



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

December 26, 2019

VIA HAND DELIVERY

U.S. EPA-REGION 3-RHC
FILED-26DEC2019AM11:39

Joseph J. Lisa (3RC00)
Regional Judicial and Presiding Officer
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103

**Re: Magnate, LLC Site, Edinburg, Shenandoah County,
Virginia: Lien Proceeding CERC 03-2019-0120LL**

Dear Presiding Officer Lisa:

By letter dated December 13, 2019, I provided Your Honor and Magnate, LLC with support for my statement that Magnate conducted scrapping operations at its property between the 2011 asbestos abatement project and February 2016. By email on December 23, 2019, I received the attached comments on my letter from Mr. Darryl Bates, through counsel Bradley Pollack, Esquire (Attachment 1). Mr. Bates raised issues under five headings, which are set forth below together with EPA's responses.

- 1. Magnate Comment #1: "Magnate has never asserted 'solely'. Magnate called for a determination of evidentiary finding, responsible parties, and adequate remedial action. Magnate and EPA scheduled this meeting in October of 2017, with all knowledgeable parties to be present, on site, in order to ascertain the necessary evidence to make such determinations. This meeting was cancelled by the OSC, and replaced with an offsite meeting; where only 'letters of potential liability' were presented."**

The first sentence of this comment apparently responds to the second sentence in my December 13, 2019 letter wherein I stated: "[t]he reason I made this statement was to demonstrate that Magnate has not proven, by a

preponderance of evidence, that a third party was solely responsible for asbestos contamination as required to make out a third-party defense under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).” My argument is relevant to this proceeding because Magnate has attempted to raise the third-party defense in Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3), to dispute EPA’s reasonable basis to believe that Magnate is a potentially responsible party (see *Rebuttal Exhibit 3*). As explained in Section III.B of EPA’s *Rebuttal*, to raise this defense Magnate must demonstrate, by a preponderance of evidence, that the release or threatened release of hazardous substances *was caused solely by the third party*. Magnate now states that “it never asserted ‘solely.’” Magnate here admits that it has not carried its burden under the third-party defense. Having raised no other recognized defense to liability under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b), Magnate has no basis to challenge EPA’s belief that the company is a potentially responsible party. The remaining statements in this comment are not relevant to this proceeding and should not be considered further.

2. **Magnate Comment #2: “Yes, there was significant amounts of asbestos not removed. None of which were left in buildings to be demoed. To date, only those buildings were demoed. The remaining asbestos that remained was well maintained if not disrupted. Otherwise DOLI would have never approved the demolition permit.”**

3. **Magnate Comment #3: “None of the scrapping that took place from 2011 to 2018 was done on parcel #071001001B containing pile # 3 and area # 5 or in the building with the basement lying upon parcel #071001001G.”**

These comments attempt to rebut EPA’s contention, in Section III.B of its *Rebuttal*, that Magnate’s scrapping activities could have contributed to the contamination and that Magnate has accordingly not demonstrated that one or more third parties were solely responsible for such contamination. First, Magnate has made clear, in Comment #1 above, that it has not argued that third parties were solely responsible for contamination. Therefore, the third party defense is unavailable to Magnate. Second, even if one ignores Magnate’s concession above, Magnate’s statement that there was no asbestos remaining in buildings to be demolished post-abatement seems inconsistent with its own contractor’s statement, in the 2011 abatement report (*Rebuttal Exhibit 8*), that

“[t]here remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as

well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and [sic] materials found in the facility that were not tested by WECI in their inspection report dated 3/25/11 will need to be tested by a VA licensed asbestos inspector prior to any work that may disturb it.”

Third, Magnate ignores the fact that asbestos may migrate due to wind, rain, and other weather conditions (see EPA’s Threat Determination at *Rebuttal Exhibit 9* and Action Memorandum at *Lien Filing Record 6*). Fourth, Magnate does not explain what steps were taken to ensure that the remaining asbestos was “well maintained.” And fifth, even if one were to reject EPA’s argument that Magnate’s scrapping activities were potentially a source of the contamination and that Magnate has not demonstrated that contamination was due solely to the acts or omissions of third parties, EPA still has reasonable bases to believe that Magnate cannot raise or maintain the third party defense because Magnate (1) failed to exercise due care with respect to the waste because it failed to secure the Site (see Section III.B.2 of the *Rebuttal*); and (2) denied entry to EPA to facilitate a cleanup (see Section III.B.3 of the *Rebuttal*).

4. **Magnate Comment #4**: “Magnate LLC was cited for improper demolition of buildings containing asbestos. The improperness cited for demolition of buildings was the expiration of the permit to do so. Magnate had asked for an extended expiration of that permit and was granted, then revoked. The buildings demoed were part of the original abated buildings which Magnate received a legal demolition permit. They contained no asbestos or PBC’s. As to the unpermitted solid waste disposal; Magnate is being fined for operating an unlicensed landfill. This fine is under protest and will never see a courtroom. Magnate would have had to taken in solid waste and disposed of it. Needless to say, that didn’t happen. The only solid waste on the property is the residue of the abated buildings that were legally demoed. It remains there due to lack of permission to remove, by the same people who want to fine me. Magnate has not disposed of any solid waste at the site.”

Magnate’s statements that “The buildings demoed were part of the original abated buildings which Magnate received a legal demolition permit. They contained no asbestos or PBC’s” are not consistent with representations made by

the company's own asbestos abatement contractor (see Comment ## 2 & 3, above). The remaining statements in this comment are not relevant to this proceeding and should not be considered further.

5. **Magnate Comment #5**: “Furthermore, whereas two of the ‘response actions’ taken; were ‘in’ buildings [sic]; the POTUS/EPA had no authority due to statutory limitations to provide.

“(3) Limitations on Response.— The President shall not provide for a removal or remedial action under this section in response to a release or threat of release—

“(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

“(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

“(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

“(4) Exception to Limitations.—Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President’s discretion, it constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.”

This comment appears to be a new challenge to EPA’s authority to perform a response action under CERCLA to address conditions found at Magnate’s property. This assertion is beyond the scope of this proceeding, is not relevant, was not raised previously in Magnate’s briefs, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. Magnate cites to language limiting EPA’s response actions at Section 104(a)(3)(A)-(C) of CERCLA, 42 U.S.C. § 9604(a)(3)(A)-(C), and an exception to these limitations found at Section 104(a)(4) of CERCLA, 42 U.S.C. § 9604(a)(4).

Its claim that EPA lacked authority to respond “in buildings” suggests that Magnate argues that Section 104(a)(3)(B) of CERCLA, 42 U.S.C. 9604(a)(3)(B), applies under circumstances at the Site. Magnate misreads the plain language of the limitation and does not consider relevant documentation in the record. The friable asbestos found in Pile 3, Area 5, and Area 10 of the Site was no longer part of any building structure and presented threats to the public outside of any structure. In addition, the PCBs found in sediments and surface water in Area 10 were not part of any building structure and similarly presented threats outside the basement in Area 10 (*see* EPA’s Threat Determination at *Rebuttal Exhibit 9* and EPA’s Action Memorandum at *Lien Filing Record 6*).

EPA contends that none of the arguments asserted in Magnate’s December 23, 2019 email undermine EPA’s reasonable basis to believe that the predicates for lien perfection have been met and that lien perfection is appropriate. Please do not hesitate to contact me should Your Honor have any questions regarding this response.

Respectfully,

A handwritten signature in black ink, appearing to read 'A. Goldman', with a long horizontal flourish extending to the right.

ANDREW S. GOLDMAN
Sr. Assistant Regional Counsel

Attachment

cc: Brad Pollack, Esquire

Attachment 1

Goldman, Andrew

From: Brad Pollack <bgpollack@gmail.com>
Sent: Monday, December 23, 2019 2:19 PM
To: Esposito, Bevin
Cc: Goldman, Andrew
Subject: Fwd: EPA Filing 12-13-19 (Letter to RJO)
Attachments: EPA Filing 12-13-19 (Letter to RJO).pdf

Dear Presiding Officer Lisa:

Attached in red lettering is my client's response to Mr. Goldman's letter of December 13.

Thank you for your consideration.

Respectfully,

Brad Pollack
Attorney
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net
540-459-8600
540-459-8670 (fax)

----- Forwarded message -----

From: Darryl Bates (via Google Docs) <darrylwbates@gmail.com>
Date: Sun, Dec 15, 2019 at 7:22 PM
Subject: EPA Filing 12-13-19 (Letter to RJO)
To: <bgpollack@gmail.com>

darrylwbates@gmail.com has attached the following document:



EPA Filing 12-13-19 (Letter to RJO)



Brad, Here is my clarification to Andrew's letter to Lisa. It was a wonderful opportunity to clarify and correct. Please forward to Lisa.

Thanks, Darryl

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1111650 Arch Street
Philadelphia, Pennsylvania 19103-2029

VIA HAND DELIVERY

December 16, 2019

U.S. EPA-REGION 3-RHC
FILED -13DEC201SAM10:25

Joseph J. Lisa (3RC00)
Regional Judicial and Presiding Officer
U.S. Environmental Protection Agency 1650
Arch Street
Philadelphia, PA 19103

Re: Magnate, LLC Site, Edinburg, Shenandoah County, Virginia: Lien
Proceeding CERC 03-2019-0120LL

Dear Presiding Officer Lisa:

Please allow me this opportunity to clarify the information supplied by Andrew Goldman.

(1) Magnate has never asserted "solely". Magnate called for a determination of evidentiary finding, responsible parties, and adequate remedial action. Magnate and EPA scheduled this meeting in October of 2017, with all knowledgeable parties to be present, on site, in order to ascertain the necessary evidence to make such determinations. This meeting was cancelled by the OSC, and replaced with an offsite meeting; where only "letters of potential liability" were presented.

- (2) Yes, there was significant amounts of asbestos not removed. None of which were left in buildings to be demoed. To date, only those buildings were demoed. The remaining asbestos that remained was well maintained if not disrupted. Otherwise DOLI would have never approved the demolition permit.
- (3) None of the scrapping that took place from 2011 to 2018 was done on parcel #071001001B containing pile # 3 and area # 5 or in the building with the basement lying upon parcel #071001001G.
- (4) Magnate LLC was cited for improper demolition of buildings containing asbestos. The improperness cited for demolition of buildings was the expiration of the permit to do so. Magnate had asked for an extended expiration of that permit and was granted, then revoked. The buildings demoed were part of the original abated buildings which Magnate received a legal demolition permit. They contained no asbestos or PBC's. As to the unpermitted solid waste disposal; Magnate is being fined for operating an unlicensed landfill. This fine is under protest and will never see a courtroom. Magnate would have had to taken in solid waste and disposed of it. Needless to say, that didn't happen. The only solid waste on the property is the residue of the abated buildings that were legally demoed. It remains there due to lack of permission to remove, by the same people who want to fine me. Magnate has not disposed of any solid waste at the site.
- (5) Furthermore, whereas two of the "response actions" taken; were "in" buildings; the POTUS/EPA had no authority due to statutory limitations to provide.

(3) Limitations on Response.—The President shall not provide for a removal or remedial action under this section in response to a release or threat of release—

(A) of a naturally occurring substance in its unaltered form, or altered solely through naturally occurring processes or phenomena, from a location where it is naturally found;

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; or

(C) into public or private drinking water supplies due to deterioration of the system through ordinary use.

(4) Exception to Limitations.—

Notwithstanding paragraph (3) of this subsection, to the extent authorized by this section, the President may respond to any release or threat of release if in the President's discretion, it constitutes a public

health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner.

During yesterday's telephone hearing in the above-referenced matter, Your Honor requested that I supply support for my statement that Magnate, LLC conducted scrapping operations at its property between the 2011 asbestos abatement project and EPA's visit to the property in February 2016. The reason I made this statement was to demonstrate that Magnate has not proven, by a preponderance of evidence, that a third party was solely responsible for asbestos contamination as required to make out a third-party defense under Section 107(c)(3) of CERCLA, 42 U.S.C. § 9607(c)(3).¹ My statement is supported by the following documents:

Recall that Magnate's own contractor made clear *that, following completion of the abatement project:*

"[t]here remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and [sic] materials found in the facility that were not tested by WECI in their inspection report dated 3/25/11 will need to be tested by a VA licensed asbestos inspector prior to any work that may disturb it."

1. *EPA 's January 18, 2018 Endangerment Determination* (Rebuttal Exhibit 9) states, at page 2:

"The Site contains, among other things, numerous buildings in various states of demolition, open pads where buildings once stood, debris piles, a basement and tunnel (pipe chase to boiler house), and various water and oil storage tanks. Many of the buildings are in advanced stages of decay. Asbestos from tiling, mastic, roofing materials, pipe wrap, and other sources is present on the ground both inside and outside many buildings. Recent scrapping/salvaging activities have likely contributed to the spread of asbestos."

2. *EPA 's May 31, 2018 Action Memorandum* (Lien Filing Record 006) states, at page 1:

"During the course of its ownership of the parcels, current owner Magnate LLC has been cited for improper demolition of buildings containing asbestos and unpermitted onsite solid waste disposal. At present the Site is used for a variety of activities including being rented by a portable toilet company for equipment storage, storage of numerous vehicles, and general scrapping operation."

Please let me know if Your Honor seeks additional or different support for my statement.

Regards, Darryl W. Bates

cc: Brad Pollack, Esquire
cc: Andrew S. Goldman

Docket No. CERCLA 03-2019-0120LL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the documents identified below were provided to the following persons:

By First Class Mail and Email:

Bradley G. Pollack, Esquire
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net

By Hand Delivery:

Joseph Lisa (3RC00)
Regional Judicial Officer
U.S. Environmental Protection Agency
1650 Arch Street

Philadelphia, PA 19103

1. Letter from Andrew Goldman to Joseph Lisa (December 13, 2019).	

Andrew S. Goldman, Esquire Sr. Assistant Regional Counsel

Date

Docket No. CERCLA 03-2019-0120LL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the documents identified below were provided to the following persons:

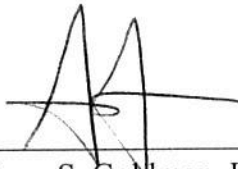
By First Class Mail and Email:

Bradley G. Pollack, Esquire
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net

By Hand Delivery:

Joseph Lisa (3RC00)
Regional Judicial Officer
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103

Documents Provided	
1.	Letter from Andrew Goldman to RJO Joseph Lisa, re: "Magnate, LLC Site, Edinburgh, Shenandoah County, Virginia: Lien Proceeding CERC-03-2019-0120LL (December 26, 2019).



Andrew S. Goldman, Esquire
Sr. Assistant Regional Counsel



Date