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	)	

COMPLAINANTS' RESPONSE TO KERR MCGEE CHEMICAL LLC'S COMBINED MOTION TO WITHDRAW CERTAIN AFFIRMATIVE DEFENSE (SIC) AND FOR LEAVE TO FILE AMENDMENTS TO AFFIRMATIVE DEFENSES TO COMPLAINANTS' COMPLAINT*, INSTANTER*

Complainants Grand Pier LLC and American International Specialty Lines Insurance Co. (collectively "Grand Pier"), submit this response to Kerr-McGee's motion to withdraw certain affirmative defenses and for leave to file amendments to affirmative defenses to Complainants' Complaint, instanter.

As a preliminary matter, instead of responding to Grand Pier's July 5, 2005, motion to dismiss affirmative defenses as directed by Hearing Officer Halloran, Kerr-McGee Chemical LLC (apparently now known as Tronox LLC), has filed a motion essentially conceding the points raised in the motion to dismiss affirmative defenses but then seeking leave to amend specific affirmative defenses. Grand Pier does not object to Kerr-McGee's motion to withdraw affirmative defenses one, two, three, four, and ten, as

those affirmative defenses would be properly stricken in accord with Grand Pier's July 5, 2005, motion to dismiss affirmative defenses.

However, Grand Pier does object to Kerr-McGee's motion to file amendments to affirmative defenses five, six, seven, eight, and nine. These affirmative defenses, even as amended, fail to plead facts with the necessary degree of specificity. *See International Ins. Co. v. Sargent & Lundy*, 242 Ill.App.3d 614, 609 N.E.2d 842, 853 (1st Dist. 1993). Furthermore, specific affirmative defenses should be stricken and the requested amendment denied because the affirmative defense fails to give color to the Complaint. *Ferris Elevator Co., Inc. v. Neffco, Inc.*, 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3d Dist. 1996) (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.).

First, Kerr-McGee's proposed amended fifth affirmative defense alleges that Grand Pier's recovery should be proportionally reduced because Complainants' own fault contributed to their injuries and because Grand Pier is liable under the Act. This affirmative defense fails to give color to Grand Pier's allegation in its Complaint that: "Grand Pier was an innocent purchaser of the RV3 Site. Grand Pier is a wholly innocent owner which had no involvement with the improper treatment, storage, disposal or discharge of thorium contamination at the RV3 Site." Complaint ¶30. Because Kerr-McGee's purported amended fifth defense does not give color to Grand Pier's claims, it is improperly pled as an affirmative defense. A properly pled affirmative defense confesses or admits the cause of action, which this purported affirmative defense fails to do.

Next, as to the proposed amended sixth affirmative defense, Kerr-McGee claims that Complainants' claims are barred by preceding, intervening and/or superseding acts of third parties or because of events over which Respondent had no control. In the fourteen paragraphs Kerr-McGee has proffered to support this affirmative defense, Kerr-McGee has failed to specifically plead what acts of what third party bar Grand Pier's claims. Without more, this affirmative defense should be stricken. Furthermore, to the extent that Kerr-McGee states that it had no control, such an allegation veers from a good faith pleading. Kerr-McGee had been actively involved in the remediation of contamination at the Lindsay Light II Site since 1996, for which it was responsible due to the acts of its predecessor, Lindsay Light Company. Certainly, by 1996, Kerr-McGee was sufficiently in control of the prior acts of its predecessor, Lindsay Light, that Kerr-McGee could have advised adjacent landowners that it knew the soil was contaminated with thorium. However, Kerr-McGee did nothing. Not only is this affirmative defense lacking specific allegations, but it oversteps the bounds of good faith pleading as provided by Supreme Court Rule 137.

As to the proposed amended seventh affirmative defense, Kerr-McGee contends that Grand Pier is precluded from recovery because it knowingly and voluntarily assumed the risk of incurring any alleged damage suffered. Review of precedent does not reveal authority indicating that assumption of the risk, as plead by Kerr-McGee, is an affirmative defense to a violation of the Act, a *malum prohibitum* statute. Furthermore, Kerr-McGee again fails to give color to the allegations of Grand Pier's Complaint in which Grand Pier states that it was an innocent purchaser and had no involvement in the

improper treatment, storage, disposal or discharge of thorium contamination at the RV3 Site. *See* Complaint ¶30.

Next, as to the proposed amended eighth affirmative defense, Kerr-McGee claims that Grand Pier's claims are preempted by federal law. Kerr-McGee claims that it has entered settlements with the USEPA, which somehow remove Kerr-McGee's egregious conduct from the purview of the Environmental Protection Act. Notably, however, Kerr-McGee again fails to plead with specificity by failing to indicate what document equates to a settlement. Kerr-McGee nakedly states that is has resolved "some or all of a response action" for "some or all of the costs of such action" in a "judicially approved settlement." Not only is the statement woefully ambiguous, but it reveals that Kerr-McGee itself may not know what response action, if any, it has resolved. If Kerr-McGee contends that the UAO it responded to in 1996 is a settlement, Kerr-McGee is wrong. Compliance with a Unilateral Administrative Order or an Administrative Order on Consent does not constitute to a settlement. *See Pharmacia Corp. v. Clayton Chemical Acquisition LLC*, 382 F.Supp.2d 1079 (S.D. Ill. 2005) (holding that "the AOC is not an settlement pursuant to [CERCLA] Section 113(f)(3)(B)").

Finally, with respect to the proposed amended ninth affirmative defense, Kerr-McGee argues that it is entitled to contribution under CERCLA section 113(f)(2). Kerr-McGee once again fails to give color to Grand Pier's Complaint, which alleges that Grand Pier was an innocent purchaser of the RV3 Site and had no involvement in the improper treatment, storage, disposal or discharge of thorium contamination at the RV3 Site. *See* Complaint ¶30. When this allegation is given color, a contribution affirmative

defense is unavailable to Kerr-McGee, as Kerr-McGee must admit that Grand Pier is not liable under the Environmental Protection Act or CERCLA.

WHEREFORE, Grand Pier requests that this Board deny Kerr-McGee's motion for leave to file amendments to affirmative defenses to Grand Pier's Complaint, to dismiss all affirmative defenses in accord with Grand Pier's motion to dismiss affirmative defenses of July 5, 2005, and to enter any further relief the Board deems necessary.

October 11, 2005

Respectfully submitted

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

By: s/ Garrett L. Boehm, Jr.
One of Complainants' attorneys

Frederick S. Mueller
Daniel C. Murray
Garrett L. Boehm, Jr.
Johnson & Bell, Ltd.
55 E. Monroe St.
Suite 4100
Chicago, IL 60603
(312) 372-0770

CERTIFICATE OF SERVICE

I, an attorney, state that I have served on the date of October 11, 2005, the attached Response to Kerr-McGee Chemical LLC's Combined Motion to Withdraw Certain Affirmative Defense (sic) and for Leave to File Amendments to Affirmative Defenses to Complainants' Complaint, Instanter, by U.S. mail, upon the following persons:

Attorney for River East LLC and Chicago Dock and Canal Trust
Donald J. Moran
PEDERSEN & HOUPT
161 North Clark Street, Suite 3100
Chicago, Illinois 60601-3242

Attorney for Kerr-McGee Chemical LLC
John T. Smith II
COVINGTON & BURLING
1201 Pennsylvania Avenue N.W.
Washington, D.C. 20004-2401

Michael P. Connelly
Garrett C. Carter
Connelly Roberts & McGivney LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606

Illinois Pollution Control Board Hearing Officer

Bradley P. Halloran
Hearing Officer
Illinois Pollution Control Board
James R. Thompson Center, Suite 11-500
100 W. Randolph Street
Chicago, Illinois 60601

s/ Garrett L. Boehm, Jr.
Garrett L. Boehm, Jr.
JOHNSON & BELL, LTD.