

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
Daniel C. Murray
Garrett L. Boehm, Jr.
JOHNSON & BELL, LTD.
55 East Monroe Street
Suite 4100
Chicago, IL 60603-5803

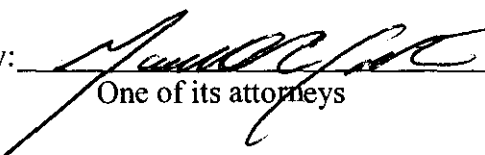
Donald J. Moran
Pedersen & Houpt
161 North Clark Street
Suite 3100
Chicago, IL 60601-3242

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 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 AMEND AFFIRMATIVE DEFENSES TO COMPLAINANTS' COMPLAINT**, copies of which are served upon you along with this notice.

Tronox LLC

By: 
One of its attorneys

Michael P. Connelly
Garrett C. Carter
Connelly Roberts & McGivney LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
Tele: (312) 251.9600

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STATE OF 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,)
)
TRONOX LLC,)
)
Respondent/)
Counter-Complaint Complainant.)
)

PCB 2005-157
(Enforcement)

**TRONOX LLC'S REPLY IN FURTHER SUPPORT OF ITS MOTION TO
AMEND AFFIRMATIVE DEFENSES TO COMPLAINANTS' COMPLAINT**

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

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 Withdraw Certain Affirmative Defenses and for Leave to File Amendments to Affirmative Defenses. This Reply addresses the Motion for Leave to File Amendments to Affirmative Defenses.

I. Tronox's Fifth Affirmative Defense is Well-Plead

For its fifth affirmative defense, Tronox claims that its liability "if any, should be proportionately reduced because Complainants' own fault contributed to their injuries." Answer and Affirmative Defenses of Kerr-McGee Chemical LLC, at 11 (filed June 13, 2005). Grand Pier argues that this defense is not well-plead because it allegedly does not "give color" to Grand Pier's allegations that Grand Pier was an "innocent purchaser" and uninvolved in "the improper treatment, storage, disposal or discharge of thorium contamination at the RV3 Site." Grand Pier's Response to Motion for Leave to Amend Affirmative Defenses, at 2 (filed Oct. 11, 2005) (citing Grand Pier's Complaint ¶30). However, Tronox's affirmative defense is not a denial of, but rather is compatible with, those allegations, which have no bearing on whether Grand Pier took actions that contributed to the exposure of thorium at the RV3 Site and thus contributed to Grand Pier's own damages.

In asserting its fifth affirmative defense, Tronox alleges, among other things, that (1) Grand Pier's property was protected by a "pavement covering" that "acted as a shield to prevent human exposure to the 'gamma radiation' associated with thorium residues," (2) in "January 2000, Grand Pier began to remove the pavement . . . to prepare for construction of a commercial building," and (3) "[o]nly by removal of the pavement and excavation of the site for construction of a commercial development, was the public and the environment exposed to the risk of thorium." Tronox LLC's Combined Motion to Withdraw Certain Affirmative Defenses and for Leave to File Amendments to Affirmative

Defenses, at 3 (filed Sept. 22, 2005).³ These averments do not deny Tronox's allegations; rather they assert a new matter -- Tronox's environmentally hazardous activities -- which defeats Tronox's claim. Thus, Tronox's fifth affirmative defense "gives color [to Grand Pier's] claim and then asserts a new matter by which [Grand Pier's] apparent right is defeated." See Ferris Elevator Co., Inc. v. Neffco, Inc., 285 Ill.App.3d 350, 354, 674 N.E.2d 449, 452 (3d Dist. 1996).

II. Tronox's Sixth Affirmative Defense is Well-Plead

Grand Pier accuses Tronox of pleading its sixth affirmative defense -- that Grand Pier's "claims are barred, in whole or in part, because of the preceding, intervening and/or superseding acts of third parties or because of events over which [Tronox] had no control"⁴ -- in bad faith. See Grand Pier's Response to Tronox's Motion to Amend Affirmative Defenses, at 3. Grand Pier's position is at odds with itself. Grand Pier first asserts that it cannot discern what third party actions are at issue in Tronox's sixth affirmative defense because Tronox allegedly "fails to specifically plead what acts of what third party" give rise to the defense. Id. In the next sentence, however, Grand Pier is sufficiently confident that Tronox had "control" over the third-party acts to accuse Tronox of bad faith for alleging otherwise. Id.

³ 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." Transcript of Oral Argument before the EAB, at 44 (Petition No. CERCLA 106(b) 04-01) (June 16, 2005), attached hereto as Exhibit A.

⁴ Answer and Affirmative Defenses of Kerr-McGee Chemical LLC, at 11 (filed June 13, 2005).

Moreover, Tronox's sixth affirmative defense is well-plead. For example, Tronox specifically alleged, among other things, that "[n]either Grand Pier nor any consultant to Grand Pier conducted a file search at the EPA to learn the particulars of the then-ongoing cleanup activities" on adjacent property, and that, "[a]lthough Grand Pier and/or its consultants and contractors, conducted subsurface borings at the 200 East Illinois Street site, none was addressed to the possibility of thorium residues[.]" Tronox's Amendment to Certain Affirmative Defenses, at 2 (filed Sept. 22, 2005).

Whether Tronox had "control" over these and other actions which contributed to the environmentally hazardous conditions on Grand Pier's property, is a matter for hearing before the Board in due course, not for accusations of bad faith premised on hunches about what the record will show. Indeed, Tronox did not know that Grand Pier's property had underground thorium deposits until after Grand Pier stripped the asphalt from its property. Grand Pier speculated on a multi-million dollar development adjacent to an ongoing multi-million dollar cleanup of radioactive material that was being undertaken by public order of USEPA. Grand Pier is a sophisticated party and its principal, Raymond Chin, is a trained engineer. Grand Pier hired consultants and contractors. It conducted soil borings on its property. Tronox could not have anticipated that Grand Pier, its consultants, and contractors would fail to investigate the possibility of thorium contamination on Grand Pier's property. Indeed, even USEPA has called Grand Pier's failure to include sampling for thorium as part of its environmental assessments "surprising." USEPA's Comments Upon EAB's Preliminary Decision, at 3 (Oct. 5, 2005), attached hereto as Exhibit B.

III. Tronox's Seventh Affirmative Defense is Well-Plead

Tronox's seventh affirmative defense -- that "[b]y their actions,

Complainants knowingly and voluntarily assumed the risk of incurring any alleged damage they may have suffered and are therefore precluded from recovery”⁵ -- is compatible with Grand Pier’s allegations about its purchase of the RV3 Site and its involvement in disposing of thorium at that site. See Grand Pier’s Response to Tronox’s Motion to Amend Affirmative Defenses, at 3-4. Tronox’s seventh affirmative defense alleges that Grand Pier ought to have taken a more sober approach to the possibility of thorium contamination on Grand Pier’s property. Rather than pressing ahead with the destruction of the protective asphalt shield, Grand Pier ought to have first investigated whether the site contained underground thorium deposits. By choosing to move forward in the face of knowable risk, Grand Pier voluntarily assumed the risk of incurring its alleged damage.⁶

IV. Tronox’s Eighth Affirmative Defense is Well-Plead

Tronox’s eight affirmative defense -- “that Counts I, II, and III of the Complaint are preempted by Section 113(f)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act”⁷ -- is well-plead because, among other things, Tronox alleged that it entered into at least one settlement with USEPA with respect to Grand Pier’s property. See, e.g., Counter Complaint ¶16 (filed June 13, 2005) (“Pursuant to a consent decree under § 107 of CERCLA [Tronox] has reimbursed EPA approximately

⁵ Answer and Affirmative Defenses of Kerr-McGee Chemical LLC, at 11.

⁶ Grand Pier also argues that Tronox’s seventh affirmative defense, even if well-plead, is not an appropriate defense. Grand Pier does not cite any authority on that point and its bare opinion on the subject should not be sufficient to strike a well-plead defense.

⁷ Tronox’s Amendment to Certain Affirmative Defenses, at 4-5 (filed Sept. 22, 2005 as attachment Exhibit B to Tronox’s Combined Motion To Withdraw Certain Affirmative Defenses and for Leave to File Amendments to Affirmative Defenses).

\$130,000 for its costs of oversight and response with respect to the 200 East Illinois Street site.”).⁸

V. Tronox’s Ninth Affirmative Defense is Well-Plead

Grand Pier has misread, and therefore misunderstood, Tronox’s ninth affirmative defense, which states as follows: “With respect to Counts I, II, and III of the Complaint, [Tronox] is entitled to contribution protection under [CERCLA section 113(f)(2)]” Amendment to Certain Affirmative Defenses, at 5 (emphasis added). Grand Pier misreads this defense to state that Tronox “is entitled to contribution under CERCLA section 113(f)(2).” Grand Pier’s Response to Motion for Leave to Amend Affirmative Defenses, at 4 (emphasis added); see also id. at 4-5 (“a contribution affirmative defense is unavailable”) (emphasis added). None of Grand Pier’s remarks are directed to Tronox’s ninth affirmative defense defense, as that defense properly is read.

CONCLUSION

For the reasons above and those set forth in the Motion for Leave to Amend Affirmative Defenses, Tronox respectfully requests that the Board grant Tronox’s motion to amend its affirmative defenses.

Respectfully submitted,

TRONOX LLC

By: 
One of its Attorneys

⁸ Tronox incorporated and adopted in its affirmative defenses the specific factual averments contained in its Counter-Complaint. See Amendment to Certain Affirmative Defenses, at 1.

Michael P. Connelly
Garrett C Carter
Connelly Roberts & McGivney LLC
One North Franklin Street
Suite 1200
Chicago, Illinois 60606
(312) 251-9600

Peter J. Nickles
J.T. Smith II
Thomas E. Hogan
COVINGTON & BURLING
1201 Pennsylvania Ave., N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Respondent Tronox LLC

ORIGINAL

25

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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1 that we need to operate within the determinations
2 that you made in issuing the order, since the order
3 is the premise for the petition?

4 MS. FULGHUM: I certainly believe that the
5 order does include the facility but I think that if
6 you disagree with me, the purpose of 106(b)
7 petitions are to determine the liability and
8 because of the exigent circumstances at the time
9 and the very best information that we had at that
10 time was that they were the owner of the site and
11 we were trying to differentiate their status from
12 the status of River East and Kerr-McGee, who were
13 also respondents to this amended order.

14 JUDGE WOLGAST: Does that mean that we
15 could also take up issues of divisibility even
16 though that wasn't raised by the Petitioner in this
17 case?

18 MS. FULGHUM: I noted in regarding
19 Marblehead although apparently divisibility wasn't
20 raised by the town of Marblehead. It wasn't
21 annunciated in the brief or oral argument. I
22 believe, if I correctly remember that footnote that

1 the board did consider divisibility. In this
2 instance, there's been no showing of how this harm
3 can be divided.

4 I would urge that when Grand Pier stripped
5 the concrete off it's side, engaged in the
6 potholing, the removal of obstructions, to allow
7 the caisson drills to operate adjacent to the right
8 of ways. There were nine caissons placed along
9 Columbus right of way itself. Their work abutting
10 the Columbus Drive right of way which exposed
11 materials and worked in the Columbus Drive right of
12 way before we even got to the site.

13 That's what created the imminent and
14 substantial engagement that the agency responded
15 to. And that imminent and substantial endangerment
16 continued after they did their gray beam
17 construction in the sidewalk right of way. It
18 might be helpful at this point to show you an
19 exhibit.

20 This is our attachment--six, figure one.
21 This exhibit was provided to the U.S. EPA by Grand
22 Pier. It's a construction drawing to show the

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY - 6 AM 8:57
WASHINGTON, D.C.

ENVIR. APPEALS BOARD

_____)	
)	
IN THE MATTER OF:)	
)	
Grand Pier Center, LLC)	CERCLA 106(b) Petition No. 04-01
)	
_____)	

**RESPONDENT'S COMMENTS UPON
ENVIRONMENTAL APPEALS BOARD PRELIMINARY DECISION**

In accordance with the United States Environmental Appeals Board (the "Board") Order dated August 18, 2005, Respondent, U.S. EPA, Region 5 respectfully offers the following comments upon the Preliminary Decision.

I. Grand Pier Asserted it was not a CERCLA 107(a) "Operator."

The opening paragraph of the Board's Preliminary Decision explains that "Grand Pier's petition focuses on the scope of liability of a present owner under CERCLA Section 107(a)." U.S. EPA, Region 5 agrees that is a correct statement. In its Petition, however, at pages 6-7, C. Grounds for Reimbursement, paragraph 20 a. and b., Grand Pier explicitly asserted that it was "never" the operator of the off-site sidewalk area. Also, in the Preliminary Decision, at pages 20-21, in I. Background, C. Procedural History, the Board states that Grand Pier argues "...because it is not an owner of the 'off-site sidewalk area' it was not liable" This procedural discussion should also reflect that Grand Pier's Petition expressly asserted it was not an operator of the off-site sidewalk area. Had U.S. EPA, Region 5 declined to respond to Grand Pier's assertion that it was not an operator, the Board or any reviewing court, may not have looked favorably upon the



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 AMEND AFFIRMATIVE DEFENSES TO COMPLAINANTS' COMPLAINT** 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.

Lynne Pudlo

Subscribed and sworn to
before me October 21, 2005.

[Signature]

Notary Public

