UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION I

IN THE MATTER OF Rogers Fibre Mill Superfund Site Bars Mills, Maine C.F.H, Inc., Property Owner	CERCLA Lien Recommended Decision #250

I. Background

This matter was commenced by the United States Environmental Protection Agency (EPA) on September 27, 1999 by issuance of a notice of lien filing and opportunity for a meeting, pursuant to Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, (CERCLA) 42 U.S.C. 9607(1). On November 9, 1999, C.F.H., Inc.,(Property Owner or CFH) through its counsel, filed a request for a meeting. On November 23, 2000, the undersigned was designated by the Regional Administrator as the neutral to conduct an informal lien meeting and issue a recommended decision pursuant to EPA Supplemental Guidance on Federal Superfund Liens, OSWER Directive Number 9832.12-1a, dated July 29, 1993,(EPA's Supplemental Guidance).

The Lien Filing record (LFR) in this matter, which contains the documents on which the EPA relied in filing the notice of lien was filed on or about November 30, 2000. A supplement to the LFR was filed by EPA on December 1, 2000 and January 23, 2001. The Property Owner filed supplements to the LFR on January 17, 2001, and January 23, 2001. The undersigned conducted a conference call with counsel for EPA and CFH on November 30, 2000, during which possible issues were discussed. A lien meeting was held on January 8, 2001. A verbatim transcript of the meeting was provided to each of the parties and made part of the LFR. All documents filed by the parties have been added to the LFR and constitute the record on which this recommended decision is based.

II. Applicable Statutory Elements and Scope of Review

The statutory criteria for filing a notice of federal lien are stated in Section 107(l) of CERCLA. Section 107(l)(1) provides as the first element that "all costs and damages for which a person is liable to the

United States under [CERCLA 107(a)] . . . shall constitute a lien in favor of the United States . . . ." provided that the following requirements of Sections 107(l)(1) and (2) are met:

1. The property belongs to the person who is liable for the costs and damages.

2) The property upon which the lien arises is subject to a removal or remedial action.

3) The person has been provided written notice of potential liability.

4) The United States has incurred costs with respect to a response action under CERCLA.

EPA's Supplemental Guidance (page 7) provides that "the neutral EPA official should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for perfection of the lien." The Supplemental Guidance then sets forth five factors that the EPA neutral official should consider. The first four factors are the statutory elements set forth above, and the fifth factor is whether:

> the record contains any other information which is sufficient to show that the lien notice should not be filed.
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> Id.

The scope of the review is discussed in Reardon v. United States, 947 F.2d 1509, 1522-23(1st Cir. 1991) and in EPA's Supplemental Guidance. EPA's Supplemental Guidance specifically states that the scope of the neutral official's review is as follows:

> The sole issue at the meeting is whether the EPA has . . . a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied.
>
> Id. at 8.

The review cannot focus on the selection of the remedy or other matters which are only reviewable in a cost recovery action under Section 107 or are not subject to review. See Section 113(h), 42 U.S.C. 9613(h).

III. Factual Background

The property which is the subject of this proceeding is located on Depot Street, Bars Mills, Maine. The property was acquired by Patrick G. Canonica on February 7, 1989. By deed dated May 26,1995, the property was conveyed from Patrick G. Canonica to CFH.[1]

The background relating to EPA's removal action is discussed in detail in four Action Memoranda, dated June 19, 1998, October 15, 1998, January 15, 1999 and August 9,1999. (Action Memoranda). The Site is an abandoned fiberboard facility located in a residential area on Depot Street, Bars Mills, York County, Maine. The site was used as a manufacturing facility of the fiberboard industry from approximately 1917 to 1980 by Rogers Fibre Co., which merged with Colonial Board Company in 1967. Id. at 1. Since the facility was abandoned, unknown materials in tanks and other containers were left in the mill. The mill structure had deteriorated to the extent that portions of the mill had collapsed. Id. at 2. The site consists of a single one to three story main mill building centered with a large water tower, a smoke stack, two separate unfenced parking areas and a small single house. Id. at 3. The main mill building is situated adjacent to and partially above the Saco River with a water sluiceway flowing under/through a portion of the building. The majority of the mill building is in a state of disrepair, with portions having collapsed on to themselves or into the Saco River. Id. at 3. The Saco River is classified as a Class A river under the Maine State Water Classification Program. The river supplies more than two billion gallons of drinking water annually to at least four cities and towns. Id. at 3. In summary, the site has been used for the storage and/or disposal of wastes, including wastes containing hazardous substances. Samples taken by EPA from this waste indicated the presence of chromium.

In accordance with CERCLA and other authorities EPA undertook certain actions and incurred certain costs in response to conditions at the Site. As of April 30, 2000, EPA has incurred $3,815,475.30 in costs as a response action at the site. See Exhibit 8.

On September 27, 1999, EPA notified CFH via certified mail of its potential liability under CERCLA for EPA's costs in responding to a release, or threat of release. See Exhibit 1.

IV. Discussion

The issue to be decided in this proceeding is whether the LFR shows that EPA has a reasonable basis to believe that the statutory elements for perfecting the lien have been satisfied. EPA's Supplemental Guidance at 8. Based on my review of the entire record, including the lien meeting, and supplemental memoranda of the parties, I conclude that EPA has such a reasonable basis for believing that the statutory elements for perfecting the lien have been satisfied.

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[1] Mr. Canonica is an officer of CFH.

The Property Owner raised the following issues in the informal meeting and in written submissions included in the LFR, which form the basis for its opposition to EPA's action.

A. Innocent Landowner Defense

Under CERCLA Section 107(b)(3), a person cannot be held liable under CERCLA Section 107(a) if that person 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: (1) an act or omission of a third party; (2) the third party's act or omission did not occur in connection with 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 the third party's foreseeable acts or omissions and the foreseeable consequences thereof.

CFH contends that EPA does not have a reasonable basis for perfection of the lien because the innocent landowner defense is applicable in this case. In support of this position, Patrick Canonica, President of CFH, Inc, and the individual owner of the property from 1989 until its transference to CFH on May 25, 1995, states: When he acquired the property in 1989, the Purchase and Sales Agreement reflected the seller's representations to him that the property was free of hazardous material except for some asbestos board and pipe lagging and underground tanks that were required to be removed under Maine law. Canonica Affidavit, Paragraph 3. Prior to purchasing the property, he had been told that a licensed abatement contractor had abated all asbestos at the site except ACM board contained in one of the walls in an elevator shaft. Id. at Paragraph 4. Prior to purchasing the property, Mr. Canonica asked the former owner about the vats on the premises and was told that they contained non-hazardous material. Id. at Paragraph 5. He further asserts that the buildings themselves covered approximately 90% of the property making it unreasonably difficult, if not impossible, to conduct soil sampling, particularly in the areas where EPA later found additional hazardous material. Id. at Paragraph 6.

Mr. Canonica acknowledges that he was aware of prior industrial uses at the property, and states this was a reason why he wanted to be sure that there was no existing contamination as evidenced by the seller's representations and warranty. Id. at Paragraph 7. Mr. Canonica further attests that he made numerous efforts when title was in his name to ensure that any environmental problems at the site were addressed and remedied. Id. at Paragraphs 8, 9 10. Mr. Canonica further attests that the Maine Department of Environmental Protection (Maine DEP) conducted an inspection of the property, on or about May 25, 1995 for the purpose of identifying environmental hazards, including oily or hazardous wastes present on the property. He never had any reason to believe that the Maine DEP inspection was deficient in any way. Id. at Paragraph 14. At the time of the DEP inspection, he was aware of the three 6,000 gallon residential oil tanks, ten 55-gallon drums, as well as smaller containers and used oil sorbent materials. Id. at Paragraph 15. Until August of 1995, Mr. Canonica was not fully aware of the official results of the DEP inspection, and at no time prior to the sale to CHF, was he aware of any hazardous or oily materials at the Property beyond those discovered by the Maine DEP, as listed in the

letter. Id. at Paragraph 17. Finally, Mr. Canonica attests that the hazardous materials found by EPA were not readily apparent, and that he and CFH operated at all times with due diligence to identify and remove hazardous materials placed upon the site by others. Id. at paragraphs 18-28.

The Agency, however, presents a different view of what occurred, and argues that CFH fails to meet the standards to invoke an innocent landowners defense. The Agency argues that there was ample information available to CFH prior to the date of purchase (May 26, 1995), including information generated by a Maine DEP inspection. The Agency also emphasized that Mr. Canonica was the owner of the site immediately before CFH, and argues that Mr. Canonica's knowledge of the condition of the Site is imputed to C.F.H. Agency December 1, 2000 response.

I agree. Landowners are not relieved of their obligation to investigate the environmental condition of the property, even if the seller represents that the property is clean or withholds information regarding the existence of contamination on the property. See In the Matter of Iron Mountain Mine Superfund Site, EPA Region 9, May 4, 2000. If a prospective purchaser is aware of information regarding the land's prior owners or uses which would put a reasonable person in the prospective purchaser's position on notice of the possibility of hazardous waste contamination, "then" further inquiry to eliminate the possibility that the property is contaminated is probably required." K.C. 1986 Limited Partnership v. Reade Manufacturing, Inc., 33 F. Supp. 2d 1143, 1152 (W.D.Mo. 1998). Moreover, a corporate officer's knowledge is generally imputed to the corporation. See FDIC v. Shrader & York, 991 F. 2d 216, 222 (5th Cir. 1993), cert. denied, 512 U.S. 1219 (1994).[2]

In this case, Mr. Canonica acknowledges that he was aware of the prior industrial uses of the property, the existence of hazardous substances such as asbestos, and that the building was structurally unsound. In addition, the Maine DEP May 25, 1995 inspection provided additional information. These conditions were sufficient to place a reasonable person on notice of the possibility of hazardous waste contamination. CFH has failed to show that it did not know and had no reason to know that the Site was contaminated. See 42 U.S.C. §§ 9601(35)(A)(i), 9607(b)(3).

The Agency also argues that the innocent landowner defense is inapplicable because CFH has failed to meet its burden of showing that it took the necessary steps to prevent foreseeable adverse consequences arising from the pollution at the site.

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[2] The Property owner has submitted copy of decision Thomson Precision Ball Company v. PSB Associates Liquidating Trust, 2001 WL 10507 (W.D. Conn. Jan 3, 2001), to support the position that a buyer of property is entitled to innocent landowner status despite knowledge of certain contamination on the site. See CFH January 23, 2001 submission. The facts in Thomson are distinguishable from the facts in this matter.

Despite the assertions that CFH (and Mr. Canonica when he owned the property) operated at all times with due diligence, the LFR demonstrates a litany of evidence to the contrary. See Exhibits A,B,C,D,E,F, and G. For example, on May 16, 1996, the Maine DEP wrote to Mr. Canonica raising the fact that a portion of the warehouse was falling into the Saco River, and stating that "unless the mill is repaired or destroyed, other portions of the mill will fall into the river. . . You were lucky that the structure failed during that winter. The ice caught the debris and prevented any significant environmental damages, for the time being. If the building is left in its current state of disrepair it is unlikely that you will be as lucky in the future". See Letter from William Cook to Patrick Canonica, dated February 16, 1996, Exhibit D. On March 4, 1996, DEP issue a Notice of Violation to C.F.H. With a letter stating that the sections of the building that were supposed to be secured had been washed down the river, and that "[t]here had been no attempt to remove the wall sections or prevent their discharge to the open waters of the river." See Letter from William Cook to Patrick Canonica dated May 4, 1996. Exhibit E. The EPA On-Scene Coordinator who investigated this matter concludes that portions of the building that collapsed into the river contained asbestos. See Janis Tsang Affidavit, Paragraph 8. There is no evidence in the LFR that demonstrates that steps were taken to prevent the structure containing asbestos from falling into the Saco River, a drinking water supply.

Therefore, based upon the LFR, I conclude that the property owner's arguments that it is entitled to the innocent landowner defense is unpersuasive. Furthermore, the Agency has a reasonable basis for its belief that the property owners are not entitled to the innocent landowner defense. However, this finding does not preclude the property owner from raising this defense in the future in the appropriate forum.

B. The Lien is Unnecessary Because the Property has no Value

The property owner has argued that the property that is the subject of the lien has no value, and thus the lien is unnecessary. The purposes of the lien provisions are to facilitate the United State's recovery of response costs and prevent windfalls. "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from cleanup and restoration activities. "131 Cong. Rec. §11580 *Statement of Sen. Stafford)(September 17, 1985). See also In the Matter of Copley Square Plaza Site, (EPA Region 5, June 5, 1997). Provided the Agency has a reasonable basis to believe that the statutory elements have been satisfied, the Agency has the discretion to protect its investment and impose a Superfund lien or not. The decision whether to perfect a lien is the Agency's. Even if CFH's assertion that the property is currently valueless is correct, the value of the site at the conclusion of the removal or remediation action is currently unknown. See Copley Square Plaza. Therefore, CFH's argument is without merit.

C. The Scope and Reasonableness of EPA's Response Actions were Unjustified

The Property Owner has raised arguments concerning the scope, reasonableness, and necessity of the actions taken and costs incurred by EPA. The property owner argues that even if EPA proceeded reasonably in addressing the asbestos throughout the building rather than only in the parts that

threatened to collapse, it was unreasonable to demolish all the buildings rather than simply to remove the asbestos. CFH letter dated November 9, 1999 at 4. Moreover, the property owner argues that EPA is not entitled to the costs that were unreasonable or unrelated to CERCLA. Id. at 5.

As stated above, the sole issue in this matter is whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. Under this process, issues not relating to the proposed perfection of a lien, including issues such as the remedy selected, the contents of a remedy selection and the selection of documents such as action memorandums, should not be considered by the Agency neutral. Supplemental Guidance at 8. Therefore, the issue of whether the actions taken and costs incurred by EPA were necessary and reasonable are not within the scope of this proceeding.

D. The Documentation Provided by EPA is Inadequate to Verify the Costs

The property owner also argues that EPA's documentation of its response costs is inadequate to verify the costs in general or to segregate the excludable costs in particular. As such, CFH argues, more documentation and verification is required before EPA should be permitted to impose a lien on this property. Id.

The LFR contains cost summaries that demonstrate that EPA incurred costs of $342,449.05 for which it has not been reimbursed. EPA has met its burden of demonstrating that the United States incurred costs relating to a removal action. Under the Supplemental Guidance, a summary report of costs is sufficient to show that EPA actually incurred costs at the site. Supplemental Guidance at 2. See In the Matter of Toka-Renbe Farm Site, CERCLA I-94-1014 (EPA Region 1, April 5, 2000). "[T] CERLCA statute contemplates the filing of a notice of lien well before cleanup procedures are completed, with the result that the lien is not for any sum certain, but for an indefinite amount." Reardon v. United States. For purposes of this proceeding, no further verification of these costs is necessary. Moreover, this is not the appropriate forum to argue the sum for which a party is liable. This issue should appropriately be raised in a cost recovery action or during negotiations.

E. Part of EPA's Response Actions contravened the Building/Structure Exemption

The property owner cites § 104(a)(3) of CERCLA which provides in relevant part:

> The President shall not provide to a removal or remedial action under this section in response to a release or threat of release-. . .(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; . . .

The property owner argues that part of EPA's response actions contravened this prohibition. As support for this position, the property owner cites EPA's Notification of Potential Liability and Invitation to Perform or Finance Proposed Cleanup Activities dated June 26, 1998, which cited the release or threat of release of "without limitation asbestos". CFH November 9, 1999 letter at 3. The

basis for the objection is that the Notification alleged that there was an imminent and substantial endangerment in light of the fact that the building had been condemned, yet there were Sections that were sufficiently sound that came within the building/structure exemption. The property owner concludes that EPA's response actions in those sections were unauthorized under CERCLA.

As the property owner concedes that there were sections of the building to which this exemption does not apply, there is no need for me to address this issue.

V. Conclusion and Recommendation

For the reasons stated above, and having considered all issues raised by the parties in this matter, and the LFR, I conclude that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien pursuant to Section 107(l) of CERCLA on the property located at Depot Street, Bars Mills, Maine were satisfied. All conclusions and supporting arguments of the parties have been considered. To the extent that findings, and conclusions submitted by the parties and the arguments made by them are in accordance with the findings, conclusions, and views stated herein, they have been accepted. To the extent that any proposed findings, conclusions submitted by the parties, and the arguments made by them are inconsistent with the conclusions and views stated here, they have been rejected. I recommend that the Regional Administrator of EPA Region I issue a final decision adopting this recommendation. A proposed final decision is attached.

This recommended decision is not a binding determination of liability or nonliability and no preclusive effect attaches to this determination.

July 27, 2001
Date

/s/
Sharon T. Wells
Regional Judicial Officer