

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MARYLAND

1325 "G" STREET ASSOCIATES, LP  
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:  
v. : Civil Action No. DKC 2002-1622  
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ROCKWOOD PIGMENTS NA, INC.  
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**MEMORANDUM OPINION**

Presently pending and ready for resolution in this environmental contamination case filed under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. §§ 9601, *et seq.*, are (1) a motion by Plaintiff 1325 "G" Street Associates, LP for summary judgment and (2) a motion by Defendant Rockwood Pigments NA, Inc. for summary judgment. The issues have been fully briefed and the court now rules, no hearing being deemed necessary. Local Rule 105.6. For the reasons that follow, the court will grant Plaintiff's motion for summary judgment and deny Defendant's motion for summary judgment.

**I. Background**

**A. Factual Background**

Unless otherwise stated, the following facts are uncontroverted. Defendant Rockwood Pigments NA, Inc. is the legal successor to Mineral Pigments Corporation (Mineral

Pigments), a corporation that had manufactured metal-based pigments for use in paints and other products, since at least the 1960s, at its facility in Beltsville, Maryland (Mineral Pigments Factory). The Mineral Pigments Factory generated waste materials containing, *inter alia*, chromium, lead and zinc. During the early 1970s, Mineral Pigments disposed of or contracted for the disposal of waste generated at its factory into several mined-out sand and gravel pits. These pits were located on tracts of land owned by the Contee Sand and Gravel Company, Inc. (CSG Facility), about one mile west of the Mineral Pigments Factory.<sup>1</sup>

In June 1982, Plaintiff 1325 "G" Street Associates, LP acquired the tracts of land containing the CSG Facility, and it currently owns those tracts. In October 1984, the Maryland Department of Health and Hygiene, the predecessor to the Maryland Department of the Environment (both hereinafter referred to as MDE), received information that dumping of hazardous waste had occurred at the CSG Facility. MDE conducted visual inspections of the land soon after and confirmed that Mineral Pigments had dumped waste into the gravel pits on the

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<sup>1</sup> CSG is now known as Percontee, Inc., which is a third-party defendant in this case.

CSG Facility in the 1970s. No samples were collected at the time.

MDE conducted additional environmental investigations and collected samples at the CSG Facility in 1986. The investigations confirmed that releases of, *inter alia*, chromium, lead, and zinc had occurred where Mineral Pigments had dumped its waste. In 1987, a contractor of the United States Environmental Protection Agency (EPA) collected samples at the CSG Facility and confirmed the MDE findings from a year earlier.

MDE returned to the CSG Facility, in 2000, to conduct a further environmental assessment and its investigation revealed that hazardous substances--including chromium, lead and zinc--remained on the property. MDE subsequently issued a report, in which it recommended delineation of the extent of contaminated sediments at the CSG Facility and further investigation there, "followed by appropriate remedial measures." Paper 77, Ex. 10 at 5. Furthermore, MDE requested that Plaintiff conduct the additional environmental assessments and investigations at the CSG Facility. Plaintiff retained an environmental engineering consulting firm, Gannett Fleming, Inc., which performed an MDE-approved investigation between October 2001 and February 2002. The firm concluded in its investigation report that chromium, lead and zinc had been

disposed of and released into soil, water, and former sand and gravel pits at the CSG Facility.

Following the investigation by Gannett Fleming, MDE requested that Plaintiff install a security fence around one of the exposed areas (referred to as a lagoon) where elevated concentrations of chromium, lead and zinc were found. Plaintiff installed the security fence in late 2001. Plaintiff claims that it has incurred response costs of approximately \$184,000.00, which include payment to Gannett Fleming for its investigation at the CSG Facility and installation of the security fence.<sup>2</sup>

***B. Procedural Background***

On May 6, 2002, Plaintiff filed a complaint against Defendant under various provisions of CERCLA, regarding the CSG Facility. In particular, Plaintiff sought (1) recovery for all costs of response incurred by Plaintiff, pursuant to 42 U.S.C. § 9607 (CERCLA § 107); (2) contribution for an equitable share of all costs of response incurred by Plaintiff, pursuant to 42 U.S.C. § 9613 (CERCLA § 113); and (3) a declaratory judgment that Defendant shall be held jointly and severally liable, or

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<sup>2</sup> Plaintiff seeks to recover \$184,761.16 in past costs. The amounts set forth in the Declaration of Caleb Gould and supporting documents, however, total \$181,461.16. The justification for the remaining \$3300 is missing.

liable in contribution, to pay all future costs of response incurred by Plaintiff with regard to the CSG Facility. Defendant filed a motion to dismiss the complaint for failure to state a claim. On December 20, 2002, the court denied Defendant's motion. See *1325 "G" Street Assoc., LP v. Rockwood Pigments NA, Inc.*, 235 F.Supp.2d 458 (D.Md. 2002).

On April 7, 2003, Defendant filed a counterclaim against Plaintiff, alleging that Plaintiff is liable to Defendant "for contribution of its fair share of response costs under 42 U.S.C. § 9607(a) and § 9613(f)." Paper 26 at ¶ 22.<sup>3</sup> Plaintiff subsequently filed a motion to dismiss Plaintiff's counterclaim for failure to state a claim. The court granted the motion on February 10, 2004.

On January 20, 2004, Plaintiff filed a motion for summary judgment, contending that it is entitled to full recovery of response costs under CERCLA § 107 or, in the alternative, to contribution under CERCLA § 113. Plaintiff also seeks a declaratory judgment against Defendant for any future costs of response. On February 18, 2004, Defendant filed a cross-motion for summary judgment in opposition to Plaintiff's motion.

## **II. Standard of Review**

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<sup>3</sup> At the same time, Defendant also filed a third-party complaint against Third-Party Defendants Percontee, Inc. and Contee Resources, Inc.

It is well established that a motion for summary judgment will be granted only if there exists no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In other words, if there clearly exist factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. *Anderson*, 477 U.S. at 250; see also *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4<sup>th</sup> Cir. 1987); *Morrison v. Nissan Motor Co.*, 601 F.2d 139, 141 (4<sup>th</sup> Cir. 1987). The moving party bears the burden of showing that there is no genuine issue as to any material fact and that he is entitled to judgment as a matter of law. See Fed.R.Civ.P. 56(c); *Catawba Indian Tribe of South Carolina v. State of S.C.*, 978 F.2d 1334, 1339 (4<sup>th</sup> Cir. 1992), *cert. denied*, 507 U.S. 972 (1993).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. See *U.S. v. Diebold*, 369 U.S. 654, 655 (1962); *Gill v. Rollins Protective Servs. Co.*, 773 F.2d 592, 595 (4<sup>th</sup> Cir. 1985). A party who bears the burden of proof on a

particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all other facts immaterial." *Celotex Corp.*, 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence in order to show the existence of a genuine issue for trial. See *Anderson*, 477 U.S. at 256; *Celotex Corp.*, 477 U.S. at 324. However, "[a] mere scintilla of evidence in support of the nonmovant's position will not defeat a motion for summary judgment." *Detrick v. Panalpina, Inc.*, 108 F.3d 529, 536 (4<sup>th</sup> Cir.), cert. denied, 522 U.S. 810 (1997). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The inquiry involved on a summary judgment motion "necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." *Anderson*, 477 U.S. at 252. Where the movant also bears the burden of proof on the claims at trial, as Plaintiff here, it "must do

more than put the issue into genuine doubt; indeed, [it] must remove genuine doubt from the issue altogether." *Hoover Color Corp. v. Bayer Corp.*, 199 F.3d 160, 164 (4<sup>th</sup> Cir. 1999) (internal quotation omitted), *cert. denied*, 530 U.S. 1204 (2000); *see also Proctor v. Prince George's Hosp. Ctr.*, 32 F.Supp.2d 820, 822 (D.Md. 1998) (evidentiary showing by movant "must be sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party") (internal quotation and italics omitted). Summary judgment will not be appropriate unless the movant's evidence supporting the motion "demonstrate[s] an absence of a genuine dispute as to every fact material to each element of the movant's claim and the non-movant's response fails to raise a genuine issue of material fact as to any one element." *McIntyre v. Robinson*, 126 F.Supp.2d 394, 400 (D.Md. 2000) (internal citations omitted).

When faced with cross-motions for summary judgment, as in this case, the court must consider "each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4<sup>th</sup> Cir. 2003) (internal quotation omitted). *See also havePower, LLC v. Gen. Electric Co.*, 256 F.Supp.2d 402, 406 (D.Md. 2003) (citing 10A Charles A. Wright and Arthur R. Miller, *Federal Practice & Procedure* § 2720 (3d ed. 1983)). The

court reviews each motion under the familiar standard for summary judgment, *supra*. The court must deny both motions if it finds there is a genuine issue of material fact, “[b]ut if there is no genuine issue and one or the other party is entitled to prevail as a matter of law, the court will render judgment.” 10A Federal Practice & Procedure §2720.

### **III. Analysis**

CERCLA was enacted in 1980 as “a congressional response to public concern over the improper disposal of hazardous waste.” *South Carolina Dep’t of Health And Env’tl. Control v. Commerce and Indus. Ins. Co.*, 372 F.3d 245, 251 (4<sup>th</sup> Cir. 2004). The primary goals of CERCLA are two-fold: “(1) the promotion of prompt and effective cleanup of hazardous waste sites, and (2) the sharing of financial responsibility among those parties who created the hazards.” *Id.* (internal quotation omitted).

To achieve these goals, CERCLA § 107(a) imposes strict liability upon a “potentially responsible party” (PRP) for cleanup costs incurred in remediating a hazardous waste facility. *Westfarm Assoc. Ltd. P’ship v. Washington Suburban Sanitary Comm’n*, 66 F.3d 669, 677 (4<sup>th</sup> Cir. 1995), *cert. denied*, 517 U.S. 1103 (1996); *Axel Johnson, Inc. v. Carroll Carolina Oil*

*Co., Inc.*, 191 F.3d 409, 413 (4<sup>th</sup> Cir. 1999).<sup>4</sup> Because of the statutory strict liability scheme, a plaintiff "generally need not prove causation, only that the defendant is a 'covered person'" under CERCLA § 107(a). *Pneumo Abex Corp. v. High Point, Thomasville and Denton R.R. Co.*, 142 F.3d 769, 774 (4<sup>th</sup> Cir.) (internal quotation omitted), *cert. denied*, 525 U.S. 963 (1998).<sup>5</sup> See also *Dent v. Beazer Materials and Servs., Inc.*, 156

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<sup>4</sup> The EPA has defined a PRP, for purposes of the statute, as the "person or persons who may be held liable for hazardous substance contamination under CERCLA. PRPs may include the owners and operators, generators, transporters, and disposers of the hazardous substances." *Commerce and Indus. Ins. Co.*, 372 F.3d at 251 (quoting Orientation Manual, app. D).

<sup>5</sup> The relevant portions of 42 U.S.C. § 9607(a) provide:  
Notwithstanding any other provision or rule of law,  
and subject only to the defenses set forth in  
subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,  
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(3) any person who by contract, agreement, or  
otherwise arranged for disposal or treatment. . . of  
hazardous substances owned or possessed by such  
person, by any other party or entity, at any facility.  
. . owned or operated by another party or entity and  
containing such hazardous substances,  
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from which there is a release, or a threatened release  
which causes the incurrence of response costs, of a  
hazardous substance, shall be liable for--  
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(B) any other necessary costs of response incurred by  
any other person consistent with the national  
(continued...)

F.3d 523, 529 (4<sup>th</sup> Cir. 1998) (strict liability under CERCLA "imposed without regard to culpability or causation"). In addition, to recover its costs of response, a plaintiff must prove that it "incurred necessary cleanup costs 'consistent with the national contingency plan.'" *Westfarm Assoc.*, 66 F.3d at 677 (quoting 42 U.S.C. § 9607(a)(4)(B)).

**A. Plaintiff's Motion for Summary Judgment**

*1. Recovery Under CERCLA § 107(a)*

There is no dispute between the parties that Defendant, as the legal successor to Mineral Pigments, is a "covered person" and PRP under CERCLA § 107(a)(3).<sup>6</sup> As discussed, *supra*, Mineral Pigments disposed of or contracted for the disposal of waste generated at its factory into several mined-out sand and gravel pits at the CSG Facility. Defendant admits that, upon the merger of Mineral Pigments into it in 1994, Defendant assumed all of the obligations and liabilities of Mineral Pigments. See Paper 77, Ex. 1 at 1-2. CERCLA liability properly passes to a corporation that "affirmatively assumes the liabilities of its predecessor," as Defendant did here. *HRW Sys., Inc. v.*

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(...continued)  
contingency plan.

<sup>6</sup> Similarly, it is uncontroverted that, for purposes of CERCLA, the CSG Facility is a "facility" and that a "release" of "hazardous substances" occurred there. 42 U.S.C. § 9601.

*Washington Gas Light Co.*, 823 F.Supp. 318, 332 (D.Md. 1993) (successor corporation "clearly. . . can be held liable for that which the predecessor could be held liable"). See also *Minyard Enters., Inc. v. Southeastern Chem. & Solvent Co.*, 184 F.3d 373, 386 (4<sup>th</sup> Cir. 1999) (entity qualified as PRP where other plaintiffs "pleaded and proved" that entity had contract with defendant for removal of "hazardous substances" from property).

Therefore, in order to recover costs from cleanup at the CSG Facility, Plaintiff must prove that the response costs it incurred were "necessary" and "consistent with the national contingency plan" (NCP). 42 U.S.C. § 9607(a)(4)(B); see also *Westfarm Assoc.*, 66 F.3d at 677. At the liability stage, Plaintiff need only "prove that it incurred *some* response costs consistent with the NCP," which thus would be recoverable under CERCLA. *Sherwin-Williams Co. v. ARTRA Group, Inc.*, 125 F.Supp.2d 739, 752 (D.Md. 2001) (emphasis in original). The proper standard for measuring such consistency is "substantial compliance." 40 C.F.R. § 300.700(c)(3)(i); *Sherwin-Williams*, 125 F.Supp.2d at 752. As a result, "proof of the consistency of the remaining costs may wait until trial on the issue of damages." *Weyerhaeuser v. Koppers Co., Inc.*, 771 F.Supp. 1406, 1413 (D.Md. 1991). If, however, there is no material factual

dispute that the costs satisfy that standard, summary judgment may be appropriate as to the full amount.

In its assessment report of the CSG Facility, as discussed *supra*, MDE recommended, *inter alia*, further delineation regarding the "extent of contaminated sediments" and "[f]urther investigation of soil and groundwater in the landfilled area to determine waste types and extent." Paper 77, Ex. 10 at 5. MDE further requested that Plaintiff conduct the additional environmental assessments and investigations. Plaintiff hired an environmental engineering consulting firm, Gannett Fleming, Inc., which performed an MDE-approved investigation between October 2001 and February 2002. The firm concluded in its investigation report that "significant elevated levels of lead, zinc, and chromium" were present on the property and that "[t]hese contaminants are associated with yellowish-green material found at the site. . . believed to be waste pigment associated with disposal." Paper 88, Ex. 2 at 21. Following this investigation, MDE requested that Plaintiff install a security fence around one of the lagoons where elevated concentrations of chromium, lead and zinc were found. Plaintiff installed the security fence in late 2001.<sup>7</sup> At issue in the

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<sup>7</sup> CERCLA defines "response" as, *inter alia*, "remove" and "removal." 42 U.S.C. § 9601(25). "Remove" or "removal," in  
(continued...)

instant case is whether these costs incurred by Plaintiff were necessary and consistent with the NCP, so as to be recoverable under CERCLA.

Based on the record, Plaintiff has satisfied its burden of demonstrating that its response costs were necessary and consistent with the NCP. The retention of Gannett Fleming and its subsequent investigation, as well as installation of the security fence, "were taken at the direction of the MDE and were designed to effectuate the removal of sources of contaminants on the property that posed a risk to the environment." *Sherwin-Williams*, 125 F.Supp.2d at 753. Moreover, the investigations were necessary to delineate and characterize the extent of the hazardous substances at the CSG Facility, as ordered by MDE in its report. So too was the security fence, also ordered by MDE, necessary to contain these environmental hazards in one particularly contaminated lagoon.

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turn, refer to "actions as may be necessary to monitor, assess, and evaluate the release or threat of release of hazardous substances." 42 U.S.C. § 9601(23). The terms also refer to "such other actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment"--which specifically include "security fencing or other measures to limit access." *Id.* Thus, the investigations conducted by Gannett Fleming at the CSG Facility and installation of the security fence by Plaintiff, at the direction of MDE, can qualify as "removal" costs under CERCLA. See *Weyerhaeuser*, 771 F.Supp. at 1414.

Defendant argues that Plaintiff has failed to show that any of the response costs were necessary and consistent with the NCP. However, Defendant fails to challenge the evidence presented by Plaintiff that the investigations conducted by Gannett Fleming and the security fence installed by Plaintiff were mandated by MDE, the lead agency for the CSG Facility. Instead, Defendant merely points to its expert witness, Peter E. Rich, who testified very conclusorily that the response costs incurred by Plaintiff "were duplicative, unnecessary, and focused on supporting litigation, and not consistent with the National Contingency Plan." Paper 88 at 39. When asked at deposition why the costs were "duplicative," he responded: "Mainly the analysis of this waste material, continuing to analyze it every time they encounter it, re-looking at areas that have already been determined to have pigment waste in them, looking a them again, doing investigation in them again." Paper 88, Ex. 5, at 68. He acknowledged, though, that new areas of contamination were discovered during that analysis. When asked why the cost was "unnecessary," he responded: "I believe that the way Gannett-Fleming is investigating the site is reactive and not in line with how the Maryland consulting firm who is interested in bringing this property to developmental use would do it." Ex. 5, at 70. He acknowledged later, though, that MDE

requested the sampling and that it was not unreasonable for Gannett-Fleming to accede<sup>8</sup> to MDE's request.

That Plaintiff hired Gannett Fleming to perform environmental investigations at the CSG Facility and installed the security fence there, both at the effective direction of MDE, negate any claim that these costs were duplicative or unnecessary. Furthermore, whether Plaintiff was motivated by potential litigation interests in undertaking these measures is irrelevant to the present issue. Indeed, nothing in the NCP "contemplates that information gathered for one purpose cannot be used for another." *HRW Sys.*, 823 F.Supp. at 343 (noting that CERCLA § 101(25) "clearly contemplates the use of information gathered as part of a 'response' to be used for enforcement purposes"). Finally, and quite notably, the investigation report commissioned by Plaintiff (and prepared by Gannett Fleming) describes the release of hazardous substances, describes the probable nature of the release, and makes recommendations for future action. See Paper 88, Ex. 2. This investigation complies with the requirements of a remedial site evaluation under CERCLA, see 40 C.F.R. § 300.420--and therefore is "clearly consistent with the NCP, and it falls under the

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<sup>8</sup> The transcript reads "exceed," but the context makes clear that the word was "accede." Paper 88, Ex. 5, at 71.

rubric of 'necessary costs.'" *HRW Sys.*, 823 F.Supp. at 342-43.

Plaintiff has established, as a matter of law, that the response costs it incurred were necessary and consistent with the NCP, thereby satisfying CERCLA § 107(a)(4)(B). Plaintiff has submitted the declaration of Caleb Gould, the vice president of its general partner (Gould Property Company), which documents the payments it made as response costs. See Paper 78.<sup>9</sup> Accordingly, Plaintiff is entitled to judgment on the issue of Defendant's liability and the amount of past response costs under CERCLA. See *Weyerhaeuser*, 771 F.Supp. at 1415. The focus of the inquiry now shifts to the scope and extent of Defendant's liability for the contamination at the CSG Facility.

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<sup>9</sup> Attached to the declaration are copies of the various invoices and checks issued as payment. As noted above, the payments total \$181,461.16, not the \$184,761.16 claimed.

## 2. Innocent Landowner Defense

As the current owner and operator of the contaminated CSG Facility, Plaintiff qualifies as a PRP under CERCLA § 107(a)(1), even if it did not own the property at the time disposal of the hazardous substances occurred. See *Crofton Ventures Ltd. P'ship v. G & H P'ship*, 258 F.3d 292, 297 (4<sup>th</sup> Cir. 2001) (emphasis omitted); *Sherwin-Williams*, 125 F.Supp.2d at 745. In general, a PRP cannot recover response costs under CERCLA § 107(a) from another PRP but instead must seek contribution pursuant to CERCLA § 113(f), because a PRP is "presumptively liable for some portion of those costs." *Axel Johnson*, 191 F.3d at 415; see also *Minyard Enters.*, 184 F.3d at 385.<sup>10</sup>

The distinction is crucial because in a cost recovery action under CERCLA § 107(a), "a party can impose joint and several liability for *all* its cleanup costs upon the defendant." *Axel Johnson*, 191 F.3d at 415 (emphasis in original) ("any claim for damages made by a potentially responsible person--even a claim

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<sup>10</sup> The relevant portion of 42 U.S.C. § 9613(f) provides:

Any person may seek contribution from any other person who is liable or potentially liable under section 9607(a) of this title, during or following any civil action under section 9606 of this title or under section 9607(a) of this title. . . . In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate.

ostensibly made under § 107--is considered a contribution claim under § 113"). Therefore, a PRP may pursue a cost recovery action under CERCLA § 107(a) "only by proving an affirmative defense provided in § 9607(b)." *Crofton Ventures*, 258 F.3d at 297.<sup>11</sup>

Plaintiff argues that, despite its ownership of the land containing the CSG Facility, it is entitled to the full recovery of its response costs because it is an "innocent landowner" under CERCLA § 107(b)(3). To qualify for the "innocent landowner" defense, Plaintiff must prove each of the following elements by a preponderance of the evidence:

(1) that another party was the "sole cause" of the release of hazardous substances and the damages caused thereby; (2) that the other, responsible party did not cause the release in connection with a contractual, employment, or agency relationship with [Plaintiff]; and (3) that [Plaintiff] exercised due care and guarded against the foreseeable acts or omissions of the responsible party.

*Westfarm Assoc.*, 66 F.3d at 682 (emphasis in original) (citing 42 U.S.C. § 9607(b)(3)).<sup>12</sup> CERCLA § 107(b)(3) provides "a

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<sup>11</sup> In fact, a party entitled to the innocent landowner defense under CERCLA § 107(b)(3) "is not a PRP for purposes of the statute." *Morrison Enters. v. McShares, Inc.*, 302 F.3d 1127, 1133-34 (10<sup>th</sup> Cir. 2002); see also *W. Props. Serv. Corp. v. Shell Oil Co.*, 358 F.3d 678, 690 n.53 (9<sup>th</sup> Cir. 2004).

<sup>12</sup> The relevant portion of 42 U.S.C. § 9607(b)(3) provides:

(continued...)

limited affirmative defense based on the complete absence of causation." *United States v. Monsanto Co.*, 858 F.2d 160, 168 (4<sup>th</sup> Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989). Plaintiff may avail itself of this defense, however, only by proving that it "is truly innocent of any pollution." *Axel Johnson*, 191 F.3d at 416 (emphasis in original); *see also Sherwin-Williams*, 125 F.Supp.2d at 745.

*a. Sole Cause*

Plaintiff argues that it "is not responsible for the release of any of the hazardous substances at the CSG Facility" because there exists no evidence that the substances at issue--*i.e.*, pigment waste containing chromium, lead and zinc--were disposed

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(...continued)

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. . . 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 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.

of at the site after 1982, when Plaintiff acquired the property. Paper 77 at 25 (emphasis in original); Paper 90 at 22. In two separate reports about the CSG Facility, in September 1986 and June 2000, MDE discussed evidence of "tanker trucks from Mineral Pigments Corporation emptying liquid wastes into lagoons at the site in the late 1960s and early 1970s." Paper 77, Ex. 10 at 2; Paper 88, Ex. 12 at G04459. An EPA inspection report, in March 1988, further stated: "The primary concern at the site is the unregulated disposal of wastewater at the site by the Mineral Pigments Corporation between the late 1960s and early 1970s. Mineral Pigments reportedly disposed of a sludge-like material containing elevated levels of metals in on-site unlined lagoons." Paper 88, Ex. 11 at G00847. The record evidence, undisputed by either party, indicates that Mineral Pigments was ordered in January 1975 to cease usage of the CSG Facility "as a disposal site for waste materials from its paint manufacturing processes," and that Mineral Pigments complied with this order. *Id.*, Ex. 7 at 000220-000223.

Defendant contends that despite the termination of disposal of hazardous pigment waste in January 1975, "there are other hazardous substances on the property. . . which exceed MDE guidelines." *Id.* at 14. However, as Plaintiff correctly argues, this case concerns only the recovery of response costs

incurred as a result of the "dumping of pigment wastes containing chromium, lead and zinc." Paper 90 at 25.<sup>13</sup> See *HRW Sys.*, 823 F.Supp. at 349 (plaintiff not deprived of innocent landowner defense for hazardous substance at issue "because of the presence of other hazardous substances in the ground"). Defendant's own expert even acknowledged there is no evidence of any disposal of the hazardous pigment waste at the site after 1982, when Plaintiff acquired the property. See Paper 77, Ex. 16 at 202 (lines 10-13).<sup>14</sup>

Plaintiff has made a sufficient showing that Defendant, as the legal successor of Mineral Pigments, was the "sole cause" of the disposal of these hazardous substances and the resulting damage at the CSG Facility; all dumping of the hazardous substances at issue occurred prior to Plaintiff's acquisition of the property. Indeed, Defendant has produced no evidence to the

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<sup>13</sup> Thus, the purported presence of any other hazardous substances on the property referred to by Defendant, such as "SVOC's" (semi-volatile organic compounds), is irrelevant in the instant case. Paper 88 at 14.

<sup>14</sup> This exchange occurred in the deposition of Defendant's expert, Peter Rich:

Q. Do you have any evidence at all of any dumping of hazardous substances at the site after 1982?

A. No.

Paper 77, Ex. 16 at 202 (lines 10-13).

contrary--i.e., that any disposal occurred after 1982. Cf. *Sherwin-Williams*, 125 F.Supp.2d at 745 (current landowner not entitled to defense where, during its ownership, it "was subject to numerous state enforcement efforts in which the State documented spills and leaks," and releases of hazardous substances occurred at site).

*b. Due Care and Necessary Precautions*

To assert the innocent landowner defense, CERCLA requires that upon discovery of a hazardous substance or knowledge of possible contamination through the conduct of a third party, a landowner "should exercise due care, and take appropriate precautions, in order to insure that no pollution occurs." *HRW Sys.*, 823 F.Supp. at 349. In particular, the statute provides that Plaintiff, as landowner of the CSG Facility, must exercise "due care with respect to the hazardous substance concerned. . . in light of all relevant facts and circumstances." 42 U.S.C. § 9607(b)(3). Although CERCLA does not define this requirement, "due care" suggests that a landowner must show that it "took all precautions with respect to the particular waste that a similarly situated reasonable and prudent person would have taken" under similar circumstances--specifically, those measures "necessary to protect the public from a health or environmental

threat." *State of N.Y. v. Lashins Arcade Co.*, 91 F.3d 353, 361 (2d Cir. 1996) (quoting CERCLA legislative history).<sup>15</sup>

Plaintiff contends that it exercised sufficient due care once it learned of the hazardous pigment waste presence at the CSG Facility in 1986, following the MDE investigation. The record is uncontroverted that, following the various MDE and EPA site investigations, Plaintiff consistently complied with the orders and recommendations of both agencies. As discussed in detail, *supra*, Plaintiff hired Gannett Fleming to conduct further investigations of the property and installed the security fence around a lagoon there. Indeed, the due care requirement arises only upon discovery of the hazardous substances or knowledge of such possible pollution, as CERCLA "clearly does not contemplate a party taking due care and precautions *prior to*" these occurrences. *HRW Sys.*, 823 F.Supp. at 349 (emphasis in original).<sup>16</sup>

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<sup>15</sup> The Second Circuit noted its agreement with the *HRW Sys.* decision, regarding the due care requirement, which it cited with approval. See *Lashins Arcade*, 91 F.3d at 361.

<sup>16</sup> Plaintiff's conduct here is in contrast to that of the defendant in *Westfarm Assoc.* In that case, the defendant failed to satisfy the due care element where "undisputed evidence at summary judgment" showed that, despite knowledge of contamination, it "took no precautions. . . against the foreseeable result that hazardous substances. . . would be discharged into the sewer." *Westfarm Assoc.*, 66 F.3d at 683.

Defendant does not appear to address the due care issue, instead arguing that Plaintiff failed to investigate the property sufficiently at the time of purchase. However, this argument forms part of the separate contractual relationship analysis, discussed *infra*, and therefore is irrelevant to this inquiry. See *id.* Defendant either conflates these issues or ignores the due care requirement entirely. In any event, Defendant has not offered any evidence to suggest that Plaintiff failed to exercise due care or to take the necessary precautions, with regard to the hazardous substances at issue--*i.e.*, the pigment waste containing chromium, lead and zinc. Accordingly, Plaintiff has demonstrated, as a matter of law, that it satisfied the due care requirement of the innocent landowner defense.

*c. Contractual Relationship and All Appropriate Inquiry*

The innocent landowner defense is not available if release of the hazardous substances by Defendant occurred in connection with a "contractual relationship, existing directly or indirectly," with Plaintiff. 42 U.S.C. § 9607(b)(3). The term "contractual relationship," however, does not apply if Plaintiff can prove by a preponderance of the evidence that: (1) it acquired the property after disposal of the hazardous substances at issue and (2) at the time it acquired the CSG

Facility, it "did not know and had no reason to know" that these hazardous substances were "disposed of on, in, or at the facility." 42 U.S.C. § 9601(35)(A)(i).<sup>17</sup> Plaintiff already has shown, *supra*, that it acquired the property after disposal of the hazardous pigment waste there.

To establish it had "no reason to know," Plaintiff must show that, at the time of acquisition, it undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice." 42 U.S.C. § 9601(35)(B).<sup>18</sup> The proper standards for the court to apply in this analysis "must be those which were in effect at the time of the purchase" in 1982. *HRW Sys.*, 823 F.Supp. at 348. Indeed, the use of any other measure "would hold landowners to the impossibly high standard of complying with

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<sup>17</sup> Although the statute uses the term "defendant" in CERCLA § 107(b)(3), the same analysis applies here to Plaintiff, as the party asserting the defense. See *HRW Sys.*, 823 F.Supp. at 347 n.23.

<sup>18</sup> In evaluating the sufficiency of the inquiry, the court shall consider "[1] any specialized knowledge or experience on the part of the [plaintiff], [2] the relationship of the purchase price to the value of the property if uncontaminated, [3] commonly known or reasonably ascertainable information about the property, [4] the obviousness of the presence or likely presence of contamination at the property, and [5] the ability to detect such contamination by appropriate inspection." 42 U.S.C. § 9601(35)(B).

current perceptions of appropriateness in an area where perceptions change quickly." *Id.*

(1) *Retroactivity*

In December 2001, Congress passed the Small Business Relief and Brownfields Revitalization Act (Act or Brownfields Amendments), which imposed new, additional elements on the innocent landowner defense and defined in greater detail what constitutes "all appropriate inquiry." See Pub.L. 107-118, 115 Stat. 2356 (2001).<sup>19</sup> The Act altered the innocent landowner defense in four important ways. First, a landowner now must show that it has provided "full cooperation, assistance, and facility access to the persons that are authorized to conduct response actions at the facility," which includes permitting access to the facility for installing, operating and maintaining remediation systems. 42 U.S.C. § 9601(35)(A). Second, the Act changed the "all appropriate inquiry" standard from one that must be "consistent with good commercial or customary practice" to one that must be "in accordance with generally accepted good commercial and customary standards and practices." 42 U.S.C. § 9601(35)(B)(i)(I). Third, the Act established extensive criteria for the EPA to include in regulations for determining

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<sup>19</sup> President Bush signed the Act into law in January 2002.

whether a landowner sufficiently has made "all appropriate inquiries." See 42 U.S.C. § 9601(35)(B)(iii).<sup>20</sup> Fourth, a landowner now must demonstrate that it "took reasonable steps" to stop any continuing release, prevent any threatened future release, and prevent or limit exposure to any previously released hazardous substance. 42 U.S.C. § 9601(35)(B)(i)(II)(aa)-(cc).

Plaintiff argues that the initial version of the innocent landowner defense should apply in this case because the Brownfields Amendments to the defense impose an "impermissible" retroactive application. Paper 90 at 33. Defendant does not challenge or even address this argument. Nevertheless, a discussion of the issue is appropriate to determine the applicable legal standard that Plaintiff must satisfy to assert the innocent landowner defense.

The Supreme Court has recognized a "traditional presumption" against retroactive legislation because of "the unfairness of imposing new burdens on persons after the fact." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 270, 280 (1994) (noting that

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<sup>20</sup> Until promulgation of permanent regulations, the Act adopted as interim standards, for property purchased before May 31, 1997 (like the CSG Facility), the same factors as those enumerated in n.16, *supra*. See 42 U.S.C. § 9601(35)(B)(iv)(aa)-(ee).

"settled expectations should not be lightly disrupted"). Because of the axiomatic "principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place," courts should adhere to this presumption "unless Congress has clearly manifested its intent to the contrary." *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946 (1997) (internal quotations omitted).

When a pending case involves a federal statute enacted after the underlying events in the lawsuit, as here, the court first must "determine whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280. If the statute contains no such directive on its "temporal reach," *Martin v. Hadix*, 527 U.S. 343, 352 (1999), the court then must determine "whether the new statute would have retroactive effect." *Landgraf*, 511 U.S. at 280. The test of whether a statute operates retroactively is "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70. Where such a retroactive operation would result, the presumption against retroactivity instructs that the new statute "does not govern absent clear congressional intent favoring such a result." *Id.* at 280. *See also Tasios v. Reno*, 204 F.3d 544, 549 (4<sup>th</sup> Cir. 2000) (absent such intent, "presumption against statutory retroactivity is not rebutted").

Nothing in the Brownfields Amendments "evidences a clear intent by Congress that [they] be applied retroactively" to the innocent landowner defense, "and no one suggests otherwise." *Hughes Aircraft Co.*, 520 U.S. at 946. As Plaintiff aptly points out, the significant events in this case occurred when the initial version of the innocent landowner defense was in place and long before the Brownfields Amendments took effect in 2002: the first MDE environmental investigation at the CSG Facility in 1986; the EPA investigation in 1987; and the subsequent investigation and orders issued by MDE in 2000.

The Brownfields Amendments have retroactive effect because they impose additional substantive requirements for use of the innocent landowner defense. They unquestionably attach "new legal consequences" to events that occurred before their enactment by "alter[ing] the legal standards that are applied in reviewing the merits of [Plaintiff's] claims." *Khattak v. Ashcroft*, 332 F.3d 250, 253 (4<sup>th</sup> Cir.), *cert. denied*, 124 S.Ct. 833 (2003).<sup>21</sup> Prior to 2002, a party asserting the innocent landowner defense had to satisfy the initial "all appropriate inquiry" standard, discussed *supra*. If applied here, "the legal

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<sup>21</sup> Indeed, Congress has noted that all of "[t]hese requirements are in addition to the due care requirement of section 107(b)(3)." S. Rep. No. 107-2, at 14 (2001), *reprinted in* 2001 WL 254419, \* 14.

effect" of the Brownfields Amendments "would be to deprive [Plaintiff] of that defense," which was in effect at the time of the MDE and EPA investigations. *Hughes Aircraft Co.*, 520 U.S. at 951-52. Accordingly, the initial version of the innocent landowner defense is the appropriate standard to apply in this case, and the court will evaluate Plaintiff's claimed defense under that standard.<sup>22</sup>

(2) *All Appropriate Inquiry of Plaintiff*

This analysis begins with whether Plaintiff knew or had reason to know of the disposal of the hazardous substances at

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<sup>22</sup> This conclusion is in accord with apparently the only other court to have considered the effect of the Brownfields Amendments on the innocent landowner defense. In that case, the court held that Congress did not intend to make the Brownfields Amendments retroactive:

[I]f the Brownfields Amendments to the innocent landowner defense were applied to this case, it would have retroactive effect by imposing new substantive obligations on Lombardi Realty years after [the Rhode Island Department of Environmental Management] and the EPA's investigation into contamination at the Site began. Because of this retroactive impact and the lack of clear congressional intent favoring such a result, this Court concludes that the innocent landowner defense, as it existed at the time the underlying events in this case occurred, is the appropriate standard to be applied in this case.

*U.S. v. Domenic Lombardi Realty, Inc.*, 290 F.Supp.2d 198, 210 (D.R.I. 2003).

the CSG Facility when it acquired the property in 1982.<sup>23</sup> The court must examine whether Plaintiff conducted "all appropriate inquiry" into the property, consistent with good commercial practice at that time.<sup>24</sup> The CSG Facility is situated on less than 30 acres on a property that contains nearly 800 acres. See Paper 77, Ex. 15 at ¶ 29.

As evidence, Plaintiff has produced deposition excerpts of Caleb Gould, who stated that Plaintiff did "everything that was considered proper commercial practices of the time in acquiring large real [e]state holdings." Paper 77, Ex. 2 at 29 (lines 13-16). In particular, Gould testified that, prior to acquiring the CSG Facility and the entire property where it is located, Plaintiff's principals conducted and reviewed, *inter alia*, inventories of the property, geological surveys, topographic maps, county planning documents, transportation plans, aerial photographs, and leases and titles. See *id.* at 28-29.<sup>25</sup> Plaintiff also flew over the property, drove around the property

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<sup>23</sup> Plaintiff purchased the property and took title in late 1981.

<sup>24</sup> Defendant has briefed its arguments on the innocent landowner defense based on the Brownfields Amendments version. For the reasons articulated, *supra*, this version does not apply here and the court will disregard any such arguments pertaining to it.

<sup>25</sup> Plaintiff performed these tasks both personally and through the use of consultants and specialists. See *id.*

and walked over the property. See *id.* Plaintiff states that, despite these measures, it "obtained no actual knowledge that hazardous substances were present at the site." Paper 77 at 30.

Moreover, Plaintiff's expert, Fred Hart, a licensed professional engineer, testified that in 1981-1982 "[t]here was no requirement to conduct. . . a environmental audit or environmental assessment by a purchaser. . . . it was not the practice nor the duty to go out and conduct a pre-purchase investigation." *Id.*, Ex. 17 at 48 (lines 7-9), 100 (lines 14-15).<sup>26</sup> Hart is qualified to testify about this matter. He directed the study for the EPA that developed the manual in 1980 for the investigation of abandoned waste sites, as well as the study that developed the anticipated response costs for contaminated sites required by the passage of CERCLA in 1980; he

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<sup>26</sup> Defendant makes much of the fact that "[c]uriously, Hart testified to the exact opposite opinion" in another case. Paper 88 at 19. In fact, Hart testified here, he "did not offer that opinion" about an investigation requirement, but rather he opined that the party there should have known about the contamination because "[t]here were documents that indicated that they knew." Paper 90, Ex. 9 at 27 (lines 13-14), 28 (line 15). Indeed, as the court noted in the other case: Hart testified that, in his opinion, the party "knew or should have known at the time it purchased the property that there existed environmental problems with the Site that would require remediation," based on "various documents which he believed [the party] should have been aware of." *Interfaith Comm'y Org. v. Honeywell Int'l, Inc.*, 263 F.Supp.2d 796, 811-12 (D.N.J. 2003). Thus, when read in context, there is no material inconsistency in Hart's position.

also led the field investigation between the EPA and its contractor, which examined contaminated sites throughout the country between 1980 and 1982, the time period in question here. See *id.*, Ex. 15 at ¶¶ 5-6. Hart testified that this manual, published when Plaintiff acquired the property, did not contain any recommendation or requirement for conducting site investigations. See *id.* at 36 (lines 13-18).<sup>27</sup>

To refute Plaintiff on the "all appropriate inquiry" issue, Defendant submits and relies upon evidence provided by its expert, Peter Rich, also a licensed professional engineer. Rich testified that Plaintiff had and ignored the duty to perform an environmental evaluation in 1981 before acquiring the property. Plaintiff contends that Rich's opinion on this issue should be excluded because it constitutes impermissible *ipse dixit* expert evidence. The court agrees.

Under Federal Rule of Evidence 702, the district court has "a special obligation . . . to ensure that any and all scientific testimony . . . is not only relevant, but reliable."

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<sup>27</sup> Defendant points out that the *Interfaith* court "was not impressed" with Hart as a witness, finding his testimony "unpersuasive," and therefore accorded his testimony "little weight." *Interfaith Comm'y Org.*, 263 F.Supp.2d at 812, 856 n.14. That evaluation is of no moment in the instant case for several reasons. Most importantly, this court is, at present, determining whether there is a dispute of material fact; not weighing evidence as a fact finder.

*Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 147 (1999) (quoting *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993)).<sup>28</sup> To be considered reliable, an expert opinion "must be based on scientific, technical, or other specialized knowledge and not on belief or speculation, and inferences must be derived using scientific or other valid methods." *Oglesby v. Gen. Motors Corp.*, 190 F.3d 244, 250 (4<sup>th</sup> Cir. 1999) (emphasis in original) (citing *Daubert*, 509 U.S. at 592-93). Indeed, the Supreme Court has made clear that "nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert." *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997) ("A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered"). The district court enjoys "broad latitude" in

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<sup>28</sup> Federal Rule of Evidence 702 provides:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

determining the reliability and admissibility of expert testimony, and its determination receives considerable deference. *Kumho Tire Co.*, 526 U.S. at 142 (citing *Joiner*, 522 U.S. at 143); see also *Oglesby*, 190 F.3d at 250.

In his deposition, Rich admits that, on the issue of consistency with good commercial practice in 1981-1982, he "didn't research if there were documents available stating what the actual state of practice was at that time." Paper 77, Ex. 16 at 201 (lines 2-4).<sup>29</sup> Instead, in concluding that a duty to investigate property existed at the time, Rich resorts to such unsupported assertions as this: "Any person who developed a sand and gravel min[e] should have known that a possible use of it was for waste disposal by that time because many of them were being used for waste disposal." Paper 88, Ex. 5 at 18 (lines 10-13). Rich further asserts without any supporting evidence: "[B]y 1981 the environmental dumping and environmental contamination was pretty public. It was already well within the public's mind set. There was a lot of concern about it by then." *Id.* at 185 (lines 10-13). When asked the basis for that

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<sup>29</sup> With regard to research he conducted as a basis for his opinions, Rich states that he hadn't "done anything other than review of the EPA web site." *Id.* at 186 (lines 18-19), 190 (line 14). This stands in stark contrast to Plaintiff's expert Hart, who reviewed nearly 60 documents (Paper 77, Ex. 15 at App. D) and 40 periodicals (*Id.* at App. E) to help form his opinions.

statement, Rich acknowledged that he was in high school at the time but that "I remember what's going on, at least to some extent." *Id.* (lines 16-17).

To ensure reliability and relevancy of expert testimony, an expert must "employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field." *Kumho Tire Co.*, 526 U.S. 137 at 152. The report and deposition testimony of Rich--rife with unsupported conclusions and not grounded in any substantive research (and upon which Defendant significantly relies)--falls well short of this requisite level.

In sum, Rich's testimony "amounted to a wholly conclusory finding based upon his subjective beliefs rather than any valid scientific method." *Cooper v. Smith & Nephew, Inc.*, 259 F.3d 194, 200 (4<sup>th</sup> Cir. 2001). Where an expert opinion "appears to be based more on supposition than science," as here, the court is within its discretion to exclude that evidence. *O'Neill v. Windshire-Copeland Assoc.*, 372 F.3d 281, 285 (4<sup>th</sup> Cir. 2004); see also *Cooper*, 259 F.3d at 203 (district court properly excluded evidence where expert's "insufficient" methodology rendered opinion "little more than speculation").<sup>30</sup> Rich's opinions,

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<sup>30</sup> Although Rich, as a licensed professional engineer, may  
(continued...)

rendered both in his report and deposition testimony, are unsupported and unreliable. Accordingly, the court will exclude these opinions as *ipse dixit* evidence. See *Cavallo v. Star Enter.*, 100 F.3d 1150, 1159 (4<sup>th</sup> Cir. 1996) (excluding evidence on summary judgment motion where opinions were "based largely on hypothesis and speculation"), *cert. denied*, 522 U.S. 1044 (1998).<sup>31</sup> That evidence will play no part in determining whether Plaintiff conducted a sufficiently appropriate inquiry, so as to entitle it to use the innocent landowner defense.

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(...continued)

be qualified to testify on certain matters under FRE 702, "qualification to testify as an expert also requires that the area of the witness's competence matches the subject matter of the witness's testimony." 29 Charles A. Wright and Victor J. Gold, *Federal Practice & Procedure* § 6265 (1997). Based on the foregoing discussion, Rich is not qualified to testify about the particular subject of what constituted good commercial practice at the time Plaintiff acquired the CSG Facility and, therefore, whether Plaintiff satisfied that standard. See *Shreve v. Sears, Roebuck & Co.*, 166 F.Supp.2d 378, 391 (D.Md. 2001) ("The fact that a proposed witness is an expert in one area, does not *ipso facto* qualify him to testify as an expert in all related areas") (citing *Oglesby*, 190 F.3d at 247). For the same reasons, the evidence of Third-Party Defendant Percontee's expert, Melvyn Kopstein--to the extent Defendant seeks to rely on such evidence--also will be excluded.

<sup>31</sup> Although on summary judgment the court typically resolves disputed issues of fact against the moving party, here Plaintiff, "the question of admissibility of expert testimony is not such an issue of fact." *Joiner*, 522 U.S. at 143 (question therefore "is reviewable under the abuse-of-discretion standard").

Defendant also contends that Plaintiff should have known about the hazardous substances at the CSG Facility because of "zoning documents in the possession of the Prince George's County Board of Zoning Appeals," which revealed that Mineral Pigments had disposed of the pigment waste on the property. Paper 88 at 24-25; Paper 94 at 8. Defendant argues that this information was readily ascertainable because the documents were "available for public review" at the time. Paper 88 at 25. However, Defendant provides no evidence to support this assertion.

The purported zoning records proffered by Defendant do not appear, on their face, to have been available to the public. The "records" consist primarily of correspondence between the Board of Zoning Appeals and counsel for Mineral Pigments; the documents include, *inter alia*, an "inter-office memorandum" of the Board. Paper 88, Ex. 7 at 000196. Plaintiff states that zoning appeal records were discovered in County files, in March 2002, by an MDE geologist, who gave them to Plaintiff. Defendant subsequently obtained the records only after it "filed a Public Information Act request." Paper 90 at 29 n.18. These occurrences, unchallenged by Defendant, further suggest that the records were not available publicly at the time Plaintiff acquired the CSG Facility. Moreover, Plaintiff's expert Hart

has reported that "it was not the accepted customary practice at the time to make inquiries to federal, state and local governmental agencies regarding the use and environmental regulatory history of a piece of property like this one." Paper 77, Ex. 15 at ¶ 32. Nor does Defendant contest this evidence with any properly supported evidence of its own.<sup>32</sup>

Instead, Defendant merely asserts, without more, that Plaintiff failed to conduct an appropriate inquiry because, had it done so, the review "would have revealed the presence of the lagoons and the landfill, and zoning records." Paper 88 at 28-29.<sup>33</sup> This argument rests upon an "imperfect syllogism constructed from unsupported suppositions" and thus is plainly insufficient to withstand summary judgment. *Oglesby*, 190 F.3d at 250. Plaintiff has presented uncontroverted evidence establishing all the elements necessary for it to assert the innocent landowner defense. Conversely, Defendant has failed to demonstrate any disputed issues of material fact. Accordingly,

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<sup>32</sup> Notably, Defendant's expert Rich concedes that he "didn't research that type of question." Paper 90, Ex. 16 at 199 (lines 8-9).

<sup>33</sup> Gould testified that Plaintiff did not know that a lagoon lay underneath a rubble fill at the CSG Facility because the lagoon "was 25 feet under rubble and dirt." Paper 90, Ex. 8 at 246 (lines 4-5). As discussed, *supra*, Defendant offers no properly supported evidence to show that Plaintiff had reason to know of the lagoon or, more generally, the presence of hazardous substances containing chromium, lead and zinc on the property.

the court will grant Plaintiff's motion for summary judgment as to full recovery of necessary response costs under CERCLA § 107.

### 3. Contribution Under CERCLA § 113(f)

The court previously held in this case that Plaintiff could pursue its claim for full recovery of necessary response costs under CERCLA § 107(a) "or, in the alternative, for contribution under CERCLA § 113(f)." Paper 84 at 4. The CERCLA contribution provision "must be used by parties who are themselves potentially responsible parties." *Pneumo Abex*, 142 F.3d at 776. Because it now has held that, as a matter of law, Plaintiff is an innocent landowner entitled to recovery under CERCLA § 107(a), *supra*, the court need not address the issue of contribution under CERCLA § 113(f).<sup>34</sup>

### 4. Declaratory Judgment

Plaintiff also seeks a declaratory judgment against Defendant for future response costs as are consistent with the NCP. Under CERCLA § 113(g)(2), "the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. §

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<sup>34</sup> Defendant has conceded its "shared responsibility" for the disposal of the hazardous pigment waste at the CSG Facility. Paper 94 at 1.

9613(g)(2). This statutory language makes explicit that "the entry of declaratory judgment as to liability is mandatory." *Dent*, 156 F.3d at 531 (internal quotation omitted); see also *Sherwin-Williams*, 125 F.Supp.2d at 753-54.

Thus, under CERCLA § 113(g)(2), the court "is required to enter judgment as to liability for the site," in order to fulfill the statutory purpose that such judgment "have a preclusive effect as to liability on all successive actions." *Dent*, 156 F.3d at 532 (emphasis in original). Moreover, "the fact that future costs are somewhat speculative is no bar to a present declaration of liability." *Id.* (internal quotations omitted). Because it has determined that Defendant is liable to Plaintiff for the full amount of necessary response costs, Plaintiff is entitled to--and the court must enter--a declaratory judgment against Defendant for future response costs. See *Sherwin-Williams*, 125 F.Supp.2d at 754.

#### ***B. Defendant's Motion for Summary Judgment***

Based on the foregoing discussion granting Plaintiff's motion for summary judgment, it follows that Defendant's motion for summary judgment must be denied. Defendant has not shown that it is entitled to judgment as a matter of law.

#### **IV. Conclusion**



