UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
Four Penn Center
1600 John F. Kennedy Boulevard
Philadelphia, Pennsylvania 19103-2852

In the Matter of:	:	
	:	
LeFevre Street Superfund Site	:	CERCLA LIEN PROCEEDING
2710 Lefevre Street	:	Docket No. CERCLA-03-2022-
Philadelphia, PA 19137.	:	0129LL
	:	
MAS Management, LLC,	:	
Owner.	:	

RECOMMENDED DECISION

I. INTRODUCTION

This Recommend Decision addresses whether the United States Environmental Protection Agency – Region 3 ("EPA" or "Agency") had a reasonable basis in law and fact to perfect a lien pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9607(l), on the property located at 2710 Lefevre Street in Philadelphia, Pennsylvania ("Site") and currently owned by MAS Management, LLC ("MAS"). This proceeding has been conducted in accordance with the requirements of EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued by the Agency on July 29, 1993 ("*Supplemental Guidance"*).

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

On August 18, 2022, EPA executed a Notice of Lien perfecting a CERCLA lien for responses costs incurred by the United States for the Site. (Lien Filing Administrative Record

("LFAR" or "Administrative Record") 1.07 and 1.08) (See Appendix A). On August 18, 2022, EPA provided a written notification to MAS of its opportunity to request a meeting before an Agency neutral official to contest the perfection of the lien. (LFAR 1.09).[1] By letter dated September 9, 2022, MAS requested a meeting before an Agency neutral official. (LFAR 1.11).

On September 28, 2022, I was designated to serve as the Agency neutral official[2] for purposes of this matter. (LFAR 1.12). A meeting of the parties was held on February 28, 2023.[3] The following persons participated in the meeting:

- Joseph J. Lisa – Regional Judicial and Presiding Officer, EPA Region 3;
- Joseph P. Howard, Esq., legal counsel for MAS;
- Mahmood Saeed, owner and authorized representative of MAS;
- Robert Hasson, Senior Assistant Regional Counsel, legal counsel for EPA, EPA Region 3;
- Lauren Brick, Assistant Regional Counsel, legal counsel for EPA, EPA Region 3;
- Joanne Marinelli, Chief, Cost Recovery Section, SEMD, EPA Region 3;
- Benjamin Joseph, Civil Investigator, Cost Recovery Section, SEMD, EPA Region 3; and
- Bevin Esposito, Regional Hearing Clerk, EPA Region 3.

II. RECOMMENDED DECISION

Having reviewed the Administrative Record, the legal and factual arguments presented by the parties and the information provided at the meeting of the parties, and for the reasons set forth, *infra*, it is my recommended decision to the Regional Counsel that EPA had a reasonable basis in law and fact to conclude that the statutory elements of CERCLA Section 107(l), 42 U.S.C. § 9607(l), were satisfied for perfection of the CERCLA lien for the Site.

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[1] The Notice of Lien was dated August 16, 2022 and was filed/perfected on August 18, 2022. The Notice Letter to MAS was dated August 16, 2022 and was provided to MAS via email on August 18, 2022. The Notice Letter was also sent via Certified Mail, Return Receipt Requested to MAS. (LFAR 1.07 and 1.09).

[2] According to the *Supplemental Guidance*, the neutral official selected to conduct a CERCLA lien meeting must be an Agency attorney who has not performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved. (*Supplemental Guidance* at 7). An EPA Regional Judicial and Presiding Officer can serve as the neutral. (Id.) I am an Agency attorney and currently serve as EPA Region 3's Regional Judicial and Presiding Officer. I have not performed any prosecutorial, investigative, or supervisory functions in connection with this case or the Site. (*See also* Rule 22.4(b) of EPA's *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (CROP)*, 40 C.F.R. Part 22, concerning the impartiality and neutrality requirements for Regional Judicial and Presiding Officers. (40 C.F.R. § 22.4(b) and (c)).

[3] The meeting with the parties initially was scheduled for January 18, 2023 but was postponed as a result of a joint request by the parties.

III. STANDARD OF REVIEW

This matter is governed by the *Supplemental Guidance* which "outlines procedures for Regional staff to follow to provide notice and opportunity to be heard to potentially responsible parties on whose property liens are to be perfected." (*Supplemental Guidance* at 1). The *Supplemental Guidance* provides that an Agency neutral "should consider all facts relating to whether EPA has a reasonable basis to believe that the [CERCLA] statutory elements have been satisfied for the perfection of a lien." (*Supplemental Guidance* at 7). More specifically, the following five (5) CERCLA statutory factors are to be considered:

1) *Notice* - Was the property owner sent notice by certified mail of its potential liability under CERCLA for payment of response costs;

2) *Removal/Remedial Action* - Is the property at issue subject to or has it been affected by a removal or remedial action (i.e., a response action);

3) *Response Costs Incurred* - Has the United States incurred costs with respect to a response action performed under CERCLA with regard to the property;

4) *SOL/Satisfaction of Liability* – Has the liability for the response costs been satisfied or has it become unenforceable through operation of the statute limitations as provided in CERCLA Section 113(g)(2), 42 U.S.C. § 9613(g)(2); and

5) *Potentially Liable Party* - Is the property owned by a person who is potentially liable for response costs under CERCLA.

(CERCLA Section 107(l)(2), 42 U.S.C. § 9607(l)(2) and *Supplemental Guidance* at 7). The *Supplemental Guidance* also provides that an Agency neutral must consider "all facts in the Lien Filing Record", "all presentations made at the meeting" of the parties and "any other information which is sufficient to show that the lien should not be filed." (*Supplemental Guidance* at 7-8).

IV. FACTUAL BACKGROUND

The Site encompasses approximately 10,450 square feet and is located at 2710 Lefevre Street in Philadelphia, Pennsylvania. (LFAR 1.14 at 3). It is bordered on three sides by residential properties. (Id.). From in or about 1955 until in or about 2008, the Site was used for the sale and storage of electrical equipment. (Id.). In 2008, the City of Philadelphia condemned and demolished a warehouse on the property. (Id.). Thereafter, a large portion of the Site was covered by a concrete slab of varying thickness that previously served as the floor of the demolished warehouse. (Id. at 4 and LFAR 1.04).

From April of 2009 through June of 2009, EPA Region 3 conducted an emergency removal action at the Site that was limited to: (1) assessment and removal of containers (i.e., drums, totes, and various other receptacles) containing PCBs that were abandoned on the property; and (2) removal and recyling of uncontaminated heating oil found in an abandoned underground storage tank ("UST") on the property. (LFAR 1.14 at 4-5 and LFAR 1.15 at 74-82). This removal action was initited after EPA received a request for assistance from the City of Philadelphia Fire Department's Hazardous Materials Administrative Unit and the City of Philadelphia Department of Licenses and Inspections. (LFAR 1.14 at 5). The 2009 removal action and the response costs incurred in connection with that action are not part of the CERCLA lien perfected on the Site in August of 2022 and, therefore, are not part of this proceeding. (LFAR 1.14 at 2, n. 2).

On March 16, 2018, MAS Management, LLC purchased the Site. (LFAR 1.01).

In July of 2018, EPA obtained "credible information" that PCBs may have been released into the environment at the Site and that the release may have occurred prior to purchase of the property by MAS. (LFAR 1.14 at 5). EPA provided MAS with this information and obtained the company's consent to collect surface soil samples from various locations at the Site. (Id.). Test results of these samples showed PCB concentrations exceeding permissible levels under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601 *et seq.*, and its implementing regulations set forth at 40 C.F.R. Part 761. (Id.). In September 2018, EPA collected samples of sub-surface soils at the Site. (Id. at 6). Analytical results of these samples also revealed the presence of PCBs in concentrations above permissible levels. (Id.).

From approximately July 2018 through early 2020, EPA communicated with MAS about the need to have a cleanup action conducted at the Site. (Id. at 6 and 7). On April 20, 2020, EPA issued a General Notice Letter to MAS notifying the company that, as the current owner of the Site, it was potentially liable for the contamination thereon and informing MAS that the Agency was planning to take additional response actions to assess, remove and arrange for the disposal of the PCBs on the property. (LFAR 1.02, 1.03 and 1.14 at 7-8). From early March 2021 through August 4, 2021, EPA performed a Fund-financed removal action at the Site. (LFAR 1.05 and 1.14 at 9). In connection with response actions conducted at the Site, EPA incurred CERCLA response costs. (LFAR 1.06 and 1.14 at 9). An EPA Cost Summary dated November 15, 2022, indicates that EPA incurred $762,641.67 in Site-related response costs for the time period of September 16, 2018 through October 9, 2021. These costs do not include EPA expenditures that have accrued since October 9, 2021 and any pre-judgment interest. (Id.).

Having received information at the end of July 2022 indicating that a sale of the Site by MAS was likely to occur at some point in the near future, EPA perfected its CERCLA lien on the property on August 18, 2022. (LFAR 1.14 at 9-10) and 1.15 Exhibit H). On August 18, 2022, EPA provided to MAS notice of the perfection of the CERCLA lien and MAS' opportunity to request a hearing before an Agency neutral to contest the lien perfection. (LFAR 1.09 and 1.10).

V. ANALYSIS OF *SUPPLEMENTAL GUIDANCE* FACTORS

For purposes of this proceeding, MAS has indicated that, with regard to the five (5) statutory elements of CERCLA Section 107(l), 42 U.S.C. § 9607(l), it disputes only EPA's position that the company is a Current Owner potentially responsible party ("PRP") liable under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1). (LFAR 1.16 at 13-19). More specifically, although MAS acknowledges that it currently holds title to and owns the Site, it argues that it is not liable since it qualifies for the CERCLA Innocent Landowner affirmative defense. (Id. at 14).[4]

A. CERCLA Lien Perfection Elements

For purposes of the Administrative Record, the following brief analysis addresses the four (4) CERCLA statutory elements that are not in dispute between the parties.

1. Notice of Potential Liability/Intent to Perfect Lien

For purposes of this proceeding, MAS does not dispute that, on April 20, 2020, EPA served it with a General Notice Letter addressing the company's potential liability under CERCLA Section 107(a)(1) 42 U.S.C. § 9607(a)(1). (LFAR 1.16 at 13-14).[5] Additionally, MAS does not dispute that, on August 18, 2022, EPA notified the company (via a letter sent by email and Certified Mail, Return Receipt Requested) of the perfection of a CERCLA lien on the Site and the opportunity to request a hearing before a designated Agency neutral to contest the lien perfection. (Id.).

2. Property is subject to or affected by a removal or remedial action

For purposes of this proceeding, MAS does not dispute that, from in or about 2018 through in or about 2021, EPA conducted CERCLA response actions at the Site to address PCB contamination of soils and sub-surface soils of the property (i.e., removal action). (Id. at 13).

3. United States incurred costs with respect to a response action under CERCLA

For purposes of this proceeding, MAS does not dispute that the United States has incurred costs in connection with CERCLA response actions performed at the Site. (Id.). However, MAS

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[4] This affirmative defense is also commonly referred to as the Innocent Purchaser affirmative defense. The Innocent Landowner affirmative defense, however, is separate from the Bona Fide Prospective Purchaser classification under CERCLA.

[5] In its November 18, 2022, Brief, EPA indicates the following: "EPA sent MAS the GNL at a time when EPA's Region 3 office was closed because of the COVID-19 pandemic. At that time, all Agency correspondence was sent via email, although multiple attempts were made to send MAS certified mail via the U.S. Postal Service. Return receipt was requested in each such attempt by EPA but was never received." (p. 17, n. 15).

has not agreed to the exact amount of response costs incurred by the United States. (Id. at 7-8). For purposes of this proceeding and determining the reasonableness of EPA's actions in perfecting the CERCLA lien, it is the incurrence of response costs by the United States as a general matter and not the exact amount of response costs incurred that is the relevant issue.

4. Liability has not been satisfied or rendered unenforceable through operation of the applicable CERCLA Statute of Limitations

For purposes of this proceeding, MAS does not dispute EPA's position that liability for the CERCLA response costs incurred by the United States has not been satisfied to date and that this liability has not been rendered unenforceable through the operation of the applicable statute of limitations in CERCLA Section 113(g)(2), 42 U.S.C. § 9613(g)(2). (Id. at 14).

5. MAS' Potential Liability under CERCLA Section 107

As previously noted, the parties are not in agreement as to whether MAS qualifies as a liable party under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1).

MAS has indicated that the company currently holds title to and is the current owner of the Site. Based upon this information, EPA determined that the company qualifies as a Current Owner[6] potential responsible party ("PRP") under CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1)[7], and, therefore, perfected the CERCLA lien on the Site. In its defense, MAS has asserted that the lien should not have been perfected because the company qualifies for the Innocent Landowner affirmative defense and, thereby, is not a liable party. (LFAR 1.16 at 14-19). In response, EPA has argued that it does not believe that MAS can meet its burden of proving by a preponderance of the evidence that the company qualifies for the Innocent Landowner affirmative defense. More specifically, EPA argues that MAS is unable to prove that it, *inter alia*: performed

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[6] The term "owner" is defined, in pertinent part, by CERCLA as "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." CERCLA Section 101(20)(A)(ii), 42 U.S.C. § 9601(20)(A)(ii). The term "person" is defined to include, among other things, a "firm", "association" or a "commercial entity." CERCLA Section 101(21), 42 U.S.C. § 9601(21).

[7] CERCLA Section 107(a), 42 U.S.C. § 9607(a), provides in pertinent part that, "(1) the owner and operator of a … facility… shall be liable for:

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian Tribe not inconsistent with the national contingency plan;
(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
(D) the costs of any health assessment or health effects study carried out under Section 9604(i) of this title."

State of N.Y. v. Shore Realty Corp., 759 F.2d 1032, 1043-44 (2d. Cir. 1985) (Section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation).

the "all appropriate inquiries" investigation prior to purchasing the Site; and exercised due care and undertook precautionary measures concerning the property.

Therefore, the primary issue to be addressed is whether EPA had a reasonable basis in law and fact in concluding that MAS will not be able satisfy its burden of establishing by a preponderance of the evidence that it qualifies for the CERCLA Innocent Landowner affirmative defense.

Based upon my review of the Administrative Record and the discussions held at the meeting of the parties, I have determined that EPA acted reasonably in concluding that MAS will not be able to satisfy its burden in establishing the Innocent Landowner affirmative defense.

a. Innocent Landowner Affirmative Defense

In enacting CERCLA, Congress made responsible parties covered by Section 107(a) strictly liable (i.e., not requiring a showing of fault) for response costs incurred in connection with the clean-up of contaminated properties and provided only a limited number of affirmative defenses to liability set forth in CERCLA Section 107(b), 42 U.S.C. § 9607(b). *See State of N.Y. v. Shore Realty*, 759 F.2d 1032, 1042 (2d Cir. 1985) (*citing* 126 Cong. Rec. 30,932 (statement of Sen. Randolph)). With CERCLA's basic remedial purposes in mind, the federal courts have narrowly construed the scope and applicability of these affirmative defenses. *See Shore Realty*, 759 F.2d at 1048-49; *Kelley v. Thomas Solvent Co.*, 727 F. Supp. 1532, 1540 n. 2 (W.D. Mich. 1989); and *Pinhole Point Properties, Inc. v. Bethlehem Steel Corp.,* 596 F. Supp. 283, 286 (N.D.Cal.1984) (contrasting "extremely limited" defenses under CERCLA Section 107(b) with "extremely broad" scope of liability under CERCLA Section 107(a)). The burden of proving a CERCLA affirmative defense rests with the party asserting the defense.

The Innocent Landowner affirmative defense is a subset of CERCLA's Third-Party affirmative defense, which provides in pertinent part:

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

CERCLA Section 107(b)(3), 42 U.S.C. § 9607(b)(3).

The 1986 amendments to CERCLA (referred to as the Superfund Amendments and Reauthorization Act of 1986) clarified and expanded the Third-Party defense by defining the term "contractual relationship" as follows:

> The term "contractual relationship", for the purpose of Section 9607(b)(3) of this title, includes, but is not limited to, land contracts, deeds, easements, leases, or other instruments transferring title or possession, unless 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 one or more of the circumstances described in clause (i), (ii), or (iii) is also established by the defendant by a preponderance of the evidence:
>
> (i) At the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility...
>
> In addition to establishing the foregoing, the defendant must establish that the defendant has satisfied the requirements of Section 9607(b)(3)(a) and (b) of this title, provides full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility (including the cooperation and access necessary for the installation, integrity, operation, and maintenance of any complete or partial response action at the facility), is in compliance with any land use restrictions established or relied on in connection with the response action at a facility, and does not impede the effectiveness or integrity of any institutional control employed at the facility in connection with a response action.

CERCLA Section 101(35)(A), 42 U.S.C. § 9601(35)(A). This definition created what is now commonly referred to as the Innocent Landowner affirmative defense.

A party seeking to assert the Innocent Landowner affirmative defense has the burden of proving by a preponderance of the evidence that:

1) The release or threatened release of hazardous substances and resultant damages were caused solely by the act or omission of a third-party;
2) "All appropriate inquiries" into the previous ownership and use of the facility were conducted in accordance with generally accepted good commercial and customary standards and were performed prior to the purchase of the property (i.e., the purchaser "did not know and had no reason to know that any hazardous substances, which is the subject of the release or threatened release, was disposed of on, in or at the facility");

3) Due care was exercised by the landowner/purchaser with respect to the hazardous substances released on the property; and
4) Precautionary measures were taken by the landowner/purchaser against foreseeable acts or omissions of third parties and the foreseeable consequences therefrom.

CERCLA Section 101(35)(B)(i)(I) and (II), 42 U.S.C. § 9601(35)(B)(i)(I) and (II).

i. "All appropriate inquiries" Standard

As part of the Brownfield Amendments to the CERCLA statute, Congress ordered EPA to promulgate regulations to define further the term "all appropriate inquiries." In CERCLA Section 101(35)(B)(iii), 42 U.S.C. § 9601(35)(B)(iii), Congress set forth the criteria that EPA was to utilize in promulgating these regulations. EPA published a final rule on November 1, 2005 (70 Fed. Reg. 66070 (Nov. 1, 2005)) and codified its "all appropriate inquiries" regulations at 40 C.F.R. Part 312.

These regulations require, *inter alia*, that "all appropriate inquiries" must be conducted or updated within 180 days prior to the date a party purchases or acquires a property. The purchaser must hire an "environmental professional", who meets the qualification set forth in 40 C.F.R. § 312.10, to perform the inquiry and to identify conditions indicative of releases or threatened releases of hazardous substances. 40 C.F.R. §§ 312.21 and 312.22. The inquiry by the environmental professional must include, for example: interviews with past and present owners; reviews of historical sources; reviews of government records; and visual inspection of the property. 40 C.F.R. § 312.21. The results of the environmental professional's inquiry must be documented in a written report that satisfies the requirements of 40 C.F.R. §§ 312.21(c). The report must include a signed declaration by the environmental professional that represents that s/he meets the definition of an "environmental professional" as provided in 40 C.F.R. § 312.10 and that the "all appropriate inquiries" investigation was performed in accordance with the standards and practices set forth in 40 C.F.R. Part 312. 40 C.F.R. §§ 312.21(d).

a. MAS did not employ an "environmental professional" prior to its purchase of the Site

The Administrative Record clearly indicates and MAS confirmed at the meeting of the parties that, prior to its March 16, 2018 purchase of the Site, the company did not hire an "environmental professional" to perform an "all appropriate inquiries" investigation as required by CERCLA. Rather, the Administrative Record indicates that the first time MAS employed the services of an environmental company concerning the Site was in spring/summer of 2020 when it hired RT Environmental Service, Inc. to address the contamination issues identified in the April 2020 General Notice Letter. (LFAR 1.16 at 6

b. MAS has not produced an "environmental professional" report

In its filings and at the meeting of the parties, MAS indicated that it does not have a written report prepared by an "environmental professional" that satisfies the "all appropriate inquiries" requirements of CERCLA. (LFRA 1.16 at 17-19).

Rather, MAS has noted that, prior to its 2018 purchase of the property, it "completed a brief appraisal of the property (it was a vacant lot), performed a title search and researched zoning, variance and use conditions as part of its due diligence for the commercial loan extended for the purchase and development of the lot." (LFAR 1.16 at 15). According to the company, "there was no indication in the title search or in the seller's affidavit or in the city records indicating any presence of hazardous materials." (Id.). MAS argues that this research should be viewed as being a "de facto" report or equivalent report by an environmental professional for purposes of the "all appropriate inquiries" requirement. (Id.). However, the CERCLA statute and EPA's implementing regulations are clear and specific as to the scope, timing and substance of an "all appropriate inquiries" investigation and the contents of the resulting environmental professional report. The research that MAS performed prior to its purchase does not satisfy the clear and specific requirements of CERCLA both in terms of the types of information that must be reviewed and the qualifications of the professional who undertakes such a review.

It is important to note that the federal courts have required "strict compliance" with the "all appropriate inquiries" standards set forth in the CERCLA statute and EPA's implementing regulations. *See e.g., Von Duprin LLC v. Major Holdings, LLC*, 12 F.4th 751, 769 (7th Cir. 2021) (Defendant whose written report by an environmental professional did not include the required certifications by an environmental professional under 40 C.F.R. §§ 312.21 and 312.22, and whose "all appropriate inquiries" were conducted more than 180 days before the acquisition of the property, was not eligible for bona fide perspective purchaser ("BFPP")[8] liability protections under CERCLA); and *Voggenthaler v. Maryland Square, LLC*, 724 F.3d 1050, 1063 (9th Cir. 2013) ("Affidavit submitted by defendant's environmental professional failed to meet all the requirements for "all appropriate inquiries" under 40 C.F.R. §§ 312.21 and 312.22 and was insufficient to establish defendant was a BFPP within the meaning of CERCLA).

Finally, it is also important to note that the types of research and government records that MAS reviewed prior ot the purchase of the property are typically not the types of records that would contain information about the release or threatened release of hazardous substances at a property. This is one of the reasons why the CERCLA "all appropriate inquiries" standards require trained and experienced environmental professionals to review as part of their investigations a much wider range of records that address potential contamination of properties, including, but not limited to, records of federal, state and local government agencies, like, for example: EPA; the Pennsylvania Department of Environmental Protection; and the City of Philadelphia Fire Department's Hazardous Materials Administrative Unit.

[8] The Innocent Landowner Defense shares common elements with other CERCLA provisions extending liability protections to certain persons, including, for example, contiguous property owner or bona fide prospective purchasers. The requirement to perform "all appropriate inquiries" is one of these shared common elements. 42 U.S.C. §§ 9601(4), 9607(q) and 9607(r).

c. Review of available records would likely have revealed potential contamination of Site.

Discussions at the meeting of the parties revealed that, if MAS had hired an environmental professional to perform an "all appropriate inquiries" investigation prior to its purchase of the Site, this investigation should have uncovered a document referencing potential contamination of the property. More specifically, the Administrative Record contains an EPA Close-Out Special Bulletin dated September 29, 2009 (part of the 2009 removal action) which provides, in pertinent part:

> On July 2 [2009], the OSC informed the City of Philadelphia Law Department about a claim by a reputable source that *PCB oils may have been permitted to leak in the rear portion of the vacant lot*. This individual, formerly employed by the City, inspected the facility in the early 1980s when the electrical parts warehouse was in operation and had obtained information suggesting this. The OSC suggested that the City make this a requirement before any future development of the property. He offered to arrange for the sampling of the area if the City wished. (Emphasis added).

Therefore, a record dating to 2009 exists which contains information about potential contamination of the Site (i.e., that PCBs may have been released into the environment at the Site). Based upon the standards of practice set forth in EPA's regulations, it certainly is reasonable to conclude that an environmental professional performing an "all appropriate inquiries" investigation into the Site would have uncovered this document. Indeed, at the meeting of the parties, EPA legal counsel Robert Hasson confirmed that this 2009 Close-Out Special Bulletin would have been releasable in response to a Freedom of Information Act request made to the Agency.

ii. <u>Due Care and Preventative Measures</u>

A person seeking to successfully assert the Innocent Landowner affirmative defense must also prove that it exercised due care with respect to the hazardous substances at the property and took preventative measures against foreseeable acts or omissions of third parties and the foreseeable consequences thereof.[9] The legislative history of CERCLA suggests that Congress intended 'due care' to mean the type of care an objective, similarly situated reasonable person would have taken under the circumstances presented. *See State of New York v. Lashins Arcade Co.* 91 F.3d 353, 361 (2d Cir. 1996).

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[9] The aforementioned "due care" and "precautions" requirements are not defined by the statute. However, courts have consulted CERCLA's legislative history for guidance on how to interpret these terms. "[T]he defendant must demonstrate that he took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken in light of all relevant facts and circumstances. *State of N.Y. v. Lashins Arcade Co.*, 91 F.3d 353, 361-62 (2d. Cir. 1996) (*quoting*, H. R. Rep. No. 1016, 96th Cong., 2d Sess., pt. 1, at 34 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6137). "Further, 'due care' would include those steps necessary to protect the public from a health or environmental threat.'" *U.S. v. A & N Cleaners and Launderers, Inc.* 854 F. Supp. 229, 238 (S.D.N.Y. 1994) (*quoting* H.R. Rep. No. 253, 99th Cong., 2d Sess. 187 (1986) U.S. Code Cong. & Admin. News 1986, 2835). See also *Kerr-McGee Chem. Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 & n.3 (due care not established when no affirmative measures taken to control site).

In its filings, EPA documented instances in which MAS did not maintain the fence surrounding the property and did not prevent access points to the Site from the neighboring residential properties. Also, EPA provided information indicating that trespassers had gained access to the property and deposited trash thereon (e.g., cigarette lighters and beverage cans throughout the property). (LFAR 1.14 at 29 referencing LFAR 1.04 at 2-5). This information was documented in Agency records and photographs. (LFAR 1.19 and LFAR 1.20 at 7-11).

MAS has contested these assertions and has argued that it "performed basic maintenance to the site in order to prepare it for development. They cut the grass, they shored up fence panels that had fallen over, they replaced sections of missing fencing in the rear, they installed a new front gate and changed the way the gates were secured so that people couldn't slip through the front gates." (LFAR 1.16 at 7 and 16).

As a result, there is a dispute between the parties concerning the condition of the property and whether MAS exercised due care and took preventative measures to secure the Site. However, given the limited scope of review provided by the *Supplemental Guidance* (i.e., the reasonableness of EPA's conclusions and actions in perfecting a CERCLA lien), I find that it certainly was within the bounds of reasonableness for EPA to determine, based upon the information it possessed, that MAS did not exercise the level of due care and did not take the precautionary measures necessary to secure the Site as required by the Innocent Landowner affirmative defense.

VI. OTHER FACTORS CONSIDERED

A. Equitable Arguments raised by MAS

MAS has raised a number of equitable arguments in support of its position that it is not a liable party concerning the Site and that the CERCLA lien should not have been perfected by EPA. For example, MAS has asserted that:

- EPA negligently withheld information about potential contamination of the Site from the City of Philadelphia, the previous property John Joyce, Jr. and MAS (LFAR 1.16 at 11);
- MAS relied upon the City's rezoning of the Site to residential for concluding that any contamination of the property had previously been cleaned-up (LFAR 1.16 at 12-13, and 18);
- MAS has no "business affiliation" with the previous owner of the Site (LFAR 1.16 at 15);
- The City of Philadelphia "took the property in 2014 through a tax sale foreclosure" and "[i]f the City was armed with some knowledge that the property was contaminated . . . it would have not been able to turn the property back to the Joyce family [previous owner] upon redemption" (LFAR 1.16 at 18); and
- "EPA arrived at the site under very suspicious circumstances" (LFAR 1.16 at 19).

However, such equitable arguments generally have no bearing on the issue of a person's liability as a PRP under CERCLA. The federal courts have consistently held that the CERCLA statute is a strict liability statute. *See, e.g., United States v. Mexico Feed and Seed Co., Inc.,* 980 F.2d 478 (8th Cir. 1992); *United States v. Alcan Aluminum*, 964 F.2d 252, 265 (3d Cir. 1992)

(*citing New York v. Shore Realty Corp*. 759 F.2d 1032 (2d Cir. 1985)). As such, a person's liability under CERCLA arises from its status as one of four categories of potentially responsible parties (e.g., a current owner or operator) provided in CERCLA Section 107(a)(1), 42 U.S.C. § 9607(a)(1). Furthermore, defenses to liability under the statute are limited to those few specifically set forth in CERCLA Section 107(b), 42 U.S.C. § 9607(b).

As a result, I find that it was reasonable for EPA to conclude that the equitable arguments raised by MAS will not affect the company's classification as a Current Owner PRP for the Site.

B. "Exceptional Circumstances" warranting of Pre-Notice Perfection of Lien

The *Supplemental Guidance* permits that the EPA "may, in exceptional circumstances, perfect a lien prior to offering or providing a property owner with a meeting." (*Supplemental Guidance* at 5). "Exceptional circumstances …include, but are not limited to: instances in which EPA's interest in the property could be impaired, such as imminent bankruptcy of the property owner, imminent transfer of all or a portion of the property, imminent perfection of a secured interest which would have priority under applicable state law, or indications that these events are about to take place." (Id. at 5-6).

In this matter, EPA perfected the CERCLA lien on the Site prior to noticing MAS and holding a meeting before an Agency neutral. EPA has noted that it undertook this action because it obtained information on July 31, 2022, which indicated that a sale of the property by MAS was "imminent." (LFAR 1.19 at 7). Additionally, on August 1, 2022, EPA received a completed "Comfort Letter" Questionnaire from a prospective purchaser which also indicated that a sale of the Site was imminent. (Id.).

The decision as to whether to perfect a CERCLA lien prior to notice to a property owner rests within the discretion of a Regional Counsel. Based upon the information in the Administrative Record, I find that EPA's determination that a sale of the property was imminent, and that "exceptional circumstances" existed warranting pre-notice perfection of the lien was reasonable given the information available to the Agency at the time.

C. On-Scene Coordinator

In its filings, MAS has questioned the actions of EPA's On-Scene Coordinator in connection with the Agency's response actions performed at the Site. (LFAR 1.16). However, a careful review of the Administrative Record reveals that the OSC performed his official responsibilities in accordance with all applicable standards of conduct for a government employee in his position. Additionally, the Administrative Record indicates that the OSC attempted in good faith to provide assistance to MAS in responding to the conditions present at the Site. In its November 18, 2022 Brief, EPA notes the following:

> After the sampling events conducted in August and September 2018, the OSC communicated with MAS on several occasions during 2018 and 2019 about the PCB analytical results and the need to conduct an adequate cleanup before residential development of the Property could being. MAS acknowledged that it was not familiar with federal regulatory requirements for PCB cleanups, and OSC

> Jack Kelly provided MAS with general information about TSCA and CERCLA requirements, the names of several local environmental consulting firms, potential landfill locations, helpful website, and related matters.

(LFAR 1.14 at 6-7).

VII. CONCLUSION

Based upon my review of the information set forth in the Administrative record, the arguments raised by the parties in their written filings and the information presented at the meeting of the parties, and for the reasons set forth in this Recommended Decision, it is my recommended decision to the Regional Counsel that EPA had a reasonable basis in law and fact upon which to conclude that the CERCLA statutory requirements under CERCLA Section 107(l), 42 U.S.C. § 9607(l), were satisfied with regard to the perfection of the CERCLA lien on the Site.

The scope of this proceeding and Recommended Decision is narrowly limited to the issue of whether EPA had a reasonable basis in law and fact to perfect its CERCLA lien on the Site. The final decision to perfect a CERCLA lien on a property resides with the Regional Counsel. This Recommended Decision does not compel the perfection of a CERCLA lien; it merely finds that there is a reasonable basis in law and fact for doing so. This Recommended Decision does not preclude the United States (EPA) or MAS from raising any claims or defenses in any later proceedings. It is not a binding determination of liability. This Recommended Decision has no preclusive effect and shall not be given any deference and shall not otherwise constitute evidence in any subsequent proceedings.

JOSEPH LISA Digitally signed by JOSEPH LISA Date: 2023.03.22 09:16:27 -04'00'

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

APPENDIX A

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
	)	LIEN-FILING RECORD
Lefevre Street Container Superfund Site	)	
2710 Lefevre Street	)	
Philadelphia, PA 19137.	)	EPA DOCKET NO.
	)	CERCLA-03-2022-0129LL
	)	
MAS Management, LLC	)	
Owner.	)	

LIEN-FILING RECORD INDEX

1. Indenture dated March 16, 2018, between John F. Joyce (Grantor/Seller) and MAS Management LLC (Grantee/Buyer);

2. General Notice Letter, dated April 20, 2020, from Claudette Reed, Chief, Program Support & Cost Recovery Branch, Superfund & Emergency Management Division, EPA Region 3, to MAS Management LLC (Attention: Zahra and Amer Saeed);

3. Email dated April 23, 2020, from Zahra Saeed, MAS Management LLC, to Benjamin Joseph, Civil Investigator, Cost Recovery Section, Superfund & Emergency Management Division, EPA Region 3 (acknowledging receipt of April 20, 2020 General Notice Letter);

4. Action Memorandum for Lefevre Street Container Site, June 11, 2020;

5. Final Letter Trip Report, Lefevre Street Container Site, prepared by Tetra Tech for EPA, December 8, 2021;

6. EPA Certified Itemized Cost Summary Verification, Lefevre Street Container Site (Site ID No. A3 MZ), November 15, 2022;

7. Federal Superfund Lien Notice (notarized), signed by Cecil Rodrigues, Regional Counsel, August 16, 2022;

8. Email from First Judicial District, Commonwealth of Pennsylvania, to Robert Hasson, Assistant Regional Counsel, EPA, confirming acceptance of electronic filing of lien notice, August 18, 2022;

9. Notice of Perfection of Superfund Lien and Opportunity to be Heard from Cecil Rodrigues, Regional Counsel, to MAS Management LLC, August 16, 2022;

10. Email from Benjamin Joseph, Civil Investigator, Cost Recovery Section, Superfund & Emergency Management Division, EPA Region 3, to MAS Management LLC, with attached copies of Notice of Perfection and Federal Superfund Lien Notice, August 18, 2022;

11. Request for Meeting on Superfund Lien, Joseph P. Howard, Esq., September 9, 2022;

12. Order of Assignment, designating Region Judicial Officer Joseph L. Lisa as neutral agency official to conduct meeting on Superfund Lien, signed by Regional Counsel Cecil Rodrigues, September 28, 2022;

13. In the Matter of: Lefevre Street Container Superfund Site, EPA Docket No. CERCLA-03-2022-0129LL, Scheduling Order, October 28, 2022;

14. U.S. Environmental Protection Agency's Response to Owner, MAS Management, LLC's Request for a Meeting on a Perfected Superfund Lien and Certificate of Service, November 18, 2022;

15. Exhibits to U.S. Environmental Protection Agency's Response to Owner, MAS Management, LLC's Request for a Meeting on a Perfected Superfund Lien, November 18, 2022;

16. MAS Management's Response to U.S. Environmental Protection Agency's Request to Perfect a Superfund Lien of the Property, Dated December 16, 2022, Filed December 19, 2022;

17. MAS Management's Response to U.S. Environmental Protection Agency's Request to Perfect a Superfund Lien of the Property, Certificate of Service, Dated December 16, 2022, Filed December 19, 2022;

18. MAS Management's Response to U.S. Environmental Protection Agency's Request to Perfect a Superfund Lien of the Property, Attachment – Email from OSC Kelly August 2018;

19. U.S. Environmental Protection Agency's Reply to Owner, MAS Management, LLC's Brief Concerning a Perfected Superfund Lien, January 6, 2023;

20. Exhibits to U.S. Environmental Protection Agency's Reply to Owner, MAS Management, LLC's Brief Concerning a Perfected Superfund Lien, January 6, 2023;

21. U.S. Environmental Protection Agency's Reply to Owner, MAS Management, LLC's Brief Concerning a Perfected Superfund Lien, Certificate of Service, January 6, 2023.

22. U.S. Environmental Protection Agency's Unopposed Motion for Continuance of Meeting on Federal Superfund Lien, January 9, 2023;

23. U.S. Environmental Protection Agency's Unopposed Motion for Continuance of Meeting on Federal Superfund Lien, Certificate of Service, January 9, 2023;

24. In the Matter of: Lefevre Street Container Superfund Site, EPA Docket No. CERCLA- 03-2022-0129LL, Scheduling Order, January 13, 2023; and

25. In the Matter of: Lefevre Street Container Superfund Site, EPA Docket No. CERCLA- 03-2022-0129LL, Microsoft Teams Transcript of Lien Hearing, February 28, 2023.