IN RE GRAND PIER CENTER, LLC

CERCLA § 106(b) Petition No. 04-01

FINAL DECISION

Decided October 28, 2005

Syllabus

Grand Pier Center, LLC ("Grand Pier") seeks reimbursement pursuant to section 106(b)(2)(A) and (C) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") of approximately $200,000, which is a portion of the amount Grand Pier expended in complying with a unilateral administrative order issued by the United States Environmental Protection Agency, Region 5 (the "Region"). CERCLA section 106(b)(2) provides, among other things, that reimbursement shall be granted when the petitioner establishes by a preponderance of the evidence that it is not liable under section 107(a) for response costs. CERCLA section 107(a)(1) states that an "owner" of a "facility" is liable for response costs incurred in responding to a release of a hazardous substance.

Grand Pier argues that it is not liable under section 107(a)(1) for the response costs at issue on the ground that it does not own the property where the costs were incurred. The costs at issue were incurred in removing thorium radionuclide contamination from property that the parties refer to as the "off-site sidewalk area," which is a parcel adjacent to property that Grand Pier acknowledges it owns — the "Grand Pier Site" — and for which Grand Pier admits it is liable for costs incurred in complying with the Region's order. Further, Grand Pier agrees that the Grand Pier Site and the off-site sidewalk area are contiguous properties that were contaminated by the same past industrial operation.

The Region argues that Grand Pier is liable under CERCLA section 107(a) for costs incurred throughout the "facility," including costs of responding to thorium contamination at the off-site sidewalk area. Specifically, the Region argues that the "facility" at issue in this case is demarcated by where the thorium contamination has come to be located, which includes both Grand Pier's property and the adjacent off-site sidewalk area.

Held: The Board concludes that Grand Pier failed to sustain its burden of proof under CERCLA section 106(a) that it is not liable as a present owner under section 107(a) for all response costs associated with the relevant CERCLA "facility."

The statutory language provides that the "owner" of a "facility" shall be liable for response costs. Identification of the CERCLA facility is necessary to give meaning to all words in the statutory text, and the relevant case law contemplates identification of the facility as the first element of the analysis. The statute's broad "facility" definition, which is predicated on where the contamination has come to be located, as interpreted in a long line of federal court and Board decisions, compels the Board's conclusion that the relevant CERCLA "facility" in this case consists of both the Grand Pier Site and the adjacent

off-site sidewalk area. Nothing in the statute or case law supports Grand Pier's contention that the "facility" must be defined by or be coextensive with an owner's property lines.

Grand Pier's admitted ownership of the Grand Pier Site establishes that Grand Pier is liable under CERCLA section 107(a) for response costs incurred at the facility as one of the present owners of that facility. Whether a person has the status of "owner" must typically be determined by reference to the ordinary meaning of the term "owner," which in the case of real property must look to legal or equitable title and related concepts of state property law. Once status as an owner, and hence liability under section 107(a), is established, the extent of that liability is determined under CERCLA, not under state property law. All persons liable under any of the four section 107(a) categories are generally jointly and severally liable for response costs. In particular, owners of only part of the facility are generally jointly and severally liable for all response costs associated with the facility.

In the present case, the CERCLA facility is not limited to Grand Pier's property boundary, but instead is demarcated by where the thorium contamination has come to be located. Grand Pier does not dispute that thorium contamination attributable to a prior industrial operation is found throughout the area the Region demarcated as the "facility" at issue. Grand Pier admits that it owns the Grand Pier Site, which constitutes a significant portion of the contaminated area. Accordingly, under the prevailing case law, Grand Pier's argument that its liability is limited to the boundaries of its property must be rejected, and instead the Board holds that Grand Pier is jointly and severally liable under CERCLA section 107(a)(1) for the response costs incurred at the facility, which includes both the Grand Pier Site and the off-site sidewalk area. Grand Pier has not argued that the harm presented by the thorium contamination at the facility is susceptible to division as a possible exception to joint and several liability. For these reasons, Grand Pier has failed to sustain its burden of proof that it is entitled to recover any portion of its response costs incurred in cleaning up the CERCLA facility.

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

[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 (Aug. 28, 1996).

seeks reimbursement pursuant to section 106(b)(2)(A) and (C) of CERCLA,[2] arguing that it is not liable under section 107(a) of CERCLA for the identified portion of the costs it incurred in complying with the Region's order. In particular, Grand Pier's petition focuses on the scope of liability of a present owner under CERCLA section 107(a)(1). Grand Pier argues that it is not an owner of what the parties refer to as the "off-site sidewalk area," a parcel adjacent to property that Grand Pier acknowledges it owns and for which Grand Pier admits it is liable for costs incurred in complying with the Region's order.

As will be explained below in Part I.B, Grand Pier's petition seeks reimbursement for its costs only with respect to a portion of the sidewalk right-of-way adjacent to its property located in Chicago, Illinois. Specifically, Grand Pier seeks reimbursement only with respect to an area that is approximately 46 feet long and approximately 10 feet wide located in the sidewalk right-of-way along North Columbus Drive on the east side of Grand Pier's property. Grand Pier, however, also removed thorium contamination from significant portions of the sidewalk right-of-ways outside of the 46-foot by 10-foot parcel at issue. We will refer to the specific 46-foot by 10-foot area at issue as the "off-site sidewalk area."

In accordance with this Board's practice in CERCLA section 106(b) reimbursement matters, the Board requested that the Region file a response to Grand Pier's petition, which the Region did file on February 16, 2005. The Region notes that section 107(a)(1) refers to the owner of the "facility," and the Region argues as one of its central contentions that the "facility" at issue in this case consists of both Grand Pier's property and the adjacent sidewalk right-of-ways, including the off-site sidewalk area.[3] The Region argues that Grand Pier is liable under CERCLA section 107(a) for all of the compliance costs at the facility including costs

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[2] The statute authorizes the President to approve such reimbursement. CERCLA § 106(b), 42 U.S.C. § 9606(b). The President's statutory authority to decide such claims has been delegated to the Administrator of the EPA. *See* Exec. Order No. 12,580 (Jan. 23, 1987), 52 Fed. Reg. 2923 (Jan. 29, 1987). The Administrator's authority has, in turn, been delegated to the Board. *See* Delegations of Authority 14-27 ("Petitions for Reimbursement") (June 1994).

[3] *See* U.S. EPA, Region 5's Response to Petition for Reimbursement of Costs Under 42 U.S.C. Section 9606(b)(2) at 23-30 (Feb. 15, 2005) (hereinafter "Region's Response"). Grand Pier stated at oral argument that it was unaware of the Region's central contention that the CERCLA facility consists of both Grand Pier's property and the adjacent sidewalk right-of-ways. Transcript of Oral Argument at 14-17, 22, 25 (June 16, 2005) (hereinafter "Tr. at __"). However, the Region articulated its view in the Region's initial response to Grand Pier's petition. The Region stated:

> Petitioner may not own the sidewalk right-of-way but for the purposes of CERCLA's remedial intent and consistent with CERCLA's statutory definitions, the Columbus Drive Sidewalk right-of-way was *part of the* "*facility*." If Petitioner is the owner of the [Grand Pier Site] then Petitioner is also owner of the "facility" *which included the* "*Off-Site Sidewalk Area.*"

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of compliance with respect to the off-site sidewalk area. Both parties filed additional briefs further developing these arguments, and on June 16, 2005, the Board held oral argument in this matter.

For the following reasons, we conclude that Grand Pier has failed to sustain its burden of proof under CERCLA section 106(a) that it is not liable as a present owner under section 107(a) for all response costs associated with the relevant CERCLA "facility," which in this case includes not only Grand Pier's property but also the specific off-site sidewalk area at issue.

I. *BACKGROUND*

A. *Statutory Background*

CERCLA was enacted "to accomplish the dual purpose of ensuring the prompt cleanup of hazardous waste sites and imposing the costs of such cleanups on responsible parties." *Dico, Inc. v. Diamond*, 35 F.3d 348, 349 (8th Cir. 1994). "As numerous courts have observed, CERCLA is a remedial statute which should be construed liberally to effectuate its goals." *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 258 (3rd Cir. 1992); *accord Atlantic Richfield Co. v. Am. Airlines, Inc.*, 98 F.3d 564, 570 (10th Cir. 1996).

CERCLA grants broad authority to the Federal government to require the cleanup of sites contaminated with hazardous substances. The government may respond to a release or threatened release[4] of a hazardous substance[5] at a facility[6] by undertaking a cleanup action under section 104(a), 42 U.S.C. § 9604(a), and then bring a cost recovery action against the responsible parties under section

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(continued)
Region's Response at 24 (emphasis added). The Region stated further that the CERCLA facility identified as a "functional unit" in this case "included both the on-site contamination as well as the contamination that crossed the property lines into the sidewalk right-of-way." *Id.* at 27.

[4] Section 101(22) defines "release" as "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment (including abandonment or discarding of barrels, containers, and other closed receptacles containing any hazardous substance or pollutant or contaminant)." 42 U.S.C. § 9601(22).

[5] The term "hazardous substance" includes any substance identified as a hazardous substance under CERCLA § 101(14) and any other substance identified as a hazardous substance by Agency regulation. *See* CERCLA § 102, 42 U.S.C. § 9602. A list of substances EPA has designated as hazardous substances appears at 40 C.F.R. § 302.4. There is no dispute that thorium radionuclides, the substance addressed by the Grand Pier remediation, is a hazardous substance.

[6] The meaning of the term "facility" as used in CERCLA section 107(a)(1) is one of the central issues in this case. Below in Part II.A, we discuss CERCLA's definition of the term "facility," which is set forth in section 101(9), 42 U.S.C. § 9601(9).

107(a), 42 U.S.C. § 9607(a). Alternatively, where there is an imminent and substantial endangerment of harm to public health or welfare or the environment, the Federal government may, pursuant to section 106(a), 42 U.S.C. § 9606(a), issue such administrative orders as may be necessary to protect public health and welfare and the environment. An administrative order issued under section 106(a) may direct potential responsible parties, or "PRPs," to clean up the facility. This latter approach is the one the Region chose to follow in this case.

Persons who have received a section 106(a) administrative order may, in appropriate circumstances, seek reimbursement of the reasonable response costs incurred in complying with the order. CERCLA § 106(b)(2)(A), 42 U.S.C. § 9606(b)(2)(A). This opportunity to request reimbursement, which was added to CERCLA as part of the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), provides that:

> Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest.

Id.[7] The right to recover compliance costs is limited by, among other provisions, section 106(b)(2)(C), which provides that:

> [T]o obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 107(a) and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

CERCLA § 106(b)(2)(C), 42 U.S.C. § 9606(b)(2)(C). As this section makes clear, in a section 106(b) reimbursement proceeding the petitioner bears the burden of proof (including the burden of initially going forward with the evidence and the ultimate burden of persuasion) to show by a preponderance of the evidence that it is not liable under section 107(a). *See In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 454 (EAB 1996).

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[7] We have held that there are four statutory prerequisites the petitioner must establish before the Board will consider the merits of a reimbursement request. *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 315 (EAB 1996). Those prerequisites are that the petitioner: 1) complied with the order; 2) completed the required action; 3) submitted the petition within sixty days of completing the action; and 4) incurred costs responding to the order. *Id.* In addition, the petitioner must have received an order issued under CERCLA section 106(a) requiring the petitioner to perform the work for which reimbursement is sought. *In re Katania Shipping Co.*, 8 E.A.D. 294 (EAB 1999). These prerequisites appear to be satisfied in the present case.

Section 107(a) lists four categories of responsible parties who are liable for the costs of the cleanup. The liability category relevant to the Board's decision in the present matter includes the current "owner and operator of a vessel or a facility." CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1).[8] The statute provides in section 107(b) certain narrow defenses to the liability that otherwise obtains under section 107(a). Grand Pier has not argued that any of these defenses apply in this case. *See* Petition at 1, ¶ 19.

In addition, even if a party is liable under CERCLA section 107(a), it can obtain reimbursement of all or part of its costs to the extent it can prove that the Region's selection of the response action was "arbitrary and capricious or was otherwise not in accordance with law." CERCLA § 106(b)(2)(D), 42 U.S.C. § 9606(b)(2)(D). Grand Pier's petition does not allege that the response action in this case was arbitrary and capricious in any respect.

B. *Factual Background*

1. *Description of the Site*

The properties relevant to this case are located in Chicago's Streeterville neighborhood and were owned by, used by, or adjacent to property owned or used by the Lindsey Light Company from 1904 until the 1930s. The property at issue in this proceeding was, in the early 1900s, part of "a very long east-west city block without cross streets." Power/CRSS, "Report of Environmental Investigation," at 11 (Sept. 11, 1992); *see also* Tr. at 10-11. The area is located between East Illinois Street and East Grand Avenue, which run east and west.

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[8] The following three additional categories of parties are also liable under CERCLA section 107(a):

> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
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> (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances * * * , and
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> (4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities * * * from which there is a release, or threatened release which causes the incurrence of response costs, of a hazardous substance * * * .

CERCLA § 107(a), 42 U.S.C. § 9607(a). As explained in the procedural background in part I.C. below, the Region also argues that Grand Pier is liable under section 107(a)(2) as an operator at the time of disposal. As explained in footnote 18 below, the Board does not reach this issue.

In more recent history, the long city block has been divided. At the west end is a building known as the "Lindsey Light Building," with an address of 161 East Grand Avenue. Immediately to the east of the Lindsey Light Building is property presently owned by Grand Pier and known as the "Grand Pier Site." North St. Clair Street passes between the Lindsey Light Building and the Grand Pier Site. Immediately to the east of the Grand Pier Site is property referred to as the River East development located at 316 East Illinois Street ("316 East Illinois"). North Columbus Drive was extended through the property in the 1980s creating the division that now exists between the Grand Pier Site and 316 East Illinois. Tr. at 11.[9] The specific off-site sidewalk area at issue in this case is adjacent to the Grand Pier Site, located in the North Columbus Drive right-of-way that was created in the 1980s.

2. *Lindsey Light's Contamination of the Area*

In the 1990s, EPA discovered that many properties in the Streeterville neighborhood were contaminated with thorium radionuclides from the Lindsey Light Company's operations.[10] The thorium contamination was created by the Lindsay Light Company in the early 1900s when it produced incandescent gas lights and gas light mantles at various locations in the surrounding neighborhood. STS Consultants, "Grand Pier Center LLC Final Closure Report," Vol. 1 at 2 (July 2, 2001) ("On-Site Closure Report"). Gas mantle manufacturing involved dipping gauze mantle bags into solutions containing thorium nitrate, which caused the gas mantle to burn more brightly. The principle ingredient in thorium nitrate is radioactive thorium, specifically, thorium-232, which is a radionuclide and a hazardous substance as defined by CERCLA.[11] The Lindsay Light Company extracted thorium from monazite ore, the processing of which generated radioactive mill tailings that required disposal and apparently were used as fill material in the surrounding neighborhood. Grand Pier acknowledges that the contamination at issue in this proceeding was caused by the Lindsey Light Company in the early part of the 1900s. Tr. at 10-11.

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[9] The Grand Pier Site is identified by the Cook County Assessor's Parcel Number 17 10 212 019 and is sometimes referred to as "RV3 North Columbus Drive."

[10] The Lindsey Light Company owned the property at 161 East Illinois Street and, from 1915 to 1933, leased a building that was located at 316 East Illinois. *See* Letter from Ronald W. Bugg and Thomas Kouris, Ecology and Environment, Inc., to Ms. Jan Pfundheller, U.S. EPA Region 5 (Aug. 18, 1993); Work Plan for Characterization of Radioactive Contamination 316 East Illinois Street, Chicago, Illinois, App. E, E-23 (Sept. 1993).

[11] Under CERCLA section 101(14), hazardous substance is defined as including "any hazardous air pollutant listed under section 112 of the Clean Air Act," which lists radionuclides as hazardous air pollutants in section 112(b), 42 U.S.C. § 7412(b).

3. *The Original Unilateral Administrative Order*

Investigations of the Lindsay Light Company in the early 1990s by the Department of Energy, the Nuclear Regulatory Commission and U.S. EPA led to the identification of the thorium contamination at the 316 East Illinois property and in the interior of the Lindsay Light Building. Letter from Verneta Simon, U.S. EPA On-Scene Coordinator, to Ron Steele, Building Manager, 205 East Grand Ave. (June 21, 1993).

On June 6, 1996, the Region issued a unilateral administrative order ("UAO") to the Chicago Dock & Canal Trust and Kerr-McGee Chemical Corporation[12] requiring them to conduct removal activities to abate an imminent and substantial endangerment to the public health, welfare, and environment at the 316 East Illinois property, which the UAO referred to as the "Lindsey Light II Site." The UAO required the Chicago Dock & Canal Trust and Kerr-McGee Chemical Corporation to remove the thorium contamination from the 316 East Illinois property.

The Chicago Dock & Canal Trust and Kerr-McGee Chemical Corporation largely completed the work required under the UAO by May 2000. At that time, the Region issued a determination that all on-site work was completed at the 316 East Illinois property. Letter from Verneta Simon, U.S. EPA On-Scene Coordinator, to Richard Berggreen, STS Consultants (May 19, 2000).

With respect to both known and unknown off-site contamination in the right-of-ways surrounding the 316 East Illinois property, the Region worked with the City of Chicago and the original[13] respondents to the UAO to develop a system to notify the Region whenever a person applied for a permit to intrude into those right-of-ways. Right-of-Way Agreement (Sept. 27, 1999). The Right-of-Way Agreement was recorded in the Cook County Recorder of Deeds office. In addition, the Right-of-Way Agreement provided that the City of Chicago would create a notice in its permit database designed to alert any permit applicant of the potential presence of radiation and the need to survey for radiation and properly manage and dispose of any contamination.

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[12] Chicago Dock & Canal Trust was, at that time, the owner of the 316 East Illinois property, and Kerr-McGee Chemical Corporation was the corporate successor to Lindsey Light Company, the generator of the contamination.

[13] As noted in the next part I.B.4., Grand Pier was subsequently added as a respondent obligated to perform work under an amendment to the UAO.

4. *The First Amendment to the UAO*

In December 1999, Grand Pier began to excavate the Grand Pier Site for construction of a multi-use development. Grand Pier did not provide any notice to EPA before it began excavating the Grand Pier Site, even though its property is located between properties that had earlier been identified as contaminated with thorium and even though it intended to excavate in the right-of-ways covered by the Right-Of-Way Agreement. On February 29, 2000, the Region inspected the Grand Pier Site and discovered levels of radioactive contamination significantly above background levels, including contamination in and around the excavation for a caisson that encroached into the North Columbus Drive sidewalk right-of-way. *See* On-Site Closure Report at 3. The Region discovered that Grand Pier had caused contaminated soil from the sidewalk right-of-way to be excavated and deposited on Grand Pier's property. In addition, from December 1999, and continuing until the Region identified radioactive contamination at Grand Pier's property, Grand Pier arranged for transportation and disposal of radioactively contaminated soil from the Grand Pier property to off-site locations.

On March 29, 2000, the Region issued the first amendment to the UAO (the "UAO First Amendment"), which, among other things, expanded the description of the Lindsey Light II Site to include the Grand Pier Site and added Grand Pier as a respondent obligated to perform required removal activities. Specifically, the UAO First Amendment stated that "[t]he Lindsay Light II Site ('the Site' or 'the Facility') is located at 316 East Illinois Street, and also at Parcel Number 17 10 212 019 (bound by North Columbus Drive, East Grand Avenue, North St. Clair Street, and East Illinois Street), Chicago, Cook County, Illinois" (the "Grand Pier Site"). UAO First Amendment at 1. The UAO First Amendment left unchanged the portion of the UAO's requirements for "Work to be Performed" that obligated the respondents to "[c]onduct off-site surveying and sampling as necessary and, at a minimum, implement the standards of 40 Code of Federal Regulations ('CFR') 192, if deemed necessary should contamination be discovered beyond current site boundaries." UAO at 7. Part 192 of the Code of Federal Regulations establishes health and environmental protection standards for cleanup of uranium and thorium processing sites.

5. *Grand Pier's Compliance Activity*

The Region allowed Grand Pier to combine the compliance work it performed under the UAO First Amendment with its site preparation and construction activities for its planned development of the site. On-Site Closure Report at 5-9; *see also* STS Consultants Ltd., "Work Plan for Site Radiation Survey and

Excavation Soil Management" 4 (Mar. 21, 2000) ("On-Site Work Plan").[14] Grand Pier began its work under the UAO First Amendment with an initial site survey to identify the location of radiation exceeding the clean-up criteria of the UAO, followed by further monitoring as the excavations and construction of the caisson foundation system proceeded. *Id.* at 9-13. The initial site survey showed that the thorium contamination located on-site also extended beyond the Grand Pier Site's legal boundaries and into the sidewalk right-of-ways in several locations. On-Site Closure Report, fig. 1.3 ("Areas of Elevated Gamma Radiation (mR/hr) from Initial Site Grid Survey"); *see also id.,* fig. 2.4 ("Location of Known Removed & Remaining Off-Site Impacted Soil"). In particular, the initial site survey showed that thorium contamination extended beyond the Grand Pier Site's legal boundary into the off-site sidewalk area at issue. On-Site Closure Report, fig. 1.3 ("Areas of Elevated Gamma Radiation (mR/hr) From Initial Site Grid Survey").

During the course of Grand Pier's construction activity, Grand Pier removed from within the legal boundaries of its property all soils impacted by thorium at or above the cleanup criteria set forth in the UAO. On-Site Closure Report at 7, 9. In addition, at the same time Grand Pier also removed the majority of thorium-impacted soils from within the sidewalk right-of-ways adjacent to its property. *Id.* However, by the time Grand Pier had completed the removal activities within the legal boundaries of its property, Grand Pier had also identified a few locations where contamination was present in the adjacent sidewalk right-of-ways, but where Grand Pier had not yet removed the contaminated soil. *Id.; see also* STS Consultants, Ltd, "Columbus Drive Sidewalk Remediation Work Plan" 1 (Mar. 9, 2001) ("Off-Site Work Plan").Specifically, Grand Pier had not removed all of the thorium contamination from the off-site sidewalk area at issue in this case. Off-Site Work Plan at 2. Notably, monitoring showed that the thorium contamination extending beyond Grand Pier's property into the off-site sidewalk area was among the highest contamination at the site.On-Site Closure Report, fig. 1.3 ("Areas of Elevated Gamma Radiation (mR/hr) From Initial Site Grid Survey"); *see also id.,* fig. 2.4 ("Location of Known Removed & Remaining Off-Site Impacted Soil"); Off-Site Work Plan, fig. 1.

As part of Grand Pier's construction activities, Grand Pier undertook significant work in the off-site sidewalk area. Tr. at 10 ("Grand Pier did do some excavation in the offsite sidewalk area as part of the construction activities in the years

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[14] Specifically, Grand Pier's work plan divided the Grand Pier Site into three work areas conforming to Grand Pier's development plan: Area A, consisting of the western portion of the site, was reserved for a later development phase as a high-rise; Area B, located at the center of the site, was to be developed with a one-story deep basement and caisson foundation system; and Area C, located at the east end of the site, was to be developed with a slab-on-grade retail facility supported with grade beams and a caisson foundation system. On-Site Work Plan at 1, 4. Each of these areas was bordered on at least one side by a portion of the street and sidewalk right-of-ways. The specific off-site sidewalk area at issue is located adjacent to Area C at the east end of the Grand Pier Site.

2000 and 2001."); *see also* On-Site Closure Report, fig. 2.3 ("Grade Beam Excavations Elevator and Escalator Pits"); Letter from Richard G. Berggreen, Principal Geologist for STS Consultants, Ltd., to Fred Micke, EPA On-Scene Coordinator, fig. 2 (May 26, 2000). However, Grand Pier did not complete the removal of thorium from the off-site sidewalk area at that time. Instead, Grand Pier requested that the Region allow Grand Pier to delay completion of the off-site removal activities and that the Region proceed without delay to issue a letter stating that the on-site cleanup was complete. Tr. at 25-26. In its On-Site Closure Report, Grand Pier stated that "[a] separate Work Plan was prepared and has been approved by USEPA for this off-site work." On-Site Closure Report at 10.

The Region issued a letter dated August 26, 2002 (the "2002 Completion Letter"), stating that the removal activity required by the UAO First Amendment had been completed on what the letter described as the "on-site portion of the Grand Pier Site." The 2002 Completion Letter defined "on-site" as "the real property identified as Cook County's Assessor's Parcel Number 17 10 212 019 that is bounded by, but does not include any remaining thorium contamination underlying the adjacent sidewalks or street right-of-ways of East Illinois Street, North Columbus Drive, East Grand Avenue, and St. Clair Street." It also stated that "all off-site work required by the Amended UAO has not been completed."

Grand Pier, in fact, had submitted a Sidewalk Remediation Work Plan, dated March 9, 2001, covering the removal work to be performed in the off-site sidewalk area, *see* Off-Site Work Plan, and the Region had approved that plan on April 11, 2001. STS Consultants, Ltd., "Final Closure Report Addendum Columbus Drive Sidewalk Remediation," 1 (Rev. Aug. 31, 2004) ("Off-Site Closure Report"). As previously noted, the Sidewalk Remediation Work Plan described removal activities to be performed in a portion of the sidewalk right-of-way adjacent to the North Columbus Drive side of Grand Pier's property. The affected off-site sidewalk area at issue here is approximately 46 feet long and approximately 10 feet wide, and the contaminated soil extended to a depth of between 7.5 and 8 feet. Off-Site Closure Report at 4 & fig. 1. Although EPA had approved the Off-Site Work Plan in April 2001, Grand Pier performed the removal work in this off-site sidewalk area between May 17 and May 28, 2004. Off-Site Closure Report at 1. The Region issued a letter, dated October 8, 2004 (the "2004 Completion Letter"), stating that the removal activity required by the UAO First Amendment in the off-site sidewalk area had been completed.

C. *Procedural History*

On December 13, 2004, Grand Pier filed its petition seeking reimbursement pursuant to section 106(b)(2)(A) and (C) of CERCLA. *See* CERCLA § 106(b) Petition for Reimbursement Pursuant to CERCLA § 106(b)(2)(A) and (C) Filed by Petitioner Grand Pier Center, LLC (Dec. 13, 2004) (hereinafter "Petition"). Grand Pier requests reimbursement of approximately $200,000 that Grand Pier

states it expended in performing the work described in the Sidewalk Remediation Work Plan for the off-site sidewalk area. Petition ¶ 15. Grand Pier specifically states that it does not seek reimbursement of any of its costs for removing thorium contamination from the "site." *Id.* ¶ 14. Grand Pier argues that, because it is not an owner of the "off-site sidewalk area," it is not liable under section 107(a)(1) of CERCLA for the removal costs attributable to this off-site area. *Id.* ¶¶ 21-24.

On February 16, 2005, the Region filed its response to Grand Pier's Petition. *See* Region's Response. The Region argues in its Response that Grand Pier has failed to sustain its burden of proof to show that it is not liable both as an owner under section 107(a)(1) and as an operator under section 107(a)(1) and (2). Specifically, with respect to owner liability under section 107(a)(1), the Region notes that the statute refers to the owner of the "facility," and the Region argues that the "facility" at issue in this case consists of both Grand Pier's property and the off-site sidewalk area. Region's Response at 23-29. The Region argues that Grand Pier is liable under CERCLA section 107(a)(1) for all of the compliance costs at the facility including costs of compliance with respect to the off-site sidewalk area because it is a present owner of the Grand Pier Site, and because the facility at issue includes the off-site sidewalk area. *Id.*

With respect to operator liability under section 107(a)(1), the Region argues that Grand Pier's construction activities in the off-site sidewalk area establish that Grand Pier was an operator of the site during Grand Pier's development of the Grand Pier Site. *Id.* at 30-31. With respect to operator liability under section 107(a)(2), the Region argues that Grand Pier was an operator of the off-site sidewalk area at the time of disposal of hazardous substances on-site and off-site during the excavation and grading as part of Grand Pier's construction activities.[15] *Id.* at 32-36.

On April 20, 2005, Grand Pier filed a reply to the Region's response, arguing that the Region had never claimed, nor did the UAO First Amendment state, that Grand Pier was liable under section 107(a)(2) as an "operator," and that any such claim was now barred. On May 9, 2005, the Region filed an Instanter Surreply Brief. The Region filed an additional Instanter Supplemental Brief on June 1, 2005, arguing that "Grand Pier is liable as an 'owner' of the sidewalk right-of-way under CERCLA Section 107(a), because Grand Pier barricaded, controlled, excavated, and installed permanent encroachments in the right-of-way, thereby demonstrating that it possessed the requisite indicia of ownership for the

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[15] During Grand Pier's excavation and grading of the Grand Pier Site, Grand Pier created a pile of excavated fill material that contained at least several cubic yards of contaminated soil. Letter from Richard G. Berggreen, STS Consultants to Verneta Simon and Fred Micke, U.S. EPA On-Scene Coordinators (Apr. 12, 2000). It is this "disposal" to which the Region refers, not the original disposal by the Lindsey Light Company.

purposes of establishing CERCLA owner liability." On June 8, 2005, Grand Pier filed a response to the Region's Instanter Supplemental Brief. On June 16, 2005, the Board held oral argument in this matter.

On August 17, 2005, the Board issued a Preliminary Decision setting forth the Board's preliminary conclusions on the question of liability. Consistent with the Board's practice, the parties were given an opportunity to comment on the Board's Preliminary Decision. *See* U.S. EPA, Environmental Appeals Board, *Revised Guidance on Procedures for Submission and Review of CERCLA Section 106(b) Reimbursement Petitions* 9-10 (Nov. 10, 2004) (hereinafter "CERCLA Guidance").[16] On September 16, 2005, Grand Pier filed a two-paragraph letter stating that it disagrees with the Board's Preliminary Decision, but declining to provide comments. On October 6, 2005, the Region filed its comments suggesting clarification of three matters.[17]

II. *DISCUSSION*

The central question we address in this proceeding is whether Grand Pier is liable as an "owner" under CERCLA section 107(a)(1) for the costs of removing thorium contamination from the off-site sidewalk area. Our conclusion that Grand Pier is indeed liable for response costs incurred in connection with both its property and the adjacent off-site sidewalk area flows directly from the statutory language, including the statute's definition of the term "facility," and from a long line of federal court and EAB decisions applying joint and several liability in similar circumstances.[18]

We begin with the statutory language of section 107(a)(1), which provides that the "owner" of a "facility" shall be liable for "response" costs:

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[16] The CERCLA Guidance is available on the Environmental Appeals Board's internet website and may be viewed at http://www.epa.gov/eab/cercla-guidance2004.pdf.

[17] The Region requested changes to the text in what is now footnote 18. While we decline to make the specific changes suggested by the Region, we did make a slight change to the wording of this footnote while still noting that we are not deciding the issue identified therein. The Region also suggested clarification regarding parts of the historical background pertaining to ownership of the various Streeterville properties in the early 1900s. We have reviewed the record and find the Region's suggestions on this point merited clarifying changes in our decision. Finally, the Region stated that it "would not concur that Grand Pier does not hold equitable title to any portion of the sidewalk right-of-way." Respondent's Comments Upon Environmental Appeals Board Preliminary Decision at 5. We do not reach the question of equitable ownership, but we have made a change in our decision at footnote 33 to clarify the position of the Region.

[18] Because we reject Grand Pier's central contention that it is not liable as an "owner" under section 107(a)(1) for costs incurred at the portions of the facility not owned by Grand Pier, we do not reach the issue of Grand Pier's potential liability as an "operator" under section 107(a)(1) and (2).

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> > (1) the owner and operator of a vessel or a facility,
> >
> > * * *
> >
> > * * * shall be liable for —
> >
> > (A) all costs of removal or remedial action incurred by the United States Government or a State not inconsistent with the national contingency plan;
> >
> > (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> * * *

CERCLA § 107(a), 42 U.S.C. § 9607(a).

In this case, Grand Pier does not argue that the costs it incurred cleaning up the off-site sidewalk area are not properly viewed as "costs of response."[19] Grand Pier also does not argue that it is completely free of liability for response costs incurred under the UAO First Amendment. Indeed, Grand Pier admits that it is a current owner of the Grand Pier Site and, as such, is liable for the cleanup of the Grand Pier Site. Instead, Grand Pier argues that its section 107(a) liability cannot extend geographically beyond the legal boundaries of the property that it owns. For the following reasons, we reject Grand Pier's argument.

As we explain below in part II.A., the statute's broad "facility" definition compels our conclusion that the relevant CERCLA "facility" in this case consists of both the Grand Pier Site and the adjacent off-site sidewalk area, which were contaminated at the same time long before the North Columbus Drive right-of-way was extended through the property creating the property separation upon which Grand Pier now relies. As discussed in part II.B., the owner of any

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[19] A challenge to the scope of the work required by a UAO must be brought under CERCLA section 106(b)(2)(D) on the grounds that the response ordered was arbitrary and capricious. *In re A&W Smelters and Refiners, Inc.*, 6 E.A.D. 302, 325-26 (EAB 1996). Grand Pier has not requested any relief under section 106(b)(2)(D). *See* Petition at 1, ¶ 19.

portion of the CERCLA facility — such as Grand Pier's admitted ownership of the Grand Pier Site in this case — is generally jointly and severally liable for all response costs incurred at any part of the CERCLA facility. In part II.B., we explain that Grand Pier has failed to demonstrate why it should not be held jointly and severally liable for the response costs incurred in the off-site sidewalk area and, thus, Grand Pier has failed to sustain its burden of proof that it is entitled to recover any portion of its response costs incurred cleaning up the CERCLA facility.

A. *The CERCLA Facility*

The first question we address is the geographic scope of the relevant CERCLA facility. Identification of the CERCLA facility is necessary to give meaning to all words in the statutory text, which imposes liability on property owners that have an ownership nexus with the CERCLA facility.[20] The relevant case law contemplates identification of the facility as the first element of the analysis.[21] Grand Pier, however, has not articulated in its Petition or subsequent briefs

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[20] Section 107(a)(1) imposes liability on "the owner * * * of * * * a *facility*." CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1) (emphasis added). The statutory definition of owner likewise reinforces the importance of identifying the relevant facility as a necessary and logical predicate to determining whether the ownership nexus exists: "[t]he term 'owner or operator' means * * * any person owning or operating such facility." CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii).

[21] The Seventh Circuit has held that liability for the recovery of response costs is established under section 107(a) of CERCLA if:

> (1) the site in question is a "facility" as defined in § 101(9);
>
> (2) the defendant is a responsible person under § 107(a);
>
> (3) a release or a threatened release of a hazardous substance has occurred; and
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> (4) the release or the threatened release has caused the plaintiff to incur response costs.

Town of Munster, Ind. v. Sherwin-Williams Co., Inc., 27 F.3d 1268, 1273 (7th Cir. 1994); *see also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 (7th Cir. 1994); *Envtl. Transp. Sys., Inc. v. ENSCO, Inc.*, 969 F.2d 503, 506 (7th Cir. 1992). We have likewise held in a section 106(b) reimbursement proceeding that "liability for clean-up costs attaches under CERCLA § 107 where the following elements are established: 1) the site in question is a 'facility' as defined in CERCLA § 101(9); 2) a release or threatened release of a hazardous substance has occurred at the facility; and 3) the recipient of the administrative order is a responsible person under CERCLA § 107(a)." *In re Chem-Nuclear Sys., Inc.*, 6 E.A.D. 445, 455 (EAB 1996), *aff'd* 292 F.3d 254 (D.C. Cir. 2002). The fourth element identified by the Seventh Circuit in a section 107(a) cost recovery action — that the release or threatened release caused the plaintiff to incur response costs — is addressed in a section 106(b) reimbursement proceeding in three distinct parts: first, the petitioner must allege in the petition that the petitioner incurred response costs; second, the petitioner may argue that the decision in selecting the response action required was arbitrary and capricious under section 106(b)(2)(D); and third, if granted reimbursement, the petitioner must show that its response costs are reasonable.

what it believes to be the appropriate scope of the CERCLA facility.[22] Instead, Grand Pier alleges in its Petition that the company's liability as an "owner" under CERCLA extends only to costs associated with response actions taking place within the legal boundaries of the Grand Pier Site. Petition ¶ 9. In opposition, the Region clearly states its view that the relevant CERCLA facility consists of both the Grand Pier Site and the off-site locations where the thorium contamination has come to be located, including the off-site sidewalk area at issue.[23]

The Region's characterization of the facility as encompassing contiguous parcels where thorium contamination was found is consistent with the statute and with applicable case law. The term "facility" is defined by CERCLA as including "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." CERCLA § 101(9), 42 U.S.C. § 9601(9).[24] As was observed by one of the first courts to address an argument similar to Grand Pier's, "nothing in the statute or case law supports defendants' claim that a 'facility' must be defined by or be coextensive with an owner's property lines." *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987); *accord In re Town of Marblehead*, 10 E.A.D. 570, 592-93 (EAB 2002).

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[22] Grand Pier does state in its petition that:

> The name and address of the facility at which the response action was implemented and which is the subject of this Petition for Reimbursement is: Grand Pier Center, LLC, 200 East Illinois Street, Chicago, Illinois 60611. The Grand Pier Center, LLC facility is located on what USEPA further identifies as the RV3 North Columbus Drive parcel directly across Columbus Drive and to the west of 316 East Illinois Street, Chicago, Illinois.

Petition ¶ 3; *see also id.* ¶ 9. At oral argument, however, Grand Pier's counsel stated that "[f]or purposes of this reimbursement petition, the facility is the offsite sidewalk area." Tr. at 24. While these seemingly contradictory statements do apparently express Grand Pier's view that there are two facilities at issue in this case, neither statement provides a rationale for treating the off-site sidewalk area as a separate CERCLA facility from the Grand Pier Site; nor do these statements provide a rationale for why the Region's characterization of the geographic scope of the facility is mistaken.

[23] *See* note 3 above.

[24] CERCLA defines the term "facility" in full as follows:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer or publicly owned treatment works), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located; but does not include any consumer product in consumer use or any vessel.

CERCLA § 101(9), 42 U.S.C. § 9601(9).

Instead of relying on legal title, courts have relied upon the statutory definition of the term "facility" in concluding that the primary consideration in defining the scope of a CERCLA facility is where the contamination has come to be located. *See, e.g., Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 418-19 (4th Cir. 1999) (holding that widespread contamination scattered throughout the property prevented limiting the facility to the particular geographical units); *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998); *Quaker State Minit-Lube, Inc. v. Fireman's Fund Ins. Co.*, 52 F.3d 1522, 1525 (10th Cir. 1995); *Akzo Coatings, Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1358 (N.D. Ind. 1996) (rejecting the argument that because the "Site can be divided into five distinct geographic areas, each area is a distinct facility" and instead holding that the site was one facility because hazardous substances had "otherwise come to be located in several locations at the Site"), *aff'd on other grounds*, 197 F.3d 302, 304 (7th Cir. 1999);[25] *Northwestern Mut. Life Ins. Co. v. Atl. Research Corp.*, 847 F. Supp. 389, 395-96 (E.D. Va. 1994) (holding that "[w]hat matters for the purpose of defining the scope of the facility is where the hazardous substances were 'deposited, stored, disposed of, . . . or *[have] otherwise come to be located*'" and "the uncontradicted record confirms that hazardous substances exist in the soil, the groundwater, and the structures in all quadrants of the property." (quoting 42 U.S.C. § 9601(9)(alterations made by the court))); *Arizona v. Motorola, Inc.*, 805 F. Supp. 749, 752-53 (D. Ariz. 1992).

Grand Pier has not cited, and we have not found, any case where a court relied solely on legal title boundaries to determine that two contiguous properties were separate CERCLA facilities. To the contrary, numerous courts have concluded that the boundaries of legal title do not alone[26] control the scope of the CERCLA facility. The Sixth Circuit in *United States v. Township of Brighton*, 153 F.3d 307, 313 (6th Cir. 1998), adopted the general rule that when an area cannot be reasonably or naturally divided into multiple parts or functional units, it should be defined as a single "facility." Later, in *United States v. 150 Acres of Land*, 204 F.3d 698, 707-09 (6th Cir. 2000), the Sixth Circuit explained that dis-

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[25] The Seventh Circuit's holding on appeal in the *Akzo Coatings* case reinforces the notion that the proper scope of the "facility" must take into account the facts as developed in the record of the case. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 304 (7th Cir. 1999) ("this factual conclusion makes it unnecessary (and inappropriate) for us to inquire what the judge should have done at an earlier stage of the case [i.e., summary judgment], when the record contained less information.").

[26] In determining the scope of the relevant CERCLA facility, a few courts have considered legal property boundaries as a relevant fact to be considered along with other facts concerning the location of the contamination, property history including the history of activities and operations conducted on the property, and geographical features. *See, e.g., Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 131 (N.D. N.Y. 2003); *United States v. Nalco Chem. Co.*, 1995 WL 1937245 (N.D. Ill. 1995). In this regard, we note that Grand Pier has not presented evidence or analysis of the operating or ownership history of the contiguous, but separately owned parcels at issue in the present case.

tinguishing facilities based on legal property boundaries would not be consistent with this general rule, finding that "[t]he merely formal division in the land records is not a 'reasonable or natural' division under *Brighton*." *150 Acres of Land*, 204 F.3d at 707-09. *See also United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3rd Cir. 1993) (recognizing CERCLA facility had multiple owners); *Tanglewood East Homeowners v. Charles-Thomas, Inc.*, 849 F.2d 1568, 1573 (5th Cir. 1988) (entire subdivision constructed on contaminated land is a single facility); *United States v. Vertac Chem. Corp.*, 364 F. Supp. 2d 941, 959 (E.D. Ark., 2005) ("The Plant Site and Off-Site areas are not distinct facilities, but are one facility for purposes of liability under CERCLA."); *City of Bangor v. Citizens Communications Co.*, No. Civ. 02-183-B-S, 2004 WL 483201 (D. Me. Mar. 11, 2004) (recognizing facility consisting of several legally distinct parcels); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 131 (N.D. N.Y. 2003) (Although site consists of multiple parcels currently owned by different respondents, the entire site is a single CERCLA facility because it was owned and operated together at the time of the contamination); *U.S. v. Manzo*, 279 F. Supp. 2d 558, 573-74 (D. N.J. 2003) (recognizing that facility consists of entire site, not just area owned by the particular responsible party); *City of Tulsa v. Tyson Foods, Inc.* 258 F. Supp. 2d 1263, 1279-80 (N.D. Ok. 2003)[27] (subsequently vacated pursuant to settlement); *New York v. Westwood-Squibb Pharm. Co.*, 138 F. Supp. 2d 372, 382 (W.D. N.Y. 2000) ("[C]ontamination of the Westwood Property ultimately caused contamination of the Creek Property. As such, the Westwood Property and the Creek Property are part of the same CERCLA facility."); *S. Pac. Transp. Co. v. Voluntary Purchasing Groups Inc.*, No. Civ A.3:94-CV-2477, 1997 WL 457510, at *5-6 (N.D. Tex. Aug. 7, 1997) ("The relevant 'facility' for purposes of this CERCLA case need not be defined in terms of legal property boundaries."); *Clear Lake Props. v. Rockwell Intern. Corp.*, 959 F. Supp. 763, 768 (S.D. Tex. 1997) ("[C]ourts have consistently rejected attempts to create unnatural boundaries between different 'facilities' based on legal ownership boundaries."); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 276-77 (D. Colo. 1994) (recognizing that relevant facility consisted of "contaminated groundwater in the pond plume, including the portion of the plume beyond the boundary of the Parcel."); *Massachusetts v. Blackstone Valley Elec. Co.*, 808 F. Supp. 912, 916 (D. Mass. 1992) (recognizing that CERCLA facility was entire site even though only a portion of the site was owned by the particular respondent).

Further, where a particular site may be viewed as multiple facilities or consisting of a "facility within a facility," there is a strong presumption in favor of

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[27] In *Tyson Foods*, the court rejected a motion for summary judgment on the scope of the alleged facility, holding that the definition of "facility" under CERCLA is broad enough to encompass 415 square miles of watershed where hazardous substances may have been deposited. 258 F. Supp. 2d at 1279-80.

treating the entire site as a single facility.[28] *See, e.g., Sierra Club v. Seaboard Farms Inc.*, 387 F.3d 1167, 1174-75 (10th Cir. 2004) (finding that farm complex as a whole, as opposed to every barn, lagoon and land application area on complex, constituted single "facility" under CERCLA); *Axel Johnson Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 417-18 (4th Cir. 1999); *New York v. Westwood-Squibb Pharm. Co.*, 138 F. Supp. 2d 372, 382 (W.D. N.Y. 2000). The Fourth Circuit has observed that simply because "a property could be divided [into multiple facilities] does not, however, mean that it must be so divided for CERCLA purposes" and "[n]o court has held * * * that any area that could qualify as a facility under the definition *must* be considered a separate facility." *Axel Johnson*, 191 F.3d at 417-18; *accord Akzo Coatings, Inc. v. Aigner Corp.*, 960 F. Supp. 1354, 1359 (N.D. Ind. 1996) (treating each part of site as a separate facility "could have disastrous consequences, for ultimately every separate instance of contamination, down to each separate barrel of hazardous waste, could feasibly be construed to constitute a separate CERCLA facility"), *aff'd* 197 F.3d 302 (7th Cir. 1999).[29]

The *Cytec Industries* court aptly explained why the relevant CERCLA facility generally should be the broadest geographical definition:

> [T]he broadest geographical definition of a facility that is appropriate under the specific facts and circumstances of a given case would likely best advance CERCLA's two underlying purposes — to ensure prompt and efficient cleanup of hazardous wastes sites and to place the costs of those cleanups on the potentially responsible persons. *See United States v. Coatings of Am., Inc.*, 949 F.2d 1409, 1416-17 (6th Cir. 1991). This approach serves CERCLA's two primary purposes because it avoids piecemeal litigation, encourages a comprehensive remedy which is co-extensive with the entire geographical area affected by a release or threatened release of hazardous substances, and promotes the concept of strict liability which CERCLA incorporates. Put differently, issues relating to respective liability can best be determined in one litigation,

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[28] A facility, however, will not be deemed to include the entire legal bounds of a site when the contamination is located in discrete areas. *See, e.g., Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837, 843 (4th Cir. 1992) (stating that "the only 'area' where hazardous substances [had] 'come to be located' was in and around the storage tanks, so the relevant 'facility' [was] properly confined to that area").

[29] On appeal, the Seventh Circuit declined to review the district court's summary judgment decision finding a single facility for purposes of determining liability when the record supported the district court's later holding after trial that it was not possible to identify distinct harms for the purposes of apportionment. *Akzo Nobel Coatings, Inc. v. Aigner Corp.*, 197 F.3d 302, 304 (7th Cir. 1999).

> and therefore the definition of facility should be the most geographically complete definition that is appropriate under the circumstances of a given case.

Cytec Indus. v. B.F. Goodrich Co., 232 F. Supp. 2d 821, 836 (S.D. Ohio 2002).

In the present case, the undisputed facts show that the hazardous substance — thorium 232 — was widely spread throughout both the Grand Pier Site and the sidewalk areas adjacent to the Grand Pier Site, including the specific off-site sidewalk area at issue in this proceeding. On-Site Closure Report, fig. 1.3 ("Areas of Elevated Gamma Radiation (mR/hr) From Initial Site Grid Survey"); *see also id.*, fig. 2.4 ("Location of Known Removed & Remaining Off-Site Impacted Soils"). It is also undisputed that the thorium contamination was created by the Lindsey Light Company operations in the early 1900s and that "the property was all continuous in the sense there were no roadways cutting [] north and south through the properties." Tr. at 10-11.

Further, it is undisputed that the North Columbus Drive right-of-way, which includes the off-site sidewalk area at issue, and upon which Grand Pier seeks to rely as a separate facility from thorium contamination on its property, was created in the 1980s long after the area became contaminated with thorium. Tr. at 11. Indeed, the record does not contain any evidence that the legal boundaries between Grand Pier's property and the off-site sidewalk area conform to any natural features of the property, or to any segregable areas of contamination, but instead were merely based upon an extension of North Columbus Drive into the property that had been a long, continuous city block.

Moreover, it was Grand Pier's own construction activities into the adjacent right-of-way that disclosed a wide-spread and continuous deposition of thorium contamination that included the right-of-way as well as the Grand Pier Site. Grand Pier's construction activities extended beyond its property boundaries and into the adjacent sidewalk right-of-ways, where utilities were installed, upgraded, or maintained in those right-of-ways to support Grand Pier's use of its property. *See, e.g.*, On-Site Closure Report, fig. 2.3 ("Grade Beam Excavations Elevator and Escalator Pits"); Letter from Richard G. Berggreen, Principal Geologist for STS Consultants, Ltd., to Fred Micke, EPA On-Scene Coordinator, fig. 2 (May 26, 2000). These activities in the adjacent right-of-way disclosed thorium contamination at some of the highest levels found at the entire site,[30] and evidenced a continuous pattern of contamination extending beyond the Grand Pier Site into the sidewalk right-of-way. These undisputed facts are clearly sufficient under the prevailing

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[30] On-Site Closure Report, fig. 1.3 ("Areas of Elevated Gamma Radiation (mR/hr) From Initial Site Grid Survey"); *see also id.*, fig. 2.4 ("Location of Known Removed & Remaining Off-Site Impacted Soil"); Off-Site Work Plan, fig. 1.

case law discussed above to establish that the Grand Pier Site and the off-site sidewalk area were appropriately treated as a single CERCLA "facility" for purposes of the amended UAO.

B. *Grand Pier's "Owner" Argument and the Scope of CERCLA Liability*

CERCLA section 107(a)(1) imposes liability on "the owner * * * of * * * a facility." CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1). As we discussed above, the broad statutory definition of "facility" compels the conclusion that the relevant CERCLA facility for the purposes of this case consists of both the Grand Pier Site and the off-site sidewalk area where thorium contamination came to be located when both parcels were owned and operated by the Lindsey Light Company. Next, we turn to the meaning of "owner" as used in CERCLA section 107(a)(1) and specifically to the scope of an owner's liability where the owner does not own the entire facility.

Grand Pier argues that its "ownership" liability under section 107(a)(1) must be determined by reference to the metes and bounds of its legal title. Grand Pier Center, LLC's Reply Brief in Support of CERCLA 106(b)(2) Petition for Reimbursement at 2 (Apr. 20, 2005). In support of this contention, Grand Pier observes that the statutory definition of "owner," which states that "[t]he term 'owner or operator' means * * * any person owning or operating such facility,"[31] is circular. *Id.* Grand Pier contends that, since the statutory definition of "owner" is circular, the ordinary meaning of "owner," which looks to legal title, must govern the limits of Grand Pier's ownership interest, and also the scope of the company's liability under CERCLA section 107(a). *Id.*

Grand Pier is certainly correct that the term "owner," as used in CERCLA section 107(a)(1), must be given its ordinary meaning. Indeed, the Seventh Circuit stated this proposition quite succinctly in *Edward Hines Lumber Co. v. Vulcan Materials Co.*, 861 F.2d 155 (7th Cir. 1988). In that case, the Court stated:

> The definition of "owner or operator" * * * must come from a source other than the text. The circularity strongly implies, however, that the statutory terms have their ordinary meanings rather than unusual or technical meanings.

Id. at 156.[32] Accordingly, whether a person has the status of "owner" must typically be determined by reference to the ordinary meaning of the term "owner,"

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[31] CERCLA § 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii).

[32] The Seventh Circuit made this statement when looking at the meaning of the term "operator." *Edward Hines Lumber*, 861 F.2d at 156. Its conclusions, however, are equally applicable to an interpretation of the term "owner."

which in the case of real property must look to legal or equitable title and related concepts of state property law. In the present case, the parties agree that Grand Pier holds legal title to the Grand Pier Site, but does not, under state law, hold legal title[33] to the off-site sidewalk area.

Grand Pier contends that by proving it does not, under state law, own the *off-site sidewalk area*, it has established that it is not liable for the costs of removing the thorium contamination from that area. *See* Petition ¶ 24. On this point, Grand Pier is mistaken. Rather, Grand Pier's admitted ownership of the *Grand Pier Site* establishes that Grand Pier is liable under CERCLA section 107(a) for response costs incurred at the facility as one of the present owners of that facility.

Grand Pier admits that it owns the Grand Pier Site and that it is liable for the clean up of that property. *Id.* ¶ 21. Once status as an owner, and hence liability under section 107(a), is established, the extent of that liability is determined under CERCLA, not under state property law as Grand Pier suggests. Under CERCLA section 107(a)(1), 42 U.S.C. § 9607(a)(1), current owners of the CERCLA facility are strictly liable for response costs whether or not the owner caused the contamination. *In re Tamposi Family Invs.*, 6 E.A.D. 106, 109 (EAB 1995).[34] In addition, under CERCLA, all persons liable under any of the four section 107(a) categories are generally jointly and severally liable for response costs. *See, e.g., In re Town of Marblehead*, 10 E.A.D. 570, 580 & n.11 (EAB 2002); *accord Dent v. Beazer Materials & Servs., Inc.*, 156 F.3d 523, 529 (4th Cir. 1998); *Rumpke of Ind., Inc. v. Cummins Engine Co., Inc.*, 107 F.3d 1235, 1240 (7th Cir. 1997).[35]

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[33] The Region does contend that Grand Pier may hold some form of equitable interest in portions of the sidewalk right-of-ways, at least insofar as its foundation caisson system encroaches into the right-of-ways. We do not reach the question whether such potential interests may be sufficient to establish that Grand Pier holds an equitable interest in the specific off-site sidewalk area at issue here. The Region has also observed that a number of courts have concluded that lessors may be considered "owners" under CERCLA because "'site control' is an important consideration in determining who qualifies as an owner under Section 107(a)." Region's Instanter Supplemental Brief at 3. Because we find, as discussed below, that Grand Pier is jointly and severally liable for the response costs incurred in the off-site sidewalk area due to Grand Pier's ownership of a significant portion of the CERCLA facility, we do not reach the Region's "site control" theory of ownership liability.

[34] *See also OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997); *New Castle County v. Halliburton NUS Corp.*, 111 F.3d 1116 (3d Cir. 1997); *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir. 1994); *United States v. Alcan Aluminum Corp.*, 990 F.2d 711 (2d Cir. 1993); *United States v. Mexico Feed and Seed Co., Inc.*, 980 F.2d 478 (8th Cir. 1992); *In re Hemingway Transp., Inc.*, 993 F.2d 915 (1st Cir. 1993), *cert. denied*, 510 U.S. 914 (1993).

[35] The proposition that liability under section 107(a) is generally joint and several is well established. *See, e.g., U.S. v. Alcan Aluminum Corp.*, 315 F.3d 179 (2nd Cir. 2003), *cert. denied* 540 U.S. 1103; *OHM Remediation Servs. v. Evans Cooperage Co., Inc.*, 116 F.3d 1574 (5th Cir. 1997); *Millipore Corp. v. Travelers Indem. Co.*, 115 F.3d 21 (1st Cir. 1997); *New Castle County v. Hallibur-*
Continued

In particular, owners of only part of the facility are generally jointly and severally liable for all response costs associated with the facility. *See, e.g.,United States v. 150 Acres of Land*, 204 F.3d 698, 707-09 (6th Cir. 2000) (treating three legally distinct parcels as a single facility); *United States v. Rohm & Haas Co.*, 2 F.3d 1265, 1279-80 (3rd Cir. 1993) ("We decline to attribute to Congress an intention to distinguish between single owner and multiple owner situations. A current owner of a facility may be liable under § 107 without regard to whether it is the sole owner or one of several owners."); *United States v. Vertac Chem. Corp.*, 364 F. Supp. 2d 941, 958-59 (E.D. Ark., 2005); *City of Bangor v. Citizens Communications Co.*, No. Civ. 02-183-B-S, 2004 WL 483201 (D. Me. Mar. 11, 2004)(holding that City's partial ownership of area contaminated with hazardous substances threatening the river made it a liable party for cleanup of the facility consisting of both the City's property and other property); *Niagara Mohawk Power Corp. v. Consol. Rail Corp.*, 291 F. Supp. 2d 105, 131 (N.D. N.Y. 2003)("Chevron is a current owner of a portion of the former MGP facility upon which a hazardous substance was released for which remediation costs have been incurred and therefore is a 'covered person' liable for response costs."); *New York v. Westwood-Squibb Pharm. Co.*, 138 F. Supp. 2d 372, 382 (W.D. N.Y. 2000) ("Westwood's liability for the Westwood Property's contamination, then, gives rise to liability for the Creek Property's contamination."); *S. Pac. Transp. Co. v. Voluntary Purchasing Groups Inc.*, No. CIV. A.3:94-CV-2477, 1997 WL 457510, at *5-6 (N.D. Tex. Aug. 7, 1997) ("[I]t is undisputed that SSW currently

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ton NUS Corp., 111 F.3d 1116 (3rd Cir. 1997); *United States v. Alcan Aluminum Corp.*, 964 F.2d 252 (3rd Cir. 1992); *In re Town of Marblehead*, 10 E.A.D. 570 (EAB 2002).

Although the terms of the statute do not expressly mandate joint and several liability, courts have recognized that the legislative history of section 107(a) shows Congress intended "to have the scope of liability determined under common law principles" with the liable party bearing the burden of showing that joint and several liability is not appropriate. *United States v. Monsanto Co.*, 858 F.2d 160, 171-72 (4th Cir. 1988). The *Monsanto* court explained the origins of joint and several liability under CERCLA section 107(a) as follows:

> As many courts have noted, a proposed requirement that joint and several liability be imposed in all CERCLA cases was deleted from the final version of the bill. *See, e.g., [United States v.] Chem-Dyne*, 572 F. Supp. [802,] 806 [(S.D. Ohio 1983)]. "The deletion," however, "was not intended as a rejection of joint and several liability," but rather "to have the scope of liability determined under common law principles." *Id.* at 808. We adopt the *Chem-Dyne* court's thorough discussion of CERCLA's legislative history with respect to joint and several liability. We note that the approach taken in *Chem-Dyne* was subsequently confirmed as correct by Congress in its consideration of SARA's contribution provisions. *See* H.R. Rep. No. 253(I), 99th Cong.2d Sess., 79-80 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News at 2835, 2861-62.

Monsanto Co., 858 F.2d at 171-72; *see also Town of Minster, Ind. v. Sherwin-Williams Co.*, 27 F.3d 1268, 1271 (7th Cir. 1994).

owns--and in fact has owned for more than a century--property at the contaminated Commerce Site. As a current owner of part of the Commerce facility, SSW is a covered person under Section 107(a)(1)."); *Clear Lake Properties v. Rockwell Intern. Corp.*, 959 F. Supp. 763, 768 (S.D. Tex. 1997); *United States v. Broderick Inv. Co.*, 862 F. Supp. 272, 276-77 (D. Colo. 1994); *Massachusetts v. Blackstone Valley Elec. Co.*, 808 F. Supp. 912, 916 (D. Mass. 1992) ("Courtois is liable pursuant to Section 107(a)(1) of CERCLA * * * as an owner of a portion of the Mendon Road site from or at which there has been a release or threat of release. The company currently holds legal title to one of the lots located at the site which contains hazardous waste."); *Arizona v. Motorola, Inc.*, 805 F. Supp. 749, 752-53 (D. Ariz. 1992); *United States v. Stringfellow*, 661 F. Supp. 1053, 1059 (C.D. Cal. 1987).

In *Rohm and Haas*, the Third Circuit held that an owner of less than 10% of the facility was liable for the response costs of cleaning up the entire facility. The court rejected the suggestion that "Congress may have intended that EPA, when faced with a release involving several disparately owned properties, define each property as a facility and bring multiple enforcement proceedings." *Rohm & Haas Co.*, 2 F.3d at 1279. The court explained:

> [W]e think it evident from the broad statutory definition of "facility" that Congress did not intend EPA to be straight-jacketed in this manner in situations involving a release transcending property boundaries. Second, even if Congress contemplated that EPA's enforcement authority would be so constrained, CP's reading of the statute would still result in no "current ownership" liability in any situation where more than one individual or firm own an undivided interest in a single property.
>
> We decline to attribute to Congress an intention to distinguish between single owner and multiple owner situations. A current owner of a facility may be liable under § 107 without regard to whether it is the sole owner or one of several owners.

Rohm & Haas Co., 2 F.3d at 1279-80 (footnote omitted).

In the present case, as discussed above, the CERCLA facility is not limited to Grand Pier's property boundary, but instead is demarcated by where the thorium contamination has come to be located, which includes both the Grand Pier Site and the off-site sidewalk area. *See* part II.A above. Grand Pier has admitted that it owns the Grand Pier Site, which constitutes a significant portion of the CERCLA facility. Petition ¶ 21. Accordingly, under the prevailing case law and for the reasons discussed above, we must reject Grand Pier's argument that its

liability is limited to the boundaries of its property and instead we must hold that Grand Pier is jointly and severally liable under CERCLA section 107(a)(1) for the response costs incurred at the entire facility, including both the Grand Pier Site and the off-site sidewalk area.

Finally, we note that, although a party found liable under section 107(a) can "escape joint and several liability" if it can demonstrate that the environmental harm at the facility is divisible, Grand Pier has not argued that the harm presented by the thorium contamination at this facility is susceptible to division. *See, e.g., United States v. Alcan Aluminum Corp.*, 315 F.3d 179, 185 (2d Cir. 2003); *In re Bell Petroleum Servs., Inc.*, 3 F.3d 889, 895-97 (5th Cir. 1993); *see also, e.g., In re Town of Marblehead*, 10 E.A.D. 570, 581, 592-97 (EAB 2002); *In re The Sherwin Williams Co.*, 6 E.A.D. 195, 223 (EAB 1995). Grand Pier has not in its petition,[36] nor in its subsequent briefs, invoked the affirmative defense of divisibility to attempt to defeat the joint and several liability that would normally obtain.[37] It is well recognized that the party seeking to avoid the imposition of joint and several liability has the burden of proving divisibility of harm as an affirmative defense. *See United States v. Mottolo*, 26 F.3d 261, 263 (1st Cir. 1994); *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4th Cir. 1988). Further, the Board's guidance on procedures for review of CERCLA reimbursement petitions states that "[t]he petition must set forth *all* legal arguments, factual contentions * * * , and supporting evidence on which the petitioner relies in support of its claim for reimbursement." CERCLA Guidance[38] at 5 (emphasis added). Grand

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[36] Grand Pier's Petition does suggest that, by allowing Grand Pier to complete work on the off-site sidewalk area after issuing the completion letter for the on-site portion of the work, the Region "acknowledge[d] the distinction between the Site activities the Petitioner was required to perform under the UAO as the Site owner, as distinguished from the Off-Site Sidewalk Area which the Petitioner has never owned, but was nevertheless ordered by USEPA to remediate." Petition ¶ 23. Grand Pier has given no indication that it intended to raise the affirmative defense of divisibility by this statement and, in any event, similar arguments have been rejected as a basis for divisibility. *See, e.g., United States v. Vertac Chem. Corp.*, 364 F. Supp. 2d 941, 951 (E.D. Ark. 2005)(holding that the Agency's decision to separate the cleanup requirements into "operable units" was not a basis for finding divisibility) (An operable unit is "a discrete action that comprises an incremental step toward comprehensively addressing site problems." 40 C.F.R. § 300.5.); *United States v. Manzo*, 279 F. Supp. 2d 558, 574 (D. N.J. 2003); *Washington v. United States*, 922 F. Supp. 421, 428 (W.D. Wash. 1996) (EPA's selection of remedial actions provides no basis for apportioning harm).

[37] Grand Pier's counsel only briefly mentioned the defense of divisibility at oral argument. Tr. at 21-23 ("This word has not been written or uttered to this point in these proceedings in the brief or even by Your Honors at this point, but there is a concept of divisibility which I know Your Honors are very familiar with and to the extent that there was a circumstance where there could be some divisibility based on ownership. That would be a basis to look at who is liable and who isn't and who's liable for what part of the facility and not for another part of the facility.").

[38] *See* note 16 above.

Pier has failed to raise or advance an affirmative defense based on divisibility of harm, and therefore the Board does not reach that issue.

Thus, we conclude that Grand Pier's Petition falls short of meeting its burden of proof that it should not be held jointly and severally liable for the response costs incurred cleaning up the CERCLA facility that consists of both the Grand Pier Site and the off-site sidewalk area.

III. *CONCLUSION*

For the foregoing reasons, the Board's final 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. Accordingly, Grand Pier Center, LLC's petition for reimbursement of response costs under CERCLA section 106(b)(2)(A) and (C) is hereby denied in all respects.

So ordered.