**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**REGION 3**

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| **In the Matter of:** | : | |
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| **Turog Properties, Limited** | : | **Docket No. CERCLA 03-2019- 0111LL** |
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| **Chem Fab Superfund Site,** | : | |
| **Doylestown, Bucks County,** | : | |
| **Pennsylvania** | : | |
| | : | |

# EPA'S POST-HEARING BRIEF

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# EPA'S POST-HEARING BRIEF

This brief is provided on behalf of the U.S. Environmental Protection Agency ("EPA") following a virtual conference held by the Regional Judicial and Presiding Officer ("RJO") on March 25, 2021 ("Hearing"). By Order dated April 9, 2021, as modified on April 20, 2021 and June 14, 2021, the RJO directed the parties to file Post-Hearing Briefs addressing issues raised during the Conference, including four questions raised by the RJO (see Section V, below). This Post-Hearing Brief summarizes the issues in this case and addresses the RJO's questions.

For the reasons set forth herein, EPA contends that neither Turog's arguments during the Conference nor the RJO's questions raise any issues which undermine EPA's conclusions that the legal predicates for the existence of the lien have been met and that EPA has a reasonable basis to perfect the lien.[1]

## I. Procedural History

By letter dated July 1, 2019, EPA notified Turog of EPA's intent to perfect a lien on property owned by Turog and included within the Chem Fab Superfund Site

[1] Following submission of the Post-Hearing briefs, the RJO will make a recommendation to the EPA Region 3 Regional Counsel regarding perfection of the lien. The Regional Counsel will ultimately decide whether perfection of the lien is appropriate. All contentions and arguments in this response are those of the undersigned staff attorney and not the Regional Counsel.

("Chem Fab Site" or "Site"). *Docket 1*.[2] By letter dated July 17, 2019, Turog notified EPA of its objections to EPA's perfection of the lien and of its desire to meet with a neutral EPA official. *Docket 5, Exhibit 3, at PDF 79.*[3] On September 17, 2019, the EPA Region 3 Regional Counsel signed an *Order of Assignment* designating the RJO as the neutral official to review this matter. *Docket 4*. The *Order of Assignment* additionally required EPA to serve a copy of the Lien Filing Record and a written reply to Turog's objections on Turog within 20 days. *Id*. On September 17, 2019, the undersigned served the Lien Filing Record on Turog. *Docket 2 and 3*. On October 2, 2019, the undersigned served EPA's *Rebuttal* on Turog. *Docket 5*. By letter dated February 13, 2020, the RJO directed Turog to submit its brief responding to EPA's *Rebuttal* by March 9, 2020 and directed EPA to file its response thereto by April 3, 2020. *Docket 12*. In addition, the RJO tentatively set April 22, 2020 as the date on which the Hearing would be held. *Id.*

[2] Docket numbers refer to the administrative record in this matter found at https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/07a828025febe17885257562006fff58/a65405432ddce6bb852584780058567f!OpenDocument.

[3] Docket 5's exhibits are exhibits to EPA's *Rebuttal to Arguments Presented by Turog Properties, Limited in its July 17, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* ("*Rebuttal*") served on Turog and copied to the EPA Region 3 Hearing Clerk under cover of letter dated October 2, 2019. The body of the *Rebuttal* and the exhibits thereto are *Docket* 5. References to the *Rebuttal* exhibits in this brief will recite the *Rebuttal* exhibit number and the PDF page number on which such exhibit begins.

By letter dated February 26, 2020, Turog requested a 60-day extension to the deadline for filing its response to EPA's *Rebuttal* in order to gather information from the Commonwealth of Pennsylvania. *Docket 13.* EPA did not object. *Docket 14.* By letter dated February 27, 2020, the RJO set Turog's new filing deadline at May 8, 2020; EPA's filing deadline at June 5, 2020; and the Hearing for June 24, 2020. *Docket 15*.

By email on May 4, 2020, after EPA Region 3 closed its Philadelphia office building because of the COVID19 pandemic, Turog requested a second extension of time to file its response, this time a 30-day extension "[g]iven the circumstances, and in light of the non-emergent nature of the issue." *Docket 16.* Again, EPA did not object to the extension. *Id.* By email on May 5, 2020, the RJO set Turog's new filing deadline at June 8, 2020, and EPA's filing deadline at July 8, 2020. *Id.*

By email on May 29, 2020, Turog requested a third extension of time to file its response, this time a 45-day extension "to hire counsel and have them prepare a defense." *Docket 17*. By email on June 1, 2020, EPA responded that it would not object to Turog's request if, by June 8, Turog provided EPA with (a) certain assurances regarding transfer of its property, actions which might encumber its property, bankruptcy, and payment of real estate taxes, and (b) weekly reports on its progress in hiring counsel. *Docket 18*. By email on June 4, 2020, Turog provided

EPA with acceptable assurances, and on June 5, 2020, EPA notified the RJO. *Docket 21.* By Order dated June 5, 2020, the RJO set Turog's filing deadline at July 24, 2020, and EPA's filing deadline at August 28, 2020. *Docket 22*.

By letter dated July 22, 2020, counsel for Turog requested a fourth extension of time to submit its response, this time for 30 days after receipt of certain information allegedly owed to Turog by EPA. *Docket 23*. By email on July 23, 2020, EPA agreed to a one-week extension and advised the RJO that EPA would expeditiously consider Turog's request. *Docket 25*. By letter dated July 27, 2020, EPA advised Turog's counsel that (a) the information referenced in counsel's email of July 22 had been provided to Turog on January 14, 2020, and (b) EPA would agree to Turog's fourth request for an extension of time if Turog agreed not to object if EPA perfected the lien in advance of the lien hearing. *Docket 27*. On July 30, 2020, the RJO held a status conference during which Turog declined to agree to EPA's proposal. *Docket 29*. Following the status conference, the RJO issued an Order setting Turog's new filing deadline at August 17, EPA's new filing deadline at September 14, and the Hearing for October 13, 2020. *Id.*

On August 17, 2020, Turog submitted its response to EPA's *Rebuttal ("Turog Response")*. *Docket* 30. On September 10, 2020, EPA submitted *EPA's Response to Arguments Presented by Turog Properties, Limited in its August 17, 2020 Brief*

*Submitted Pre-Hearing (Pre-Meeting)* ("EPA Response Brief") and Exhibits. *Docket 31*. On September 28, 2020, Turog's counsel requested that the Hearing be postponed for scheduling and other reasons. *Docket 32*. On October 6, 2020, the RJO postponed the Hearing and directed Turog to file a status report no later than October 13, 2020. *Docket 33*. Turog filed its first status report on October 13, 2021. *Docket 34*. The RJO continued the postponement and required a second status report from Turog by November 17, 2020. *Docket 35*. Turog filed its second status report on November 17, 2020, and later that day the RJO again continued the postponement and required a third status report by January 8, 2021. *Docket 36 and 37*. Turog filed its third status report on January 8, 2021. *Docket 38*. On January 20, 2021, the RJO rescheduled the Hearing for March 25, 2021. *Docket 39.* The Hearing was held virtually on March 25, 2021. By Order dated April 9, 2021, modified on April 20, 2021 and June 14, 2021, the RJO directed the parties to file Post-Hearing Briefs by no later than July 9, 2021. *Docket 41, 42, 44*.

## II. Scope of This Proceeding

The purpose of this proceeding is to provide Turog with an opportunity to respond to EPA's Notice of Intent to Perfect a Lien on its property under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(l). The lien secures the

United States' claim for costs "for which a person is liable to the United States under [CERCLA § 9607(a)]." CERCLA § 9607(l). However, neither the conclusion of this proceeding nor the perfection of a lien on Turog's property will constitute a determination that Turog is liable, under CERCLA § 107(a), to the United States for costs incurred in connection with the Chem Fab Site. Similarly, neither this proceeding nor perfection of a lien will determine the costs for which Turog may be liable. Such determinations are the domain of a cost recovery lawsuit which may be brought by the United States against Turog if and when the United States elects to seek recovery of its costs against the company. Should that occur, Turog will have ample opportunity to challenge EPA's response actions and costs in an effort to minimize or avoid liability.[4]

The lien that EPA seeks to perfect already exists by operation of law. *See Docket 5*, at 9-10. By perfecting a lien arising under CERCLA § 107(l), EPA provides notice to other existing and potential lienholders and claims a place with respect to priority should the property be liquidated pursuant to a judgement against

[4] Section 107(l)(4) of CERCLA, 42 U.S.C. § 9607(l)(4), provides:

> "The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred. Nothing in this subsection shall affect the right of the United States to bring an action against any person to recover all costs and damages for which such person is liable under subsection (a) of this section."

the property owner or otherwise.

As set forth in EPA's briefs in this matter (*Docket 5 and 31*) and acknowledged by the RJO during the Hearing (*Hearing Transcript, pp. 10-11*),[5] the scope of this proceeding is limited to ***whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien under CERCLA § 107(l)***.

## III. EPA's Bases to Believe That the Statutory Elements Have Been Satisfied For Perfection of a Lien Under CERCLA § 107(l)

To secure a favorable recommendation from the RJO in this matter, EPA must demonstrate that it has a reasonable basis to believe that the following CERCLA § 107(l) statutory predicates have been satisfied:

1. Turog owns the land upon which EPA seeks to perfect the lien;

2. The land has been subject to or affected by a response action;

3. EPA has incurred costs;

4. EPA provided Turog with written notice of potential liability via certified or registered mail; and

5. Turog is a CERCLA § 107(a) responsible party in that:

    a. Turog is a party described in CERCLA § 107(a), and

[5] The Hearing Transcript and Hearing Exhibits are included as Exhibit 8 of this brief for convenience.

b. Turog cannot maintain a defense to liability under CERCLA § 107(b). See *Docket 5, at 9-10*; *Hearing Transcript, at 21-24*; *Hearing Exhibit EPA-1*. This section will summarize EPA's case on each of these predicates.[6]

### A. EPA's Reasonable Basis to Believe That Turog Owns the Land Upon Which EPA Seeks to Perfect the Lien

Turog previously asserted that it acquired the land upon which EPA seeks to perfect the lien ("Property") in 1998.[7] *Docket 5, Exhibit 3*. Turog admitted that it is the current owner of the Property. *Hearing Transcript, at 131-32*. This issue is not in dispute.

### B. EPA's Reasonable Basis to Believe That the Property Has Been Subject to or Affected By a Response Action

EPA previously explained that several response actions have been conducted at the Property in the past and that response actions are continuing there. *Docket 5, at 14-18*. Turog admitted that the Property has been subject to a response action.

[6] EPA incorporates herein its arguments from its *Rebuttal* (*Docket* 5), *Responsive Brief* (*Docket* 31), and the Hearing.

[7] Turog explained that the tax sale deed was issued in 1998 to 300 N. Broad Street, Ltd., which Turog represented to EPA as an "alter ego" of Turog "having the same close ownership, and the same management." *Docket 5, Exhibit 3*. EPA's review of relevant land records reflects that the Property was transferred from 300 N. Broad Street, Ltd. to Turog in 2005. *Docket 5, Exhibit 6*. In the Post-Hearing Scheduling Orders, the RJO asked the parties to explore the significance of this chronology (see Section V.A, below). The answer to the RJO's question regarding the timing of the acquisition does not affect the result under this predicate.

*Hearing Transcript, at 131-32.* This issue is not in dispute.

### C. EPA's Reasonable Basis to Believe That EPA Has Incurred Costs

EPA previously documented that it incurred response costs in connection with the Property. *Docket 5, at 18.* Turog admitted that EPA has incurred costs in connection with the Property. *Hearing Transcript, at 131-32.* This issue is not in dispute.

### D. EPA's Reasonable Basis to Believe That EPA Provided Turog With Written Notice of Potential Liability Via Certified or Registered Mail

EPA previously documented that it provided Turog with written notice, via certified mail, of Turog's potential liability in connection with the Chem Fab Site. *Docket 5, at 18.* Turog admitted that EPA provided it with such notice. *Hearing Transcript, at 131-32.* This issue is not in dispute.

### E. EPA's Reasonable Basis to Believe That Turog is a Party Described in CERCLA § 107(a)

EPA previously explained the statutory liability categories and its bases to believe that (1) the Property is a "facility" within the meaning of CERCLA § 101(9), and (2) Turog is an "owner" of the facility within the meaning of CERCLA § 107(a)(1). *Docket 5, at 11-13.* Turog has not disputed that the Property is a facility or that it owns the facility. EPA contends that Turog admitted that it is

the facility owner within the meaning of CERCLA § 107(a)(1). *See Hearing Transcript, at 133-35*. If this is not a correct interpretation of Turog's representations at the Hearing, EPA contends that Turog has not identified any basis to refute EPA's contention, supported in EPA's *Rebuttal*, that the Property is a facility or that Turog is the facility owner within the meaning of CERCLA § 107(a)(1), and that EPA has a reasonable basis to believe that Turog is a party described in CERCLA § 107(a).

### F. EPA's Reasonable Basis to Believe That Turog Cannot Maintain a Defense to Liability Under CERCLA § 107(b)

Turog has raised only one of the defenses afforded by CERCLA § 107(b) — the innocent landowner defense described in CERCLA §§ 107(b)(3) and 101(35).[8]

[8] CERCLA § 107(b) provides as follows:

> "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
> "(1) an act of God;
> "(2) an act of war;
> "(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 (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, 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; or

In order to raise this defense in this matter, Turog must demonstrate, by a preponderance of the evidence, that (1) the release or threat of release of hazardous substances and the damage therefrom was caused solely by a third party; (2) the act or omission of the third party did not occur in connection, directly or indirectly, with a "contractual relationship" with the third party; (3) Turog neither knew nor had reason to know that hazardous substances had been disposed of at the Property; (4) Turog exercised due care with respect to the hazardous substances, in light of all relevant facts and circumstances; (5) Turog took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions; and (6) Turog provided full cooperation, assistance, and facility access. *See Docket 5, at 19-21*; *In the Matter of Magnate, LLC*, CERCLA Lien Recommended Decision, at 9-10 (EPA Region 3, 2020) (Exhibit 7 to this brief).

EPA has argued that Turog cannot carry its evidentiary burden under the defense because the act or omission of the third party occurred in connection, directly or indirectly, with a "contractual relationship" with the third party; Turog knew or had reason to know that hazardous substances had been disposed of at the

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"(4) any combination of the foregoing paragraphs."

Turog has not raised, and EPA has no basis to believe that Turog would qualify for, any of the other defenses in CERCLA § 107(b).

Property; Turog failed to exercise due care with respect to the hazardous substances, in light of all relevant facts and circumstances; and Turog failed to provide full cooperation, assistance, and facility access.[9] Each of these contentions is summarized below.

[9] EPA additionally notes that Turog has offered no evidence at all to support a contention that the release or threat of release of hazardous substances and the damage therefrom was caused solely by a third party, or that it took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions. In a glancing nod to the first requirement, Turog stated in its brief:

> "It is undisputed that the owner was a non-polluter—i.e., that any materials that migrated from the property had been placed there back when Chem Fab owned the site, from 1967 until it went out of business. Chem-Fab's ownership went back to 1967. And it went out of business before (or during) the environmental cleanup."

*Docket 30, at 8.* However, the releases and threatened releases of hazardous substances giving rise to a need to perform a Superfund response action did not stop after the prior owner ceased operations or after EPA completed the 1994-95 removal action at the Site. EPA continued to address releases and threatened releases at the Site, including the Property, in 2014 (removal of over 2,000 tons of contaminated soil), 2015-16 (installation of a vapor mitigation system in one of the commercial buildings on the Property); and 2017 (selection of a interim remedial action to install a pump and treat system to remediate contaminated groundwater beneath the Property) and has yet to select a final groundwater remedy for the Site. Turog performed major renovations to ready the Property for the lease of commercial office space and neglected to explain (1) how none of the construction activities could have caused or contributed to the release or threatened release of hazardous substances at the Site, or (2) what precautions, if any, it took against the acts or omissions of the polluting party. EPA contends that Turog's failure to demonstrate, by a preponderance of evidence, that the release or threat of release of hazardous substances and the damage therefrom was caused solely by a third party, or that Turog took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions, would be reason enough to conclude in this proceeding that EPA has a reasonable basis to believe that Turog cannot maintain the defense.

**1. The act or omission of the third party occurred in connection, directly or indirectly, with a "contractual relationship" with the third party**

The innocent landowner defense permits a landowner to raise a third-party defense where the third party was not, among other things, in a direct or indirect "contractual relationship" with the landowner. CERCLA § 107(b)(3). In its July 17, 2019 letter requesting a hearing in this matter, Turog argued that

> "[w]e had no contractual relationship with Chem-Fab Corp., the prior owner of the subject Site, or with any of their employees, principals or agents, whose actions caused the present release or threat of release of a hazardous substance at the subject Site."

*Docket* 5, *Exhibit 3*.

Under CERCLA, "contractual relationship" includes, but is not limited to, "land contracts, deeds, easements, leases, or other instruments transferring title or possession." CERCLA § 101(35)(A). EPA argued that the release and damages occurred as a result of acts or omissions of a third party with whom Turog had a direct or indirect contractual relationship (Chem Fab) because Turog took possession of the property via a "land contract, deed, or other instrument transferring title or possession." *Docket 5, at 22*. Turog acknowledged that it took title to the Property via a deed at a tax upset sale. *Docket 30, at 2.* Turog argued, however, that the relationship between Turog and Chem Fab was not "contractual" because "a tax sale is a statutory creation, and the Tax Claim Bureau issues the deed, under statutory

powers." *Docket* 30*, at 5*. Turog provided no legal support for this position.

In response, after noting that the issue had not been reviewed in this jurisdiction, EPA explained that the 9th Circuit Court of Appeals decided this very question in *California Department of Toxic Substances Control vs. Westside Delivery, LLC*, 888 F.3d 1085 (9th Cir. 2018). In *Westside Delivery*, the Court concluded that transfer of property via a tax sale does not nullify the contractual relationship that otherwise exists under Federal law between the tax purchaser and the polluter. *Id.*, at 1093-98. EPA contends that it is reasonable to rely on this decision, unchallenged by any other Federal appeals court or the U.S. Supreme Court, to refute Turog's claim that a "contractual relationship" could not exist because the Property was acquired via a tax sale.

During the Hearing, the RJO observed that in 1999 a Federal District Court in Illinois had decided this question differently and requested that the parties address this apparent conflict. *Hearing Transcript, at 179-180*. For the reasons set forth in Section V.B, below, EPA contends that its reliance on the 9th Circuit's holding in *Westside Delivery* to refute Turog's claim that the tax sale nullified its contractual relationship is reasonable and that, in the absence of any other explanation or rationale supporting Turog's view, EPA has a reasonable basis to believe that a contractual relationship did exist within the meaning of CERCLA § 101(35). EPA's

basis to believe that Turog cannot maintain an innocent landowner defense under CERCLA § 107(b)(3) is therefore reasonable.

### 2. Turog knew or should have known that hazardous substances had been disposed of at the Property.

Under CERCLA, a land contract, deed, easement, lease, or other instrument transferring title or possession will not constitute a "contractual relationship" if, among other things, at the time the owner acquired the property it neither knew nor had no reason to know that any hazardous substance was disposed of on, in, or at the property. CERCLA § 101(35)(A). Turog argued that its ability to access the Property was limited by a fence and that no potential auction bidder had a right to enter prior to the sale due to State law. *Docket 5, Exhibit 3*. Turog also argued that its research into possible contamination of the Site prior to purchase included "our study of the reports and statements of the EPA, and their officials and agents, regarding the Site as published in newspapers, and in the documents lodged in the Doylestown Borough offices, and the EPA records room in the Regional Offices in Philadelphia." *Id*.

EPA responded that a search of EPA's files prior to Turog's 1998 acquisition of the Property would have revealed documentation regarding EPA's 1994-95 Superfund removal action during which significant quantities of hazardous substances that were disposed of in, among other things, drums, tanks, and cylinders on the

Property were removed from the Property and properly disposed of elsewhere. EPA specifically cited to the following:

- Twenty-three Pollution Reports ("POLREPs") (Nos. 1-23) issued between September 2, 1994 and June 15, 1995 (*Docket 5, Exhibit 7*);
- The Action Memorandum approving the funding and performance of the 1994-95 response action at the Site (*Docket* 2, *Document 3*); and
- The Federal On Scene Coordinator's After-Action Report describing the response action conducted at the Property by EPA in 1994-1995 (*Docket 2, Document 4*).

To establish that Turog had no reason to know, Turog must demonstrate that on or before its acquisition of the Property it carried out all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices. CERCLA § 101(35)(B)(i)(I). Because the Property was acquired after May 31, 1997, and before EPA published standards and practices on the subject, the procedures of the American Society for Testing and Materials, including "Standard E1527-97" entitled "Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process" were to be used. CERCLA § 101(35)(B)(iv)(II). Turog has not said it used or followed the standards set forth in E1527-97 before it acquired the Property. Instead, Turog merely alleged:

- It performed extensive due diligence (*Docket 30, at 2*);

- It relied on public declarations and statements of and from EPA (*id*.);
- It could not enter or observe the property because of fencing (*id., at 2-3*);
- It reviewed public records in Doylestown Borough, where EPA had lodged a set of documents (*id., at 3*);
- It studied the reports and statements of EPA and its officials and agents (*id., at 4*);
- It reviewed statements and reports published in newspapers (*id*.)

Had Turog reviewed POLREP Nos. 1-23 documenting the site investigation and performance of the 1994-95 removal action (*Docket 5, Exhibit 7*), the Action Memorandum identifying what was found at the Property prior to selection of the removal response action (*Docket 2, Document 3*), and/or the OSC After-Action Report summarizing the 1994-95 response action (*Docket 2, Document 4*), Turog could not in good conscience say that it had no reason to know that any hazardous substance was disposed of on, in, or at the facility. For example, a review of the Action Memorandum would have revealed the following statements:

- "Reports of illegal dumping at the facility date back to 1973. The most recent report, dated June 1994, indicated the presence of abandoned drums and containers. A recent assessment conducted by the Pennsylvania Department of Environmental Resources (PADER) indicated the presence of hexavalent chromium in the soil at the Site." (*Docket 2, Document 3, at AR98*)[10]

[10] The 1995 Action Memorandum contained no page numbers when issued. References here are to the administrative record ("AR") page numbers subsequently added on the bottom right corner of each page when the administrative record supporting the action was established.

- "Approximately 100 drums and 1 underground storage container were found during the Removal Assessment and Criminal Investigation. Many were tentatively identified as containing flammable liquids and acids. Acid drums bore hazardous waste labels indicating that the waste was generated in the mid 1980's. Drums of methyl isobutyl ketone and hydrochloric acid were located on the Chem Fab portion of the Site." (*Id., at AR98*)

- "A partially filled underground storage tank was discovered on the Chem Fab Corporation portion of the Site. Initial information indicates the tank was used to store chromic acid, which is defined and listed as a hazardous substance. The tank is of questionable integrity and may be leaking." (*Id*.)

- "The drums on the eastern side of the property are in continued exposure to the elements, which has accelerated their deterioration . . . The potential exists for a catastrophic release or fire, resulting in the uncontrolled release of hazardous substances into the environment." (*Id., at AR99*)

- "The section of Bucks County where Chem Fab Corporation is located has a shallow water table. Residents of Doylestown rely on groundwater for their potable water source. Local officials have identified several wells in close proximity to the facility. During the removal assessment, excavation activities revealed an underground storage tank containing an unknown substance. The bottom portion of this tank, which was reportedly used to store chromic acid, a hazardous substance, was surrounded by liquid. The probability that the contents of this tank are leaking is very high, which poses a potential threat to drinking water supplies." (*Id., at AR100*)

- "Currently, drums and containers of CERCLA listed hazardous substances are incompatibly and haphazardly stored on-site. The threat of release of these substances is compounded by the fact that the Chem Fab Corporation portion of the Site is vacant. Accidental or intentional release of these substances may occur due to incompatible chemical storage, fire, and/or through acts of vandalism." (*Id*.)

Further, a review of the OSC's After-Action Report would have revealed that EPA found the following substances at the Property and disposed of them off-Site:

- flammable liquids & acids
- methyl isobutyl ketone
- Hydrochloric acid
- liquid chromium waste
- corrosive solids
- liquids containing arsenic, lead, and cadmium
- sodium hydroxide
- potassium hydroxide
- benzene
- potassium cyanide
- nitric acid
- hydrogen peroxide
- sodium dichromate
- boron tribromide
- PCBs
- concrete with thorium nitrate
- anhydrous ammonia

*Docket 2, Document 3, at 10-12.*

EPA also suggested that information about the cleanup, including the chemicals removed from the Property, would have been in files maintained by PADER, the Bucks County Department of Health, and the Bucks County Emergency Management Agency, each identified as coordinating agencies in the OSC Report. *Id.*, at 25.[11]

[11] Turog emphasized that Heywood Becker had 50 years of experience buying and selling neglected properties, many of which had environmental problems. *Docket 30, at 9*. As such, Mr. Becker was likely familiar with EPA's cleanup procedures, documentation, and Freedom of Information Act obligations, as well as the availability of documents from support agencies such as

Rather than focus on what had been found at the Property prior to its acquisition, Turog argued that EPA had removed all of the hazardous materials, contaminants, and chemicals from the Property; the Site had been remediated; and the Property no longer contained hazardous materials, chemicals, or contaminants known to EPA. *Docket 30, at 2-3*. That is, Turog argued that at the time it acquired the Property, Turog thought it was clean. However, believing that previously disposed waste materials had been cleaned up prior to acquisition is not the standard in the statute. Rather, the knowledge standard that defeats the "contractual relationship" is:

> "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."

CERCLA § 101(35)(A)(i). Said another way, if Turog knew or should have known that a hazardous substance that was released or which threatened to be release was disposed of at the Property *at any time*, it cannot carry its burden under this factor. This reading of the plain language of the statute was supported by *American National Bank and Trust Co. of Chicago as Trustee for Illinois Land Trust No.*

PADER, the local health department, and the local emergency management agency, and should have been able to access documentation about EPA's Superfund action at the Property.

*120658-01 v. Harcros Chemicals, Inc.*, No. 95 C 3750, 1997 WL 281295, at *14 (N.D. Ill. May 20, 1997) (CERCLA does not provide an exception for one who knows that contamination existed on the property, but believes it has been cleaned up).

In the Post-Hearing Scheduling Orders, the RJO directed the parties to discuss this legal standard with specific reference to the *Harcros* decision. *Docket 41*, *42*, *44*. For the reasons set forth in Section V.C, below, EPA contends that its interpretation of the knowledge standard is reasonable, that EPA reasonably believes that Turog either knew or should have known that hazardous substances that were released had been disposed of at the Property within the meaning of CERCLA § 101(35)(A)(i), and that EPA therefore has a reasonable basis to believe that Turog cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

### 3. Turog failed to exercise due care with respect to the hazardous substances, in light of all relevant facts and circumstances

CERCLA provides that in order to maintain an innocent landowner defense an owner must establish, by a preponderance of evidence, that it exercised due care with respect to the hazardous substances present, in light of all relevant facts and circumstances. CERCLA §§ 107(b)(3)(a) and 101(35)(a). In its briefs and during

the Hearing, EPA argued that Turog failed to meet this standard of behavior in connection with at least four activities as described below.[12]

**a. Turog failed to exercise due care by failing to timely respond to EPA's request for access to obtain sub-slab soil samples.**

In March and June 2008, PADEP collected indoor air samples from the buildings on the Property; analysis of these samples showed detections of 1,1,1-trichloroethane ("1,1,1-TCA"), trichloroethylene ("TCE"), and perchloroethylene ("PCE"). *Docket 2, Document 19.*[13] On November 18, 2010, after EPA had

[12] *Hearing Exhibit EPA-3* identifies the bases upon which EPA contends that Turog cannot meet its evidentiary burden under the innocent landowner defense. Contentions pertaining to Turog's failure to exercise due care appear in the exhibit under numbers 2, 4, 6, and 8.

[13] EPA and Pennsylvania assumed lead agency responsibility for the Chem Fab Site at different times:

> "In 1998, PADEP assumed the lead role in further assessing the Chem-Fab Site. Beginning in 1999, PADEP began an investigation of the soils and groundwater in the vicinity of the Site. PADEP found hexavalent chromium (Cr[VI]) and VOCs in the soils and in the groundwater on the Property and on an adjacent property. Visible chromium contamination was observed in the drainage ditch on the adjacent property. In 2004, PADEP issued a Statement of Decision selecting a groundwater remedy for the Site. However implementation of the remedy was delayed due to technical issues and lack of funding. PADEP continued its investigation and requested that EPA list the Site on the CERCLA National Priorities List (NPL).
>
> "EPA proposed the Chem-Fab Site for the NPL in September 2007. The Site was formally added to the NPL in March 2008. 1n September 2009, EPA initiated a fund-lead Remedial Investigation and Feasibility Study to comprehensively characterize the nature and extent of contamination at the Chem-Fab Site and to evaluate alternatives for addressing threats to human health and the environment presented by such contamination. EPA also conducted vapor intrusion (VI) sampling in the homes of residents living down-gradient from the Site. and

assumed responsibility for the Site from the Commonwealth, EPA requested entry to the Property from Turog for purposes of performing a sub-slab soil gas survey to determine if substances detected by PADEP were also found in the soils beneath the foundation of the buildings. *Hearing Exhibit EPA-5(R), at 5*. EPA's request was received by Turog on November 22, 2010. *Id., at 11*. EPA's request made clear that past operations at the Property caused volatile organic compound ("VOC") groundwater contamination in the area, that VOCs can easily move from groundwater below the surface into buildings, that EPA was seeking access to test in areas where groundwater was contaminated above guidelines, and that the test area included Turog's property. *Id., at 5-6.* At the time of EPA's request, information in EPA's files identified a large variety of hazardous substances, including VOCs, in the groundwater including 1,1,2,2-tetrachloroethane; 1,1,2-trichloroethane; 1,1-dichloroethane; 1,2-dichloroethane; 1,4-dioxane; benzene; bromodichloromethane; carbon tetrachloride; chloroform, cis-1,2-dichloroethene; dibromochloromethane; ethylbenzene; methyl tert-butyl ether; dichloromethane; perchloroethylene; trans-1,3-dichloropropene; trichloroethylene; vinyl chloride; and xylenes. *Docket 30, Exhibit 2.* Turog declined to consent to the entry requested until after EPA issued an

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conducted VI sampling in the commercial spaces at the Property."

*Docket 2, Document 5, at PDF 3.*

administrative access order on May 31, 2011—over six months after it received EPA's request. *Hearing Exhibit EPA-5(R), at 85*.[14]

It is undisputed that between November 2010 and May 2011, Turog raised, and EPA responded to, inquiries regarding EPA's plans for the sub-slab sampling, including questions about drilling through hardwood floors, disruption to tenants, removal of a septic tank suspected by Turog to be the source of contamination, replacement of damaged flooring, and use of "slant drilling" as an alternative to EPA's plans.[15] *See, e.g., Hearing Exhibit EPA-5(R), at 28, 35, 38, 41, 50, 51, 78, 83.* Turog has characterized these communications as an owner's expression of opinion, making suggestions, and disagreeing with EPA rather than a failure to exercise due care or to cooperate, assist, and provide access. *Docket 30, at 9.* However, EPA does not argue that the expression of Turog's opinion, advancing suggestions, or disagreeing with EPA's positions are the bases for EPA's contentions about due care and cooperation. Rather, EPA contends that

(1) Turog's failure to respond to EPA's entry request *at all* for twenty-five days following its receipt of the request,

[14] The undersigned does not have ready access to correspondence in which Turog agreed to comply with the administrative access order but acknowledges that this occurred at some point following EPA's issuance of the order.

[15] "Slant drilling" involves drilling at an angle rather than from directly above. *See, e.g.,* https://en.wikipedia.org/wiki/Directional_drilling. Turog proposed that EPA use this method to avoid having to drill through building floors and foundations.

(2) Turog's failure to advance its questions and concerns about EPA's plans for eighty days following its receipt of the request, and

(3) Slow-walking its arguments and issues for a period of over five months from its receipt of EPA's request

while it was aware that hazardous substances could be present in soils beneath its office buildings and migrating into its tenants' spaces evidences a failure to exercise due care with respect to the wastes (and a failure to cooperate, assist, and provide access). EPA's factual bases for these contentions are illustrated in *Hearing Exhibit EPA-(R)5,* which sets forth a chronology of communications between EPA and Turog relating to EPA's request for entry. In summary:

- EPA issued its request for entry on November 18, 2010. *Hearing Exhibit (R)5, at 5*.
- Turog received EPA's request for entry on November 22, 2010. *Id., at 11*.
- Having received no response, EPA emailed Turog on December 10, 2010. *Id., at 13*.
- On December 17, 2010, Turog responded with a 2-sentence email asking which buildings would be involved and what modes of testing would be used. *Id.* This response was sent 25 days after its receipt of EPA's entry request.
- On December 17, 2010, EPA notified Turog via email that the On Scene Coordinator was out of the country and that coordination was necessary in order to respond. *Id., at 12*.
- On January 14, 2011, EPA responded to Turog's 2-sentence email and requested Turog's position on entry. *Id., at 15*.

- Having received no response, EPA sent Turog another email on January 26, 2011. *Id., at 19*.

- Having received no response to either EPA's January 14 or January 26 emails, EPA sent Turog a letter, dated February 4, 2011, indicating that if EPA did not hear back from Turog by February 11, EPA would conclude that Turog declined to consent for access. *Id., at 22*. This letter was received by Turog on February 8, 2011. *Id., at 26*.

- By email on February 4, 2011, Turog notified EPA that its computer had died and that a response would be provided after the replacement computer arrived. *Id., at 27*.

- By unsigned letter dated February 10, 2011, Turog raised substantive issues for the first time, including potential damage to finished floors which could be avoided by drilling in closets or by using slant drilling, disruption to tenants, removal of a septic tank suspected by Turog to be the source of the problem. *Id., at 28.*[16] This letter was dated 80 days after Turog's receipt of EPA's entry request.

- As discussed above, EPA and Turog exchanged emails and letters from mid-March through May 2, 2011, during which time Turog raised issues and questions, EPA provided responses, and EPA renewed its request for entry to perform the sampling. *Id., at 37-84*.

- By letter dated April 22, 2011, EPA advised Turog of the following:

> "EPA initially contacted Turog for authorization to enter the property to conduct vapor intrusion sampling by letter dated November 18, 2010. It is now over five months later and the requested access has not been provided. I need to know, within 5 business days of your receipt of this letter, Turog's position on

[16] In its February 10 letter, Turog alleged that EPA's request was "inapplicable" to two of the three buildings on the Property since they contained no basements, advised EPA that it would sign the entry form for the remaining building (340 North Broad Street), and noted it would be willing to consent to entry to sample beneath the other buildings via exterior slant-drilling. *Id., at 30*. Turog provided a signed entry form for 340 North Broad Street under separate cover. *Id., at 31-34*.

> EPA's request for access to the other buildings (300-330 and 350-360 North Broad Street). If I do not receive Turog's consent to enter the other buildings to perform the necessary sampling within five (5) business days of your receipt of this letter, EPA will take other steps to gain entry to those buildings to perform the sampling work. Those steps might include, among other things, issuance of an administrative order directing Turog to permit entry for the work and/or a request that the U.S. Department of Justice obtain an administrative warrant authorizing such entry. Costs incurred by the Government to secure entry to conduct the vapor intrusion sampling are response costs for which Turog may be responsible as a potentially responsible party associated with the Chem-Fab Site."

*Id., at 79.* That letter was received by Turog on April 26, 2011. *Id., at 82.*

- By letter dated May 2, 2011, Turog advised EPA of piping beneath the buildings which could present drilling problems, complained that EPA would not guarantee to pay for damaged floors in the context of an entry request, and again suggested use of slant-drilling from the exterior of the buildings. *Id., at 83-84.* Turog did not consent to entry as requested by EPA. <u>This letter was dated 161 days—over five months—after Turog's receipt of EPA's request for entry to perform the sampling</u>.

EPA previously cited to the RJO's analysis of the standard of care required by the statute in this context (*Docket 31, at 30-31)* and here contends that EPA has a reasonable basis to believe that Turog's failure to respond to EPA's entry request *at all* for *twenty-five days* following its receipt of the request, Turog's failure to raise questions and concerns about EPA's plans for *eighty days* following its receipt of the request, and Turog's slow-walking its arguments and issues for a period of *over five months* from its receipt of EPA's request, all while it was aware that hazardous

substances could be present in soils beneath its office buildings and migrating into its tenants' spaces, do not meet this standard.

b. **Turog failed to exercise due care with respect to the hazardous substances because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *The Work Plan***

In November 2012, EPA's OSC determined that TCE vapors migrating from contaminated groundwater beneath one of the commercial buildings at the Property into office suites within the building presented an unacceptable threat to the tenants and installed portable air filters within the building. *Docket 2, Documents 5 and 6*. In September 2015, EPA decided to replace the portable air units with a permanent sub-slab depressurization system ("Vapor Mitigation System").[17] *Docket 2,*

[17] A sub-slab depressurization system prevents harmful chemical vapors from entering a building by directing the vapors through pipes toward an exit point, usually above the roof line, using pressure. These systems are commonly used to address radon threats in residential buildings. The systems were described as follows in an EPA publication:

> "While several methods exist for reducing radon concentrations in the home, sub-slab depressurization (SSD) is generally the most common and most effective radon reduction strategy in basement and slab-on-grade houses. Sub-slab depressurization reduces the pressure in the sub-slab environment by exhausting sub-slab gases before they can move through floor cracks or openings into the house.
>
> "An SSD system consists of one or more pipes attached to a fan or blower which creates a suction. The pipes usually originate in a pit dug into the fill material underneath the concrete slab flooring of a house. The pipe is typically concealed in a closet corner or an unfinished area. Where possible the piping is routed upward to the attic and vented through the roof."

"Handbook: Sub-Slab Depressurization for Low-Permeability Fill Material" (EPA Office

*Document 9.* In 2015 and 2016, EPA installed a 10-fan Vapor Mitigation System at the impacted building. *Docket 2, Document 11, at 4*. Between August 2016 and April 2017, EPA attempted to reach a settlement with Turog under which Turog would operate and maintain the Vapor Mitigation System. *Docket 2, Document 12, at 10*. On May 31, 2017, having failed to reach a settlement with Turog, EPA issued an administrative order ("Order") requiring that Turog operate and maintain the Vapor Mitigation System. *Docket 2, Document 12*. The Order became effective on July 2, 2017. *Docket 2, Document 20*. EPA included the following findings of fact in the Order:

> "In the absence of evidence to the contrary, and assuming conditions impacting the migration of VOCs into Building A remain constant, EPA has concluded that continued reduction of VOCs to acceptable levels within the tenant spaces in Building A depends on the following:
>
> "1. Continuous operation 24 hours a day, seven days a week, 365 days a year ("24/7/365")—of the depressurization system installed by EPA, as may be modified in response to changes in floorplan or the foundation of Building A or other factors which cause indoor VOC levels to reach or exceed 8µg/m3 ("Depressurization System"). Attachment 2 is a detailed report describing the system installed by EPA and its operation.
>
> "2. Maintenance of the Depressurization System in accordance with the requirements of this Order.
>
> "3. Collection and analysis of indoor air samples in accordance with the requirements of this Order.

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of Research and Development) (July 1991), at 3. The document is available here: https://cfpub.epa.gov/si/si_public_record_report.cfm?dirEntryId=130228&Lab=NRMRL.

> "4. Prevention of penetration of the foundation of Building A or, if penetration occurs, use of proper sealants to ensure no transmission of soil gas into the building.
>
> "5. Modification of the Depressurization System as necessary in the event of changes to the floorplan or the foundation of Building A or other factors which cause indoor TCE levels to reach or exceed 8 µg/m3."

*Id.*, at 9-10.[18] Under the Order, Turog was required to, among other things:

- Ensure that the Vapor Mitigation System was powered at all times subject only to periodic maintenance and power outages (*id., at 14*);
- Check each of the fan gauges to see that pipe pressure was within acceptable limits identified for each gauge (*id.*);
- Check each of the fans to see if was operating properly (*id.*);
- Replace fans operating outside certain parameters (*id.*);
- Notify EPA of changes to existing floorplans, status of the foundation, or other factors causing indoor VOC levels to exceed acceptable levels (*id.*, at 15);
- Submit quarterly progress reports summarizing actions taken to comply with the Order, including significant developments, actions performed and problems encountered, problems anticipated during the next reporting period, and planned resolution of problems (*id., at 18*); and
- Provide a draft notice for EPA approval, within 15 days of the effective date, to be filed in the property records notifying persons searching title of EPA involvement at, and response action selection for, the Property (*id., at 21*).

[18] EPA removed the annual indoor air sampling requirements after Turog asserted that it could not afford to perform this work. *Docket 2, Document 13*.

Paragraph 20.a of the Order required that Turog submit, within 30 days of the effective date, a work plan detailing how Turog would implement the Order (the due date for this Work Plan was August 2, 2017). *Docket 2, Document 12, at 16*. Among other things, the work plan would ensure that Turog understood the steps necessary to operate the system protecting its tenants from harmful chemical vapors that would otherwise migrate into the building, and satisfy EPA that Turog was aware of, and would implement, all of the requirements of the Order.

EPA did not receive a work plan from Turog within the 30 days after the Order's effective date. On August 7, 2017, the OSC notified Turog that it had missed the deadline for submission of the work plan. *Hearing Exhibit EPA-8, at 1*. On August 23, 2017, twenty-one days after the due date, Turog submitted a 3-sentence statement that read:

> "Our work plan is that the Radon Fan Vacuum Meters will be regularly read on a weekly basis, and specially read the day following any significant rain event. If any of the said meter readings shall be abnormally low, Mr. Eduardo Rivera shall be notified within one hour of the said reading by text and/or email of the same.
>
> "The draft deed notice is in preparation, and will soon be submitted."

*Hearing Exhibit EPA-8, at 6*. On September 26, 2017, EPA (1) disapproved the submission because it did not follow the Order's requirements for a work plan, and (2) and provided Turog with detailed suggestions on what the work plan should

cover, including operation of the Vapor Mitigation System, maintenance of the Vapor Mitigation System, notice to EPA of changes potentially impacting performance of the Vapor Mitigation System, access, record-keeping, progress reports, the final report, the land records notice, and notice to EPA of any transfer of the Property. *Hearing Exhibit EPA-8, at 7-17*. EPA's letter additionally provided a template for progress reports. *Id., at 12-13.* On October 12, 2017, *16 days after receiving EPA's comments and 71 days after the work plan due date*, Turog submitted a 4-sentence proposed workplan which ignored EPA's September 26, suggestions. This new proposed work plan provided:

> "Our work plan is that the Radon Fan Vacuum Meters will be regularly read on a weekly basis, and especially read the day following any significant rain event. If any of the said meter readings shall be less than 25% or more as compared to the desired vacuum level as posted on the applicable gauge, Mr. Eduardo Rivera shall be notified within 24 hours of the said reading by text and/or email of the same. The fans will also be individually inspected at the same time to check that the same are in compliance with 2) b) of Attachment A to your letter dated September 26, 2017.
>
> "It is the intent of this Work Plan to comply with the requirements of Attachment A to your letter dated September 26, 2017, and the same are incorporated herewith by reference."

*Id., at 18*. On October 12, 2017, EPA disapproved this submission, converted its September 26 recommendations into a draft work plan, and asked Turog to sign and return it. *Id., at 19-25*. On October 23, eleven days after EPA's disapproval of

Turog's work plan and 82 days after the work plan due date, Turog returned a signed, but marked up, version of EPA's work plan. *Id., at 26-27.* On November 16, 106 days after the work plan due date, EPA disapproved the marked-up work plan, made changes to reflect the concerns raised by Turog's markup comments, signed it, and directed Turog to implement the work plan under the Order. *Docket 5, Exhibit 12*.

EPA contends that Turog's failure, during a period of close to 3 months and in violation of EPA's Order, to produce a work plan intended to ensure that Turog understood the steps necessary operate and maintain the Vapor Mitigation System protecting its tenants and to assure EPA that Turog was aware of and would implement all of the requirements of the Order, constitutes a failure to exercise due care with respect to the hazardous substances at the Property. EPA further contends that Turog's failure to produce an acceptable work plan *at all* constitutes a failure to exercise due care with respect to the hazardous substances at the Property. Accordingly, EPA contends that its basis to believe that Turog cannot maintain an innocent landowner defense is reasonable.

**c. Turog failed to exercise due care with respect to the hazardous substances because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Progress Reports***

*See* Section III.F.3.b of this brief for background information on EPA's 2017 Order directing Turog to operate and maintain the Vapor Mitigation System installed by EPA on the Property. Paragraph 25 of the Order requires submission of Progress Reports every 90 days (quarterly) from the date EPA approved the Work Plan. *Docket 2, Document 20, at 18*. The timing of these reports was altered in January 2020 by Amendment No. 3 to the Order (*Docket 31, Exhibit 9*), but that change is not relevant to this argument. The Quarterly Progress Reports are required to address:

- All actions taken to operate the Vapor Mitigation system;
- Problems encountered;
- Anticipated problems;
- Schedule of events intended to be performed; and
- All actions taken with respect to repair and maintenance.

*Docket 2, Document 20, at 18.* Through these reports, EPA is:

- Notified of Turog's performance under the Order and approved Work Plan;
- Alerted to changes to Turog's building or foundation which might necessitate adjustments to the Vapor Mitigation System;
- Alerted to problems or issues with the Vapor Mitigation System itself so that changes could be made;
- Alerted to problems with Turog's performance under the Order; and

- Alerted to problems or issues with the Order or Work Plan so that changes could be made to these documents.

EPA approved the work plan on November 16, 2017. *Docket 2, Document 14.*

Progress Reports were therefore due from Turog as follows:

- Progress Report #1 by February 14, 2018
- Progress Report #2 by May 15, 2018
- Progress Report #3 by August 13, 2018
- Progress Report #4 by November 11, 2018
- Progress Report #5 by February 9, 2019
- Progress Report #6 by May 1, 2019
- Progress Report #7 by July 27, 2019
- Progress Report #8 by October 25, 2019

Turog did not submit any of these reports on time. On December 2, 2019, 746 days after EPA approved the Work Plan, Turog submitted "back reports" covering the missing eight reports. *Docket 31, Exhibit 10.*

Turog missed the due date for submission of the 1st Quarterly report by 656 days; the 2d report by 566 days; the 3rd report by 476 days; the 4th report by 386 days; the 5th report by 346 days; the 6th report by 306 days; the 7th report by 266 days; and the 8th report by 226 days. Said another way, Turog did not provide Progress Reports for 8 quarterly cycles, almost two years.[19]

[19] During the Hearing, the RJO asked the parties to identify when Turog was notified of deficiencies in submitting the Progress reports. *Hearing Transcript, at 82.* Turog was notified of its failure to submit Progress Reports via letters dated October 16, 2018 (*Docket 2, Document 20*) and November 20, 2019 (*Docket 31, Exhibit 8*).

In its brief, Turog argued that:

> "The reports regarding the fans (see Filed Document No. 5, at its Section III.B.4) were, at first, provided frequently by the owner. Then, the EPA asked for them to be given less frequently. And then, the EPA complained that they wanted them more frequently. And, instead of wanting them to be mailed, the EPA wanted the reports sent electronically, after they had already been mailed. This is not a failure to cooperate fully; it's a situation where the parties were able to arrive at a satisfactory procedure, after both were able to agree on a mutually-agreeable and understandable procedure."

*Docket 30, at 7.*

EPA agrees that the frequency with which Turog was required to inspect the fans and gauges changed. EPA also agrees that it asked Turog to email Progress Reports rather than send them via postal mail because the COVID19 pandemic caused most EPA employees to work from an alternative work location. That said, Turog conflates the fan/gauge inspection sheets it filled out every time it inspected the fans/gauges (*see, e.g., Hearing Exhibit EPA-7*) with the quarterly progress reports required by Paragraph 25 of EPA's Order (*see, e.g., Docket 5, Document 12, at PDF 7-8*) (*see also* Section IV.E of this brief). Turog does not dispute that it failed to submit a single Progress Report for close to two years, depriving EPA of information necessary to adequately oversee Turog's operation and maintenance of the Vapor Mitigation System protecting its tenants from harmful chemical vapors in their office suites. EPA contends that Turog's failure to submit these Progress

Reports reasonably constitutes a failure to exercise due care with respect to hazardous substances at the Property, and that EPA has a reasonable belief that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b).

**d. Turog failed to exercise due care with respect to the hazardous substances because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Notice of Pressure Problems***

See Section III.F.3.b of this brief for background information on EPA's 2017 Order directing Turog to operate and maintain the Vapor Mitigation System installed by EPA on the Property. Paragraph 18.b.1 of the Order requires Turog to inspect each of the fan gauges to ensure that air pressure in the connected pipe is within parameters printed on the gauge. *Docket 2, Document 12, at 14.* That paragraph additionally provides that "[i]n the event one or more gauges are found to read outside its/their initial vacuum reading by 25% or more, [Turog shall] notify the EPA Project Coordinator within 48 hours of such finding(s)." *Id*.[20] Through this notification, EPA would be alerted as soon as possible to problems with a fan or the Vapor Mitigation System as a whole and make decisions regarding replacement or adjustments.

[20] Paragraph 18.b.1 of the Order was modified in Amendment No.3 of the Order but such modification is not relevant to this argument. *Docket 31, Exhibit 9.*

Turog did not comply with this requirement. According to the weekly inspection sheets submitted by Turog to EPA on a quarterly basis:

- *For 13 consecutive weeks* between April—June 2020, Fan No. 2 was observed operating at a pressure more than 25% outside its intended pressure. *Hearing Exhibit EPA-7, at 1-14.*

- *For 13 consecutive weeks* between July-September 2020, Fan Nos. 2 and 10 were observed operating at pressures more than 25% outside their intended pressures. *Id., at 15-27.*

- *For 13 consecutive weeks* between October-December 2020, at least two, and sometimes three fans, were observed operating at pressures more than 25% outside their intended pressures. *Id., at 28-40.*

EPA received no notices from Turog about these fan issues until the inspection sheets were provided to EPA at the end of each quarter. This means that EPA was deprived of information about ill-performing fans that was required to be provided under EPA's Order for as many as 90 days for each of the above-identified quarters in 2020. EPA contends that it is reasonable to believe that Turog's failure to notify EPA, for close to 3 months and in violation of EPA's Order, of pressure problems with one or more fans in the Vapor Mitigation System intended to protect Turog's tenants from harmful chemical vapors constitutes a failure to exercise due care with respect to the hazardous substances at the Property and that EPA therefore has a reasonable basis to believe that Turog cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

### 4. Turog failed to provide cooperation, assistance, and facility access

CERCLA provides that in order to maintain an innocent landowner defense an owner must provide full cooperation, assistance, and facility access. CERCLA § 101(35). In its briefs and during the Hearing, EPA argued that Turog failed to meet this standard of behavior in connection with six activities as described below.[21] During the Hearing, Turog went to great lengths to describe how Turog cooperated with EPA throughout the years of EPA's involvement at the Property.[22]

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[21] *Hearing Exhibit EPA-3* identifies the bases upon which EPA contends that Turog cannot meet its evidentiary burden under the innocent landowner defense. Contentions pertaining to Turog's failure to provide full cooperation, assistance, and facility access appear in the exhibit under numbers 3, 5, 7, 9, 10, and 11.

[22] During his opening statement, Turog's counsel said:

> "I have just the one witness, and he is the manager for Turog, and he will emphasize and describe things over the past years where he did, in fact, cooperate with the Agency and has not been obstreperous or uncooperative in any way or at least not in any way that supports the concept of perfecting a lien."

*Hearing Transcript, at 19.* Later in the hearing, counsel told his witness:

> "[ ] I do need you to keep telling your whole story but the thing about changing the numbers on the fans, we don't need to know that. We need to know what you've done to cooperate with EPA because one of their big, big accusations is you being uncooperative and barring them from doing stuff on the property?
>
> "As you move forward with the story I still want you tell the story and as you move forward with the story could you please focus on how those statements by EPA that you were uncooperative or didn't give them access -- how instead you were cooperate and you did give them access?"

*Id.*, at 88. The undersigned objected to the extent such testimony would speak to events unrelated to those identified by EPA as failures to cooperate, assist, or provide access.

However, neither Turog nor Mr. Becker provided a meaningful response to EPA's contention that the company failed to provide cooperation, assistance, and facility access in the six incidents described below.

a. **Turog failed to provide cooperation, assistance, and facility access by failing to timely respond to EPA's request for access to obtain sub-slab soil samples.**

*See* Section III.F.3.a of this brief for a discussion of Turog's failure to timely respond to EPA's request for access to obtain sub-slab soil samples. EPA contends that, in addition to constituting a failure to exercise due care with respect to hazardous substances at the Property within the meaning of CERCLA §§ 107(b)(3)(A) and 101(35)(A), this failure also constitutes a failure to provide cooperation, assistance, and facility access within the meaning of CERCLA § 101(35)(A). EPA further contends that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

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The undersigned additionally notes that "EPA will stipulate to the fact that Mr. Becker was cooperative and did provide access at times other than those six events for which we have based our arguments on, on the innocent landowner defense." *Id.*

**b. Turog failed to provide full cooperation and assistance because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Work Plan***

See Section III.F.3.b of this brief for a discussion of Turog's failure to comply with EPA's Order to operate and maintain the Vapor Mitigation System by failing to submit an acceptable Work Plan as required thereby. EPA contends that, in addition to constituting a failure to exercise due care with respect to hazardous substances at the Property within the meaning of CERCLA §§ 107(b)(3)(A) and 101(35)(A), this failure also constitutes a failure to provide cooperation and assistance within the meaning of CERCLA § 101(35)(A). EPA further contends that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

**c. Turog failed to provide full cooperation and assistance because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Progress Reports***

See Section III.F.3.c of this brief for a discussion of Turog's failure to comply with EPA's Order to operate and maintain the Vapor Mitigation System by failing to submit Progress Reports as required thereby. EPA contends that, in addition to constituting a failure to exercise due care with respect to hazardous substances at the Property within the meaning of CERCLA §§ 107(b)(3)(A) and 101(35)(A), this

failure also constitutes a failure to provide cooperation and assistance within the meaning of CERCLA § 101(35)(A). EPA further contends that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

**d. Turog failed to provide full cooperation and assistance because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Notice of Pressure Problems***

See Section III.F.3.d of this brief for a discussion of Turog's failure to comply with EPA's Order to operate and maintain the Vapor Mitigation System by failing to timely notify EPA of fan pressure problems as required thereby. EPA contends that, in addition to constituting a failure to exercise due care with respect to hazardous substances at the Property within the meaning of CERCLA §§ 107(b)(3)(A) and 101(35)(A), this failure also constitutes a failure to provide cooperation and assistance within the meaning of CERCLA § 101(35)(A). EPA further contends that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

### e. Turog failed to provide full cooperation and assistance because it failed to comply with EPA's order to operate and maintain the vapor mitigation system installed by EPA: *Draft Land Notice and Records Certification*

See Section III.F.3.b of this brief for background information on EPA's 2017 Order directing Turog to operate and maintain the Vapor Mitigation System installed by EPA on the Property.

#### 1. The Draft Land Records Notice

Paragraph 31.a of the Order required that, within 15 days after the Order's effective date, Turog submit to EPA for approval a draft notice for filing in the land records containing:

- a legal description the Property; and
- notice to all successors-in-title that:
  - the Property is part of the Chem Fab Site;
  - EPA has selected a response action for the Site; and
  - EPA has ordered a potentially responsible party to implement that action

and to record the notice within 10 days after EPA's approval of the notice. *Docket 2, Document 12, at 21*. The effective date of the Order was July 2, 2017. *Docket 2, Document 20*. Turog's draft notice was due no later than 15 days after the effective date—*i.e.*, no later than July 17, 2017. Turog failed to meet this deadline. The government reminded Turog of its failure to comply with this obligation numerous times, including:

- EPA's August 16, 2017 email to Mr. Becker (*Docket 5, Exhibit 11*);
- EPA's October 16, 2018 letter to Mr. Becker (*Docket 2, Document 20*); and
- The Department of Justice's November 20, 2019 letter to Mr. Becker (*Docket 31, Exhibit 8*).

Turog failed to submit the draft notice required by EPA's Order for over 2 years.[23] EPA contends that Turog's failure, for more than two years and in violation of EPA's Order, to submit a draft notice for filing in the land records constitutes a failure to provide full cooperation and assistance to EPA. EPA further contends that that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

**2. The Records Certification**

Paragraph 40 of EPA's 2017 Order required that Turog provide, within 30 days of the effective date, a written certification that:

- it had not altered, destroyed, or disposed of any records relating to its potential liability regarding the Site; and
- it had fully complied with all EPA requests for information regarding the Site under CERCLA and RCRA.

*Docket 2, Document 12, at 24.* The effective date of the Order was July 2, 2017. *Docket 2, Document 20*. Turog's certification was due no later than 30 days after the

[23] The undersigned does not have ready access to the date on which Turog finally submitted the draft notice but acknowledges that it was submitted after Turog's receipt of DOJ's November 20, 2019 letter. The period between the date this draft should have been submitted (July 17, 2017) and the date of DOJ's letter (November 20, 2019) is over two years.

effective date—*i.e.*, no later than August 1, 2017. Turog failed to meet this deadline. The government reminded Turog of its failure to comply with this obligation on at least two occasions:

- EPA's October 16, 2018 letter to Mr. Becker (*Docket 2, Document 20*); and
- The Department of Justice's (DOJ's) November 20, 2019 letter to Mr. Becker (*Docket 31, Exhibit 8*).[24]

Turog failed to submit the certification required by EPA's Order for over 2 years.[25] EPA contends that Turog's failure, for more than two years and in violation of EPA's Order, to submit the certification constitutes a failure to provide full cooperation and assistance to EPA. EPA further contends that that it has a reasonable basis to believe that Turog therefore cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

[24] EPA sought assistance from DOJ in response to Turog's continued failures to comply with the requirements of the Order.

[25] The undersigned does not have ready access to the date on which Turog finally submitted the certification but acknowledges that it was submitted after Turog's receipt of DOJ's November 20, 2019 letter. The period between the date this certification should have been submitted (August 1, 2017) and the date of DOJ's letter (November 20, 2019) is over two years.

### f. Turog failed to provide full cooperation and assistance because it failed to timely comply with EPA's statutorily authorized information request

See Section III.F.3.b of this brief for background information on EPA's 2017 Order directing Turog to operate and maintain the Vapor Mitigation System installed by EPA on the Property. Paragraph 18.c of the Order required that Turog annually collect and analyze air samples from inside the building. *Docket 2, Document 12, at 15.* Turog claimed that it was financially incapable of performing this annual air sampling within the building. *Docket 5, Exhibits 9, 10.* EPA modified the Order to remove this requirement while the Agency reviewed Turog's claim of financial inability to perform this requirement. *Docket 2, Document 13*. EPA thereafter issued, pursuant to CERCLA § 104(e), three information request letters to Turog seeking financial information relating to Turog's ability to pay for the indoor air sampling. Information received from Turog in response to the first two requests indicated that in January 2017, Turog sold a property it owned on Bushkill Drive in Easton, Pennsylvania ("Bushkill Property") to Lafayette College and that Heywood Becker was owed the sum of $1,114,000 at settlement for

- acquisition of the Bushkill Property
- rehabilitation of the Bushkill Property
- construction management fees pertaining to the Bushkill Property
- management/leasing fees associated with the Bushkill Property.

*Hearing Exhibit EPA-4, at PDF 2-3.* By letter dated March 19, 2018, EPA issued a third request seeking information pertinent to the sequestration of funds from Turog's sale of the Bushkill Property. *Docket 5, Exhibit 13.* A response was due within 30 calendar days of receipt. *Id.* The letter was signed for on March 22, 2018. *Id., at PDF 11.* A response was therefore due by April 23, 2018. No response was received by that date. Between April and October 2018, EPA attempted to secure a response, or at least a date by which a response was forthcoming, to the Agency's March 19, 2018 information request. *Docket 5, Exhibits 14a – 14j. See also, Docket 5, at 36-38.* The government's last notice regarding Turog's failure to respond to EPA's information request was contained in a letter dated November 20, 2019. *Docket 31, Exhibit 8.* Assuming Turog submitted its response on the date of this last notice (which it did not), Turog failed to respond to EPA's information request letter for 576 days, or more than 1.5 years.[26]

EPA contends that a failure, for more than 1.5 years and in violation of CERCLA § 104(e), to submit a response to EPA's request, seeking information pertinent to Turog's ability to pay for indoor air sampling necessary to assess the continued effectiveness of the Vapor Mitigation System, constitutes a failure to

[26] The undersigned does not have ready access to the submission ultimately accepted as responsive to EPA's March 19, 2018 information request letter but acknowledges that this submission was received at some point after November 20, 2019.

provide cooperation and assistance to EPA. EPA therefore has a reasonable basis to believe that Turog cannot maintain an innocent landowner defense under CERCLA § 107(b)(3).

**5. Conclusions Regarding the Innocent Landowner Defense**

As explained in EPA's briefs and at the Hearing, a finding that any one of the several requirements of the innocent landowner defense has not been met is sufficient to disqualify a defendant from maintaining that defense. In this matter, EPA has identified *thirteen bases* on which to find that Turog is not entitled to maintain the defense:

1. A contractual relationship existed between Turog and the third party;

2. Turog knew or should have known hazardous substances were disposed of at the Property;

3. Turog failed to exercise due care with respect to the hazardous substances because it failed to timely respond to EPA's request for access to collect sub-slab samples;

4. Turog failed to exercise due care with respect to the hazardous substances because it failed to submit an acceptable Work Plan detailing how it would comply with EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

5. Turog failed to exercise due care with respect to the hazardous substances because it failed to timely submit Progress Reports describing its implementation of EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

6. Turog failed to exercise due care with respect to the hazardous substances because it failed to timely notify EPA of pressure problems

exhibited by some of the fans in the Vapor Mitigation System protecting its tenants;

7. Turog failed to provide cooperation, assistance, and facility access because it failed to timely respond to EPA's request for access to collect sub-slab samples;

8. Turog failed to provide cooperation and assistance because it failed to submit an acceptable Work Plan detailing how it would comply with EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

9. Turog failed to provide cooperation and assistance because it failed to timely submit Progress Reports describing its implementation of EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

10. Turog failed to provide cooperation and assistance because it failed to timely notify EPA of pressure problems exhibited by some of the fans in the Vapor Mitigation System protecting its tenants;

11. Turog failed to provide cooperation and assistance because it failed to timely provide EPA with a draft land records notice advising persons searching title of the status of, and EPA's involvement with, the Property;

12. Turog failed to provide cooperation and assistance because it failed to timely provide EPA with a required certification regarding its retention of certain documents and compliance with EPA's information requests; and

13. Turog failed to provide cooperation and assistance because it failed to timely respond to an EPA information request concerning its ability to pay for air sampling necessary to assess the effectiveness of the Vapor Mitigation System protecting its tenants.

EPA has substantiated its reasonable bases to believe each of these contentions. EPA contends that if the RJO agrees that EPA has a reasonable basis to believe any one or

more of these assertions, the RJO must find that EPA has a reasonable basis to believe that Turog cannot maintain an innocent landowner defense under CERCLA.

### G. Conclusions Regarding the Statutory Elements for Existence of the CERCLA § 107(l) Lien

EPA has substantiated, and Turog has admitted, that Turog owns the land upon which EPA seeks to perfect the lien (*see* Section III.A of this brief). EPA has substantiated, and Turog has admitted, that the land has been subject to or affected by a response action (*see* Section III.B of this brief). EPA has substantiated, and Turog has admitted, that EPA has incurred costs (*see* Section III.C of this brief). EPA has substantiated, and Turog has admitted, that EPA provided Turog with written notice of potential liability via certified mail (*see* Section III.D of this brief). EPA has substantiated that Turog is a party described in CERCLA § 107(a) (*see* Section III.E of this brief). EPA has substantiated that Turog cannot maintain a defense to liability under CERCLA § 107(b) (*see* Section III.F of this brief). Accordingly, EPA respectfully requests that the RJO find that EPA has a reasonable basis to believe that the statutory elements for existence of a CERCLA § 107(l) lien are satisfied.

## IV. Turog's Presentation at the Hearing

Turog's presentation at the Hearing consisted substantially of testimony from Turog principal Heywood Becker who provided, over the course of 1.5-2 hours and over two general relevancy objections raised by the undersigned, his lengthy recollection of Turog's dealings with EPA.[27] EPA asks the RJO to take note of the following points when reviewing this testimony.

### A. EPA's Position on Mr. Becker's Testimony

As stated during the Hearing, EPA does not concede that Mr. Becker's recollections and representations were correct or accurate (*see Hearing Transcript, at 128).* EPA respectfully requests an opportunity to respond to any findings and/or recommendations made by the RJO based upon facts drawn exclusively from this testimony.

### B. Cooperation, Assistance, and Facility Access

A significant theme of Turog's presentation at the Hearing was that Turog was cooperative with, and provided access to, EPA most of the time.[28] However, the

[27] EPA objected that Mr. Becker was permitted to testify about issues having nothing to do with the issues in dispute. *Hearing Transcript, at 67-70, 88-89*. These objections were overruled.

[28] During the Hearing Mr. Clever stated to Mr. Becker:

> "Mr. Becker, I want you to tell this whole story because in the post-hearing brief one of the things I'm going to say is if there's 100 opportunities for access and you cooperated in 95 of them then that's going to be sufficient and the difference is de minimus. I'm going to argue that."

issue to be decided regarding cooperation, assistance, and facility access is not whether Turog generally cooperated with, and provided access to, EPA but rather whether EPA has a reasonable basis to believe that the incidents identified in Sections III.F.4.a-f of this brief evidence a failure by Turog to provide "full cooperation, assistance, and facility access" as required by CERCLA § 101(35)(A).

### C. Complying With EPA's 2017 Order

During the Hearing Mr. Becker suggested that EPA's 2017 Order directing Turog to operate and maintain the Vapor Mitigation System was unnecessarily complicated, confusing, and ill-suited to Turog's small operation.[29] To the contrary,

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*Hearing Transcript, at 87.*

[29] Mr. Becker testified:

> "They kept on talking about operating a system and I kept on thinking I'm not operating a system. I'm not turning any valves, not monitoring the performance of flow valves and chemical interchange. I'm just reading meters. This is designed for Shell Oil and I'm a one-man shop. I have no staff. I have no employees. This is not a place where you have compliance officers which is what the form looked like it was written for. I just couldn't understand how it applied to me."

*Hearing Transcript, at 94.* Mr. Becker also stated:

> "I remember being overwhelmed and confused by the directives of EPA. They clearly had thought this out beforehand and there were pages and pages and pages of directions that looked like they had been designed for a company the size of Shell Oil to maintain a gas diffusion system or something, but it really didn't much apply to this very small operation with commercial and retail tenants."

*Id., at 76.*

the operation and maintenance requirements were tailored specifically for the Vapor Mitigation System installed at the Property, were broken down in the Order and Work Plan in a methodical fashion, and were not reported by Mr. Becker to EPA before this Hearing as confusing or inapplicable. Mr. Becker possessed a copy of EPA's original Order after it was issued and before it became effective, and provided EPA with a notice of Turog' intent to comply after meeting with EPA during Turog's opportunity to confer under Section VII of the Order (*Docket 2, Document 12, at 11-12).* Mr. Becker did not suggest during that meeting that the Order was confusing or inappropriate. The Order contemplated that Turog would retain a contractor to implement the Order's requirements (*id., at Paragraph 14*) but Mr. Becker elected to perform the work himself. As to Mr. Becker's competency to read and understand the Order, EPA notes that (1) according to Turog's counsel, Mr. Becker has over 50 years of experience in buying and selling properties (*Docket 30, at 9*); (2) Mr. Becker was at one time a practicing attorney (*see, e.g.,* https://www.mcall.com/news/mc-xpm-1988-05-21-2629507-story.html); and (3) Mr. Becker's lengthy testimony during the Hearing was confident, focused, and responsive to questions.[30] EPA does not agree that this is a case of an unqualified individual overwhelmed by a complex, inapplicable, or inappropriate set of tasks.

[30] Despite this characterization EPA still contends that a majority of Mr. Becker's testimony was not relevant to the proceeding.

### D. Requirements of EPA's 2017 Order

During the Hearing Mr. Becker repeatedly testified that he was merely a "meter reader" who was not operating or maintaining the Vapor Mitigation System (*see, e.g., Hearing Transcript, at 76, 80, 81, 85, 85, 94, 95*). To the contrary, Turog was required to do much more than merely read meters and report the results to EPA. EPA's 2017 Order and the approved Work Plan required that Turog keep the system running continuously, inspect gauges, inspect fans, notify EPA of issues/problems with the system, replace faulty equipment, provide EPA with notice of changes in the floor plan or the condition of the foundation, maintain records, provide progress reports, and provide a final report upon system shutdown. *Docket 2, Document 12*; *Hearing Transcript, at 140*. These obligations, methodically documented in the Order and Work Plan, were collectively a comprehensive program under which Turog would maintain the Vapor Mitigation System for the protection of its tenants with minimal oversight from EPA. EPA did not go to all of the effort associated with attempting to negotiate a settlement, and then issue an administrative order, merely to have meters read. The Order and Work Plan were clear, Mr. Becker was competent to read and understand the requirements they created, and those requirements were not limited to "reading meters."

### E. Progress Reports vs. Weekly Log Sheets

Paragraph 18 of EPA's amended 2017 Order requires Turog to inspect fans and gauges on a weekly basis and to contact EPA within 48 hours of learning that one or more gauges read more than 25% outside its target pressure. *Docket 31, Exhibit 9, at PDF 4.* Paragraph 25 of the Order requires Turog to provide quarterly Progress Reports to EPA detailing "significant developments during the preceding reporting period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems." *Id., at PDF 6.*

At all times relevant to this proceeding there have been 10 sets of fans/gauges in the system. EPA proposed that Turog use a log sheet to record Turog's weekly inspection findings. *Hearing Exhibit EPA-8, at 14.* These log sheets were not required to be submitted on a weekly basis but were required to be included in the quarterly Progress Reports. *Docket 31, Exhibit 9, at PDF 4.* Despite EPA's development and transmittal of a sample Progress Report (*Hearing Exhibit EPA-8, at 15-17*), Turog mistakenly believed that submission of the weekly log sheets, without more, would satisfy the Order's requirement for a quarterly Progress Report.

In response to the government's identification of deficiencies in the Progress Reports, Mr. Becker merely added lines to the weekly log sheets. *Hearing Transcript, at 97-99*. It was never EPA's intention, and the Order and Work Plan do not require, that Turog provide information required by the quarterly reports on a weekly basis. The content of the two types of documents was obviously different because they served two different purposes. The log sheets were intended to memorialize the weekly inspection of fans and gauges and would be useful to EPA for purposes of, among other things, confirming that Turog was inspecting these items weekly and immediately reporting pressure issues to EPA as required by the Order. The quarterly Progress Reports, on the other hand, would alert EPA to changes to Turog's building or foundation which might necessitate adjustments to the system, alert EPA to problems or issues with the system itself so that changes could be made, alert EPA to problems with Turog's performance under the Order, and alert EPA to problems or issues with the Order or Work Plan so that changes could be made to ensure receipt by EPA of appropriate information. The Order and Work Plan clearly specified the timing and content requirements for each type of submission, and Mr. Becker was able to understand these requirements.

### F. "Everything Has Been Cured"

During the Hearing, Turog's counsel suggested that the numerous incidents identified by EPA as bases for believing that Turog failed to exercise due care and/or provide EPA with full cooperation, assistance, and facility access were instances of past conduct which were cured. *Hearing Transcript, at 118*. There are two problems with this argument.

First, this "cure" approach is not an appropriate measure to be used to determine if EPA has a reasonable basis to believe that Turog failed to exercise due care or provide EPA with full cooperation, assistance, and facility access. EPA may have *ultimately* obtained access, progress reports, and a response to its information request, but ultimate accomplishment of such tasks does not mean that the path to eventual compliance did not include a failure to exercise due care or to cooperate with EPA, or that accomplishment somehow diminishes or eliminates the earlier due care or cooperation failures. That a landowner ultimately boards up an open well on his property should not relieve that owner from liability for the death of the child who fell down that well the week before.

Second, with two exceptions, none of EPA's arguments are based upon a "curable" failure by Turog to accomplish a task; rather, EPA argues that Turog's significant delays in accomplishing tasks evidence a failure to exercise due care or to

provide EPA with full cooperation, assistance, and/or facility access. Referring to the list in Section III.F.5 of this brief, EPA argues that:

- Turog failed to exercise due care with respect to the waste because it failed to *timely respond* to EPA's request for access to collect sub-slab samples;

- Turog failed to exercise due care with respect to the hazardous substances because it failed to *timely submit* Progress Reports describing its implementation of EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

- Turog failed to exercise due care with respect to the hazardous substances because it failed to *timely notify* EPA of pressure problems exhibited by some of the fans in the Vapor Mitigation System protecting its tenants;

- Turog failed to provide cooperation, assistance, and facility access because it failed to *timely respond* to EPA's request for access to collect sub-slab samples;

- Turog failed to provide cooperation and assistance because it failed to *timely submit* Progress Reports describing its implementation of EPA's Order to operate and maintain the Vapor Mitigation System protecting its tenants;

- Turog failed to provide cooperation and assistance because it failed to *timely notify* EPA of pressure problems exhibited by some of the fans in the Vapor Mitigation System protecting its tenants;

- Turog failed to provide cooperation and assistance because it failed to *timely provide* EPA with a draft land records notice advising persons searching title of the status of, and EPA's involvement with, the Property;

- Turog failed to provide cooperation and assistance because it failed to *timely provide* EPA with a required certification regarding its retention

of certain documents and compliance with EPA's information requests; and

- Turog failed to provide cooperation and assistance because it failed to *timely respond* to an EPA information request concerning its ability to pay for air sampling necessary to assess the effectives of the Vapor Mitigation System protecting its tenants.[31]

These failures based on timeliness are not curable.

## V. The RJO's Issues

In the RJO's Post-Hearing Scheduling Orders, the RJO directed the parties to address a number of issues. The issues, and EPA's response, are below.

### A. "The parties are asked to address the significance of the fact that two separate companies/partnerships, 300 N. Broad Street, Ltd. and Turog Properties, Ltd., were involved in two separate deed transfers for the Site. What is the significance of this for purposes of the Innocent Landowner Defense?"

Throughout this proceeding Turog represented that it acquired the Property, via its alter ego entity "300 N. Broad Street, Ltd.," in 1998 notwithstanding the fact that the Bucks County, Pennsylvania land records reflect that Turog took title to the Property from 300 N. Broad Street, Ltd. in 2005. *See Docket 5, at 4, footnote 4*.

This factual issue is relevant solely to a single predicate for perfecting the lien—whether Turog knew or should have known that wastes had been disposed of

[31] The two exceptions are EPA's belief that Turog failed to exercise due care and failed to provide full cooperation and assistance because Turog failed to submit an acceptable Work Plan as required by EPA's 2017 Order. Neither of these were cured as EPA had to develop the Work Plan itself following several unacceptable attempts by Turog to develop the plan.

on the Property.[32] EPA contends that there would be no change to its conclusions that (a) Turog knew or should have known that wastes had been disposed of at the Property, or (b) Turog therefore cannot maintain a CERCLA § 107(b)(3) innocent landowner defense, were we to use 2005 as the acquisition date rather than 1998. However, the facts and analyses considered would be significantly different, and worse for Turog, under the knowledge requirement. Simply put, additional environmental investigation and documentation of the continued release and migration of hazardous substances at the Property occurred between 1998 and 2005. This additional information and documentation makes it much harder for Turog to argue that it neither knew nor should have known that wastes had been disposed of at the Property.

EPA has explained that Turog cannot qualify for an innocent landowner defense if the act or omission of the third-party polluter occurred in connection with a "contractual relationship, existing directly or indirectly," with Turog. *See* CERCLA § 107(b)(3); *Docket 5, at 19-20*. EPA further explained that such a

[32] The timing of Turog's acquisition of the Property is not relevant to whether (1) the release or threat of release of hazardous substances and the damage therefrom was caused solely by a third party; (2) the act or omission of the third party occurred in connection, directly or indirectly, with a "contractual relationship" with the third party; (3) Turog exercised due care with respect to the hazardous substances, in light of all relevant facts and circumstances; (4) Turog took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions; or (5) Turog provided full cooperation, assistance, and facility access.

"contractual relationship" includes, with certain exceptions, "land contracts, deeds, easements, leases, or other instruments transferring title or possession." *See* CERCLA § 101(35); *Docket 5*, at 19-20.[33] Under the relevant exception in this case, the "contractual relationship" would be defeated if "at the time [Turog] acquired the facility [it] 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." CERCLA § 101(35)(A)(i).

[33] During the Hearing, the RJO observed that Turog's argument that the tax sale interrupted the "contractual relationship" may apply to the tax purchaser (300 North Broad Street) but questioned whether this would be true of the subsequent transfer between the tax purchaser and Turog. *Hearing Transcript, at 178*. EPA agrees that this tax argument would be inapplicable to the transfer from the tax purchaser to Turog, and contends that Turog would still have an indirect contractual relationship with the polluter. In the *Westside Delivery* case, the 9th Circuit stated:

> "The fact that a previous owner may be a third party makes the word 'indirectly' in § 9607(b)(3) very important. If the owner who immediately preceded defendant A—say, B—has a 'direct' contractual relationship with A, and the owner before that—say, C—has a direct contractual relationship with B, then A has an 'indirect' contractual relationship with C. *See Buffalo Marine Servs. Inc. v. United States*, 663 F.3d 750, 755, 758 (5th Cir. 2011) (describing a 'contractual relationship ... involving a chain of intermediaries' as 'an indirect' contractual relationship within the meaning of the Oil Pollution Act, which contains 'a third-party defense provision virtually identical to" CERCLA's). The same logic leads to the conclusion that a defendant-landowner has a contractual relationship with all previous landowners—or, at least, all previous landowners in the chain of title—unless the defendant-landowner can qualify for the innocent-landowner defense.' *See United States v. CDMG Realty Co*., 96 F.3d 706, 716 (3d Cir. 1996) (noting that '[t]he [third-party] defense is generally not available if the third party causing the release is in the chain of title with the defendant' unless 'the person claiming the defense is an "innocent owner"").

*Westside Delivery*, 888 F.3d 1085, 1092 (emphasis added).

One of EPA's earliest response actions at the Chem Fab Site was performed in 1994-95. During that response action, EPA removed and disposed of 117 drums; approximately 8,400 gallons of liquid waste; approximately 250 gallons of fuel oil; 6 cubic yard boxes of solid waste; and three cylinders. Substances removed included "[i]norganic acidic liquids and solids, caustic liquids and solids, poisonous solids, liquids, and gases, flammable liquids, radioactive material, [and] poly chlorinated biphenyls." Among the agencies with whom EPA coordinated during this response were the Pennsylvania Department of Environmental Resources, the Bucks County Department of Health, and the Bucks County Emergency Management Agency. *Docket 5, at 23-25*. In its briefs, EPA argued that Turog knew or should have known that these materials were at one time disposed of at the property as EPA created ample documentation of their discovery and removal. Such documentation included a funding request describing threats at the Site and the actions to be taken to address such threats; twenty-three Pollution Reports issued between September 2, 1995 and June 15, 1995 describing the cleanup work; and an After-Action Report. *Id.* Turog admitted it was aware of the disposal when, in its Pre-Hearing Brief, it stated that in conducting its pre-acquisition due diligence it "relied on the public declarations and statements of and from EPA [saying that] . . . EPA had removed all of the hazardous materials, contaminants, and chemicals from the property; that the

Site had been remediated; and that the property no longer contained hazardous materials, contaminants, or chemicals known to the EPA." *Docket 5, at 21-22* (*quoting Docket 30,* at 2-3).

In November 1998, the Pennsylvania Department of Environmental Protection ("PADEP") assumed lead agency status at the Chem Fab Site with the approval of EPA. *Post Hearing Brief Exhibit EPA 01*.[34] Between November 1998 and October 2005 (the property was transferred to Turog on October 21, 2005) (*Docket 5, Exhibit 6*), PADEP conducted an extensive environmental investigation at the Property and produced several reports including the documents identified below.

1. **"Final Site Characterization Specification of Services" (Ogden Environmental and Energy Services Co., Inc.) (April 1, 1999) (*PHB EPA 02*)**

   This was PADEP's work plan for continued investigation at the Site. *PHB*

2. **"Final Site Characterization Report Volume 1" (Ogden Environmental and Energy Services Co., Inc.) (July 12, 2000) (*PHB EPA 03)***

This report documented that numerous hazardous substances remained at the Property in various media including:

- Trichloroethene, tetrachloroethene, methylene chloride, naphthalene, toluene, phenanthrene, and xylenes detected in soils on the Property (*PHB EPA 03*, at 6-1);

[34] Hereinafter exhibits to this brief shall be numbering using the following format: "PHB EPA XX."

- Antimony; cadmium; chromium III; chromium IV; manganese; nickel; vanadium; 1,1,1-trichloroethane; 1,1-dichloroethene; 1,1-dichloroethane; methylene chloride; tetrachloroethene; trichloroethene; vinyl chloride; cis-1,2-dichloroethene; bis(2-ethylhexyl)phthalate; and naphthalene detected in groundwater on the Property (*PHB EPA 03*, at 6-2);

- Copper and manganese were detected in surface water at the Property (*PHB EPA 03*, at 6-3); and

- Chromium and nickel were detected in sediments at the Property (*PHB EPA 03*, at 6-3).

**3. "Final Phase II Site Characterization Report Volume 1" (AMEC Earth & Environmental, Inc.) (November 25, 2002) (*PHB EPA 04)***

This report documented that numerous hazardous substances remained at the Property in various media including:

- Trichloroethene; tetrachloroethene; 1,1-dichloroethene; methylene chloride; hexavalent chromium; lead; naphthalene; toluene; phenanthrene; and xylenes found in subsurface soils (*PHB EPA 04*, at PDF 63-64)

- Aluminum; antimony; arsenic; barium; beryllium; cadmium; chromium (III) and (VI); cobalt; copper; iron; lead; manganese; mercury; nickel; thallium; vanadium; 1,1,1-trichloroethane; 1,1-dichloroethene; 1,1-dichloroethane; methylene chloride; tetrachloroethene; trichloroethene; vinyl chloride; cis-1,2-dichloroethene; chloroform; carbon tetrachloride; bis(2-ethylhexyl)phthalate; and naphthalene found in groundwater (*PHB EPA 004*, at PDF 65).

- Chromium and nickel found in sediments (PHB EPA 004, at PDF 65).

**4. "Final Phase II Site Characterization Report Addendum" (AMEC Earth & Environmental, Inc.) (January 14, 2003) (*PHB EPA 05)***

This was a continuation of the Final Phase II Site Characterization Report dated November 25, 2002, and included results from two additional rounds of groundwater sampling. *PHB EPA 05, at 1-1*.

**5. "Final Engineering Evaluation Report" (AMEC Earth & Environmental, Inc.) (May 2, 2003) (*PHB EPA 06)***

This report considered remedial technologies to provide an appropriate range of options and sufficient information to allow for comparative analysis in the selection of a groundwater remedy. *PHB EPA 06, at PDF 8*.

**6. Final Phase II Supplemental Groundwater Investigation" (AMEC Earth & Environmental, Inc.) (February 27, 2004) (*PHB EPA 07)***

This report was a continuation of the Final Phase II Site Characterization Report dated November 25, 2002 and the Final Phase II Site Characterization Report Addendum dated January 14, 2003 and consisted of data from two additional rounds of groundwater sampling. *PHB EPA 07, at 1*. The report concluded that the contaminant plume was continuing to migrate off of the Property. *PHB EPA 07, at 25*.

Thus, Turog's claim it had confirmed, through due diligence, that "EPA had removed all of the hazardous materials, contaminants, and chemicals from the property; that the Site had been remediated; and that the property no longer

contained hazardous materials, contaminants, or chemicals known to the EPA" prior to acquisition in 1998 could not possibly hold true if the acquisition date was 2005. The aforementioned state investigatory efforts revealing the existence of hazardous substances at the Property all occurred between 1998 and 2004 (one year prior to the transfer of title to Turog) and were readily identifiable in publicly available documents housed at both EPA and PADEP.

The land records reflect that Turog acquired the Property in 2005. Turog explained that an entity claimed by Turog to be an alter-ego of Turog--300 North Broad Street, Ltd.--acquired the Property in 1998. Mr. Becker testified that he caused Turog to acquire title from 300 North Broad Street, Ltd. in 2005 because of a corporate defect discovered in 300 North Broad Street, Ltd. *Hearing Transcript, at 177*. The question whether the 1998 acquisition can be charged to Turog as opposed to 300 North Broad Street, Ltd. is a legal question the answer to which will not change the result in this proceeding. EPA has demonstrated that it has a reasonable basis to believe that Turog knew or should have known that hazardous substances had been disposed of at the Property prior to 1998. Should the RJO conclude that Turog's ownership for purposes of this matter started in 2005, EPA requests that the RJO include the facts and circumstances identified in the above-referenced State reports issued between 1998 and 2005 as facts and circumstances

Turog either knew of or should have known about at the time of acquisition.

**B. "Turog has challenged the existence of a 'contractual relationship' for purposes of the Innocent Landowner Defense concerning 300 N. Broad Street, Ltd. due to the fact that 300 N. Broad Street Ltd. took title to the property in connection with a tax sale. The parties are asked to address this issue and any applicable case law, including, but not limited to: *Calif. Dept. of Toxic Substances Control v. Westside Delivery, LLC,* 888 F.3d 1085 (9th Cir. 2018) and *Continental Tire* [sic] *Co. v. The People's Gas, Light and Coke Co.*, 199 Westlaw 753933 (N.D. Ill. 1999) (Senior Judge decision) and 199 WL 1250666 (Magistrate Report and Recommendation)."**

In its final Pre-Hearing Brief, EPA addressed Turog's argument that the tax sale in which 300 N. Broad Street, Ltd. took title to the property in 1998 interrupted the "contractual relationship" between Turog and the third-party polluter. *Docket 31, at 12-18.* Turog offered no caselaw or other persuasive writings to substantiate its view. In response, after noting that the issue had not been decided in this jurisdiction, EPA cited the 2018 9th Circuit decision in *California Department of Toxic Substances Control vs. Westside Delivery, LLC*, 888 F.3d 1085 (9th Cir. 2018), which thoughtfully concluded after an extensive analysis that Congress did not intend to afford tax-sale purchasers with significant liability protection over non-tax-sale purchasers merely because of the nature of the acquisition.

During the Hearing, the RJO identified a 1999 decision by the U.S. District Court for the Northern District of Illinois captioned *Continental Title Company vs.*

*The Peoples Gas Light and Coke Company*, 1999 W.L. 753933 (September 15, 1999) and an underlying magistrate's recommendation (1999 W.L. 1250666 (March 18, 1999)) holding the opposite view. *Hearing Transcript, at 179-180*. At the Hearing, the RJO said "I'd like both parties, especially EPA, to address that decision, whether it factually applies here, whether is it is -- from a legal perspective what the Agency's position concerning that is." *Id., at 180*. EPA responds as follows.

1. ***Inadvertent Omission.*** The undersigned regrets the failure to find or identify the *Continental Title* case; it was certainly not the undersigned's intent to mislead either party regarding the existence of caselaw that might be contrary to that cited to in EPA's brief.[35]

2. ***RJO Mandate.*** As the undersigned mentioned during the Hearing, the RJO's charge is not to decide which interpretation of the law among conflicting cases is correct, but rather whether EPA is reasonable in placing reliance on the interpretation it identified. *Hearing Transcript*, at 185-86. EPA respectfully contends that doing otherwise would establish caselaw in an unappealable environment, potentially create confusion to Superfund litigants, and overstep the mandate of the Order of Assignment.

[35] The undersigned notes that opposing counsel did not include the *Continental Title* case (or any other caselaw for that matter) in its brief supporting his argument about the effect of a tax sale.

3. ***Continental: The Magistrate's Report and the Court's Decision***.

Setting aside for the moment the differences in date (*Westside* is a more recent decision) and stature (*Westside* was issued by a Federal appeals court while *Continental* was issued by a Federal trial court), the two decisions present markedly different views on the role of state law in interpreting a federal statute. Both Courts began at the same starting point—CERCLA § 101(35)(A) defines "contractual relationship" to include without limitation "land contracts, deeds or other instruments transferring title or possession." Where they went next was determinative.

In his Report and Recommendation to the District Court, the Magistrate in *Continental* observed that the term "tax deed" is not defined in CERCLA and that State law should therefore control. The Magistrate then explained that under Illinois law, a tax sale, a two-step process governed by state statute, (a) divests the tax debtor of rights in the subject property, and (b) generates, at the hands of the State, a "new and independent title, free and clear from all previous titles and claims of every kind." The Magistrate wrote:

> "The legal rights of the owner and tax purchaser are not determined by the negotiations of a willing buyer and seller in a free marketplace, rather they are determined entirely by statute. By operation of law, title is divested from the owner and conveyed to the tax purchaser. Not only is title divested from the owner, but all prior interests are extinguished, which in some cases conveys to the tax purchaser a cleaner title than

> what the owner previously held. Thus, following the issuance of a tax deed by the county, the most clouded title in the world is suddenly transformed into merchantable title. It defies logic to say that such a transformation, being a divestiture, without consideration to the previous title holder or lienholder, can create a contractual relationship between the holder of an encumbered title and a tax purchaser who following a tax sale receives a new and independent title free of all prior encumbrances."

1999 W.L. 1250666, at 8. Thus, according to this interpretation, a tax sale does not result in any transfer of property rights. In response to the defendant's reference to a 1991 case in which the Northern District of Illinois held that, under Section 548 of the Bankruptcy Code, a "transfer" via a tax sale occurred upon the expiration of the redemption period and not upon the date of the tax sale, the Magistrate said "[t]his Court sees no justification for superimposing the Bankruptcy Code's extremely broad definition of 'transfer' over CERCLA's use of the same term in conjunction with defining a 'contractual relationship." *Id.*, at 9 (referring to *McKeever v. McLandon,* 132 B.R. 996 (N.D. Ill. 1991)).

The defendant objected to the Magistrate's finding, arguing that a tax deed transfers title from a tax debtor to a tax purchaser. In its decision, the District Court noted that this view relies on the Bankruptcy Code's broad definition of "transfer," explained that Congress intended this definition to be as broad as possible ("[u]nder the Code, a 'transfer' is a prerequisite to the trustee's ability to avoid a fraudulent conveyance and to augment the estate to benefit creditors" (1999 W.L 753933, at

2)), and reiterated the Magistrate's observation that Congress left no clue of any intention to utilize the broad definition of "transfer" from the Bankruptcy Code in the context of CERCLA. *Id.* The District Court wrote:

> "In fact, based on the environmental statute's specific use of the phrase 'contractual relationship,' it seems more probable that Congress intended to include only voluntary and direct transactions rather than the broad range of transactions envisioned by the Bankruptcy Code. As the magistrate judge explained, it defies common sense to conclude that the divestiture of Paschen's property interest created a contractual relationship between Continental and Paschen. Indeed, the tax deed proceeding terminated Paschen's interest in the Pitney Court site, and Paschen therefore had no property interest to convey to Continental. The Cook County Clerk issued the tax deed to Continental, which under Illinois law created a "new and independent title, free and clear from all previous titles and claims of every kind."

*Id.*

4. ***Tax Sales in Pennsylvania***. Pennsylvania law provides for two types of involuntary tax sales--(1) an "upset" sale conducted pursuant to 72 P.S. § 5860.601-.609, and (2) a "judicial sale" conducted pursuant to 72 P.S. § 5860.610- 612. The Commonwealth Court of Pennsylvania has explained:

> "[A] judicial tax sale is governed by Sections 610–612 of the Tax Sale Law, 72 P.S. §§ 5860.610–5860.612. These sections provide a judicial remedy where the upset price has not been bid at the tax sale conducted by the Bureau. In such a case, pursuant to Section 610 of the Tax Sale Law, the Bureau may petition the common pleas court for a judicial tax sale. Pursuant to Section 612, if the court is satisfied that the necessary requirements are met, it shall order that the property be sold at a subsequent date to be set by the court.

> "In contrast, an upset tax sale by the Bureau is governed by Sections 605–609 of the Tax Sale Law, 72 P.S. §§ 5860.605–609. An upset tax sale is a prerequisite to a judicial tax sale and is conducted by the Bureau in accordance with the notice provisions set forth in Sections 607 and 607a of the Tax Sale Law, 72 P.S. § 5860.607 and 5860.607a."

*Murphy vs. Monroe County Tax Claim Bureau*, 784 A.2d 878, 881 (Pa. Cmwlth. 2001). According to Turog, the 1998 tax sale in which 300 N. Broad Street, Ltd. took title to the property was an "upset sale." *Docket 5, Exhibit 3; Docket 30, at 2*; *Hearing Transcript, at 136*.

Under Pennsylvania law, a tax purchaser taking title following an upset sale does not take "a new and independent title free of all prior encumbrances" as described by the *Continental* Court when speaking about Illinois law. To the contrary, Pennsylvania law on upset sales states:

> "Every such sale shall convey title to the property under and subject to the lien of every recorded obligation, claim, lien, estate, mortgage, ground rent and Commonwealth tax lien not included in the upset price with which said property may have or shall become charged or for which it may become liable."

72 P.S. § 5860.609. Thus, even were one to take the view that State law ultimately governs whether a tax sale disrupts the contractual relationship under CERCLA, one may not necessarily arrive at the *Continental* Court's conclusion in this case because, unlike the Illinois property tax sale, the Pennsylvania upset tax sale is not intended to deliver free and clear title.

5. **The 9th Circuit's Decision in *Westside Delivery***. In *Westside Delivery*, the 9th Circuit provided a different take on the role of state law in interpreting the Federal definition of "contractual relationship":

> "Before deciding what 'contractual relationship' means and whether Defendant and Davis have a 'contractual relationship' by virtue of the tax deed, we must determine what role state law should play in our analysis. Of course, the meaning of 'contractual relationship' is 'necessarily a federal question in the sense that its construction remains subject to ... supervision' by federal courts. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989). But 'Congress sometimes intends that a statutory term be given content by the application of state law.' *Id*. The 'general assumption,' though, is that, 'in the absence of a plain indication to the contrary, Congress when it enacts a statute is not making the application of the federal act dependent on state law.' *Id*. (internal quotation marks and alteration omitted).
>
> "Here, we do not think that there is a 'plain indication' that Congress intended for state law to answer the question whether a particular type of instrument or transaction is a 'contractual relationship.' To be sure, the statutory definition refers to several instruments—such as deeds and easements—that are creatures of state property law. But Congress defined 'contractual relationship' broadly to include both a catch-all ('other instruments transferring title or possession') and a 'not limited to' clause. Those provisions suggest that Congress was trying to capture a certain kind of instrument reflecting a certain kind of relationship between a defendant and a purported third party, regardless of how state law might characterize that instrument or that relationship."

888 F.3d 1085, 1093-94. The 9th Circuit then noted that while it is true, in Federal tax and bankruptcy law, that State law determines whether a person has a property right and what the nature of that right may be, "a federal standard governs the

federal consequences of transferring that property right. . . And when Congress uses broad wording to define the types of property interests or transfers to which it seeks to attach consequences, it evinces an intent to use a uniform federal standard that does not depend on the particulars of state property law." *Id.* The Court observed that tax sales can occur in one of two different ways—(1) a single transaction in which the property is sold directly to the tax purchaser and not possessed by the State (the process used in California), and (2) a two-step transaction in which the State acquires the interest from the tax debtor and then transfers it to the tax purchaser—and concluded that under either process a "contractual relationship" is preserved.[36] But beyond analyzing how the contractual relationship mechanically survives the alternative tax sale processes, the 9th Circuit provided a more academic explanation as to why the law should be interpreted that way:

> "The definition of 'contractual relationship' was added to CERCLA at the same time as the innocent-landowner defense. Indeed, it was through the definition that Congress added the innocent-landowner defense. 'Congress intended the [innocent-landowner] defense to be

[36] The Court noted that Congress intended the definition of "contractual relationship" to be broadly construed (referring to the "including, but not limited to" language and the "catch-all" language). "Indeed, those clauses, when read in light of the specific examples listed in the statute, suggested that Congress intended to capture any instrument reflecting a voluntary transaction resulting in a change of ownership or possession." *Id*. (emphasis in original). It then noted that the exceptions in CERCLA § 101(35)(A)(ii)—acquisition by a government entity through escheat or through any other involuntary transfer or acquisition—mean that these involuntary transfers would otherwise be included within the definition of "contractual relationship." *Id*. "Applying that reasoning, even involuntary transfers can be transfers of title or possession within the meaning of the statute, and a 'contractual relationship' can form even when property is transferred without the consent of both parties." *Id.*

very narrowly applicable, for fear that it might be subject to abuse.' *Carson Harbor Vill.*, 270 F.3d at 883. A typical—that is, non-tax-sale—private purchaser who buys property contaminated by a previous owner or possessor is entitled to the innocent-landowner defense only if the purchaser bought the property without actual or constructive knowledge of contamination. 42 U.S.C. § 9601(35)(A)(i). That is, the purchaser must be 'truly "innocent."' *PCS Nitrogen Inc. v. Ashley II of Charleston LLC*, 714 F.3d 161, 185 (4th Cir. 2013). But under Defendant's reading of the statute, a private purchaser of tax-defaulted property contaminated by a previous owner or possessor—who, if anything, should be more wary of preexisting contamination than a typical land purchaser—need not be 'innocent' or unaware of the contamination to be relieved of liability. Defendant's reading thus creates, in effect, a loophole that frustrates the defense's purpose. To be sure, Congress often includes exceptions in statutes that serve to undermine broader statutory purposes; that is the natural result of a legislative process that involves compromise and difficult-to-reconcile policy preferences. When Congress does so, though, it tends to speak clearly. *See James v. City of Costa Mesa*, 700 F.3d 394, 403 (9th Cir. 2012) ('Congress could not have intended to create such a capacious loophole, especially through such an ambiguous provision.'). It did not do so here. On the contrary, the breadth of the definition of 'contractual relationship' implies that the Congress that enacted [the 1986 amendments to CERCLA] intended the innocent-landowner defense to be the sole defense available to private purchasers of land contaminated by previous owners.

"Relatedly, we note that Defendant's reading of the statute would lead to anomalous results. For example, consider the situation of a prospective purchaser who learns that there are tax liens on a contaminated property that he or she is interested in buying. Under Defendant's view, the buyer is better off waiting until the owner defaults on the tax liens and the property goes through the tax-sale procedure than buying the property from the owner and risking CERCLA liability or complying with the many requirements of the bona fide prospective purchaser defense: once the property has gone through the tax-sale procedure, the CERCLA liability is 'scraped off' and the buyer is not responsible for clean-up costs. Defendant can point

> to nothing in the statute suggesting that Congress intended to give such an enormous advantage to private tax-sale purchasers. As the EPA stated, 'there is no authority anywhere in CERCLA that would support the '"laundering" of liability' through a mechanism such as a tax sale. 57 Fed. Reg. at 18,372–73.

888 F.3d at 1097-98.

Thus, in addition to avoiding the need to ascertain, on a state-by-state basis, whether state law regards acquisition of a parcel via a tax sale as a "land contract[], deed[] or other instrument[] transferring title or possession" in order to evaluate whether the contractual relationship survives, the 9th Circuit's view prevents the unintended consequence of creating a new immunity to liability under what is generally regarded as a limited defense.

EPA contends that placing reliance on a subsequently decided Federal appeals court's interpretation of a Federal statute over a previously decided Federal trial court's interpretation of that statute is reasonable and appropriate. EPA additionally contends that the appeals court's analysis of the applicability of State law in cases involving the interpretation of a Federal statute makes better sense because it results in national consistency and, in the absence of statutory language acknowledging that State law controls, more clearly fulfills Congressional intent.

**C. "Turog has argued that the requirements of the Innocent Landowner Defense were satisfied because, prior to taking title to the Site, it believed that the contamination (i.e., release of hazardous substances) at the Site had been cleaned-up. The parties are asked to address the legal standard under CERCLA with regard to due diligence and the Innocent Landowner Defense. The parties are requested to cite applicable caselaw and to address specifically the following decision: *American National Bank and Trust Co. of Chicago v. Harcros Chemicals, Inc*., 1997 WL 281295 (N.D. Ill, 1997)."**

CERCLA's innocent landowner defense is set out in CERCLA §§ 107(b)(3) (third-party defense) and 101(35)(A) (definition of contractual relationship). The statute says that a person who is otherwise described in CERCLA § 107(a) (describing the four liability categories) shall not be liable if that person can establish, by a preponderance of the evidence, that the release or threat of release of a hazardous substance and the damages caused therefrom were caused solely by "an act or omission of a third party other than . . . one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant." CERCLA § 107(b)(3) (emphasis added). Thus, if the contractual relationship exists, the defense does not apply. Turog argues that the contractual relationship does not exist in this case.

The term "contractual relationship" is defined at CERCLA § 101(35)(A). The term "includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession" unless acquisition occurred after

the disposal of hazardous substances and one or more of three circumstances is also established by the defendant by a preponderance of the evidence. For purposes of this proceeding the undersigned has broken the "contractual relationship" issue into two parts—(1) whether a contractual relationship can exist (*i.e.*, whether there was a "land contract[ ], deed[ ], easement[ ], lease[ ], or other instrument[ ] transferring title or possession within the meaning of CERCLA § 101(35)(A)); and (2) whether one or more of the three exceptions to "contractual relationship" status exists.

EPA has previously addressed the issue whether a contractual relationship can exist in this case and contends that it has a reasonable basis to believe that it does. *See* Sections III.F.1 and V.B of this brief.

Turog has argued that one of the three exceptions to the definition of contractual relationship exists—"[a]t 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."[37] If, at the time of acquisition, Turog "did not know and had no reason

[37] The other two circumstances are:

> "(ii) The defendant is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; and
>
> "(iii) The defendant acquired the facility by inheritance or bequest."

CERCLA § 101(35)(A)(ii) and (iii).

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," then a contractual relationship does not exist and the defense is not disabled by this factor.[38] Alternatively, if at the time Turog acquired the facility it "knew or had reason to know that a hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility" then a "contractual relationship" exists and the defense is disabled. The issue here is what one needs to prove in order to demonstrate that he/she "did not know and had no reason to know" within the meaning of CERCLA § 101(35)(A)(i).

Citing no law or other source of authority, Turog argued that it "did not know and had no reason to know" because prior to acquisition it allegedly received assurances that EPA's 1994-1995 response action cleaned up the Property,

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[38] But Turog must also meet the following statutory requirements set forth at CERCLA § 101(35)(A):

> "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 persons 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."

CERCLA § 101(35)(A).

eliminating all hazardous substances that may have been there. *Docket 5, Exhibit 3, at PDF 2; Docket 30, at 4*. EPA argued that, in addition to being incorrect about the total elimination of potentially dangerous hazardous substances at the Property, Turog misread the plain meaning of the knowledge requirement. EPA asserted in its responsive brief:

> "[ ] Turog appears to misconstrue the knowledge requirement of the Innocent Landowner Defense. The statute does not say that a landowner raising the defense must have no actual or constructive knowledge of contamination *present on the property at the time of acquisition*, but rather that "[a]t 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."
> 42 U.S.C. § 9601(35)(A)(i). Stated another way, if Turog knew or should have known that a hazardous substance was disposed of at the property *at any time in the past* it cannot carry its burden under this factor. That Turog believed the property was free of contamination as a result of EPA's cleanup efforts is not relevant."

*Docket 31, at 20-21*. In support, EPA cited *American National Bank and Trust Co. of Chicago as Trustee for Illinois Land Trust No. 120658-01 v. Harcros Chemicals, Inc.*, No. 95 C 3750, 1997 WL 281295, at *14 (N.D. Ill. May 20, 1997) (CERCLA does not provide an exception for one who knows that contamination existed on the property, but believes it has been cleaned up).

In *Harcros*, Plaintiffs (then-current owners of a property that formerly hosted a number of chemical operations) sued entities that formerly operated and

purportedly contaminated the property under CERCLA §§ 107 and 113 for environmental response costs incurred in the past and to be incurred in the future.[39] The Defendants filed counterclaims against the Plaintiffs and motions for summary judgment were filed by both sets of parties. At some point between 1968-69, former owner Commerce Industrial Chemicals, Inc. ("Commerce") had installed 67 underground storage tanks ("USTs") on the property which were used by, among other entities, the Defendants for the storage of chemicals that were CERCLA hazardous substances. In 1969, Commerce sold the property to an individual who directed Commerce to place the land into a trust. The USTs installed by Commerce fell into disrepair and ultimately leaked. In 1987, defendant Harcros Chemicals Inc. (who operated at the property under a lease between 1981 and 1994) hired an environmental contractor to clean up the property. Harcros notified the Illinois Environmental Protection Agency ("IEPA") of the cleanup project and IEPA recommended cleanup levels. Harcros's contractor removed the USTs and over 20,000 cubic yards of contaminated material. In 1990, Harcros's contractor acknowledged that contamination was still present at the property. Defendant T–H

[39] Plaintiffs Atwater Capital Group, Inc.; Lancelot Equities, Inc.; and American National Bank sued T–H Agriculture & Nutrition Company, Inc.; Harcros Chemicals, Inc.; and Willis Hart for cost recovery under CERCLA § 107(a); contribution under CERCLA § 113(f); environmental contractual indemnity and damage to improvements under the lease provisions, waste; and declaratory relief.

Agriculture & Nutrition Company, Inc. ("THAN"), who stored chemicals in the USTs prior to Harcros, agreed to pay Harcros 50% of the $8 million expended by Harcros for the cleanup but hired its own consultant to evaluate Harcros's work. That consultant concluded that Harcros's work was deficient because, among other things, the property was insufficiently characterized and the cleanup failed to meet IEPA-recommended cleanup levels in several locations. In 1994, the beneficiaries of the trust began discussing a sale of the property with Plaintiff Atwater Capital ("Atwater"), an entity with experience in developing Brownfields sites. Johnine Brown, counsel for the beneficial owners of the property, advised Atwater of her environmental concerns regarding the property. On November 8, 1994, Harcros's counsel sent Ms. Brown a letter detailing the cleanup and Harcros's position that (1) any remaining contamination at the site was not the result of its operations but rather those of entities operating there prior to 1969, (2) the site was in much better condition than it was at the beginning of the Harcros lease, and (3) it believed its cleanup satisfied IEPA. Atwater saw this letter and claimed its concerns were put at ease. After Atwater acquired the property it confirmed that contamination was in fact present. In March 1995, IEPA announced that contamination exceeded IEP standards and that further actions were needed.

In evaluating Plaintiff's innocent landowner claim, the Court wrote:

> "There is no question that plaintiffs knew there had been a "disposal" of hazardous substances before they purchased the Site. In early November 1994, Ms. Brown, the attorney for the owners of the Site, informed [Atwater] that she had concerns regarding the environmental condition of the Site and made available a number of documents relating to the Site's environmental condition. At that time, [Atwater] had the opportunity to review the [Harcros contractor] report, which summarized the UST removal and remediation project conducted on the Site. The report specifically stated that contaminated soil had been encountered. In fact, [an Atwater representative] testified he had concerns about the environmental condition of the Site based upon his review of the [contractor] report.
>
> "Plaintiffs' knowledge of contamination on the Site at one time forecloses their use of the innocent landowner defense. Plaintiffs argue, however, that at the time they purchased the Site, they believed all contamination had been remediated to the satisfaction of the IEPA based on the November 8, 1994 letter from [Harcros's counsel] to Ms. Brown. Thus, plaintiffs argue they are entitled to the defense because they had no reason to know that there was any remaining contamination at the Site. Plaintiffs add that this letter dispelled any possible suspicions relating to the environmental condition of the Site that could have been drawn from the documents."

*Harcros*, at 13-14. The Court rejected this argument, stating that "[CERCLA] does not provide an exception for one who knows that contamination existed on the property, but believes it has been cleaned up." *Id*., at 14. The Court cited to no caselaw or other authority supporting this interpretation.

EPA contends that it has a reasonable basis to believe that Turog knew or should have known that hazardous substances were disposed of at the Property using

the *Harcros* knowledge standard for the reasons that follow.

1. A Court Has Spoken on the Issue and No Contrary Decision Has Been Issued. Though not binding in this jurisdiction, the *Harcros* decision interpreted CERCLA § 101(35)(A) to say that a purchaser's belief that a property is clean because of a cleanup prior to acquisition does not satisfy the knowledge standard. This decision has not been contradicted by any other court, and this interpretation has been reached by at least one other court (*City of Bangor vs. Citizens Communication Company, et al.*, 2004 WL 483201 (D. Me 2004), at 8 (argument that state had certified the clean-up of the subject area bears little resemblance to the statutory test, which concerns a purchaser's knowledge of the past disposal of hazardous substances at the facility)).

2. The Facts of Harcros and the Present Facts Are Similar. In *Harcros*, the current owner of the subject property had reviewed documents describing contamination at the property and the efforts made to address that contamination but argued that it satisfied the knowledge standard because it was led to believe that the property had been cleaned up. The same is true in the present matter—Turog indisputably knew that the Property had been contaminated through the disposal of hazardous substances but argues that it was told the contamination was remediated.

3. The Text of the Statute is Unambiguous and Its Plain Meaning Supports EPA's Interpretation. The Third Circuit has previously posited its opinion on statutory construction in an environmental matter involving CERCLA. In *U.S. vs. E. I. DuPont de Nemours and Company Inc.*, 432 F.3d 161 (3d Cir. 2005), the Court wrote:

> "The starting point is the language of the statute. If the meaning of the text is clear, "there is no need to ... consult the purpose of CERCLA at all." *Cooper Indus., Inc. v. Aviall Services, Inc*., 543 U.S. 157, 125 S.Ct. 577, 584, 160 L.Ed.2d 548 (2004); see id. ("As we have said: '[I]t is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.' ") (quoting *Oncale v. Sundowner Offshore Servs., Inc*., 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998)). We note at the outset, however, that "CERCLA is not ... 'a model of legislative draftsmanship'." *United States v. Gen. Battery Corp*., 423 F.3d 294, 298 (3d Cir.2005) (quoting *Exxon Corp. v. Hunt*, 475 U.S. 355, 363, 106 S.Ct. 1103, 89 L.Ed.2d 364 (1986)). Where a statute's text is ambiguous, relevant legislative history, along with consideration of the statutory objectives, can be useful in illuminating its meaning. *Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600, 124 S.Ct. 1236, 157 L.Ed.2d 1094 (2004) (examining "the text, structure, purpose and history" of the relevant statute).

*Id.*, at 169. The language at issue is this:

> "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."

CERCLA § 101(35)(A)(i). EPA contends that this language is clear, unambiguous, and easily applied. Hazardous substances had been disposed

of at the Property prior to Turog's acquisition and Turog was aware of this. Even if the hazardous substances had been completely cleaned up (which had not happened) the prior disposal would not "disappear" as if there had been no disposal at all. Had Congress intended this to be the case it would have used different language—*e.g.*, "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 present on, in, or at the facility*"). Congress did not use language suggesting that the knowledge standard should look solely to the condition of the property at the time of acquisition and/or take into account prior cleanup activity. The language is clear (and thus no consideration of the purposes of the statute need be given under *DuPont*) and unambiguous (and thus no consideration of legislative history or statutory purpose need be given under *DuPont*). EPA contends that its reliance on the plain meaning of the statutory language is reasonable.

4. EPA's Interpretation is Consistent With Other Language in the Statute. Congress shed some light on this issue when it chose language addressing what "reason to know" means. CERCLA § 101(35)(B) provides in relevant part:

> "To establish that the defendant had no reason to know of the matter described in subparagraph (A)(i), the defendant must demonstrate to a

court that—

> "(I) on or before the date on which the defendant acquired the facility, the defendant carried out all appropriate inquiries, as provided in clauses (ii) and (iv), into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices."

Further, in CERCLA § 101(35)(B)(ii), Congress directed the Administrator of EPA to establish standards and practices for conducting "all appropriate inquiries."[40] Congress provided guidance regarding the content of these regulations. CERCLA § 101(35)(b)(iii) provides:

> "Criteria. — In promulgating regulations that establish the standards and practices referred to in clause (ii), the Administrator shall include each of the following:
>
> (I) The results of an inquiry by an environmental professional.
>
> (II) Interviews with past and present owners, operators, and occupants of the facility for the purpose of gathering information regarding the potential for contamination at the facility.
>
> (III) Reviews of historical sources, such as chain of title documents, aerial photographs, building department records, and land use records, to determine previous uses and occupancies of the real property since the property was first developed.

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[40] That section provides:

> "Standards and practices.—
>
> "Not later than 2 years after January 11, 2002, the Administrator shall by regulation establish standards and practices for the purpose of satisfying the requirement to carry out all appropriate inquiries under clause (i)."

(IV) Searches for recorded environmental cleanup liens against the facility that are filed under Federal, State, or local law.

(V) Reviews of Federal, State, and local government records, waste disposal records, underground storage tank records, and hazardous waste handling, generation, treatment, disposal, and spill records, concerning contamination at or near the facility.

(VI) Visual inspections of the facility and of adjoining properties.

(VII) Specialized knowledge or experience on the part of the defendant.

(VIII) The relationship of the purchase price to the value of the property, if the property was not contaminated.

(IX) Commonly known or reasonably ascertainable information about the property.

(X) The degree of obviousness of the presence or likely presence of contamination at the property, and the ability to detect the contamination by appropriate investigation."

EPA contends that if Congress intended to limit the knowledge standard to the condition of the property at the time of acquisition it would have specifically included cleanup actions in this list. Further, by expressly including IV (a search for recorded environmental cleanup liens under Federal or State law) and *not* expressly including a search for documentation of clean up actions performed at a property, Congress arguably telegraphed its intention that cleanup actions are not relevant to the inquiry.

**D. "Turog indicated on page 4 of its letter brief of August 17, 2020 that 300 N. Broad Street, Ltd. signed and entered into an agreement with the Pennsylvania Department of Environmental Protection (PADEP) to participate in the Department's Brownfields program with regard to the Site. Turog is requested to provide more information concerning this agreement and to attach to its Post-Hearing Brief any documents entered into between Turog and PADEP, and any other documents addressing the existence and scope of such an agreement."**

In its request for a hearing, Turog stated that "[a]fter our purchase of the Site, we entered into a settlement and release agreement with the PADEP for their testing and future remediation of the Site wherein PADEP represented to us that it was in a partnership with the EPA for all such work to be done by them at the subject Site." *Docket 5, Exhibit 3, at PDF 3*. EPA responded as follows:

> "EPA assumes that Turog claims that it is protected from liability by such alleged settlement with PADEP. EPA has not seen or reviewed such settlement and contends that any alleged settlement between Turog and the Commonwealth of Pennsylvania regarding Turog's potential liability for environmental cleanup costs or work would not be binding on the United States, including EPA. EPA is willing to review said settlement but at present contends that this fact is not relevant."

*Docket 5, at 43-44*. Turog again mentioned that this issue in its August 17, 2020 brief (*Docket 30*).

> "After receiving its 1999 Tax Claim Bureau deed (the deed, from its having been the successful bidder for the property at the 1998 Upset Sale), 300 N. Broad Street, Ltd., participated in the 'Brownfields' program.

> "In particular, 300 N. Broad Street, Ltd., entered into a settlement and release agreement with the Pennsylvania Department of Environmental Protection (PADEP). Under that agreement, 300 N. Broad Street, Ltd., and PADEP provided for PADEP to do testing and future remediation of the site. In connection with making that Brownfields agreement, PADEP represented to 300 N. Broad Street, Ltd., that PADEP was in partnership with the EPA for all such work to be done by PADEP at the property.

*Docket 30, at 4*.

Subject to certain exceptions which may apply here, CERCLA § 128(b) contains an "enforcement bar" which limits EPA enforcement actions under CERCLA §§ 106(a) and 107(a) at "eligible response sites" that are addressed in compliance with state response programs that specifically govern cleanups to protect human health and the environment.[41] It is unclear from Turog's representations

[41] That section provides:

"(b) Enforcement in cases of a release subject to State program

(1) Enforcement

(A) In general

Except as provided in subparagraph (B) and subject to subparagraph (C), in the case of an eligible response site at which—

(i) there is a release or threatened release of a hazardous substance, pollutant, or contaminant; and

(ii) a person is conducting or has completed a response action regarding the specific release that is addressed by the response action that is in compliance with the State program that specifically governs response actions for the protection of public health and the environment,

whether it entered into an agreement with the Commonwealth of Pennsylvania triggering the "enforcement bar," and Turog has not argued that it did. Further, Turog has not argued that EPA is prohibited by CERCLA § 128 from bringing a cost

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> the President may not use authority under this chapter to take an administrative or judicial enforcement action under section 9606(a) of this title or to take a judicial enforcement action to recover response costs under section 9607(a) of this title against the person regarding the specific release that is addressed by the response action.
>
> (B) Exceptions
>
> The President may bring an administrative or judicial enforcement action under this chapter during or after completion of a response action described in subparagraph (A) with respect to a release or threatened release at an eligible response site described in that subparagraph if—
>
> (i) the State requests that the President provide assistance in the performance of a response action;
>
> (ii) the Administrator determines that contamination has migrated or will migrate across a State line, resulting in the need for further response action to protect human health or the environment, or the President determines that contamination has migrated or is likely to migrate onto property subject to the jurisdiction, custody, or control of a department, agency, or instrumentality of the United States and may impact the authorized purposes of the Federal property;
>
> (iii) after taking into consideration the response activities already taken, the Administrator determines that—
>
> (I) a release or threatened release may present an imminent and substantial endangerment to public health or welfare or the environment; and
> (II) additional response actions are likely to be necessary to address, prevent, limit, or mitigate the release or threatened release; or
>
> (iv) the Administrator, after consultation with the State, determines that information, that on the earlier of the date on which cleanup was approved or completed, was not known by the State, as recorded in documents prepared or relied on in selecting or conducting the cleanup, has been discovered regarding the contamination or conditions at a facility such that the contamination or conditions at the facility present a threat requiring further remediation to protect public health or welfare or the environment. Consultation with the State shall not limit the ability of the Administrator to make this determination."

recovery action against it or that this provision somehow impacts the appropriateness of perfecting the CERCLA § 107(l) lien. Turog was made aware that this argument was available in EPA's Rebuttal Brief (*Docket 5, at 43-44*) but did not advance it. Turog was made aware, in EPA's Rebuttal Brief, that EPA had no knowledge of, and did not possess, any agreement between Turog and Pennsylvania but that EPA would be willing to review it (*id*.); Turog did not produce it to EPA but rather further characterized it in its brief. *Docket 30, at 4*. The RJO has directed Turog to produce such agreement but has barred further briefing in this matter absent leave of the RJO upon prior written request. *Docket 42*. EPA respectfully requests that, it the RJO makes any finding or determination adverse to EPA's interests in this matter based in whole or in part on this alleged agreement between Turog and Pennsylvania, EPA be given an opportunity to comment on such finding or determination prior to the time the RJO finalizes his recommendations to the Regional Counsel.

## V. Conclusions

For the reasons stated above, EPA contends that that:

1. The lien on Turog's property at the Chem Fab Site arose by operation of law pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l);

2. EPA has a reasonable basis to believe that Turog is a party described in Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as the owner of the Property upon which a release or threatened release of hazardous substances occurred;

3. EPA has a reasonable basis to believe that the land upon which EPA seeks to perfect a lien was subject to or affected by removal action;

4. EPA has a reasonable basis to believe that it expended response costs at this property;

5. EPA has a reasonable basis to believe that it provided Turog with written notice of its potential liability in connection with the Chem Fab Site via certified mail;

6. EPA has a reasonable basis to believe that Turog cannot carry its burden of proving, by a preponderance of the evidence, that it is protected from liability by the innocent landowner defense in CERCLA §§ 107(b)(3) and 101(35)(A) of CERCLA because:

a. Turog had a "contractual relationship" with the alleged prior owner polluter;

b. Turog had reason to know, before it acquired the Property, that hazardous substances had been disposed of at the Property;

c. Turog failed to "exercise due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to timely respond to EPA's request for entry, and failed to timely notify EPA of its objections to EPA's entry request, in connection with EPA's request for access to perform a sub-slab investigation on Turog's property to evaluate threats to Turog's tenants;

d. Turog failed to "exercise due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA to protect its tenants;

e. Turog failed to provide "full cooperation, assistance, and facility access" because it failed to diligently respond to EPA's request for access to perform a sub-slab investigation to evaluate threats to Turog's tenants;

f. Turog failed to provide "full cooperation, assistance, and facility access" because it failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA to protect its tenants; and

g. Turog failed to provide "full cooperation, assistance, and facility access" because it failed to comply with an EPA information request seeking

information on Turog's ability to pay for indoor air sampling necessary to protect its tenants.

7. Turog has not demonstrated that EPA lacks a reasonable basis to perfect a lien on the Property.

8. EPA has demonstrated that it has a reasonable basis to perfect the lien.

9. Perfection of the statutory lien is therefore appropriate.

Goldman, Andrew

Digitally signed by Goldman, Andrew
Date: 2021.07.09 13:08:04 -04'00'

Date

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[42] At present the undersigned continues to work from an alternative work location because of the COVID19 pandemic. In addition, in late Fall of 2021, EPA Region 3 will be moving its regional office to 4 Penn Center, 1600 John F. Kennedy Boulevard, Philadelphia, PA 19103. As such, the undersigned recommends that all future correspondence regarding this matter directed to EPA be transmitted via email.

# List of Exhibits

| No. | Description | |
|---|---|---|
| 01 | Letter from George M. Danyliw to David Wright, re: "Chem-Fab Site" (November 24, 1998). | As this brief is submitted electronically, the exhibits are contained in a separate PDF. |
| 02 | "Final Site Characterization Specification of Services" (Ogden Environmental and Energy Services Co., Inc. (April 1, 1999)). | |
| 03 | "Final Site Characterization Specification of Services" (Ogden Environmental and Energy Services Co., Inc. (July 12, 2000)). | |
| 04 | "Final Phase II Site Characterization Report Volume 1" (AMEC Earth & Environmental, Inc. (November 26, 2002)). | |
| 05 | "Final Phase II Site Characterization Report Addendum" (AMEC Earth & Environmental, Inc. (January 14, 2003)). | |
| 06 | "Final Engineering Evaluation Report" (AMEC Earth & Environmental, Inc. (May 2, 2003)). | |
| 07 | "Final Phase II Supplemental Groundwater Investigation" (AMEC Earth & Environmental, Inc. (February 27, 2004)). | |
| 08 | Hearing Transcript & Hearing Exhibits | |