

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

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OCT 21 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 2005-157
(Enforcement)

TO: Frederick S. Mueller
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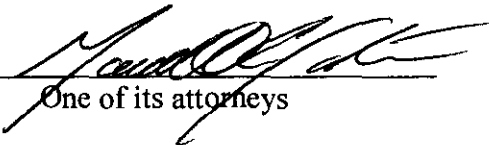
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Bradley Halloran
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Control Board
James R. Thompson
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NOTICE OF FILING

PLEASE TAKE NOTICE that on October 21, 2005, we caused to be filed with the Illinois Pollution Control Board in the James R. Thompson Center, Chicago, Illinois, **TRONOX LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES**, copies of which are served upon you along with this notice.

Tronox LLC

By: 
One of its attorneys

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OCT 21 2005

STATE OF ILLINOIS
Pollution Control Board

GRAND PIER CENTER LLC,)
AMERICAN INTERNATIONAL)
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as subrogee of Grand Pier Center LLC,)

Complainants/)
Counter-Complaint Respondents,)

v.)

PCB 2005-157
(Enforcement)

RIVER EAST LLC,)
CHICAGO DOCK AND CANAL TRUST,)
CHICAGO DOCK AND CANAL COMPANY,)

Respondents,)

TRONOX LLC,)

Respondent/)
Counter-Complaint Complainant.)

**TRONOX LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO
STRIKE CERTAIN AFFIRMATIVE DEFENSES**

Respondent Tronox LLC ("Tronox"),¹ in further support of its Motion to Strike Certain Affirmative Defenses of Complainants' Grand Pier Center LLC and American International Specialty Lines Insurance Co., as subrogee of Grand Pier Center LLC (collectively, "Grand Pier"), states as follows:²

I. Grand Pier Fails to Plead Facts that Support Its Second through Sixth

¹ Tronox LLC was formerly known as Kerr-McGee Chemical Company LLC. A Notice of Name Change was filed with the Board on October 11, 2005.

² Tronox LLC filed a combined Motion To Dismiss Complainants' Counter-Complaint And To Strike Complainants' Affirmative Defenses. This Reply is in further support of the Motion to Strike Complainants' Affirmative Defenses.

Affirmative Defenses.

The allegations in Grand Pier's pleadings are insufficient to support Grand Pier's second through sixth affirmative defenses. Consequently, Grand Pier has attempted in its Response brief to introduce new, unplead allegations to augment its inadequate pleadings. Grand Pier's attempt to rely on new, unplead allegations underscores Grand Pier's failure to allege adequate facts in its actual pleadings. Moreover, even with the addition of new, unplead allegations, Grand Pier still fails to allege facts sufficient to support its affirmative defenses. Thus, the Board should strike the second through sixth of Grand Pier's affirmative defenses, to wit, that Tronox acted as a volunteer, assumed the risk, waived a right to contribution, acted with unclean hands, and acted negligently. See Grand Pier's Answer to Counter-Complaint, Affirmative Defenses and Counterclaim, at 7-8 (filed July 5, 2005).

Grand Pier points to the allegations in paragraphs 16, 17, and 19 of its Complaint to support the second through sixth of its affirmative defenses. See Grand Pier's Response to Motion to Strike, at 2 (filed Oct. 4, 2005).³ Grand Pier describes those paragraphs as alleging "that [Tronox] performed removal actions at the Lindsay Light II and RV3 Sites in accord with [United States Environmental Protection Agency ("USEPA")] administrative orders." Id.

Grand Pier does not explain how obedience to an USEPA order indicates that a party acted as a volunteer, assumed the risk, waived a right to contribution, acted with unclean hands, or acted negligently. In fact, few prudent parties would defy USEPA's

³ The pages containing paragraphs 16, 17, and 19 of Grand Pier's Complaint are attached hereto as Exhibit A.

unilateral administrative orders, regardless of the merits. The penalty for noncompliance is a daily fine of \$25,000. 42 U.S.C. § 9606(b)(1).⁴ Because virtually no prudent party chooses to disobey USEPA's unilateral administrative orders, Grand Pier's allegation that Tronox obeyed USEPA's unilateral orders does not support Grand Pier's claim that Tronox acted as volunteer, assumed the risk, waived a right to contribution, acted with unclean hands, or acted negligently. Indeed, the allegations in paragraphs 16, 17, and 19 of Grand Pier's Complaint equally apply to Grand Pier and Tronox because Grand Pier, too, has performed cleanup actions at the RV3 Site in accord with an USEPA order. Presumably, Grand Pier does not concede that it acted as a volunteer, assumed the risk, waived a right to contribution, acted with unclean hands, or acted negligently.

Grand Pier, perhaps cognizant that the allegations of its Complaint are insufficient, introduces allegations that do not appear in its pleadings. For example, Grand Pier alleges that Tronox has not sought reimbursement from USEPA for its costs. See Grand Pier's Response to Motion to Strike, at 2. Grand Pier also alleges that Tronox "only belatedly stepped-up to" perform the USEPA-ordered cleanup. Id. Grand Pier's reliance upon these unplead allegations highlights its failure to adequately plead its affirmative defenses.

Furthermore, Grand Pier proceeds to draw the improper inference from its allegation that Tronox has not sought reimbursement of costs from USEPA's Environmental Appeals Board ("EAB"). Grand Pier argues that one may conclude from this allegation that Tronox has conceded that it is responsible for thorium contamination at

⁴ The penalty scheme is so harsh that it has come under a credible constitutional due process challenge in the United States District Court of the District of Columbia. See General Electric Company v. Johnson, 362 F.Supp.2d 327 (D.D.C. 2005) (denying USEPA's motion for summary judgment).

the RV3 Site. However, a decision not to commence a reimbursement action before the EAB is not a concession of liability. As Grand Pier is well aware, the burden of proof in EAB proceedings is on the party petitioning for reimbursement, and relief is very rare. Indeed, not a single petition for reimbursement met with any success for the first eleven years that EAB heard petitions, and few petitions have met with success since then.⁵ Grand Pier itself has not sought reimbursement for the costs that it has incurred for its on-site cleanup activities at the RV3 Site. Presumably, Grand Pier does not contend that its decision is a concession. To be sure, Grand Pier sought reimbursement with respect to its off-site cleanup of thorium contamination adjacent to the RV3 Site, but its claim predictably was denied in a preliminary decision. See Preliminary Decision of Environmental Appeals Board, at 50 (Aug. 17, 2005) (finding that Grand Pier is liable for off-site thorium contamination as well as on-site thorium contamination in connection with the RV3 Site).⁶ In a sign that Grand Pier has come to recognize the rarity of relief from EAB, counsel for Grand Pier stated in a letter to the EAB that it was “not providing comments upon the Preliminary Decision” because “we understand that the EAB has never reversed a Preliminary Decision.” Letter from Johnson & Bell to EAB (Sept. 16, 2005), attached hereto as Exhibit C.

Thus, the Board should strike affirmative defenses two through six on the ground that Grand Pier has failed to allege facts indicating that Tronox acted as a volunteer, assumed the risk, waived a right to contribution, acted with unclean hands, or acted

⁵ In 1997, eleven years after the enactment of 42 U.S.C. § 9606(b), EPA approved the first-ever settlement of a petition for reimbursement, reimbursing approximately six percent of costs.

⁶ The cited portion of EAB’s Preliminary Decision is attached hereto as Exhibit B.

negligently.

II. Grand Pier Fails to Plead Facts that Support its Seventh and Eighth Affirmative Defenses.

Tronox, in its motion to strike Grand Pier's affirmative defenses, argued that Grand Pier failed to plead sufficient facts to support its seventh and eighth affirmative defenses. Grand Pier, in its response to Tronox's motion, has shown that its seventh and eighth affirmative defenses are not proper affirmative defenses to begin with. Thus, the Board should strike them as inadequately plead.

Grand Pier has explained that its seventh affirmative defense -- that the "alleged acts or omissions of Grand Pier are not the proximate cause of any alleged environmental contamination and resultant damages"⁷ -- is premised on its allegations that Grand Pier was an innocent purchaser of the RV3 Site and that it did not treat, store, dispose or discharge thorium at the RV3 Site. See Grand Pier's Response to Motion to Strike, at 2. Those allegations, however, show that Grand Pier's seventh affirmative defense is a denial of, not an affirmative defense to, Tronox's counterclaim. Tronox claimed that Grand Pier proximately caused environmental contamination and damages by removing the asphalt that had been safely shielding underground thorium deposits. See, e.g., Tronox's Counter-Complaint ¶12 ("Only by Grand Pier's removal of the pavement and excavation of the site for construction . . . was the public and the environment exposed to the risks of thorium. . . .") (filed June 13, 2005). Indeed, USEPA has indicated that "when Grand Pier stripped the concrete off" and began construction activities, "[t]hat's what created the imminent and substantial engagement (sic) that the agency responded to."

⁷ Grand Pier's Answer to Counter-Complaint, Affirmative Defenses and Counterclaim, at 6.

Transcript of Oral Argument before the EAB, at 44 (Petition No. CERCLA 106(b) 04-01) (June 16, 2005), attached hereto as Exhibit D. Grand Pier's seventh counterclaim, however, denies, rather than gives color to, Tronox's counterclaim. See 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 an affirmative defense which must be plead is whether the defense gives color to the opposing party's claim and then asserts new matter by which the apparent right is defeated.").

Likewise, Grand Pier has shown that its eighth affirmative defense -- that Tronox's "alleged injuries or damages . . . were caused in whole or in substantial part by the negligent acts and/or omissions of" Tronox⁸ -- is a denial of Tronox's counterclaim and not an affirmative defense. The allegations that Grand Pier identifies to support its eighth affirmative defense fail to give color to Tronox's claim that Grand Pier's destruction of the protective asphalt shield caused Tronox's damages. See Grand Pier's Response to Motion to Strike, at 3 (identifying irrelevant allegations that concern only historical ownership of the RV3 site by Chicago Dock and Canal Company at a time long before Grand Pier damaged the protective asphalt shield that secured the thorium deposits).

III. Grand Pier Fails to Plead Facts that Support its Ninth Affirmative Defense.

Grand Pier also fails to allege sufficient facts to support its ninth affirmative defense. Grand Pier, once again, attempts to rely upon newly introduced, unplead allegations.

Grand Pier's ninth affirmative defense -- that Tronox failed to mitigate its

⁸ Grand Pier's Answer to Counter-Complaint, Affirmative Defenses and Counterclaim, at 8.

damages because it failed to warn Grand Pier of the underground thorium deposits on Grand Pier's property⁹ -- amounts to an argument that Grand Pier would have abstained from its environmentally destructive actions if Tronox had told Grand Pier that there were underground thorium deposits buried beneath Grand Pier's RV3 Site. Grand Pier fails, however, to allege in its pleadings that Tronox knew that thorium was beneath Grand Pier's property at the RV3 Site. Instead, Grand Pier attempts to augment its pleadings with a new, unplead allegation that Tronox had inferential knowledge of the possibility that underground thorium deposits were on Grand Pier's property. See Grand Pier's Response to Motion to Strike, at 3. Grand Pier's reliance on this unplead allegation underscores the inadequacy of Grand Pier's actual pleading.

Furthermore, Grand Pier is a sophisticated party capable of inferring risk from the adjacent multi-million dollar cleanup of radioactive material taking place under a public order of USEPA. Tronox could not have anticipated the inadequacy of Grand Pier's investigation of its own property and Grand Pier does not allege that Tronox knew that Grand Pier was not investigating thorium deposits. Indeed, even USEPA has called "surprising" Grand Pier's failure to include sampling for thorium as part of its environmental assessments. USEPA's Comments Upon EAB's Preliminary Decision, at 3 (Oct. 5, 2005), attached hereto as Exhibit E.

CONCLUSION

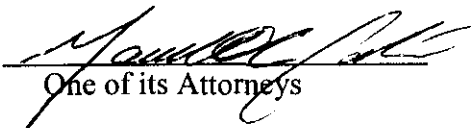
For the reasons above and those set forth in the Motion to Strike, Tronox respectfully requests that the Board strike the second through ninth of Grand Pier's

⁹ Grand Pier's Answer to Counter-Complaint, Affirmative Defenses and Counterclaim, at 9.

affirmative defenses with prejudice.

Respectfully submitted,

TRONOX LLC

By: 
One of its Attorneys

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Attorneys for Respondent Tronox LLC

13. The principal ingredient in gaslight mantle manufacture is thorium. Thorium occurs principally as the parent radionuclide thorium-232 in association with its daughter products in a decay sequence known as the Thorium Decay Series. It is believed that the principal source of contamination at the RV3 Site is the Thorium Decay Series.

14. Between at least 1915 and 1933, Lindsay Light Company operated its incandescent gaslight mantle manufacturing business at the Lindsay Light II Site, and arranged for the disposal of hazardous substances at the Lindsay Light II Site, including the RV3 North Columbus Drive parcel, the parcel pertinent to this citizen suit.

15. Chicago Dock and Canal Company owned the RV3 North Columbus Drive parcel of the Lindsay Light II Site at the time hazardous substances were disposed at the RV3 Site by Lindsay Light Company.

Remediation of the RV3 Site

16. Through a series of administrative orders, the USEPA ordered Chicago Dock and Canal Trust and Kerr-McGee Chemical LLC to remove the hazardous substances contamination at the Lindsay Light II Site, and in an amendment, ordered River East LLC, Kerr-McGee Chemical LLC and Grand Pier Center LLC to remove the hazardous substances contamination at the RV3 North Columbus Drive Site.

17. The remediation work performed at the RV3 Site was conducted under the Unilateral Administrative Order Docket Number V-W-96-C-353 issued June 6, 1996 (UAO) and the First Amendment to that Order dated March 29, 2000. The work was conducted in accordance with the Work Plan for Site Radiation Survey and Excavation Soil Management dated March 20, 2000 and approved by the USEPA on March 23, 2000.



18. Thereafter, the USEPA required additional work, which was conducted in accordance with the Sidewalk Remediation Work Plan dated March 9, 2001 and approved by USEPA on April 11, 2001.

19. The First Amendment to the UAO required Grand Pier, River East LLC, and Kerr-McGee Chemical LLC to perform certain removal actions including, but not limited to, the implementation of a Site Health and Safety Plan, the implementation of an air monitoring program, the removal of contamination, and the disposal of hazardous substances.

20. Grand Pier Center LLC, as the then current owner of the RV3 Site, and AISLIC, as subrogee of Grand Pier, performed and completed work at the RV3 Site in accordance with the UAO, the UAO's First Amendment, and the Work Plans.

21. The removal activities under the Work Plan began on April 4, 2000, and Grand Pier Center LLC has been in compliance with the UAO since the UAO was issued to Grand Pier Center LLC for the RV3 Site.

22. A final Closure Report for the area bounded by North Columbus Drive, East Grand Avenue, North St. Clair Street, and East Illinois Street was prepared by the Project Coordinator, STS Consultants, Ltd., and submitted to the USEPA on July 2, 2001. Thereafter, the Final Closure Report Addendum dated August 31, 2004 was submitted to USEPA.

23. USEPA issued Letters of Completion on August 26, 2002 and on October 8, 2004 for the work performed according to the approved Work Plans.

24. Grand Pier and AISLIC incurred necessary response costs of approximately \$2,300,000 at the RV3 Site, and continue to incur additional costs of response.

25. Respondents are liable "persons" as that term is defined by Section 3.315 of the Act (415 ILCS 5/3.315) for all costs of response at the RV3 Site.

Grand Pier Center, L.L.C.

CERCLA § 106(b) Petition No. 04-01

PRELIMINARY DECISION

August 17, 2005

Before Environmental Appeals Judges Edward E. Reich, Kathie A. Stein, and Anna L. Wolgast.

Opinion of the Board by Judge Wolgast:

On December 13, 2004, Grand Pier Center, LLC ("Grand Pier") filed a petition seeking reimbursement of approximately \$200,000 that Grand Pier states is a portion of the amount it expended in complying with a unilateral administrative order issued by the United States Environmental Protection Agency, Region 5 (the "Region"). The Region issued the unilateral administrative order pursuant to section 106(a) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §§ 9601-9675 ("CERCLA").¹ Grand Pier seeks reimbursement

¹ Although the statute grants the President the authority to issue such orders, the President has delegated this authority to certain agencies, including the EPA. See Exec. Order No. 12,580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987); see also Exec. Order No. 13,016 (Aug. 28, 1996), 61 Fed. Reg. 45,871 (1996).



III. CONCLUSION

For the foregoing reasons, the Board's preliminary decision is that Grand Pier Center, LLC, has failed to show that it is not liable as an owner under CERCLA section 107(a)(1) for the response costs incurred in removing thorium contamination from the off-site sidewalk area. If, after reviewing the parties' comments, the Board's ultimate decision remains that Grand Pier has failed to show that it is not liable, then the Board will enter an order denying Grand Pier's petition for reimbursement.

JOHNSON & BELL Ltd.

Attorneys at Law

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September 16, 2005

U.S. Environmental Protection Agency
Environmental Appeals Board
Ariel Rios Building
1200 Pennsylvania Avenue, NW
Washington, DC 20460
Attn: Ms. Eurika Durr, Clerk of the Board

RE: *CERCLA 106(b) Petition No. 04-01*
USEPA Preliminary Decision 08/17/05

Dear Ms. Durr:

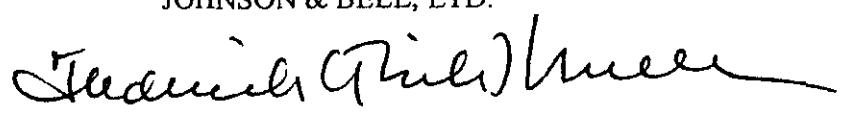
We are in receipt of a copy of the EAB's Preliminary Decision dated August 17, 2005 proposing to deny Grand Pier Center, LLC's Petition for Reimbursement. We respectfully disagree with the EAB's Preliminary Decision, which is premised on the position that Grand Pier Center, LLC is "jointly and severally" liable for response costs associated with the entire "facility", even though the USEPA in its series of filings with the EAB did not articulate such an argument.

Further, while we are of the opinion that the EAB should issue a final order granting Grand Pier Center LLC's Petition for Reimbursement, we have no doubt that comments to the Preliminary Decision would not sway the EAB to reverse its Preliminary Decision. In this respect, we understand that the EAB has never reversed a Preliminary Decision. As such, we are not providing comments upon the Preliminary Decision.

Once the EAB issues a final order, Grand Pier Center, LLC will proceed accordingly.

Very truly yours,

JOHNSON & BELL, LTD.



Frederick S. Mueller

FSM/smd
#1294458



ORIGINAL

SVS

1

SG

BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

----- X
 :
 IN THE MATTER OF: :
 : Petition No.
 GRAND PIER CENTER, LLC : CERCLA 106(b) 04-01
 :
 :
 ----- X

Thursday, June 16, 2005

Environmental Protection Agency
Courtroom 1152
1201 Constitution Avenue, N.W.
Washington, D.C.

The oral argument in the above-entitled
matter convened, pursuant to notice, at 10:00 a.m.

BEFORE:

ANNA L. WOLGAST, EDWARD E. REICH
and KATHIE A. STEIN
Environmental Appeals Judges

MILLER REPORTING CO., INC.
735 - 8TH STREET, S.E.
WASHINGTON, D.C. 20003
(202) 546-6666



APPEARANCES:

On behalf of the Petitioner:

DANIEL C. MURRAY, ESQ.

On behalf of the U.S. EPA, Region 5:

MARY FULGHUM, ESQ.
CATHLEEN MARTWICK, ESQ.

ALSO PRESENT:

FREDERICK S. MUELLER
Present with Counsel for Petitioner

EURIKA DURR, Clerk
Environmental Protection Agency

- - -
C O N T E N T S

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Daniel C. Murray, On behalf of the Grand Pier Center, LLP	4
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intended only to reflect, as Attachment 9, page 11 stated, that “[f]or most of this [the 20th] century the study site was part of a very long east-west city block without cross streets. The Columbus Drive and McClurg Court extensions were only extended across the site during the last decade.” Note that the “study site” referenced in Attachment 9 is the 316 E. Illinois, River East site immediately east of the Columbus Drive extension. The Lindsay Light Company did not own the 316 E. Illinois Street property or the Grand Pier property. During the Lindsay Light Company’s operation, however, that “very long east-west city block” encompassed both the present-day Grand Pier property and the adjacent 316 E. Illinois property. The fact that the properties were contiguous during the Lindsay Light Company’s operations was of particular interest to U.S. EPA, Region 5 because of the likelihood that materials would have been transferred between the two operating Lindsay Light Company facilities across the present-day Grand Pier property. It also made more surprising the fact that Grand Pier’s environmental assessments did not include sampling for thorium.

The Board’s Preliminary Decision at page 10, I. Background, B. Factual Background, 1. Description of the Site, discusses the history of the ownership of the property at issue, i.e. the approximately 10’ wide by 46’ long by 8’ deep off-site sidewalk area for which Grand Pier sought reimbursement. Although the property at issue was not owned by the Lindsay Light Company, it is part of the facility (as defined by CERCLA) where Lindsay Light Company thorium wastes came to be located. The only property that the Lindsay Light Company owned was the Lindsay Light Building at 161 E. Grand. It should be clarified that the property at issue in this case is located in Chicago’s Streeterville neighborhood where the Lindsay Light Company operated from 1904 until the 1930’s and that the property at issue was once part of a long east-

CERTIFICATE OF SERVICE

I, Lynne Pudlo, a non-attorney, being first sworn on oath, depose and state that I served the attached **TRONOX LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO STRIKE CERTAIN AFFIRMATIVE DEFENSES** 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 October 21, 2005.



Subscribed and sworn to
before me October 21, 2005.



Notary Public

