



IN THE MATTER OF:

**Scorpio Recycling Superfund Site
To Baja, Puerto Rico**

CERCLA LIEN PROCEEDING

RECOMMENDED DECISION

Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (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 States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. 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).

By letter dated February 5, 2002, Jose V. Lanza Ramirez, President of Scorpio Recycling, Inc. (Scorpio), was notified that the United States Environmental Protection Agency (EPA) intends to perfect a lien upon property located at the southern end of Acuna Street, in the municipality of To Baja, Puerto Rico (the Property). Mr. Lanza, as President of the company owning the property, exercised his right to request a meeting with a neutral EPA official to determine whether or not EPA has a reasonable basis upon which to perfect the lien.

Such proceedings are conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993 (*Supplemental Guidance*). As Regional Judicial Officer for EPA's Region 2, I am the neutral EPA official designated to conduct this proceeding and to make a written recommendation to the Regional Counsel (the Region 2 official authorized to file liens) as to whether EPA has a reasonable basis to perfect the lien.

As the neutral Agency official, I have repeatedly attempted to contact Mr. Lanza to schedule a conference, to be held either in person or , as he requested “via conference call,” in this matter. After repeated attempts to contact Mr. Lanza by telephone, I sent a letter dated April 15, 2002 by both facsimile and First Class mail to Scorpio’s last known address, requesting that he contact me at his earliest convenience to schedule the hearing which he had requested.

When I received no written or telephonic response to the April 15th letter, I sent a letter dated May 1, 2002 by both facsimile and Express Mail. In that letter, I requested that Mr. Lanza contact me by May 9, 2002 to schedule the hearing, or, in the alternative, to indicate that he was no longer interested in a hearing in this matter.

However, the Express Mail receipt indicated that Mr. Lanza did not receive this letter until the morning of May 9th. In order to assure that Scorpio was given due process in this matter (see the section entitled **Due Process**, below), I sent a third letter dated May 31, 2002 to Mr. Lanza, by facsimile and Federal Express. In that letter, I requested that Mr. Lanza contact me by June 17, 2002. I also emphasized that a failure to contact me by that date would be “interpreted as an indication that you are no longer interested in a hearing” and that, in that case, “I will close the Lien Filing Record on June 17, 2002 and issue a recommended decision in this matter based on documents in the Lien Filing Record as of that date.” A copy of each letter mentioned herein, together with the relevant facsimile transmission records and Certificates of Service, has been added to the Lien Filing Record (LFR).¹ A copy of the Index to the LFR has been included as *Attachment A*, hereto.

It does appear that Mr. Lanza receives correspondence by both facsimile and mail, and can contact EPA when he chooses, but has declined to respond, either in writing or by telephone, regarding his CERCLA Lien dispute. In addition, Mr. Lanza has chosen to make no additional submissions to the LFR. Therefore, I am issuing this Recommended Decision based on the LFR as of June 17, 2002, which of course included Mr. Lanza’s February 14, 2002 response.

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

- 1) Was the property owner sent notice by certified mail of potential liability?
- 2) Is the property owned by a person who is potentially liable under CERCLA?
- 3) Is the property subject to or affected by a removal or remedial action?
- 4) Has the United States incurred costs with respect to a response action under CERCLA?

5) Does the record contain any other information which is sufficient to show that the lien should not be filed?

Due Process Requirements

While CERCLA does not provide for challenges to the imposition of a lien under Section 107(l), in accordance with the *Supplemental Guidance*, EPA affords property owners an opportunity to present evidence and to be heard when it files CERCLA lien notices. The *Supplemental Guidance* was issued by the Agency in response to the decision in Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991). Under Reardon, the minimum procedural requirements would be notice of an intention to file a lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed. Reardon at 1522; In the Matter of Mercury Refining Superfund Site, CERCLA Lien Recommended Decision (Region 2, June 11, 2002); In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

The Standard to be Applied

The “reasonable basis” standard applied here is that used in the *Supplemental Guidance*: “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.” *Supplemental Guidance* at page 7. 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 . . .” Id.

Discussion

In the February 14, 2002 letter, Scorpio requested, in addition to a hearing by conference call with a neutral EPA official, the following:

- a breakdown of the costs incurred by EPA and justification for these costs;
- an explanation of why property owned by Astur Metals Corp. should be used as a guarantee for EPA’s costs;
- the opportunity to negotiate a reasonable payment plan with EPA;
- a copy of the Lien Filing Record.

First, I note that Scorpio’s request for a copy of the LFR has been addressed by the fact that the LFR has been made accessible to both parties at both EPA’s Region 2 office and EPA’s Caribbean Environmental Protection Division office in Santurce, Puerto Rico. Mr. Lanza was informed of that fact in EPA’s letter, dated February 5, 2002, which notified Scorpio of the lien.²

In the February 14th letter, Scorpio also briefly challenged the lien on the grounds that “the notice of lien will have a chilling effect on all prospective buyers and/or financial institutions that provide (or have provided) financial assistance to Scorpio Recycling,” stating that “It is my intention to preserve the value of the land . . .”³

I must emphasize that the scope of my review of EPA’s proposal to file a notice of lien is limited to the inquiry as to the reasonableness of EPA’s belief that all the statutory elements for perfecting a lien have been satisfied. The only specific factors which Scorpio appears to be putting in issue by its February 14th letter is the ownership of the property by a potentially liable party (Factor 2, above), and whether EPA has in fact incurred costs with respect to a response action under CERCLA (Factor 4, above).

After reviewing the LFR, I find that the *Title Search Report*, LFR Document 1, shows that Scorpio is the owner of the property in question, upon which a significant portion of the Site is located. As stated on page 5 of the *EPA Action Memorandum* dated September 29, 2000, LFR Document 2, the facility at the Site initiated operations there in 1972 under the name of Astur Metals, Inc., but changed its name to Scorpio Recycling in 1988. Scorpio has not submitted any information to contradict the information presented in either the *Title Search Report* or the *EPA Action Memorandum*.

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. It is not disputed that Scorpio is a person (as defined in CERCLA § 101(21), 42 U.S.C. § 9601(21)) that owns a facility (as defined in CERCLA § 101(9), 42 U.S.C. § 9601(9)), at which there was a disposal (as defined in CERCLA § 101(29), 42 U.S.C. § 9601(29)). It appears that Scorpio, which currently owns the Site *and* owned the Site during the disposal of hazardous substances, is a potentially liable party. In any case, Scorpio has not challenged EPA’s position that it is a potentially liable party.⁴ Therefore, I conclude that the property upon which EPA proposes to perfect a lien is owned by a potentially liable party.

I believe that Scorpio’s request that EPA break down costs is adequately addressed by EPA’s *Superfund Cost Recovery Package and On-Line System (SCORPIOS) Report*, LFR Document 3, which sets forth a complete breakdown of the costs incurred by EPA through November 15, 2001. Additional costs have been incurred since that date, and will continue to be incurred.⁵

Scorpio also requests that EPA justify these costs. As stated in LFR Document 4, “[i]n response to the release and threatened release of hazardous substances at the site, EPA has spent public funds and anticipates spending additional public funds. These actions have been and will be taken by EPA pursuant to CERCLA.” I note that, throughout the LFR, EPA provides Scorpio with details regarding EPA’s documentation of the release and threatened releases at the Site, and the statutory basis for undertaking that response and holding responsible parties liable for monies

expended. EPA's actions have been carefully described and documented, and the necessity as well as the statutory authorization for the activities, have been established in Documents 2, 4, 5 and 6 of the LFR. Hence, I conclude that the United States has incurred costs with respect to a response action under CERCLA.

By emphasizing the negative effect that the imposition of the lien will have on the value of the property, Scorpio appears to be arguing that the record does contain other information sufficient to show that the lien notice should not be filed. Based on this position, Scorpio is also asking for an opportunity to fashion some sort of financial arrangement where clean up is completed by EPA without perfection of a lien by EPA. Rather, Scorpio requests "an opportunity to discuss and negotiate with EPA a payment schedule, after due consideration of the cost incurred by EPA." Scorpio believes that any other requirements on the part of EPA will work a financial hardship on the company, rendering it unable to sell and/or obtain other financing for the Site, and leaving it unable to pay for the response which EPA is undertaking, as that property will be "the basic source to satisfy the cost incurred thus far."⁶

Regardless of Scorpio's position that the value of the land will be diminished by the filing of the lien, to both Scorpio's and EPA's detriment, I must consider the underlying purposes of a CERCLA lien, which are to protect the United States' ability to recover public funds expended on the cleanup of contamination on the property and to avoid a windfall to the landowner. As discussed in the *Guidance*⁷ and other Recommended Decisions in CERCLA Lien Proceedings, some of which are cited below, as a matter of policy the Agency will consider perfecting a lien whenever settlement negotiations have not yet resulted in appropriate assurance that the United States will be able to recover the funds it has expended at the site. In the Matter of Mercury Refining Superfund Site, supra; In the Matter of Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (Region 2, February 14, 2002); In the Matter of The Asbestos Dump - Millington Site, CERCLA Lien Recommended Decision (Region 2, February May 16, 2001).

While the potential financial consequences to Scorpio of a lien filing are not relevant to the issue of whether EPA is reasonable in believing that such a lien should be filed, in this case, where the property owner has indicated that the property will be the major source of funds from which to reimburse EPA, the lien is particularly appropriate. As discussed in Recommended Decisions issued by Regional Judicial Officers in other Regions, where the property owners presented similar hardship arguments, those financial difficulties are of the same nature as those anticipated by EPA to warrant filing of a lien notice under EPA's applicable policy. In the Matter of CryoChem, Inc. EPA Docket No. III-93-003L, November 29, 1993; In the Matter of Harvey and Knotts Drum Site, EPA Docket No. III-93-001L, November 10, 1993. See also, In the Matter of Exact Anodizing Superfund Site, supra.

As set forth in the *Guidance*, at pages 3-4:

Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

- (1) the property is the chief or the substantial asset of the PRP;
- (2) the property has substantial monetary value;
- (3) there is a likelihood that the defendant owner may file for bankruptcy . . . ;
- (4) the value of the property will increase significantly as a result of the removal or remedial work; or
- (5) the PRP plans to sell the property.

Based on Scorpio's February 14th letter, the first and fifth factors may be considerations in this case.⁸ In addition, it is usually a fair assumption to state that the value of the Site will increase and the Site will become more marketable as a result of EPA's response action. This brings me to the second consideration addressed by EPA's lien filing policy, the prevention of windfalls to the property owner.

As quoted on page 4 of In the Matter of Iron Mountain Mine, Inc., *supra*: "A statutory lien would allow the Federal government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from cleanup and restoration activities." The RJO cites 131 Cong. Rec. S11580 (statement of Senator Stafford)(September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, page 40, indicating that the lien provision was intended to prevent unjust enrichment. See In the Matter of Exact Anodizing Superfund Site, supra; In the Matter of The Asbestos Dump - Millington Site, supra; In the Matter of Copley Square Plaza Site, Determination of Probable Cause, June 5, 1997.

To the extent that EPA's efforts will render the Site marketable and more valuable, perfecting a lien on the Site would best serve the purpose of preventing windfalls to the landowner, who in this case, will most likely realize an appreciated value on the Site from the efforts of EPA on that Site. In the Matter of Exact Anodizing Superfund Site, supra;

As I have emphasized throughout this decision, the scope of my review of EPA's proposal to file a notice of lien is limited to the inquiry as to the reasonableness of EPA's belief that all the statutory elements for perfecting a lien have been satisfied. The Regions are in accord that equitable considerations, such as hardship to the Property Owner, are not relevant to the issue of whether EPA is reasonable in believing that such a lien should be filed.

In a Region 1 case, the Property Owners argued that equitable considerations, including the tragic consequences imposition of the lien would have on the Property Owners, should preclude the filing of the lien. The Regional Judicial Officer noted that these types of assertions do not constitute “any other information which is sufficient to show that the lien notice should not be filed” under the *Supplemental Guidance*. In the Matter of Picollo Farm Superfund Site, CERCLA Lien Recommended Decision (Region 1, August 27, 1997).

I noted in the **Conclusion** of an earlier Region 2 Recommended Decision that consideration of, and the weight to be accorded, such arguments, is a matter of discretion within the prerogative of the Region’s management, and that the decision to actually file a lien remains within the Regional Counsel’s discretion. In the Matter of The Asbestos Dump - Millington Site, supra.

In another proceeding, the Regional Judicial Officer, responding to the Property Owner’s argument that it was unfair for EPA to impose a lien on the site for the total amount of costs incurred while it was allegedly not pursuing other PRP’s, simply noted that these types of arguments “go to the EPA’s exercise of enforcement discretion and will not be addressed in the probable cause determination.” In the Matter of Copley Square Plaza Site, supra at page 8.

In addition, the fact that Scorpio has offered to enter into a payment plan and draft a formal agreement “in which Scorpio could recognize the preeminence of EPA’s interest in the property as collateral” does not in any way diminish EPA’s legal authority to file a lien. In the Matter of Mercury Refining Superfund Site, supra; In the Matter of Exact Anodizing Superfund Site, supra; In the Matter of Iron Mountain Mine, Inc., supra.

The extent to which EPA will work out an arrangement with a property owner is within the discretion of EPA’s management. In the Matter of Mercury Refining Superfund Site, supra; In the Matter of Exact Anodizing Superfund Site, supra; In the Matter of Iron Mountain Mine, Inc., supra; In the Matter of Picollo Farm Superfund Site, supra. The record shows that EPA afforded Scorpio ample opportunity to undertake a remedial investigation and feasibility study (RI/FS) and initial response measures.⁹ As noted on page 4 of the *Administrative Order*, although Scorpio expressed a willingness to undertake a response action, it was not able to demonstrate the requisite financial capability.¹⁰

A further delay in filing a lien is not contemplated by either the statutes or the case law on CERCLA liens, especially in light of one purpose of a lien, discussed above, to ensure that there is property available to reimburse EPA for its unrecovered costs. In the Matter of Exact Anodizing Superfund Site, supra.

I conclude that the equitable considerations presented by Scorpio do not impact the reasonableness of EPA in seeking to perfect a lien on the Site.

Conclusion

I find that the LFR supports a determination that EPA has a reasonable basis to perfect a lien under Section 107(l) of CERCLA. Scorpio has not submitted any information that would rebut EPA's claim that it has a reasonable basis to perfect a lien. The issues raised by Scorpio do not reach the issue of the reasonable basis to file the lien, but address matters of discretion within the prerogative of Region 2's management. The decision to actually file a lien remains within the Regional Counsel's discretion.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien. This Recommended Decision does not compel the filing of the lien; it merely establishes that there is a reasonable basis for doing so. This Recommended Decision does not bar EPA or the property owner from raising any claims or defenses in later proceedings; it is not a binding determination of liability. The recommendation has no preclusive effect and shall not be given any deference or otherwise constitute evidence in subsequent proceedings.

Dated: July 2, 2002

/s/

HELEN S. FERRARA
Regional Judicial and Presiding Officer
U.S. EPA-Region II

1. April 15, 2002 letter - LFR Document 8; May 1, 2002 letter - LFR Document 9; May 31, 2002 letter - LFR Document 10.

2. LFR Document 6.

3. LFR Document 7.

4. LFR Document 4.

5. LFR Document 6.

6. LFR Document 7.

7. *Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12, issued September 22, 1987, Section IV.

8. LFR Document 7.

9. LFR Document 4.

10. LFR Document 5.