BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	
	EPA DOCKET NO. CERCLA-03-2018-0110LL
Belgrade Transformer Superfund Site, 2818-20 Belgrade Street Philadelphia, PA 19134	
	U.S. EPA-REGION 3-RHC FILED-26JUN2018PM3:06
John F. Joyce, Jr. Owner,	PROCEEDING UNDER SECTION 107(l) OF THE COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. § 9607(l)

RESPONSE OF U.S. ENVIRONMENTAL PROTECTION AGENCY TO OWNER'S REQUEST FOR MEETING ON PERFECTED FEDERAL SUPERFUND LIEN

The U.S. Environmental Protection Agency respectfully submits that it has a reasonable basis to perfect a federal Superfund lien on real property located at 2818-20 Belgrade Street, Philadelphia, Pennsylvania ("the Property"). All the statutory elements required for perfection of a lien under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(l), have been met.

The Property comprises the Belgrade Transformer Superfund Site ("Site") and is owned by John F. Joyce, Jr. EPA has incurred, and will continue to incur, response costs for performance of a removal action at the Property to mitigate the release or threatened release of the hazardous substances, polychlorinated biphenyls ("PCBs"), under Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). EPA has notified Mr. Joyce of his potential liability as the current owner of the Site under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

Mr. Joyce has alleged that he is not responsible for any environmental contamination at the Property because he can avail himself of the third-party defense provided by Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). However, EPA believes that Mr. Joyce would not be eligible for CERCLA's third-party defense because he cannot prove facts essential to the defense. Specifically, Mr. Joyce cannot prove, by a preponderance of the evidence, three required elements of the defense: (i) that the release or threat of release of hazardous substances at the Property was caused solely by the act or omission of a third party; (ii) that he exercised due care with respect to hazardous substances at the Property; and (iii) that he took precautions against the foreseeable acts or omissions of a third party and the consequences that could foreseeably result from such acts or omissions. *See* 42 U.S.C. § 9607(b)(3)(a) and (b). Therefore, because all legal requirements for a federal Superfund lien have otherwise been met, EPA respectfully submits that it has a reasonable basis to perfect a federal Superfund lien on the Property on behalf of the United States in accordance with Section 107(l) of CERCLA, 42 U.S.C. § 9607(l).

I. BACKGROUND

Mr. Joyce acquired the Property from his mother, Mary Joyce, by a deed dated June 30, 1988 (EPA Lien-Filing Rec., Doc. 2).[1] A warehouse with a roll-up, garage-type door on one side occupies the entire Property with entrances on Belgrade and Miller Streets. The warehouse takes up approximately 4,500 square feet on the first floor. There is a small second-floor office above a portion of the warehouse. During Mr. Joyce's ownership of the Property, he has used it for the

[1] Hereafter, all references to documents in EPA's Lien-Filing Record will refer to the document's number in the attached Index to the Lien-Filing Record. Thus, Doc. 2 is the document numbered 2 on the Index— i.e., *Indenture, dated June 30, 1988, between Mary Joyce (Grantor) and John F. Joyce, Jr. (Grantee), conveying Nos. 2818-20 East Belgrade Street, Philadelphia, PA, to Grantee*. Both the Lien-Filing Record and its Index are enclosed with this Response.

storage of dozens of electrical transformers, other electrical supplies and equipment, and drums and other receptacles containing transformer oil and other contents (Docs. 5, 3c, 15, and 17). EPA has determined that some of the transformers, drums, other containers, electric equipment, and debris at the Property contain high concentrations of PCBs (Docs. 3a, 3b, 4, and 26-30).

Beginning on or around April 30, 2012, Mr. Joyce received at least seven Notices of Violation ("NOVs") from the City of Philadelphia's Department of Licenses and Inspections ("L&I") for his failure to maintain the Property (Doc. 18). These NOVs, which arose from L&I inspections of the exterior of the Property, notified Mr. Joyce that the Property was not in compliance with various provisions of the Philadelphia Property Maintenance Code[2] and cited him for broken or missing windows, failure to maintain the garage door and bay doors, holes in and partial collapse of the warehouse roof, boarded windows and bay doors, and deteriorating bricks. Four of the NOVs declared the warehouse building unsafe, in whole or in part, because the front and rear walls are bulged and in danger of collapse and because the roof of the warehouse is partially collapsed and in danger of further collapse.[3]

Mr. Joyce failed to comply with the NOVs and did not perform all the necessary repairs to the Property. As a result, on April 17, 2017, the City of Philadelphia filed a Complaint against Mr. Joyce in the Court of Common Pleas, Philadelphia County, Pennsylvania ("Court of Common Pleas"), seeking an injunction, fines, and costs (Doc. 16).

On October 26, 2017, an Order to Enter and Inspect by Agreement [of the Parties] was issued by the Court of Common Pleas, under which Mr. Joyce consented to an inspection of the

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[2] The *Philadelphia Building Maintenance Code* contains ordinances and regulations related to residential properties, provisions for the maintenance of non-residential properties, and provisions related to vacant, unsafe, and dangerous properties in the City. It is incorporated as Sub-code "PM" of the *Philadelphia Building Construction and Occupancy Code* (BCOC), which comprises Title 4 of *The Philadelphia Code.*

[3] *See* NOVs dated May 13, 2014, July 4, 2014, Nov. 8, 2016, and Nov. 9, 2016, which are among the NOVs included in Doc. 18.

Property, including the interior of the warehouse, by L&I, and to the eventual demolition of the warehouse (Doc. 15, Order at ¶¶ 5-6).

On November 6, 2017, in a separate Civil Action, Select Neighborhoods, Inc. filed a Petition for Appointment of a Conservator ("Petition") in the Court of Common Pleas, seeking to be appointed conservator of the Property under the Pennsylvania Abandoned and Blighted Property Conservator Act, 68 P.S. § 1101, *et seq*. (2008). If appointed conservator, Select Neighborhoods, Inc. would take possession of the Property and incur expenses to clean it up. These expenses would constitute a lien against the Property. Such a lien could have priority over the United States' Superfund lien. As conservator, Select Neighborhoods might also force the sale of the Property after cleaning it up. A hearing on the Petition has been continued until July 5, 2018.[4]

On November 28, 2017, two men were arrested by the City of Philadelphia Police Department and charged with burglarizing the Property. When apprehended, the two men were each pushing hand trucks with 55-gallon drums containing copper taken from transformers stored at the Property. An eyewitness told the police she saw the two men exiting the warehouse pushing the hand trucks with the 55-gallon drums. The police interviewed Mr. Joyce, who identified the drums and copper as his personal property. Mr. Joyce told the police that the copper had been removed from transformers he stored at the Property. Mr. Joyce also told the police that he had last visited the Property on November 25, 2017, and that he had left the garage door to the warehouse unlocked at that time because he had previously removed the lock on the door (Docs. 17 and 22). Mr. Joyce and an eyewitness told the police that people had entered the

[4] On May 14, 2018, the United States filed a *Notice of Federal Interest* in the conservatorship case with the Court of Common Pleas, informing the Court about EPA's removal action and the United States' Superfund lien under Section 107(l) of CERCLA.

Property without permission on other occasions, perhaps as early as September 2017 (Doc. 22). One of the responding police officers told a detective that he had gone to the warehouse and described it as filled with electric equipment, "and everything appeared to be covered in oil." He also stated that the two arrested men were covered with oil (Doc. 22).

On or around January 3, 2018, an L&I inspector requested that EPA On-Scene Coordinator ("OSC") Jack Kelly do a walk-through assessment of the Property because of the inspector's concerns about transformers located at the Property and potential PCB contamination. Based on his observations, OSC Kelly believed it would be appropriate for EPA to conduct a removal site assessment at the Property to determine whether any hazardous substances, pollutants, or contaminants found there presented an imminent and substantial danger to the public health or welfare. The City of Philadelphia and the Pennsylvania Department of Environmental Protection requested that EPA take the lead on the site assessment and any response actions required at the Site (Doc. 19).

On January 16, 2018, Mr. Joyce consented to EPA's entry onto the Property to perform a removal site assessment (Doc. 20).

On January 18, 2018, EPA conducted a preliminary site assessment in the warehouse, pursuant to Section 104(a) of CERCLA, 42 U.S.C. § 9604(a). During this preliminary site assessment, EPA discovered that the contents of the warehouse were in a state of disarray with various items thrown together in piles. Some of the items were piled on top of transformers, none of which were marked. EPA observed dozens of transformers and other receptacles containing or leaking oil. Analysis of sampling conducted by EPA during the site assessment showed that oil in some transformers and other receptacles, as well as oil-saturated debris and other items in the warehouse, were contaminated with PCBs (Docs. 3a, 3b, 3c, 4, and 5). PCBs are hazardous

substances under Section 102 of CERCLA, 42 U.S.C. § 9602, and 40 C.F.R. Part 302.4. PCBs are also regulated under the Toxic Substances Control Act ("TSCA"), 15 U.S.C. §§ 2601-2697, and 40 C.F.R. Part 761 ("PCB regulations"), and have been associated with certain human cancers and other diseases (Doc. 31).

Based on EPA's findings from the site assessment, the Agency determined that the Property presents an imminent and substantial endangerment to the public health, welfare, or the environment, and issued an Action Memorandum on March 5, 2018, selecting a removal action in accordance with Section 104(a) of CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. Part 300 (Doc. 5). EPA's removal action will include, among other things, further sampling to determine the extent of contamination at the Site, the removal and off-site disposal of all transformers and PCB-contaminated debris in the warehouse, and decontamination of surfaces within the warehouse and of other nearby areas (Doc. 5 at pp. 7-8).

EPA mobilized to the Site shortly after issuance of the Action Memorandum to begin the removal action. Additional sampling performed by EPA has shown PCB concentrations as high as 530,000 parts per million ("ppm") in oil stored in drums and other containers at the Property (Docs. 13 and 29).[5] Sampling has also shown that several of the transformers in the warehouse contain PCBs at concentrations ≥500 ppm; and one of these transformers has PCB concentrations of 680,000 ppm (Doc. 28).[6] Eight of ten wipe samples collected by EPA from the surfaces of electrical equipment in the warehouse exceeded 100 µg/100 cm^2 for PCBs, and most

[5] Under 40 C.F.R. § 761.1(b)(2), PCB concentrations are generally determined on a weight-per-weight basis (e.g., milligrams per kilogram, which is the equivalent of parts per million), or for liquids, on a weight-per-volume basis (e.g., milligrams per liter) if the density of the liquid is also reported.

[6] Under 40 C.F.R. § 761.3, any transformer that contains ≥500 ppm PCBs is defined as a "PCB Transformer" and is subject to the storage and disposal requirements of 40 C.F.R. Part 761, Subpart D.

of these wipe samples were in the thousands of micrograms of PCBs per 100 cm^2 (Doc. 28).[7] A wipe sample taken from the sidewalk outside the warehouse on Miller Street showed PCBs present at 240 µg/100 cm^2 (Doc. 26). EPA's ongoing assessment of the Site has found PCBs in water samples collected in the sewer line below manholes on Belgrade Street and in sediments collected below manholes on Miller Street (Doc. 29). EPA anticipates it will take six months to complete the removal action and estimates that the cost of the cleanup will exceed $1.3 million (not including indirect or enforcement costs) (Doc. 5 at pp. 9-10). As of June 19, 2018, EPA had spent more than $90,000 in costs for removal action at the Site (Doc. 7).

On May 10, 2018, EPA sent Mr. Joyce formal written notice of his potential liability as the current owner of the Site under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), (Doc. 8).

On May 14, 2018, EPA perfected a lien on the Property and sent Mr. Joyce a Notice of Federal Superfund Lien and Opportunity to Be Heard ("EPA's Lien Notice"). EPA's Lien Notice informed Mr. Joyce that EPA had perfected a lien on the Property under Section 107(l) of CERCLA and of his opportunity to be heard as contemplated by EPA's *Supplemental Guidance on Federal Superfund Liens* ("*Lien Guidance*") (Docs. 10 and 11).

On May 17, 2018, Mr. Joyce responded to EPA's Lien Notice and requested a meeting with a neutral EPA official on the issue of whether the Agency has a reasonable basis to perfect a Superfund lien on the Property (Doc. 12).

On June 4, 2018, Regional Counsel Mary B. Coe issued an Order of Assignment, designating Regional Judicial Officer Joseph J. Lisa as the neutral Agency official who would

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[7] Surficial PCB contamination is measured in micrograms per 100 square centimeters or "µg/100 cm^2." Under 40 C.F.R. § 761.1(b)(3), the provisions of the federal PCB regulations that apply to PCBs at concentrations of ≥500 ppm also apply to contaminated surfaces at PCB concentrations of ≥100 µg/100 cm^2.

preside at the meeting requested by Mr. Joyce (Doc. 14). EPA sent Mr. Joyce a copy of the Order of Assignment and the *Supplemental Guidance on Federal Superfund Liens* on June 4, 2018 (Doc. 21).

II. FRAMEWORK AND PURPOSE OF AN EPA LIEN HEARING

EPA's lien-filing practice follows Section 107(l) of CERCLA and the Agency's July 29, 1993 *Supplemental Guidance on Federal Superfund Liens* ("*Lien Guidance*"). As provided in the *Lien Guidance*, EPA gives notice to property owners believed to be potentially responsible parties ("PRPs") under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), informing them that the Agency intends to perfect, or has perfected, a lien on their property pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l). The *Lien Guidance* states that EPA will give the property owner an opportunity to be heard concerning the Superfund lien. *See Reardon v. United States*, 947 F.2d 1509, 1523-24 (1st Cir. 1991) (without notice and an opportunity to be heard, CERCLA's lien provisions violate the Fifth Amendment's "due process" clause).

As described in the *Lien Guidance*, the property owner's opportunity to be heard is a meeting before a neutral EPA official, who should be an attorney for the Agency with no prior involvement in the case at issue. The neutral official "should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien." *Lien Guidance*, at p. 7.

The meeting with the neutral official is conducted "as an informal exchange of information, not bound by judicial or administrative rules of evidence." *Id.*, at p. 8. "Neither EPA nor the property owner waives any claims or defenses by the conduct of the meeting or the outcome." *Id.* There is no direct examination or cross-examination of witnesses. Only issues and

information about whether EPA has a reasonable basis to perfect a Superfund lien will be considered at the meeting. *Id.* at p. 9.

Following the meeting, the neutral official will issue a written recommended decision. "Because of the preliminary and informal nature of the proceedings . . . , and the fact that the neutral official's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability." *Id.* The recommended decision would not be admissible as evidence in any future proceeding.

III. STATUTORY ELEMENTS FOR PERFECTION OF SUPERFUND LIEN

Section 107(l) of CERCLA provides that the response costs for which a person is liable to the United States under Section 107(a) of CERCLA shall constitute a lien in favor of the United States on real property owned by this person and subject to or affected by a removal (or remedial) action. 42 U.S.C. § 9607(l)(1)(A) and (B). The lien imposed by Section 107(l) of CERCLA arises upon the later of two occurrences: (i) when response costs are first incurred by the United States on the affected real property, or (ii) when the person owning the affected real property is given written notice of that person's potential liability. 42 U.S.C. § 9607(l)(2)(A) and (B). The lien "shall continue until the liability for the costs (or any judgment against the person arising out of such liability) is satisfied or becomes unenforceable through operation of the statute of limitations provided in section 113 [of CERCLA]." *Id.*

Thus, there are five statutory elements that EPA must satisfy to have a reasonable basis to perfect a Superfund lien:

1. There must be real property subject to or affected by a removal or remedial action under CERCLA;

2. The real property subject to or affected by a removal or remedial action must be owned by a person who is a potentially liable party under Section 107(a) of CERCLA;
3. Response costs must have been incurred by the United States on the affected real property;
4. The person owning the affected real property must have received from EPA written notice of his potential liability; and
5. The liability for the costs (or any judgment against the person arising out of such liability) must not have been satisfied or must not have become unenforceable through operation of the statute of limitations provided in Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2).

IV. ARGUMENT

A. EPA has a reasonable basis to believe that all the statutory requirements for a federal Superfund lien have been met.

As discussed below, and as supported by EPA's Lien-Filing Record, each of the statutory requirements under CERCLA for perfection of a federal Superfund lien have been met for the Property. Therefore, EPA believes it has a reasonable basis to perfect a lien on the Property.

1. *Statutory Element No. 1: There is real property subject to or affected by a removal or remedial action under CERCLA.*

The Property has been the subject of an EPA removal action as defined by Section 101(23) of CERCLA, 42 U.S.C. § 9601(23) (defining "removal" to include "actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such other actions as may be

necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release.").

On January 18, 2018, EPA performed a removal assessment of the Property to evaluate the release or threatened release of PCBs (Docs. 3b, 3c, and 4).[8] Based on sampling results obtained during the removal assessment, EPA has taken other actions to prevent, minimize, or mitigate damage to the public health or welfare or to the environment, such as issuance of an Action Memorandum, which selected a removal action for the Site, additional assessment and monitoring to determine the extent of contamination, and the removal and off-site disposal of contaminated liquids and material from the Site (Docs. 5, 13, and 26-30). EPA expects to perform additional removal activities at the Property over the next several months (Doc. 5).

2. *Statutory Element No. 2: Real property subject to or affected by a removal or remedial action is owned by a potentially liable party under Section 107(a) of CERCLA.*

The deed for the Property shows that Mr. Joyce is its current owner (Doc. No. 2).

Section 107(a) of CERCLA contains the liability provisions of the statute. Section 107(a)(1) of CERCLA provides that, "[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in . . . [Section 107(b) of CERCLA]," the owner of a "***facility***" shall be liable for "all costs of removal or remedial action incurred by the United States . . . not inconsistent with the National Contingency Plan . . . ." 42 U.S.C. § 9607(a)(1). Section 101(9) of CERCLA defines the term "***facility***" as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." 42 U.S.C. § 9601(9).

[8] PCBs are identified as hazardous substances as defined by Section 101(14), 42 U.S.C. § 9601(14), and as listed at 40 C.F.R. Part 302.4 (List of Hazardous Substances and Reportable Quantities).

In this case, the Property fits CERCLA's definition of "***facility***" because, as EPA's site assessments and sampling have revealed, it is a site or an area where PCBs have been deposited, stored, disposed of, placed, or come to be located (Docs. 3a, 3b, 4, 13, 26, and 28-30).

3. *Statutory Element No. 3: Response costs have been incurred by the United States on the affected real property.*

EPA's certified cost summary report dated June 19, 2018, shows that EPA has incurred more than $90,000 in costs for removal action at the Property (Doc. 7). EPA estimates it will spend more than $1,300,000 (not including indirect costs) to complete the removal action (Doc. 5).

4. *Statutory Element No. 4: The person owning the affected Property has received written notice of his potential liability.*

On May 10, 2018, EPA sent Mr. Joyce, through his counsel, a written letter notifying him of his potential liability under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), as the current owner of the Property (Doc. 8). Richard DeMarco, Esq., Mr. Joyce's counsel, acknowledged receipt of this notice letter (Docs. 9 and 12).

5. *Statutory Element No. 5: Liability for the costs or any judgment against Mr. Joyce arising out of such liability has not been satisfied and has not become unenforceable through operation of the statute of limitations provided in Section 113(g)(2) of CERCLA.*

To date, the United States has not brought a civil action against Mr. Joyce for his potential liability under Section 107(a)(1) of CERCLA. Therefore, any potential liability Mr. Joyce may have to the United States under CERCLA for the Site has not been satisfied.

Concerning the statute of limitations ("SOL"), Section 113(g)(2) of CERCLA provides, in relevant part, that an initial action for recovery of costs for removal action must commence within three years after the completion of the removal action.[9] 42 U.S.C. § 9613(g)(2) (emphasis

[9] Section 113(g)(2) includes an exception to the three-year SOL for cases where a waiver has been granted under

added). Because EPA has not yet completed the removal action in this case, the SOL has not run on a cost-recovery action under CERCLA for the Site.

Since, as discussed above, all five statutory requirements for a Superfund lien under Section 107(l) of CERCLA are satisfied in this case, EPA believes it has a reasonable basis to perfect a Superfund lien on the Property.

B. Mr. Joyce cannot prove all the elements of the third-party defense by a preponderance of the evidence; therefore, EPA has a reasonable basis to perfect a federal Superfund lien on the Property.

In his letter dated May 17, 2018, Mr. DeMarco has alleged that Mr. Joyce can avail himself of the third-party defense set forth in Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). Mr. DeMarco suggests that EPA cannot prove one of the required elements for a federal Superfund lien under Section 107(l) of CERCLA—i.e., the second statutory element requiring that the real property subject to or affected by a removal or remedial action be owned by a person who is a liable party under Section 107(a) of CERCLA. However, as discussed in greater detail below, Mr. Joyce cannot meet his burden of proving, by a preponderance of the evidence, the statutory elements of the third-party defense.

1. The Third-Party Defense under CERCLA

CERCLA is a strict liability statute, subject only to the defenses set forth in Section 107(b) of the statute. *See* 42 U.S.C. § 9607(a).

Section 107(b)(3) of CERCLA, provides for the third-party defense:

> There shall be no liability under . . . [Section 107(a)] for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

Section 104(c)(1) of CERCLA (". . . except such cost recovery action must be brought within 6 years after a determination to grant a waiver under section 104(c)(1)(C) for continued response action."). 42 U.S.C. § 9613(g)(2). This exception refers to a waiver of the statutory limits of 12 months and $2 million for a removal action. *See* 42 U.S.C. § 9604(c)(1). Since the removal action in this case was started in March 2018 and is expected to be completed in less than 12 months and to cost lost less than $2 million, EPA does not believe that the exception clause in Section 113(g)(2) is relevant to any current discussion of the statute of limitations.

> . . . 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 with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts or circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions . . . .

42 U.S.C. § 9607(b)(3) (emphasis added).

Thus, to avail oneself of the third-party defense a person must prove by a preponderance of the evidence the following things:

(1) The release or threat of release of the hazardous substances and the resultant damages were caused solely by the act or omission of a third party;

(2) This third party was not the defendant's employee or agent, or a person in a direct or indirect contractual relationship with the defendant;[10]

(3) The defendant exercised due care with respect to the hazardous substances concerned; and

(4) The defendant took precautions against the foreseeable acts or omissions of a third party and the foreseeable consequences thereof.

a. The release or threat of release of PCBs at the Property and the damages resulting therefrom were not solely caused by the act or omission of a third party.

Mr. Joyce cannot prove by a preponderance of the evidence that the release or threat of release of PCBs at the Property and EPA's damages (i.e., response costs) resulting therefrom were caused solely by the acts or omissions of the third-party trespassers, who burglarized the

[10] Section 101(35) of CERCLA defines "contractual relationship" to include, among other things, land contracts, deeds, easements, leases, or other instruments transferring title or possession.

Property on November 28, 2017. More than three years prior to the break-in, deteriorating conditions at the Property already presented a threat of release of PCBs.[11]

In his May 17, 2018 letter to EPA, requesting a meeting with a neutral EPA official, Mr. Richard DeMarco states that Mr. Joyce is not responsible for any environmental damage at the Property, and that the contamination and environmental issues at the Property were solely caused by two individuals who broke into the warehouse, dismantled transformers located there, and removed them from the Property.[12] But the NOVs issued by L&I reveal that the warehouse was not secured and that conditions at the warehouse for years prior to the November 28, 2017 break-in presented a threat of release of PCBs (Doc. 18).

L&I notified Mr. Joyce of the need to repair the warehouse after inspecting the Property on April 26, 2012. In an NOV dated April 30, 2012, L&I noted, among other things, that a second-floor window on the Belgrade-Street side of the building and the doors on the Miller-Street side needed to be repaired or replaced. These repairs were not made, and conditions at the Property worsened.[13] On December 23, 2015, L&I notified Mr. Joyce that he was required to correct several violations, including two boarded-up windows, one broken window, and two boarded-up bay doors. L&I issued at least five additional NOVs through November 9, 2016, ultimately declaring the warehouse unsafe because the building's wall was "bulged and in danger of collapse" and because the building's roof was "partially collapsed and in danger of further collapse."[14] Photographs taken by L&I on three separate visits to the Property on June 1, 2017, August 22, 2017, October 19, 2017, reveal several missing windows, barely secured doorways,

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[11] See July 4, 2014 NOV, which is included in Doc. 18.
[12] EPA has not seen any evidence that these two individuals removed actual transformers from the Property. Rather, based on police reports about the incident, the two individuals dismantled transformers and removed their copper cores from the Property.
[13] See Doc. 18; see also Doc. 15, 16, and 25.
[14] NOVs dated May 13, 2014, July 4, 2014, November 8, 2016, and November 9, 2016.

and a roof with large gaping holes, completely open to rain and other weather and to anyone wishing to gain entry to the warehouse through the roof (Doc. 25).

Mr. Joyce allowed conditions at the Property to deteriorate for at least five years while he continued to store PCB Transformers and other PCB Items in the warehouse.[15] L&I's inspections and NOVs described conditions at the Property before the November 28, 2017 break-in, which Mr. Joyce alleges is the sole cause of the environmental conditions at the Property. Based on the L&I reports, a threatened release of PCBs was already present at the Property because of the deteriorating physical state of the warehouse. Indeed, the City of Philadelphia filed a Complaint against Mr. Joyce on April 19, 2017, averring that conditions at the Property more than seven months before the break-in presented a serious and immediate hazard to the safety, health, and welfare of the general public (Doc. 16); and in an Order to Enter and Inspect by Agreement, dated October 26, 2017, the Court of Common Pleas ordered an inspection to determine the number and condition of the transformers at the Property and the appropriate manner for their remediation, removal, or disposal (Doc. 15).

Thus, because conditions at the Property presented a threat of release of PCBs prior to the November 28, 2017 burglary, Mr. Joyce cannot prove the threshold element of the third-party defense—that the release or threat of release of hazardous substances was caused solely by the acts or omissions of third parties. Mr. Joyce's own acts or omissions prior to November 28, 2017, contributed to the release or threat of release of PCBs at the Property, and Mr. Joyce would be a potentially liable person under Section 107(a) of CERCLA as the current owner of the Property.

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[15] 40 C.F.R. § 761.3 defines a "PCB Item" as ". . . anything that deliberately or unintentionally contains or has as a part of it any PCB or PCBs."

b. Mr. Joyce did not exercise "due care" with respect to PCBs located at the Property.

The unsafe and deteriorating conditions at the warehouse described by L&I over five years also demonstrate that Mr. Joyce failed to exercise due care with respect to the PCBs present at the Property. A reasonably prudent owner of PCB Transformers would have taken steps to safeguard them by ensuring that the building in which they were stored was structurally sound and secure. This would especially be true in a situation, like this, where the building was in a residential neighborhood and shared a wall with the rowhome next door and a sidewalk with the public.

While the "due care" requirement is not defined in CERCLA, Courts have looked to the statute's legislative history for guidance:

> With respect to the third party defense, a defendant is also required to establish that he exercised due care with respect to the hazardous waste concerned, taking into consideration the characteristics of such waste. The defendant must show that he exercised due care with respect to all reasonably foreseeable acts or omissions of a third party. . . . In general, the committee intends that for a defendant to establish that he exercised due care, the 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.

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 (emphasis added); *See State of New York v. Lashins Arcade Co.*, 91 F.3d 353, 360-61 (2d Cir. 1996); *see also Foster v. United States*, 922 F. Supp. 642, 657 (D.D.C. 1996) (quoting above legislative history).

The Second Circuit has defined the "due care" requirement to "include those steps necessary to protect the public from a health or environmental threat." *Lashins Arcade Co.*, 91 F.3d at 361 (quoting H.R. Rep. No. 253, 99nth Cong., 2d Sess. 187 (1986), reprinted in 1986 U.S.C.C.A.N. 2835). Other courts have generally held that a party cannot establish that he

exercised due care if he took no action in the face of the threat of release of hazardous substances. For instance, in *Westfarm Assoc. Ltd. P'ship v. Washington Suburban Sanitary Comm'n*, 66 F.3d 669, 683 (4th Cir. 1995), the court held that a sanitary commission failed to establish due care because it took no steps to prevent third parties from dumping hazardous waste into the sewers. *See also Kerr–McGee Chemical Corp. v. Lefton Iron & Metal Co.*, 14 F.3d 321, 325 & n.3 (7th Cir. 1994) (holding that defendant landowner failed to exercise due care when it took no affirmative steps to address the threats posed by wood preservatives on its property).

Courts have found that a party has exercised due care when it took affirmative measures to address the threatened release of hazardous substances. *See Lashins Arcade Co.*, 91 F.3d at 361 n. 6 (upholding the District Court's finding of due care where defendant maintained a water filter and regularly took water samples, among other actions); *see also HRW Sys. Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318, 349 (D. Md. 1993) (finding due care where defendant took steps to assess, evaluate, and monitor the release of hazardous substances and proposed a clean-up plan); *Interfaith Cmty. Org. v. Honeywell Int'l, Inc.*, 263 F. Supp. 2d 796, 864-65 (D.N.J. 2003) (owner who cooperated with state authorities by providing site security and other measures to protect the public has satisfied the "due care" and "reasonable precautions" requirements of Section 107(b)(3) of CERCLA).

Mr. Joyce cannot prove that he exercised due care, as defined by Congress and the courts, with respect to the PCBs located at the Property. As L&I's Notices of Violation show, Mr. Joyce did not adequately maintain or secure the warehouse for more than five years, although he knew PCB Transformers and other PCB Items were stored there. He also did not take affirmative measures to prevent the release or threatened release of PCBs by, for instance, complying with

L&I's NOVs or with federal regulations for the handling and storage of PCBs. *See* 40 C.F.R. Part 761 ("PCB regulations").

Compliance with the PCB regulations would be evidence of due care with respect to PCBs that a similarly situated, reasonable, prudent person would have exercised, especially one who handled and stored PCBs as part of his business operations. But Mr. Joyce appears not to have complied with the PCB regulations in his handling of PCB Transformers. For instance, he did not properly mark PCB Transformers stored at the Property, as required by 40 C.F.R. §§ 761.40(a)(2) and 761.40(c).[16] He did not properly mark the areas of the warehouse where PCB Transformers or other PCB Items were stored, as required by 40 C.F.R. § 761.40(a)(10) ("Each storage area used to store PCBs and PCB Items for disposal" shall be marked as illustrated in 40 C.F.R. § 761.45(a). *See* footnote 14, below). He did not mark the means of access to the PCB Transformers in a manner that can easily be read by emergency personnel fighting a fire involving this equipment, as required by 40 C.F.R. §§ 761.40(j)(1) ("means of access," among other things, shall be marked in accordance with 40 C.F.R. § 761.45(a)) and 761.40(j)(3) (mark must be placed in location described 761.40(j)(1) and "in a manner that can be easily read by emergency response personnel . . ."). He did not comply with 40 C.F.R. § 761.65(b), which

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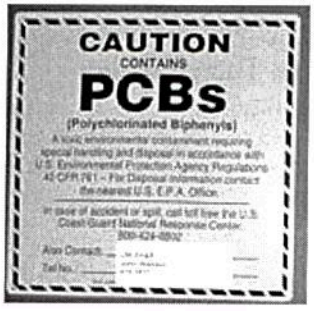
[16] In relevant part, 40 C.F.R. §§ 761.40(a)(2) and 761.40(c) require PCB Transformers to be labeled, in accordance with 40 C.F.R. § 761.45(a), with a durable mark that states, "*Caution Contains PCBs, a toxic environmental contaminant requiring special handling and disposal in accordance with U.S. Environmental Protection Agency Regulations 40 CFR 761—For Disposal Information contact the nearest U.S. EPA Office. In case of accident or spill, call toll free the U.S. Coast Guard National Response Center: 800:424-8802.*" See sample label below.



requires, among other things, an adequate roof and walls in any facility where PCB Items are stored, to prevent rainwater from reaching them, and which requires continuous curbing around the PCB Items to contain any spillage of PCBs. *See* 40 C.F.R. § 761.65(b)(1)(i)-(ii).

Had Mr. Joyce complied with the PCB regulations, he would have been exercising due care with respect to PCBs. For instance, if he had marked the PCB Transformers, the areas where they were stored, and the doors to the warehouse, as required by the PCB regulations, third-party trespassers and other persons (e.g., the L&I inspectors, the Philadelphia police officers responding to the break-in, and Mr. Joyce's neighbors on Belgrade and Miller Streets) would have been on notice that PCBs were present at the Property, and they would have known whom to contact after the break-in if they suspected PCBs had been released. The police officer investigating the break-in reported that, in the warehouse, "everything appeared to be covered in oil," as were the two men arrested for the break-in (Doc. 22). If Mr. Joyce had exercised due care and complied with the PCB regulations requiring markings, as described above, people who were exposed to PCBs might not have been exposed, and releases of PCBs might not have occurred in areas like the public sidewalk on Miller Street and the sewer lines beneath Belgrade and Miller Streets. If Mr. Joyce had exercised due care, he would have contacted EPA after the November 28, 2017 break-in about the damaged PCB Transformers and the releases. As events transpired, it was L&I, not Mr. Joyce, who contacted EPA about the potential releases of PCBs at the Property in early January, several weeks after the break-in.

For all the foregoing reasons, Mr. Joyce cannot prove, by a preponderance of the evidence, that he exercised due care with respect to the PCBs at the Property. Therefore, he cannot avail himself of the third-party defense.

c. Mr. Joyce did not take precautions against the foreseeable acts or omissions of a third party and the resultant foreseeable consequences of these acts or omissions.

Following the November 28, 2017 break-in at the Property, Mr. Joyce was interviewed by the Philadelphia Police Department's East Detective Division. During this interview, Mr. Joyce was asked, "When was the last time you were at the property?" Mr. Joyce replied, "Saturday," which would have been November 25, 2017, three days prior to the burglary. The detective then asked, "When you left the property on Saturday, was the building locked?" Mr. Joyce answered, "No. I couldn't lock it because I removed the lock on the door. It's a twelve-foot-wide door. People have been going in there and locking the door from the inside, and I was not able to get in. So, I removed the lock so they couldn't lock me out from the inside."[17]

A reasonably prudent owner of a facility where transformers and other receptacles containing PCBs were stored would have securely locked the facility to safeguard these hazardous substances and to protect his neighbors from potential releases. Mr. Joyce did not do this. His failure to secure the building by removing the locks on its doors is additional evidence that Mr. Joyce did not exercise due care with respect to the hazardous substances at the Property.

Mr. Joyce also cannot prove by a preponderance of the evidence that he took precautions against the foreseeable acts of third parties and the consequences that could foreseeably result from such acts, as required by the third-party defense. Mr. Joyce knew that trespassers had previously entered the warehouse. But, as he admitted to the Philadelphia police, his response to such trespass was to provide for less, not more, security, by removing the locks from the garage door and leaving the building unlocked and the PCBs accessible to anyone who entered the warehouse. These were not reasonable precautionary measures. Foreseeable acts or omissions of third-party trespassers gaining access to the building included, among other things, the potential

[17] The Police Department's Investigation Interview Record, which was signed by Mr. Joyce, is included in Doc. 22.

movement and theft of the PCB Transformers and their contents. The foreseeable consequences of these acts or omissions were the release or threatened release of PCBs that did occur.

As with the other two elements of the third-party defense previously discussed, Mr. Joyce cannot prove, by a preponderance of the evidence, that he took precautionary measures as to the foreseeable acts or omissions of the third-party trespassers and the foreseeable consequences (i.e., the release of PCBs) of these acts or omissions. Therefore, Mr. Joyce is a potentially liable person under Section 107(a)(1) of CERCLA, as the current owner of the Site, and EPA has a reasonable basis to perfect a Superfund lien on the Property.

V. Conclusion

EPA has a reasonable basis to perfect a Superfund lien on the Property under Section 107(l) of CERCLA because all required statutory elements for this lien have been met for the Property. EPA can show that it has been performing a removal action at the Property under Section 104(a) of CERCLA and that the Property is owned by Mr. Joyce, who, as the current owner of the Property, is a potentially liable party under Section 107(a)(1) of CERCLA. EPA can also show that it has incurred response costs at the Property, and that the Agency has notified Mr. Joyce in writing about his potential liability under CERCLA. Finally, EPA can show that its potential claims against Mr. Joyce have not been satisfied and have not been time-barred under Section 113(g) of CERCLA's relevant statute of limitations for removal actions (i.e., three years after the completion of the removal action).

Mr. Joyce has alleged he can avail himself of the third-party defense provided for at Section 107(b)(3) of CERCLA. However, he cannot prove by a preponderance of the evidence three required elements of this defense. First, he cannot prove that the release or threat of release of PCBs at the Property was solely caused by an act or omission of a third party. Second, he

cannot prove that he exercised due care with respect to the PCBs stored by him at the Property. Third, he cannot prove that he took precautionary measures as to the foreseeable acts or omissions of any third party and the foreseeable consequences of these acts or omissions.

For all the foregoing reasons, EPA respectfully submits that it has a reasonable basis to perfect a Superfund lien on the Property.

Respectfully submitted on behalf of the U.S. Environmental Protection Agency,

Robert Hasson

06/25/2018
Date

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BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	)	
	)	
	)	LIEN-FILING RECORD
Belgrade Transformer Superfund Site 2818-2820 East Belgrade Street Philadelphia, PA 19134	)	U.S. EPA-REGION 3-RHC FILED-27JUN2018AM11:34
	)	EPA DOCKET NO. CERCLA-03-2018-0110LL
	)	
John F. Joyce, Jr., Owner	)	PROCEEDING UNDER SECTION 107(l) OF THE COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. § 9607(l)

INDEX TO LIEN-FILING RECORD

1. Memorandum, dated May 10, 2018, from Joanne Marinelli, Branch Chief, Cost Recovery Branch, Office of Enforcement EPA Region III, to Diane Ajl, Chief, Office of Site Remediation, Office of Regional Counsel, EPA Region III, re: Request for the Filing and Perfection of a Lien

2. Indenture, dated June 30, 1988, between Mary Joyce (Grantor) and John F. Joyce, Jr. (Grantee), conveying Nos. 2818-20 East Belgrade Street, Philadelphia, PA, to Grantee.

3. Trip Report – (a) Initial Sampling Results, January 25, 2018; (b) PCB Sampling, Belgrade Transformer Site, dated February 2, 2018; (c) Photographs of Belgrade Transformer Site, taken during Removal Site Assessment, January 18, 2018

4. Initial Pollution Report (POLREP #1), dated January 26, 2018

5. Action Memorandum, dated March 5, 2018

6. *Select Neighborhoods, Inc. v. John F. Joyce, Jr.*, Notice of Filing of a Petition for the Appointment of a Conservator and related filings

7. Itemized Cost Summary, dated June 19, 2018

8. Notice of Potential Liability, dated May 10, 2018, from Joan Armstrong, Associate Director, Office of Enforcement, Hazardous Site Cleanup Division, to John F. Joyce, Jr., c/o Richard DeMarco, Esq.

9. Email exchange, dated May 10, 2018, between Richard DeMarco, Esq., and Robert Hasson, Senior Assistant Regional Counsel, EPA Region III

10. Notice of Lien, dated May 14, 2018

11. Lien Notice Letter, dated May 14, 2018, notifying owner John F. Joyce, Jr. of perfection of lien and opportunity to be heard

12. Letter, dated May 17, 2018, from Richard DeMarco, Esq. (Lauletta Birnbaum), to Robert S. Hasson, Senior Assistant Regional Counsel, requesting opportunity to meet with neutral official concerning perfection of Superfund lien

13. Photo log of samples collected on May 11, 2018

14. Order of Assignment, June 4, 2018

15. *City of Philadelphia v. John F. Joyce, Jr.* (Case No. 170402506) – Order to Enter and Inspect by Agreement (Oct. 26, 2017)

16. *City of Philadelphia v. John F. Joyce, Jr.* (Case No. 170402506) – Complaint in a Civil Action in Equity (April 19, 2017)

17. Philadelphia Police Department Investigation Report (Dec. 30, 2017)

18. City of Philadelphia, Department of Licenses and Inspections, Notices of Violation, dated April 30, 2012, May 8, 2014, May 13, 2014, July 4, 2014, Dec. 23, 2015, Nov. 8, 2016, and Nov. 9, 2016

19. (a) Email chain of correspondence between EPA and City of Philadelphia, dated January 3, 2018; (b) Email from Patrick Patterson, DEP, to David Perri, City of Philadelphia, concerning Philadelphia Sites, dated January 17, 2018

20. Consent to Enter (Jan. 16, 2018)

21. *Supplemental Guidance on Federal Superfund Liens*

22. Philadelphia Police Department, Investigation Interview Record (Nov. 28, 2017)

23. *Commonwealth v. Deesch* (CP-51-CR-0000276-2018), Docket

24. *Commonwealth v. Fitzgerald* (CP-51-CR-0000275-2018), Docket

25. Photographs taken by L&I, dated June 1, 2017, August 22, 2017, October 19, 2017

26. POLREP # 2 (reporting period 01/27/2018 to 03/04/2018), dated June 11, 2018

27. POLREP # 3 (reporting period 03/05/2018 to 03/30/2018) dated June 11, 2018

28. POLREP #4 (reporting period 04/01/2018 to 04/30/2018), dated June 12, 2018

29. POLREP #5 (reporting period 05/01/2018 to 05/31/2018), dated June 16, 2018

30. POLREP #6 (reporting period 06/01/2018 to 06/15/2018), dated June 16, 2018

31. Agency for Toxic Substances Disease Registry, Public Health Statement, Polychlorinated Biphenyls (November 2000)

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

IN THE MATTER OF:	
Belgrade Transformer Superfund Site 2818-2820 East Belgrade Street Philadelphia, PA 19134	EPA DOCKET NO. CERCLA-03-2018-0110LL
John F. Joyce, Jr., Owner	PROCEEDING UNDER SECTION 107(l) OF THE COMPREHENSIVE ENVIRONMENTAL, RESPONSE, COMPENSATION, AND LIABILITY ACT, 42 U.S.C. § 9607(l)

CERTIFICATE OF SERVICE

I hereby certify that the attached (i) *Response of the U.S. Environmental Protection Agency to Owner's Request for Meeting on Perfected Federal Superfund Lien*, and (ii) the U.S. Environmental Protection Agency's Lien-Filing Record were served by Overnight Mail via U.P.S. (signature requested upon delivery), postage paid, and by email (*Response* only), on the following person:

Richard C. DeMarco, Esq.
Lauletta Birnbaum, LLC
100. S. Broad Street
Philadelphia, PA 19110

Dated: June 26, 2018

ROBERT S. HASSON
Senior Assistant Regional Counsel
U.S. Environmental Protection Agency