UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3

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

EPA's Response to Arguments Presented by Turog Properties, Limited in its August 17, 2020 *Brief Submitted Pre-Hearing (Pre-Meeting)*

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EPA's Rebuttal to Arguments Presented by Turog Properties, Limited in its August 17, 2020 *Brief Submitted Pre-Hearing (Pre-Meeting)*

This is a response by the U.S. Environmental Protection Agency ("EPA") to arguments raised by Turog Properties, Limited ("Turog") in its August 17, 2020 *Brief Submitted Pre-Hearing (Pre-Meeting)* in connection with this matter ("Turog Response"). For the reasons set forth herein, EPA contends that the Turog Response raises no issues which undermine EPA's conclusions that the legal predicates for the existence of the lien have been met, that EPA has a reasonable basis to perfect the lien, and that perfecting the lien is appropriate.[1]

I. Procedural History

By letter dated July 1, 2019, EPA notified Turog of EPA's intent to perfect a lien on property owned by Turog and included within the Chem Fab Superfund Site ("Chem Fab Site" or "Site"). *Filing No. 1*.[3] By letter dated July 17, 2019,

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[1] This response has been prepared in anticipation of a conference with Turog and the EPA Region 3 Regional Judicial and Presiding Officer ("RJO"). The RJO will make recommendations to the EPA Region 3 Regional Counsel, who will decide whether perfection of the lien is appropriate. All contentions and arguments in this response are those of the undersigned staff attorney and not the Regional Counsel.

[3] Filing numbers correspond to documents filed in the docket for this matter (*see* https://yosemite.epa.gov/oa/rhc/epaadmin.nsf/7b598669425eac47852575400050b7e2/a65405432ddce6bb852584780058567f!OpenDocument).

Turog notified EPA of its objections to EPA's perfection of the lien and of its desire to meet with a neutral EPA official. *Filing No. 5, Rebuttal Exhibit 3, at PDF 79.*[4] On September 17, 2019, the EPA Region 3 Regional Counsel signed an *Order of Assignment* designating the EPA Region 3 Regional Judicial and Presiding Officer ("RJO") as the neutral official to review this matter. *Filing No. 4.* The *Order of Assignment* additionally required EPA to serve a copy of the Lien Filing Record and a written reply to Turog's objections on Turog within 20 days. *Id*. On September 17, 2019, the undersigned served the Lien Filing Record on Turog. *Filing Nos. 2 and 3*. On October 2, 2019, the undersigned served EPA's *Rebuttal to Arguments Presented by Turog Properties Limited in its July 17, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* ("Rebuttal") on Turog. *Filing No. 5*. By letter dated February 13, 2020, the RJO directed Turog to submit its brief responding to EPA's *Rebuttal* by March 9, 2020 and directed EPA to file its response by April 3, 2020. *Filing No. 12.* In addition, the RJO tentatively set April 22, 2020 as the date on which the lien conference would be held. *Id.*

[4] "Rebuttal Exhibits" are exhibits to EPA's *Rebuttal to Arguments Presented by Turog Properties, Limited in its July 17, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* ("*Rebuttal*") served on Turog and copied to the EPA Region 3 Hearing Clerk under cover of letter dated October 2, 2019. The body of the *Rebuttal* and the exhibits thereto are *Filing No*. 5. References to the *Rebuttal* exhibits in this brief will recite the *Rebuttal* exhibit number and the PDF page number on which such exhibit begins.

By letter dated February 26, 2020, Turog requested a 60-day extension to the deadline for filing its response in order to gather information from the Commonwealth of Pennsylvania. *Filing No. 13*. EPA did not object. *Filing No. 14*. By letter dated February 27, 2020, the RJO set Turog's new filing deadline at May 8, 2020; EPA's filing deadline at June 5, 2020; and the conference at June 24, 2020. *Filing No. 15*.

By email on May 4, 2020, after EPA Region 3 closed its Philadelphia office building because of the COVID19 pandemic, Turog requested a second extension of time to file its response, this time a 30-day extension "[g]iven the circumstances, and in light of the non-emergent nature of the issue." *Filing No. 16*. Again, EPA did not object to the extension. *Id.* By email on May 5, 2020, the RJO set Turog's new filing deadline at June 8, 2020 and EPA's filing deadline at July 8, 2020. *Id.*

By email on May 29, 2020, Turog requested a third extension of time to file its response, this time a 45-day extension "to hire counsel and have them prepare a defense." *Filing No. 17*. By email on June 1, 2020, EPA responded that it would not object to Turog's request if, by June 8, Turog provided EPA with (a) certain assurances regarding transfer of its property, actions which might encumber its property, bankruptcy, and payment of real estate taxes, and (b) weekly reports on its progress in hiring counsel. *Filing No. 18*. By email on June 4, 2020, Turog

provided EPA with acceptable assurances, and on June 5, 2020, EPA notified the RJO. *Filing No. 21*. By Order dated June 5, 2020, the RJO set Turog's filing deadline at July 24, 2020, and EPA's filing deadline at August 28, 2020. *Filing No. 22*.

By letter dated July 22, 2020, counsel for Turog requested a fourth extension of time to submit its response, this time for 30 days after receipt of certain information allegedly owed to Turog by EPA. *Filing No. 23*. By email on July 23, 2020, EPA agreed to a one-week extension and advised the RJO that EPA would expeditiously consider Turog's request. *Filing No. 25*. By letter dated July 27, 2020, EPA advised Turog's counsel that (a) the information referenced in counsel's email of July 22 had been provided to Turog on January 14, 2020, and (b) EPA would agree to Turog's fourth request for an extension of time if Turog agreed not to object if EPA perfected the lien in advance of the lien hearing. *Filing No. 27*. On July 30, 2020, the RJO held a status conference during which Turog declined to agree to EPA's proposal. *Filing No. 29*. Following the status conference, the RJO issued an Order setting Turog's new filing deadline at August 17, EPA's new filing deadline at September 14, and the lien conference at October 13, 2020. *Id*.

On August 17, 2020, Turog submitted the Turog Response. *Filing No.* 30. This EPA brief responds to the Turog Response and incorporates all facts and arguments in EPA's *Rebuttal.*

II. Scope of This Proceeding

The purpose of this proceeding is to provide Turog with an opportunity to respond to EPA's Notice of Intent to Perfect a Lien on its property under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(l). The lien secures the United States' claim for costs "for which a person is liable to the United States under [42 U.S.C. § 9607(a)]." 42 U.S.C. § 9607(l). However, neither the conclusion of this proceeding nor the perfection of a lien on Turog's property will constitute a determination that Turog is liable, under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), to the United States for costs incurred in connection with the Chem Fab Site. Similarly, neither this proceeding nor perfection of a lien will determine the costs for which Turog may be liable. Such determinations are the domain of a cost recovery lawsuit which may be brought by the United States against Turog if and when the United States elects to recover its costs against the company. Should that occur, Turog will have ample opportunity to challenge EPA's response actions and costs in an effort to minimize or avoid

liability.[5]

The lien that EPA seeks to perfect already exists by operation of law. *See Filing No. 5*, at 9-10. By perfecting liens arising under Section 107(l) of CERCLA, EPA provides notice to other existing and potential lienholders and claims a place with respect to priority should the property be liquidated pursuant to a judgement against the property owner or otherwise.

As set forth in EPA's *Rebuttal*, the scope of this proceeding is limited to ***whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l)***. As explained in EPA's *Rebuttal*, the five statutory predicates are:

1. The property owner is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a);

2. The land upon which EPA seeks to perfect the lien belongs to the property owner;

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

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

3. The land upon which EPA seeks to perfect the lien was subject to or affected by a removal or remedial action;

4. The United States has incurred costs in connection with the property; and

5. EPA provided the property owner with written notice of potential liability via certified or registered mail.

In EPA's *Rebuttal*, the undersigned provided its reasonable bases supporting each of these predicates. *Filing No. 5*, at Section III.

III. Turog's Response to EPA's Contentions

Turog has not disputed EPA's reasonable bases to believe that:

- The land upon which EPA seeks to perfect the lien belongs to Turog (addressed by EPA in *Filing No. 5*, at Section III.A.2);
- The land upon which EPA seeks to perfect the lien was subject to or affected by a removal or remedial action (addressed by EPA in *Filing No. 5*, at Section III.A.3);
- The United States has incurred costs in connection with the property (addressed by EPA in *Filing No. 5*, at Section III.A.4); or
- EPA provided Turog with written notice of potential liability via certified or registered mail (addressed by EPA in *Filing No. 5*, at Section III.A.5).

Further, Turog does not dispute EPA's reasonable basis to believe that Turog is a responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)

(addressed by EPA in *Filing No. 5*, at Section III.A.1). Rather, Turog disputes EPA's reasonable basis to believe that Turog cannot maintain the defense set forth at 42 U.S.C. §§ 9607(b)(3) and 9601(35)(A) (addressed by EPA at *Filing No. 5*, Section III.B) ("Innocent Landowner Defense"). This is the sole disputed issue in this proceeding.[6]

As discussed by EPA in *Filing No. 5*, in order to raise the Innocent Landowner Defense, Turog must establish, by a preponderance of evidence, that (1) the release or threat of release of hazardous substances and the damage therefrom was caused solely by a third party; and (2) the act or omission of the third party did not occur in connection, directly or indirectly, with a "contractual relationship" with the third party; and (3) Turog neither knew nor had reason to know that hazardous substances had been disposed of at the Property; and (4) Turog exercised due care with respect to the hazardous substances, in light of all relevant facts and circumstances; and (5) Turog took precautions against foreseeable acts or omissions of the third party and the consequences that could foreseeably result from such acts or omissions; and (6) Turog provided full cooperation, assistance, and facility access. Turog must establish each of these facts for it to be able to maintain the defense. *See, e.g., Foster v. U.S.*, 922 F. Supp.

[6] EPA separates the issue of liability under CERCLA § 107(a) from the issue of a defense under CERCLA § 107(b) for clarity.

642, 654 (D.D.C. 1996) (a defendant's failure to meet its burden on any one of the required elements precludes the application of the defense) (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)); *U.S. v. A & N Cleaners and Launderers, Inc.*, 854 F. Supp. 229, 239 (S.D.N.Y 1994).

In its *Rebuttal*, EPA explained its reasonable basis to believe that Turog cannot maintain the Innocent Landowner defense. EPA identified the following seven reasons supporting this conclusion:

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

2. Turog had reason to know, before it acquired the property, that hazardous substances had been disposed of there;[7]

3. Turog has not "exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to consent to entry by EPA to the property to perform a sub-slab investigation to evaluate threats to Turog's tenants;

4. Turog has not "exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA to protect its tenants;

[7] Items 1 and 2 are statutorily linked. A party can defeat the existence of the "contractual relationship" by demonstrating, by a preponderance of the evidence, that "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." 42 U.S.C. §9601(35). Thus, once the threshold definition of "contractual relationship" is proven the analysis turns on the knowledge element.

5. Turog has not provided "full cooperation, assistance, and facility access" because it failed to consent to entry to the property to perform a sub-slab investigation to evaluate threats to Turog's tenants;

6. Turog has not provided "full cooperation, assistance, and facility access" because it failed to operate and maintain a vapor mitigation system installed by EPA to protect its tenants; and

7. Turog has not provided "full cooperation, assistance, and facility access" because it failed to comply with an EPA information request seeking information on Turog's ability to pay for indoor air sampling necessary to protect its tenants.

Under Sections 107(b)(3) and 101(35) of CERCLA, 42 U.S.C. § 9607(b)(3) and 9601(35), Turog's defense must fail if *any* of [(1)+(2)] through (7), above, are true.[8] That said, the RJO is not tasked with determining whether Turog's defense fails. Rather, the RJO must determine *whether EPA has a reasonable basis to believe that Turog cannot maintain the defense*. If the RJO determines that EPA has a reasonable basis to believe that any of [(1)+(2)] through (7) are true, the RJO must conclude that EPA has a reasonable basis to believe that Turog cannot maintain an Innocent Landowner Defense. Such a conclusion, combined with Turog's decision not to challenge EPA's position on the other predicates for a CERCLA § 107 lien, leads to the inevitable conclusion that EPA has a reasonable basis to believe that the statutory predicates for the lien have been met and that

[8] See Footnote 7.

perfection of the lien is appropriate.

Turog addressed EPA's claims regarding (1)-(7), above, in the Turog Response. Turog's arguments and EPA's responses are set forth below.

A. EPA's Contention That the Act or Omission of the Third Party Occurred in Connection, Directly or Indirectly, With a "Contractual Relationship" With the Third Party.

Section 107(b)(3) of CERCLA requires that, in order to raise and maintain the Innocent Landowner Defense, Turog must establish, by a preponderance of the evidence, that "the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by . . . 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.* 42 U.S.C. § 9607(a)(3) (emphasis added). "Contractual relationship" is defined in the statute to include "land contracts, deeds, easements, leases, or other instruments transferring title or possession" unless an exemption is triggered.[9] 42 U.S.C. § 9601(35). In its objection to EPA's Notice of Intent to Perfect a Lien, Turog argued that "[Turog] had no contractual relationship with Chem-Fab Corp., the prior owner of the Site, or with any of their employees, principals or agents, whose actions caused the present release or threat

[9] The exemption is discussed at the end of this subsection and in Section III.B, below.

of release of a hazardous substance at the subject Site." *Filing No. 5, Rebuttal Exhibit* 3, at PDF 79. In its *Rebuttal*, EPA argued that the release and damages occurred as a result of acts or omissions of a third party with whom Turog had a direct or indirect contractual relationship (Chem Fab) because Turog took possession of the property via a "land contract, deed, or other instrument transferring title or possession." *Filing No. 5*, at Section III.B.1. In its response, Turog argued that its relationship with Chem Fab was not a "contractual relationship" within the meaning of the statute. *Filing No. 30*, at 5.[10] In support of this argument, Turog stated, without any legal support or further explanation:

> "The Tax Claim Bureau deed issued in 1999, as a result of the 1998 tax sale, was NOT a contractual relationship between the old owner (Chem-Fab) and the new owner (300 N. Broad). A tax sale is a statutory creation, and the Tax Claim Bureau issues the deed, under statutory powers."

Id. Turog argues here that because the company acquired the property in a tax sale, there can be no contractual relationship between Turog and Chem Fab, the alleged third-party polluter.

The question whether a tax deed nullifies the contractual relationship between a prior owning polluter and a tax-sale purchaser has not been answered in

[10] *Filing No. 30* consists of a cover letter, certificate of service, and Turog's brief. The pages in Turog's brief are numbered starting with Page 1. References by EPA in this brief to page numbers within *Filing No. 30* refer to the page numbers of Turog's brief and not the page number of the PDF file.

this jurisdiction. However, the issue was addressed by the Ninth Circuit in *California Department of Toxic Substances Control v. Westside Delivery, LLC*, 888 F.3d 1085 (9th Cir. 2018). In that case, the State of California brought an action to recover response costs under CERCLA against an entity that acquired the contaminated property via a tax sale. The tax-purchaser raised the Innocent Landowner Defense, arguing that it was not liable because the contamination was caused solely by third parties with whom it lacked a "contractual relationship." The District Court agreed with the tax-purchaser and granted summary judgment; the State appealed. *Westside*, at 1089-90.

The Ninth Circuit first confirmed that (a) the "third party" could be someone whose relevant acts or omissions occurred before the tax sale, (b) an *indirect* contractual relationship exists between a current owner and persons who owned before his/her grantor, and (c) "a defendant-landowner has a contractual relationship with all previous landowners—or, at least, all previous landowners in the chain of title—unless the defendant-landowner can qualify for the innocent-landowner defense." *Id*., at 1092 (citing *United States v. CDMG Realty Co*., 96 F.3d 706, 716 (3d Cir. 1996) (noting that '[t]he [third-party] defense is generally not available if the third party causing the release is in the chain of title with the defendant' unless 'the person claiming the defense is an "innocent owner"'). *Id*.

The Ninth Circuit then rejected the idea that State law plays a role in the analysis. Noting that the meaning of "contractual relationship" in CERCLA is a federal question subject to supervision by federal courts, the Court acknowledged that, from time to time, Congress has given a "plain indication" that a statutory term should be construed by referring to State law. The Court continued that although the definition of "contractual relationship" does refer to instruments that are creatures of State property law (*e.g.*, deeds and easements), Congress included a catch-all ("other instruments transferring title or possession"), "suggest[ing] that Congress was trying to capture a certain kind of instrument reflecting a certain kind of relationship between a defendant and a purported third party, regardless of how state law might characterize that instrument or that relationship." *Id.*, at 1093-94.

The Ninth Circuit then observed that tax sales can take the form of a one-step process in which the State never takes possession or holds an interest in the property sold to the tax-purchaser, or a two-step process under which the State acquires the property and then transfers it to the tax-purchaser. *Id*., at 1094. Under both scenarios, the Ninth Circuit concluded that a contractual relationship exists between the prior owning polluter and the tax-purchaser. *Id*., at 1095. The Court noted that the definition of "contractual relationship" was added to CERCLA at the

same time Congress added the Innocent Landowner Defense; that Congress intended the Innocent Landowner Defense to be narrowly applicable for fear it might be subject to abuse; and that a typical non-tax sale purchaser may avail itself of the Innocent Landowner Defense only if the purchaser bought with no actual or constructive knowledge of the contamination. *Id*., at 1097. The Court then stated:

> "But under Defendant's reading of the statute, a private purchaser of tax-defaulted property contaminated by a previous owner or possessor—who, if anything, should be *more* wary of preexisting contamination than a typical land purchaser—need not be 'innocent' or unaware of the contamination to be relieved of liability. Defendant's reading thus creates, in effect, a loophole that frustrates the defense's purpose."

Id., at 1097-98. The Court noted that, under the defendant's interpretation of "contractual relationship," a prospective purchaser who knows that there are tax liens on a contaminated property of interest to that person is better off waiting until the owner defaults on the tax liens and the property goes through a tax sale rather than purchasing the property and risking CERCLA liability. The defendant, said the Court, could point to nothing in CERCLA suggesting that Congress intended to give tax-sale purchasers "such an enormous advantage" and, as EPA argued, "there is no authority anywhere in CERCLA that would support the "laundering" of liability' through a mechanism such as a tax sale." *Id*., at 1098. The Court concluded:

> "Given the breadth of the definition of 'contractual relationship' and the stringent requirements that Congress set out for ensuring that only 'truly "innocent"' purchasers would be able to avoid liability, we think it likely that Congress intended for the innocent-landowner defense to be the *sole* defense available to a private purchaser of land contaminated by a previous owner or possessor. At the very least, we are confident that Congress did not mean to treat tax-sale purchasers differently from typical purchasers, which is why it defined 'contractual relationship' broadly enough to include the relationship between a tax-sale purchaser and the pre-tax-sale owner of tax-defaulted property.
>
> "Both the plain text of the definition of 'contractual relationship' and its place in the statutory scheme convince us that a tax-sale buyer such as Defendant has a 'contractual relationship' with the pre-tax-sale owner of that property."

Id. Under the Ninth Circuit's view, a tax sale such as the one through which Turog acquired possession of the property does not itself break the "contractual relationship." Turog has not demonstrated that the entity it identifies as the polluting third-party is an innocent landowner. Therefore, under this interpretation, EPA has a reasonable basis to believe that Turog and that party had a "contractual relationship," subject to the statutory exemption.

Pursuant to Section 101(35) of CERCLA, in order to defeat the contractual nature of its relationship to the polluting party, Turog is required to establish, by a preponderance of evidence, any of the following:

(i) At the time the Turog acquired the facility Turog 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; or

(ii) Turog is a government entity which acquired the facility by escheat, or through any other involuntary transfer or acquisition, or through the exercise of eminent domain authority by purchase or condemnation; or

(iii) Turog acquired the facility by inheritance or bequest.

42 U.S.C. § 9601(35). Turog has not claimed that it is a government entity or that it acquired the property by inheritance or bequest. Rather, it contends that it satisfies the knowledge requirement. EPA disagrees (see Section III.B, below).

B. EPA's Contention That Turog Had Reason to Know, Before it Acquired the Property, That Hazardous Substances Had Been Disposed There.

In its *Rebuttal*, EPA claimed that Turog had reason to know that hazardous substances had been disposed of at the property before it acquired the property at a tax sale and that a "contractual relationship" between Turog and the prior polluting owner therefore existed. *Filing No. 5*, at Section III.B.2. In its response, Turog alleges numerous facts ostensibly in response to EPA's claim.[11] Specifically, Turog argues that:

- Turog could not physically investigate the property before it acquired it via a tax sale because (a) neither Bucks County nor any other governmental agency was authorized to permit prospective bidders

[11] Turog's response does not clearly match facts alleged with specific arguments. The undersigned attempted to do so in this and subsequent subsections of this brief.

such as Turog onto the property, and (b) the property was surrounded by an opaque fence on all four sides (*Filing No.* 30, at 2, 3);

- In conducting its due diligence, Turog relied on public declarations and statements of and from EPA that EPA had removed all of the hazardous materials, contaminants, and chemicals from the property; that the Site had been remediated; and that the property no longer contained hazardous materials, contaminants, or chemicals (*Id.*, at 2-3);

- The public documents viewed by Turog prior to its purchase made no mention of any (a) leak of chromic acid from an underground storage tank found by EPA at the Site, or (b) deep-aquifer chromate contamination at the Chem Fab Site (*Id.*, at 3);

- Because EPA did not know about the leak, aquifer contamination, or the resulting vapor intrusion problem until years after the tax sale, Turog could not possibly have known about these issues prior to purchase (*Id.*); and

- When Turog purchased the property, (a) EPA's cleanup had been completed, (b) EPA reported that the cleanup had been completed, and (c) Turog had undertaken extensive due diligence in order to assure itself that no further cleanup was needed at the property (*Id.*, at 4).

There are two problems with Turog's argument. For example, Turog alleges that, prior to Turog's acquisition of the property, EPA stated or declared that all hazardous substances had been removed from the property and that no hazardous substances remained. Turog points to no document or person as the source of such statements. The undersigned is aware of no such statements or declarations made in this case. Given EPA's acknowledgment, in the document authorizing

performance of the 1994-95 removal response action, that additional response actions beyond those selected in that document could later be found to be necessary, EPA contends that it is unlikely that such statements or declarations would have been made.[12]

Second, Turog appears to misconstrue the knowledge requirement of the Innocent Landowner Defense. The statute does not say that a landowner raising the defense must have no actual or constructive knowledge of contamination *present on the property at the time of acquisition*, but rather that "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to

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[12] In Section II.D of the Action Memorandum, the OSC stated:

"D. National Priorities

"This site has not been reviewed for placement on the National Priorities List (NPL). The OSC will forward information obtained from the removal action to the site assessment section."

Further, in Section V.C of the Action Memorandum, the OSC noted:

C. "Contribution to Remedial Performance

"The Chem Fab Corporation Site in not on the NPL, so there are currently no plans for long-term Remedial Action. The proposed Removal Action is consistent with accepted removal practices and is expected to abate the threats that meet the NCP removal criteria. The proposed action is not anticipated to impede future responses at this Site."

Filing No. 2, Lien Filing Record No. 3, at PDF 13, Sections II.D and V.C. The Lien Filing Record is *Filing No*. 2. That record consists of 31 separate documents docketed as a single PDF. For convenience, references to specific documents within the Lien Filing Record will include the PDF page number upon which the referenced document starts.

know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility." 42 U.S.C. § 9601(35)(A)(i). Stated another way, if Turog knew or should have known that a hazardous substance was disposed of at the property *at any time in the past* it cannot carry its burden under this factor. That Turog believed the property was free of contamination as a result of EPA's cleanup efforts is not relevant. *See American National Bank and Trust Co. of Chicago as Trustee for Illinois Land Trust No. 120658-01 v. Harcros Chemicals, Inc.*, No. 95 C 3750, 1997 WL 281295, at *14 (N.D. Ill. May 20, 1997) (CERCLA does not provide an exception for one who knows that contamination existed on the property, but believes it has been cleaned up).

EPA provided factual support for its contention that Turog should have known that hazardous substances were disposed of at the property in its *Rebuttal*. *Filing No. 5*, at Section III.B.2. In the *Turog Response*, Turog actually admits that it was aware of the disposal of hazardous substances before it acquired the property. The Turog Response states that in conducting its due diligence prior to its acquisition, Turog

> "relied on the public declarations and statements of and from EPA [saying that] . . . EPA had removed all of the hazardous materials, contaminants, and chemicals from the property; that the Site had been

> remediated; and that the property no longer contained hazardous materials, contaminants, or chemicals known to the EPA."

Filing No. 30, at 2-3. Turog argues that it had reason to believe the property was clean when it acquired it, but this contention is not relevant to the Innocent Landowner Defense under the plain reading of the statute and the *Harcos* decision. Further, Turog has not demonstrated that it neither knew nor should have known that hazardous substances were *ever* disposed of at the property. Accordingly, EPA has a reasonable basis to believe that Turog knew or should have known that hazardous substances had been disposed of at the property and that Turog does not qualify for the "contractual relationship" exemption described at 42 U.S.C. § 9601(35)(A)(1). As such, EPA has a reasonable basis to believe that a "contractual relationship" existed between Turog and the third-party polluter within the meaning of 42 U.S.C. §9607(b)(3), that no exemption applies, and that Turog cannot maintain the Innocent Landowner Defense.

C. EPA's Contention that Turog Has Not "Exercised Due Care With Respect to the Hazardous Substance, in Light of All Relevant Facts and Circumstances" Because it Failed to Consent to Entry by EPA to the Property to Permit EPA to Perform a Sub-Slab Investigation to Evaluate Threats to Turog's Tenants.

Section 107(b)(3) of CERCLA requires that, in order to raise and maintain the Innocent Landowner Defense, Turog must establish, by a preponderance of

evidence, that it "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." 42 U.S.C. § 9607(a)(3). In its *Rebuttal*, EPA argued that Turog cannot meet this burden because, among other things, it failed to permit EPA to enter its property to investigate a vapor intrusion problem potentially placing its tenants at risk. *Filing No. 5*, at Section III.B.3. In response, Turog argues that EPA incorrectly equates Turog's failure to consent to entry for the sampling with a "failure to exercise due care with respect to the hazardous substance concerned." *Filing No. 30*, at 6. Turog claims that it withheld consent to enter for the sampling because it disagreed with EPA regarding how that sampling would be performed. *Id.*[13]

EPA does not dispute that Turog disagreed with EPA regarding aspects of the vapor intrusion sampling event. Further, EPA does not contend here that asking questions or raising issues concerning EPA's request automatically constitutes a failure to exercise "due care" within the meaning of CERCLA § 107(b)(3). Rather, EPA contends that delays to the vapor intrusion

[13] Curiously, Turog does not limit its depiction of disagreements with EPA to the sampling EPA desired to perform. Turog adds allegations of a disagreement between the parties pertaining to soil removal, scaffolding, and tree removal which are not relevant to EPA's request for consent to enter for the vapor intrusion sampling and accordingly not relevant to this analysis.

sampling caused by, among other things, *Turog's failure to timely respond to EPA's requests for entry* and Turog's *failure to timely raise its concerns about the sampling event* were inconsistent with the care that was due to its tenants under the circumstances. Those circumstances—the possibility that Turog's tenants were being exposed to volatile organic contaminants in the form of vapors entering the buildings from the contaminated groundwater below--were communicated to Turog in EPA's initial request for entry dated November 18, 2010. In that letter, which was received by Turog on November 22, 2010, EPA explained:

> "EPA has found that past operations at the Chem Fab Site have resulted in groundwater contamination. Some of the compounds that have entered the groundwater are volatile organic compounds (VOCs). VOCs are chemical compounds that easily evaporate into the air and can move from the groundwater into air inside homes and other buildings.
>
> "To determine whether any structures are being affected by the movement of VOCs from groundwater into the air, EPA is conducting sub-slab air quality testing in areas where historical data has demonstrated concentrations of groundwater contaminants above federal guideline standards. The test area includes the 300 North Broad Street property."

Exhibit 1.[14] At the time of EPA's request, information available to EPA indicated that groundwater at the Chem Fab Site contained numerous VOCs, semi-volatile

[14] "Exhibit" numbers refer to exhibits to this brief. As this brief is submitted electronically, the exhibits are contained in a separate PDF file that includes all of the exhibits. The reader can advance to a particular exhibit by clicking on the page number of that exhibit in the chart at the beginning of the file. References to specific page numbers within an exhibit will

organic contaminants, and metals that are "hazardous substances" within the meaning of CERCLA § 101(14). As reported in a Final Technical Memorandum prepared in January 2010 in connection with an ongoing Remedial Investigation for the Chem Fab Site:

> "Groundwater samples previously collected at Chem Fab have been analyzed for volatile organic compounds (VOCs), semi-volatile organic compounds (SVOCs), and total and dissolved target analyte list (TAL) metals (including cyanide and Cr[VI]). VOCs detected in groundwater that exceed current EPA Region III Risk Screening Levels (RSLs) include 1,1,2,2-Tetrachloroethane, 1,1,2-Trichloroethane (1,1,2-TCA), 1,1-Dichloroethane (1,1-DCA), 1,2-DCA, 1,4-Dioxane, Benzene, Bromodichloromethane, Carbon Tetrachloride, Chloroform, cis-1,2-Dichloroethene (cis-1,2-DCE), Dibromochloromethane, Ethylbenzene, Methyl tert-Butyl Ether (MTBE), Dichloromethane (DCM), PCE, trans-1,3-Dichloropropene, TCE, VC, and Xylenes (total) . . . The most recent groundwater sampling events (2008 and 2009) have focused on VOCs, Cr(VI), and TAL metals (minus cyanide). Groundwater samples (MW-02, MW-03, MW-04, MW-05, MW-06 and MW-07) collected in and immediately down gradient of the historic source areas (i.e., areas including the former ASTs, UST, and warehouse) contained VOCs (halogenated and BTEX), SVOCs, and TAL metals (including Cr[VI], no cyanide) that exceed current EPA Region III RSLs."

Exhibit 2, at PDF 14-15.[15] Thus, at the time EPA requested access from Turog to perform the sampling, groundwater at the Chem Fab Site, which includes

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use the PDF page numbers which are stamped on the bottom right of each page.

[15] "RSLs" are Regional Screening Levels. They are described on EPA's website as follows:

groundwater beneath Turog's property, contained VOCs including 1,1,2,2-Tetrachloroethane; 1,1,2-Trichloroethane; 1,1-Dichloroethane; 1,2-Dichloroethane; 1,4-Dioxane; Benzene; Bromodichloromethane; Carbon Tetrachloride; Chloroform, cis-1,2-Dichloroethene; Dibromochloromethane; Ethylbenzene; Methyl tert-Butyl Ether; Dichloromethane; Perchloroethylene; trans-1,3-Dichloropropene; Trichloroethylene; Vinyl chloride; and Xylenes at levels warranting further investigation. EPA's November 22, 2010 letter explained that VOCs could move from groundwater inside buildings such as those on Turog's property.

> "[RSLs] are risk-based concentrations derived from standardized equations combining exposure information assumptions with EPA toxicity data. SLs are considered by the Agency to be protective for humans (including sensitive groups) over a lifetime; however, SLs are not always applicable to a particular site and do not address non-human health endpoints, such as ecological impacts. The SLs contained in the SL table are generic; they are calculated without site-specific information. They may be re-calculated using site-specific data.
> . . .
> "They are used for site 'screening' and as initial cleanup goals, if applicable. SLs are not de facto cleanup standards and should not be applied as such. The SL's role in site 'screening' is to help identify areas, contaminants, and conditions that require further federal attention at a particular site. Generally, at sites where contaminant concentrations fall below SLs, no further action or study is warranted under the Superfund program, so long as the exposure assumptions at a site match those taken into account by the SL calculations. Chemical concentrations above the SL would not automatically designate a site as 'dirty' or trigger a response action; however, exceeding a SL suggests that further evaluation of the potential risks by site contaminants is appropriate."

See https://www.epa.gov/risk/regional-screening-levels-frequent-questions#FQ1.

The undersigned's November 18, 2010 request for access enclosed entry forms for signature by Turog and its tenants and asked that Turog sign and return them quickly because the work would be performed soon:

> "Please have these forms completed and returned to my office at your earliest convenience or call me at (215) 814-2487 if you have any questions. If you would prefer that I work directly with the tenants, please provide me with their identity and contact information. EPA would like to perform this work in January."

Exhibit 1, at PDF 4. The letter was sent to Turog principal Heywood Becker.

Nineteen days passed with no response from Mr. Becker, and on December 10, 2010, the undersigned sent an email to Mr. Becker which read:

> "I have not heard from you in response to my email dated 11/18 or the certified letter sent to you on the same day (the return receipt slip shows the letter was signed for on 11/22). Please contact me via email or at (215) 814-2487 to let me know when we might receive signed entry forms. Thanks."

Exhibit 3, at PDF 252-253. Another seven days went by with no response. Finally, on December 17, 2010, *twenty-six days* after receiving EPA's request, Mr. Becker provided this cursory response:

> "Do you know the specifics of which buildings, and/or addresses, and the mode of testing? Passive charcoal filters, or drilling, at the other extreme, for example?"

Id., at PDF 252. That day, the undersigned responded that the assigned OSC was out of the country but that this information would be provided after her return.

Exhibit 4, at PDF 255.[16] The undersigned provided this information to Mr. Becker via email on January 14, 2011. *Exhibit* 3. In addition to providing such information, EPA's email stated:

> "Please get back to me at your earliest convenience to advise us of your position with respect to:
>
> "1. Your consent for EPA to enter Turog's property consistent with the terms of the form I previously provided
>
> "2. Your willingness to collect consent forms from your tenants, or a list of contact information for such tenants.

[16] Despite Turog's questions and the undersigned's subsequent response, EPA's November 18, 2011 letter made clear that the sampling would require drilling through the basement floor or slab, placement of a sampling port, and connection to a cannister to collect air from beneath the foundation:

> "The study will require EPA to visit the property for three consecutive days. On the first day EPA will install the air testing equipment. This will involve drilling a small hole in the basement floor or slab and installing a dime-sized sampling port. On the second day EPA will connect a small canister to the equipment. On the third day the canister will be removed and taken to a laboratory for analysis. This results [sic] will assist EPA in determining whether contaminants associated with the Chem-Fab Site are present within the structure on the property. If such contaminants exist, EPA may need to perform ask to perform [sic] additional work within the structure."

Exhibit 1, at PDF 3-4. Turog was also aware that EPA was seeking consent from Turog's tenants for this work and that their presence at the property would be required:

> "In order to perform this testing, EPA seeks consent to access the property from you and your tenant(s). Consent from tenants is important because EPA will need to coordinate entry times with the tenants and, in addition, work with tenants to ensure that products or items within the structure which may interfere with the test are temporarily removed."

Id., at PDF 4 and PDF 7.

> "EPA will be collecting vapor samples from other properties in the area in early February, and it would be beneficial for us to include the Turog property at that time. I therefore ask for a prompt reply to this email."

Id., at PDF 252. Another twelve days passed with no response from Mr. Becker.

On January 26, 2011, the undersigned sent a letter, via certified mail and email, to Mr. Becker. That letter stated in part:

> "On December 17 you sent me an email asking several questions relating to EPA's request. I responded to your question via email on January 14, 2011 (the unavailability of EPA's On Scene Coordinator delayed my ability to respond earlier). In my January 14 email I requested that you advise me of Turog's position on (1) EPA's request for consent to enter the property to conduct the sampling, and (2) Turog's willingness to collect signatures from its tenants on the tenant consent form. Having received no response, I sent you a followup email on January 26 requesting a response.
>
> "Please be advised that EPA's On Scene Coordinator will take steps to obtain consent from Turog's tenants. I write today to request that Turog consent to entry as requested in November 2010 and again enclose a copy of the consent form. **If I do not hear from you by Friday, Februarv 11, I will assume that Turog declines to consent to entry for the sampling. EPA will then consider taking additional steps to secure entry to the property including, among other things, issuing an administrative access order under 42 U.S.C. § 9604(e)(5) and/or securing a warrant authorizing entry for the sample work**.
>
> "Please contact me at your earliest convenience to discuss this matter."

Exhibit 5, at PDF 258-59 (emphasis in original). That letter was signed for on February 8, 2020. *Id*., at PDF 262. By (unsigned) letter dated February 10, 2011,

eighty-one days after EPA's initial request for access was received by Turog, Turog raised, for the first time, concerns about EPA drilling through finished floors and disruption to its tenants' businesses, and suggested that EPA remove an abandoned septic tank it believed was the source of the contamination as the "first order of business." *Exhibit* 6, at PDF 265.[17]

The RJO has previously opined on the meaning of "due care" in this context:

> "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.

[17] Turog's letter was dated twenty-eight days after Turog received answers to its questions from EPA. However, as described in Footnote 14, Turog was aware when it received EPA's November 18, 2010 letter that EPA intended to drill through floors and involve Turog's tenants.

> & 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)."

In the Matter of Magnate LLC, CERCLA Lien Recommended Decision at 14 (No. CERCLA-3-2019-0120LL) (EPA Region 3, 2020) (*Exhibit* 7, at PDF 280).

Despite the characterizations expressed in the *Turog Response*, during this eighty-one day period Turog raised no issues, expressed no opinions, and articulated no differences with EPA. This eighty-one day delay, which included a period of twenty-six days during which Turog failed to respond *at all* to a pending request for access, evidences a lack of attention on the part of Turog to the seriousness of the circumstances surrounding EPA's request for access to conduct the sampling. EPA contends that these circumstances--the potential exposure of Turog's tenants to vapors containing volatile organic contaminants—should have alerted Mr. Becker, an individual alleged to have "50 years' experience in buying & selling neglected properties . . . many of which indeed had some environmental concerns" (*Filing No*. 30, at 9) to the potential consequences of ignoring EPA's request and, in EPA's view, make it unlikely that Turog can establish, by a preponderance of the evidence, that it exercised due care with respect to the harmful contaminants potentially entering its tenants' office suites. Completely

ignoring EPA's request for entry to perform the sampling under these circumstances for twenty-six days, only then to raise its concerns with EPA's plans on the eighty-first day are hardly consistent with taking steps necessary to protect the public from a health or environmental threat. Accordingly, EPA has a reasonable basis to believe that Turog cannot carry its burden of showing, by a preponderance of the evidence, that it exercised due care with respect to the contaminants in groundwater beneath its building and that Turog therefore cannot maintain an Innocent Landowner Defense.

D. EPA's Contention That Turog Has Not "Exercised Due Care With Respect to the Hazardous Substance, in Light of All Relevant Facts and Circumstances" Because it Failed to Comply With an EPA Order Requiring it to Operate and Maintain a Vapor Mitigation System Installed by EPA to Protect its Tenants.

Section 107(b)(3) of CERCLA requires that, in order to raise and maintain the Innocent Landowner Defense, Turog must establish, by a preponderance of evidence, that it "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." 42 U.S.C. § 9607(a)(3). In its *Rebuttal*, EPA argued that Turog cannot meet this burden because, among other things, it failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA at the property to protect

Turog's tenants from harmful volatile organic compound vapors ("2017 Order"). *Filing No. 5*, at Section III.B.4. EPA's argument was based in part on Turog's failure to provide progress reports required by the 2017 Order. *Id.* In response, Turog states:

> "Similarly, Sections III.B.4 through III.B.7 of *Filed Document No. 5* chronicle, first, the EPA's idea's, on the one hand, and then, secondly, on the other hand, the owner's own legitimate and honest differences with, and disagreements with, or honest efforts to comply with the Agency's various proposals and ideas.
> . . .
> At every point, the owner cooperated fully. The reports regarding the fans (see Filed Document No. 5, at its Section III.B.4) were, at first, provided frequently by the owner. Then, EPA asked for them to be given less frequently. And then, the EPA complained that they wanted them *more* frequently. And, instead of wanting them to be mailed, the EPA wanted the reports sent electronically, after they had already been mailed. This is not a failure to cooperate fully; it's a situation where the parties were able to arrive at a satisfactory procedure, after both were able to agree on a mutually agreeable and understandable procedure."

Filing No. 30, at 7.

EPA issued the 2017 Order following an unsuccessful attempt to negotiate a settlement under which Turog would operate and maintain the vapor mitigation system. *See Filing No. 5*, at Section III.B.4. The importance of the vapor mitigation system was explained in an Action Memorandum, signed on September 30, 2015 by the Associate Director of the Office of Preparedness and Response,

Hazardous Site Cleanup Division, EPA Region 3. In that document, EPA's OSC reported that:

> "EPA Region 3 Removal Program collected sub-slab and indoor air samples (Building A) in January and April 2015 and indoor air samples in June 2015. Results from the three sampling events were similar, with sub-slab TCE concentrations as high as 58,000 µg/m^3 and indoor as high as 27 µg/m^3.
>
> "EPA and ATSDR toxicologists reviewed the data and recommended that a permanent solution (e.g., negative pressure system) be installed to provide adequate ventilation of the sub-slab for the entire building."

Lien Filing Record 9, at PDF 191, 193.[18] The work approved in the Action Memorandum included the following:

> "Install a permanent depressurization system to reduce indoor TCE levels in Building A to 8 µg/m^3, which level has been determined in this situation to pose no unacceptable risk to the tenants and their patrons."

Id., at PDF 194. Hence, the vapor mitigation system was intended to, among other things, reduce TCE concentrations detected at levels *over three times* the level at which unacceptable risks would be experienced by tenants working in the building. EPA's 2017 Order contained the following finding:

> "In the absence of evidence to the contrary, and assuming conditions impacting the migration of VOCs into Building A remain constant, EPA has concluded that continued reduction of VOCs to acceptable levels within the tenant spaces in Building A depends on the following:

[18] "Building A" is the largest of the three buildings containing tenant spaces and the one in which EPA found a vapor intrusion problem.

> "(a) Continuous operation–24 hours a day, seven days a week, 365 days a year ('27/7/365')--of the depressurization system installed by EPA, as may be modified in response to changes in floorplan or the foundation of Building A or other factors which cause indoor VOC levels to exceed acceptable levels ('Depressurization System'). [ ]
>
> "(b) Maintenance of the Depressurization System in accordance with the requirements of this Order.
>
> "(c) Collection and analysis of indoor air samples in accordance with the requirements of this Order.
>
> "(d) Prevention of penetration of the foundation of Building A or, if penetration occurs, use of proper sealants to ensure no transmission of soil gas into the building.
>
> "(e) Modification of the Depressurization System as necessary in the event of changes to the floorplan or the foundation of Building A or other factors which cause indoor VOC levels to exceed acceptable levels."

Lien Filing Record 12, at PDF 222-23. Section VI of the 2017 Order required Turog to, among other things, runs the system continuously, subject only to periodic maintenance and power interruptions; inspect the gauge on each of the fans in the system to ensure that it reads within 25% of its design pressure; inspect each of the fans to ensure it was functioning as intended; notify EPA of any equipment issues (including fan pressure issues); and maintain records documenting all actions taken to comply with the 2017 Order, including records

documenting maintenance of the system. *Id.*, at PDF 227-28. In addition, Paragraph 25 of the 2017 Order required the following:

> "Progress Reports. [Turog] shall submit a written progress report to EPA concerning actions undertaken pursuant to this Order on a quarterly basis (every ninety (90) days) or as otherwise requested by EPA, from the date of receipt of EPA's approval of the Removal Work Plan until issuance of Notice of Completion of Work pursuant to Section XXIV, unless otherwise directed in writing by the OSC. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, analytical data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems."

Id., at PDF 231. Progress reports were the means by which EPA could ensure that (1) the vapor mitigation system, the operation of which was needed to protect Turog's tenants from VOC concentrations far in excess of acceptable levels, was being properly operated and maintained, and (2) no changes to the building were occurring which might require a modification to the vapor mitigation system.

Turog's generalizations about "disagreements" with procedures and "honest efforts to comply" paint a factually inaccurate depiction of the circumstances of Turog's failure to comply with the 2017 Order. EPA contends, and Turog cannot deny, that Turog violated the terms of the 2017 Order. EPA issued the 2017 Order on May 31, 2017, and it became effective on July 2, 2017. *Filing No.* 2, *Lien Filing Record No.*12, at PDF 211; *Filing No.* 2, *Lien Filing Record No*. 20, at PDF 395.

Paragraph 25 of the 2017 Order required Turog to, among other things, provide progress reports every 90 days from the date EPA approved the Work Plan detailing how the 2017 Order would be implemented. The EPA-approved Work Plan, which is an enforceable requirement of the Order, further stated:

> "Turog shall submit written progress reports to EPA every 90 days concerning actions undertaken pursuant to the Order, including all actions taken to operate the system (e.g., payment of electricity), and all actions relating to system repair and maintenance, and all other events and circumstances required by Paragraph 25 of the Order. A sample Progress Report is attached as Exhibit 1 to this Attachment."

Filing No. 2, Lien Filing Record 14, at PDF 275, 280. Exhibit 1 to the EPA-approved Work Plan was a sample progress report which communicated EPA's expectations regarding progress report content and included a chart, to be filled out by Turog, comparing the observed operating pressure to the intended pressure range of each of the ten fans responsible for diverting contaminants away from the foundation of the building. *Id.*, at PDF 284.

EPA provided Turog with an approved Work Plan on November 16, 2017. *Filing No*. 2, *Lien Filing Record* 14, at PDF 275. Therefore, progress reports were due from Turog on February 14, May 15, and August 13, 2018. Those progress reports were not received. By letter dated October 16, 2018, EPA's On Scene Coordinator stated to Turog:

> "EPA is concerned with Turog's lack of performance under the Order. First, EPA has received no progress reports. Without such reports EPA has no assurance that Turog has been inspecting the gauges and fans as required by the Order. Progress reports were due on February 14, May 15, and August 13, 2018. We do not know if Turog prepared reports and neglected to submit them or failed to prepare the reports. Although the next progress report is not due until November 11, 2018, we hereby require that, by close of the tenth business day following your receipt of this letter via hand delivery, Turog either (a) submit any progress reports which were previously prepared but not submitted, or (b) submit a progress report providing all reportable information described by Paragraph 25 of the Order from the date EPA approved the Work Plan (November 16, 2017) through the present."

Filing No. 2, Lien Filing Record 20, at PDF 395, 396. The letter was hand delivered to Mr. Becker on November 14, 2018. *Filing No. 5*, *Rebuttal Exhibit* 8, at PDF 130. As of the date EPA filed its *Rebuttal* in October 2019, EPA received no response to the letter *and received none of the required progress reports*. *Filing No. 5*, at 33. Further, as of November 20, 2019, the date the U.S. Department of Justice ("DOJ") notified Turog of several violations of the Order and the possibility of a civil action for judicial enforcement of its terms, Turog had not submitted *any* progress reports to EPA. *See Exhibit* 8, discussed below. By the date of that letter, Turog had failed to submit *seven* progress reports required by the 2017 Order covering almost *two years*.[20] During this period, EPA was deprived of

[20] Turog states that progress reports were:

information, required by the 2017 Order, pertaining to the functionality of the vapor mitigation system EPA installed to prevent exposure by Turug's tenants to harmful contaminant vapors. Turog's failure to submit progress reports was not the result of a misunderstanding or disagreement with the requirements of the 2017 Order and most certainly did not evidence any "honest effort to comply."

Turog's violations of the 2017 Order additionally include numerous multiple failures to notify EPA of an out-of-spec fan reading. Paragraph 18.b.1 of the 2017 Order requires Turog to notify EPA if Turog finds that a fan is not running at its intended pressure:

> "In the event one or more gauges are found to read outside its/their initial vacuum reading by 25% or more, notify the EPA Project Coordinator within 48 hours of such finding(s). Respondent shall comply with all EPA Project Coordinator requests for additional information/inspections for each gauge so identified."

> "first, provided frequently by the owner. Then, EPA asked for them to be given less frequently. And then, the EPA complained that they wanted them more frequently. And, instead of wanting them to be mailed, the EPA wanted the reports sent electronically, after they had already been mailed."

Filing No. 30, at 7. Turog confuses the requirement to submit progress reports with the requirement to inspect the vapor mitigation system gauges and fans and document the results. As issued, the 2017 Order required that Turog submit progress reports every 90 days. *Filing No. 2, Lien Filing Record* 12, at PDF 211, 231. This schedule was changed in January 2020 at Turog's request (the revised schedule called for submission of reports on January 1, April 1, July 1, and October 1). Exhibit 9, at PDF 296, 301. Turog did not submit *any* progress reports until December 2019, when it submitted eight reports covering February 2018 through October 2019 (*Exhibits* 12 and 13). Turog's July 2020 progress report was due after the EPA Philadelphia office closed due to COVID19; EPA requested that this report be emailed because mail service to the building was interrupted and EPA employees were not consistently working in the building. *Exhibit* 11.

Filing No. 2, Lien Filing Record 12, at PDF 211, 227. Turog's progress report for July 2020 contained thirteen weekly log sheets upon which Turog entered observed fan pressures. *Exhibits* 12 and 13. The sheets reported the pressure for Fan #2 during this period as follows:

Date of Inspection	**Fan #2 Reading**	**Fan #2 Design Pressure**
April 3, 2020	4.5	9
April 10, 2020	4.5	9
April 17, 2020	4.5	9
April 24, 2020	4.5	9
May 1, 2020	3.5	9
May 8, 2020	3.5	9
May 15, 2020	3.6	9
May 22, 2020	3.5	9
May 29, 2020	3.5	9
June 5, 2020	3.5	9
June 12, 2020	3.5	9
June 19, 2020	3.5	9
June 26, 2020	3.5	9

Exhibit 13. The following statement appeared on each of these thirteen sheets:

> "The Depressurization System Fan: Numbers 1-10 Appear To Be Operating Normally, With Exception of Number(s): 2"

Id. EPA received no notice of Fan #2's underperformance until Turog submitted the package of log sheets via email on July 3, 2020. EPA was deprived of this information for a period of ninety-two days, and Turog violated Paragraph 18.b.1

of the 2017 Order each time it inspected the fans but failed to report the underperformance issue as required under the 2017 Order.

Turog's violation of the 2017 Order was not limited to its multiple failures to timely submit progress reports and multiple failures to report a fan pressure deficiency. After EPA filed its *Rebuttal* in this matter, DOJ contacted Turog in connection with its failure to comply with the 2017 Order. That letter stated in relevant part:

> "The United States believes that there are compelling grounds for a civil action against Turog under CERCLA for failing to comply with the administrative order EPA issued to Turog on May 31, 2017 ('2017 Order') under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a). The 2017 Order directed Turog to operate and maintain a vapor mitigation system at the Site under EPA oversight. Specifically, Turog violated the 2017 Order when it failed to (1) submit for EPA approval a draft notice for filing in the appropriate land records as required by Paragraph 31.a of the 2017 Order, (2) submit to EPA a written certification regarding records and documents as required by Paragraph 40 of the 2017 Order, and (3) submit to EPA, every 90 days, a progress report detailing, among other things, actions taken by Turog to comply with the 2017 Order (including Turog's efforts to operate and maintain the vapor mitigation system) as required by Paragraph 25 of the 2017 Order. Pursuant to Section 106(b)(1) of CERCLA, 42 U.S.C. § 9606(b)(1), each one of these violations carries the possibility of civil penalties of up to $55,907 per day for each day of violation. Turog failed to comply with the 2017 Order for well over two years and, as of the date of this letter, these violations continue."

Exhibit 8, at PDF 293-94 (footnotes excluded). EPA does not here argue that Turog's failure to submit the draft notice for filing in the appropriate land records

and failure to submit a written certification regarding records and documents constitute a failure to exercise due care with respect to the contaminants at the Chem Fab Site. Rather, EPA contends that Turog failed to exercise due care by failing to submit the progress reports and by failing to report the underperforming fan over the course of thirteen weeks.[21]

In depriving EPA of information essential to determining the operational status of the vapor mitigation system and information from which adjustments to that system might be needed, Turog failed to exercise due care with respect to the VOCs beneath its tenants' feet. At a minimum, these facts make it unlikely that Turog can establish, by a preponderance of the evidence, that it exercised due care with respect to these contaminants. EPA therefore has a reasonable basis to believe that Turog cannot establish, by a preponderance of the evidence, that it exercised due care with respect to the contaminants at the Site and that Turog therefore cannot maintain an Innocent Landowner Defense.

E. EPA's Contention That Turog Has Not Provided "Full Cooperation, Assistance, and Facility Access" Because it Failed to Consent to Entry to the Property to Allow EPA to Perform a Sub-Slab Investigation to Evaluate Threats to Turog's Tenants.

[21] EPA does include these additional violations in its argument that Turog failed to provide full "cooperation, assistance, and facility access" because it failed to comply with the 2017 Order (*see* Section III.F, *infra*).

Section 101(35) of CERCLA requires that, in order to raise and maintain the Innocent Landowner Defense, Turog must provide "full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility [ ]." 42 U.S.C. § 9601(35). In its *Rebuttal*, EPA argued that Turog cannot meet this burden because, among other things, it failed to consent to entry to the property to perform a sub-slab investigation to evaluate threats to Turog's tenants and their patrons. *Filing No. 5*, at Section III.B.5. In response, Turog does not directly respond to this claim. The undersigned reads the Turog Response to suggest that Turog makes the same arguments described in Section III.C, above, characterizing its failure to provide access as "expressing its own opinion," "making suggestions," and "disagreeing." *Filing No. 30*, at 9. These arguments ignore the fact that the statute requires, as a predicate for raising the Innocent Landowner Defense, that Turog provide access to its property. As detailed in Section III.C, above, that access was withheld between November 18, 2010 (the date EPA transmitted its request for access) and at least July 14, 2011 (the date on which EPA issued its access order).

Turog argued, in connection with its argument that it did not fail to exercise "due care" by declining to provide access, that it disagreed with EPA's plans to collect samples and that such disagreement should not be regarded as a lack of

"due care." EPA argued that Turog's "due care" failure arose from delays caused by its failure to diligently respond to EPA's request for entry and its failure to timely identify its concerns (*see* Section III.C, above). Unlike the "due care" context, the "cooperation, assistance, and facility access" language does not contain a subjective concept such as "due care." The language does not require a party attempting to raise the Innocent Landowner Defense to demonstrate that it "did not *unreasonably* withhold access." Rather, it requires that such party *provide access*. This was not done for nearly eight months during which time Turog was not diligent in responding to EPA's request or raising its concerns. Turog cannot therefore claim that it has provided "full cooperation, assistance, and facility access" to EPA. EPA therefore has a reasonable basis to believe that Turog cannot establish that it provided "full cooperation, assistance, and facility access" and that Turog therefore cannot maintain an Innocent Landowner Defense.

F. EPA's Contention That Turog Has Not Provided "Full Cooperation, Assistance, and Facility Access" Because it Failed to Comply With an Order Requiring That Turog Operate and Maintain a Vapor Mitigation System Installed by EPA to Protect its Tenants.

Section 101(35) of CERCLA requires that, in order to raise and maintain the Innocent Landowner Defense, Turog must provide "full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility [ ]." 42 U.S.C. § 9601(35). In its Rebuttal, EPA argued that Turog

cannot meet this burden because, among other things, it failed to comply with the 2017 Order requiring that it operate and maintain a vapor mitigation system installed by EPA to protect its tenants. *Filing No. 5*, at Section III.B.6. In response**,** Turog states the following:

> "Similarly, Sections III.B.4 through III.B.7 of *Filed Document No. 5* chronicle, first, the EPA's idea's, on the one hand, and then, secondly, on the other hand, the owner's own legitimate and honest differences with, and disagreements with, or honest efforts to comply with the Agency's various proposals and ideas.
> . . .
> At every point, the owner cooperated fully. The reports regarding the fans (see Filed Document No. 5, at its Section III.B.4) were, at first, provided frequently by the owner. Then, EPA asked for them to be given less frequently. And then, the EPA complained that they wanted them *more* frequently. And, instead of wanting them to be mailed, the EPA wanted the reports sent electronically, after they had already been mailed. This is not a failure to cooperate fully; it's a situation where the parties were able to arrive at a satisfactory procedure, after both were able to agree on a mutually agreeable and understandable procedure."

Filing No. 30, at 7. EPA has previously explained in this brief that Turog's characterizations do not refute the fact that Turog violated the 2017 Order by failing to submit progress reports and failing to notify EPA regarding the underperforming Fan #2 (*see* Section III.D, above). In addition to these failures, Turog also violated the 2017 Order by (1) failing to timely submit for EPA approval a draft notice for filing in the appropriate land records as required by Paragraph 31.a of the 2017 Order, and (2) failing to timely submit to EPA a written

certification regarding records and documents as required by Paragraph 40 of the 2017 Order. *Exhibit* 8. These failures continued for a period exceeding two years. *Id.* As in the case of Turog's failure to submit progress reports, these failures were not the result of a misunderstanding or disagreement with the requirements of the 2017 Order, and Turog points to no evidence of any "honest effort to comply" with these requirements during substantial period of time Turog ignored them.[22]

Because Turog failed to submit progress reports, failed to notify EPA of the underperforming Fan #2, failed to submit the draft notice for the land records, and failed to submit a records certification, Turog cannot claim that it has provided "full cooperation, assistance, and facility access" to EPA. EPA therefore has a reasonable basis to believe that Turog has not provided "full cooperation, assistance, and facility access" and that it therefore cannot maintain an Innocent Landowner Defense.

G. EPA's Contention That Turog Has Not Provided "Full Cooperation, Assistance, and Facility Access" Because it Failed to Comply With an EPA Information Request Seeking Information on Turog's Ability to Pay for Indoor Air Sampling Necessary to Protect its Tenants.

Section 101(35) of CERCLA requires that, in order to maintain the Innocent Landowner Defense, Turog must provide "full cooperation, assistance, and facility

[22] Similar to the situation with the progress reports, Turog did not comply with these requirements until after DOJ sent its letter in November 2019.

access to the persons that are authorized to conduct response actions at the facility [ ]." 42 U.S.C. § 9601(35). In its *Rebuttal,* EPA argued that Turog cannot meet this burden because, among other things, it failed to comply with a statutorily authorized information request issued by EPA seeking information on Turog's ability to pay for indoor air sampling required by the 2017 Order. *Filing No. 5*, at Section III.B.5. In response, Turog does not directly respond to this claim. The undersigned reads the Turog Response as making the same arguments described in Section III.C, above, characterizing its failure as "the owner's own legitimate and honest differences with, and disagreements with, or honest efforts to comply with the Agency's various proposals and ideas." *Filing No.30*, at 7.

Turog has not denied that it failed to respond to EPA's information request and has not explained how such failure could be construed as "the owner's own legitimate and honest differences with, and disagreements with, or honest efforts to comply with the Agency's various proposals and ideas." EPA therefore has a reasonable basis to believe that Turog has not provided "full cooperation, assistance, and facility access" and that it therefore cannot maintain an Innocent Landowner Defense.

H. Conclusions Regarding the Innocent Landowner Defense.

In this Section III, EPA explained its reasonable bases to believe that:

1. A "contractual relationship" existed between Turog and the alleged third-party polluter;

2. Turog had reason to know, before it acquired the property, that hazardous substances had been disposed of on its property;

3. Turog has not "exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to diligently respond to EPA's request for entry to perform a sub-slab investigation to evaluate threats to Turog's tenants;

4. Turog has not "exercised due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA to protect its tenants;

5. Turog has not provided "full cooperation, assistance, and facility access" because it failed to diligently respond to EPA's request to enter the property to perform a sub-slab investigation to evaluate threats to Turog's tenants;

6. Turog has not provided "full cooperation, assistance, and facility access" because it failed to operate and maintain a vapor mitigation system installed by EPA to protect its tenants; and

7. Turog has not provided "full cooperation, assistance, and facility access" because it failed to comply with an EPA information request seeking information on Turog's ability to pay for indoor air sampling necessary to protect its tenants.

If the RJO agrees that EPA has a reasonable basis to believe any of [(1) + (2)] through (7) any one of these contentions, the RJO must conclude that EPA has a

reasonable basis to believe that Turog does not have a viable Innocent Landowner Defense under CERCLA §§ 107(b)(3) and 101(35). Because Turog has not disputed that EPA has reasonable bases to believe that:

1. The land upon which EPA seeks to perfect the lien belongs to Turog;
2. The land upon which EPA seeks to perfect the lien was subject to or affected by a removal or remedial action;
3. The United States has incurred costs in connection with the property, or
4. EPA provided Turog with written notice of potential liability via certified or registered mail;

the RJO must conclude that EPA has a reasonable basis to believe that the statutory predicates for existence of the lien have been met and that perfection of the lien is appropriate.

IV. Turog's Other Arguments

Turog's response contains several other arguments as to why the CERCLA § 107(l) lien should not be perfected. Turog argues that the value of EPA's lien is greater than the worth of the property (*Filing No.* 30, at 10), Turog did not contribute to the contamination (*Id*., at 8, 10), and that perfection of the lien "seems retaliatory, retaliating against an owner who—instead of unquestioningly accepting the plans being imposed—made suggestions instead (*Id*., at 11). None of

these arguments are relevant in the context of this proceeding, and the last one is false.

First, as set forth in Section II of EPA's *Rebuttal* and Section II of this brief, the scope of this proceeding is limited to determining whether EPA has a reasonable basis to believe that the statutory requirements for a CERCLA § 107(l) lien have been met. Nothing in CERCLA; the NCP; EPA's *"Guidance on Federal Superfund Liens"* (OSWER Directive No. 9832.12 (September 22, 1987)) ("1987 Lien Guidance"), EPA's "*Supplemental Guidance on Federal Superfund Liens"* (OSWER Directive No. 9832.12-1a (July 29, 1993)), or the *Order of Assignment* issued in this matter supports the idea that the existence or perfection of a CERCLA § 107(l) lien depends on the relationship between EPA's costs and the value of the property subject to the lien. As stated in EPA's *Rebuttal*, the lien arises by operation of law. *Filing No. 5*, at Section III.A. Its existence therefore does not require any deliberation on the part of EPA, let alone a comparison between EPA's costs and the property value. That the value of EPA's lien exceeds the value of the property is clearly not relevant.

Second, EPA neither needs to allege here, nor has alleged here, that Turog participated in the contamination of its property or the Chem Fab Site. EPA contends, however, that it has a reasonable basis to believe that Turog is liable for

the United States' costs under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as the owner of the property (*Filing No. 5*, at Section III.A.1). Turog's status as an "(a)(1)" property owner is sufficient for the lien to attach by operation of law. It matters not whether Turog actually participated in the contamination of the property.[34]

Lastly, Turog is clearly wrong in suggesting that EPA seeks to perfect the statutory lien as an act of retaliation for Turog's denial of consent for access or Turog's challenge to EPA's sampling proposals. The lien provides an avenue for EPA to recover its costs and prevents an owner from benefitting from the government's expenditures. The 1987 Lien Guidance states:

> "The lien provision is designed to facilitate the United States' 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 fund cleanup and restoration activities.' 131 Cong. Rec. S11580 (Statement of Sen. Stafford) (September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, p. 140, indicating that one of Congress' primary purposes in enacting the lien provision was to prevent unjust enrichment."

Exhibit 14, at PDF 326. In this matter, EPA has expended a significant sum of Federal dollars and EPA believes that Turog is a CERCLA § 107(a)(1) liable party. EPA believes that Turog's sole asset with substantial value may be its property at

[34] The RJO has recently considered Section 107(a)(1) liability. *See Exhibit* 7, at PDF 274.

the Chem Fab Site. The above-described Congressional intent would not be served if Turog sold the property tomorrow and made away with the proceeds. By perfecting the lien on this property, EPA ensures that this will not occur as Turog would be forced to settle its liability to the United States in order to transfer the property free of the CERCLA § 107(l) lien. EPA's motive in desiring to perfect the lien has nothing to do with Turog's response to EPA's request for entry or to its performance under the 2017 Order.

V. Conclusions

For the reasons stated above, EPA contends that that:

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

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

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

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

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

6. EPA has a reasonable basis to believe that Turog cannot carry its burden of proving, by a preponderance of the evidence, that it is protected from liability by the innocent landowner defense in Sections 107(b)(3) and 101(35)(A) of CERCLA, 42 U.S.C. §§ 9607(b)(3) and 101(35)(A), because:

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

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

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

d. Turog failed to "exercise due care with respect to the hazardous substance, in light of all relevant facts and circumstances" because it

failed to comply with an EPA order requiring it to operate and maintain a vapor mitigation system installed by EPA to protect its tenants;

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

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

g. Turog failed to provide "full cooperation, assistance, and facility access" because it failed to comply with an EPA information request seeking information on Turog's ability to pay for indoor air sampling necessary to protect its tenants.

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

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

9. Perfection of the statutory lien is therefore appropriate.

ANDREW GOLDMAN

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List of Exhibits

No.	Description	PDF Page #
1	Letter from Andrew S. Goldman to Heywood Becker, re: "Access to 300 North Broad Street, Doylestown for Subsurface Soil Gas Survey" (November 18, 2010).	As this brief is submitted electronically, the exhibits are contained in a separate PDF file that includes all of the exhibits as well as a cover sheet with PDF page references for each exhibit.
2	Letter from John Fellinger (EA Engineering, Science, and Technology, Inc.) to Huu Ngo (EPA Remedial Project Manager), re: "Final Technical Memorandum" (January 4, 2010).	
3	Email Exchange Between Andrew S. Goldman and Heywood Becker (December 10, 2010–January 14, 2011).	
4	Email Exchange Between Andrew S. Goldman and Heywood Becker (December 10, 2010–December 17, 2010).	
5	Letter from Andrew S. Goldman to Heywood Becker, re: Access to 300 North Broad Street, Doylestown For Subslab Soil Gas Survey" (February 4, 2011), and USPS Return Receipt Card.	
6	Letter from Heywood Becker to Andrew S. Goldman, re: "Your Letter Date Stamped February 4, 2011" (February 10, 2011).	
7	*In the Matter of Magnate LLC*, CERCLA Lien Recommended Decision (No. CERCLA-3-2019-0210LL) (February 12, 2020).	
8	Letter from Leigh Rendé (U.S. Department of Justice) to Turog Properties, Ltd., re: "Potential Litigation Under CERCLA"" (November 20, 2019).	
9	Letter from Andrew S. Goldman to Turog Properties Limited, re: "Order No. CERC-03-2017-0140-DC Amendment #3 (January 28, 2020).	
10	Letter from Eduardo Rovira, Jr. to Turog Properties, Ltd., re: "Order No. CERC-03-2017-0140-DC: Progress Reports" (December 17, 2019).	
11	Email from Eduardo Rovira to Heywood Becker, re: "Quarterly Report" (July 1, 2020).	
12	Email from Heywood Becker to Eduardo Rovira, re: "Reports April-June 2020" (July 3, 2020).	

13	Weekly Progress Reports Dates April 3, 2020-June 26, 2020.	
14	Guidance on Federal Superfund Liens (OSWER Directive No. 9832.12) (September 22, 1987).	