BEFORE THE ENVIRONMENTAL APPEALS BOARD

In The Matter of AMERICAN AIRLINES, INC. MCI Maintenance and Engineering Base Kansas City, Missouri MISSOURI HAZARDOUS WASTE MANAGEMENT FACILITY PERMIT PART I RCRA ID# MOD0439035048	))))))))	Case No. _____

NOTICE OF PERMIT APPEAL BY AMERICAN AIRLINES, INC., AND BRIEF IN SUPPORT

COMES NOW Petitioner, American Airlines, Inc. ("American"), by and through its undersigned counsel, and pursuant to Sections 40 C.F.R. Part 124 files this Notice of Permit Appeal ("Appeal") and states as follows:

American seeks relief from the Environmental Appeals Board ("EAB") with regard to the Environmental Protection Agency's ("EPA") August 11, 2010 issuance of a Hazardous Waste Management Facility Part II Permit, Number MOD0439035048 ("RCRA Permit") that designates American as the RCRA facility operator ("Operator") at the MCI Maintenance and Engineering Base ("Base") located at the Kansas City International Airport ("KCIA") in Kansas City, Missouri. The issuance of the RCRA Permit designating American as the Operator was arbitrary, capricious, an abuse of discretion and in violation of the Constitution and laws of the United States and EPA regulations

EAB JURISIDICTION

1. Pursuant to Section 40 C.F.R. § 124.19, the EAB has the delegated authority to hear this appeal, to hold hearings and conduct proceedings in accordance 40 C.F.R. § Part 124, and to issue findings of fact and conclusions of law.

BACKGROUND

2. The Base is owned by the City of Kansas City and was originally constructed by Trans World Airways ("TWA") in the 1950s and expanded on several occasions over the years.

3. By 1976, when RCRA was enacted, the Base contained a number of hazardous waste treatment, storage and/or disposal units, and solid waste management units created and operated by TWA.

4. Because of the hazardous waste operations and solid waste management units, TWA was required to obtain the RCRA Permit and to investigate and address soil and groundwater contamination at the Base.

5. In August of 1998, after a series of orders requiring closure of the hazardous and solid waste management units at the Base, EPA and MDNR issued the initial RCRA Permit to TWA. The RCRA Permit contained certain ongoing requirements for corrective action and post-closure activities at the Base. Corrective measures included the installation of a Groundwater Interceptor Trench in the Surface Impoundment Area and caps on the Surface Impoundments, Ravine Area Landfill and SWMU 8. TWA completed these corrective measures by March, 2001, and they were approved by MDNR in May, 2001. Long term groundwater monitoring was required for the facility.

6. In the first quarter of 2001, TWA filed bankruptcy. In connection therewith, American agreed to purchase certain assets of TWA out of the bankruptcy estate and was assigned TWA's lease for the Base.

7. As part of the agreement to sell substantially all of its assets to American, TWA retained all environmental liabilities and obligations associated with its activities at the Base.

8. In 2001, American began aircraft maintenance and repair activities at the Base. In connection therewith, American also began performing groundwater monitoring and other post-closure activities required under the Permit. American did not contribute any wastes or contamination to the units identified in the RCRA Permit.

9. Because American occupied the entire Base, and had voluntarily undertaken the required activities under the Permit, American prepared and submitted a RCRA Part A application to change the RCRA facility Operator from TWA to American.

10. In 2005, American and the City entered into a new lease for the Base ("Lease"). That lease contemplated that, in the future, American might reduce its activities, and thus vacate certain portions of the Base under certain conditions. That Lease contained no requirement that American perform the function of Operator of the closed hazardous waste facility.

11. In connection with the scheduled expiration of the RCRA Permit in 2008, American submitted an application, signed by both American and the City, for renewal of the RCRA Permit. That application was submitted on February 8, 2008.

12. Subsequent to the submission of the 2008 application, American determined that it would substantially reduce its maintenance activities at the Base. Shortly thereafter, American further determined that it would cease all maintenance activities at KCI and vacate the Base.

13. EPA and MDNR issued a draft of the new RCRA permit on August 27, 2009 (the "Draft Permit").

14. American timely submitted comments on the Draft Permit on October 19, 2009, and, per the request of MDNR, submitted additional comments on February 12, 2010. (attached as Exhibits "A" and "B")

15. Insofar as American was no longer engaged in significant activity at the Base, its comments asserted that American should not be designated in the Permit as the Operator of the RCRA facility at the Base. American requested that EPA and MDNR remove American as co-permittee/Operator under the new RCRA Permit and that the City be designated as both owner and Operator.

16. EPA and MDNR denied American's request and, on August 11, 2010, issued the new RCRA Permit naming American as the Operator of the RCRA facility.

17. As of the date of issuance of the new RCRA Permit, American's maintenance activities had been substantially reduced to only a few areas on the Base. At that time, American occupied only those areas known as the Superhangar, the Fuel Farm, and the Barrel House (See Exhibit "C"); all other areas formerly occupied under American's Lease had been turned back to the City.

18. American will cease all maintenance activities at the Base as of September 24, 2010 and American plans to terminate the Lease on or before November 30, 2010.

DISCUSSION

It is undisputed that American had nothing to do with the Base prior to the spring of 2001, and therefore had nothing to do with the creation or operation of the hazardous waste disposal units, solid waste management units ("SWMUs"), or any other historic contamination addressed under the Permit. American did not contribute any waste or hazardous substances to the units identified in the RCRA Permit. American has never had a RCRA permit for ongoing hazardous waste operations or units at the Base. Instead, American conducted its operations at

the Base under generator status[1] – with any generated hazardous wastes being containerized and shipped off-site for treatment and disposal.

As noted 270.1(c):

> Owners and operators of hazardous waste management units must have permits during the active life (including the closure period) of the unit. Owners and operators of surface impoundments, landfills, land treatment units and waste pile units that received waste after July 26, 1982 or that certified closure (according to 265.115 of this chapter) after January 26, 1983 must have post-closure permits[.]

40 C.F.R. § 270.1(c). American was never the owner or Operator of an active hazardous waste management unit at the Base. Likewise, American was never the owner or Operator of a surface impoundment, landfill, land treatment unit or waste pile unit. As such, American should never have been designated as an "Operator" of the facility in the first place; those duties should have instead remained with TWA and/or the City as the Operators and owners of the units.

In any event, when it began its aircraft maintenance operations at the Base, American submitted a Part-A Application to MDNR and EPA. Thereafter, American performed the post-closure care activities under the RCRA Permit. However, as noted in American's comments on the draft Permit, there was no written agreement between American and the City, MDNR or EPA requiring American to do so. At the time American started its operations at the Base, it perhaps made sense for the City, MDNR and EPA to look to American, as the sole user of the entire Base, to perform the role of Operator and conduct post-closure care activities under the Permit. This is because the regulations defined the term "Operator" as "the person responsible for the ***overall operation*** of a ***facility***." 40 C.F.R. § 260.10. At that point in time, American was in charge of all aircraft maintenance within the buildings at the Base and the operation of the other equipment located thereon. Viewing the terms "overall operation" and "facility" in the

[1] Under the RCRA regulations, "Generators who accumulate hazardous waste on-site for less that the time periods provided in [40 C.F.R] § 262.70" are "among those who are not required to obtain a RCRA permit[.]" 40 C.F.R. § 270.1(c)(2)(i).

vernacular, one could easily see how American would naturally be expected extend its operations at the Base to include the maintenance of the closed units and performance of groundwater monitoring and other activities under the RCRA Permit.

Of course, any conclusion at the inception of American's activities at the Base that American was the Operator of the RCRA facility ***presupposed*** that the term "facility" was synonymous with the entire extent of the Base leasehold – which it is not. Specifically, the regulations define the term "facility" narrowly as follows:

> All contiguous land, and structures, other appurtenances, and improvements on the land, ***used for treating, storing, or disposing of hazardous waste***, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (*e.g.,* one or more landfills, surface impoundments, or combinations of them).

Id. As pointed out in American's comments, this definition of "facility" clearly refers to something different from and smaller than the "Base." The RCRA facility, as operated by TWA, consisted only of the ***active*** hazardous waste management units operated by TWA after the effective date of RCRA – *i.e.* the Surface Impoundments and the Ravine Area Landfill. American never operated these units or used the area occupied by these units. As such, American ***incorrectly*** designated itself as "Operator" of these units under the Permit.

In addition to former active units, the Permit required corrective action at several SWMUs located outside the confines of the permitted facility but within the area of the Base. This is because the regulations provided that, "[f]or the purpose of implementing corrective action under 40 CFR 264.101 or 267.101," the term facility includes "all contiguous property under control of the owner or operator ***seeking a permit*** under Subtitle C of RCRA." At the time the Permit was first issued, the entire Base was and always had been under the joint control of TWA and the City. As such, it made perfect sense that the Permit, as originally issued to TWA,

included corrective action for all SWMUs resulting from TWA's operations and under TWA's control.[2] However, once American moved onto the Base, the logic of this scenario no longer applied. American simply should never have been designated as the "Operator" of the ***RCRA "facility"*** consisting of the Surface Impoundments and Ravine Area Landfill merely due to the fact that those then-closed units were within its leasehold. As noted above, unlike the City and TWA, American had nothing to do with those units. Furthermore, since American never contributed any waste to or otherwise operated the two once-active hazardous waste management units on its leasehold, American should not have been called upon to perform the ongoing care related to the other SWMUs on the Base because American would never have been in a position where it was "seeking a permit under Subtitle C."

American has now made the decision to terminate all maintenance operations at the Base and move out. American maintains that is should be able to leave the Base as it was when American first got there in 2001 because (1) it did not contribute to the wastes at issue, and (2) will no longer control the areas where the wastes are located. The RCRA permit regulations clearly state that the Operator is "the person responsible for the ***overall operation of a facility***." 40 C.F.R. § 260.10. Under the Permit and regulations, the "facility" consists of all of the previously closed hazardous waste management units and the SWMUs. American no longer has possession or control of most of the Base and there is nothing that makes American responsible for the "overall operation of [the] facility."[3] Instead, American now controls only the Superhangar area, Barrel House area and Fuel Farm (*See* Ex. C). Thus, American does not have

[2] SWMU 8 was reportedly a waste disposal site used by construction contractors working for the airport in the early 1970s. Although not part of TWA's leasehold when used for waste disposal, TWA was also clearly responsible for placing waste material in the area of SWMU during construction of the Superhangar, thus causing or contributing to the contamination at that location. Because TWA's disposal activities caused or contributed to the contamination, TWA would be responsible for addressing the contamination pursuant to 42 U.S.C. § 6973.

[3] There is nothing in American's 2005 lease with the City that requires American to perform the operation, maintenance and groundwater monitoring activities under the Permit.

responsibility for the overall operation of the Base or, for that matter, the RCRA "facility," and, ***by definition***, cannot be the Operator under the Permit.

The EPA's argument that American is the RCRA Facility Operator because the City has granted or can grant American access to the RCRA facility to perform the Operator's duties does not find support under the law. In the case of *In re Valley Steel Products Company*, 157 B.R. 442 (Bankr.E.D.Mo. 1993), MDNR sought to have Valley Steel ("Valley") perform post-closure obligations at one of Valley's facilities after Valley had declared bankruptcy. In that case, MDNR argued that even though Valley did not have actual possession of the property to perform the post-closure activities, it had "constructive" possession – *i.e.* the right to enter the property and perform the post-closure obligations. MDNR claimed Valley had reserved constructive possession in an earlier Consent Order with EPA and expressly "created a right to enter the facility when it transferred title to the Facility" to another entity. *Id.* at 447. In support of its argument, MDNR cited Black's Legal Dictionary, noting that Black's defines possession as follows:

> "[t]he detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises anyone's place and name. . . . A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing either directly or through another person or persons in then in constructive possession of it.

Id. (citing *Black's Legal Dictionary* 1047 (5th ed. 1979)). MDNR asserted that evidence of Valley's "intent to exercise dominion" was the fact that, after relinquishing title to the facility (prior to its bankruptcy), Valley continued to conduct post-closure monitoring and reporting at the facility. In rejecting MDNR's arguments and making its determination, the Court found that even if Valley possessed a limited right to enter the property, it did not have possession of it, and

that Valley could not be in constructive possession of the facility because "it no longer has an intent to exercise dominion or control of the Facility even if it did have such an intent in the past." *Id.*

The *Valley* Court's determination that a mere grant of access to party does not put that party in constructive possession of a facility is relevant here insofar as RCRA specifies that the "operator" is the party responsible for the "overall operation of the facility." Obviously, if a party is not "exercising dominion" over a facility, it cannot be responsible for the "overall operation" of the facility. Here, American does not have actual possession of the RCRA Facility, has no intent to exercise dominion or control over the RCRA facility, and has no contractual obligation to do so. Because American does not possess or control – either actually or constructively - the RCRA facility, it cannot be the one responsible for its "overall operation." As such, American cannot be designated as an Operator under the Permit – regardless of any contractual obligations to the City. At most, American could agree with the City to perform the City's or the RCRA Facility Operator's obligations under the Permit; American has not done so.

From an equitable perspective, as between American and the City, the City is the party that should be responsible for continuing the various post-closure activities required under the Permit as both the owner and the Operator. The City has owned the property from the early days of TWA's operations and is the Operator of the airport as a whole. The City currently provides the financial assurance to guarantee that all post-closure activities are performed. As the owner, the City was responsible for ensuring that TWA's operations did not cause harm to the environment. Unfortunately, the City did not perform that obligation and, as between American and the City, should be the one responsible for continued post-closure care.

In discussing the responsibility of the landowner under a RCRA permit, EPA made it very clear right from the start[4] that facility owners are responsible for a former Operator's hazardous waste activities. Specifically, in discussing the relationship between owners and Operators under a RCRA permit, EPA stated as follows:

> [I]t is not uncommon for an operator to lease the land and perhaps structures from a landowner.
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> ***
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> In the proposed regulations the Agency used the term "owner/operator" when referring to any or all of these parties, and defined the term to mean "the person who owns the land on which a facility is located and/or the person who is responsible for the overall operation of the facility."
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> ***
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> EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of these regulations.
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> ***
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> ***If the owner is not bound by the regulations, EPA could have a very hard time trying to implement and enforce the closure and financial responsibility provisions of the regulations.*** . . . [T]he legislative history of RCRA indicates that responsibility for complying with the regulations pertaining to hazardous waste facilities should rest equally with owners and operators where the owner is not the operator.
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> ***
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> Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. ***The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility.***

45 F.R. 33154, 33169 (May 19, 1980). Thus, it is clear, that the City is jointly responsible with TWA under RCRA for dealing with the aftermath of TWA's operations. Now that American is no longer the overall Operator of the Base and was not the Operator of the RCRA "facility" thereon, because there is no contractual agreement to require American to perform the ongoing activities under the Permit, and because American did not contribute to any of the contamination

[4] The initial RCRA regulations were promulgated in 1980.

in the units addressed under the Permit, the Permit obligations now must properly fall on the City.

EPA and MDNR argue that American cannot terminate its role as Operator at the Site until it finds someone to agree to step into that role. Essentially, this means that – even though American did not contribute anything to the contamination at issue, and even though financial assurance is in place to guarantee the successful completion of the post-closure activities, and even though American paid for and conducted over eight (8) years of post closure care – it will be held hostage until the contamination which it did not cause, and is not liable for, is abated. If American desires to terminate its role at the Base, it will have no course of action other than to initiate litigation against the City for indemnity or for declaratory judgment to force the City to apply for and assume the Operator role.

Based on the equities, American submits that the EPA has the duty and obligation to release American from the RCRA Permit and find that the City is now the owner and/or Operator with the responsibility for the finalization of post-closure activities. As the City is currently a party to the RCRA Permit, such action would not involve a "transfer" of the permit to a third-party in any sense, and would therefore not trigger the requirements of 40 C.F.R. § 270.40. Furthermore, it is clear that the "transfer" provisions of 40 C.F.R. § 270.40 were meant to apply in the case of a transfer to a third party and ***to make certain that acceptable financial assurance*** is in place before the former Operator is released. In other words, the object of 40 C.F.R. § 270.40 is not to prevent a party from being released from Operator obligations – the goal is to ensure that there is, at all times, adequate financial assurance in place to perform all post-closure obligations.

If American is released as the Operator, the financial assurance in place will not change. The City has always provided such financial assurance during the time American has occupied the Base, and will continue to do so after American is gone. Notably, there is nothing in the statute or regulations that prevent EPA from releasing an Operator from the permit where the Operator is not looked to for purposes of satisfying the financial assurance requirements, had no responsibility for creating the contamination at issue, and has no ongoing involvement in or control over the facility. By releasing American from the role of Operator role, and either designating the City as the owner/Operator, or dealing with the City solely as the owner, EPA would not be violating the letter or intent of the law, and will be fulfilling the purpose of the transfer provisions. Furthermore, since such action would not be a permit transfer, EPA could accomplish such action pursuant to the authority of Section 3005 of RCRA which provides: "Nothing in this subchapter shall preclude the Administrator from reviewing and modifying a permit at any time during its term." 42 U.S.C. § 6925(c)(3).

On the other hand, by continuing to hold American as a financial hostage even though it receives no benefit from a continued role as Operator, had no role in creating the contamination and did not undertake the role of providing financial assurance, EPA's actions constitute a taking of private property without due process of law as prohibited by the United States Constitution.

By its action, EPA is ignoring the intent of the regulations. Since the City now controls most of the buildings and equipment and can lease them piecemeal to whomever if sees fit without requiring further financial assurance, EPA's action places American in the impossible position of not being able to transfer control of the facility to someone who will take over the financial assurance, and yet being perpetually saddled with an obligation for which it is not ultimately liable. As such, EPA's statement in the response to comments that a new candidate

will need to come forward and replace American as Operator before American can be relieved of Operator duties rings hollows. Now that the bulk of American's leasehold has been returned to the City, American itself will ***never*** be in a position to be able to transfer the Operator responsibilities under this RCRA Permit to a third party and release itself from an obligation that it did not create, but voluntarily assumed in order to get the corresponding benefit of operating at the Base. This is not what was intended by under RCRA. The law and regulations are intended to allow Operators to sever their ties with a facility as long as adequate financial assurance is in place to ensure the successful completion of all post-closure activities.

CONCLUSION

In summary, American should be released from the role of Operator under the Permit, and the City should either become the owner/Operator or be dealt with simply as owner to complete post-closure obligations because:

1. American should not have been designated as Operator in the first instance,
2. The City is already a party to the Permit – no transfer is required,
3. Financial assurance is in place and will not change,
4. American did not cause or contribute to the contamination at issue,
5. As between the parties, only the City was in a position to prevent the contamination,
6. American is no longer in control of the "overall operation of the facility,"
7. American is powerless to transfer the lease to a party who will provide financial assurance,
8. The statute and regulations do not prohibit EPA from releasing American from the role of Operator.

EPA's actions in naming American as an Operator under the RCRA Permit were arbitrary, capricious, an abuse of discretion and in violation of the Constitution and laws of the United

States and EPA regulations. Consequently, American requests that the EAB remand the permit decision to EPA with direction to remove American as an Operator under the Permit.

Electronically Submitted

September 13, 2010

Respectfully submitted,

/s/Robert J. Joyce
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October 19, 2009

VIA Email and U.S. Mail

Mr. William Fanska, P.E.
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Mr. Ken Herstowski, P.E.
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RCRA Corrective Action & Permits Branch
901 N. Fifth St.
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Re: Draft Missouri Hazardous Waste Management Facility Permit
MCI Maintenance and Engineering Base
9200 NW 112th Street, Kansas City, MO
Permit Number: MOD043935048

Dear Messrs Fanska and Herstowski:

American Airlines, Inc. ("American") submits the comments set forth herein regarding the above referenced Draft Hazardous Waste Management Facility Permit ("Draft Permit") for the Maintenance and Engineering Base ("Base") at the Kansas City International Airport. American appreciates the Missouri Department of Natural Resources' ("MDNR") and the Environmental Protection Agency's ("EPA") consideration of the material set forth herein.

SUMMARY

When American purchased the assets of Trans World Airlines ("TWA") in 2001 and was assigned the lease for the entire Base,[1] American became the overall operator of the Base. In connection therewith, American also voluntarily stepped into the role of "operator" under the RCRA permit ("Permit") covering the former hazardous waste management facility at the Base. As such, American performed all groundwater monitoring at the facility and all operations and maintenance activity for the remediation systems and closed units. Recently, however, American substantially reduced its level of aircraft maintenance activity at the Base and now occupies only three areas of the Base: the Superhangar, Barrel House Storage and Fuel Farm. Consequently, American is neither the overall operator of the Base nor the overall operator of the hazardous waste facility on the Base. Because American is not the overall operator, and because American did not operate the hazardous waste management units at the Base or contribute to the contamination associated therewith, American is not an "operator" of the "facility" under RCRA. American therefore requests that MDNR remove American as a co-permittee from the Draft Permit. In addition, regardless of any determination regarding American's operator status, the Facility should be designated in the Permit as the Kansas City International Airport (MCI) Maintenance Base and not the American Airlines MCI Maintenance and Engineering Base.

Ex A

[1] While operated by TWA, the Base was referred to as the Ground Operations Center.

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BACKGROUND[2]

The current Base at the Kansas City International Airport ("MCI") was originally constructed by TWA in the 1950s. At that time, the City of Kansas City, Missouri ("City") owned the property at MCI and TWA conducted aircraft maintenance operations at the Base pursuant to a long term lease. The first portion of the Base was constructed and became operational in 1956. Initially, the Base consisted of Building 1 (a large building that housed administrative offices, aircraft hangars and several support shops for airframes); the first phase of Building 2 (which contained operations related to piston engine overhaul and testing); and the original Wastewater Treatment Plant ("WTP") (which, with its associated basins and sludge drying beds, was used for treating oily wastewater from the Base).

In 1971, the Base was expanded with the construction of the so-called "Superhangar" for maintenance work on wide-body jets, the expansion of Building 2, and the modification of the WTP. In 1975, the Base was again expanded with the construction of the South SPCC Pond (located in the Ravine Area) and the Cooper Road SPCC Pond (located west of the Superhangar). Also, a Chemical Wastewater Treatment Plant was constructed on the west side of Building 2 to treat waste from the electroplating shop. As a result of the construction in the 1970s, the sludge drying beds (located in the Surface Impoundment Area) were excavated, and the detritus was transferred to the western portion of the facility (now occupied by the Superhangar). When the Superhangar was built, the sludge was again transferred and placed by TWA in a location (now known as SWMU 8) at the east end of runway 27R.

RCRA was enacted in 1976 and became effective in 1980 to address the generation, treatment, storage and disposal of "hazardous waste." Under RCRA, much of the waste material generated by TWA's operations was considered to be hazardous waste. With the passage of RCRA, TWA was required to either terminate certain of its hazardous waste operations or apply for a permit under RCRA. While TWA timely notified the EPA of its hazardous waste operations, it apparently failed to voluntarily implement many of the applicable RCRA requirements.

On June 25 and 26, 1985, EPA and MDNR conducted a joint inspection of the Base and identified a number of RCRA violations. As a result of this joint investigation, MDNR served TWA with an Order to Abate Violations, dated August 26, 1985. In February 1986, EPA undertook a further investigation into TWA's waste management practices at the Base. In June of 1988, EPA filed a complaint, compliance order, and notice of opportunity for hearing, ordering TWA, among other things, to: (1) pay a significant monetary penalty; (2) develop and implement closure and post-closure plans for certain waste disposal areas; (3) address groundwater monitoring deficiencies and further action; and (4) develop a groundwater monitoring plan in accordance with the applicable federal and state environmental regulations. TWA and EPA then entered into a consent agreement and, on September 29, 1989, an Administrative Order on Consent ("AOC") was issued. The AOC provided for study, planning, and implementation of RCRA corrective measures.

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[2] Much of the information contained herein is taken from the Court's opinion in the case of *In Re. Trans World Airlines*, 322 F.3d 283 (3rd.Cir. 2003) (*See* Attachment "A")

The work conducted by TWA under the AOC included a RCRA Facility Investigation ("RFI") and a Corrective Measures Study ("CMS"). The CMS was approved in 1996 and the AOC was then terminated. Shortly thereafter, in August of 1998, EPA and MDNR issued the final Permit for the Base which embodied the ongoing requirements for corrective measures and post-closure activities at the Base. Corrective measures included the installation of a Groundwater Interceptor Trench in the Surface Impoundment Area and caps on the Surface Impoundments, Ravine Area Landfill and SWMU 8. These corrective measures were completed by March, 2001, and approved by MDNR in May, 2001. Long term groundwater monitoring was also instituted and is continuing.

In the first quarter of 2001, due to its deteriorating financial condition, TWA filed for bankruptcy. At that time, American announced its intention to purchase substantially all assets of TWA that were set for auction by the Bankruptcy Court. American's offer to buy certain assets of TWA was approved by the TWA Board and the Bankruptcy Court and the transaction closed on April 9, 2001. As part of the agreement to sell substantially all of its assets, TWA retained all environmental liabilities and obligations associated with its pre-closing operations – including those associated with the Base; American did not assume any liabilities or obligations (other than those specifically described in the sale agreement) in connection with the former TWA operations,[3] and did not assume any of the environmental liability associated with TWA's operations at the Base.

When American began operations at the Base in 2001, it was assigned TWA's lease with the City for the entire Base. At that time, American began performing the groundwater monitoring and the operation and maintenance of the remediation systems at the Surface Impoundment Area, Solid Waste Management Unit (SWMU 8) and the Ravine Area Landfill. Because American's lease covered the entire Base, and because American had voluntarily undertaken the operation, maintenance and monitoring activities under the Permit, American prepared and submitted a RCRA Part A application to change the facility operator from TWA to American. Subsequently, American submitted a request to modify the groundwater monitoring requirements under the Permit, but that request was never acted on by MDNR. In connection with the scheduled expiration of the Permit in 2008, American further submitted an application for renewal of the Permit signed by both American and the City. The Draft Permit at issue in this proceeding was the result of that renewal application.

By the time American arrived on site in 2001, the Permit was nearly three years old. American had not contributed in any way to the contamination addressed by the Permit. The Surface Impoundments, Ravine Area Landfill and SWMU 8 had all been closed and capped by TWA, the Groundwater Interceptor Trench had been installed near the Surface Impoundments, and a Vapor Extraction Groundwater Enhancement ("VEGE") system had been installed near the Surface Impoundments. In addition, neither the Electroplating Shop nor the Chemical Wastewater Treatment Plant in Building 2 were operated by American, but were, instead, removed. American also promptly discontinued the bulk storage of chlorinated solvents at the

[3] *See In Re. Trans World Airlines,* 322 F.3d 283 (3rd.Cir. 2003). which generally discusses American's non-assumption of TWA liabilities.

Base. As such, American had nothing to do with the contamination addressed by the Permit and now has little connection with many of the areas addressed under the Permit.

In 2005, American and the City entered into a new lease for the Base. That lease contemplated that American could reduce its activities, and thus vacate certain portions of the Base. That Lease contained no requirement that American perform the function of operator of the closed hazardous waste facility. As of today, American conducts operations in only a few areas on the Base; the Ravine Area, Surface Impoundment Area, Interceptor Trench and SWMU 8 are no longer within its leasehold. Currently, American occupies only the Superhangar area, the Fuel Farm, and the Barrel House area; all other areas formerly occupied under the prior lease have been turned back to the City.[4] Because American is no longer the overall operator of the Base, and is not the overall operator of the RCRA facility thereon, American requests that it be removed as co-permittee/operator under the Permit and that the City be designated as both owner and operator.

DISCUSSION

First and foremost, it is without doubt that American had nothing to do with the Base prior to the spring of 2001, and therefore had nothing to do with the waste disposal units (aka hazardous waste management units), the solid waste management units ("SWMUs"), or any other historic contamination addressed under the Permit. American has never had a RCRA permit for ongoing hazardous waste operations at the Base, but has, instead, conducted its operations at the Base under generator status[5] – with any generated hazardous wastes being containerized and shipped off-site for treatment and disposal. As noted above, American voluntarily performed the post-closure activities required by the Permit since American was, for a time, responsible for the overall operation of the Base. However, there was no written agreement between American and the City or MDNR requiring American to do so.

Under RCRA, "***[o]wners and operators*** of ***hazardous waste management units*** must have permits during the ***active life*** (including the closure period) of the unit." 40 CFR § 270.1(c).[6] American – while it did conduct aircraft maintenance operations at the base – was never an ***owner or operator*** of an active or closing ***hazardous waste management unit*** at the Base. Thus, American never had a RCRA operating permit for the Base.

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[4] In addition to vacating the areas formerly occupied under the prior lease, American has removed all machinery and equipment from Buildings 1 and 2, and these areas have subsequently been leased by the City to others.

[5] Under the RCRA regulations, "Generators who accumulate hazardous waste on-site for less that the time periods provided in [40 C.F.R] § 262.70" are "among those who are not required to obtain a RCRA permit[.]" 40 C.F.R. § 270.1(c)(2)(i).

[6] The regulations under 40 CFR Part 260 have been incorporated by reference into the MDNR hazardous waste regulations at 10 CSR 25-3.260(1). Under MDNR regulations, the term "'Owner/Operator' shall be substituted for each reference to 'owner and operator' and 'owner or operator' in the 40 CFR parts incorporated in 10 CSR 25." The regulations under 40 CFR Part 270 have been incorporated by reference into the MDNR hazardous waste regulations at 10 CSR 25-3.270(1).

In addition, RCRA requires that:

> ***[o]wners and operators*** of surface impoundments, land fills, land treatment units, and waste pile units that received waste after July 26, 1982, or that certified closure . . . after January 26, 1982, must have ***post-closure permits***, unless they demonstrate closure by removal or decontamination . . . or obtain an enforceable document in lieu of a post-closure permit.

Id. Because American was never an ***owner or operator*** of a surface impoundment, landfill, land treatment unit or waste pile at the Base that received waste after July 26, 1982, American likewise was not required to have a ***post-closure permit*** for its operations at the Base. However, because the City was the owner of the Base at all relevant times, and TWA was the only operator of the active units (Surface Impoundments and Landfill) that were closed, the City and TWA – as the owner and operator – were jointly required to have the RCRA post-closure permit.

Of course, when TWA declared bankruptcy in early 2001, its ability to perform its obligations under the Permit were severely impaired. Normally, MDNR would have then looked to the owner to fulfill the obligations under the Permit. However, in this instance, the City avoided the Permit obligations as owner under the Permit because American – as the operator of the Base (as opposed to operator of the permitted RCRA "facility") – stepped in and voluntarily conducted the prescribed operation, maintenance and monitoring under the Permit. However, it is, also clear that American never agreed to assume any of TWA's or the City's environmental liabilities or obligations.

At the time American started operations at the Base, it was easy for the City to look to American, as the sole user of the entire Base, to act as operator of the closed hazardous waste facility under the Permit. This is because the applicable regulations defined the term "operator" as "the person responsible for the overall operation of a ***facility***." 40 C.F.R. § 260.10. Of course, any conclusion that American was the operator of the RCRA facility presupposes that the term "facility" was synonymous with the entire extent of the Base – which it is not. Specifically, the regulations define the term "facility" as follows:

> All contiguous land, and structures, other appurtenances, and improvements on the land, ***used for treating, storing, or disposing of hazardous waste***, or for managing hazardous secondary materials prior to reclamation. A facility may consist of several treatment, storage, or disposal operational units (*e.g.*, one or more landfills, surface impoundments, or combinations of them).

Id. Based on this definition, the "facility" under the Permit is clearly different from and smaller than the "Base." The RCRA permitted facility as operated by TWA consisted only of the ***active*** hazardous waste management units operated by TWA after the effective date of RCRA – *i.e.* the Surface Impoundments and the Ravine Area Landfill. American never operated these units or used the area occupied by these units. As such, American incorrectly designated itself as "operator" of these units under the Permit.

In addition to requirements related to the formerly active units, the Permit also contained provisions for corrective action at various SWMUs located on the Base, but outside of the area of "contiguous land, and structures, other appurtenances, and improvements on the land, ***used for treating, storing, or disposing of hazardous waste***" (*i.e.* outside the permitted facility). This is because the regulations provide that, "[f]or the purpose of implementing corrective action under 40 CFR 264.101 or 267.101," the term facility includes "all contiguous property under control of the owner or operator seeking a permit under Subtitle C of RCRA." At the time the Permit was initially issued, the entire Base was and always had been under the joint control of TWA and the City. As such, it made perfect sense that the Permit, as originally issued to TWA, included corrective action for all SWMUs resulting from TWA's operations and under TWA's control.[7] However, once American commenced its operations at the Base, the logic of this scenario breaks down. American simply should not have been designated as the "operator" of the ***RCRA "facility"*** consisting of the Surface Impoundments and Ravine Area Landfill merely due to the fact that those units were within the leasehold, because American had nothing to do with those units. Furthermore, if American was never an operator of those two hazardous waste management units, then there would be no way to impose upon American the ongoing care related to the other SWMUs on the Base because American would not have been "seeking a permit under Subtitle C."

Even if one does not agree with the position that American should never have been considered operator under the Permit when American leased the entire Base, American's position makes even more sense now that American has reduced its leasehold at the Base. The RCRA permitting regulations specifically state that the operator is "the person responsible for the overall operation of a facility." 40 C.F.R. § 260.10. Under the Permit, the "facility" consists of all of the previously closed hazardous waste management units and the SWMUs throughout the Base. However, American no longer has control over most of the Base and there is nothing that makes American responsible for the "overall operation of [the] facility."[8] Instead, American now operates and controls only the Superhangar area, Barrel House area and Fuel Farm. Thus, American does not have responsibility for the overall operation of the Base or, for that matter, the RCRA "facility," and, ***by definition***, cannot be the operator under the Draft Permit.

Nor should American even be held responsible for dealing with any SWMUs on its current leasehold, since there has been no showing that, in the brief time American has been at the Base, American has in any way caused or contributed to any contamination. The City is the party that should be responsible for continuing the various post-closure activities required under the Permit. The City has owned the property from the early days of TWA's operations and is the operator of the airport as a whole. The City currently provides the financial assurance to guarantee that all post-closure activities are performed. Unfortunately, the City, as was its right

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[7] SWMU 8 was reportedly a waste disposal site used by construction contractors working for the airport in the early 1970s. Although not part of TWA's leasehold when used for waste disposal, TWA was also clearly responsible for placing waste material in the area of SWMU during construction of the Superhangar, thus causing or contributing to the contamination at that location. Because TWA's disposal activities caused or contributed to the contamination, TWA would be responsible for addressing the contamination pursuant to 42 U.S.C. § 6973.

[8] There is nothing in American's 2005 lease with the City that requires American to perform the operation, maintenance and groundwater monitoring activities under the Permit.

and obligation as the landowner, did not prevent TWA, as operator, from contaminating the area through its hazardous waste activities.

In discussing the responsibility of the landowner under a RCRA permit, EPA made it very clear right from the start[9] that facility owners are responsible for a former operator's hazardous waste activities. Specifically, in discussing the relationship between owners and operators under a RCRA permit, EPA stated as follows:

> [I]t is not uncommon for an operator to lease the land and perhaps structures from a landowner.
>
> ***
>
> In the proposed regulations the Agency used the term "owner/operator" when referring to any or all of these parties, and defined the term to mean "the person who owns the land on which a facility is located and/or the person who is responsible for the overall operation of the facility."
>
> ***
>
> EPA considers the owner (or owners) and operator of a facility jointly and severally responsible to the Agency for carrying out the requirements of these regulations.
>
> ***
>
> ***If the owner is not bound by the regulations, EPA could have a very hard time trying to implement and enforce the closure and financial responsibility provisions of the regulations.*** . . . [T]he legislative history of RCRA indicates that responsibility for complying with the regulations pertaining to hazardous waste facilities should rest equally with owners and operators where the owner is not the operator.
>
> ***
>
> Some facility owners have historically been absentees, knowing and perhaps caring little about the operation of the facility on their property. ***The Agency believes that Congress intended that this should change and that they should know and understand that they are assuming joint responsibility for compliance with these regulations when they lease their land to a hazardous waste facility.***

45 F.R. 33154, 33169 (May 19, 1980). Thus, it is clear, that the City is jointly responsible with TWA under RCRA for dealing with the aftermath of TWA's operations. Now that American is no longer the overall operator of the Base and was not the operator of the RCRA "facility" thereon, and because there is no contractual agreement to require American to perform the ongoing activities under the Permit, the Permit obligations now must properly fall on the City.

[9] The initial RCRA regulations were promulgated in 1980.

CONCLUSION

As owner of the Base and of the RCRA permitted hazardous waste units thereon, the City is the proper party to be designated as the sole permittee under the Draft Permit. TWA, as the former operator of the Base and the hazardous waste facility thereon should likewise be a permittee under the Draft Permit, but for its dissolution in bankruptcy. American, not having assumed TWA's liabilities in the 2001 asset purchase, does not have responsibility for TWA's environmental obligations. American did not contribute to the contamination addressed under the Draft Permit and never operated the hazardous waste management units covered by the Draft Permit. Furthermore, American no longer occupies the bulk of the area encompassed by the Draft Permit and cannot, by definition, be the "operator" because it is not "the person responsible for the overall operation of [the] ***facility.***" As such, American's name should be removed from the Draft Permit and American should not be designated the operator or a permittee under the Draft Permit.

American greatly appreciates the attention of the MDNR and EPA to these comments. If you have any questions or need any additional information, please don't hesitate to call me at 918-599-0700.

Very truly yours,

JOYCE & PAUL, PLLC

Robert J. Joyce

cc: Fred Augustine
Jim Johnson, Esq.
Grant Smith (Burns & McDonnell)

Enc.

322 F.3d 283, 91 Fair Empl.Prac.Cas. (BNA) 385, 84 Empl. Prac. Dec. P 41,362, 40 Bankr.Ct.Dec. 284, Bankr. L. Rep. P 78,815, 25 NDLR P 194, 22 A.L.R. Fed. 2d 809
(Cite as: 322 F.3d 283)

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United States Court of Appeals,
Third Circuit.
In re: TRANS WORLD AIRLINES, INC.
United States of America and Equal Employment Opportunity Commission, Appellants
Linda Knox-Schillinger, on behalf of herself and the class of flight attendants she represents, Appellant.
Nos. 01-1788, 01-4159 and 01-4437.

Argued Sept. 12, 2002.
Filed March 13, 2003.

Order was entered by the United States Bankruptcy Court for the District of Delaware authorizing sale of assets of Chapter 11 debtor-airline to successor free and clear of airline employees' successor liability claims. Appeal was taken. The District Court, Sue L. Robinson, Chief Judge, affirmed. On further appeal, the Court of Appeals, Fuentes, Circuit Judge, held that: (1) airline workers' employment discrimination claims, as well as flight attendants' rights under travel voucher program that debtor-airline had established in settlement of sex discrimination action, both qualified as "interests in property," under bankruptcy statute that provided for sale of assets of estate free and clear of interests in property; and (2) claims were reducible to monetary judgment, so as to permit sale of debtor's assets free and clear of such claims.

Affirmed.

West Headnotes

[1] Bankruptcy 51 ⚿3782

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3782 k. Conclusions of Law; De Novo Review. Most Cited Cases

Bankruptcy 51 ⚿3786

51 Bankruptcy
51XIX Review
51XIX(B) Review of Bankruptcy Court
51k3785 Findings of Fact
51k3786 k. Clear Error. Most Cited Cases

On appeal in bankruptcy case, Court of Appeals reviews bankruptcy court's findings of fact for clear error and exercises plenary review over its legal determinations. Fed.Rules Bankr.Proc.Rule 8013, 11 U.S.C.A.

[2] Bankruptcy 51 ⚿3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Airline workers' employment discrimination claims against Chapter 11 debtor-airline, as well as flight attendants' rights under travel voucher program that debtor-airline had established in settlement of sex discrimination action, both qualified as "interests in property," under bankruptcy statute that provided for sale of assets of estate free and clear of any interests in property as long as one of five conditions is satisfied. Bankr.Code, 11 U.S.C.A. § 363(f).

[3] Bankruptcy 51 ⚿3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Phrase "interest in property," as used in bankruptcy statute providing for sale of assets of estate free and

clear of any interest in property as long as one of five conditions is satisfied, is not limited in scope only to in rem interests, such as liens, but should be interpreted more expansively to include other interests arising from property being sold. Bankr.Code, 11 U.S.C.A. § 363(f).

[4] Bankruptcy 51 ⚿3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Flight attendants' rights under travel voucher program which debtor-airline had established in settlement of sex discrimination claims, being in nature of right to obtain seat on flights of their choosing, could be reduced to specific monetary value, so as to permit sale of assets of debtor-airline free and clear of flight attendants' rights under this program. Bankr.Code, 11 U.S.C.A. § 363(f)(5).

[5] Bankruptcy 51 ⚿3073

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3073 k. Adequate Protection; Sale Free of Liens. Most Cited Cases

Employment discrimination claims asserted against Chapter 11 debtor-airline were claims that were reducible to, and that could be satisfied by, monetary awards, even if relief sought was injunctive in nature, so that debtor was statutorily authorized to sell its assets free and clear of such claims. Bankr.Code, 11 U.S.C.A. § 363(f)(5).

[6] Bankruptcy 51 ⚿2951

51 Bankruptcy
51VII Claims
51VII(F) Priorities
51k2951 k. In General. Most Cited Cases

Bankruptcy 51 ⚿3079

51 Bankruptcy
51IX Administration
51IX(B) Possession, Use, Sale, or Lease of Assets
51k3067 Sale or Assignment of Property
51k3079 k. Rights and Liabilities of Purchasers, and Right to Purchase. Most Cited Cases

Allowing employees whose claims against Chapter 11 debtor-airline, arising from airline's alleged sex or employment discrimination, were in nature of general unsecured claims to pursue successor liability claims against purchaser of debtor's assets, while limiting other secured creditors' recourse solely to proceeds from asset sale, would be inconsistent with the Bankruptcy Code's priority scheme. Bankr.Code, 11 U.S.C.A. § 507(a).

***284** John S. Koppel (Argued), William Kanter, Appellate Staff, Civil Division, United States Department of Justice, Washington, D.C., Robert D. McCallum, Jr., Assistant Attorney General, United States Department of Justice, Washington, D.C., Colm F. Connolly, United States Attorney, Wilmington, DE, Nicholas M. Inzeo, Acting Deputy General Counsel, Philip B. Sklover, Associate General Counsel, Lorraine Davis, Assistant General Counsel, Robert J. Gregory, Senior Attorney, Equal Employment Opportunity Commission, Washington, D.C., for Federal Appellants.

Namita Luthra (Argued), Lenora M. Lapidus, American Civil Liberties Union Foundation, Women's Rights Project, New York, NY, for Appellant Linda Knox-Schillinger.

Richard A. Rothman (Argued), Greg A. Danilow, Alan B. Miller, Weil, Gotshal & Manges L.L.P., New York, NY, Gregory S. Coleman, Weil, Gotshal & Manges L.L.P., Houston, TX, Mark D. Collins, Richards, Layton & Finger, Wilmington, DE, for Appellees American Airlines, Inc., AMR

Corporation, AMR Finance Inc.

Eric F. Leon, Kirkland & Ellis, New York, NY, Alexander Dimitrief, P.C., James H.M. Sprayregen, Kirkland & Ellis, Chicago, IL, Laura Davis Jones, Bruce Grohsgal, Pachulski, Stang, Ziehl, Young & Jones, Wilmington, DE, for Appellees Trans World Airlines, Inc., et al.

Before: ALITO and FUENTES, Circuit Judges and OBERDORFER,[FN*] District Judge.

FN* The Honorable Louis F. Oberdorfer, United States District Judge for the District of Columbia, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge.

The issues in this bankruptcy appeal involve the doctrine of successor liability ***285** and arise out of the Bankruptcy Court's order approving the sale of the assets of Trans World Airlines ("TWA") to American Airlines ("American"). The primary question is whether the District Court erred in affirming the Bankruptcy Court's order, which had the effect of extinguishing the liability of American, as successor to TWA, for (1) employment discrimination claims against TWA and (2) for the Travel Voucher Program awarded to TWA's flight attendants in settlement of a sex discrimination class action. Because section 363(f) of the Bankruptcy Code permits a sale of property "free and clear" of an "interest in such property[,]" and because the claims against TWA here were connected to or arise from the assets sold, we affirm the Bankruptcy Court's order approving the sale "free and clear" of successor liability.

I. *Facts and Procedural Background*

We first review the factual background as it relates to the two types of claims under consideration here, the Travel Voucher Program and the Equal Employment Opportunity Commission ("EEOC") claims.

A. *The Travel Voucher Program*

In regard to the Travel Voucher Program, two separate federal actions were filed. In 1976, the EEOC filed an action in the United States District Court for the Central District of California against TWA and against TWA's flight attendant collective bargaining representative. The collective bargaining representative subsequently aligned itself with the EEOC as a plaintiff. In 1977, Linda Knox-Schillinger filed a separate suit on her own behalf and on behalf of other female flight attendants, solely against TWA, in the United States District Court for the Southern District of New York. The principal contention of the two lawsuits was that TWA's former maternity leave of absence policy for flight attendants, including placing female flight attendants on leave immediately upon becoming pregnant, constituted sex discrimination in violation of Title VII of the Civil Rights Act of 1964, *as amended,* 42 U.S.C. § 2000e, *et seq.* In 1978, the Knox-Schillinger case was certified as a class action and thereafter consolidated with the EEOC suit filed in the Central District of California.

Eventually, in 1995, both lawsuits were settled under a court-approved settlement agreement. The terms of the agreement required TWA to provide ten travel vouchers for each covered pregnancy to eligible class members who timely submitted a notarized proof of claim form to the EEOC (hereafter the "Travel Voucher Program"). The agreement provided that travel vouchers could be used by the class member or her family at any time during her life subject to certain age limitations for dependent children. Under the program, anyone traveling on one of these vouchers could be bumped by a paying passenger. Approximately 2,053 class members each received on average twenty five vouchers under the settlement agreement. Most flight attend-

ants, as was their prerogative, elected to save the vouchers for long trips to be taken after retirement when they had more time to travel and would receive more favorable tax consequences for use of the vouchers.

B. *EEOC Claims*

In addition to the claims arising out of the Travel Voucher Program, as of March 2, 2001, twenty-nine charges of discrimination had been filed against TWA with the EEOC or simultaneously filed with both the EEOC and a state or local Fair Employment*286 Practices Agency.[FN1] The charges alleged various violations of several federal employment discrimination statutes, including Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act. The appellants, the EEOC and the United States (collectively the "EEOC"), assert that they are unable to estimate the value, if any, of these claims, or the likelihood that the EEOC would commence litigation on the basis of any of these claims.

> FN1. The EEOC asserts that, given that the law allows victims of discrimination 300 days from the date of the incident to file a claim with the EEOC, more charges of this type may have been filed after March 2, 2001.

C. *American's Purchase of TWA's Assets*

On January 10, 2002, TWA filed a Chapter 11 bankruptcy petition.[FN2] Although it was the nation's eighth largest airline at the time, it had not earned a profit in over a decade.[FN3] Months earlier, in the Spring of 2000, TWA determined that it could not continue to operate as an independent airline and that it needed to enter into a strategic transaction, such as a merger with, or sale of, TWA as a going concern to another airline. *See In re Trans World Airlines, Inc., et al.*, No. 01-00056, slip op. at 5, 2001 WL 1820326 (Bankr.D.Del. Apr.2, 2001) (hereafter "*Order on Emergency Stay Motions*"). Throughout 2000, TWA held intermittent discussions with American concerning the possibility of a strategic partnership. On January 3, 2001, American contacted TWA with a proposal to purchase substantially all of TWA's assets. On January 9, 2001, American agreed to a purchase plan subject to an auction and Bankruptcy Court approval.

> FN2. TWA had filed Chapter 11 petitions twice before, once in 1992 and again in 1995.
>
> FN3. The Bankruptcy Court found that TWA ended the year 2000 with $100 million in cash, which was $50 to $100 million less than the airline needed to survive its winter season. *See In re Trans World Airlines, Inc., et al.*, No. 01-00056, slip op. at 10, 2001 WL 1820326 (Bankr.D.Del. Apr.2, 2001) (Order on Emergency Stay Motions). The Court also found that TWA's cash balance on January 10, 2001, was approximately $20 to $30 million and TWA needed $40 million to fund its operations the next day. *See id.*

Though TWA's assets were being sold under a court-approved bidding process, as of February 28, 2001, the deadline for the submission of bids, TWA had not received any alternate proposals other than American's that conformed with the bidding procedures. Accordingly, TWA's Board of Directors voted to accept American's proposal to purchase TWA's assets for $742 million.

D. *Bankruptcy Court and District Court Approval of Sale*

The EEOC and the Knox-Schillinger class objected to the sale to American. After conducting an evidentiary hearing, the Bankruptcy Court approved the sale to American over the objections of the EEOC and the Knox-Schillinger plaintiffs. In approving the Sale Order, the Bankruptcy Court determined that there was no basis for successor liability on the

part of American and that the flight attendants' claims could be treated as unsecured claims. In keeping with the Bankruptcy Court's conclusions, the Sale Order extinguished successor liability on the part of American for the Travel Voucher Program and any discrimination charges pending before the EEOC. Specifically, the Order provided that, in accordance with § 363(f) of the Bankruptcy Code:

> the free and clear delivery of the Assets shall include, but not be limited to, all ***287** asserted or unasserted, known or unknown, employment related claims, payroll taxes, employee contracts, employee seniority accrued while employed with any of the Sellers and successorship liability accrued up to the date of closing of such sale.

Sale Order, ¶ 4, App. at 6. The Sale Order also enjoined all persons from seeking to enforce successor liability claims against American. The Court's order provided that:

> Pursuant to sections 105(a) and 363 of the Bankruptcy Code, all Persons are enjoined from taking any action against Purchaser or Purchaser's Affiliates including, without limitation, TWA Airlines LLC, to recover any claim which such Person had solely against Sellers or Sellers' Affiliates.

Sale Order, ¶ 11, App. at 8.

Immediately after the Sale Order was entered, the EEOC filed a Notice of Appeal. On October 11, 2001, the District Court affirmed the Bankruptcy Court's decision, finding that TWA's assets were properly transferred free and clear of (1) the Travel Voucher Program and (2) the charges of employer misconduct filed with the EEOC. The District Court affirmed the Bankruptcy Court's holding that the claims against the debtor (TWA) were "interests in property" within the meaning of 11 U.S.C. § 363(f), and therefore, the debtor's assets could be transferred free and clear of those claims. The District Court determined that the Bankruptcy Court's findings of fact were not clearly erroneous and that the Bankruptcy Court's legal conclusions were supported by the factual record. The District Court further noted that:

> there is record evidence supporting the bankruptcy court's conclusions that: (a) pursuant to a court-approved bidding procedure, debtors determined that American's offer was the highest and best offer for the purchase of substantially all of debtor's assets; (b) it was unlikely that debtors and American would have consummated the sale if appellants' claims were not extinguished; (c) if the sale did not go forward, it was highly likely that debtors would have been liquidated with resulting material harm to creditors, employees and the St. Louis, Missouri region, as well as rendering debtors unable to satisfy its [sic] obligations under the Travel Voucher Program; and (d) the travel vouchers may be reduced to a monetary satisfaction.

District Court's Order affirming the Bankruptcy Court's Sale Order, App. at 118 (citations omitted). On November 13, 2001, the Knox-Schillinger class filed a Notice of Appeal. On December 7, 2001, the EEOC also appealed the District Court's order. The appeals have been consolidated.

II. *Jurisdiction and Standard of Review*

This Court has jurisdiction to review the District Court's order of October 11, 2001, affirming the Bankruptcy Court's Sale Order of March 12, 2001, pursuant to 28 U.S.C. §§ 158(d) and 1292(a)(1).

[1] Our standard of review over the District Court's bankruptcy decision is the same as that exercised by the District Court. *See In re Woskob,* 305 F.3d 177, 181 (3d Cir.2002). Accordingly, we review the Bankruptcy Court's findings of fact for clear error and exercise plenary review over the Bankruptcy Court's legal determinations. *See id.; see also In re Continental Airlines,* 125 F.3d 120, 128 (3d Cir.1997).

***288 III.** *Analysis*

The parties' dispute in this case concerns the meaning of the phrase "interest in such property" (hereafter "interest in property") as that phrase is used in § 363(f) of the Bankruptcy Code. This section "permits sale of property free and clear of any interest in the property of an entity other than the estate." S.Rep. No. 95-989, at 56 (1978), U.S. Code Cong. & Admin. News at 5787, 5842. Appellants assert that the Travel Voucher Program and the pending EEOC charges are not interests in property within the meaning of this section and that, therefore, these claims were improperly extinguished by the Sale Order. They assert that interests in property are limited to "liens, mortgages, money judgments, writs of garnishment and attachment, and the like, and cannot encompass successor liability claims arising under federal antidiscrimination statutes and judicial decrees implementing those statutes." Federal Appellants' Br. at 19. Appellants also assert that their claims are outside the scope of § 363(f), and therefore cannot be extinguished, because they could not "be compelled, in a legal or equitable proceeding, to accept a money satisfaction of [their] interest[s]." 11 U.S.C. § 363(f)(5). The Airlines, on the other hand, argue that, while Congress did not expressly define "interest in property," the phrase should be broadly read to authorize a bankruptcy court to bar any interest that could potentially travel with the property being sold, even if the asserted interest is unsecured. They also assert that appellants' claims lie within the scope of § 363(f)(5), and therefore, can be extinguished because appellants can be compelled to accept a money satisfaction of their claims. We agree with the Airlines.[FN4]

FN4. On appeal the Airlines also assert that the imposition of successor liability on American is not warranted under applicable nonbankruptcy law. We have addressed the issue of successor liability in other contexts. *See Rego v. ARC Water Treatment Co. of Pa.*, 181 F.3d 396, 401-02 (3d Cir.1999) (explaining the rationale underlying successor liability and setting forth factors to consider in determining whether successor liability should attach). Here we decline to speculate as to whether there is a basis for successor liability and, instead, assume for purposes of our analysis that but for the Sale Order, appellants could have asserted viable successor liability claims against American.

A. *Interest in Property*

[2][3] The contentions of the parties require us to consider whether the claims in this case constitute an interest in property as understood within the meaning of § 363(f). Section 363(f) of the Bankruptcy Code provides, in pertinent part:

> The trustee may sell property ... free and clear of any interest in such property of an entity other than the estate, only if-
>
> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; *or*
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f) (emphasis added). Some courts have narrowly interpreted interests in property to mean *in rem* interests in property, such as liens. *See, e.g., In re White Motor Credit Corp.*, 75 B.R. 944, 948 (Bankr.N.D.Ohio 1987) ("General unsecured claimants including tort claimants, have no specific interest in a debtor's ***289** property. Therefore, section 363 is inapplicable for sales free and clear of such claims."); *In re New England Fish Co.*, 19 B.R. 323, 326 (Bankr.W.D.Wash.1982)

(same). However, the trend seems to be toward a more expansive reading of "interests in property" which "encompasses other obligations that may flow from ownership of the property." 3 Collier on Bankruptcy ¶ 363.06[1].[FN5]

> FN5. *See, e.g., In re WBQ Partnership,* 189 B.R. 97, 105 (Bankr.E.D.Va.1995) (Virginia's right to recover depreciation overpayment upon sale of debtor's assets was an "interest" within the meaning of section 363(f)); *In re All American of Ashburn, Inc.,* 56 B.R. 186, 190 (Bankr.N.D.Ga.1986) (sale pursuant to § 363(f) precluded mobile home owners from prosecuting product liability action against purchaser of debtor's assets).

In *Folger Adam Sec., Inc. v. DeMatteis/MacGregor, JV,* 209 F.3d 252 (3d Cir.2000), we addressed the issue of whether certain affirmative defenses to a claim for breach of contract constituted an interest in property within the meaning of section 363(f). Specifically, we were asked to decide "whether the affirmative defenses of setoff, recoupment, and other contract defenses ... constitute an 'interest' under section 363(f) of the Bankruptcy Code such that a sale of the debtors' assets in a consolidated Bankruptcy Court auction free and clear, extinguished such affirmative defenses...." *Id.* at 253-54. We observed that there was no support in the case law for the proposition that *a defense* may be extinguished as a result of a free and clear sale. *See id.* at 261. Accordingly, we held that "a right of recoupment is a defense and not an interest and therefore is not extinguished by a § 363(f) sale." *Id.*

In arriving at this conclusion, we explored the significance of the Fourth Circuit's decision in *In re Leckie Smokeless Coal Co.,* 99 F.3d 573 (4th Cir.1996). In *Leckie,* the Fourth Circuit held that, irrespective of whether the purchasers of the debtors' assets were successors in interest, under § 363(f), the Bankruptcy Court could properly extinguish all successor liability claims against the purchasers arising under the Coal Act by entering an order transferring the debtors' assets free and clear of those claims. *See id.* at 576. The Fourth Circuit held that the two employer-sponsored benefit plans that sought to collect Coal Act premium payments from the debtors' successors in interest were asserting interests in property that had already been sold through the section 363 sale. The Fourth Circuit explained that:

> while the plain meaning of the phrase "interest in such property" suggests that not all general rights to payment are encompassed by the statute, Congress did not expressly indicate that, by employing such language, it intended to limit the scope of section 363(f) to *in rem* interests, strictly defined, and we decline to adopt such a restricted reading of the statute here.

Id. at 582. The Court explained that the employer-sponsored benefit plans had interests in the property of the debtors which had been transferred under section 363(f) in the sense that there was a relationship between their right to demand premium payments from the debtors and the use to which the debtors had put their assets. *See id.* Importantly, in the course of our review of *Leckie,* we noted that "the term 'any interest' is intended to refer to obligations that are connected to, or arise from, the property being sold." *Folger Adam,* 209 F.3d at 259 (*citing* 3 Collier on Bankruptcy ¶ 363.06[1]).

Here the Airlines correctly assert that the Travel Voucher and EEOC claims at issue had the same relationship to TWA's assets in the § 363(f) sale, as the employee benefits did to the debtors' assets in *Leckie.* ***290** In each case it was the assets of the debtor which gave rise to the claims. Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA's investment in commercial aviation is inextricably linked to its employment of the Knox-Schillinger claimants as flight attendants, and its ability to distribute travel vouchers as part of the settlement agreement. While the interests of the EEOC and the Knox-Schillinger class in the assets

of TWA's bankruptcy estate are not interests in property in the sense that they are not *in rem* interests, the reasoning of *Leckie* and *Folger Adam* suggests that they are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold.

Indeed, to equate interests in property with only *in rem* interests such as liens would be inconsistent with section 363(f)(3), which contemplates that a lien is but one type of interest. Section 363(f)(3) provides:

> The trustee may sell property ... free and clear of any interest in such property of an entity other than the estate, only if-
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property[.]

11 U.S.C. § 363(f)(3). In this regard, we find ourselves in agreement with Collier's observation that:

> Section 363(f) permits the bankruptcy court to authorize a sale free of "any interest" that an entity has in property of the estate. Yet the Code does not define the concept of "interest," of which the property may be sold free. Certainly a lien is a type of "interest" of which the property may be sold free and clear. This becomes apparent in reviewing section 363(f)(3), which provides for particular treatment when "such interest is a lien." Obviously there must be situations in which the interest is something other than a lien; otherwise section 363(f)(3) would not need to deal explicitly with the case in which the interest is a lien.

3 Collier on Bankruptcy ¶ 363.06[1]. *See also In re P.K.R. Convalescent Centers, Inc.*, 189 B.R. 90, 94 (Bankr.E.D.Va.1995) ("As the plain meaning of the statute demonstrates, § 363 covers more situations than just sales involving liens.") (*citing In re Beker Indus. Corp.*, 63 B.R. 474, 478 (Bankr.S.D.N.Y.1986) and *In re Manning*, 37 B.R. 755, 759 (Bankr.D.Colo.1984), *aff'd in part, vacated in part*, 831 F.2d 205 (10th Cir.1987)); *In re WBQ Partnership*, 189 B.R. at 105 ("Since 'lien' is a defined term under the Bankruptcy Code, it stands to reason that Congress would have used the term 'lien' instead of 'interest,' had it intended to restrict the scope of § 363(f) to liens. Furthermore, § 363(f)(3) applies to situations in which 'such interest is a lien,' which suggests that liens constitute a subcategory of 'any interest.' ").

B. *Money Satisfaction*

[4][5] In addition to asserting that their claims are not interests in property within the meaning of § 363(f), appellants also assert that their claims are outside the scope of § 363(f)(5) because neither the vouchers nor the EEOC claims are interests on account of which they could be compelled to accept money satisfaction. As noted above, under § 363(f), assuming the "interest in property" at issue falls within the meaning of the statute, a sale free and clear of such interest can occur if any one of five conditions has been satisfied. The Bankruptcy Court determined that, because the travel voucher and ***291** EEOC claims were both subject to monetary valuation, the fifth condition had been satisfied. We agree. Had TWA liquidated its assets under Chapter 7 of the Bankruptcy Code, the claims at issue would have been converted to dollar amounts and the claimants would have received the distribution provided to other general unsecured creditors on account of their claims. A travel voucher represents a seat on an airplane, a travel benefit that can be reduced to a specific monetary value. Indeed, TWA arrived at a valuation for tax purposes, as noted in the Annex to the settlement agreement. Likewise, the EEOC discrimination claims are reducible to, and can be satisfied by, monetary awards even if the relief sought is injunctive in nature. *See In re Continental Airlines*, 125 F.3d at 133-36 (seniority integration rights of employees of a bankrupt airline could be satisfied by monetary awards).

C. Other Considerations

[6] Even were we to conclude that the claims at issue are not interests in property, the priority scheme of the Bankruptcy Code supports the transfer of TWA's assets free and clear of the claims. The statutory scheme, 11 U.S.C. § 507(a) (2003), defines various classes of creditors entitled to satisfaction before general unsecured creditors may access the pool of available assets. In *New England Fish,* the Bankruptcy Court held that the civil rights claims before it were *not* interests in property but decided that the claimants were general unsecured creditors and that the debtor's assets could be transferred free and clear of such claims. *See New England Fish,* 19 B.R. at 326-29.

In *New England Fish Co.,* the issue was whether the Bankruptcy Court could extinguish the right to payment of claimants asserting civil rights claims in the Bankruptcy Court. The civil rights claims at issue in *New England Fish* were based on allegations of racial discrimination in employment. In that case, two class actions had been brought against the debtor by its employees. One of the suits went to trial and the plaintiffs obtained a damages award for job discrimination, housing discrimination and attorneys fees. In the other suit, there had been no determination of liability at the time of the bankruptcy filing.[FN6] The Bankruptcy Court recognized the claimants holding a judgment as being general unsecured creditors with liquidated claims and recognized the other class of claimants as being general unsecured creditors to the extent they could prove liability. *See id.* at 326. The prospective purchaser of the assets of the debtor and its trustee sought an adjudication that the assets of the debtor were transferred free and clear of the interests of the civil rights claimants. The prospective purchaser also sought a declaration that it did not qualify as a successor employer of the debtor, and, therefore, could not be held liable to the civil rights claimants. *See id.* at 325.

> FN6. This parallels the status of appellants' claims here. The Knox-Schillinger class is comprised of general unsecured creditors whose claims have been liquidated by the Travel Voucher Program. The EEOC is a general unsecured creditor whose claims have not been liquidated.

In the course of discussing the civil rights claims in *New England Fish,* the Bankruptcy Court applied the Supreme Court's admonition in *Nathanson v. National Labor Relations Board,* 344 U.S. 25, 73 S.Ct. 80, 97 L.Ed. 23 (1952), that "if one claimant of the bankrupt's estate is to be preferred over others, 'the purpose should be clear from the statute.' " *New England Fish,* 19 B.R. at 326 (quoting *292*Nathanson,* 344 U.S. at 29, 73 S.Ct. 80). The Court reasoned that allowing the claimants to seek a recovery from the successor entity while creditors which were accorded higher priority by the Bankruptcy Code obtained their recovery from the limited assets of the bankruptcy estate would "subvert the specific priorities which define Congressional policy for bankruptcy distribution to creditors." *New England Fish,* 19 B.R. at 329.

Other courts have followed the rationale set forth in *New England Fish.* For instance, in *Forde v. Kee-Lox Mfg. Co., Inc.,* 437 F.Supp. 631 (W.D.N.Y.1977), the District Court dismissed a suit brought under Title VII by an employee of a bankrupt debtor against the purchaser of its assets on a successor liability theory. The Court rejected the civil rights claimant's assertion that the Court could not reduce his demand for reinstatement to a fixed amount of money that could be satisfied out of the proceeds of the sale of the assets of the debtor's bankruptcy estate. *See id.* at 633. The Court explained:

> There are two major difficulties with the plaintiff's position. First, the plaintiff would allow claimants such as himself to assert their claims against purchasers of the bankrupt's assets, while relegating lienholders to the proceeds of the sale. This elevates claims that have not been secured or reduced to judgment to a position superior to those that have. Yet the Bankruptcy

> Act is clearly designed to give liens on the bankrupt's property preference over unliquidated claims.
>
> An additional difficulty with the plaintiff's position is that it would seriously impair the trustee's ability to liquidate the bankrupt's estate. If the trustee in a liquidation sale is not able to transfer title to the bankrupt's assets free of all claims, including civil rights claims, prospective purchasers may be unwilling to pay a fair price for the property, leaving less to distribute to the creditors.

Id. at 633-34.

Appellants here assert that *Forde* is no longer good law because it was decided under the Bankruptcy Act, which lacked a provision expressly authorizing asset sales free and clear of interests in property. We reject this argument based on the Supreme Court's teaching in *Van Huffel v. Harkelrode,* 284 U.S. 225, 52 S.Ct. 115, 76 L.Ed. 256 (1931), that although the Bankruptcy Act did not expressly authorize bankruptcy courts to do so, the power to sell property of the bankruptcy estate free of encumbrances was "granted by implication." *Id.* at 227, 52 S.Ct. 115. We note that *Forde* continues to be cited as good law by courts construing the Bankruptcy Code. *See, e.g., MacArthur Co. v. Johns-Manville Corp.,* 837 F.2d 89, 94 (2d Cir.1988); *In re Dow Corning Corp.,* 198 B.R. 214, 244 (Bankr.E.D.Mich.1996).

We are sensitive to the concerns raised in *Forde.* We recognize that the claims of the EEOC and the Knox-Schillinger class of plaintiffs are based on congressional enactments addressing employment discrimination and are, therefore, not to be extinguished absent a compelling justification. At the same time, in the context of a bankruptcy, these claims are, by their nature, general unsecured claims and, as such, are accorded low priority. To allow the claimants to assert successor liability claims against American while limiting other creditors' recourse to the proceeds of the asset sale would be inconsistent with the Bankruptcy Code's priority scheme.

Moreover, the sale of TWA's assets to American at a time when TWA was in financial distress was likely facilitated by American obtaining title to the assets free and clear of these civil rights claims. Absent entry of the Bankruptcy Court's order*293 providing for a sale of TWA's assets free and clear of the successor liability claims at issue, American may have offered a discounted bid. This is particularly likely given that the EEOC has been unable to estimate the number of claims it would pursue or the magnitude of the damages it would seek. The arguments advanced by appellants do not seem to account adequately for the fact that American was the only entity that came forward with an offer that complied with the court-approved bidding procedures for TWA's assets and provided jobs for TWA's employees.

The Bankruptcy Court found that, in the absence of a sale of TWA's assets to American, "the EEOC will be relegated to holding an unsecured claim in what will very likely be a piece-meal liquidation of TWA. In that context, such claims are likely to have little if any value." *In re Trans World Airlines, Inc., et al.,* No. 01-00056, slip op. at 23, 2001 WL 1820326 (Bankr.D.Del. Mar.27, 2001). The same is true for claims asserted pursuant to the Travel Voucher Program, as they would be reduced to a dollar amount and would receive the same treatment as the unsecured claims of the EEOC. Given the strong likelihood of a liquidation absent the asset sale to American, a fact which appellants do not dispute, we agree with the Bankruptcy Court that a sale of the assets of TWA at the expense of preserving successor liability claims was necessary in order to preserve some 20,000 jobs, including those of Knox-Schillinger and the EEOC claimants still employed by TWA, and to provide funding for employee-related liabilities, including retirement benefits.

IV. *Conclusion*

After carefully considering the arguments discussed above and all other arguments advanced by appellants, we join the District Court in affirming the Bankruptcy Court's authorization of the sale of TWA's assets to American free and clear of the claims of the EEOC and the Knox-Schillinger class.[FN7]

> FN7. Because we hold that the District Court properly affirmed the Bankruptcy Court's Sale Order, we need not discuss appellants' assertion that the District Court abused its discretion in refusing to issue a limited stay of the Bankruptcy Court's Sale Order. The appeal from the District Court's order refusing to issue the stay will be denied as moot.

C.A.3 (Del.),2003.
In re Trans World Airlines, Inc.
322 F.3d 283, 91 Fair Empl.Prac.Cas. (BNA) 385, 84 Empl. Prac. Dec. P 41,362, 40 Bankr.Ct.Dec. 284, Bankr. L. Rep. P 78,815, 25 NDLR P 194, 22 A.L.R. Fed. 2d 809

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February 12, 2010

VIA Email and U.S. Mail

Shelley A. Woods, Esq.
Missouri Attorney General's Office
P.O.Box 899
Jefferson City, MO 65102

Re: Supplemental Comments of American Airlines, Inc.
Draft Missouri Hazardous Waste Management Facility Permit
MCI Maintenance and Engineering Base
9200 NW 112th Street, Kansas City, MO
Permit Number: MOD043935048

Dear Ms. Woods:

This letter is to follow-up on our discussions regarding the comments of American Airlines, Inc. ("American") on the above referenced Draft Hazardous Waste Management Facility Permit ("Draft Permit") for the Maintenance and Engineering Base ("Base") at the Kansas City International Airport. American appreciates the consideration given by the Missouri Department of Natural Resources ("MDNR") and the Environmental Protection Agency ("EPA") to the material set forth herein.

As pointed out in our earlier comments, American was never an owner or operator of an active or closing hazardous waste management unit at the Base. Thus, American never had a RCRA operating permit for the Base. Because American was never an owner or operator of a hazardous management unit at the Base, American likewise was not required to have a post-closure permit for its maintenance operations at the Base. All permitting, closure and post-closure obligations were those of the former Base operator – TWA. As we also pointed out, when American took over operation of the Base in 2002, American purchased the assets of TWA out of bankruptcy; American did not merge with TWA or otherwise assume TWA's environmental obligations or liabilities at the Base.

When TWA declared bankruptcy in early 2001, its ability to perform its obligations under its RCRA Permit was severely impaired and MDNR would normally have then looked to the facility owner (the City of Kansas City ("City")) to fulfill those obligations. However, in this instance, the City was able to avoid its obligations as owner under the Permit because American – as the operator of the Base (as opposed to operator of the RCRA permitted facility ("RCRA Facility")) – voluntarily stepped in and performed the prescribed operation, maintenance and monitoring activities under the RCRA Permit. However, American never agreed to assume any

Ex. B

of TWA's or the City's environmental liabilities or obligations or to perform such activities indefinitely.

At the time American submitted its earlier comments on the Permit, we explained that, while American conducted aircraft maintenance operations throughout the Base, it was never the operator of the RCRA Facility (*i.e.* the previously closed units) and it should never have been considered to be the operator of the RCRA Facility. Nevertheless, American stepped in and provided post-closure care for the RCRA Facility because it had possession and control of the entire Base within which the RCRA Facility was situated. Subsequently, when American relinquished control of the bulk of the Base, it likewise relinquished control of the RCRA Facility. At that point, any possible contention that American is the "operator" of the RCRA Facility was extinguished based on the definition of "operator" under RCRA.

Under RCRA, the operator of a RCRA Facility is "the person responsible for the overall operation of a facility." 40 C.F.R. § 260.10. Under the Permit, the RCRA Facility consists of all of the previously closed hazardous waste management units and the SWMUs throughout the Base. Simply put, American no longer has control over most of the Base and there is nothing under the law or in American's lease ("Lease") with the City that makes American responsible for the "overall operation of [the RCRA] [F]acility." Instead, American now operates and controls only the Superhangar area, Barrel House area and Fuel Farm.[1] Thus, not only does American not have responsibility for the overall operation of the Base, it does not have responsibility for the RCRA Facility, and, ***by definition***, cannot be the operator under the Draft Permit.

From our conversations with you, we understand that the City has apparently raised two arguments to support its contention that American should still be considered the operator of the RCRA Facility: (1) American is obligated under the Lease to hold and comply with the Permit, and (2) even though American does not control the majority of the Base, it can be or has been granted access by the City to those areas necessary to allow it to perform the actions of the RCRA Facility operator. Neither of these arguments is persuasive.

First, the Lease contains no provision requiring American to obtain or renew the RCRA Post-Closure Permit or requiring American to act as operator under the RCRA Post-Closure Permit. While Section 15.1 requires American to "comply in all material respects with all applicable Environmental Laws and Regulations," this provision does not and cannot mean that American agreed to assume all environmental obligations related to the Base. Instead, it simply means that American will perform whatever its obligations may be under the Lease or the law in

[1]At the inception of the Lease, the leasehold covered the entire Base and consisted of the Superhangar Area and the Remainder Area (*i.e.*, everything else). The closed RCRA units are part of the Remainder. At the time of American's initial comments on the Draft Permit, American was evaluating its plans for the Base, and was working toward reducing its leasehold interest to include only the Superhangar, Fuel Farm and Barrel House (*i.e.*, vacating most of the Remainder). However, since that time, American has determined that it will no longer require the use of *any* of the facilities at the Base and has notified the City of its intent to *completely vacate* all Base facilities on or before October 31, 2010.

compliance with the law. Since American now cannot, by definition, serve as the RCRA Facility Operator, it would not be violating the law (or the Lease) by declining to serve as such.[2]

Furthermore, the Lease is a contract between the City and American. That contract sets forth the specific rights and obligations of the parties – it is not a contract with the State of Missouri or EPA and it does not prescribe American's rights or obligations under RCRA. Whether or not the City can, pursuant to one or more contractual provisions, require American to fulfill the RCRA Facility operator's obligations, has nothing to do with whether American can be required to act as an Operator under RCRA. Even if the Lease addressed American's obligations as an Operator under RCRA, which it does not, whether American is breaching the Lease by declining to perform the duties of the RCRA Facility Operator would be strictly a private matter between American and the City.

In addition to the above, the City's argument that American is the RCRA Facility Operator because the City has granted or can grant American access to the RCRA facility to perform the operator's duties does not find support under the law. In the case of *In re Valley Steel Products Company*, 157 B.R. 442 (Bankr.E.D.Mo. 1993), MDNR sought to have Valley Steel ("Valley") perform post-closure obligations at one of Valley's facilities after Valley had declared bankruptcy. In that case, MDNR argued that even though Valley did not have actual possession of the property to perform the post-closure activities, it had "constructive" possession – *i.e.* the right to enter the property and perform the post-closure obligations. MDNR claimed Valley had reserved constructive possession in an earlier Consent Order with EPA and expressly "created a right to enter the facility when it transferred title to the Facility" to another entity. *Id.* at 447. In support of its argument, MDNR cited Black's Legal Dictionary, noting that Black's defines possession as follows:

> "[t]he detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either as owner or as the proprietor of a qualified right in it, and either held personally or by another who exercises anyone's place and name. . . . A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion and control over a thing either directly or through another person or persons in then in constructive possession of it.

Id. (citing *Black's Legal Dictionary* 1047 (5th ed. 1979)). MDNR asserted that evidence of Valley's "intent to exercise dominion" was the fact that, after relinquishing title to the facility (prior to its bankruptcy), Valley continued to conduct post-closure monitoring and reporting at the facility. In rejecting MDNR's arguments and making its determination, the Court found that even if Valley possessed a limited right to enter the property, it did not have possession of it, and that Valley could not be in constructive possession of the facility because "it no longer has an

[2]Contrary to the City's argument, the Lease actually relieves American of any obligation to act as the RCRA Facility Operator. The Lease provides that "except as may be expressly set forth in this Lease [American] shall have no further obligation as to any portion of the Remainder deemed vacated under Sections 2.2 or 2.3, including but not limited to repair, maintenance, utilities or insurance." See Section 2.3(C)(4). As such, American, upon vacating the Remainder, expressly has no obligations with respect to the vacated areas – including the RCRA Facility. Consequently, American cannot be compelled by the City to act as operator of the RCRA Facility.

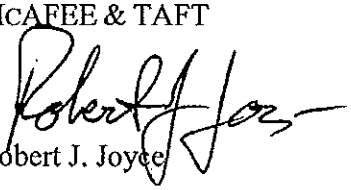
intent to exercise dominion or control of the Facility even if it did have such an intent in the past." *Id.*

The *Valley* Court's determination that a mere grant of access to party does not put that party in constructive possession of a facility is relevant here insofar as RCRA specifies that the "operator" is the party responsible for the "overall operation of the facility." Obviously, if a party is not "exercising dominion" over a facility, it cannot be responsible for the "overall operation" of the facility. Here, American does not have actual possession of the RCRA Facility, has no intent to exercise dominion or control over the RCRA facility, and has no contractual obligation to do so. Because American does not possess or control – either actually or constructively - the RCRA facility, it cannot be the one responsible for its "overall operation." As such, American cannot be designated as an operator under the Permit – regardless of any contractual obligations to the City. At most, American could agree with the City to perform the City's or the RCRA Facility Operator's obligations under the Permit; American has not done so.

Again, we appreciate the opportunity to provide these supplemental comments. If you have any further questions or need any additional information, please don't hesitate to call.

Very truly yours,

McAFEE & TAFT



Robert J. Joyce

cc: Mr. Fred Augustine (AA)
Jim Johnson, Esq. (AA)
Mr. Michael Wesche (AA)
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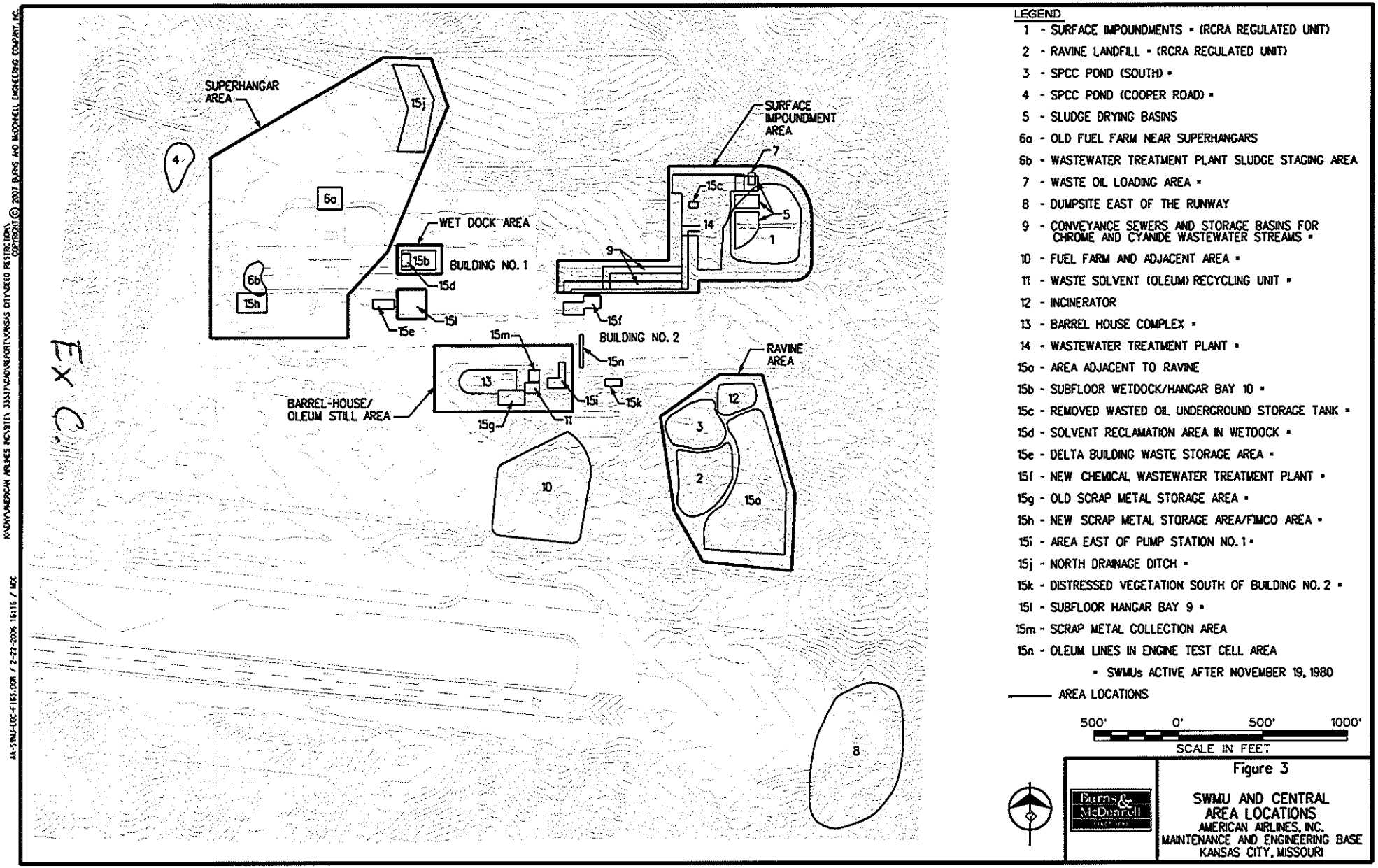

LEGEND

1 - SURFACE IMPOUNDMENTS * (RCRA REGULATED UNIT)
2 - RAVINE LANDFILL * (RCRA REGULATED UNIT)
3 - SPCC POND (SOUTH) *
4 - SPCC POND (COOPER ROAD) *
5 - SLUDGE DRYING BASINS
6a - OLD FUEL FARM NEAR SUPERHANGARS
6b - WASTEWATER TREATMENT PLANT SLUDGE STAGING AREA
7 - WASTE OIL LOADING AREA *
8 - DUMPSITE EAST OF THE RUNWAY
9 - CONVEYANCE SEWERS AND STORAGE BASINS FOR CHROME AND CYANIDE WASTEWATER STREAMS *
10 - FUEL FARM AND ADJACENT AREA *
11 - WASTE SOLVENT (OLEUM) RECYCLING UNIT *
12 - INCINERATOR
13 - BARREL HOUSE COMPLEX *
14 - WASTEWATER TREATMENT PLANT *
15a - AREA ADJACENT TO RAVINE
15b - SUBFLOOR WETDOCK/HANGAR BAY 10 *
15c - REMOVED WASTED OIL UNDERGROUND STORAGE TANK *
15d - SOLVENT RECLAMATION AREA IN WETDOCK *
15e - DELTA BUILDING WASTE STORAGE AREA *
15f - NEW CHEMICAL WASTEWATER TREATMENT PLANT *
15g - OLD SCRAP METAL STORAGE AREA *
15h - NEW SCRAP METAL STORAGE AREA/FIMCO AREA *
15i - AREA EAST OF PUMP STATION NO. 1 *
15j - NORTH DRAINAGE DITCH *
15k - DISTRESSED VEGETATION SOUTH OF BUILDING NO. 2 *
15l - SUBFLOOR HANGAR BAY 9 *
15m - SCRAP METAL COLLECTION AREA
15n - OLEUM LINES IN ENGINE TEST CELL AREA

* SWMUs ACTIVE AFTER NOVEMBER 19, 1980

AREA LOCATIONS

500' 0' 500' 1000'
SCALE IN FEET

Figure 3

SWMU AND CENTRAL AREA LOCATIONS
AMERICAN AIRLINES, INC.
MAINTENANCE AND ENGINEERING BASE
KANSAS CITY, MISSOURI

Burns & McDonnell

Ex C.