UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF	)	
	)	
Far Star Superfund Site	)	CERCLA Lien Proceeding
Shelbyville, Tennessee	)	
_____	)	

RECOMMENDED DECISION

This matter was heard by the Regional Judicial Officer for the United States Environmental Protection Agency (EPA), Region 4, to determine whether EPA had a reasonable basis to perfect a lien, pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607*(l*), on property known as the Far Star Superfund Site, located in Shelbyville, Tennessee. An informal hearing was conducted pursuant to the Supplemental Guidance on Federal Superfund Liens, dated July 29, 1993 (OSWER Directive Number 9832.12-1a), after which a Transcript ("Tr.") was prepared and made part of the Lien Filing Record (LFR).

CERCLA Lien Provisions

Section 107(*l*) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which 1) belong to such person and 2) are subject to or affected by a removal or remedial action.

Under the Supplemental Guidance, as the neutral designated to conduct this proceeding and to make a written recommendation, I am to consider all facts relating to whether EPA had a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(l) of CERCLA had been satisfied. Specific factors for my consideration under the Supplemental Guidance include:

> Element 1: Whether the property was subject to or affected by a removal or remedial action.
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> Element 2: Whether the United States has incurred costs with respect to a response action under CERCLA.
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> Element 3: Whether the property is owned by a person who is potentially liable under CERCLA.
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> Element 4: Whether the property owner was sent notice by certified mail of potential liability.
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> Element 5: Whether the record contains any other information which is sufficient to show that the lien should not be filed.

Factual Background

The property at issue in this proceeding is located at 979 Horse Mountain Road, Shelbyville, Bedford County, Tennessee and sits on approximately 10 acres of a 60-acre parcel of land. The site was used as a recycling facility for cassette tapes, vinyl records and vinyl phonograph record components during the mid 1990's. In this process, sodium hydroxide and other hazardous substances were used and stored.

The Tennessee Department of Environment and Conservation (TDEC), Division of Solid Waste Management (DSWM) issued an Order dated November 1996, to Far Star Group for improper storage and disposal of waste. Far Star failed to comply with that order. TDEC inspectors discovered that the facility had been abandoned in 2001. Abandoned drums, many of

which were unlabeled, corroded and/or leaking were left at the Site.

On July 9, 2003, EPA's Emergency Response/Removal Branch (ERRB) conducted a Site assessment. At that time four hundred drums remained abandoned at the Site. On January 21, 2004, ERRB and representatives of the TDEC re-inspected the Site and discovered that over half of the drums had been removed. The current removal action is based on the presence of approximately thirty of the remaining one hundred drums believed to contain hazardous substances.

Procedural Background

On February 19, 2004, EPA sent a Pre-Perfection Lien Notice to Shelbyville Warehouse, LLC, c/o George W. Holder, notifying Mr. Holder of EPA's intent to perfect a lien upon the subject property. However, shortly after the lien pre-perfection letter was sent, EPA claims it became aware that the property would be subject to a tax foreclosure sale on March 16, 2004. Therefore, after the time past for Mr. Holder to respond to the pre-perfection lien notice on March 2, 2004, EPA perfected a Section 107(*l*) CERCLA, 42 USC § 9607(*l*) lien on the property.[1] Thereafter, on March 3, 2004, Mr. Holder sent, via facsimile, a request for a post-perfection lien hearing.[2] This matter was heard by the undersigned Agency Neutral on May 11, 2004.

Disputed Matters

Pursuant to the warranty deed filed on April 9, 2003, Shelbyville Warehouse L.L.C. (Respondent and/or SW), is the undisputable current owner of the Far Star Superfund Site and is

[1]Notice was apparently received by Mr. Mahaffey, who in response sent a request for lien hearing on February 25, 2004.

[2]Notice to Mr. Holder is also discussed elsewhere in this recommended decision.

therefore a liable party under CERCLA Section 107(a)(1). In dispute, however, is whether Mr. George Holder, to whom the Notice of Intent to File was sent, is the owner of SW. Mr. Eddie Mahaffey, who attended the May 11, Hearing, acquired the property in 1991, and was the owner of the property at the time his tenants, the Far Star Group, generated and disposed of the hazardous wastes on the Site.

However, in 2003 Mr. Mahaffey and George Holder formed SW, whose main asset was the Site property. Full Service Restoration Inc. (FSR) obtained 60% of SW's shares and Mr. Mahaffey received 40% of SW's shares. FSR's sole beneficiary is Mr. Holder. Relying upon the 45 page document entitled "Operating Agreement of Shelbyville Warehouse, LLC, executed by George W. Holder as Trustee, of the FSR, Inc. Money Purchase Pension Plan, and Eddie Lee Mahaffey, as Member, upon payment of $560,000 by Mahaffey, Mr. Mahaffey would own 100% of SW. However, by the terms of the same document, upon failure to make that payment, 100% ownership of SW would go to FSR. Notwithstanding a great deal of what was, frankly, a rather confusing and convoluted discussion at the Hearing, no evidence was introduced to indicate that any such payment was made by Mr. Mahaffey. Furthermore, both Mr. Mahaffey, and Mr. Holder, concurred that payment was not made. Therefore, despite any understanding or misunderstanding, surprise, or consternation by either or both gentlemen, by virtue of the executed Contractual Agreement, ownership of SW is in the hands of the entity, FSR. Having established a) the validity of the Agreement for this purpose and b) that SW, for whom George Holder serves as trustee/sole beneficiary, is the current owner of the Site, the issue of whether or not SW has a defense to liability under CERCLA is now properly before me for consideration,

along with the other elements in dispute.[3]

Whether the property owner was sent notice by certified mail of potential liability:

The issue of whether Mr. Holder or Mr. Mahaffey or a combination of both, owns SW is significant in one respect only: whether sufficient notice was given by EPA to SW of its intention to file a lien on the property. From a review of the memorandum submitted by Counsel for EPA, along with a review of the record, it appears that EPA's argument is as follows:

- EPA assumed Mr. Mahaffey owned SW along with Mr. Holder. Based upon that assumption, EPA, notified both Mahaffey and Holder.

- Mr. Mahaffey received notice. Mr. Holder, as agent for SW did not, regardless of the fact that EPA met its obligations to send it to the address provided.

- Mr. Mahaffey submitted a timely response to the Notice of Intent to File the Lien. However, notwithstanding the fact that EPA sent it to him, based upon its understanding that he owned the property, they disregarded his Response. EPA justifies this based upon its discovery (albeit after-the-fact) that Mahafeey no longer owned the property by virtue of the terms contained in the Operating Agreement.

- The issue of whether or not EPA was obligated to address the Mahaffey response, became moot once there were exigent circumstances forcing the Perfection of the Lien. Mr. Mahaffey and attorney for one of the owners of the Far Star Group, told EPA representatives that the City of Shelbyville and Bedford County scheduled a tax foreclosure sale for March 16, 2004. Faced with imminent tax sale of the property, EPA decided to file the lien.

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[3] It is important to distinguish that the issue of potential liability pertains to the entity SW, as opposed to Mr. Holder individually and personally. His role with respect to SW is relevant as to whether or not notice was provided to SW.

As with many other aspects of this matter, the issue of notice is also somewhat blurred. However, from the standpoint of whether EPA fulfilled its responsibility, albeit unintentionally, the answer is in the affirmative. While I am in full agreement that EPA fulfilled its obligations to notify Mr. Holder on behalf of SW, and had every right to rely upon the information it had concerning the correct address for Mr. Holder as registered agent for service, disregarding Mr. Mahaffey's response requesting the Hearing is questionable. However, since Mahaffey wound up being served needlessly, since in actuality he now longer owned any interest in SW, EPA was not obligated to provide a lien meeting at his request. I find that SW, property owner, was sent proper notice of potential liability, through the notice to Mr. Holder as registered agent for service.

Whether the property is owned by a person who is potentially liable:

SW raises, as a defense to liability, what is refereed to as the "innocent landowner defense" under CERCLA, found at 107(b)(3) of CERCLA. That section provides in pertinent part, that,

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by...(3) an act or omission of a third-party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant...if (a) he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions..."

As applied to this proceeding, SW cannot be held liable under CERCLA Section 107(a) if it can establish that (1) the release and resulting damages were caused solely by an act or omission of a third party (Far Star Group); (2) Far Star's acts did not occur in connection with a

contractual relationship with SW;[4] (3) SW exercised due care with respect to the hazardous substance; and (4) defendant took precautions against Far Star's foreseeable acts and foreseeable consequences.

Thus, this defense absolves from liability a current owner who can demonstrate that the release of hazardous substances was caused by a third party with no contractual relationship to the current owner and that the current owner exercised due care.

As to the first prong, SW must establish that the act that caused the release and resulting damages were caused by the Far Star Group with whom SW did not have a contractual relationship as defined in section 101(35)(A).[5] While the contractual relationship may exist between the Mahaffey and SW, SW does not have a contractual relationship with the Far Star Group, whose acts and/or omissions caused the release. Furthermore, even if this is considered a relevant contractual relationship, the contract (Operating Agreement) clearly falls into the exception for those entered into after the release of the hazardous substances. It is then appropriate to consider whether SW met its other burden to establish that it had no reason to know hazardous substances were present. SW must establish that it took all appropriate inquiries, following generally accepted good commercial and customary practices. I find EPA's arguments on this issue to be persuasive. Mr. Holder takes great pains to distance himself from the need to have made inquiries appropriate for someone with a real estate interest, claiming the agreement was never entered into as a real estate transaction intended to grant him 100%

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[4] The term contractual relationship includes an exception for defendants who acquire the property after the disposal of the hazardous substances on the property who can establish that at the time of acquisition the defendant did not know and had no reason to know the hazardous substances were disposed on, in or at the facility. See CERCLA 101 (35)(A)(i).

[5]Counsel for EPA misstates the defense as including act of a third party not contractually related to the *owner* or operator of the site.

ownership interest in SW. However, other than his protests echoed by Mr. Mahaffey, there is nothing entered into the record to support this. I must add, that I found both Mr. Holder and Mr. Mahaffey speaking on Mr. Holder's behalf quite credible with respect to Mr. Holder having been taken by surprise and lacking understanding as to the consequences associated with entering into such an agreement.[6] However, as much as I might sympathize with his current plight, I do not find sufficient cause to negate or invalidate what is clearly established in the documentary evidence at hand.

The "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common Elements"), dated March 6, 2003, sheds light on this issue. For property purchased on or after May 31, 1997, procedures of the American Society for Testing and Materials, are to be used. Pursuant to the Small Business Liability Relief & Brownfields Revitalization Act, 107th Congress, January 17, 2002, which clarifies the liability (actually liability limitations) for innocent landowners under CERCLA, for property purchases on or after May 31, 1997, Phase I Environmental Site Assessment Process satisfies the requirements for all appropriate inquiries. Mr. Horder, attempted to refute this, stating, " ...I did all kinds of due diligence you could do plus the real estate broker plus two lawyers, and nowhere in all these meetings and conversations and courthouse searches was there any record anywhere of anything, not even gossip." Tr p.93. However, Mr. Holder's major failing, was not having even walked the property. He "drove to the front door around dusk". Mr. Holder's state of mind,

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[6]This is reflected in the record, when at the hearing Mr. Holder, referring to the Operating Agreement, stated, "...I was shocked you even had it. I didn't know it even existed anymore. I don't even have a copy of it. Does that make any sense?" (Tr. p.21) Mr. Mahaffey, attempting to buttress Mr. Holder's surprise, added, "Have you ever sat in a lawyer's office, though...and they pass you papers around and you just initial them all the way around the table?..." (Tr. p.24)

that he did not consider the formation of SW a real estate transaction bestowing upon him the burdens of real estate ownership, is outweighed by the fact that the Contractual Agreement provided as its purpose, to (a) own, operate, lease the warehouse space, sell parcels of land situated on the Property which is the principal asset of the Company...and engage in the maintenance and upkeep of the Property and all activities concurrent therewith . . . "

Anticipating that SW may claim a CERCLA Section 9601(20) lender exclusion, counsel for EPA spent some time addressing why SW did not qualify as a lender and why there was no loan. Again, since there was no persuasive written or verbal testimony on this point by SW, I am persuaded by EPA's argument that the Operating Agreement reflects a real estate transaction rather than a loan, is the only reasonable conclusion to reach. Therefore, I find that the lender exclusion would not apply.

Whether the United States has incurred costs with respect to a response action under CERCLA:

This element is not in dispute. EPA has incurred costs of $51,342.94, as documented by the April 9, 2004, SCORPIO Report submitted as part of the LFR.

Whether the property is the subject of a removal action:

This element is not in dispute. EPA's Enforcement Action Memorandum dated February 26, 2004, documents the presence of hazardous waste drums ono the property and the need for a removal action to be conducted at the Site.

Conclusion:

EPA has made the prima facie showing necessary to impose a CERCLA lien on the Far

Star Superfund Site. Sufficient information existed of a scheduled tax foreclosure sale for March 16, 2004. These were exceptional circumstances sufficient to establish cause to perfect the lien prior to the lien meeting. **Therefore I find that EPA had a reasonable basis to perfect the lien**.

This Determination does not bar EPA or the property owner, SW, from raising any claims or defenses in later proceedings. This is not a binding determination of liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

Dated: _____

SIGNED
SUSAN B. SCHUB
Regional Judicial Officer