UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8

In the matter of: **Valley Drive Abandoned Slurry Site, City of Kalispell, County of Flathead, Montana**	Proceeding under Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607(*l*) **DKT NO.: CERCLA-08-2024-0003**

RECOMMENDED DECISION

I. INTRODUCTION

This proceeding pertains to whether the United States Environmental Protection Agency ("EPA" or "Agency") has a reasonable basis in law and fact on which to perfect a lien pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(*l*), on certain property that is owned by Irene Serio ("Owner") and is located at 185 West Valley Drive, Kalispell, Montana, 59901 ("Parcel Number 0325250"). The proceeding has been conducted in accordance with the requirements of EPA's Supplemental Guidance on Federal Superfund Liens, OSWER Directive No. 9832.12-1a, issued by the Agency on July 29, 1993 ("Supplemental Guidance").

Section 107(*l*) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property which: (1) belong to such person; and (2) are subject to or affected by a removal or remedial action. 42 U.S.C. § 9607(*l*). The lien arises as a matter of law at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided a written notice of potential liability, whichever is later. 42 U.S.C. § 9607(*l*)(2). The lien also applies to all future costs incurred at a site and continues until the liability for the costs or a judgment against the person arising out of such liability is satisfied or becomes unenforceable through operation of the applicable statute of limitations. *Id.*

By letter dated December 12, 2023, EPA notified the Owner of their potential liability under CERCLA and the Agency's intent to perfect a CERCLA Section 107(*l*) lien for costs incurred by the United States in connection with response actions

undertaken by the Agency at the Valley Drive Abandoned Slurry Site ("Site") located at 185 West Valley Drive, Kalispell, Montana, 59901. *See* Index of Superfund Lien Filing Record Section 8 at pages 122-125 ("EPA Notice and Intent to Perfect Lien Letter").

In a January 10, 2024, email from the Owner to EPA, the Owner objected to EPA's intent to perfect a lien. *See* Appendix A - EPA Correspondence from EPA to PRP at pg. 27 of the Superfund Lien Filing Record. On February 7, 2024, the Owner submitted a written response to EPA objecting to EPA's intent to perfect a lien. See Appendix A - PRP Correspondence from PRP to EPA of the Superfund Lien Filing Record. The Owner did not request a hearing in either of their email submissions or their written submission to EPA related to EPA's intent to perfect a lien. *See* both Appendix A – EPA Correspondence from EPA to PRP and Appendix A - PRP Correspondence from PRP to EPA.

On April 11, 2024, EPA Region 8 requested a neutral to review the Superfund Lien Filing Record and issue a recommendation. I am the Region 8 Regional Judicial Officer and I am serving as the neutral for this proceeding.[1] This proceeding is limited to the review of the submitted Index of the Superfund Lien Filing Record, Appendix A – EPA Correspondence from EPA to PRP, and Appendix A - PRP Correspondence from PRP to EPA.

Having reviewed the arguments raised by the parties in their submissions found in the Index of Superfund Lien Filing Record, Appendix A – EPA Correspondence from EPA to PRP, and Appendix A - PRP Correspondence from PRP to EPA, and for the reasons set forth below, I find that EPA had a reasonable basis in law and fact to conclude that the statutory elements under CERCLA Section 107(*l*) are satisfied for purposes of perfecting a CERCLA lien on the Parcel.

II. STANDARD OF REVIEW

Pursuant to the Supplemental Guidance, an EPA neutral official in a contested lien proceeding is required to consider the following five (5) factors in determining whether EPA has or had a reasonable basis in law and fact on which to conclude that the statutory elements for perfecting a lien under Section 107(*l*) of CERCLA are satisfied:

[1] According to the Supplemental Guidance, the neutral official selected to conduct a CERCLA lien meeting must be an Agency attorney who has not performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved. Supplemental Guidance at 7. An EPA Regional Judicial and Presiding Officer can serve as the neutral official. *Id.* I am an Agency attorney and currently serve as EPA Region 8's Regional Judicial and Presiding Officer. I have not performed any prosecutorial, investigative, or supervisory functions in connection with this case or the Site. *See also* 40 C.F.R. § 22.4(b) and (c).

1) *Notice* - Was the property owner sent notice by certified mail of its potential liability under CERCLA for payment of response costs;

2) *Removal/Remedial Action* - Is the property at issue subject to or has it been affected by a removal or remedial action (i.e., a response action);

3) *Response Costs Incurred* - Has the United States incurred costs with respect to a response action performed under CERCLA with regard to the property;

4) *Potentially Liable Party* - Is the property owned by a person who is potentially liable for response costs under CERCLA; and

5) *Other Information Considered* - Does the record contain any other information which is sufficient to show that the lien should not be perfected.

Supplemental Guidance at 7. These factors are based on the statutory requirements set forth in CERCLA Section 107, 42 U.S.C. § 9607. Additionally, for purposes of rendering a Recommended Decision, the EPA neutral official must "consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record." Supplemental Guidance at 8.

III. FACTUAL BACKGROUND

The Site is located at 185 West Valley Drive, Kalispell, Montana. Irene and Anthony Serio acquired Parcel Number 0325250 via a warranty deed on April 14, 1993 (recorded on May 4, 1993). *See* Index of Superfund Lien Filing Record Section 1.d.ii at pages 5-6. On August 23, 2007, the deed was transferred to Owner via Quitclaim deed (recorded on August 30, 2007). *See* Index of Superfund Lien Filing Record Section 1.d.i at pages 5-6. The Owner does not dispute that she is the owner of record of Parcel Number 0325250.

On July 14, 2022, EPA received a report via the National Response Center of eleven large, abandoned tanks located at 185 West Valley Drive, Kalispell, Montana containing possibly 50,000 gallons of various oils. The reporting party was a private citizen who stated that there was a present discharge of oils from these tanks. *See* Index of Superfund Lien Filing Record Section 3 and Section 5.

After receiving the report from the National Response Center, EPA reached out to the reporting party via phone and email to gather additional information. The reporting party provided EPA with photos of the tanks located at the Site. The reporting party stated that he lives near the property and expressed concern about the leaking tanks contaminating the nearby well water and the nearby creek. The reporting party explained that the tanks are located uphill from the nearby creek. The

reporting party also explained that Flathead County has been trying to contact the property owner to address the tanks, but the County has not had any luck tracking down the property owner. *Id.*

On multiple occasions, EPA sought to obtain consent for access to Parcel Number 0325250 from the Owner, for the purposes of investigating and responding to the conditions described by the reporting party. On July 27, 2022, Owner denied EPA access to Parcel Number 0325250 via telephone and email. The phone conversation was documented in EPA On-Scene Coordinator ("OSC") Paul Peronard Declaration dated September 1, 2022. *See* Index of Superfund Lien Filing Record Section 3.a on pages 30-31. The email correspondence between the EPA and Owner is included in Appendix A – EPA Correspondence from EPA to PRP at pages 74-75.

On August 2 and 3, 2022, the EPA OSC for the Site observed the property conditions at parcel number 0325250 from the public right of way without entering the property. The OSC noted that parcel number 0325250 was mostly grass and trees, scattered with debris, and no visible house located on the property. The OSC observed the tanks on parcel number 0325250. They were visibly degrading and noticeably lacked any form of secondary containment. The OSC also observed a dark material leaking from a large tank that was leaning on the fence post. This material was pooling on the ground in the public right of way.

On September 6, 2022, EPA submitted an Ex Parte Application of the United States for Administrative Warrant to Enter and Access Parcel Number 0325250 in the United States District Court for the District of Montana, Missoula Division. On September 8, 2022, the court issued the administrative warrant. On September 9, 2022, and September 23, 2022, EPA mailed and emailed Owner a copy of the signed warrant. See Index of Superfund Lien Filing Record Section 3.

On September 15, 2022, EPA commenced the Removal Action at the Site. *See* Index of Superfund Lien Filing Record Section 5.a at pages 53-79.

On September 23, 2022, Owner responded via email to EPA's September 23, 2022, email correspondence regarding the signed administrative warrant claiming other parties were responsible for the contamination. On September 24, 2022, October 9, 2022, and October 25, 2022, Owner provided supporting documentation via email. The email correspondence between EPA and Owner is included in Appendix A – EPA Correspondence between EPA and PRP.

On October 27, 2022, EPA completed the removal work at the Property. This included draining and disposal of 20,000 gallons of hydrocarbon waste. The Final Pollution Report (POLREP) is included in the Index of Superfund Lien Filing Record Section 5.b at page 80.

On May 19, 2023, EPA sent Owner a Demand Letter via certified mail, seeking to recover its response costs and all interest authorized to be recovered under Section 107(a) of CERCLA. The Demand Letter included a copy of the Certified Cost Package for the Site, which shows that the total response costs identified through September 30, 2023, are $705,009.57. The Certified Cost Packages are included in the Index of Superfund Lien Filing Record Section 6 at page 111.

On December 12, 2023, the EPA sent a Notice of Potential Liability and Intent to Perfect Lien to Owner via certified mail. *See* Index of Superfund Lien Filing Record Section 8 at pages 122-125.

ANALYSIS OF SUPPLEMENTAL GUIDANCE FACTORS

1. Notice of Potential Liability/Intent to Perfect Lien

For purposes of this proceeding, the Owner does not dispute that they were served notice of their potential liability and EPA's intent to perfect a CERCLA lien on Parcel Number 0325250. As stated above, EPA mailed a Notice of Potential Liability and Intent to Perfect a Lien to the Owner on December 12, 2023, by Certified Mail Return Receipt Requested. *See* Index of Superfund Lien Filing Record Section 8 at page 122. Accordingly, I conclude that EPA had a reasonable basis to believe that the Notice element is satisfied.

2. Property is Subject to or Affected by a Removal or Remedial Action

For purposes of this proceeding, the Owner does not dispute that Parcel Number 0325250 has been subject to or affected by a removal or remedial action (though they dispute the need for the action – see Section IV.5 below).

Section 104(a) of CERCLA provides, in pertinent part, that:

> (1) Whenever
>
> (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or
>
> (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to public health or welfare, the President is authorized to act, consistent with the national contingency plan, to removal or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant or contaminant at any time (including its removal from any contaminated natural resource) or take any other response measure consistent with the national

> contingency plan which the President deems necessary to protect the public health or welfare or the environment.

42 U.S.C. § 9604(a).

Response actions under CERCLA Section 104(a) can take the form of either a removal action or a remedial action. "Removal actions are generally immediate or interim responses, and remedial actions generally are permanent responses." *In the Matter of Bell Petroleum Services, Inc.*, 3 F.3d 889, 894 (5th Cir. 1993).

As explained in Section III above, EPA has performed a removal action to address contamination at the Site. *See* Index of Superfund Lien Filing Record Section 4 and 5 including pages 53-121. Accordingly, I conclude that EPA had a reasonable basis to believe that the Removal/Remedial Action element is satisfied.

3. United States Incurred Costs with Respect to a Response Action Under CERCLA

For purposes of this proceeding, the Owner does not dispute that the United States has incurred costs with regard to response actions performed at the Site. As provided in Section III above, according to the Summary of Costs filed by EPA in this matter, EPA incurred a total of $705,009.57 as of September 30, 2023. *See* Index of Superfund Lien Filing Record at page 111. Accordingly, I conclude that EPA had a reasonable basis to believe that the Response Costs Incurred element is satisfied.

4. The Owner's Potential Liability Under CERCLA Section 107

For purposes of this proceeding, the Owner does not dispute that she currently holds title to and is the current owner of Parcel Number 0325250. Under CERCLA Section 107(a), Potentially Responsible Parties include owners or operators at the time of disposal of any hazardous substance, as well as current owners or operators. 42 U.S.C. § 9607(a). Under CERCLA Section 107(a),

> (1) the owner and operator of a … facility… shall be liable for:
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
> (D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title.

42 U.S.C. § 9607(a); *see also id.* § 9601(20)(A) (defining "owner or operator" to include "any person owning or operating" a facility); 9601(21) (defining "person" to include "an individual, firm, corporation, association, partnership . . . or commercial entity"); *United States v. Middleton*, Case No. 1:11-CV-127 (WLS), 2015 WL 5244433, at *4 (M.D. Ga., Sept. 8, 2015) (an individual is within the definition of "person" under CERCLA).

EPA provided evidence to establish the following with respect to Parcel Number 0325250, which the Owner does not dispute:

- 185 West Valley Drive, Kalispell, Montana 59901 Parcel Number 0325250 by quitclaim deed on August 23, 2007 (recorded on August 30, 2007).

See Index of Superfund Lien Filing Record Section 1.d.i at pages 5-6.

The Owner does not dispute that Owner acquired Parcel Number 0325250 on August 23, 2007. *See* both Appendix A – EPA Correspondence from EPA to PRP and Appendix A - PRP Correspondence from PRP to EPA.

Notwithstanding the Owner's status as the current owner of Parcel Number 0325250, the Owner asserts that they are not a potentially liable party because there were conditions beyond the owner's control and other parties are also responsible. *See* Appendix A - PRP Correspondence from PRP to EPA. Whether a party is a potentially responsible party under CERCLA Section 107(a) and whether a party is liable for response costs under CERCLA are two separate questions. *See Atlantic Richfield Co. v. Christian*, 140 S. Ct. 1335, 1352 (2020) ("A property owner can be a potentially responsible party even if he is no longer subject to suit in court. . . . That includes innocent landowners whose land has been contaminated by another, who would be shielded from liability by the Act's so-called 'innocent landowner' or 'third party' defense in § 107(b)(3).") (citations and quotations omitted).

a. Statutory and Regulatory Background of the Innocent Landowner Defense

In enacting CERCLA, Congress made responsible parties strictly liable for response costs incurred in connection with the cleanup of contaminated properties and provided only a limited number of affirmative defenses to liability set forth in CERCLA Section 107(b), 42 U.S.C. § 9607(b). *See State of N.Y. v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1985) (citing 126 Cong. Rec. 30,932 (statement of Sen. Randolph)). With CERCLA's basic remedial purposes in mind, federal courts narrowly construe the scope and applicability of these affirmative defenses. *Shore Realty*, 759 F.2d at 1048-49; *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 n. 2 (W.D. Mich. 1989); *Pinhole Point Properties, Inc. v. Bethlehem Steel Corp.,* 596 F. Supp. 283, 286 (N.D. Cal. 1984) (contrasting CERCLA Section 107(b)'s "extremely

limited" defenses with CERCLA Section 107(a)'s "extremely broad" scope of liability).

42 USC § 9607(b)(3); ORS 465.255(2)(b)(C), (4).

The third party defense is one of the statutory defenses set forth in CERCLA. It provides in pertinent part:

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

42 U.S.C. § 9607(b)(3).

The 1986 amendments to CERCLA (Superfund Amendments and Reauthorization Act of 1986) sought to clarify and define the term "contractual relationship" as used in connection with the third party defense and, in effect, created what is now referred to as the innocent landowner defense, which is a subset of the third party defense.

> The term "contractual relationship," for the purpose of Section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility, and one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> > (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility. . . .

> In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of Section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

42 U.S.C. § 9601(35)(A).

In order to establish that the property owner had no reason to know that any hazardous substance was disposed of on the property, CERCLA requires that the property owner establish that he conducted "all appropriate inquiries . . . into the previous ownership and uses of the property in accordance with generally accepted good commercial or customary standards and practices" and that the defendant took reasonable steps to stop any continuing release, prevent any threatened release; and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B).

The Conference Committee Report for the 1986 CERCLA amendments (that established the innocent landowner defense) explains that the duty to inquire must be judged at the time of acquisition and that good commercial or customary practice with respect to an inquiry shall mean a reasonable inquiry must have been made in all circumstances, in light of best business and land transfer principles. In addition, the Report explains that the defense is expected to be used under limited circumstances and that those engaged in commercial transactions should be held to a higher standard than those who are engaged in private residential transactions. *See* H. Rep. No. 99-962 (1986), reprinted in 1986 U.S. Code Cong. & Admin. News 2835, 3279-3280 (99th Cong., 2d Sess.).

Pursuant to the 2002 CERCLA amendments (Small Business Liability Relief and Brownfields Revitalization Act), EPA promulgated regulations establishing the standards and practices sufficient to constitute "all appropriate inquiries" effective November 1, 2006. These standards require numerous specific inquiries, including:

> • conduct interviews with past and present owners, operators, and occupants within 180 days of and prior to the property acquisition date (40 C.F.R. § 312.23);
> • review historical sources of information (40 C.F.R. § 312.24);
> • review federal, state, tribal, and local government records, including records documenting required land use restrictions and institutional controls at the property (40 C.F.R. § 312.26);

• conduct a visual inspection of the subject property and adjoining properties within 180 days of and prior to the property acquisition date (40 C.F.R. § 312.27);
• review commonly known or reasonably ascertainable information (40 C.F.R. § 312.30);
• conduct a search for environmental cleanup liens and institutional controls filed or recorded against the property (40 C.F.R. § 312.25);
• assess any specialized knowledge or experience of the prospective landowner (40 C.F.R. § 312.28);
• assess the relationship of the purchase price to the fair market value of the property if the property were not contaminated (40 C.F.R. § 312.29); and
• assess the degree of obviousness of the presence or likely presence of contamination at the property and the ability to detect any contamination (40 C.F.R. § 312.31).

b. Factual Analysis

By the Owner's own statements, they operated a dust suppression business in the 1990s on the Site which included placement of substances on surface roads to suppress dust.[2] This was during Owner's joint ownership with spouse of Parcel Number 0325250, which Owner acquired jointly with spouse in 1992. When Owner acquired sole ownership of Parcel Number 0325250 in 1997, Owner had reason to know about the contamination (tanks filled with hydrocarbon waste consistent with "tack oil" which is used to bind to pavement surfacing). At that time, according to the Owner, Flathead County was investigating the substances used by Owner to suppress dust on the county roads resulting in issuance of County fines and revocation of Owner's business license. *See* Appendix A - PRP Correspondence from PRP to EPA.

EPA disputes that Owner can establish the third-party defense because the Owner knew and contributed to the contamination (leaking tanks filled with hydrocarbon waste that contained PAHs, xylene, ethylbenzene, and napthalene) on

[2] The Montana Department of Environmental Quality ("MDEQ") had a case investigation of Owner's business conducted at Parcel Number. MDEQ's case files included Field Investigation Reports relating to Parcel Number 0325250, dated July 18, 1996, and November 12, 2013. The 1996 report notes that the Owner and their spouse operated Sure-Seal, a road dust suppression business, from Parcel Number 0325250. The 1996 report also notes that Owner and their spouse were picking up crude oil tank bottoms from local businesses and veneer dryer precipitation residue from wood product plants. The 2013 report notes that one of the tanks on the Property had a "Road Oiling" label. Based on the MDEQ Sampling Data, MDEQ concluded that the material leaking from the tanks on the Property was likely tack oil. Tack oil is a black viscous product that is used as a binder for pavement surfacing. The MDEQ sampling results showed the presence of polynuclear aromatic hydrocarbons ("PAHs"), xylene, ethylbenzene, and naphthalene. PAHs, xylene, ethylbenzene, and naphthalene are listed as "Hazardous Substances" in Section 101 of CERCLA. This was confirmed from EPA sampling as part of the removal action. *See* Index of Superfund Lien Filing Record Section 5.a. starting at page 57.

Parcel Number 0325250. *See* Index of Superfund Lien Filing Record Section 5.a. Any one potentially responsible party (PRP) may be held liable for the entire cleanup of the site (when the harm caused by multiple parties cannot be separated). *See*, *e.g.*, *United States v. Monsanto Co.,* 858 F.2d 160, 171 (4th Cir 1988). With that, a PRP cannot simply say that it was not negligent or operating according to industry standards. *EPA*, *Superfund Liability*, EPA, (2024). If a PRP deposited some amount of the hazardous waste found at the site, that party is liable. *Id.*

Courts have uniformly held that CERCLA imposes strict liability, regardless of fault. *See, e.g., Gen. Elec. Co. v. Litton Indus*., 920 F.2d 1415 (8th Cir. 1990). Moreover, CERCLA allows the imposition of joint and several liability. 42 U.S.C. § 9607; *O'Neil v. Picillo*, 883 F.2d 176, 183 (1st Cir. 1989). Under the existing precedent, CERCLA plaintiffs (especially the United States and individual states) have a relatively light burden of proof. Generally, the courts have held that plaintiffs in a CERCLA suit need not prove that a release of a particular defendant's hazardous substance caused the incurrence of response costs, but only that the defendant disposed of the same type of hazardous substances as those found on the site. *United States v. Wade*, 577 F. Supp. 1326, 1331–33 (E.D. Pa. 1983).

The Owner alleges that County Officials were a contributing reason to the waste being present on the Site for as long as it was. *See* Appendix A - PRP Correspondence from PRP to EPA at page 4. To successfully qualify for the innocent landowner defense and avoid CERCLA liability due to an act or omission of a third party other than an employee or agent of the defendant, the Owner must demonstrate by the preponderance of the evidence that they exercised due care with respect to the hazardous substances concerned, tanks containing hydrocarbon waste, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, including providing access so EPA can conduct a response action, and also take precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

Here, the Owner had a business that recycled tar pitch and used tack oil as part of their business including storing hydrocarbon waste (likely tack oil) in tanks at the Site. *See* Appendix A - PRP Correspondence from PRP to EPA. In 1996, the tanks containing the hydrocarbon waste was on Parcel Number 0325250. *See* Index of Superfund Lien Filing Record Section 5.a. starting at page 57 detailing the investigation by MDEQ. The record is silent on Owner taking due care or precautions against foreseeable acts with regards to the hydrocarbon waste leaking from the tanks. The Owner had a duty to maintain the tanks on their property. There is no evidence that the tanks were owned by anyone other than the Owner. In addition, the tanks contained waste product from surfacing of roads which is consistent with the type of material that Owner might use in their dust suppression business. It is foreseeable that tanks will corrode over time when left in the elements. Even if the County is at fault for placing the Owner out of the dust

suppression business, the Owner had a duty to maintain the integrity of those tanks. Furthermore, in order to meet the third-party defense criteria, the Owner must provide access when requested by EPA in order to assist EPA in conducting a removal action. According to the Superfund Lien Filing record, an administrative warrant was granted by the Federal District of Montana based on Owner not granting access to EPA to address the leaking tanks. *See* Index to Superfund Lien Filing Record Section 3. Based on the above referenced evidence or lack thereof, it is reasonable to conclude that the Owner does not meet the requirements for the innocent landowner defense under CERCLA.

For the foregoing reasons, I conclude that EPA had a reasonable basis to believe that the Owner is potentially liable for the response costs and does not qualify for any of the defenses to potential liability under CERCLA. Accordingly, I likewise conclude that EPA had a reasonable basis to conclude that the Potentially Liable Party element is satisfied.

5. Other Potential Reasons Not to Perfect Lien

The Owner raised that other parties should be responsible for the cleanup costs on Parcel Number 0325250 under the Resource Conservation and Recovery Act, (RCRA) "Cradle to Grave" of solid waste. Specifically, that hazardous waste generators are responsible for their waste and therefore it was not the EPA's responsibility to clean the waste or for Owner to reimburse EPA for those cleanup costs. *See* Appendix A - PRP Correspondence from PRP to EPA at page 10. RCRA, as well as CERCLA, have liability provisions for facilities that create hazardous waste. RCRA does have liability provisions for facilities that generate hazardous waste where the facility is responsible for the hazardous waste from the time it is generated through the time of its ultimate disposal. However, under CERCLA, where there is a release or threatened release of any pollutant or contaminant into the environment which may present an imminent and substantial danger to the public health or welfare, the EPA is delegated the authority to initiate a removal action relating to such pollutant or contaminant. 40 U.S.C. § 9604(a). The EPA's removal action at Parcel Number 0325250 was conducted in accordance with this provision. *See* Index of Superfund Lien Filing Record Section 5.a. In addition, CERCLA is a joint and several liability provision where any of the listed liable parties under Section 107(a) of CERCLA are jointly and severable liable for the costs of a removal action if the party meets the criteria of Section 107(a). 40 U.S.C. § 9607(a). As explained in detail above, the Owner does meet the liability provisions of Section 107(a) of CERCLA and does not meet the criteria for defenses to liability under Section 107(b). 40 U.S.C. § 9607(a) and (b). The fact that another party may also be potential liable under CERCLA for the costs of the removal action conducted on Parcel Number 0325250 does not relieve the Owner for their own liability under CERCLA nor EPA's authority to perfect a Superfund lien against an Owner who meets the definition of potentially liable party under CERCLA Section 107(*l*) when costs have been incurred to address the release or threatened release of contamination on Owner's property. 40 U.S.C. §

9607(*l*). From the submitted record, the Owner has not shown how the RCRA cradle-to-grave provisions prevent EPA from perfecting the lien on Parcel Number 0325250 under CERCLA Section 107(*l*).

IV. CONCLUSION

Based upon my review of the information set forth in the Index of Superfund Lien Filing Record, Appendix A – EPA Correspondence from EPA to PRP, and Appendix A - PRP Correspondence from PRP to EPA, and for the reasons set forth in this Recommended Decision, I conclude that EPA had a reasonable basis in law and fact from which to conclude that the statutory requirements for perfection of a lien under CERCLA Section 107(*l*) are satisfied.

The scope of this proceeding is narrowly limited to the issue of whether EPA had a reasonable basis to perfect its lien. This Recommended Decision does not compel the perfection of the CERCLA lien on the Site; it merely establishes that there is a reasonable basis in law and fact for doing so. The final decision regarding the perfection of the CERCLA lien on Parcel Number 0325250 rests with the Associate Regional Counsel for Enforcement. *See* Region 8 Federal Lien Delegation 14-026. This Recommended Decision does not preclude EPA or the Owner from raising any claims or defenses in any later proceedings. It is not a binding determination of liability. This Recommended Decision has no preclusive effect and shall not be given any deference and shall not otherwise constitute evidence in subsequent proceedings.

BARBARA NANN

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Date: 2024.07.23 08:19:24 -06'00'

Barbara Nann
Regional Judicial and Presiding Officer

CERTIFICATE OF SERVICE

The undersigned certifies that the attached **RECOMMENDED DECISION** in the matter of **Valley Drive Abandoned Slurry Site, City of Kalispell, County of Flathead, Montana; DOCKET NO.: CERCLA-08-2024-0003 was** sent via certified receipt email on July 23, 2024, to:

Respondent

Irene Serio
Owner
reneserio1956@icloud.com
tonyserio2017@gmail.com

EPA Region 8

Sarah Rae
Enforcement
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Date 7/23/2024

KATHERINE TRIBBETT Digitally signed by KATHERINE TRIBBETT Date: 2024.07.23 12:21:43 -06'00'

Kate Tribbett
Acting Regional Hearing Clerk