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UNITED STATES ENVIRONMETNAL PROTECTION AGENCY
REGION III

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In the Matter of:	)	
	)	
Lin Electric Site	)	
1400 Bluefield Avenue	)	
Bluefield, Mercer County, West Virginia	)	**Docket No. CERC-03-2013-0091LL**
	)	
Gordon M. Lusk, II, and	)	
Danny E. Lusk,	)	
Owners	)	
	)	

RECOMMENDED DECISION

Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(*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 right to such property which: (1) belong to such person and (2) are subject to or affected by a removal or remedial action. This proceeding involves the question of whether the United States Environmental Protection Agency, Region 3 ("EPA") has a reasonable basis to perfect a lien pursuant to Section 107(*l*) of CERCLA on the "Lin Electric Site" ("Lin Site" or "Site"), a Superfund site in Bluefield, West Virginia. In this Recommended Decision I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.

This proceeding is being conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993 ("*Supplemental Guidance*"). EPA gave notice to Gordon M. Lusk, II and Danny E. Lusk ("the property owners" or "owners") by letter dated October 30, 2008 that the property owners were potentially liable for the cost to be incurred or already incurred at this property (Lien Filing

Record, hereinafter "LFR", R3 2) and by letter dated August 7, 2012, which provided the owners "notice of Opportunity to be Heard" and "Notice of Federal Superfund Lien" (LFR, R3 4; LFR, R3 5). By letter dated August 23, 2012 Gordon M. Lusk, II requested an informal meeting via telephone with EPA (LFR, Hrg. 1). On June 10, 2013, the Regional Counsel of EPA, Region III issued an Order of Assignment designating the undersigned as the neutral EPA official to conduct this proceeding and to make a recommendation as to whether EPA has a reasonable basis to perfect the lien (LFR, Hrg. 2). On October 23, 2013 an informal lien hearing was conducted at EPA's Region 3 Office in Philadelphia, Pennsylvania. Gordon Lusk and his attorney, Marc Lazenby, took part via telephone (Transcript at 2). A court reporter attended and transcribed notes on the informal hearing. The transcript of the hearing has been added to the Lien Filing Record as recommended by the *Supplemental Guidance*.

At the conclusion of the informal lien hearing, the Lusks were given an opportunity to present further documents and/or evidence but indicated that no further submissions would be presented (Transcript at 39). The earlier briefs provided by EPA, dated June 14, 2013 (LFR, Hrg. 3) and by Respondent, dated September 3, 2013 ("Reply"), have been received and are a part of the LFR. I have taken the entire LFR into consideration in writing this Recommended Decision.

I. SCOPE AND STANDARD OF REVIEW

The *Supplemental Guidance* sets forth that all facts are to be considered in determining whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(*l*) of CERCLA have been satisfied (*Supplemental Guidance*, 8). Superfund lien proceedings have been described as "probable cause" hearings. See, e.g., Harbucks, Inc. Revere Chemical Site, 1995 WL 1080544 (EPA 1994) (probable cause determination). This

characterization follows the reasoning in Reardon v. Untied States, 947 F.2d 1509 (1st Cir. 1991). *The Supplemental Guidance* states, in relevant part:

> [T]he sole issue [in the proceeding] is whether EPA has (or had, in the case of a post-filing meeting) a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. The [proceeding] will not be concerned with issues not relating to the proposed perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents. *Supplemental Guidance,* 8.

II. RELEVANT LEGAL CRITERIA

Section 107(*l*)(1) of CERCLA, 42 U.S.C. § 9607(*l*)(1), provides that a lien in favor of the United States arises with respect to costs and damages for which a person is liable under Section 107(a)(1), upon all property which belongs to the person liable and which is subject to, or affected by, a removal or remedial action. Section 9607(*l*)(2), 42 U.S.C. § 9607(*l*)(2) states that a lien arises when costs are first incurred by the United States from a response action or when the property owner is notified by written notice of potential liability, whichever is later.

In addition to the statutory criteria, the following specific factors set forth in the *Supplemental Guidance* will also be considered. The factors are:

1) Was the property owner sent notice by certified mail of potential liability?
2) Is the property owned by a person who is potentially liable under CERCLA?
3) Is the property subject to or affected by a removal or remedial action?
4) Has the United States incurred costs with respect to a response action under CERCLA?
5) Does the record contain any other information which is sufficient to show that the lien notice should not be filed?

III. BACKGROUND AND RELEVANT FACTS

The Lin Site is located at 1400 Bluefield Ave., Bluefield, West Virginia. Most of the original facility was demolished in 2008, leaving only the first floor (and sumps, pits, access ways, and drains on the first floor) and basement as well as the former office, garage, and locker room buildings (Id. at i; LFR, R3 3, at 2). The total demolished building area is approximately two acres (LFR, R3 3, at i).

The Site was involved in rebuilding coal mining equipment from 1924 until 1986 (LFR, Hrg. 3, at 2; LFR, R3 1 at 2). The equipment was cleaned with trichloroethylene ("TCE") (LFR, Hrg. 3, at 2; LFR, R3 3, at 1). Polychlorinated biphenyls (PCBs") were present in the cleaning wastes, likely because some of the equipment contained PCB oil (LFR, Hrg. 3, at 2; LFR, R3 3, at 1). Former owners conducted closure and cleanup activities from 1986 until 1988 (LFR, R3 3, at 1). Thereafter, in 1988 Lin-Electric began operations at the Site (LFR, R3 3, at 3). Until 2001, Lin-Electric performed electric part/metal cleaning and forming operations and motor and generator repair services, rebuilding of transformers, and manufacturing of electric coils (Id.). Lin-Electric used toluene, xylene, acetone, varnish, and solvents (Id.). The rebuilding of transformers contributed to the PCB contamination (Id.).

In 2004, the West Virginia Department of Environmental protection ("WVDEP") performed a Site closure inspection and noted the presence of multiple chemicals including touluene, xylem, acetone, and varnishes, as well as containers of corrosives, flammable substances, and ash (LFR, R3 3, at 1; LFR, Hrg. 3, at 3). Portions of the facility including the old basement were flooded and numerous containers of hazardous substances were present (LFR, R3 3, at 1). WVDEP requested assistance from EPA in August 2004 and provided EPA an inspection report stating that when the facility was closed in 1987, all identified interconnecting

sewer and storm drains were pressure cleaned (LFR, R3 3, at 1; LFR, Hrg. 3, at 3). Confirmation samples submitted in 1987 showed that only two drains were sampled post-cleaning (LFR, Hrg. 3, at 3). Neither was sampled for PCBs (Id.).

In response to WVDEPs request EPA conducted a removal site evaluation between November 30, 2004 and December 2, 2004 (LFR, R3 3, at 1). Following the evaluation, EPA initiated a removal action pursuant to CERCLA Section 104 (Id.). EPA thus obligated federal monies to protect human health and the environment by stabilizing and decontaminating the Site, which involved removing approximately 86 drums of hazardous substances and decontaminating areas identified as a result of the evaluation (LFR, Hrg. 3, at 3). In 2005, EPA received information from a prior PCB study of the Site that levels of 11 milligram/kilogram (aroclor 1248) were found in a sewer drain at the Site (LFR, R3 3, at 1; LFR, Hrg. 3, at 4). Based on an opinion by the Agency for Toxic Substance and Disease Registry that those levels posed an insignificant threat to human health, EPA determined that no further PCB study of the drain was necessary (LFR, R3 3, at 1; LFR, Hrg. 3, at 4).

During the removal action, EPA observed nine 55-gallon drums in a basement containing oil (LFR, Hrg. 3, at 4). They stood in about three feet of water covered by an unknown black oily substance (Id.). A sample of the substance revealed 6.6mg/kg PCBs (Id.). EPA determined that the basement did not contain any drain or pathway to a navigable waterway (Id.). Therefore, EPA concluded no risk of release or threat of such was present (Id.). EPA's OSC determined he lacked the authority to respond to the drums under CERCLA or the Oil Pollution Act and thus no further investigation or response was necessary (Id.). The removal action was completed on January 28, 2005 (Id.).

On March 30, 2006 the Lusks purchased from First Century Bank certain lots comprising the Site (LFR, Prop 1-2). The purchase was recorded on October 25, 2007 (LFR, Prop 1). The Lusks and the Trustee for First Century Bank executed a Deed of Correction related to the Site on August 21, 2008 (LFR, Prop 2). The Lusks were allegedly told by the bank that the real estate was "clean" and claimed to have been provided a report from Marshall Miller & Associates, environmental consultants, stating that the property was devoid of environmental contamination (LFR, Hrg. 1, 1). This report was never provided by the Lusks. At the hearing, the Lusks' counsel indicated instead that "the auctioneer held up some sort of document ... in his hand and said, '[t]his property is clean and we're going to sell it today.['] That is the only thing that the Lusks were advised or knew about environmental contamination at that site as of March 2006 when they purchased it" (Transcript at 16). The Lusks filed suit against the bank in September 2008 due to the alleged misrepresentations (Id. at 2). The Lusks also claim to have understood at the time of purchase that the EPA had cleaned up any environmental contamination at the Site (Id. at 1). It was allegedly not until June 2008 that the Lusks, after demolishing structures at the Site, were advised by EPA of the ongoing contamination (Id. at 1).

In 2008 EPA met with WVDEP and the Virginia Department of Environmental Quality in order to review surface water sampling and fish studies conducted in the Bluestone River and its tributaries (LFR, R3 3, at 2). The Bluestone River receives drainage from the Site (Id.). Site sampling in June 2008 revealed PCB contamination in areas of the Site, including the old basement, a subsurface compressor room, floor drains, and storm drains (Id.). Dye tracing verified that the Site's drainage systems were connected to off-Site drainage systems that emptied into the Bluestone River via two creeks (Id.). In 2008, EPA's on-scene coordinator

(OSC), from a public sidewalk, viewed drums in the basement through a window (Transcript at 13).

Sampling in June 2008 led to the approval of a Request for Additional Funding, Change of Scope and Exemption from the 12 Month Statutory Limit for a Removal Action at the Lin Electric Site ("Action Memo") in July 2008 (Id.; LFR, Hrg. 3, at 5). The EPA-selected response actions in the Action Memo included removal and containment of oil and water containing hazardous substances from the basement and vaults of the former facility; the recovery, stabilization, segregation, consolidation (if appropriate), and staging of containers and their contents from within the former facility; and the minimization of off-Site migration of PCB contamination by removing migration pathways (LFR, Hrg. 3, at 5).

The second removal action began on August 13, 2008 (LFR, R3 3, at 3). On October 13, 2008 EPA transported waste generated from the activities for off-Site disposal (Id. at 5). On October 15, 2008, EPA performed sediment sampling revealing elevated PCB concentrations in the west side storm drainage system and elevated concentrations of TCE and dichlorethene (Id. at 6). EPA then completed the activities set forth in the Action memo (LFR, Hrg. 3, at 5).

The Lusks were sent Notice of Potential Liability on October 30, 2008 informing them of EPA's belief that they were potentially responsible parties ("PRPs") for the Site under CERCLA because of their status as current owners (LFR, R3 2). On November 21, 2008 EPA once again approved a Request for Modification of Scope, Additional Funding, and Exemption from the 12-Month/$2 Million Statutory Limit for the Removal Action at the Site ("Modification and Exemption Memo") authorizing EPA to take action to address additional contamination identified during the activities set forth in the Action Memo and prevent further migration of PCB contamination (LFR, Hrg. 3, at 6). The response actions selected by EPA in the

Modification and Exemption Memo included, amongst other actions, the removal of PCB-contaminated oils and equipment; the disposal off-Site of PCB-contaminated sediment, sludge, debris, or liquid generated during decontamination activities; and the minimization of off-Site migration of hazardous substances (LFR, Hrg. 3, at 6).

On March 10, 2009 EPA conducted sampling of the concrete slab at the Site in order to characterize it as a potential source of PCB contamination (LFR, R3 3, at 7). The results did not reveal significant recontamination after the 1980s remediation (Id.). EPA issued a Unilateral Administrative Order, Docket No. CERC-03-2009-0202DC ("2009 Order"), to Cooper Industries, LLC ("Cooper"), a former owner of the property at the Site, on July 9, 2009 requiring Cooper to perform certain response activities selected in the Modification and Exemption Memo at the Site, including disposing of waste materials accumulated and remaining at the site (Id. at 11). Cooper previously performed closure activities at the Site in 1988 (LFR, Hrg. 3, at 6). Cooper was notified on October 15, 2009 that it completed the requirements under the 2009 Order (Id. at 7). On July 23, 2009 and September 15, 2009 EPA conducted sampling of the old sanitary sewer system underlying the Site and the active sanitary sewer in front of and upstream of the Site, the tertiary filter media at the Bluefield Sanitary Board Wastewater Treatment Plant, and the Bluestone River (Id. at 7; LFR, R3 3, at 11). The samples suggested a source other than the Site was continuing to contribute low levels of PCB contamination at the Bluefield Sanitary Board Wastewater Treatment Plant (LFR, Hrg. 3, at 7; LFR, R3 3, at 11). Representatives of the Lusks collected environmental data in November 2009 and forwarded it to EPA in January 2010 (LFR, Hrg. 3, at 7). The data indicated low levels of volatile organic compounds (VOCs), specifically TCE, in the soil, but did not indicate PCB presence (Id.).

Based on the foregoing and prior analyses performed by EPA likely indicating PCBs and TCE in groundwater, EPA installed temporary monitoring wells at the Site on May 18 and May 19, 2010 to evaluate whether VOCs might be facilitating PCB migration from the Site through groundwater (Id. at 7; LFR, R3 3, at 11-12). Based on samples taken on June 1, 2010, EPA determined there did not appear to be a correlation between PCB concentrations and the VOCs in the groundwater samples (LFR, R3 3, at 12). Despite low levels of organic contaminants in the ground water, EPA determined the data did not suggest that the groundwater was resulting in the off-Site migration of elevated PCB contamination within the scope of the Removal Action (Id.).

From May 31, 2008 through January 24, 2012, EPA's removal action costs for the Site were $1,436,417.28 (LFR, Costs 1). The sum includes a multitude of costs including, but not limited to, expenses incurred for Site investigations and assessments, the response actions set forth in the Action Memo and Modification and Exemption Memo, contractor support, enforcement activities, and administrative overhead (i.e. indirect costs) (Id.).

IV. Discussion

a. Narrowing the Issues

The issue is whether the information contained in the LFR supports the position that EPA has a reasonable basis to perfect a lien. In order to make that assessment both statutory and guidance factors will be considered.

During the informal hearing, counsel for the Lusks stipulated to four of the five factors set forth on page 7 of the *Supplemental Guidance*, as follows:

1) The Lusks are owners of the property located at 1400 Bluefield Avenue ;
2) The Lusks were sent notice of potential liability by certified mail;

3) The property was subject to or affected by a removal or remedial action;

4) The United States has incurred costs with respect to a response action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended.

The remaining factor for consideration is whether the record contains any other information which is sufficient to show that the lien notice should not be filed (*Supplemental Guidance* at 7). The Lusks did not stipulate to this factor (Transcript at 10-11).

The Lusks argue that the EPA lacks a reasonable basis to perfect a lien because they are "innocent landowners" under CERCLA (Lusk Brief at 2; Transcript at 16-17). Therefore, the issue stands as to whether the Lusks are "innocent landowners" under CERCLA.

In their Reply Brief submitted September 3, 2013 as well as during the informal hearing, the Lusks argued, generally, that both EPA and First Century Bank indicated that the Site was clean of environmental contamination (Reply, at 1; Transcript at 17, 30). The Lusks claim to have been "entirely unaware of any such contamination" until being notified by the EPA in June 2008 and did not do anything to contaminate the Site (Reply, at 2). The Lusks specifically claim that in January 2005 the EPA "determined that the real estate was clean of environmental contamination" (Reply, at 4). The record, however, is contrary to this allegation. At the end of the Removal Action that terminated in January 2005, EPA did not remove nine drums in the basement or the PCB contamination in the drains because that was not addressed by the Removal Action (LFR, Hrg. 3, Ex. 7, at 1, 5, 7; LFR, Hrg. 3, Ex. 6, at 2). EPA "determined that the basement did not contain any drain or pathway to a navigable waterway . . . [and] the standing oil and resin/water drums in the basement d[id] not fall under the jurisdiction of CERCLA or OPA [Oil Pollution Act]." (LFR, Hrg. 3, Ex. 5 at 2). Lin Electric "was notified of the oil and the

resin/water drums in the basement and [EPA] requested that [Lin Electric] work with the City of Bluefield in handling the removal and disposal of the oil/water and resin/water drums from the basement area." (Id.). Consequently, the On Scene Coordinator "determined that no further action [wa]s deemed necessary at the site." (Id. at 3). Furthermore, the Lusks admitted that, at the time they purchased the property in 2006, they knew of the prior remedial work, lending credence to the notion that the Lusks were aware that some contamination had previously occurred (LFR, Hrg. 1, at 1), despite their later argument that they were "entirely unaware" of any contamination until 2008 (Reply, at 2; Transcript at 16).

b. The Innocent Landowner Defense Standard

The record reflects that at no time did EPA determine the Site was "clean." Nevertheless, even assuming the Lusks were told by another entity that the Site was "clean", the Lusks would not be "innocent landowners" as that defense is defined by CERCLA and the regulations promulgated under CERCLA. The "innocent landowner" defense is available in CERLCA actions and explained in two provisions of CERCLA, Section 101(35)(A), 42 USC 9601(35)(A), and Section107(b)(3)(a) and (b), 42 USC 9607(b)(3). In relevant part, Section 107 establishes the innocent landowner defense when:

> **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 (42 USC 9607(b)(3)) (emphasis added).

Further, Section 101 states that in defining "contractual relationship" CERCLA will exclude from its scope transactions where:

> the real property on which the facility concerned is located was acquired by the defendant after the disposal or placement of the hazardous substance on, in, or at the facility . . . [and **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.**
>
> ***
>
> In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of section 9607(b)(3)(a) [discussed above] and (b) of this title [as well as other requirements not at issue] (42 USC 9601(35)(A)) (emphasis added).

The requirements of Section 101(b), 42 USC § 9601(35)(b) set out the "reason to know standard" called "all appropriate inquiries" (AAI) which requires that:

> **[t]o 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**; and
>
> (II) the defendant took reasonable steps to--
>
> (aa) stop any continuing release;
>
> (bb) prevent any threatened future release; and
>
> (cc) prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance (42 USC 9601(35)(B)(i)) (emphasis added).

CERCLA confers on the EPA the power to, via regulation, set out the standards and practices establishing the extent of "all appropriate inquiries" ("AAI") (42 USC 9601(35)(B)(ii)).[1] The EPA promulgated regulations ("Final Rule") for implementing standards and practices for conducting all appropriates inquiries in 2005, with an

[1] "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)." 42 U.S.C. § 9601.

effective date of November 1, 2006 (40 CFR 312; 70 Fed. Reg. 66070 (Nov. 1, 2005). However, the Lusks purchased the real estate at issue in March 2006 (Reply, at 7). Consequently, the standards described in the Final Rule are not necessarily mandatory.

As EPA set forward in their brief (LFR, Hrg. 3, at 13-14), CERCLA sets out "Interim Standards" that may also apply to this case which are "the procedures of the American Society for Testing and Materials, including the document known as 'Standard E1527-97', entitled 'Standard Practice for Environmental Site Assessment: Phase 1 Environmental Site Assessment Process'" ("ASTM E1527-97") (42 USC § 9601(35)(B)(iv)). Shortly after this was promulgated, EPA found that owners could also satisfy AAI by following the standards set out in ASTM E1527-00 as well as that in ASTM E1527-97 (68 Fed. Reg. 24888-01 (Jun. 9, 2005)). However, in promulgating the Final Rule, EPA noted that until the Final Rule went into effect on November 1, 2006, either the Final Rule's standard (consistent with ASTM E1527-05) or one of the Interim Standards (ATSTM E1527-97 or ASTM E1527-00) could be employed to satisfy the AAI statutory requirement (70 Fed. Reg. 66070-01).[2] Therefore, the Lusks are able to satisfy AAI if they follow the standards set out in the Final Rule, ASTME E1527-97, or ASTME E1527-00.

c. The Innocent Landowner Defense Standard, Applied

The Lusks bear the burden of establishing that they are entitled to the innocent landowner defense. (42 U.S.C. 9601(35)(A). The requirement, established via AAI, that the Lusks "did not know and had no reason to know that any hazardous substance which

[2] "Until November 1, 2006, both the standards and practices included in today's final regulation and the current interim standards established by Congress for all appropriate inquiries will be recognized by EPA as satisfying the statutory requirements for the conduct of all appropriate inquiries under section 101(35)(B) of CERCLA." 70 Fed. Reg. 66070-01 (Nov. 1, 2005).

is the subject of the release or threatened release was disposed of on, in, or at the facility", is at issue. (42 USC 9601(35)(A)-(B)).

AAI under the Final Rule is more burdensome than under the ASTM E1527-97 or ATM E1527-00 standards.[3] In light of the fact that the Final Rule expands on ASTM E1527-97 and ASTM E1527-00, and thus provide a more onerous standard, this Recommended Decision will operate under the assumption that the Lusks are only alleging they have met the lesser burden of either of the interim standards. If the Lusks had met the standard set out in the Final Rule, they would necessarily have met the Interim Standards, but the converse is not true. This is also borne out by the fact that the Lusks, who have the burden of establishing AAI, in their Reply Brief argue that they met the Interim Standards and make no reference to the later regulations (Reply at 7). As the two Interim Standards are mostly identical, it will suffice to describe those standards found in both ASTM E1527-97 and ASTM E1527-00 with which the Lusks failed to demonstrate compliance.

The only inquiry the Lusks argue they performed was their half-hour personal inspection, along with other potential bidders at the auction for the sale of the Site, of the buildings and structures prior to the auction (Reply at 7; Transcript at 26).

The Interim Standards set out the standards of what is termed a "Phase I Environmental Site Assessment" to be performed by an environmental professional. The standards require that an environmental professional perform several tasks including interviews, site reconnaissance, reviews of certain documents and information, as well as

[3] For example, the final rule requires that "[i]nterviews with past and present owners, operators, and occupants" be performed. 40 C.F.R. § 312.20. However, ASTM E1527-97 and ASTM E1527-00 require only a "reasonable attempt" to interview a key site manager and the occupants.

the compiling of a signed report presenting the professional's opinion (ASTME 1527-97 at § 6.5.1; ASTME 1527-00 at § 6.5.1). The Lusks have not shown, nor even alleged, to have used an environmental professional to perform these tasks. Further, the Lusks have not argued nor is there any indication that the Lusks themselves are "environmental professionals" as that term is described in ASTM E1527-97, ASTM E1527-00, or the Final Rule (ASTME 1527-97 at 3.3.11; ASTME 1527-00 at 3.3.12; 40 C.F.R. § 312.10).

The Lusks note that due to the fact that the Site was no longer in use at the time of sale, the Lusks did not make a reasonable attempt, as required by the Interim Standards, to interview occupants, key site managers, the owner(s), or government officials (Reply, 7; ASTM E1527-97 § 9-10; ASTM E1527-00 § 9-10). While many of these interviews (e.g. with a current site manager) may have proven fruitless and/or futile in light of the fact that the Site was not in use at the time of the purchase, a reasonable attempt was nevertheless required by the Interim Standards (9-10) and was, as previously noted, required to be performed by an environmental professional. Further, why the Lusks did not try to interview local government officials was not explained by the Lusks.

In addition, the AAI Final Rule also requires review of materials, site reconnaissance, interviews, and reports be performed by, or under the supervision of, an environmental professional (40 CFR 312.21). Therefore, the Lusks' failure to use an environmental professional or even perform the tasks without such a professional (which would nevertheless be deficient) indicates that the Lusks have failed to comply with the AAI standards, be it in the form of the interim standards or the Final Rule.

The Lusks' allegation that "[w]hen [they] purchased the real estate in March 2006, [they] understood that the EPA fully cleaned any contamination in 2004, and [they]

assumed that the First Century Bank told [them] the truth that the real estate was clean," even if true, falls far short of meeting the standard of AAI (LFR, Hrg. 1, at 1). Even if performing AAI were assumed to have been unable to reveal contamination, as the Lusks argued at the hearing (Transcript at 36), such a result would not change the analysis because the potential outcome of performing AAI is not dispositive (See 42 USC 9601 (35)(B)). However, the performance thereof is essential to establishing the Innocent Landowner defense (Id.).

Furthermore, the Lusks admission that they knew that the Site had been previously subject to remedial procedures indicates that the Lusks were aware, or should have been aware, that contamination had occurred on the Site and should have considered the prospect that, notwithstanding the termination of the earlier remedial action, contamination may have remained at the Site (LFR, Hrg. 1, at 1).

As CERCLA explicitly notes, to avail oneself of the innocent landowner defense, the Lusks must not have "know[n] and [have] 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 USC § 9601). As the Lusks did not come close to fulfilling the requirements of AAI under the Interim Standards or Final Rule, the Lusks are unable meet the aforementioned standard and thus unable to avail themselves of the innocent landowner defense.

d. Bona Fide Prospective Purchasers

In the alternative, if the Lusks are not innocent landowners, they can also avoid CERCLA liability and a lien if they are a "bona fide prospective purchaser" (42 USC § 9601(40); 42 USC § 9607(r)). The Lusks did not raise this argument in either their brief or at the informal hearing. However, for the sake of completeness, this defense will be considered. To be a bona fide

prospective purchaser, the Lusks have the burden of showing, via a preponderance of the evidence, that, amongst other things, that they "made all appropriate inquiries into the previous ownership and uses of the facility in accordance with generally accepted good commercial and customary standards and practices" which requires compliance with the same AAI standards described previously regarding the innocent landowner defense (42 USC § 9601(40)(B)). For the same reasons the Lusks have failed to establish that they met AAI under the innocent landowner defense, the Lusks have failed to establish that they have performed AAI in the context of being bona fide prospective purchasers. Consequently, the Lusks cannot avail themselves of the bona fide prospective purchaser defense either.

e. The EPA has a Reasonable Basis to Perfect a SUEPRFUND Lien

The Lusks have failed to demonstrate that they are entitled to either the innocent land owner or the bona fide prospective purchaser defense. Therefore, EPA, consistent with the strict liability nature of CERCLA, has a reasonable basis to perfect a lien under the authority of CERCLA Section 107(*l*), 42 USC § 9607(*l*) and consistent with the *Supplemental Guidance*. This recommended decision does not bar EPA or the property owner from raising any claims or defenses in later proceedings. Nor is this recommended decision a binding determination of liability. The recommendation has no preclusive effect and shall not be given any deference or otherwise constitute evidence in any subsequent proceedings.

Dated: 12/31/13

Renée Sarajian

Renée Sarajian
Regional Judicial Officer
U.S. EPA, Region III

CERTIFICATE OF SERVICE

This Recommended Decision (Docket No.: CERC-03-2013-0091LL) was served on the date below, by the manner indicated, to the following people:

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Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029