



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

U.S. EPA-REGION 3-RHC
FILED-26NOV2019am10:39

November 26, 2019

VIA FIRST CLASS MAIL
& EMAIL

Brad Pollack, Esquire
753 South Main Street
Woodstock, VA 22664

**Re: Magnate, LLC Site, Edinburg, Shenandoah County,
Virginia: Lien Proceeding CERC 03-2019-0120LL**

Dear Mr. Pollack:

Enclosed please find a copy of EPA's *Response to Arguments Presented by Magnate, LLC in its November 14, 2019 Submission Regarding EPA's Perfection of a CERCLA § 107(l) Lien* filed with the Regional Judicial Officer on this date.

Respectfully,

A handwritten signature in black ink, appearing to be "A. Goldman", with a horizontal line extending to the right.

ANDREW S. GOLDMAN
Sr. Assistant Regional Counsel

Enclosure

cc: Regional Hearing Clerk

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3**

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

**EPA’s Response to Arguments Presented by
Magnate, LLC in its November 14, 2019 Submission Regarding
EPA’s Perfection of a CERCLA § 107(I) Lien**

CONTENTS			
I		Procedural History	1
II		Scope of this Proceeding	2
III		Magnate’s Arguments	5
	A	Magnate Assertion #1: “[T]here was ‘never’ a substantial release or threat of release to the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.”	5
	B	Magnate Assertion #2: “[T]he EPA/OSC was aware of the lack of evidence rising to the level of ‘substantial release or threat presenting imminent and substantial danger to the public or welfare, in that he failed to notify the public, failed to do a feasibility study, risk assessment, and failed to give Magnate opportunity to present evidence as to the ‘cause’ of the supposed threat and PRP [sic].”	6
	C	Magnate Assertion #3: “[T]here was no determination of threat based on the evidence above, due to a ‘determination of threat’ made in February 2018, based on evidence collected in May and November of 2016. This would demonstrate a total lack of “Due Care with respect to the Hazardous Substance” on the part of OSC/EPA. No Protector of the Environment would ever allow a ‘threat of substantial release or threat presenting imminent and substantial danger to the public or welfare to stand vital for over 500 days, if they actually had a basis to believe the threat was real.”	10
	D	Magnate Assertion #4: “EPA’s basis for perfect lien [sic] is based on an unwarranted response action, based on flawed evidence without due process.”	12

	E	Magnate Assertion #5: “Whereas EPA’s perfecting of lien [sic] will result in depriving of Magnate’s property [sic], this action will need to be adjudicated in a court of law, not as an administrative action.”	13
	F	Magnate Assertion #6: “There has been a complete deprivation of due process, failure to accept exculpatory evidence, and the obfuscation of the evidentiary process.”	15
	G	Magnate Assertion #7: “Magnate further asserts that the failure to reveal the original author of the complaint was to conceal the record of the complaint.”	15
	H	Magnate Assertion #8: “Magnates further asserts that the cancelling of a meeting requested by Magnate and scheduled for October 11, 2017, was cancelled in order to conceal the evidence that the meeting would have revealed [sic]. The meeting was replaced with an offsite meeting where Magnate was presented letters of Potential Liability.”	16
	I	Magnate Assertion #9: “Magnate further asserts that the failure by Myles Bartos to respond to the F.O.I.A. request dated May 14, 2018, was an effort to conceal the record.”	17
	J	Magnate Assertion #10: “Magnate also asserts that Myles Bartos notified Magnate of a scheduled meeting on June 6, 2019, when in fact the meeting was scheduled for June 5, 2019. This was done to deprive Magnate of and conceal the record from Magnate.”	17
IV		Conclusions	18
		List of Exhibits	21

**EPA’s Response to Arguments Presented by
Magnate, LLC in its November 14, 2019 Submission Regarding
EPA’s Perfection of a CERCLA § 107(I) Lien**

This is a response by the U.S. Environmental Protection Agency (“EPA” or “Agency”) to arguments raised by Magnate, LLC (“Magnate”) in its November 14, 2019 submission in connection with this matter (“Magnate Response”). For the reasons set forth herein, EPA contends that the Magnate 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 Magnate of EPA’s intent to perfect a lien on two of six parcels owned by Magnate and included within the Magnate, LLC Site (“Magnate Site” or “Site”). *Rebuttal Exhibit 3.*² By email on July 28, 2019, Magnate’s counsel notified EPA of its objections to EPA’s perfection of the lien and of its desire to meet with a neutral EPA official. *Rebuttal Exhibits 4 & 5.* On September 11, 2019, the EPA Region 3 Regional Counsel signed an *Order of*

¹ This response has been prepared in anticipation of a conference with Magnate and the EPA Region 3 Regional Judicial 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.

² “Rebuttal Exhibits” are exhibits associated with EPA’s *Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA’s Perfection of a CERCLA § 107(I) Lien* served on Magnate under cover of letter dated September 26, 2019.

Assignment designating the EPA Region 3 Regional Judicial Officer (“RJO”) as the neutral official to review this matter. *Rebuttal Exhibit 6*. The *Order of Assignment* additionally required EPA to serve a copy of the Lien Filing Record and a written reply to Magnate’s objections within 20 days. On September 12, 2019, the undersigned served the Lien Filing Record on Magnate. On September 26, 2019, the undersigned served EPA’s *Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA’s Perfection of a CERCLA § 107(l) Lien* (“Rebuttal”) on Magnate.³ By letter dated October 18, 2019, following an October 17, 2019 conference call between Magnate, the undersigned, and the RJO, the RJO directed Magnate to submit its brief responding to EPA’s *Rebuttal* by November 14, 2019, and gave EPA the option to file a response by December 3, 2019. In addition, the RJO tentatively set December 12, 2019 as the date on which a conference would be held.

II. Scope of This Proceeding

The purpose of this proceeding is to provide Magnate 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

³ By letter dated October 2, 2019, the undersigned served a corrected copy of the attachments to the *Rebuttal* to Magnate via certified mail. This letter was returned by the post office. The RJO later learned, during a November 6, 2019 call between Magnate’s counsel and the EPA Region 3 Regional Hearing Clerk, that Magnate’s counsel preferred to receive correspondence solely by regular mail or overnight delivery with no signature required. By letter dated November 6, 2019 and sent overnight delivery, the undersigned again served a corrected copy of the *Rebuttal* attachments on Magnate.

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 Magnate’s property will constitute a determination that Magnate 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 Magnate Site. Similarly, neither this proceeding nor perfection of a lien will determine the costs for which Magnate may be liable. Such determinations are the domain of a cost recovery lawsuit which may be brought by the United States against Magnate if and when the United States elects to recover its costs against the company. Should that occur, Magnate will have ample opportunity to challenge EPA’s response actions and costs in an effort to minimize or avoid liability.⁴

The lien that EPA seeks to perfect already exists by operation of law. *See Rebuttal*, at 12-13. 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

⁴ 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.”

against the property owner or otherwise.

As set forth in EPA's *Rebuttal* and reiterated by the undersigned during the October 17, 2019 conference call between Magnate, the undersigned, and the RJO, 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 further set forth 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;
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. See *Rebuttal*, Section III.

III. Magnate's Arguments

The Magnate Response contains a number of assertions in support of the company's objection to EPA's perfection of the lien. EPA contends that none of these assertions are relevant to the issues in this proceeding—whether EPA has a reasonable basis to perfect the lien under the statute—and that they should therefore not be further considered. Magnate's assertions, and EPA's responses, are set forth below.⁵

A. Magnate Assertion #1: “[T]here was ‘never’ a substantial release or threat of release to the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare.”

This assertion appears to challenge EPA's authority to perform a response action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), to address conditions found at Magnate's property. This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. EPA did not respond to a “pollutant or contaminant” under Section 104(a)(1)(B) of CERCLA, 42 U.S.C. § 9604(a)(1)(B). Rather, EPA responded to the release and threatened release of a “hazardous substance” under Section 104(a)(1)(A) of CERCLA, 42 U.S.C. § 9604(a)(1)(A). As set forth in EPA's Threat Determination (*Rebuttal*

⁵ The Magnate Response contains some confusing and apparently unfinished arguments. This section addresses arguments which the undersigned was able to understand.

Exhibit 09) and Action Memorandum (*LFR 006*),⁶ EPA responded to polychlorinated biphenyls (“PCBs”) and asbestos—both “hazardous substances” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and 40 C.F.R. § 302.4 (Designation of Hazardous Substances). No finding of an “imminent and substantial danger to the public health or welfare” is required in order to respond to the release or threatened release of a “hazardous substance” under Section 104(a)(1)(A) of CERCLA, 42 U.S.C. § 9604(a)(1)(A). Nevertheless, EPA found that the release or threatened release of PCBs and asbestos from the Magnate Site may present an imminent and substantial endangerment to the public health or welfare or to the environment based on an analysis of various factors. (*Rebuttal Exhibit 09* and *LFR 006*).

B. Magnate Assertion #2: “[T]he EPA/OSC was aware of the lack of evidence rising to the level of ‘substantial release or threat presenting imminent and substantial danger to the public or welfare, in that he failed to notify the public, failed to do a feasibility study, risk assessment, and failed to give Magnate opportunity to present evidence as to the ‘cause’ of the supposed threat and PRP [sic].”

Like the preceding assertion, this assertion appears to challenge EPA’s authority to perform a response action under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a), to address conditions found at Magnate’s property. This

⁶ “LFR ___” refers to documents in the Lien Filing Record served on Magnate by letter dated September 12, 2019.

assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. First, EPA did notify the public of the Magnate Site as required by Section 300.820 of the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”), 40 C.F.R. § 300.820 (Administrative Record File for a Removal Action). EPA compiled an administrative record supporting selection of the response action announced in EPA’s May 31, 2018 Action Memorandum and, on August 17, 2018, published a notice of the availability of this administrative record in the Northern Virginia Daily (*see Exhibit 1*).

Second, EPA is not required to conduct a “feasibility study” to support the selection of a “time critical” removal action such as the one performed on the Magnate property.⁷ Under Section 300.410 of the NCP, 40 C.F.R. § 300.410, in determining whether a removal response action is necessary EPA first performs a “Removal Site Evaluation” (“RSE”) consisting of a “Removal Preliminary Assessment” (“RPA”) and, if warranted, a “Removal Site Inspection” (“RSI”). The RSE is performed to assist in determining if a removal action is warranted. *See*

⁷ Superfund response actions are either “removal” response actions as defined in Section 101(23) of CERCLA, 42 U.S.C. § 9601(23), or “remedial” response actions as defined in Section 101(24) of CERCLA, 42 U.S.C. § 9601(24). CERCLA and the NCP establish different procedures for selection of each action. This proceeding concerns a “removal” action. Depending on the urgency with which a removal action must be implemented, the action is classified as either an “emergency” action, a “time critical” action,” or a “non-time critical” action. The NCP establishes selection procedures for non-time critical removal actions that are different from time critical removal actions.

40 C.F.R. § 300.410(i). The RPA is based on readily available information and may include, among other things, an identification of the source and nature of a release; evaluation by the Agency for Toxic Substances and Disease Registry or state public health agencies; and an evaluation of the magnitude of the threat.

40 C.F.R. § 300.410(c). An RSI is performed if more information is needed. What comes next is described in relevant part by Section 300.415 of the NCP:

“(a)(1) In determining the appropriate extent of action to be taken in response to a given release, the lead agency shall first review the removal site evaluation, any information produced through a remedial site evaluation, if any has been done previously, and the current site conditions, to determine if removal action is appropriate.

...

“(b)(1) At any release, regardless of whether the site is included on the National Priorities List (NPL), where the lead agency makes the determination, based on the factors in paragraph (b)(2) of this section, that there is a threat to public health or welfare of the United States or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.

“(2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:

“(i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;

“(ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;

“(iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;

“(iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

“(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

“(vi) Threat of fire or explosion;

“(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and

“(viii) Other situations or factors that may pose threats to public health or welfare of the United States or the environment.

“(3) If the lead agency determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the environment. The lead agency shall, at the earliest possible time, also make any necessary determinations pursuant to paragraph (b)(4) of this section.”

40 C.F.R. § 300.415. A feasibility study evaluating alternative response actions is required only if EPA determines that a “non-time critical” response is appropriate.

Section 300.415(b)(4) of the NCP states in relevant part:

“(4) Whenever a planning period of at least six months exists before on-site activities must be initiated, and the lead agency determines, based on a site evaluation, that a removal action is appropriate:

- (i) The lead agency shall conduct an engineering evaluation/cost analysis (EE/CA) or its equivalent. The EE/CA is an analysis of removal alternatives for a site.”

40 C.F.R. § 300.415(b)(4). EPA’s Action Memorandum identified the response selected for the Magnate Site as a “time critical” removal action. *LFR 006*.

Therefore, no “feasibility study” was required.

Third, EPA performed the risk assessment required of releases and threatened releases under consideration for removal action under Section 300.415(b)(2) of the NCP, 40 C.F.R. § 300.415(b)(2), in the January 18, 2018 Threat Determination and the Action Memorandum. *Rebuttal Exhibit 09 and LFR 006*. This risk assessment consisted of an evaluation of the risk factors identified in the regulation.

Lastly, Magnate provides no support for the idea that EPA failed to provide the company with an “opportunity to present evidence as to the ‘cause’ of the supposed threat.” To the contrary, the record in this matter evidences numerous opportunities for Magnate to provide EPA with any information it believed to be relevant to the Magnate Site as well as instances in which Magnate availed itself of this opportunity (*see, e.g., Rebuttal Exhibit 11*).

C. Magnate Assertion #3: “[T]here was no determination of threat based on the evidence above, due to a ‘determination of threat’ made in February 2018, based on evidence collected in May and November of 2016. This would demonstrate a total lack of “Due Care with respect to the Hazardous Substance” on the part of OSC/EPA. No Protector of the Environment would ever allow a ‘threat of substantial release or threat presenting imminent and substantial danger to the public or welfare’ to stand vital for over 500 days, if they actually had a basis to believe the threat was real.”

Although confusing, this assertion seems to suggest that there could be no “imminent and substantial danger to the public or welfare” because EPA relied on information collected in 2016. This assertion is beyond the scope of this

proceeding, is not relevant, and should therefore not be considered further.⁸

Without waiving these arguments, EPA responds as follows. EPA collected data from the Magnate Site in May and November 2016. Delays associated with laboratory validation of the data resulted in delays in the finalization of reports for these sampling events. The reports were issued in August 2016 and March 2017. The On Scene Coordinator's ("OSC") efforts in drafting a threat determination for approval by management were delayed because of the OSC's commitments at a number of competing Superfund sites to which he was assigned and because of his deployment to Puerto Rico in the wake of Hurricane Maria.⁹ As such, EPA's Threat Determination was not issued until January 18, 2018. Between February and April 2018, EPA attempted, unsuccessfully, to bring Magnate under an agreement under which the company would implement actions to address the threats identified in EPA's Threat Determination. In April 2018, EPA ceased efforts to secure an agreement and requested that Magnate provide access to its property to permit EPA to implement actions to address the threats. Magnate denied access. EPA thereafter requested that the U.S. Department of Justice commence a lawsuit against Magnate seeking court-ordered access. That lawsuit was commenced on October 11, 2018

⁸ This assertion additionally misreads the statutory predicates for responding to a release or threatened release of "hazardous substances" (which requires no finding of imminent and substantial threat).

⁹ OSCs are not authorized under EPA delegations to make determinations of imminent and substantial endangerment. In Region 3, this authority rests two management levels above the OSC.

and was resolved on February 12, 2019, when Magnate agreed to provide access under a Stipulation and Order signed by the Court. EPA and its contractor mobilized to the Magnate Site to begin implementation of the response on February 26, 2019.¹⁰ Therefore, a majority of the time between the date EPA issued the Threat Determination in this case and commencement of the action at the Magnate Site to address such threats was spent either attempting to secure private performance of the action by Magnate or attempting to obtain legal entry to the Magnate Site to facilitate performance of the action by EPA.

D. Magnate Assertion #4: “EPA’s basis for perfect lien [sic] is based on an unwarranted response action, based on flawed evidence without due process.”

This assertion also appears to challenge the removal action implemented at Magnate’s property. This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. Magnate fails to identify facts upon which it bases its claim that the response action implemented at its property was “unwarranted,” “based on flawed evidence,” or a violation of due process and therefore makes a substantive response impossible. EPA explained the reasonable basis to believe that Magnate’s property was subject to or affected by a removal

¹⁰ The undersigned represents that the facts in this paragraph are true. Should the RJO determine that such facts are relevant to this proceeding and Magnate dispute them, the undersigned will provide evidentiary support for these facts.

action in Section III.A.3 of the *Rebuttal*.

E. Magnate Assertion #5: “Whereas EPA’s perfecting of lien [sic] will result in depriving of Magnate’s property [sic], this action will need to be adjudicated in a court of law, not as an administrative action.”

Magnate here challenges the validity of this proceeding, claiming that this “action” is more appropriately “adjudicated” in a judicial setting. This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. Magnate mischaracterizes the nature and purpose of this proceeding. This proceeding is not an “adjudication” and will not result in any legally binding determination. Rather, this proceeding is intended to provide Magnate with due process before EPA decides whether to perfect the lien. EPA’s “Supplemental Guidance on Federal Superfund Liens” (*Rebuttal Exhibit 01*) states in relevant part:

“This Supplement 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.

...

The Agency should provide notice to property owners who are potentially responsible parties (‘PRPs’) under CERCLA that the Agency intends to perfect a lien on their property prior to filing papers to perfect. The Agency will give such property owners the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both.”

Rebuttal Exhibit 01.

As described in EPA’s notice of intent to perfect the lien, the end result of this proceeding will be a recommendation by the RJO as to whether EPA has a

reasonable basis to believe that the statutory predicates for perfection have been met:

“If EPA receives a written submission or a request for a meeting within 30 calendar days of your receipt of this letter, EPA will review Magnate’s submission or request for a meeting. If EPA agrees, based on Magnate’s submission, that it does not have a reasonable basis to perfect a lien on the Property, EPA will not perfect its lien and will so notify Magnate. If EPA disagrees, the written submission or request, together with the Lien Filing Record, will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting.

“If Magnate has requested an opportunity to meet, a meeting will be scheduled . . . The meeting will be held before a neutral EPA official. This will be an informal meeting in which Magnate may provide EPA with information as to why EPA’s position requires reconsideration . . .

“After reviewing Magnate’s written submission, or conducting a meeting if one is requested, the neutral EPA official will issue a recommended decision based upon the Lien Filing Record, any written submission, and any information provided at the meeting. The recommended decision will state whether EPA has a reasonable basis to perfect a lien and will be forwarded to an EPA official authorized to perfect liens. Magnate will be furnished with a copy of the recommended decision and notified of the Agency’s action.”

(Rebuttal Exhibit 03). This proceeding will neither result in a determination of liability under the Superfund statute nor perfection of the lien. The decision to perfect the lien is made, and the act of perfection is taken, by a delegated official (in Region 3 it is the Regional Counsel) based on the RJO’s recommendation following the landowner’s opportunity to contest EPA’s basis for perfecting the lien.

F. Magnate Assertion # 6: “There has been a complete deprivation of due process, failure to accept exculpatory evidence, and the obfuscation of the evidentiary process.”

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows.

Regarding Magnate’s due process claim, it is unclear whether Magnate here challenges the response action implemented at its property, this proceeding, or any other aspect of EPA involvement with the Site. To the extent Magnate is challenging the response action, *see* Section II.D, above. To the extent Magnate is challenging this proceeding, *see* Section II.E, above. Any attempt to respond to a claim based on some other act taken by EPA would be speculative.

Regarding Magnate’s claims regarding a “failure to accept exculpatory evidence” and “obfuscation of the evidentiary process,” EPA responds that Magnate has not supplied sufficient facts supporting these claims to permit a substantive response.

G. Magnate Assertion # 7: “Magnate further asserts that the failure to reveal the original author of the complaint was to conceal the record of the complaint.”

The undersigned assumes that Magnate here refers to the manner in which EPA became aware of the need to investigate conditions at the Magnate property. This assertion is beyond the scope of this proceeding, is not relevant, and should

therefore not be considered further. Without waiving these arguments, EPA responds as follows. Magnate has not supplied sufficient facts supporting these claims to permit a substantive response.

H. Magnate Assertion #8: “Magnates further asserts that the cancelling of a meeting requested by Magnate and scheduled for October 11, 2017, was cancelled in order to conceal the evidence that the meeting would have revealed [sic]. The meeting was replaced with an offsite meeting where Magnate was presented letters of Potential Liability.”

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. First, EPA’s On Scene Coordinator has indicated to the undersigned that the October 11, 2017 meeting, involving EPA and a number of state stakeholders, had always been scheduled to be held in the offices of the West Virginia Department of Environmental Quality (“DEQ”); that no meeting was scheduled to be held at the Magnate Site that day; and that Magnate principal Darryl Bates attended the October 11 meeting at DEQ’s offices. Second, Magnate fails to describe the “evidence” it claims would have been “revealed” had the meeting been held at Magnate’s property. Third, Magnate had ample opportunity to notify EPA of facts and evidence it believed to be relevant to EPA’s investigation of and response at the Magnate Site.

I. Magnate Assertion #9: “Magnate further asserts that the failure by Myles Bartos to respond to the F.O.I.A. request dated May 14, 2018, was an effort to conceal the record.”

This assertion relates to a May 14, 2018 letter from Magnate to EPA stylized as a Freedom of Information Act (“FOIA”) request (*see Exhibit 2*). This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. Magnate’s May 14, 2018 letter consisted of a series of questions asked of EPA’s OSC and sought no records or documents. By letter dated May 29, 2018, the EPA Region 3 FOIA Officer responded to Magnate’s request by giving Magnate an additional opportunity to describe the government records, if any, it sought under its request (*see Exhibit 3*). No further correspondence pertaining to this FOIA request was received by EPA.

J. Magnate Assertion #10: “Magnate also asserts that Myles Bartos notified Magnate of a scheduled meeting on June 6, 2019, when in fact the meeting was scheduled for June 5, 2019. This was done to deprive Magnate of and conceal the record from Magnate.”

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further. Without waiving these arguments, EPA responds as follows. Neither the undersigned nor Mr. Bartos are aware of any meeting regarding the Magnate Site that was scheduled for June 5 or 6, 2019. Furthermore, Magnate points to no facts or evidence demonstrating that EPA

deprived Magnate of information relevant to the Magnate Site or concealed any records from Magnate.

IV. Conclusions

For the reasons stated above, EPA contends that nothing in the Magnate Response changes the fact that:

1. The lien arose by operation of law pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l).

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

b. 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;

c. EPA has a reasonable basis to believe that it expended response costs at this Site in conducting removal actions at the Site; and

d. EPA has a reasonable basis to believe that it provided Magnate with written notice of its potential liability via certified mail.

2. Magnate has not offered any evidence to support a third-party defense under Section 107(b)(3) of CERCLA.

3. EPA has a reasonable basis to believe that Magnate cannot carry its evidentiary burden under Section 107(b)(3) of CERCLA.

a. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site because it (1) failed to secure the Site to prevent access by the public to friable asbestos and PCBs located there, (2) failed to maintain the Site to prevent the release of friable asbestos and PCBs into the environment, (3) failed to maintain the Site to prevent the creation and migration of friable asbestos from asbestos-containing sources that were not protected from weather and trespassers; and

b. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site because it prevented, for over three hundred days, entry to EPA to perform necessary removal action to abate risks at the Site.

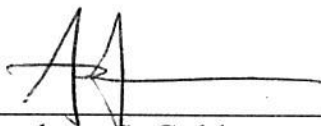
4. Magnate has not demonstrated that EPA lacks a reasonable basis to perfect a lien on the subject parcels.

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

6. Perfection of the statutory lien is therefore appropriate.

11/26/19

Date



Andrew S. Goldman
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103
(215) 814-2487
goldman.andrew@epa.gov

List of Exhibits

1. Email from Amanda Miles to Andrew Goldman, re: “Magnate LLC Public Notice for AR” (November 15, 2019).
2. Email from Darryl Bates to Myles Bartos, re: “FOIA Request” (May 15, 2018).
3. Letter from Rita Tate to Darryl Bates, re: “Freedom of Information Act Request No. EPA-R3-2018-008081” (May 29, 2018).

Exhibit 1

Goldman, Andrew

From: Miles, Amanda
Sent: Friday, November 15, 2019 2:48 PM
To: Goldman, Andrew
Cc: Bartos, Myles
Subject: Magnate LLC Public Notice for AR
Attachments: Magnate Tearsheet 8_17_18 Northern Virginia Daily.pdf

Hi Andrew,

Attached is the tear sheet (proof of publishing) for the public notice announcing the availability of the AR for the Magnate LLC Removal Site.

Let me know if you need anything else.

Thank you,

Amanda Miles
Community Involvement Coordinator
Office of Public Affairs
Community Involvement Branch (3RA22)
Environmental Protection Agency Region III
1650 Arch Street
Philadelphia, PA 19103
215-814-5557
miles.amanda@epa.gov

Man facing drug charges may avoid jail

By Alex Bridges

WOODSTOCK — A Shenandoah County man charged with drug crimes may avoid jail if he successfully completes a year of probation. A grand jury indicted Clayton Cary on Wednesday in Shenandoah County Circuit Court on Wednesday on the count of possession of a controlled substance and probation.

Cary, 32, of 425 Liberty Furnace Road, Edinburg, was charged with possession of a controlled substance on Dec. 19, 2016. Woodstock police officer C.T. Brando responded to 174 E. Rosewood Road, Apt. 3, Woodstock, for a report of a suicidal male, according to a criminal complaint dated Oct. 10, 2017. Brando stated he would receive a check from Cary, and that the court restraining order on the other counts for one year. Brando ordered the case continued until Aug. 14, 2019.

Court documents charge Cary, 32, of 425 Liberty Furnace Road, Edinburg, with possession of a controlled substance on Dec. 19, 2016. Woodstock police officer C.T. Brando responded to 174 E. Rosewood Road, Apt. 3, Woodstock, for a report of a suicidal male, according to a criminal complaint dated Oct. 10, 2017. Brando stated he would receive a check from Cary, and that the court restraining order on the other counts for one year. Brando ordered the case continued until Aug. 14, 2019.

Brando said he received a check from Cary, and that the court restraining order on the other counts for one year. Brando ordered the case continued until Aug. 14, 2019.

Brando said he received a check from Cary, and that the court restraining order on the other counts for one year. Brando ordered the case continued until Aug. 14, 2019.

Brando said he received a check from Cary, and that the court restraining order on the other counts for one year. Brando ordered the case continued until Aug. 14, 2019.

Warren School Board approves crisis plan

By Max Lee

WARREN TOWNSHIP — The Warren County Public Schools Board approved an updated crisis plan for the district during its work session on Wednesday.

Michael Hirsch, director of special services for the district, described the updated plan as an attempt to improve the district's protocol for handling lockdown procedures and for dealing with students who have allergies.

"We really looked at our lockdown procedure with our active shooter drill and we related that with the Sheriff's Office," Hirsch said.

In particular, he said, the district has installed additional barrier entrances on each school and numbered all of the multiple doors in each school to help the district communicate with law enforcement personnel during an emergency.

Strasburg to start optional program for trash, recycling cans

By Max Lee

STRASBURG — The town is changing its trash and recycling program.

Town Manager Wyatt Pearson said that starting Monday, the town will begin accepting applications for a new leasing program that will offer cans for trash and recycling for \$1 per month.

Twitter

Continued from A1

recommended him and instead had them completely ignored," he said in a ruling posted on Twitter. "I don't get it right away (President Donald Trump should do something about the on-air clips of the internet)."

Twitter said it will review the video to see if it is in violation of its rules against harassment of someone or another person to do so.

The video is no longer available on Twitter or Periscope where Jones posted it. But it is still up elsewhere on the web. In it, Jones says people need to have their battle rifles and everything ready at their bedrooms and you get to be ready because the media is well disciplined in their deception.

When deciding what the rules are and how to enforce them — especially when it comes to crisis areas — they are up against both censorious and liberal claiming bias and being silent.

VFW POST 2447
Edinburg, VA
984-4355

FRIDAY NIGHT SPECIAL
AUG 17th 5-9 PM
12 OZ. BEER, 10 OZ. HARDDOCK, OR 1 LB. SPICED SHRIMP
\$15.00
Add on 1/2 lb. Shrimp for \$19
(Served w/ baked potato, salad & dessert)

SAT. AUG 18th
CHICKEN BBQ
READY @ 9:30
PICK UP ONLY
PROCESSES ACCEPTED
— MUST PICK UP BY 1PM

OPEN TO THE PUBLIC
Hall open for non-smoking

AT Vision Care

EYE CARE

Physicians & Surgeons PC
WOODSTOCK & WINCHESTER
(540) 409-5254 • Toll free (800) 381-1186
www.eyecarepc.com

New Market Fire & Rescue

BINGO

EVERY FRIDAY

Doors Open 4:30pm
Games Start 6:30pm

ALL REGULAR GAMES PAID OUT **\$100**

\$500 JACKPOTS

BINGO EACH BLOCK

PROGRESSIVE

FOOD • Non-Smoking Event
10% of Proceeds for Fire Medical Equipment

EVERYTHING ON SALE

HARPER'S OPEN HOUSE
AUGUST 24-26

Statuary & Water Gardens

HarpersStatuary.com
Harrisonburg
540-434-8078

EPA PUBLIC NOTICE

Administrative Record available for public review

MAGNATE LLC SITE

The U.S. Environmental Protection Agency (EPA) announces the availability of the Administrative Record (AR) for removal activities conducted at the Magnate LLC site in Edinburg, Virginia, where EPA plans to remove asbestos-containing and other hazardous materials from buildings and debris piles that pose a threat to public health and the environment. The AR contains documents about cleanup activities which will ensure public health and the environment are protected.

- Cleanup documents can be viewed at the following locations:
- 1) Online at <https://semspub.epa.gov/rtr/collection/03/ARE65991>
 - 2) Shenandoah County Library
614 Stony Creek Blvd, Edinburg, VA 22824
Please visit the Circulation Desk to view these documents.
 - 3) Environmental Protection Agency, Region 3 office
1650 Arch Street, Philadelphia, PA 19103

On Second Thought Consign & Thrift Shop

Bring in today to On Second Thought Consign & Thrift your FALL ITEMS!

We have some empty spaces on our shelves from the yard crawl and we want to make you some cash on your gently used items.

Don't have anything to sell? No problem, come shop with us & see why we are #1 in the Valley.

Don't forget to check out, Like & Share our Facebook page!

476 North Main St., Woodstock (former Ben Franklin Store) 439-2655

Exhibit 2

Goldman, Andrew

From: Bartos, Myles
Sent: Tuesday, May 15, 2018 10:44 AM
To: Goldman, Andrew
Subject: Fwd: FOIA Request
Attachments: FOIA Myles Bartos.pdf; ATT00001.htm

I just got off the phone with Mr Bates. I'll call today to discuss.

Begin forwarded message:

From: Darryl Bates <darrylwbates@gmail.com>
Date: May 15, 2018 at 8:16:30 AM EDT
To: "Bartos, Myles" <Bartos.myles@epa.gov>, Bob Gottschalk <bgottschalk@adlerfinancial.com>
Subject: FOIA Request

Myles, In order for legal counsel to make a determination and to expedite that determination, more information is needed. Attached is a FOIA request for information concerning your operation at Aileen.

Thanks, as always, Darryl

Magnate LLC
3102 Headley Road,
Maurertown, VA.

FOIA Request

Myles Bartos
EPA
Philadelphia, Pa.

May 14, 2018

Magnate LLC respectfully requests the following information to do with the EPA operation at 523 Aileen Road, Edinburg VA. 22824; in order to complete the record:

Who originally contacted you, pertaining to the conditions at 523 Aileen Road, Edinburg Va. And from what agency was he / she , the representative thereof?

Is it unusual for EPA to be present for an illegal dumping complaint?

Who made the decision to request permission from Magnate LLC to inspect property?

What part of the "risk" findings were found on second testing trip, (Nov, 15-16) that weren't found on the first testing trip, (May 5-6)?

Who or whom did you have communication with from local authorities concerning the your testing between your first trip and second trip and when?

Who or whom made the determination to move October 11, 2017 meeting from Aileen site to DEQ offices in Harrisonburg?

Is it common practice for EPA to use "Super Fund" money to remedy one piece of deteriorating asbestos pipe wrap. a small piece of asbestos pipe wrap used to contaminate a 100 ton pile of Tectum with a history of being asbestos and PBC free, and to remediate a basement of PBCs and asbestos debris that could be easily sealed off from humans, water and air?

Thank you for your prompt response to this request.

Sincerely,

Darryl W. Bates / Magnate LLC

Exhibit 3



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

May 29, 2018

Darryl Bates
Magnate LLC
3102 Headley Road
Maurertown, Virginia 22644

Re: Freedom of Information Act Request No. EPA-R3-2018-008081

Dear Mr. Bates

This letter concerns the above-referenced Freedom of Information Act (FOIA) request, received by the U.S. Environmental Protection Agency (EPA) Region III, in which you are seeking information regarding the EPA operation at 523 Aileen Road, Edinburg, Virginia.

Your request does not reasonably describe the records you are seeking in a way that will permit EPA employees to identify and locate them. The EPA's FOIA regulations explain:

"Whenever possible, your request should include specific information about each record sought, such as the date, title or name, author, recipient, and subject matter. If known, you should include any file designations or descriptions for the records that you want. The more specific you are about the records or type of records that you want, the more likely EPA will be able to identify and locate records responsive to your request." 40 C.F.R. § 2.102(c).

We would like to provide you the opportunity to clarify the records that you are seeking so that EPA can process your request. As indicated in 40 C.F.R. § 2.102(c), please include any specific information about the records you seek, including time period, authors, or a more detailed description of the records' subject matter. Additionally, the FOIA does not require federal agencies to respond to questions so please consider that as you are modifying your request.

Please contact me at 215-814-2050 or R3FOIA@epa.gov with your clarification, if you would like to modify or narrow your request or if you would like to further discuss your request. If we do not hear from you by June 12, 2018, we will administratively close your request.

Sincerely,

Rita Tate

Rita Tate
Freedom of Information Officer
Office of Communications
and Government Relations

Docket No. CERCLA 03-2019-0120LL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the documents identified below were provided to the following persons:


By First Class Mail and Email:

Bradley G. Pollack, Esquire
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net

By Hand Delivery:

Joseph Lisa (3RC00)
Regional Judicial Officer
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103

Documents Provided	
1.	EPA's Response to Arguments Presented by Magnate, LLC in its November 14, 2019 Submission Regarding EPA's Perfection of a CERCLA § 107(l) Lien



Andrew S. Goldman, Esquire
Sr. Assistant Regional Counsel

11/26/19
Date