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

In the Matter of:	:	
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Magnate, LLC	:	CERCLA LIEN PROCEEDING
Edinburg, Shenandoah County, Virginia	:	Docket No. CERCLA-03-2019-0120LL
	:	
	:	

RECOMMENDED DECISION

I. INTRODUCTION

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA or Agency) has a reasonable basis to perfect a lien pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain property that is owned by Magnate, LLC (Magnate) and located at or near Aileen Road in Edinburg, Shenandoah County, Virginia (Site).

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

By letter dated July 1, 2019, EPA notified Magnate of its intent to perfect a CERCLA Section 107(l) lien on the Site for costs incurred in connection with a removal action undertaken by the Agency. (Lien Hearing Administrative Record (LHAR) Exhibit 1). The letter also notified Magnate of its opportunity to request a meeting before a neutral EPA official to contest the perfection of the lien. (Id.) By email dated July 28, 2019, Magnate requested a meeting. (LHAR Exhibit 2 – Attachment 2 at 1).

On September 11, 2019, I was designated to serve as the neutral EPA official for purposes of this CERCLA Lien Proceeding.[1] (LHAR Exhibit 2 – Attachment 1).

This CERCLA lien proceeding has been conducted in accordance with the requirements of EPA's *Supplemental Guidance on Federal Superfund Liens,* OSWER Directive No. 9832.12-1a, issued July 29, 1993 (*Supplemental Guidance*). An Administrative Record (LHAR) for this proceeding has been compiled and an Index of the LHAR is attached to this Recommended Decision. (Appendix A). On December 12, 2019, a meeting was held by telephone conference call during which representatives of Magnate and EPA presented their arguments and positions concerning EPA's intention to perfect a CERCLA lien on the Site. The following persons participated in the December 2019 meeting:

- Joseph J. Lisa – Regional Judicial and Presiding Officer, EPA Region 3;
- Bradley G. Pollack, Esq. - Counsel for Magnate;
- Darryl Bates - Member Manager and authorized representative of Magnate;
- Andrew S. Goldman - Senior Assistant Regional Counsel, EPA Region 3's Office of Regional Counsel - Counsel for EPA;
- Maria Goodine - EPA Compliance Officer;
- Bevin Esposito - EPA Region 3 Regional Hearing Clerk (RHC); and
- Vicki Mengel - court reporter.

A transcript of the December 12, 2019 meeting was prepared, served on the parties, and added to the LHAR.[2] (LHAR Exhibit 17).

Having reviewed the LHAR and for the reasons discussed below, I find that EPA has a reasonable basis in law and fact to conclude that the statutory elements for perfecting a lien under CERCLA Section 107(l), 42 U.S.C. § 9607(l), have been satisfied with regard to the removal action performed by the Agency at the Site.

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[1] According to the *Supplemental Guidance*, the neutral EPA official selected to conduct a CERCLA lien hearing must be an Agency attorney who has not performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved. (*Supplemental Guidance* at 7). An EPA Regional Judicial and Presiding Officer can serve as the neutral. (Id.) I am an Agency attorney and currently serve as EPA Region 3's Regional Judicial and Presiding Officer. I have not performed any prosecutorial, investigative, or supervisory functions in connection with this case or the Site. The use of an RJO for purposes of a CERCLA lien hearing has been upheld by the federal courts. See, e.g., United States v. 150 Acres of Land, 204 F.3d 698, 710 (6th Cir. 2000). (See also Rule 22.4(b) of EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (CROP)*, 40 C.F.R. Part 22, concerning the impartiality and neutrality requirements for Regional Judicial and Presiding Officers. (40 C.F.R. § 22.4(b) and (c)).

[2] On January 8, 2020, EPA filed a letter brief with the RHC identifying errors in the transcript and proposing corrections for those errors. (LHAR Exhibit 19). By email dated January 16, 2020, I notified the parties that I also had identified an error in the transcript. (LHAR Exhibit 20). More specifically, I noted that that the answer to a question I asked at the meeting (Question – Transcript 38:10-25; Answer 39:1-4) should have been attributed to Mr. Bates, but incorrectly was attributed to Mr. Goldman, counsel for EPA. (Id.). By email dated January 21, 2020, Magnate agreed that the aforementioned answer should have been attributed to Mr. Bates (on behalf of Magnate). (LHAR Exhibit 21). Additionally, Magnate accepted all of the errors and proposed corrections identified by EPA. (Id.). Therefore, I amend the official transcript for this proceeding to incorporate the errors and corrections identified by EPA in its January 8, 2020 letter brief and in my email of January 16, 2020.

II. DUE PROCESS REQUIREMENTS

During this lien proceeding, Magnate has asserted that it has been denied due process by EPA. (See e.g., LHAR Exhibit 10 at 6; LHAR Exhibit 2 – Attachment 2 at 4; and Transcript 21:2-16). As previously noted, for purposes of this CERCLA lien proceeding, EPA has utilized the procedures set forth in the *Supplemental Guidance*; procedures that are utilized by the Agency in connection with all CERCLA lien hearings.

The procedures set forth in the *Supplemental Guidance* were implemented by the Agency after the issuance of the federal court decision, Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991). In Reardon, the U.S. Court of Appeals for the First Circuit held that, when EPA seeks to place a lien on property pursuant to CERCLA Section 107(l), due process considerations, at a minimum, require that the property owner be provided notice of the Agency's intent to file (i.e., perfect) a lien and an opportunity for a hearing to challenge the perfection. 947 F.2d at 1522-1524. The *Supplemental Guidance* instituted these due process standards by requiring that EPA provide notice to property owners, who are potentially responsible parties (PRPs) under CERCLA, that the Agency intends to perfect a lien on their property prior to the filing of papers to perfect the lien. (*Supplemental Guidance* at 1). Additionally, EPA is required to give such property owners the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both. (Id.).[3]

The record of this case indicates that the Agency has complied with the requirements of the *Supplemental Guidance* and that Magnate has been provided due process in connection with this proceeding. By letter dated July 1, 2019, EPA provided notice to Magnate of the Agency's intention to perfect a CERCLA lien on the Site and informed Magnate of its ability to request a hearing before a neutral EPA official. A meeting was held before a neutral EPA official on December 12, 2019 during which Magnate presented its arguments and evidence in support of its position that a CERCLA lien should not be perfected on the Site. This Recommended Decision has been issued after a careful review of and is based upon the evidence contained in the LHAR of this proceeding.

III. STANDARD OF REVIEW AND FACTORS TO BE CONSIDERED

For purposes of issuing a Recommended Decision and determining whether EPA has a reasonable basis in law and fact to conclude that the statutory requirements under CERCLA Section 107(l) for perfecting a lien have been satisfied, a neutral EPA official is required under the *Supplemental Guidance* to consider the following five (5) factors:

1) *Notice* - Was the property owner sent by certified mail notice of potential liability;

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[3] The *Supplemental Guidance* requires that the "neutral official should conduct the meeting as an informal exchange of information, not bound by judicial or administrative rules of evidence" and must ensure that a record of the meeting is made and that the record be included as part of the administrative record of the matter (*Supplemental Guidance* at 8).

2) *Potentially Liable Party* - Is the property owned by a person who is potentially liable under CERCLA;

3) *Removal/Remedial Action* - Is the property subject to or has the property been affected by a removal or remedial action;

4) *Response Costs Incurred* - Has the United States incurred costs with respect to a response action under CERCLA; and

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

(*Supplemental Guidance* at 7). Additionally, the *Supplemental Guidance* requires that an EPA neutral must "consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record." (Id. at 8).

IV. FACTUAL BACKGROUND

The following discussion of the factual background of this matter is based upon the materials in the LHAR.

The Site is located off of Aileen Road in Edinburg, Shenandoah County, Virginia. (LHAR Exhibit 3 - Attachments 1 and 2). Magnate, LLC is registered as a limited liability company with the Commonwealth of Virginia. Magnate acquired legal title to the Site as part of two transactions that occurred in September 2007 and March 2009. (Id.). Subsequent to its purchase, Magnate sub-divided the Site into six (6) parcels. (LHAR Exhibit 3 - Attachment 3). According to Magnate, the previous owners of the Site "left the property in very good environmental condition." (LHAR Exhibit 4 – Attachment 11 at 3).

In early 2011, Magnate decided to demolish a "large low ceiling building (approximately 100,000 s.f)" and a "building with Tectum roof panels & asbestos floor tiles" in order to make room for a new tenant at the Site. (LHAR Exhibit 4 – Attachment 11 at 4; and Transcript – 31:1-3; 32:8-13; and 33:2-4). In February and March of 2011, an inspector with Virginia Department of Labor and Industry (VADOL) visited the Site "in response to concerns that asbestos material was being improperly scrapped from the facility." (LHAR Exhibit 4 – Attachment 8 at 1). The inspector "discovered asbestos-containing material (ACM) debris, including pipe insulation and floor tile that were not in compliance with state and federal regulations." (Id.). In order for the demolition to proceed forward, Magnate needed to address the findings of VADOL and have an asbestos abatement action performed at the Site. (LHAR Exhibit 4 – Attachment 11 at 4)

Magnate retained the services of an asbestos abatement contractor, Winchester Environmental Consultants, Inc. (WECI). (Id.). WECI identified large piles of damaged asbestos floor tile and pipe insulation, and asbestos-containing debris at various locations throughout the Site. (LHAR Exhibit 4 – Attachment 8 at 1-2). At the completion of WECI's abatement in September of 2011, approximately 40,000 cubic feet of asbestos-containing debris had been removed from the Site for disposal. (Id.). In its final report, WECI noted that a significant amount of asbestos material remained at the Site.

1. There remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and material found in the facility that were not tested by WECI in their inspection report dated 3/25/11 will need to be tested by a VA licensed asbestos inspector prior to any work that may disturb it.
2. The basement of the facility (under section 3, refer to attached map) still contains small amounts of damaged asbestos material mixed in with the significant amount of debris in the area. Due to flooding, and current disuse of the area along with budget concerns this area was not abated. However, poly barriers and signage were posted to prohibit access to this area. These barriers should remain in place until the area can be properly abated.

(Id. at 2).

Magnate was then issued a permit from Virginia state and county governmental authorities to demolish the buildings on the Site. (LHAR Exhibit 4 – Attachment 11 at 4). Debris from the demolition of the buildings was placed into piles on the Site. (Transcript 33:5-15). An inspector with VADOL then toured the Site and discovered evidence of "friable asbestos pipe wrap" on the property. (LHAR Exhibit 4 – Attachment 11 at 5). Mr. Bates of Magnate then began to look for the "least expensive way to remove [the] debris (consisting mostly of Tectum roofing panels)" from the property. (Id.).

In 2015, the Virginia Department of Environmental Quality (VADEQ) and VADOL jointly requested that EPA Region 3 "conduct an ACM investigation of debris piles [at the Site] resulting from the demolition of a former warehouse building." (LHAR Exhibit 3 – Attachment 11 at 4). In February of 2016, representatives of EPA conducted an initial walkthrough of the Site. At that time, the Site consisted of a facility with numerous buildings (some in dilapidated or partially demolished states), a fuel oil aboveground storage tank (AST), other ASTs and multiple debris piles. (LHAR Exhibit 3 – Attachment 8 at 1). The EPA representatives observed, among other things, suspect asbestos-containing material in more than a dozen debris piles around the Site. (LHAR Exhibit 4 – Attachment 9 at 1).

In May of 2016, an EPA On-Scene Coordinator (OSC) conducted an initial removal assessment of the Site and found that the conditions on the property presented, among other things: "actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances

or pollutants or contaminants"; "high levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate"; and "conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released." (LHAR Exhibit 3 – Attachment 8 at 16). In November of 2016, EPA conducted sampling at the Site. (LHAR Exhibit 3 – Attachment 7 at 12). The sampling activities revealed the presence of hazardous substances (polychlorinated biphenyls (PCBs) and friable asbestos) at the following locations:

> Debris Pile 3 – located sixty feet east of a brick office building on the Site and adjacent to a toilet storage area. Debris pile was found by EPA to included multiple types of roofing material, wood, red floor tile, mastic, pipe wrap, pipe insulation, PVC pipe and trash. Analytical results indicated friable asbestos in the pipe insulation. (Id.)
>
> Area 5 – located along the north side of Site and adjacent to Pile 5. EPA found damaged asbestos containing pipe insulation wrapped in plastic in the area. Sampling revealed friable asbestos (concentration 40% amosite and 10% chrysotile). (Id.)

The OSC determined that the asbestos in Debris Pile 3 and Area 5 was potentially subject to migration either due to weather conditions or actions of trespassers. The OSC observed that the Site was not gated, locked or otherwise monitored or controlled. (Id. at 13-14).

> Area 10 – consists of a basement area and underground tunnel. Two piles of insulation and approximately ten (10) trash bags of insulation were discovered by the OSC in the basement in May of 2016. Several holes were observed in the ceiling of the basement directly above the piles and trash bags of insulation. Sampling of sediment and water in the basement revealed PCBs in the sediment and water, and friable asbestos in the water in the basement area. (Id. at 13).

The OSC noted that the basement area in Area 10 was subject to flooding likely due to a degraded roof on the building, underground conveyances (tunnels) and open portholes. Water in the basement area was observed to recede indicating that it could be spreading PCB and asbestos contamination throughout the Site. (Id. at 13-14).

By letter dated February 13, 2018, EPA notified Magnate of its potential liability under CERCLA for the clean-up of hazardous substances at the Site and provided Magnate the opportunity to enter into an Administrative Settlement Agreement and Order on Consent for Removal Action and perform the response action subject to EPA oversight. (LHAR Exhibit 3 – Attachments 10-12).[4] Magnate declined the opportunity to enter into the agreement.

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[4] The Notice of Potential Liability originally was sent by EPA to Magnate on February 13, 2018 via Overnight Mail. EPA re-transmitted the Notice to Magnate via certified mail, return receipt requested on June 5, 2019. (LHAR Exhibit 3 - Attachment 11).

On May 31, 2018, the Director of the Hazardous Site Cleanup Division, EPA Region 3, determined that there had been a "release or threatened release of hazardous substances at and/or from the Site" and that the conditions at the Site presented or could present "an imminent and substantial endangerment to the public health or welfare or to the environment." (LHAR Exhibit 3 – Attachment 6 at 11). Based upon these findings, the Director approved the implementation of a removal action to address friable asbestos and PCBs on the Site in Areas 5 and 10, and Debris Pile 3. (LHAR Exhibit 3 – Attachment 6 at 6-8).

Between April and June of 2018, EPA and Magnate engaged in discussions concerning EPA's access to the Site to implement the selected removal action. (LHAR Exhibit 4 at 5). On Oct 11, 2018, the U.S. Department of Justice, on behalf of EPA, filed a complaint in the U.S. District Court for the Western District of Virginia seeking access to the Site. (LHAR Exhibit 3 – Attachment 17). On February 12, 2019, Magnate and the U.S. reach a settlement under which the company agreed to provide EPA with access to the Site. The settlement was approved by the District Court as part of a Stipulation and Order. (LHAR Exhibit 3 – Attachment 18).

Between February and May of 2019, EPA undertook the clean-up of hazardous substances at the Site, including, removing: six drums containing spent carbon, one drum containing PCBs and 379.94 cubic yards of debris containing friable asbestos. (LHAR Exhibit 4 at 6). As of May 23, 2019, EPA had incurred $381,252.66 in response costs in connection with the performance of the removal action at the Site. (LHAR Exhibit 3 – Attachment 9).

By letter dated July 1, 2019, EPA provided notice to Magnate of the Agency's intention to perfect a CERCLA lien on the Site for the aforementioned response costs. Although EPA conducted response actions on all six parcels of the Site (e.g., assessment work to determine the presence of hazardous substances on each of the parcels), EPA elected to seek to perfect the CERCLA lien solely on Parcel Nos. 071 01 001B and 071 01 001G, the two parcels containing the hazardous substances removed from the Site during the removal action.

Map Number	Subject to Lien Proceeding
071 01 001	No
071 01 001B	Yes
071 01 001D	No
071 01 001E	No
071 01 001F	No
071 01 001G	Yes

(LHAR Exhibit 4 at 6 and n.5).

V. ANALYSIS OF *SUPPLEMENTAL GUIDANCE* FACTORS

A. Notice of Potential Liability

Magnate does not dispute and the record is clear that EPA provided Magnate with notice of its potential liability under CERCLA. (Transcript at 9:25-10:6; and LHAR Exhibit 3 – Attachment 11). More specifically, on February 13, 2018, EPA via overnight mail notified Magnate of its potential liability under CERCLA Section 107(a), 42 U.S.C. § 9607(a), with regard to the Site. (LHAR Exhibit 3 – Attachment 10). For statutory consistency purposes, on June 5, 2019, EPA re-transmitted the notice of potential liability to Magnate by sending it certified mail to the attention of Mr. Darryl Bates, Managing Member of Magnate. (LHAR Exhibit 3 – Attachment 11). According to the signed return receipt (i.e., green card), the notice was received by Magnate on June 8, 2019. (LHAR Exhibit 3 - Tab 11a).

B. Site Owned by a Potentially Liable Party under CERCLA Section 107

CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1), provides, in pertinent part, "the owner and operator of a vessel or a facility . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for . . .all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan."

The term "owner or operator" is defined under CERCLA as "any person owning or operating a facility." CERCLA Section 101(20)(A), 42 U.S.C. § 9601(20)(A). For purposes of liability under CERCLA Section 107(a)(1), federal courts have held that a person need only qualify as either an "owner" or an "operator." See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991); State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d. Cir. 1985); and State of N.Y. v. Solvent Chemical Co., Inc., 875 F. Supp. 1015, 1019 (W.D.N.Y. 1995) ("It is generally agreed that 'owner' liability and 'operator' liability are two distinct concepts."). As previously noted, Magnate currently holds legal title to the Site, having purchased the property in 2007 and 2009, and, therefore, qualifies as the current "owner" of the Site for purposes of CERCLA Sections 101(20)(A) and 107(a)(1), 42 U.S.C. §§ 9601(20)(A) and 9607(a)(1). (LHAR Exhibit 3 – Attachments 1-3; and Transcript 10:7-15).

The term "facility" is defined, in relevant part, as "any site or area where a hazardous substance, has been deposited, stored, disposed of, or place or otherwise come to be located. CERCLA Section 101(9), 42 U.S.C. § 9601(9). A "release" is defined under CERCLA to mean "any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping to disposing in to the environment." CERCLA Section 101(22), 42 U.S.C. § 9601(22). In 2016, an EPA On-Scene Coordinator noted that conditions at the Site indicated that a release into the environment of hazardous substances had occurred and that an on-going threat of additional releases was present. More specifically, the OSC observed:

> Friable asbestos, that is not part of a structure, is present at two locations on the ground at the Site, Pile 3 and Area 5. This asbestos is subject to migration via weather or the action of the owner or trespassers. In addition, friable asbestos and PCBs have also been detected in the basement of a building at the Site. Currently, during heavy rain events, water infiltrates this basement causing it to flood. This is likely due to degraded roofing, underground conveyances (tunnels), and open portholes in the ground level floor that lead to the basement. The waters, which may contain PCBs and asbestos fibers, eventually recede from the basement after the rain event and may potentially spread contamination.

(LHAR Exhibit 3 – Attachment 6 at 3-4. See also LHAR Exhibit 3 – Attachment 7 at 12-14). PCBs and friable asbestos both qualify as "hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and are listed as "hazardous substances" at 40 C.F.R. § 302.4. As a result, the information set forth in the LHAR indicates that a "release" of hazardous substances has occurred at the Site (i.e., a "facility") for purposes of CERCLA Sections 101(9) and (22), and 107(a)(1), 42 U.S.C. §§ 9601(9) and (22), and 9607(a)(1).

Therefore, based upon the information in the LHAR, EPA clearly has a reasonable basis in law and fact to conclude that Magnate is a potentially liable party (i.e., the "current owner" of the Site) for purposes of CERCLA Section 107(a)(1), 42 U.S.C.§ 9607(a)(1).

In its defense, Magnate has raised the statutory Third-Party Defense set forth in CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3), that provides, in pertinent part:

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

The Third-Party Defense has been characterized as an affirmative defense under which a defendant bears the burden of proving each element of the defense by a preponderance of the evidence. Foster v. U.S., 922 F. Supp. 642, 654 (D.C.D.C. 1996) (citing, City of New York v. Exxon Corp., 766 F. Supp. 177, 195 (S.D.N.Y. 1991) and U.S. v. Price, 577 F. Supp. 1103, 1114 (D.N.J. 1983)). "A defendant's failure to meet its burden on any one of the required elements precludes the application of the defense." U.S. v. A & N. Cleaners and Launderers, Inc., 854 F. Supp. 229, 239 (S.D.N.Y. 1994).

Thus, in order to successfully assert the Third Party Defense, a defendant must establish that:

1) A release of a hazardous substance was solely caused by a third party;

2) The third party is not an employee or agent of the defendant, nor does the third party have a contractual relationship with the defendant;

3) The defendant exercised due care with respect to the hazardous substance; and

4) The defendant took precautions against acts or omission of third parties concerning the hazardous substances.

In the Matter of Lawrence Aviation Industries, Inc. Superfund Site, CERCLA Lien Recommended Decision at 12 (EPA Region 2, 2005); and In the Matter of Far Star Superfund Site, CERCLA Lien Recommended Decision at 6-7 (EPA Region 4, 2004).

1. Third party as sole cause of release or threat of release of hazardous substances

Magnate has made allegations that various third parties were responsible for the hazardous substances discovered by EPA at the Site in 2016. However, as explained below, Magnate has not been able to provide proof establishing by a preponderance of the evidence that a specific third party (not related to Magnate by employment, agency or contractual relationship) solely caused a release or threat of release of the hazardous substances at the Site. Rather, the information set forth in the LHAR indicates that Magnate caused the release and created the conditions for possible future releases of hazardous substances when it demolished buildings and created debris piles of ACM at the Site.

a. Allegation #1 - Virginia government agents were responsible for contamination

In its July 4, 2019 letter to EPA, Magnate asserted that "government agents" were responsible for the hazardous substances EPA found at the Site in 2016.

> Magnate, LLC will be exercising the "Third Party Defense" also found in CERCLA 107. It is the same defense that Magnate has been offering since the first day that the OSC, Myles Bartos, first visited the site. At that time, Magnate initiated the Third Party Defense by informing the OSC that Magnate had an abatement of the property that should have rendered the property free of asbestos & PCBs. We also informed the OSC that the agents that summoned the OSC to the property, were the same agents that signed off on the previous abatement and were responsible for the debris remaining on site.

(LHAR Exhibit 2 – Attachment 2 at 2) (emphasis added).

During the December 12, 2019 meeting, Mr. Bates clarified this assertion by testifying that the government "agents" responsible for the debris were agents with VADEQ and VADOL. (Transcript at

29:21-30:14). Mr. Bates also made clear that Magnate was not alleging that these governmental agents actually brought hazardous substances onto the Site. (Transcript 30:20-32:7 and 36:16-22). Rather, he argued that, since VADEQ and VADOL issued a demolition permit and subsequently denied Magnate permission to dispose of the resulting debris at a local landfill, the Virginia government, thereby, was responsible for the hazardous substance contamination of the Site (Transcript 33:17-21).

However, the argument raised by Magnate concerning Virginia government agents does not satisfy the standard of establishing by a preponderance of the evidence that these agents solely caused the release of friable asbestos at the Site. Indeed, no evidence has been introduced that any Virginia government agent took any type of action that caused a hazardous substance to be released into the environment. The actions of government officials undertaking their regulatory duties, in terms of issuing permits and overseeing the proper disposal of demolition debris, do not constitute actions causing a release of hazardous substances into the environment for purposes of the Third Party Defense.

Furthermore, the statements made by Mr. Bates during the meeting clearly indicate that it was Magnate's actions in demolishing buildings at the Site that caused the release of friable asbestos containing material. Mr. Bates stated that the hazardous substances EPA observed at the Site in 2016, specifically the friable asbestos discovered in Debris Pile 3 and Area 5, were generated by Magnate when it demolished a building located on the property in 2011.

> JUDICIAL OFFICER LISA: So in terms of the year, the year when you took the building down.
>
> MR. BATES: 2011
>
> JUDICIAL OFFICER LISA: Am I understanding you correctly that you're saying that when the OSC from EPA showed up at the site and saw piles of debris at the site that those piles of debris were still there left over from when the building was taken down?
>
> MR. BATES: Yep.

(Transcript – 33:2-11). (See also, Transcript 38:10-39:4[5] and 34:5-9; and LHAR Exhibit 14 at 3 ("The only solid waste on the property is the residue of the abated buildings that were legally demoed.")).

As a result, it is reasonable for EPA to conclude that Magnate cannot establish by a preponderance of the evidence that agents with the Virginia government solely caused the release of hazardous substances (friable asbestos) at the Site.

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[5] As previously discussed, supra n. 2, the transcript incorrectly identifies the answer on page 39 as having been said by Mr. Goldman. The answer was provided by Mr. Bates.

b. Allegation # 2 - Hazardous substances at the Site were "planted"

Magnate also has asserted that "any contamination found [at the Site] would have had to be planted." (LHAR Exhibit 2 – Attachment 2 at 2). However, when questioned during the December 2019 meeting about this assertion, Mr. Bates was unable to identify a specific third party who planted any hazardous substances at the Site.

> JUDICIAL OFFICER LISA: I just want to nail this down. Did you ever see anybody plant, bring contaminated material onto your property or is it just that you're drawing that conclusion based upon what's going on."
>
> MR. BATES: Well I'm making that presumption.

(Transcript – 36:16-22).

Speculation or the raising of "presumptions" is insufficient for purposes of establishing by a preponderance of the evidence that a third party solely caused a release. As a result, it is reasonable for EPA to conclude that Magnate cannot establish by a preponderance of the evidence that a third party "planted" friable asbestos on the Site and was solely responsible for the release of friable asbestos at the Site.

c. Allegation # 3 - ATF sting operation may have caused contamination of Site

Magnate has alleged that the release of friable asbestos at the Site may have been caused by "an illegal ATF/Sheriff's Office 'tobacco sting' operation" that had taken place on the property. (LHAR Exhibit 2 – Attachment 2 at 2). However, when asked at the December 2019 meeting to provide more detailed information about this allegation, Magnate was not able to identify any specific person associated with the "sting operation" who was in any manner responsible for the hazardous substances discovered by EPA on the Site in 2016.

> JUDICIAL OFFICER LISA: Is Magnate claiming in any way that the AFT tobacco sting was in any way responsible for causing the contamination of the property?
>
> MR. BATES: We don't know that. Well, we don't know that, but we wanted an investigation to determine that.

(Transcript 40:18-24).

As a result, it is reasonable for EPA to conclude that Magnate cannot establish by a preponderance of the evidence that a third person associated with an "ATF sting operation" solely caused a release of hazardous substances (friable asbestos) at the Site.

d. Allegation # 4 - Environmental company previously hired by Magnate caused contamination of the Site

At the December 2019 meeting, Mr. Bates alleged that the environmental company he hired in 2011 to perform an asbestos abatement at the Site should be deemed to be the party responsible for the asbestos contamination. (Transcript 33:22-24 ("Shouldn't my environment company that oversaw it and signed off that it was done, shouldn't they be the responsible party?")). However, no further information was provided by Magnate to explain what actions the environmental company had taken that caused the release of the friable asbestos at the Site. Indeed, the environmental company Magnate hired for the abatement clearly noted in its final report that, despite removing approximately 40,000 cubic feet of asbestos-containing debris from the Site, "a significant amount of asbestos material" remained at the Site and was "not removed due to time and budget constraints, as well the materials not being damaged." (LHAR Exhibit 4 – Attachment 8 at 2). Furthermore, later during the December 2019 meeting Mr. Bates stated that "[t]here was no reason to think that the abatement that I had previously done wasn't sufficient." (Transcript 35:17-19).

As a result, it is reasonable for EPA to conclude that Magnate cannot establish by a preponderance of the evidence that its environmental contractor solely caused the release of a hazardous substance (friable asbestos) at the Site.

e. Allegation # 5 - Contamination existed prior to Magnate's purchase of the Site

At the December 2019 meeting, Magnate's attorney raised the Innocent Purchaser Defense[6] by stating that the PCB and asbestos contamination on the Site existed prior to Magnate's purchase of the property and that Magnate had not contributed to the contamination in any manner.

> MR. POLLACK: Now, moving to their factors, in no way, shape or form is Magnate a responsible party here. Okay? This property was I believe a blue jean factory many, many years ago, and it was up and operating. And at some point, it stopped operating, and the owner went bankrupt, I believe. And it went up for a tax auction, I believe, and Magnate purchased it lock, stock and barrel with all of its faults and problems and apparently PCBs and then supposedly friable asbestos. And what we have here is purchaser who's done nothing but tried to abate any problems there. He has no [sic] continued with the problems. He has not continued to operate this factory. He has contributed no asbestos. He's contributed no PCBs.

(Transcript 22:16-23:5).

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6 The Innocent Purchaser Defense is a variant of the Third Party defense under CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3). (See also CERCLA Section 101(35)(A), 42 U.S.C. § 9601(35)(A)).

This assertion, however, was directly contradicted by other statements made during the December 2019 meeting by Mr. Bates that the contamination discovered by EPA in 2016 was the result of Magnate's demolition of buildings. Additionally, the assertion is directly contradicted by representations made by Magnate in its December 18, 2017 letter to EPA Administrator Scott Pruitt. In this letter, Magnate represented that the previous owners of the Site "left the property in very good environmental condition." (LHAR Exhibit 4 – Attachment 11 at 3). Finally, Magnate has provided no information to establish that it had undertaken, prior to its purchase of the Site, any type of environmental due diligence (e.g., all appropriate inquiry).

As a result, it is reasonable for EPA to conclude that Magnate cannot satisfy its burden of proof under the Innocent Purchaser Defense to CERCLA liability.

2. Exercise of Due Care and Taking of Precautions

As previously noted, a defendant seeking to utilize the Third Party Defense also bears the burden of proving by a preponderance of the evidence that he or she "exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances" and "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions." CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3). The aforementioned "due care" and "precautions" requirements are not defined by the statute. However, courts have consulted CERCLA's legislative history for guidance on how to interpret these terms. "[T]he defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances. State of N.Y. v. Lashins Arcade Co., 91 F.3d 353, 361-62 (2d. Cir. 1996) (quoting, H. R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, at 34 (1980), reprinted in 1980 U.S.C.C.A.N. 6119, 6137). "Further, 'due care' would include those steps necessary to protect the public from a health or environmental threat.'" U.S. v. A & N Cleaners and Launderers, Inc. 854 F. Supp. 229, 238 (S.D.N.Y. 1994) (quoting H.R. Rep. No. 253, 99th Cong., 2d Sess. 187 (1986) U.S. Code Cong. & Admin. News 1986, 2835). See also Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co., 14 F.3d 321, 325 & n.3 (due care not established when no affirmative measures taken to control site).

The information set forth in the LHAR indicates that Magnate did not exercise due care with regard to the friable asbestos and PCBs located on the Site and failed to take precautions against foreseeable acts or omissions by third parties concerning these hazardous substances.

As previously discussed, Mr. Bates represented at the December 2019 meeting that the debris that EPA observed at the Site in 2016 had been generated by a demolition that Magnate had conducted in 2011. As a result, Magnate allowed asbestos contaminated demolition debris to remain on the Site exposed to the elements, without any type of cover and potentially subject to migration on and off of the Site for approximately 5 years. Additionally, despite being placed on notice by WECI in 2011 that the Site contained significant amounts of asbestos-containing materials, Magnate took no steps to control

access to or to prevent trespassers from coming onto the Site. Magnate also failed to take any actions to prevent the flooding of the basement of the building in Area 10 that was found by EPA to contain PCBs and friable asbestos. EPA's OSC observed that the building had degraded roofing and open portholes that permitted water to enter the basement and potentially spread asbestos and PCB contamination throughout the Site.

As a result, based upon an analysis of the information contained in the LHAR, it clearly is reasonable for EPA to conclude that Magnate cannot satisfying its burden with regard to establishing either the Third Party Defense or Innocent Purchaser Defense to liability under CERCLA and, therefore, Magnate is a potentially liable party (i.e., the current owner) under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1).

C. Property Subject to Removal or Remedial Action

Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), provides, in pertinent part, that:

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

Response actions under CERCLA Section 104(a) can take the form of either a removal action[7] or a remedial action. "Removal actions are generally immediate or interim responses, and remedial actions generally are permanent responses." In the Matter of Bell Petroleum Services, Inc., 3 F.3d 889, 894 (5th Cir. 1993). (See also New York State Elec. & Gas Corp. v. FirstEnergy Corp., 766 F.3d 212, 230 and

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[7] The term "removal action" is defined under CERCLA to mean "the cleanup or removal of released hazardous substances from the environment, such actions as may be necessary taken in the event of the threat of release of hazardous substances into the environment, such actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat or release. The term includes, in addition, without being limited to, security fencing or other measures to limit access, provision of alternative water supplies, temporary evacuation and housing of threatened individuals not otherwise provided for, action taken under section 9604(b) of this title, and any emergency assistance which may be provided under the Disaster Relief and Emergency Assistance Act [42 U.S.S. Section 5121 et seq.]." Section 101(23) of CERCLA, 42 U.S.C. § 9601(23).

233 (2d Cir. 2014) ("Removal actions are generally clean-up measures taken in response to immediate threats to public health and safety.")).

On May 31, 2018, the Director of the Hazardous Site Cleanup Division, EPA Region 3, determined that there had been a "release or threatened release of hazardous substances at and/or from the Site" and that these conditions presented or could present "an imminent and substantial endangerment to the public health or welfare or to the environment." (LHAR Exhibit 3 – Attachment 6). Based upon these findings, the Director approved the implementation of a "removal action" at the Site. (Id.). [8]

In its letter brief of September 26, 2019, EPA noted that the removal action at the Site is on-going as of the date of this lien proceeding. Additionally, the Agency identified a number of activities that had been completed at the Site as part of the removal action and a number of additional actions that would be needed in the future, including, but not limited to:

- Removal site evaluation activities, including sampling events (May and November 2016);
- Selection of a removal action for implementation (May 2018);
- Attempts to secure voluntary access from Magnate to implement the selected removal action (April through June 2018);
- Judicial action in the U.S. District Court for the Western District of Virginia seeking court-ordered access to permit EPA to implement selected removal action (October 2018);
- Filing of Stipulation and Order by District Court resolving access matter (February 2019);
- Additional removal site evaluation activities (February 2019);
- Implementation of selected removal action (February through July of 2019)[9];
- Issuance of Lien Notice Letter (July 1, 2019);
- Lien Hearing Process; and
- Future actions to secure and recover EPA's costs.

(LHAR Exhibit 4 at 18-19).

Magnate has challenged the legal basis for EPA's decision to conduct a removal action at the Site and the process by which EPA undertook the removal action at the Site. In addition to being beyond the scope of and not relevant to the issue of this lien proceeding (whether the statutory requirements for the perfection of a CERCLA Section 107(l) lien have been satisfied), the arguments raised by Magnate are incorrect as a matter of law and contradicted by the information in the LHAR.

First, Magnate has argued that a removal action at the Site was never authorized under CERCLA because "there was 'never' a substantial release or threat of release to the environment of any pollutant

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[8] See also March 13, 2019 "Request for Additional Funding and change of Scope for a Removal Action at the Magnate LLC Site, Edinburg, Shenandoah County, Virginia." (LHAR Exhibit 3 – Attachment 7 at 7).

[9] During the response action, EPA removed for off-site disposal six drums containing spent carbon, one drum containing PCBs and 379.94 cubic yards of debris containing friable asbestos. (LHAR Exhibit 4 – Attachment 2).

or contaminant which may present an imminent and substantial danger to the public health or welfare." (LHAR Exhibit 10 at 4). However, this argument does not accurately set forth the legal prerequisites for a response action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). More specifically, CERCLA does not require a finding that a release of hazardous substances is "substantial" in nature in order for a response action, like a removal action, to be authorized. Rather, Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), only requires that a release of a hazardous substance into the environment has occurred, irrespective of quantity or nature.

Second, Magnate has argued that EPA failed to make a "determination of threat" posed by the Site in order to conduct its clean-up. (LHAR Exhibit 10 at 5). However, this argument is contradicted by the LHAR. In both May of 2018 and March of 2019, the Director of the EPA Region 3 division responsible for implementing CERCLA made a determination that the conditions at the Site presented an "imminent and substantial endangerment to the public health or welfare or to the environment."

Third, Magnate has asserted that EPA never determined the cause of the environmental contamination at the Site and, therefore, the resulting removal action was improper, if not unauthorized by law. (Transcript 24:15-21 and 28:11-13). However, neither CERCLA, nor the regulations implementing the National Contingency Plan require that EPA identify a "cause" of an actual or threatened release of hazardous substances in order to undertake clean-up activities and recover response costs. See also United States v. Alcan Aluminum Corp., 964 F.2d 252, 264 (3rd Cir. 1992); and State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d. Cir. 1985) (Section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation).

Therefore, it is reasonable for EPA to conclude that a removal action has occurred at the Site for purposes of the lien requirements of CERCLA Section 107(l).

D. United States has Incurred Costs

EPA has presented evidence indicating that, through May 23, 2019, EPA has incurred response costs in the amount of $381,252.66 in connection with the Site. (LHAR Exhibit 3 – Attachment 9).

Magnate has raised a number of arguments concerning the Agency's incurrence of response costs. In addition to not being relevant to and beyond the scope of this proceeding, these arguments are contradicted by the LHAR and are incorrect as a matter of law.

Magnate has argued that EPA has failed to quantify its costs at the Site and that "until the costs are quantified, we think a lien is premature." (Transcript 9:15-20). However, neither the *Supplemental Guidance* nor the statute require that an exact sum of costs be specified as a pre-requisite to the perfection of a lien. This is based upon the fact that a lien under CERCLA Section 9607(l), 42 U.S.C. § 9607(l), includes the costs of on-going response work at a site. As noted in one Recommended Decision, "it was anticipated that CERCLA liens would often be filed early in the history of a response

action, at a point where EPA would not know the full costs of its response action." In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision at 12 (EPA Region 9, 2000). Additionally, CERCLA Section 9607(l), 42 U.S.C. § 9607(l), clearly provides that a lien on a site "shall continue until liability for the costs … is satisfied" or becomes unenforceable through the applicable statute of limitations. Finally, even if the statute required EPA to quantify its costs, EPA clearly met such a burden by introducing into the LHAR an itemized summary ("Itemized Cost Summary Verification") of costs it has incurred at the Site through May 23, 2019. (LHAR Exhibit 3 – Attachment 9).

Magnate also has challenged EPA's presentation of incurred response costs by asserting that the Agency has failed to produce bids or contracts for the work performed at the property. (Transcript 11:2-14). However, once again, nothing in the CERCLA statute requires EPA to produce bids for purposes of perfecting a federal lien on the Site. Additionally, the case law is consistent in holding that consideration of the appropriateness of costs incurred by EPA is not a subject of review for purposes of this proceeding. "Our only inquiry is whether the LFR shows that costs have in fact been incurred." In the Matter of Herculaneum Lead Smelter Site, CERCLA Lien Recommended Decision (EPA Region 7, 2003); In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region 1, 2001).

E. Other Potential Reasons not to perfect lien

Magnate has asserted that EPA cannot perfect the CERCLA Lien for the Site because the lien does not satisfy the requirements of Virginia lien law, Va. Code § 43-4.01. (LHAR Exhibit 16 at 2 ("EPA has no reasonable basis to perfect the lien, due to Virginia state statute 43-25 that requires three basic elements to perfect a lien within its jurisdiction: amount certain, stated compensation for amount certain and 90 days to file from completion of work to be compensated for.")). However, the Virginia law cited by Magnate is inapplicable to this case. The Virginia lien law that Magnate cites concerns mechanics liens that arise in connection with the construction of one- or two-family residential buildings. Second, the requirements of Va. Code § 43-4.01 stand in direct contradiction to CERCLA Section 107(l) in which Congress expressly provided that a CERCLA Lien covers "all costs and damages for which a person is liable to the United States under CERCLA Section 107(a)" and that the lien "shall continue until the liability for the costs … is satisfied or becomes unenforceable through operation of the statute of limitations." CERCLA Section 107(l)(1) and (2), 42 U.S.C. § 107(l)(1) and (2).

The LHAR does not contain any other information which is sufficient to show that the lien notice should not be filed/perfected.

VI. CONCLUSION

Based upon my review of the information set forth in the LHAR, I find that EPA has a reasonable basis in law and in fact to conclude that the statutory requirements for perfecting a lien on the Site under CERCLA Section 107(l), 42 U.S.C. § 9607(l), have been satisfied.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien. This Recommended Decision does not compel the perfection of the CERCLA lien on the Site; it merely establishes that there is a reasonable basis in law and fact for doing so. This Recommended Decision does not preclude EPA or the Property Owner Magnate from raising any claims or defenses in any later proceedings. This Recommended Decision is not a binding determination of liability, has no preclusive effect and shall not be given any deference in any future proceedings. This Recommended Decision shall not otherwise constitute evidence in any subsequent proceedings.

Date: Feb. 12, 2020

Joseph J. Lisa
Regional Judicial and Presiding Officer
U.S. EPA Region III

APPENDIX A

MAGNATE, LLC SITE
EDINBURG, SHENANDOAH COUNTY, VIRGINIA
LIEN HEARING ADMINISTRATIVE RECORD (LHAR)
DOCKET NO. CERCLA-03-2019-0120LL

1. Notice of Intent to Perfect Federal Superfund Lien; Opportunity To Be Heard (with attachments) Letter from Cecil Rodrigues, Acting Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, (July 1, 2019).

2. Certificate of Service (with attachments) - Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, certifying that copies of the following documents were provided to Bradley Pollack, Esq. and Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III:

   Attachment

   1. Order of Assignment (September 11, 2019);
   2. Email from Bradley Pollack, Esq., to Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate LLC, Site, Notice of Intent to Perfect CERCLA 107(l) Lien (July 28, 2019), with attached unsigned letter from Darryl W. Bates to Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Letter of Response to Notice of Intent to Perfect Federal Superfund Lien (July 4, 2019); and
   3. EPA's "Supplemental Guidance on Federal Superfund Liens" (OSWER Directive No. 9832.12-1a (July 29, 1993).

3. EPA Lien Filing Record and Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (September 12, 2019).

   Attachment

   1. Deed between Donald D. Litten, Special Commissioner, in the Civil Action of County of Shenandoah v. John van der Velde, et. al., Grantor, and Magnate, LLC, Grantee, dated September 20, 2007, and recorded in the Shenandoah County, Virginia land records in Book 1385, Page 94;
   2. Trustee's Deed between Bradley G. Pollack, Substitute Trustee, Grantor, and Magnate, LLC, Grantee, dated March 9, 2009, and recorded in the Shenandoah County, Virginia land records in Book 1442, Page 648;
   3. Subdivision Plan recorded in Shenandoah County, Virginia Plat Book 1516, Page 135;

4. Printout from Shenandoah County, Virginia website for Parcel no. 0701001G (searched/printed June 5, 2019);
5. Printout from Shenandoah County, Virginia website for Parcel No. 0701001G (searched/printed June 5, 2019);
6. Memorandum from Myles Bartos, On Scene Coordinator, to Karen Melvin, Director, Hazardous Site Cleanup Division, re: "Request for Approval and Funding for a Removal Action at the Magnate, LLC Site, Edinburg, Shenandoah County, Virginia," approved May 31, 2018;
7. Memorandum from Myles Bartos, On Scene Coordinator, to Paul Leonard, Acting Director, Hazardous Site Cleanup Division, re: "Request for Additional Funding and change of Scope for a Removal Action at the Magnate, LLC Site, Edinburg, Shenandoah County, Virginia," approved March 13, 2019.
8. Pollution Reports Nos. 1-13 (February, 2016 to May 4, 2019);
9. Report of Response Costs from February 7, 2016 through May 23, 2019 for the Magnate, LLC Site (June 3, 2019) (reconciliation pending);
10. Letter from Joan Armstrong, Office of Enforcement, Hazardous Site Cleanup Division, EPA Region 3, to Magnate, LLC/Darryl Bates, Managing Member, re "Notice of Potential Liability" (February 13, 2018) (overnight mail);
11. Letter from Peter Ludzia, Branch Chief, Program Support & Cost Recovery Branch, Superfund & Emergency Management Division, EPA Region 3, to Magnate, LLC/Darryl Bates, Managing Member, re: "re-Transmittal of Notice of Potential Liability" (June 5, 2019); 11.a – PS Form 3811 Domestic Return Receipt for Article Number 7017 1450 0000 2079 2210 signed by Darryl Bates (undated)
12. Letter from Myles Bartos to Magnate, LLC (April 3, 2018);
13. Unsigned Letter from Magnate, LLC to USEPA (April 10, 2018);
14. Letter from Andrew S. Goldman, Sr. Assistant Regional Counsel, to Magnate, LLC (April 19, 2018);
15. Email from Darryl Bates to Myles Bartos (May 10, 2018);
16. Memorandum to File (Myles Bartos) (June 8, 2018)l
17. Complaint filed by United States in *United States v. Magnate, LLC,* No. 5:18-cv-00127 (W.D. Va.) (October 11, 2018);
18. Stipulation and Order in Aid of Access filed in *United States v. Magnate, LLC*, No. 5:18-cv-00127 (W.D. Va.) (February 12, 2019).

4. EPA's Rebuttal to Arguments presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA 107(l) Lien (with attached Index, EPA's Rebuttal, and Certificate of Service) - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (September 26, 2019).

Attachment

1. "Supplemental Guidance on Federal Superfund Liens" (OSWER Directive No. 9832.12-1a (July 29, 1993);
2. Email from Myles Bartos to Andrew Goldman, Esq., re: "Disposal Reports for Magnate" (August 28, 2019);
3. Letter from Cecil Rodrigues, Acting Regional Counsel, to Brad Pollack, Esq., re "Notice of Intent to Perfect Federal Superfund Lien; Opportunity to be Heard" (July 1, 2019);
4. Email from Brad Pollack, Esq. to Andrew Goldman, Esq., re "Notice of Intent to Perfect CERCLA 107(l) Lien" (July 28, 2019);
5. Letter from Darryl W. Bates, to Andrew Goldman, Esq., re "Letter of Response to Notice of Intent to Perfect Federal Superfund Lien" (July 4, 2019);
6. Order of Assignment (September 11, 2019);
7. Email from Carlyn Prisk to Andrew Goldman, Esq., re "Magnate-Ownership Research" (September 5, 2019);
8. Letter from James C. Sigurdson to Darryl Bates, re "Final Report/Asbestos Abatement/523 Aileen Road, Edinburg, VA" (September 8, 2011);
9. Memorandum from Myles Bartos to Bonnie Gross, re "Recommendation for Determination of Imminent and Substantial Endangerment at the Magnate LLC Site" (approved January 18, 2018);
10. UPS Track Sheet from Internet (June 6, 2018); and
11. Email from Darryl Bates to Myles Bartos, re "Conference Call" (June 8, 2018).

5. Corrected attachments to EPA's Rebuttal to Arguments presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA 107(l) Lien, with corrected attachments and Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (October 2, 2019).

6. Order of Assignment and Initial Case Status Conference Call – Scheduling Notice, with attached Order of Assignment - Letter from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (October 3, 2019).

7. Scheduling Letter - Letter from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (October 18, 2019).

8. Confirmation of Mailing Procedure - Letter from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (November 6, 2019).

9. Resending of Corrected Exhibits to EPA's Rebuttal to Arguments presented by Magnate, LLC, with attached Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (November 6, 2019).

10. Magnate's Response to EPA Rebuttal of September 26, 2019 - Email from Bradley Pollack, Esq., to Bevin Esposito, Regional Hearing Clerk, EPA Region III (November 14, 2019).

11. Lien Hearing Scheduling Notice - Letter from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (November 21, 2019).

12. EPA's Response to Arguments Presented by Magnate, LLC in its November 14, 2019 Submission Regarding EPA's Perfection of a CERCLA 107(l) Lien, with attached Index, EPA's Response, and Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (November 26, 2019).

13. Lien Hearing Follow-Up Letter to Joseph Lisa and Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, re: Magnate, LLC Site, Lien Proceeding, (December 13, 2019).

14. Response to EPA Letter of December 13, 2019 - Email from Bradley Pollack, Esq., to Bevin Esposito, Regional Hearing Clerk, EPA Region III, attaching Magnate's Letter to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, re: (December 23, 2019).

15. Response to Magnate's December 23, 2019 email and letter, with Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, re: Magnate, LLC Site, Lien Proceeding, (December 26, 2019).

16. Summation of Magnate - Email from Bradley Pollack, Esq., to Bevin Esposito, Regional Hearing Clerk, EPA Region III, attaching Letter to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, re: Magnate, LLC Site, (January 4, 2020).

17. Original Transcript of Magnate, LLC Site Meeting, CERCLA Lien Hearing, Docket No. CERCLA-03-2019-0120LL (December 12, 2019).

18. Post Lien Hearing Scheduling Notice - Letter from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (January 8, 2020).

19. Transcript Errata, with attached Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (January 8, 2020).

20. CERCLA Lien Hearing – Transcript Error - Email from Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, to Bradley Pollack, Esq., and Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, re: Magnate, LLC Site, (January 16, 2020).

21. CERCLA Lien Hearing – Transcript Error, attaching EPA Inspector General Complaint - Email from Bradley Pollack, Esq., to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III, re: Magnate, LLC Site, (January 21, 2020).

22. Post-Hearing Brief, with attachments and Certificate of Service - Letter from Andrew Goldman, Senior Assistant Regional Counsel, EPA Region III, to Bradley Pollack, Esq., re: Magnate, LLC Site, Lien Proceeding, (January 28, 2020).

23. Letter from Darryl Bates, re: Magnate's Response to EPA's Hearing Response January 28, 2020 - attached to Email from Bradley Pollack, Esq., to Joseph J. Lisa, Regional Judicial and Presiding Officer, EPA Region III (February 3, 2020).

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that, on the date provided below, I caused to be served the aforesaid Recommended Decision upon the following persons in the manner designated:

By Regular Mail and Email:

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FEB 12 2020
Date

Bevin Esposito

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