

BEFORE THE ILLINOIS
POLLUTION CONTROL BOARD

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MAY 05 2005

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.

STATE OF ILLINOIS
Pollution Control Board

PCB 05-157
(Enforcement)

TO: Frederick S. Mueller
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NOTICE OF FILING

PLEASE TAKE NOTICE that on May 5, 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 FOR LEAVE TO FILE A REPLY IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT** and **MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT**, copies of which are served upon you along with this notice.

Kerr-McGee Chemical LLC

By:


One of its attorneys

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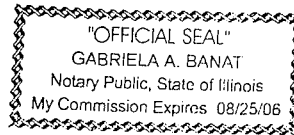
CERTIFICATE OF SERVICE

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 May 5, 2005.

Lynne Pudlo

Subscribed and sworn to
before me May 5, 2005.

[Signature]
Notary Public



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**KERR-McGEE CHEMICAL LLC'S REPLY MEMORANDUM IN SUPPORT OF ITS
MOTION TO DISMISS THE COMPLAINT**

Respondent, Kerr-McGee Chemical LLC ("Kerr-McGee"), respectfully submits this reply memorandum in support of its April 4, 2005 Motion to Dismiss the Complaint brought by Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC (collectively, "Grand Pier").

Grand Pier concedes that its pending action before the United States District Court for the Northern District of Illinois and its action before the Board "arise out of the same operative facts" and seek recovery of the same response costs. Complainants' Memorandum in Opposition, at 2. Grand Pier's lone argument that its twin-complaints are not substantially similar is that its "Complaint before the Board exclusively seeks relief according to Illinois Environmental Protection Act, sections 12(a), 12(d) and 21(e)." *Id.* However, Grand Pier's pending action in federal court also alleges that Kerr-McGee is liable to Grand Pier because of Kerr-McGee's alleged violations of Sections 12(a), 12(d), and 21(e) of Illinois Environmental Protection Act (the "Act"). Indeed, Grand Pier's Second Amended Complaint is explicit in this regard:

66. Defendants, each of them, are potentially liable under Illinois Environmental Protection Act (415 ILCS 5/1) for improper disposal, treatment, storage and abandonment of waste (415 ILCS 5/21(e)); open dumping of waste, and discharge of contaminants so as to cause or tend to cause water pollution (415 ILCS 5/12(a)), and disposal of contaminants upon land so as to create a water pollution hazard. 415 ILCS 5/12(d).

Second Amended Complaint ¶ 66.¹

Grand Pier's complaint before the district court alleges violations of both federal law and the Illinois Environmental Protection Act. This fact readily distinguishes the instant case from those cited by Grand Pier in its effort to persuade the Board that its petition is not duplicative. In Dayton Hudson Corp. v. Cardinal Industries, Inc., PCB 97-134 (Aug. 21, 1997), the federal complaint alleged only violations of the federal Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 et seq. ("CERCLA"). Similarly, in Lake County Forest Preserve District v. Ostro, PCB 92-80 (July 30, 1992), the federal complaint alleged only violations of law other than the Act. Moreover, in that case the complainant asked this Board to impose civil penalties under the Act, a form of relief that Grand Pier does not seek. Indeed, Grand Pier seeks essentially the same remedy from both this Board and the United States District Court, *i.e.*, an award of costs incurred, in cooperation with Kerr-McGee, complying with a unilateral order of the United Environmental Protection Agency. This order determined that Grand Pier, as well as Kerr-McGee, is responsible for cleanup of thorium residues at Grand Pier's property.

Accordingly, the Board should dismiss Grand Pier's complaint as duplicative. If it does

¹ In light of Grand Pier's complaint in federal court seeking cost recovery from Kerr-McGee for violations of the Act, the Board should give no weight to Grand Pier's assertion that "seeking relief under the Act in federal court would have been pointless." Complainants' Memorandum in Opposition, at 2.

not, and it were to accept Grand Pier's theory of the merits, it may open itself to a wide array of new private-party petitions seeking overlapping relief on matters expressly and comprehensively addressed by CERCLA.² In any event, the facts of the present case make it especially unsuitable for the expansion of the Board's jurisdiction effectively sought by the complainants.

Grand Pier concedes that the contamination at issue in this case occurred over 70 years ago, decades before the enactment of the Act. Grand Pier nonetheless argues that its *costs* were incurred "subsequent to the enactment of the Act," and that it is not seeking retroactive application of the Act. Complainants' Memorandum in Opposition, at 5. However, the relevant consideration is when the *alleged violations* occurred. See Lake County Forest Preserve District v. Ostro, PCB 92-80, at 2 (July 30, 1992) ("Although the complaint may fail to prove that all of the *alleged violations* occurred after the effective date of the respective provisions, this is no reason to strike the complaint at the outset.") (Emphasis added.) In that regard, it is undisputed that the only acts that Grand Pier alleges in its complaint predate the Act by several decades. Indeed, the alleged acts are so remote in time that Grand Pier is unable to plead its allegations respecting those acts with the precision required by the Board. See 2222 Elston LLC v. Purex Indus., Inc., PCB 03-55 (June 19, 2003) ("The Board's procedural rules codify the requirements for the contents of a complaint, including the 'dates, location, events, nature, extent, duration, and strength of discharges or emissions and consequences alleged to constitute violations'" (quoting 35 Ill.

² Kerr-McGee recognizes that the Board has previously determined that it has the authority to award environmental response costs to private party claimants. A significant number of the matters in which the Board has done so involve leaking underground petroleum storage tanks. See, e.g., Chrysler Realty Corp. v. Thomas Industries, Inc., PCB 01-25 (Dec. 7, 2000); Richey v. Texaco Refining and Marketing, Inc., PCB 97-148 (Aug. 7, 1997); Streit v. Oberweis Dairy, Inc., PCB 95-122 (Sept. 7, 1995); Herrin Security Bank v. Shell Oil Co., PCB 94-178 (Sept. 1, 1994). CERCLA does not cover cleanup of petroleum products, and these precedents do not suggest the overlap of federal and state remedies urged here by petitioner.

Adm. Code 103.204(c)).

An award of response costs by the Board under the circumstances of this case, in which Grand Pier seeks to recover the same costs in substantially similar actions before two tribunals for acts occurring decades before the enactment of the Act, would go beyond the outer limits of the Board's jurisdiction. In the Board's initial decision determining that it had the authority to order reimbursement of cleanup costs, Lake County Forest Preserve District v. Ostro, PCB 92-80 (March 31, 1994), the Board relied upon the decision of the Illinois Supreme Court in People v. Fiorini, 143 Ill.2d 318 (1991). There, the court determined that "it would not hold that such an award would not be an available remedy for a violation of the Act *under appropriate facts*." People v. Fiorini, 143 Ill.2d at 350 (emphasis added).

In the present case, there is a federal, but not a state enforcement action. There is a pending federal lawsuit for recovery of response costs under CERCLA. The costs in question have been incurred to clean up contamination occurring under unknown circumstances more than 70 years ago. Kerr-McGee urges the Board to recognize that this case does not present "appropriate facts" for the exercise of the Board's jurisdiction under the Illinois Environmental Protection Act.

Dated: May 5, 2005

Respectfully submitted,

Kerr-McGee Chemical LLC

By: 
One of its attorneys

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**KERR-McGEE CHEMICAL LLC'S MOTION FOR LEAVE TO FILE A REPLY IN
SUPPORT OF ITS MOTION TO DISMISS THE COMPLAINT**

Respondent, Kerr-McGee Chemical LLC ("Kerr-McGee"), respectfully asks the Illinois Pollution Control Board ("the Board") for permission to reply to the response filed by Grand Pier Center LLC and American International Specialty Lines Insurance Co. as subrogee of Grand Pier Center LLC (collectively, "Grand Pier"). The Board's procedural rules allow the filing of a reply to a response if it is to prevent material prejudice. See 35 Ill. Adm. Code 101.500(e).

Grand Pier, jointly with Kerr-McGee and the other respondents in this pending action, has been identified by the United States Environmental Protection Agency as a "responsible party" for cleanup of thorium residues discovered during construction for commercial development by Grand Pier in the Streeterville District of the City of Chicago. Grand Pier and Kerr-McGee have cooperated in removing these thorium residues pursuant to a unilateral administrative order issued by U.S. EPA pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act, and this "removal action" is now complete. Grand Pier has brought an action in the United States District Court for the Northern District of Illinois against Kerr-McGee seeking