UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

FEB 0 9 2010

VIA OVERNIGHT MAIL
Dr. Lonnie Woods, Esq.
2000 E. Lamar Blvd.
Suite 600
Arlington, Texas76006

VIA INTRA-OFFICE DELIVERY:
David L. Harbin, Esq.
Assistant Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Re: Johnnie Williams and American Drum & Pallet Company Superfund Site

Dear Dr. Woods and Mr. Harbin:

Enclosed please find the Recommended Decision in the above-captioned Superfund Lien Proceeding.

Yours truly,

Susan B. Schub
Regional Judicial Officer

cc: Lien Filing Record
Mr. Franklin Hill, Director, Waste Management Division
U. S. EPA Region 4

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	CERCLA Lien Proceeding
Johnnie Williams and	)	
American Drum and Pallet Company	)	
Memphis, Shelby County, Tennessee	)	
	)	

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RECOMMENDED DECISION

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on property known as the Johnnie Williams and American Drum & Pallet Company Superfund Site (the "Site" or the "Property"), located in Memphis, Tennessee.

As Regional Judicial Officer for EPA Region 4, I am the neutral EPA official designated to conduct this proceeding and to make a written recommendation as to whether EPA has a reasonable basis to perfect the lien. This proceeding is being conducted in accordance with the Supplemental Guidance on Federal Superfund Liens dated July 29, 1993, OSWER Directive No. 9832.12-1a (*Supplemental Guidance*).

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

Under the *Supplemental Guidance*, I am to consider all facts relating to whether EPA had a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(*l*) of CERCLA had been satisfied.[1] Specific factors for my consideration under the *Supplemental Guidance* include:

(1) Whether the property was subject to or affected by a removal or remedial action;

(2) Whether the United States has incurred costs with respect to a response action under CERCLA;

[1] *Supplemental Guidance*, at p. 7

(3) Whether the property is owned by a person who is potentially liable under CERCLA;

(4) Whether the property owner was sent notice by certified mail of potential liability;

(5) Whether the record contains any other information which is sufficient to show that the lien should not be filed.

"Reasonable basis" is the standard found in the *Supplemental Guidance* which states, "The neutral Agency 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."[2] In addition, the *Supplemental Guidance* provides that ". . . the property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien. . ."[3]

Factual Background and Procedural History

The property at issue in this proceeding consists of two parcels totaling 2.78 acres located at 806 Walnut Street in Memphis, Shelby County, Tennessee (the "Site"). There are four buildings and several sheds built on the Site. The Site is an operational pallet and drum recycling facility.

On February 22, 2007, the Tennessee Department of Environment and Conservation (TDEC) received a complaint about the Site from a building inspector with the Memphis Division of Fire Services. TDEC conducted a hazardous waste inspection at the Site on March 19, 2007, and observed piles of materials outside the buildings that included 55-gallon and 200-gallon totes, fiberboard drums, metal 55-gallon drums, lids, rags and wooden pallets. Concerned about potential release to the environment from containers and uncontained waste observed on-site, TDEC contacted EPA for assistance. On June 27, 2007, at the TDEC's request, EPA initiated a Removal Site Evaluation, and based upon observations and findings at that time, including an estimated 250 drums and containers as well as several spills of suspected hazardous substances, determined that the Site qualified for a time critical removal.[4]

By letter dated August 29, 2007, EPA notified Mr. Johnnie Williams in his capacity as President of American Drum and Pallet Company, Inc., of both his individual and American Drum & Pallet Company, Inc.'s potential liability under CERCLA. In addition, the letter requested a response to an enclosed information request and provided notification of forthcoming removal activities at the Site.[5]

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[2] *Id*

[3] *Id.*

[4] *See generally*, Lien Filing Record (LFR), Tetra Tech EM Inc., Superfund Technical Assessment Response Team Emergency Response Report, and Exhibits 2 and 5 LFR. Unless otherwise noted, "Exhibits" refer to those documents tabbed and attached to Mr. David Harbin's January 13, 2009 referral letter.

[5] LFR Exhibit 8

After offering Mr. Williams and American Drum & Pallet Company, Inc. opportunity to perform the response actions at the Site and confirming their inability to do so, EPA conducted emergency removal from December 17, 2007 until January 18, 2008.[6] During that time EPA documented the release or threatened release of hazardous substances, pollutants, or contaminants as defined in Section 101(14) CERCLA, 42 U.S.C. § 9601(14).[7]

On December 11, 2008, EPA sent a certified letter, addressed to Mr. Johnnie Williams and American Drum & Pallet Company, Inc. with notice of EPA's intention to perfect a lien on property that is part of the American Drum & Pallet Company Superfund Site.[8]

In response, on December 19, 2008, Mr. Williams wrote to David Harbin, Esq., counsel for EPA, requesting a hearing and objecting to the intent to perfect a lien on the grounds that the containers were present on the Site prior to lease and acquisition of the property and were not acquired by American Drum & Pallet. William's letter along with the Lien Filing Record (LFR), were forwarded to me as designated Agency Neutral.

Upon designation as the Agency Neutral for the lien filing proceeding, I convened a conference call with the parties on March 5, 2009, to review preliminary procedural matters, and set the date and time for the superfund lien meeting. By letter summarizing the teleconference, the parties were directed to provide written submissions elaborating upon their respective positions as well as any additional documents they intended to rely upon at the upcoming meeting. Both parties submitted their respective position papers. The meeting took place on April 14, 2009, and as requested by Dr. Lonnie Woods, Esq, attorney for Johnnie Williams and American Drum & Pallet, he and Mr. Williams participated in the meeting via telephone. The meeting was conducted pursuant to the *Supplemental Guidance*, after which a Transcript summarizing the meeting was prepared and made part of the LFR.

Once the Transcript became available, I allowed sufficient time for the parties to submit Memoranda of Law and Rebuttal Statements. Although I received a Memorandum of Summary Position and Memorandum of Law from counsel for EPA on June 11, 2009, no submission was received by Mr. Wood. To confirm that there were no intended additional submissions, by letter dated July 6, 2009, I notified the parties that the matter was ripe for my determination. In the course of my reviewing the information for the purpose of reaching a recommended determination, additional questions and issues arose. Therefore, by letter sent on or about September 9, 2009, I requested that counsel for EPA clarify certain issues pertaining to EPA's position on Site ownership. EPA provided its response by Memorandum dated November 23, 2009. Those issues, along with all other elements for my consideration are discussed further below.

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[6] LFR Exhibits 6 and 7 documenting Williams' decision not to conduct removal.
[7] LFR Exhibit 9
[8] LFR Exhibit 12

Disputed Matters

The property owners' dispute rests primarily on EPA's failure to establish the third element necessary to determining whether EPA has a reasonable basis to perfect the lien: Whether the property is owned by a person who is potentially liable under CERCLA. Their dispute is twofold, a) that there is no liability because there were no hazardous substances shown to be present at the Site and b) even if there were hazardous substances at the site, they were placed there by previous owners, thereby triggering the third party/innocent landowner defense to liability under CERCLA. I will elaborate on these defenses further below.

Discussion of the Factors for Review

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

The record clearly reflects that EPA conducted a removal action at the Site from December 17, 2007 through January 18, 2008. A detailed account of this removal action is contained in the Pollution Report dated April 3, 2008, and is made part of the LFR.[9]

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

The LFR adequately reflects that EPA incurred costs with respect to the response action taken, which are described in the cost summaries through August 26, 2008.[10] As of that time the costs incurred were $277,175.78.

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

A. Property Ownership:

Under CERCLA § 107(a)(1) and (2), 42 U.S.C. § 9607(a)(1) and (2), liable persons include persons who presently own a facility or who owned the facility at the time of disposal of a hazardous substance.

EPA contends that liability rests on current ownership and bases that conclusion upon the Quit Claim deed dated August 30, 2006, conveying the subject property from American Drum & Pallet, Inc. to Johnnie Williams/American Drum & Pallet Inc.[11] This document was filed in Shelby County, Tennessee for property at 806 Walnut Street, Memphis, Tennessee, as was an earlier Quit Claim deed dated December 23, 2002, conveying the subject property from Southern Mill Work & Lumber Company, Inc. (Southern Mill Work) to American Drum & Pallet Company, Inc. [12]

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[9] See Declaration of Steve Spurlin, LFR Exhibit 10 and Pollution Report at LFR Exhibit 9
[10] LFR Exhibit 11
[11] LFR Exhibit 1
[12] LFR Exhibit 13

Throughout this proceeding and in the many of the documents that make up the LFR, the parties interchangeably refer to the current corporate owner of the property as American Drum & Pallet Company, Inc., American Drum & Pallet, Inc., and most often, American Drum. This lack of precision by all parties has been cause for some confusion in this matter, and while the record reflects a great number of inconsistencies, defects, and errors as far as the name of the alleged corporate owner is concerned, this was especially apparent on the face of the Deeds themselves.[13] The Deed of August 30, 2006, reflects transfer of the property from a grantor to grantee both titled American Drum & Pallet, Inc. (The grantee in the earlier 2002 deed was listed as American Drum & Pallet Company, Inc.) My above-referenced letter of September 9, 2009, sought clarification from EPA counsel on this point.

In actuality there are two distinct corporations, one entitled "American Drum & Pallet *Company*, Inc.," (emphasis added) registered with, and thereafter administratively dissolved by, the Tennessee Secretary of State (hereafter, "Tn AD&P"), and the other entitled American Drum & Pallet, Inc., later registered with, and thereafter administratively dissolved by, the Secretary of State of Delaware, (hereafter, "De AD&P"). It is the latter, De AD&P that EPA alleges to be current property owner, along with individually named Johnnie Williams, for purposes of CERCLA liability.[14]

According to the *Supplemental Guidance*, documents to be made part of the LFR supporting the decision to perfect the lien, can include a deed, legal description from a survey or tax record, a title search, etc." As such, it would appear that for purposes of the CERCLA lien proceeding before me, deeds, found in the appropriate repository for such records, are reliable verification of ownership. Therefore, I find that EPA had reason to rely upon the properly filed 2006 Quit Claim Deed in its determination that both Johnnie Williams and De AD&P are current owners of the property. Furthermore, especially significant, is the fact that throughout this proceeding, as well as during interactions with EPA representatives prior to commencement of this proceeding, Mr. Williams, both in his individual capacity and/or on behalf of the corporation, not only failed to dispute any allegations that both parties currently own the subject property, but asserted as much himself.[15] As a matter of fact, the entire defense, that they are innocent landowners, is predicated on their being the current property owners, albeit not liable ones for purposes of CERCLA. Therefore, applying the appropriate reasonable basis standard, I conclude that for purposes of this CERCLA Lien proceeding, EPA has met its burden to establish that Mr. Williams and De AD& P (hereinafter "property owners") are the current property owners.

B. Potential Liability as Current Owners:

1. Presence of Hazardous Substances:

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[13] According to several 2007 records and communications, EPA refers to the Site owner as "American Drum & Pallet Company, Inc." which is discussed elsewhere. *See* LFR August 20, 2007 letter from David Harbin, Esq., to Paul Springer, Esq., Agency's Response Memo of April 2, 2009 Enclosure 7

[14] EPA November 23, 2009 Memorandum in Response to Regional Judicial Officer's Letter Requesting Clarification of Items at p. 6

[15] Transcript ("Tr.) p. 8; Access Authorization, LFR Exhibit 3; LFR American Drum & Pallet Plan of Action Report response to Ms. Angela Horton, Item ## 4 and 6.

Mr. Williams and De AD&P contend that notwithstanding reference in EPA's General Notice letter of August 29, 2007, to numerous containers holding hazardous substances, no reports indicate any scientific testing results that "warrant a conclusive finding or determination of recovering any hazardous substances from the property."[16] Moreover, Mr. Woods argues that an individual, Don Putman, hired by Mr. Williams conducted tests which resulted in finding that none of the equipment on the property was found to be toxic.

Other than asserting the claim, Mr. Williams and De AD&P fail to provide any information to support this claim. To the contrary, the LFR is replete with documentation substantiating EPA's position that hazardous substances were found at the Site, including: Methyl Parathion, 1,1,1-Trichloroethane, 4-Methly-2-pentanone, Ethylbenzene, Xylene, Toluene, Chloroform, Methylcyclohexane, and Acetone. Six samples exhibited a hazardous waste characteristic of "ignitability" pursuant to 40 CFR § 261.21(a). In addition, certain containers marked "Methyl Parathion," were confirmed to be so, which is a listed hazardous waste pursuant to the regulations at 40 C.F.R. § 261. A RCRA hazardous waste is a hazardous substance under CERCLA, and as such EPA has clearly established that CERCLA hazardous substances were present at the Site. The April 2, 2008, Pollution Report describing samples collected from 212 drums sent to separate laboratories along with verbal confirmation of the findings by EPA's On-Scene Coordinator, support the presence of hazardous substances at the Site.[17]

Mr. Williams' and De AD&P's efforts to show that a test conducted by consultant Mr. Don Putman, shows that no hazardous substances were present at the Site, are insufficient as well. I am persuaded that EPA sufficiently established the presence of hazardous wastes at the Site.

2. Innocent Landowner Defense

Mr. Williams and De AD&P raise as a defense to liability, what is referred to as the "third party defense" under CERCLA, found at Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3). 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 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 (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

[16] See LFR March 23, 2009 letter from Lonnie Woods, Esq.

[17] Tr. pp. 57 - 61; *See* LFR Tetra Tech Report, describing that sampling from the 212 drums were sent to *two labs:* Analytical Environmental Services (AES), Atlanta, Ga.; and a portion of one sample to TestAmerica Analytical Testing Corporation (Test America) of Tallahassee, Florida.

precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts of omissions..."

Applying the third party defense to this proceeding, Mr. Williams and De AD&P would be absolved from liability under CERCLA Section 107(a) if they can establish, by a preponderance of the evidence, that the release of hazardous substances was caused by a third party with no contractual relationship to either of them, that they exercised due care with respect to the Property, and lastly, that they took precautions against foreseeable acts of any such third party. Should they meet their burden to establish this defense to liability there would be no reasonable basis for a lien. I will look at each element of this defense.

a. Whether the releases of hazardous substances were caused by a third party:

During the course of the meeting, Williams and De AD&P attempted to establish that the hazardous substances that were found at the Site, if any, were placed there by previous owner/operators. In addition to more general assertions regarding the fact that drums were at the Site prior to his ownership, Mr. Williams specifically referred to Pioneer Cabinet Company as a third party particularly liable for the presence of any hazardous waste that EPA claims to have found at the site. Pioneer Cabinet, is alleged to have leased the property from the previous owner, Southern Mill Work.[18]

In order to prevail on the third party defense, the burden, to be carried by Mr. Williams and De AD& P is to establish, by a preponderance of evidence, that the third party caused the release or threatened release of a hazardous substance. However, Mr. Williams' assertions amount to nothing more than raising the possibility, unsupported and unsubstantiated, that if EPA were to investigate further, it may find that since cabinet companies generally use "ink, glue, paint, and everything else," the Pioneer Cabinet Company might be a third party liable for any release of hazardous waste. Mr. Williams states he obtained this information from the people living next door, some of whom worked for Pioneer Cabinet Company.[19] This very vague and general information regarding a lessee of a former property owner, based upon third hand unidentifiable and unsubstantiated accounts, fails to meet this burden. Certainly, to the extent Mr. Williams makes even more general reference to unnamed entities in addition to Southern Mill Work and Pioneer Cabinet Company that previously operated or owned the site, prior to his involvement – ". .. Before me, it was a fence company there. Before me, it was a barrel company there. Before me, it was a truck line there. Before me, it was an automobile company there" - so too has he failed to meet his burden of establishing that, based upon a preponderance of evidence, the hazardous substances released or threatened to be released at the site are not attributable to him and to De AD &P.[20]

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[18] Tr. p. 118

[19] *Id* p. 119

[20] *Id* p. 42; In actuality, containers found to contain methyl parathion, described as an "acutely hazardous waste" were found among other containers on tractor trailers at the facility loading dock, ready to be shipped by De AD&P to another company in Greenfield, Tennessee.

b. Contractual Relationship Provision:

In addition, even if Mr. Williams and AD&P had established that a third party caused the release or threatened release, he would also have to have shown that the third party was someone 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.

Had Mr. Williams or De AD&P established that Pioneer Cabinet had sole responsibility for the release, it is questionable whether the second prong would have been met - that Pioneer Cabinet's actions or omissions had not occurred in connection with a contractual relationship. It was Mr. William's understanding that the Pioneer Cabinet Company leased the property from Southern Mill Work, a predecessor in title to him and De AD & P, but he certainly has not substantiated by a preponderance of evidence that there were releases of hazardous substances caused by Pioneer as lessee as opposed to the property owner at that time, Southern Mill Work. It has been determined that "[t]he scope of 'contractual relationship' under CERCLA § 107(3)(b) is not limited to one's immediate predecessor in title, but is broad enough to include a chain of deeds reaching to past owners." *In Re: Tamposi Family Investments*, 6 E.A.D. 106, 120-21 (July 6, 1995). It is likely that as a predecessor in title, releases by Southern Mill, and other previous owners, would be considered as having been caused by entitities with whom Johnnie Williams and De AD& P had a direct or indirect contractual relationship, thus defeating the innocent landowner defense. Ultimately, I cannot make a finding that the third party alleged to have caused the release at this Site did not have a contractual relationship with the current property owner, as the facts presented are too vague and speculative to identify a third party.

c. All Appropriate Inquiries:

Assuming the other elements of the innocent landowner defense were established, Williams and De A&P would have to establish, by a preponderance of the evidence, that when they acquired the property, they did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.[21] To establish they had no such "reason to know" they would have had to demonstrate that prior to purchase they carried out all appropriate inquiries into previous ownership and uses of the facility, and that they took reasonable steps to stop any continuing releases, prevent any threatened future ones and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.[22]

The "appropriate inquiry" would have had to be conducted in accordance with "generally accepted good commercial and customary standards and practices."[23] For property purchased between May 31, 1997 through November 1, 2006, the proper procedures to have used, prior to purchasing the property, were those of the American Society for Testing and Materials (ASTM), including the Standard E1527 - 97 document, "Standard Practice for Environmental Site

[21] 42 U.S.C. § 9601(35)(A)(i)
[22] 42 U.S.C. § 9601(35)(B)
[23] 42 U.S.C. § 9601(35)(A)(i); 40 C.F.R. § 312.20

Assessments: Phase I Environmental Site Assessment Process."[24] The inquiry that the property owners appear to rely upon is that conducted by Mr. Don Putman entitled "Plan of Action Report" dated May 24, 2007. In addition, EPA introduced into the LFR a document prepared by Mr. Terrell Hall, which is referred to as a Report of Findings of a Phase I Environmental Site Assessment for the American Drum and Pallet Company dated November 7, 2003 ("Terrell Report"). As EPA summarized at the meeting, a number of regulatory requirements for a Phase I Environmental Assessment were not followed in these reports, including documenting the methodology used, interviews of owners and operators, completing a records review and a declaration of the environmental professional who conducted the assessment.[25] EPA also went on to explain in some detail that the reports were neither prepared nor updated within the proper timeframes.[26] However, issues pertaining to the timing of both reports, whether considered inventories or searches are not as pertinent, since I am persuaded that neither Mr. Putman's Plan of Action nor the Terrell Report met the standards for an acceptable Phase I Environmental Site Assessment.[27]

d. Exercising Due Care:

Lastly, even if all other elements of the Innocent Landowner Defense were met, the property owners would bear the burden to establish, again, by a preponderance of the evidence, that they took reasonable steps to stop any continuing release, prevent any threatened future release and prevent or limit any human, environmental, or natural resource exposure to any previously released hazardous substance.[28]

Counsel for the property owners argued that such reasonable steps can be inferred from a letter from TDEP dated February 22, 2007, commending Mr. Williams for staging the drums and implementing best management practices. However, the letter had not been submitted into the lien filing record before the meeting nor after the meeting as instructed. Therefore, this document is simply too unreliable to take into consideration for the purpose of establishing due care. Furthermore, the property owners contend that they attempted to take such steps but were in essence, usurped by the EPA response process. However, to the contrary, there are documents in the LFR indicating that Mr. Williams was unable to conduct such cleanup, and deferred to EPA for that purpose.[29] Again, notwithstanding any other such information, the property owners have the burden to establish by preponderance of the evidence that they took all necessary measures to meet the containment and prevention measures described above. There is insufficient support in the record that this was the case.

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[24] *See* EPA's "Agency Response Memorandum" dated April 2, 2009. It is noted that EPA, with frequency, states that the property was purchased by American Drum on December 23, 2002. This was the date of purchase by the previous property owner, Tn AD&P.

[25] *See* 40 C.F.R. § 312.20

[26] During the meeting and in Agency submissions, information pertaining to the timing of the searches and inventory also erroneously base the corporate purchase as that by the Tn AD&P in 2002. Nevertheless, the reports were neither conducted nor updated by the property owners within the timeframes required at 40 C.F.R. § 312.20.

[27] Tr. pp. 99-101

[28] 42 U.S.C. § 9601(35)(B)(II).

[29] LFR Exhibit 7

Based upon the above, I find that Williams and De AD&P failed to meet the innocent landowner defense. Williams and De AD&P had not raised, as a defense, that under the 2002 Brownfield Amendments at CERCLA § 107(r), 42 U.S.C. § 9607, they qualify as "bona fide prospective purchasers (BFPP)" of known contaminated property. Nevertheless, I had asked the parties to address elements of the bona fide prospective purchaser. However, for the reasons set forth above, Williams' and De AD&P's failure to make all appropriate inquiries and exercise appropriate care, in and of themselves, preclude their being considered bona fide perspective purchasers. Further discussion on this issue is unwarranted.

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

This is not a matter in dispute as the parties stipulated during the prehearing call that they were sent notice by certified mail of potential liability.[30] However, there are certain inconsistencies in the record that merit some discussion. The August 29, 2007, General Notice Letter was actually sent to Mr. Williams as President of American Drum & Pallet Company, Inc., and mistakenly, and repeatedly referred throughout to American Drum & Pallet *Company*, Inc.'s potential liability, probable responsibility and status as current owner of the Site.

However, the "Notice to Perfect the Lien, sent subsequently, on December 11, 2008, was again sent to Mr. Williams notifying him and the same, American Drum and Pallet *Company*, Inc. of EPA's intention to perfect a lien on the property, but goes on to state, "EPA has determined, based on title and tax assessor records, that you and American Drum & Pallet, Inc. are the owners of the Property."[31] Satisfaction of CERCLA Section 107(*l*)(2)(B) is met by providing notice via this letter, if notice has not already been furnished.[32]

Therefore, while these are two distinct corporations, in light of the fact that a) there was notice to De AD &P via the Notice to Perfect the Lien; b) Mr. Williams, served as officer of both companies; c) the addresses are the same for both companies and is the subject property itself; and d) a stipulation was entered into the lien filing record that notice was sent by certified mail of potential liability, I find the notification, while somewhat flawed, was not fatally so.[33]

V. Whether the record contains any other information which is sufficient to show that the lien should not be filed:

As indicated above, based upon a close reading of the documents contained in the LFR and the meeting Transcript, I had additional questions as to how, if at all, the fact that these two corporate entities were at varying time administratively dissolved, impacts upon this proceeding to perfect a lien.

To summarize the corporate status at the time of property transfers:

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[30] Tr p. 14; LFR March 17, 2009 letter from Susan Schub to Harbin and Woods

[31] Alternatively, in the same paragraph, it is written, "The lien is intended to secure payment to the United States of costs and damages for which you and the American Drum & Pallet Company, Inc., as the owners of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a)."

[32] *Supplemental Guidance* p. 4

[33] Listed as President of the De AD & P, and Vice-President of Tn AD & P.

- July 19, 2002, Te AD& P was administratively dissolved by the Tennessee Secretary of State;
- December 23, 2002, the property was sold by Southern Mill Works to Te AD&P;
- August 13, 2006, De AD&P is incorporated in Delaware, with no record indicating it is registered to do business in Tennessee;
- August 30, 2006, the property is sold by Te AD&P to Johnnie Williams and De AD&P.
- August 29, 2007, EPA sends its notification of potential liability;
- March 1, 2008, De AD&P is administratively dissolved;
- December 11, 2008, EPA sends its Notice to Perfect Lien commencing the proceeding.

When asked to clarify the effect of the aforementioned sequence of events and its impact on this matter, EPA referred to Tennessee State Law for the premise that a corporation administratively dissolved continues its corporate existence, at the same time noting that the corporation may not carry on business except that necessary to wind up and liquidate its affairs. Tenn. Code Ann. 48-24-202(c). EPA argues, even if Tn AD &P's acquisition of the property subsequent to its dissolution was in fact improper, the deed is potentially voidable, rather than void, should an injured party choose to bring an action to quiet title.

While I am in agreement with counsel for EPA, that this is not the forum to quiet title, and as discussed elsewhere, EPA appropriately relied upon Deeds filed in the appropriate repository as well as Williams' and De AD&P's position with respect to their status as owners, it is possible that based upon the case law in Tennessee, any such action to quiet title could result in a declaration that the Deeds transferring the property are void *ab initio*, on the basis of Tn AD&P's capacity to enter into binding contracts.[34]

Similarly, a question arises as to the impact, if any, on this lien proceeding, resulting from De AD&P's current status as an administratively dissolved corporation. It is EPA's position, without elaboration, that this has no effect on EPA's ability to perfect a lien against the subject property. To reiterate, De AD&P was administratively dissolved on March 1, 2008. Delaware State law on dissolved corporations generally sets a three-year period for a corporation by its own limitation or otherwise dissolved to wind up its affairs and to defend and prosecute suits, whether civil, criminal or administrative, by or against them. 8 Del. C. 1953, Sec. 278. At this point in time, the lien proceeding before me is well within the three year period. However, suffice to note that generally speaking, the dissolution of a corporation, in a number of circuits, has impacted CERCLA liability.[35]

Conclusion

EPA has met its burden that it has a reasonable basis to impose a CERCLA lien on the American Drum & Pallet Site. Johnnie Williams and De AD&P have failed to prove the

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[34] See *Gary Winn d/b/a Wynn Homes, Inc., et al. v. La Maruja Realty Corp., et. al., Court of Appeals of Tennessee at Nashville*, No. M2008-01511-COA-R9-Cv (September 15, 2009).

[35] *See Marsh v. Rosenbloom*, 2007 WL 2416543 (C.A. 2 2007); For further discussion on CERCLA and corporate dissolution laws, see "Corporate Life After Death: CERCLA Preemption of State Corporate Dissolution Law," Michigan Law Review, (October, 1989), LEXSEE 88 MICHLR 131.

elements necessary to prevail on the CERCLA Section 107(b)(3) third party/innocent landowner defense. Therefore, I find that EPA has a reasonable basis to perfect its lien.

This determination does not bar EPA or the property owners, Johnnie Williams and De AD&P, 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: Feb. 9, 2010

Susan B. Schub

Susan B. Schub
Regional Judicial Officer