a volunteer, assumption of the risk, waiver, unclean hands, and negligence. By addressing the contamination at the Lindsay Light II and RV3 sites, Kerr-McGee only belatedly stepped-up to a problem of its predecessors' making, and should not now be heard to complain against others, including Grand Pier.. Accordingly, the Board should deny Kerr-McGee's motion to dismiss affirmative defenses two through six.

Facts supporting affirmative defense seven include the following: In paragraph 30 of the Complaint, Grand Pier specifically alleges that it was an innocent purchaser of the RV3 Site. Grand Pier further alleges that it had no involvement with the improper treatment, storage, disposal or discharge of thorium contamination at the RV3 Site. These facts clearly support Grand Pier's affirmative defense that the acts or omissions of Grand Pier are not the proximate cause of any alleged environmental contamination and resultant damages complained of by Kerr-McGee in its Counter-Complaint. The Board should deny the motion to dismiss affirmative defense seven.

Facts supporting affirmative defense eight include the following: In paragraph 15 of the Complaint, Grand Pier specifically alleges that Chicago Dock and Canal Company owned the RV3 Site at the time hazardous substances were disposed at the Site; in paragraph 6 of the Complaint, Grand Pier specifically alleges that Chicago Dock and Canal Trust is the successor of and successor in interest to Chicago Dock and Canal Company; in paragraph 5 of the Complaint, Grand Pier specifically alleges that River East LLC is the successor of and successor in interest to Chicago Dock and Canal Company. These allegations regarding the prior owner of the site and its successors in interest support Grand Pier's eighth affirmative defense that the injuries, damages or conditions complained of by Kerr-McGee were caused by the acts or omissions of third parties not under the control of Grand Pier. Thus, Kerr-McGee's motion to dismiss the eighth affirmative defense should be denied.

Facts supporting affirmative defense nine include the following: In paragraphs 9 and 16 of the Complaint, Grand Pier alleges that Kerr-McGee acted in response to a series of administrative orders regarding remediation of the thorium contamination at the Lindsay Light II Site, which is adjacent to the RV3 Site. These administrative orders date back to at least 1996. Consequently, Kerr-McGee was intimately aware of the thorium contamination, was responding to the contamination at adjacent properties, but failed to mitigate future damages incurred by Grand Pier by failing to advise Grand Pier of the contamination prior to Grand Pier's commencement of construction activities. Kerr-McGee had the ability to take affirmative steps to avoid the unnecessary costs Grand Pier subsequently incurred due to historic contamination caused by Kerr-McGee's

predecessors. Consequently, the facts alleged in the Complaint adequately support Grand Pier's ninth affirmative defense of failure to mitigate its damages.

II. Complainants' Counterclaim to Kerr-McGee's Counter-Complaint Is Not Duplicative of Complainants' Complaint

Kerr-McGee claims that the allegations raised in Complainants' Counterclaim are the same as those raised in Complainants' Complaint. This contention is inaccurate. The Complaint seeks remuneration for monies expended by Grand Pier during the remediation of the RV3 Site according to the Environmental Protection Act. Grand Pier estimates these monies to be around \$2.3 Million. Kerr-McGee's Counter-Complaint pertains to monies expended by Kerr-McGee during the remediation of the RV3 Site. Kerr-McGee estimates those monies to be around \$3.5 Million. Grand Pier's Counterclaim, brought pursuant to the Contribution Act rather than the Environmental Protection Act, seeks an allocation of liability of Kerr-McGee's asserted \$3.5 Million in damages, should the Board determine that Grand Pier is liable to Kerr-McGee according to the Counter-Complaint. Although all allegations in this case relate to the RV3 Site and monies expended during remediation, the Complaint relates to Grand Pier's damages, and the Counter-Complaint relates to Kerr-McGee's purported damages (albeit for cleaning up its own mess). Consequently, it cannot be concluded that the Complaint and the Counterclaim to Kerr-McGee's Counter-Complaint are duplicative.

Lastly, should the Board determine that Grand Pier did not comply with Board rules regarding moving for leave to file a Counterclaim (also known as a counter-complaint under Board parlance) to Kerr-McGee's Counter-Complaint, Grand Pier now seeks leave to file its counterclaim/counter-complaint. Kerr-McGee will not incur

prejudice should the Board now grant Grand Pier leave to file its responsive pleading to Kerr-McGee's Counter-Complaint. Kerr-McGee certainly has notice of the claims and Grand Pier would not object to the Board granting Kerr-McGee additional time to answer the allegations of Grand Pier's counterclaim/counter-complaint to Kerr-McGee's Counter-Complaint, should the Board deem additional time necessary. Grand Pier requests the Board to exercise its discretion to allow Grand Pier's counterclaim/counter-complaint to stand, to avoid unnecessary repetitive filings.

WHEREFORE, Grand Pier requests that this Board deny Kerr-McGee's motion to dismiss affirmative defenses. In the alternative, should the Board conclude that any of Grand Pier's affirmative defenses are subject to being stricken, Grand Pier requests leave to file amended affirmative defenses(s), within 10 days of the Board's order ruling upon Kerr-McGee's motion. Grand Pier also requests that this Board deny Kerr-McGee's motion to strike Grand Pier's counterclaim/counter-complaint, and to order any further relief this Board deems necessary.

Respectfully submitted

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

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CERTIFICATE OF SERVICE

I, an attorney, state that I have served on the date of October 4, 2005, the attached Response to Kerr-McGee Chemical LLC's Motion to Dismiss Complainants' Counter-Complaint and to Strike Complainants' Affirmative Defenses, by U.S. mail, upon the following persons:

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