UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF	)	
	)	
Ward Transformer Superfund Site	)	CERCLA Lien Proceeding
Raleigh, Wake County, North Carolina	)	
	)	

RECOMMENDED DECISION

This matter was heard by the Regional Judicial Officer for the United States Environmental Protection Agency (EPA), Region 4, to determine whether EPA has a reasonable basis to perfect a lien, pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(*l*), on property known as the Ward Transformer Superfund Site, located in Raleigh, Wake County, Georgia. An informal hearing was conducted pursuant to the Supplemental Guidance on Federal Superfund Liens, dated July 29, 1993 (OSWER Directive Number 9832.12-1a), after which additional Memoranda of Law and exhibits were submitted into the Lien Filing Record (LFR).

CERCLA Lien Provisions

Section 107(*l*) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United States upon all real property and rights to such property which 1) belong to such person and 2) are subject to or affected by a removal or remedial action.

Under the Supplemental Guidance, as the neutral designated to conduct this proceeding and to make a written recommendation, I am to consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements for perfecting a

lien under Section 107(*l*) of CERCLA have been satisfied. Specific factors for my consideration under the Supplemental Guidance include:

> Element 1: Whether the property was subject to or affected by a removal or remedial action.
>
> Element 2: Whether the United States has incurred costs with respect to a response action under CERCLA.
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> Element 3: Whether the property is owned by a person who is potentially liable under CERCLA.
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> Element 4: Whether the property owner was sent notice by certified mail of potential liability.
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> Element 5: Whether the record contains any other information which is sufficient to show that the lien should not be filed.

Factual Background

The property at issue in this proceeding consists of a 2.19 acre parcel of property located at 6720 Mt. Herman Road, Morrisville, North Carolina 27560-9698 (the Property). The Property is part of the Ward Transformer Superfund Site (Site), located in an industrial area of Raleigh, Wake County, North Carolina. In addition to the Property that is the subject of this proceeding, the Site encompasses an active transformer and electrical equipment manufacturing, repair, sales, and reconditioning facility constructed in 1964 on 11 acres of land. The transformer facility is owned by Ward Transformer Company, Inc. and operated by Ward Sales and Service, Inc. As EPA describes, due to ongoing releases of polychlorinated biphenyls (PCBs) from Ward operations, contamination has entered tributaries, streams, and other properties downstream from the Site. Hence, EPA considers these properties part of the "facility" as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9). The Property at hand, is situated adjacent to

and north of the parcel owned by Ward Transformer facility property and is occupied by a warehouse building under lease to Stromberg Metal Works.

According to the summary provided by EPA, over the past 25 years, EPA and the North Carolina Department of Environment and Natural Resources (NCDENR) have been investigating the Ward Transformer facility property. Specifically relevant to this proceeding, in April 2003, EPA began collecting samples as part of a Remedial Investigation/Feasibility Study (RI/FS) of the Site, which included sampling of the Property. This culminated in a report dated September 2004, which found that the Property contained surface soils with elevated levels of PCBs.

Thereafter, on October 20, 2004, EPA sent Notice letters to 43 companies, including Reward Properties, LLC, (Reward Properties) notifying them of their potential liability for releases of hazardous substances at the Ward Transformer facility and certain properties adjacent to and downstream from the Ward Transformer facility property. Rewards' Notice/ Demand Letter indicated that EPA considered it liable as a current owner of a facility pursuant to Section 107(a) of CERCLA.

The title history to the property, while undisputed as to its facts, is the primary legal issue in contention in this proceeding. That history is summarized as follows:

1. On July 12, 1966 Ward Transformer Company, Inc. took title to the property by deed from Johnny H. King, Mary B. King, and Emma F. King.

2. On January 23, 1974, the property was conveyed by deed to Robert E. Ward, Jr. from Ward Transformer Company, Inc.

3. On December 10, 1966, Robert E. Ward, Jr., died and title to the Property

vested in his widow, Virginia P. Ward by operation of Item V of Robert Ward's Last Will and Testament.

4. On September 14, 2001, the Property was conveyed by deed to the Virginia P. Ward Revocable Trust from Virginia P. Ward.

5. On January 12, 2004, the Property was conveyed by deed to Virginia P. Ward from the Virginia P. Ward Revocable Trust, then, on that same date, conveyed by deed to Reward Properties, L.L.C. from Virginia P. Ward.

Issues Not in Dispute:

Pursuant to a telephone conference held with the parties on March 15, 2005, the parties stipulated to limiting the scope of the hearing to Element 3 above, whether the property is owned by a person who is potentially liable under CERCLA. Therefore, I reach the following determination on the remaining uncontested elements of this lien proceeding:

Whether the property owner was sent notice by certified mail of potential liability:

On December 16, 2004, EPA sent a general notice letter to Reward Properties, c/o Walter Brock, informing it that it was potentially liable for the costs incurred and that EPA intended to perfect a lien on the property, pursuant to Sections 107(a) and 107(l)of CERCLA, 42 U.S.C. § 9607(a) and (*l*). The letter was sent Certified Mail, Return Receipt Requested, and received on December 20, 2004, as indicated on the copy of the return receipt made part of the LFR.

Whether the United States has incurred costs with respect to a response action under CERCLA:

It has been sufficiently established that EPA has incurred costs at the Ward Transformer Superfund Site of $1,804,689.15, as of January 21, 2005. (EPA Itemized Cost Summary Report)

Whether the property was subject to or affected by a removal or remedial action:

According to the Oct 18, 2004 enforcement action memo, in April, 2003, EPA began collecting samples at the Site as part of a Remedial Investigation/Feasibility Study (RI/FS). As documented in the Remedial Inspection (RI) Report dated September 2004, PCBs in soils sampled from the Property have been detected at concentrations exceeding 1 mg/Kg. Based on the RI and a removal assessment conducted on August 9, 2004, EPA determined that a current unacceptable risk exists at the Site which necessitates a time-critical removal action. On October 20, 2004, EPA sent notice letters and draft Administrative Orders on Consent to a total of 43 PRPs. including Reward Properties. I conclude, that to date the Property has been subject to or affected by numerous EPA response actions.

Disputed Matters

Whether the property is owned by a person who is potentially liable under CERCLA:

EPA has determined that Reward Properties is potentially liable under CERCLA as a current property owner. Clearly current owners are liable under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), which states in pertinent part:

> "Notwithstanding any other provision or rule of law, and subject to the defenses set forth in subsection (b) of this section.

> (1) The owner..., of a ...facility...shall be liable for...
> (A) all costs of removal or remedial action incurred by the United States Government...not inconsistent with the national contingency plan..."

However, while the facts regarding title to the property are not in dispute, such that Reward Properties is the current owner, and both parties describe conveyance of title to the property in the same legal terms, Reward Properties raises what is referred to as the "third party defense" to liability under CERCLA, found at 107(b)(3) of CERCLA. That section, provides in pertinent part, that,

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

Section 101(35), sheds further light on the meaning of a "contractual relationship", setting out the following:

> The term "contractual relationship", for the purpose of section 9607(b)(3) of this title, includes but is not limited to..."land contracts, deeds, easements, leases, or other instruments transferring title or possession." The only exceptions to these transfers being considered "contractual relationship" is if the defendant acquired the contaminated property after disposal occurred and the defendant establishes by a preponderance of the evidence that 1) at the time the defendant acquired the property the defendant

> did not know and had not reason to know that the property was contaminated; ... or (3) the defendant acquired the property by inheritance or bequest.

The above-referenced provision was well summarized and thoroughly examined by the US EPA Environmental Appeals Board (EAB) in the case, In Re: Tamposi Family Investments, 6 E.A.D. 106, July 6, 1995). Addressing both statutory defenses, that of inheritance and of the innocent landowner, the EAB writes:

> "To summarize, a current owner of contaminated property is liable for response costs under CERCLA, unless he proves that the damage was caused solely by an act of God, an act of war, or by someone with whom he has no direct or indirect contractual relationship. The absence of a contractual relationship with predecessors in the property's chain of title is established by showing that the landowner had 'no reason to know' of the contamination; that showing is made by the owner having undertaken 'all appropriate inquiry' prior to the acquisition or by acquiring the property by 'inheritance or bequest.' The degree of 'appropriate inquiry' required depends upon when the property was acquired, and the circumstances under which it was acquired. Finally, the landowner must fulfill the remaining requirements of § 107(b)(3) by exercising 'due care' with respect to the hazardous substance and taking 'precautions' against the foreseeable acts of third parties with respect to the hazardous substance. CERCLA §§ 101(35) (A) & (B), and 107(b)(3)." Id at 112.

I will address each of these alternative arguments separately.

Inheritance Defense:

EPA has taken an unwavering stand on this issue, interpreting "inheritance or bequest" narrowly and literally. The position of the EPA is that regardless of the purpose of the conveyance to Reward Properties, it was a transfer by deed, therefore not by inheritance or bequest. Reward Properties on the other hand, seeks to have this Neutral

look beyond the mode of conveyance, to its purpose and intent, so that if the conveyance served the purpose of an inheritance or bequest, then the "inheritance defense" applies.

For purpose of this analysis, I accept Reward Properties' premise that the transfer was in good faith and solely for estate tax purposes. I am persuaded of that by the affidavit submitted by Felix H. Allen, CPA that Reward Properties was created in order to afford Mrs. Ward the opportunity to take advantage of the unified credit under federal estate tax laws. However, notwithstanding this initial conclusion, for this superfund lien proceeding, that finding is not enough for Reward Properties to meet its burden to establish the inheritance defense to liability.

The above-referenced case, In Re: Tamposi, is relied upon by EPA, directly on point and controlling. The decisive language used by the EAB is directly applicable to the facts at hand and establishes a precedent that I am inclined to follow. EAB states that "the usual meaning of 'inheritance" is "[p]roperty which descends to [an] heir on the intestate death of another', and [b]equest means 'a gift by will of personal property; a legacy." In Re: Tamposi at 124-25. The EAB further states that "it is obvious that the use of the two terms [inheritance and bequest] in the statute is intended to confer 'innocent landowner' status only on persons who acquire real property upon the death of the owner, either by the laws of intestacy or by will, and who would not necessarily have the opportunity to make any inquiry as to the status of the property." Id. at 125.

Therefore, while I sympathize with Mrs. Ward's plight, that having employed a prudent estate planning mechanism deprives her of the CERCLA inheritance defense she would otherwise have likely had, and have taken into consideration Reward Properties equitable arguments on this issue, none are sufficient to meet its burden and

overcome the precedent set by In Re: Tamposi. Therefore, I view the EAB ruling and analysis controlling and find that Reward Properties cannot prevail on the inheritance defense.

The Innocent Landowner Defense:

As previously stated, to establish the innocent landowner defense found at CERCLA Sections 107(b)(3) and 101(35)(A)(i), Reward Properties must show that a third party with whom it had no direct or indirect contractual relationship, was the sole cause of the release at the Site, that it exercised due care and took precautions against foreseeable acts or omissions of a third party.

Reward Properties argues that a) contamination was caused solely by an act or omission of a third party – the historical operations of Ward Transformer Company – not by Reward Properties; b) Ward Transformer's act or omission did not occur in connection with a contractual relationship with Reward Properties because it took title by deed from Virginia Ward; c) Reward Properties exercised the requisite due care and guarded against third party acts since acquiring title when it cooperated with EPA in allowing access to conduct an inspection, and there was nothing to suggest any contamination of the property occurring since Virginia Ward inherited the property. Lastly, and most importantly, relying upon the case 150 Acres of Land, 204 F.3d 698 (6th Cir.2000) and United States v. Pacific Hide and Fur Depot, Inc., 716 F. Supp 1341 (D.Idaho 1989), Reward Properties argues that it met the requirements of CERCLA § 9601(35) (A) (i), of having conducted "all appropriate inquiries" necessary under the unique circumstances of its creation and ownership of the Property.

The first prong has not only been met, but is uncontested, that the contamination was caused by the third party Ward Transformer Company, Inc. Furthermore, since Reward Properties' title can be traced back to Ward Transformer Company, Inc., it clearly has a contractual relationship with that third party, albeit indirect. Therefore, in order to ultimately prevail, Reward Properties would have to establish that it conducted "all appropriate inquiries" prior to acquiring the Property.

To that end Reward Properties argues that a) the sequence of events at the site was such that it would have had no reason to make any appropriate inquiry with respect to the Property and b) it was contiguous, rather than part of, the known contaminated site. It refers to the fact that EPA requested, and was granted, permission to take samples from the Property in the spring of 2003, and that Reward Properties did not even exist until July 2003 and deeded the property in January 2004. Additionally, Reward Properties contends that there should be no expectation of any inquiry by Virginia Ward as principal of Reward Properties since she already owned the Property.

However, as pointed out by EPA, the facts of the case primarily relied upon by Reward Properties are distinguishable. In Pacific Hide, the (stock) transfer was involuntary in nature as far as the recipients were concerned, so that they had no opportunity to learn of the contamination before acquisition. In this matter, Reward Properties was indeed created for the purpose of receiving the Property. There was opportunity and ability to learn of the contamination. It is safe to say that *some* level of inquiry was required. As EPA argues, the transfer in this case is more similar to that in In Re: Tamposi. As held there, the company created by the inter vivos gifts could not benefit from the innocent landowner defense, because it ... "did nothing affirmative to

familiarize itself with the land it accepted... let alone take steps to minimize any liability it might acquire in accepting the land, despite the fact that it intended to hold the land for investment purposes..." Id at 123. In the instant case, Reward Properties did not meet its burden to conduct some level of inquiry regarding the property at hand. Certainly the history of action taken at the Ward Transformer Company facility should have triggered some level of inquiry, especially in light of the timing of the sampling in the spring of 2003, and the location of the Property with respect to the overall Site. Therefore, without the necessity to address other claims, as to whether Virginia Ward had actual knowledge, or that at a minimum a Phase I Environmental Assessment was required, I find that not having conducted any inquiry whatsoever, Reward Properties fails to meet the requirements for the innocent landowner defense as well.

Conclusion:

EPA has made the prima facie showing necessary to impose a CERCLA lien on the Ward Transformer Superfund Site. Therefore, I find that EPA has a reasonable basis to perfect its lien. **Probable cause exists for EPA to file the proposed notice of Federal Lien.**

This Determination does not bar EPA or the property owner, Reward Properties, LLC, from raising any claims or defenses in later proceedings. This is not a binding determination of liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

Dated: 9/27/05

Susan B. Schub
Regional Judicial Officer

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