IN THE MATTER OF:

Mercury Refining Superfund Site
26 Railroad Avenue
Towns of Colonie and Guilderland
Albany County, New York **CERCLA LIEN PROCEEDING**

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 certain property in Albany County, New York owned by 26 Railroad Avenue, Inc. (26 Railroad), a New York corporation.

This proceeding, instituted at 26 Railroad's request, is being 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.

In accordance with the *Supplemental Guidance*, I held a telephonic meeting, with the following personnel participating: Kevin M. Young, Esq., Counsel to 26 Railroad; Leo Cohen, Chairman of the Board of Mercury Refining Company, Inc.; Sharon Kivowitz, Esq., Assistant Regional Counsel for EPA-Region 2; and, Thomas Taccone, Remedial Project Manager for EPA-Region 2. The meeting notes have been transcribed and added to the Lien Filing Record (LFR),[1] as required by the *Supplemental Guidance*. Post-meeting submissions filed by Counsel for EPA and for 26 Railroad, filed on March 26, 2002 and March 29, 2002, respectively, have also been added to the LFR.[2] A copy of the Index to the LFR has been included as *Attachment A*, hereto.

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 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).

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 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.

Factual Background

The Mercury Refining Superfund site (Site), located at 26 Railroad Avenue, which is in both the Towns of Colonie and Guilderland, Albany County, New York, consists of three legal parcels. The southernmost parcel (Parcel 1) is described in the Deed, dated February 27, 1987 (LFR Document 1b), which transferred title to this property from Mercury Refining Company, Inc. (Mereco) to 26 Railroad,[3] and is the subject of one proposed EPA lien. This property shall be referred to throughout this Recommended Decision as the "1987 property".

The center parcel (Parcel 2) and northernmost parcel (Parcel 3) of property is described in the Deed, dated January 13, 1983, transferring title to the property from Martin Corbit Associates, Inc. to 26 Railroad (LFR Document 1a). The property transferred in 1983 is divided into two parcels for tax purposes because the township line, separating Colonie from Guilderland, bisects the property,[4] but together form the property upon which EPA proposes to file a second lien. This property shall be referred to as the "1983 property."

The relevant history of the site is lengthy and complicated. Mereco operated a mercury reclamation business through 1998. Battery casings and other materials were discarded behind a furnace building through 1980; after 1980, these wastes were stored in drums on wooden pallets on paved areas.[5]

In the early 1980's, tests were conducted on the Site, which indicated the presence of wastes, high levels of PCBs in the soil, and mercury and other heavy metals in the soil, groundwater, surface water and sediments. The Site was placed on the National Priority List (NPL) in September of 1983, and the New York State Department of Environmental Conservation (NYSDEC) became the lead agency for enforcement at the Site. In 1985, Mereco and other parties entered in to a Consent Judgment under CERCLA with the State of New York. Pursuant to this Judgment, Mereco performed excavation and removal of contaminated soil and waste, sealed and capped other contaminated waste, and agreed to complete a fish monitoring program at a creek adjacent to the Site. Pursuant to this agreement, Mereco was granted a release of liability as set forth in the Consent Judgment.[6]

However, the release of hazardous substances into the soil, groundwater and surface water continued at and around the Site. Mereco and NYSDEC entered into an administrative Consent Order in June 1989 to address violations of a number of sections of the Environmental Conservation Law of the State of New York (ECL), requiring Mereco to abate unauthorized mercury discharges from the Site, fund a NYSDEC study, and perform a limited cleanup. Mereco failed to comply with this Order, and subsequent NYSDEC studies revealed mercury contamination.

A fire in September 1989 at the Site caused the additional release of hazardous substances. Another Consent Order under the ECL was issued by NYSDEC in 1993, requiring completion of all activities included in the 1989 Order, some of which have never been completed, as well as long-term monitoring of soil, groundwater and stream sediments, on- and off-Site, which also has never been completed.

A hazardous waste corrective action permit was issued by NYSDEC in 1996 to control the generation and storage of hazardous waste on-Site, and for investigating and remediation of on- and off-Site contamination. In addition, all unfinished work under the previous consent orders was subsumed into this permit, and outstanding RCRA violations, discovered in the course of 1994 and 1995 inspections, were resolved.[7]

Mereco sold some of its assets and leased its permitted storage area to Mercury Waste Solutions of New York, Inc (MWS-NY) in 1998, agreeing to stop all mercury processing at the facility. Subsequently, the retort ovens were removed and the furnace building was razed. A 1998 Consent Order entered into by Mereco and MWS-NY, which added the latter as a co-permitee, required the establishment of an escrow account by Mereco funded with money remaining from the 1998 sale to complete all corrective action required by the corrective action permit.[8]

In 1999, NYSDEC filed a complaint against Mereco, charging it with violations of RCRA, as well as failure to complete corrective action permit requirements. Later that year, NYSDEC requested that EPA take over the lead at the Site, completing the remediation under the Superfund program. EPA issued a Notice of Potential Liability and Request for Information dated May 16, 2000 to Mereco and 26 Railroad, notifying them of their liability as owner and operator of the Site and offering the companies the opportunity to complete the remedial investigation/feasibility study (RI/FS). Because Mereco did not have adequate funds to complete the necessary work, EPA undertook the RI/FS, giving a work assignment under the EPA Response Action Contract program to CDM Federal Programs Corporation to complete the RI/FS (See *Remedial Investigation/Feasibility Study Workplan*, LFR Document 4); the field work of the RI was completed in March 2002. EPA's goal is to complete the RI/FS and issue a record of decision by spring of 2003.[9]

As of July 13, 2001, as set forth in EPA's *Superfund Cost Recovery Package and On-Line System (SCORPIOS) Report* (LFR Document 2), EPA had incurred costs of over $400,000. Additional costs have been incurred since that date, and will continue to be incurred.[10]

Factors for Review

1) Notice of Potential Liability

There is no dispute that the property owner, 26 Railroad, and the operator, Mereco, were sent notice of potential liability, dated May 16, 2000, by certified mail, return receipt requested (Document 3 in the LFR).

2) Property Owned by Potentially Liable Party

There is no dispute that 26 Railroad has owned Parcel 1 of subject property since 1987; Mereco owned this property prior to that transfer. See *Deed*, Document 1b in the LFR. In addition, there is no dispute that Parcel 2 and Parcel 3 of the Site was owned by 26 Railroad since January of 1983. See *Deed*, Document 1a in the LFR.

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 26 Railroad 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)). Therefore, it appears on its face that 26 Railroad, which currently owns the Site *and* owned the Site during the disposal of hazardous substances, is a potentially liable party.

However, 26 Railroad takes the position that Mereco, the prior owner of Parcel 1 of the Site, as well as all its subsidiaries, including 26 Railroad, were released from liability pursuant to a Consent Judgment entered into with NYSDEC in 1985. 26 Railroad emphasizes that at the time the site was placed on the NPL, NYSDEC was the lead agency under CERCLA, and NYSDEC requested that Mereco investigate and remediate the Site. At that time, NYSDEC and EPA executed a Memorandum of Understanding regarding lead CERCLA enforcement at NPL sites, and pursuant to that agreement, EPA was copied on all technical correspondence and provided comments thereon. The court found that the remedial plan set forth in the 1985 Consent Judgment had been approved by both the State and EPA , was consistent with the National Contigency Plan (NCP) and fully abated any public nuisance arising from the Site. The Consent Judgment, according to 26 Railroad, provided Mereco with a complete release from liability. 26 Railroad alleges that Mereco expended in excess of one million dollars to complete the remedial activities under the 1985 Consent Judgment.

26 Railroad also emphasizes the fact that, before the sale of certain assets to MWS-NY, MWS-NY obtained a release of liability from New York State. To secure this release, Mereco placed $460,000 plus one third of gross rent payments paid by MWS-NY in escrow to complete the corrective action at the Site. As detailed in the *Historical Background Document*, accompanying 26 Railroad's March 29th Post Hearing Submission (LFR Document 11, Attachment A, pages 2-5), 26

Railroad believes that Mereco was conducting the work in accordance with its agreement with NYSDEC when EPA assumed responsibility for managing remediation at the Site, and Mereco was told to stop remedial work. 26 Railroad characterizes the NYSDEC filing of an administrative complaint as a result of confusion involving Mereco's RCRA Facility Investigation (RFI) workplan, claiming that Mereco had made numerous attempts to resolve the matter. 26 Railroad maintains that, in addition to long-term monitoring, deed restrictions and some soil removal, necessary corrective actions at the Site consisted of remediating the area underneath the Furnace Building. 26 Railroad had selected *in situ* stabilization as the corrective measure, with which it was willing to proceed when EPA took over the Site. EPA's RI/FS is estimated to cost over one million dollars.[11]

To summarize 26 Railroad's position, Mereco had completed the remedial work in accordance with the 1985 Consent Judgement, escrowed the money required by the 1998 release from liability of MWS-NY, completed all the necessary investigations required under the RCRA corrective action permit, and was prepared to implement the corrective measures. Therefore, 26 Railroad argues that it is not liable to EPA for additional compensation.[12]

As stated in 26 Railroad's March 29, 2002 Post Hearing Submission, Document 11 in the LFR, EPA is "bound either under the doctrine of collateral estoppel, res judicata and/or under an agency theory to the terms and condition of the Consent Judgment entered into between the State of New York and Mercury Refining Co., Inc ("Mereco") dated August 20, 1985."

26 Railroad also makes the argument, related to the one above, that the "South End" of the Site, which was purchased by Mereco in 1985, was fully remediated in 1985 pursuant to the 1985 Consent Judgment discussed above. Therefore, 26 Railroad argues, EPA is collaterally estopped by the findings in the Judgment that the remediation was consistent with the NCP and fully abated any nuisance. 26 Railroad concludes that EPA is required to demonstrate that there has been a release on this parcel subsequent to the 1985 remediation which gives rise to the need for additional investigation. 26 Railroad reasons that since EPA has not demonstrated a subsequent release, this parcel must be deleted from the lien. This argument will be considered together with the more general argument presented immediately above.[13]

EPA responds to 26 Railroad's position with a number of arguments. First of all, EPA states that the NYSDEC release does not release Mereco from all liability. EPA emphasizes that it was not a signatory to the Consent Judgment, not a party to that action, and never released Mereco from CERCLA liability.[14]

EPA includes a copy of the *CERCLA Enforcement Protocol*, governing EPA and NYSDEC relations regarding enforcement actions under CERCLA. The language cited from the protocol states that the reviewing agency (in this case, EPA) does not "waive its rights to take any necessary and appropriate response or enforcement action at a CERCLA site . . ." Based on this language, EPA

asserts that it "did not waive any of its rights to take necessary action against Mereco or its subsidiary, 26 Railroad, under CERCLA."[15]

EPA also quotes language contained in the Consent Judgment, which clearly states that the judgement does not create or affect the rights of any entities who are not parties to the action. Hence, EPA concludes that, as EPA was not a party to the Consent Judgment, it was not bound by the action of the State, and 26 Railroad is not relieved of its CERCLA liability to EPA.[16]

EPA also addresses the second part of this argument, that EPA is estopped from taking further action at the Site since Mereco fully remediated the South end of 26 Railroad Avenue pursuant to the 1985 Consent Judgment. EPA believes that the 26 Railroad's reliance on the doctrine of collateral estoppel is misplaced, as it only prohibits relitigation of an issue if there is a showing that the issue being decided in the second proceeding is identical to the issue decided in the prior proceeding and the party against whom collateral estoppel is being asserted had an opportunity to litigate the issue in the prior proceeding. EPA notes that the issues are not identical because, subsequent to the Consent Judgment, there were numerous additional releases, as set forth in the various subsequent consent orders issued by New York State. EPA also states that there is "still a threat to human health in the environment caused by the mercury at site," and refers to the substantial contamination under the old Furnace Building, ground water contamination, and the Mereco study of Patron Creek, which NYSDEC and EPA believe to have been flawed.[17] Therefore, EPA argues that even if it were bound by the 1985 Judgment, which it argues it is not, that Judgment does not preclude EPA from taking action to address post-1985 releases.[18]

I conclude that EPA, by virtue of the 1985 Consent Judgment, did not release 26 Railroad from CERCLA liability. I have noted that the Consent Judgement does describe EPA's review of the Approved Remedial Plan, EPA's participation in the settlement negotiations, and EPA's opportunity to submit comments and objections to the Judgment.[19] However, the fact remains that EPA was not a signatory to this Judgment, which specifically provides that the Judgment will not affect the rights of any persons or entities that are not parties to this action.

In addition, I can not agree with 26 Railroad that as a result of the relationship between NYSDEC, as the lead agency and EPA, as the reviewing agency, EPA was bound by the terms of the Judgment and the Approved Remedial Plan. As quoted by EPA, the protocol governing the relationship between the agencies regarding enforcement actions brought under CERCLA specifically preserves the reviewing agency's rights to take appropriate and necessary action at a CERCLA site regardless of whether the agency reviewed, or commented on, the Consent Judgment.

However, I need not rely on the fact that EPA was not legally bound by NYSDEC's release of Mereco under the terms of the 1985 Consent Judgment or the terms set forth in the protocol. I conclude that the Consent Judgment could not operate to release Mereco from liability to EPA for post-1985 releases. Responsible parties can not avoid liability for new releases based on the fact that

they entered into a prior Consent Judgment, because, as pointed out in EPA's Post Hearing Submission, LFR Document 10 at page 9, that would violate the "very spirit of CERCLA."

This point brings me to 26 Railroad's related argument that EPA is estopped from taking action at the Site because 26 Railroad fully remediated the South end of the Site pursuant to the 1985 Consent Judgment. I find that the doctrine of collateral estoppel, discussed above, is inapplicable to the current situation. As EPA points out, EPA is not seeking to relitigate the same issue as the issue litigated by the State in 1985. As emphasized by EPA, there have been numerous additional releases from the Site since entry of the 1985 Consent Judgment. Whether EPA was bound by that Consent Judgment or not, that Judgment does not preclude EPA from addressing the post-1985 releases, as 26 Railroad's liability for these releases does not affect its rights or interests as established under the Consent Judgment. In addition, EPA did not have an opportunity to litigate with respect to these new releases.

Therefore, I conclude that the 1985 Consent Judgment entered into by Mereco and NYSDEC is not binding on EPA and does not relieve either Mereco or 26 Railroad, as its wholly owned subsidiary, from liability for releases subsequent to the Judgment's execution. Therefore, despite 26 Railroad's arguments to the contrary, the property upon which EPA proposes to perfect liens are owned by a potentially liable party.

3) Property Subject to Removal or Remedial Action

It is undisputed that EPA has commenced, and continues to undertake, a removal or remedial action on the property, defined in CERCLA § 101(23) as inter alia, those actions necessary to "monitor, assess, and evaluate the release or threat of release of hazardous substances . .. .". EPA points out that it is currently performing a RI/FS at the Site in order to assess and evaluate the release of hazardous substances (See LFR Document 4).

However, 26 Railroad argues that the lien is too broad because it included the "northern portion" of the property, which is leased to the Albany Pallet Company. 26 Railroad argues that this property has been used exclusively for the production of wood pallets, and has never been subject to any remediation.[20]

EPA responds that, first of all, it is unclear exactly what part of the property 26 Railroad is referring to by the term "northern portion." EPA notes that the northernmost portion of the two properties upon which it is seeking to perfect a lien includes not only the portion of the property which has in fact been leased to the pallet company, but also that part of the property which was the site of a good deal of Mereco's operations, including the old furnace building. EPA argues that the lien attaches to the entire parcel owned by the potentially responsible party (PRP), and EPA is not required to place a lien only on that portion of the property affected by a cleanup. Moreover, EPA emphasizes that, while the northern end of the site may not have been used for the storage or treatment of hazardous substances, EPA has taken soil samples on this portion of the property, and therefore, that portion is

subject to a removal action. EPA cites CERCLA § 101(23), which as discussed above, defines a removal action to include action necessary to "monitor, assess, and evaluate the release or threat of release of hazardous substances."[21]

At this juncture it is helpful to review the parcels that comprise the Site. As discussed in the **Factual Background** section above, EPA seeks to perfect two separate liens on property owned by 26 Railroad. The first lien is on property which was transferred by deed dated February 27, 1987 (1987 property), and the second lien would be on the property transferred in 1983 (1983 property), and which included the "northern portion." As discussed above, the 1983 property included two legal parcels because the township line bisects the property, and therefore it has been divided along this line for tax purposes.

I note that tax division is not germane to the issue before me because the division of the 1983 property into the Guilderland parcel and the Colonie parcel does not separate property leased to the pallet company from the site of past Mereco operations. In other words, part of the old furnace building was located on each legal parcel comprising the 1983 property. Therefore, it appears that Mereco operations occurred on all three legal parcels, the one that comprises the 1987 property and the two that compromise the 1983 property. Therefore, it does not impact 26 Railroad's position if EPA treats the two parcels that were transferred in 1983, and upon which EPA is attempting to perfect one of two liens, as one parcel for the sake of this argument. I also note that 26 Railroad does not argue that the township dividing line is germane to its argument. Hence, I find that no issues are presented by EPA's treatment of these two legal parcels as one piece of property, as the entire area was transferred to 26 Railroad in 1983 by one deed, and separating the property along the town line does not in any way enhance 26 Railroad's argument.

I conclude, first, that the case law is consistent in supporting EPA's position that each lien rightfully attaches to the entire parcel owned by 26 Railroad upon which the lien is proposed, and that EPA is not required to place a lien just on that portion of a parcel directly affected by a removal or remedial action. United States v. 150 Acres of Land, 3 F. Supp. 2d 823 (N.D. Ohio 1997), *aff'd in relevant part* 204 F.3d 698 (6th C. 2000); In the Matter of The Asbestos Dump - Millington Site, CERCLA Lien Recommended Decision (Region 2, May 16, 2001).

26 Railroad's limited interpretation of the phrase "property subjected to or affected by a removal or remedial action" as it appears in Section 107(l) of CERCLA is not supported by either the legal precedent or the guidance. As stated in *Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12, issued September 22, 1987 (*Guidance*):[22] "The lien apples to all property owned by the PRP upon which response action has been taken, not just the portion of the property directly affected by cleanup activities." This *Guidance* cites H.R. 2817 (page 18), enacted as part of Superfund Amendments and Reauthorization Act of 1986 (SARA), which states that "the lien should apply to the title to the entire property on which the response action was taken."

Based on the authority and precedents cited above, I conclude that each of the two liens EPA is proposing to perfect, the lien on the 1987 property and the lien on the 1983 property, would rightfully attach to the entire piece of property transferred by, respectively, the 1987 and 1983 deeds included in the LFR as Documents 1b and 1a, because response actions were taken on at least a portion of each property.

I will also inquire as to whether EPA activities on the northernmost part of the 1983 property did in fact constitute a removal action, as that term is defined in CERCLA. In deciding this question, it is informative to evaluate other Recommended Decisions that considered the issue of whether a removal or remedial action has occurred on certain property. In the Matter of Maryland Sand Gravel and Stone Company, CERCLA Lien Recommended Decision (Region 3, June 22, 1999), the Regional Judicial Officer determined that a lien on two contiguous pieces of property was reasonable, although there was no contamination of the second parcel. In addition to the fact that the Property Owner had always treated both parcels, though legally separate, as a single site, there had been groundwater testing, as well as other monitoring and investigative activities, on the second site.

In In the Matter of Prestige Chemical Company Site, CERCLA Lien Recommended Decision (Region 4, March 26, 2002) , the Regional Judicial Officer found that the establishment of an EPA command center on a parcel where there was no removal of hazardous waste constitutes the type of removal activities contemplated by the Act, and therefore, that the total property, including that parcel, was subject to a remedial or removal action, and therefore, properly subject to a lien.

Similarly, in the case In the Matter of Bohaty Drum Site, CERCLA Lien Recommended Decision (Region 5, June 22, 1995), although drums of hazardous waste were physically removed from only one parcel of property, the Regional Judicial Officer found that all three parcels in question were subject or affected by a removal action based upon the fact that investigatory activities were conducted on each parcel. The Regional Judicial Officer in Region 5 cited Kelly v. E. I. DuPont DeNemours and Co., 17 F.3d.836 (6th Cir.1994), in relying upon the proposition that investigatory activity was included in the definition of removal as "such actions as may be necessary to . . . assess, and evaluate the release or threat of release." See also, United States v. 150 Acres of Land, supra, in which the court considered the claims filed by the Property Owners, including *inter alia* the Property Owners' challenge to the EPA proposed lien addressed in the Lien Proceeding of In the Matter of Bohaty Drum Site, discussed above.

The LFR shows that, in accordance with the RI/FS Work Plan (LFR Document 4), EPA has taken soil samples on the "northernmost portion" of the property that was leased to the pallet company. In accordance with the precedents discussed above, I conclude that such samples, taken in an effort to monitor, assess and evaluate the release or threat of release of hazardous substances at the Site, constituted a removal action in accordance with CERCLA.

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 another consideration addressed by EPA's lien filing policy. The 1983 property, which included both the "northernmost portion" (the leased area) as well as part of the site of past Mereco operations, may very well have been rendered unmarketable by the existence of contamination on a portion of that parcel. To the extent that EPA's efforts will ultimately render the entire 1983 property marketable and more valuable, the entire parcel has been "affected" by the removal; where the value of the whole parcel has been enhanced by the removal and remediation, it is reasonable to subject that entire parcel to a lien. Perfecting a lien on the Site would best serve one of the purposes of the lien provision, which is to prevent windfalls to the landowner, who in this case, may realize an appreciated value on the entire parcel from the efforts of EPA on a portion of that parcel.

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 Regional Judicial Officer 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. In the Matter of Copley Square Plaza Site, CERCLA Lien Recommended Decision (Region 5, June 5, 1997).

In its January 7, 2002 letter, 26 Railroad's attorney argues briefly that the property located at 30 Railroad Avenue was purchased after the 1985 remediation, was not used for storage of hazardous wastes, and that, therefore, there is no basis for EPA's lien on this separate parcel. A review of the record indicates that EPA has not filed a Notice of Federal Lien on this property and therefore, I make no further inquiries or recommendations regarding this property.

I find that the entire Site was in fact subject to or affected by a removal or remedial action for purposes of Section 107(l) of CERCLA, including the three legal parcels of property which together, form the two separate pieces of property (the 1987 property and the 1983 property) on which EPA intends to perfect its liens.

4) United States Incurred Costs

There is no dispute that the United States incurred costs. As of July 13, 2001, as set forth in EPA's *SCORPIOS Report* (LFR Document 2), EPA had incurred costs of over $400,000. Additional costs have been incurred since that date, and will continue to be incurred.[23]

As stated in the *Guidance*, the statute does not require that an exact sum of costs be specified as a prerequisite to perfection of a lien, especially since the lien includes the cost of ongoing response work. As noted in one Recommended Decision, "it was anticipated that CERCLA liens would often

be filed early in the history of a response action, at a point where EPA would not know the full cost of its response action." In the Matter of Iron Mountain Mine, Inc., supra at 8.

5) Other Information Showing Lien Should Not Be Filed

26 Railroad presents a number of additional arguments in support of its position that EPA does not have a reasonable basis upon which to perfect liens against its property. First of all, I must emphasize that these allegations do not have any bearing on the reasonableness of EPA's belief that all the statutory elements for perfecting a lien have been satisfied. 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 this inquiry. However, in an effort to provide the parties with as much information as possible, I will briefly address each argument set forth by 26 Railroad.

Constitutionality

In its January 10, 2002 letter to EPA,[24] 26 Railroad argues that the process adopted by EPA to address the court's decision in Paul V. Reardon v. US, 947 F.2d 1509 (1st Cir. 1991) is inadequate to correct the constitutional deficiency of the CERCLA provision. As stated above in the section entitled ***Due Process Requirements***, I believe that the *Supplemental Guidance*, which requires that the property owner be provided with a notice of intention to file a lien and an opportunity to be heard, through the submission of documentation and/or through a hearing before a neutral EPA official, complies with the procedural requirements set forth in the Reardon case. See In the Matter of Iron Mountain Mine, Inc., supra.

As noted in EPA's March 26th submission, the constitutionality of EPA's procedures under the *Supplemental Guidance* have withstood challenge. In United States v. 150 Acres of Land, supra, the court upheld the lower court's decision that the Property Owners appearing before the Region 5 Regional Judicial Office in the Lien Proceeding, In the Matter of Bohaty Drum Site, supra, received sufficient due process. As in the case before me, the Property Owners were provided with notice of intention to perfect the lien, an informal hearing before a neutral EPA official, and the opportunity to submit information as to whether EPA had a reasonable basis to perfect a lien.

There are a number of regulatory safeguards in place to ensure the Regional Judicial Officer's neutrality. First, as set forth in 40 C.F.R. § 22.4(b), the Regional Judicial Officer should not be employed by either the enforcement division or by the division directly associated with the type of violation in issue at the proceeding. In addition, 40 C.F.R. § 22.4(b) mandates that the Regional Judicial Officer should not have performed prosecutorial or investigative functions associated with any hearing in which he or she is Regional Judicial Officer, or with any factually related hearing.

As the Regional Judicial Officer in this case, I can assure the parties that these safeguards have been met in this instance. I do not work for the Regional branch responsible for proposing the filing of

this lien, the Office of Regional Counsel's New York Caribbean Superfund Branch. In addition, I have not performed prosecutorial or investigative functions related to the Site. I find that the procedures which have been implemented in this case, which comply with the guidelines set forth the in the *Supplemental Guidance* as well as the applicable regulations, have been found to comply with the due process requirements set forth in Reardon. Therefore, I conclude that the lien filing procedures followed by EPA are constitutional.

Capacity Assurance Requirements

Another argument which 26 Railroad presents is that EPA is barred from spending Superfund money in the State of New York under certain CERCLA provisions, and, as a result, EPA can not file a lien against 26 Railroad's property to recover costs spent at the Site. 26 Railroad bases its position on CERCLA §§ 104(c)(3) and (9), 42 U.S.C. §§ 9604(c)(3) and (9) and related regulations, which require that, in order for EPA to spend Federal Superfund dollars in New York State, New York must enter into a cooperative agreement with EPA, certifying in that agreement that New York either has adequate capacity to manage the hazardous waste generated within the state or has interstate compacts with other states to provide such capacity.[25]

26 Railroad points out that NYSDEC issued its Capacity Assurance Plan in October 1989, updating it in 1994, but that plan does not include the 2.3 million cubic yards of sediments associated with the proposed dredging of the Hudson River. 26 Railroad believes that New York State is generating far more waste than the state has the capacity to manage, and, as a result, that NYSDEC can not certify that it has adequate disposal capacity. Therefore, 26 Railroad concludes that, without capacity assurances, EPA can not finance CERCLA remedial actions in New York.[26]

First of all, as noted briefly in the introduction in this section, this argument is not related to the inquiry at hand, the reasonableness of EPA in believing that the statutory elements for perfecting a lien have been satisfied. Secondly, the "capacity assurance requirements" only bar EPA from spending Superfund money to finance remedial actions if the state can not assure capacity. As pointed out in EPA's March 26th submission, in this case, EPA is currently funding an RI/FS, which constitutes a removal action and not a remedial action under CERCLA.[27] Therefore, I conclude that this argument does not present "other information showing that the lien should not be filed."

Small Business Liability Relief and Brownfields Revitalization Act of 2002

In its January 10, 2002 submission, 26 Railroad states

> We are also evaluating HR2869 (Title 1 - - Small Business Liability Protection; Title II - - Brownsville Revitalization and Environmental Restoration) which passed both Houses of Congress and is awaiting signature by the President to determine the impact of that legislation on

> EPA's ability to issue this lien. We reserve the right to supplement these objections if and when HR2869 is signed by the President and we determine that it impacts the ability of EPA to issue a lien in the matter.[28]

26 Railroad does not submit any additional information to supplement this initial statement, and made no mention of this issue during the hearing. Therefore, it has not set forth its determination as to how this statute impacts the reasonableness of EPA in filing liens on subject property.

EPA notes in its March 26th submission that the statute does not apply to NPL sites, and that the small business provisions do not relate to owners and operators of sites.[29]

I conclude, based upon the information which I have been given, that 26 Railroad has not shown that subject Act has any impact whatsoever on whether EPA has a reasonable basis to file a lien at this Site.

Equitable Considerations

26 Railroad's final argument, which was carried through to its March 29th submission, is that "given all the circumstances and equities of this case, the Owner also believes that equity considerations mandate a determination that EPA does not have a reasonable basis to file the lien."[30] In support of its position that EPA should exercise its discretion not to file a lien, 26 Railroad submitted the aforementioned binder entitled *Historical Background Document* together with Exhibits thereto, as part of its Post Hearing Submission.[31] In addition, 26 Railroad's attorney addressed this argument during the March 12th teleconference.

Mr. Young emphasizes that the company, in 1985, did "not run away from this liability," and put a great deal of money into remediation.[32] Subsequently, the owner of the company invested a great deal of his own money back into the company to modernize the facility; money from the sale of the property to MWS-NY was put in escrow for the ongoing cleanup.[33] As discussed previously, 26 Railroad believes that at the time that EPA assumed the lead at the Site, the Site required long-term groundwater monitoring, deed restrictions, soil removal and corrective action consisting of remediating the area underneath the Furnace Building. Mereco had done the necessary studies, prepared a remedial workplan, and was in the process of conducting a pilot test. 26 Railroad argues that NYSDEC has requested that all this work be placed on hold, and has refused to comment on the pilot test protocol. 26 Railroad also refers to Mereco's frustrated attempts to clear up the confusion resulting in the NYSDEC 1999 complaint. Finally, 26 Railroad claims that the mercury levels in and around the Site are now acceptable.[34]

Regardless of 26 Railroad's past cooperation and expenditure of money on the 1985 remediation and subsequent investigations and cleanups, 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*[35] 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 Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (Region 2, February 14, 2002); In the Matter of The Asbestos Dump - Millington Site, supra.

In a Region 1 case, the Property Owners argued that equitable considerations, including the fact that there were other parties who contaminated the site who had not been fined or paid cleanup costs and 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 concluded in an earlier CERCLA Lien Recommended Decision that issues such as the extent of the Property Owner's cooperation regarding cleanup at the Site did not reach the issue of the reasonable basis to file the lien. Consideration of, and the weight to be accorded, such arguments, is a matter of discretion within the prerogative of the Region's management. I noted 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.

More specifically, 26 Railroad is presenting the argument that the fact that EPA has become the lead agency in the case, resulting in Mereco's remediation plans being put on hold and liens being proposed against 26 Railroad's property, is inequitable because Mereco was pursuing its own effective and adequate removal and remediation at the Site. I can not agree. The LFR evidences a long history of continuing releases of hazardous wastes despite numerous studies and cleanup efforts by Mereco under agreements, judgements, permits and orders entered into with NYSDEC. In fact, the record shows that despite 26 Railroad's argument to the contrary, NYSDEC did request that EPA take over the Site at least in part as a result of the persistence of problems at the Site.

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. This review cannot review the merits of the corrective action being proposed by Mereco relative to the EPA's decision to take the lead on the case and undertake an RI/FS, and focus on the selection of one remedy over the other . As stated in In the Matter of Layton Salvage Yard Site, CERCLA Lien Recommended Decision (Region 8) when faced with a similar claim,

> The review can not focus on the selection of the remedy or other matters which are only reviewable in a cost recovery action under Section 107, or are not subject to review. See, Section 113(h), 42 U.S.C. § 9613(h).

In any case, the fact that Mereco had prepared a RFI does not in any way diminish EPA's legal authority to file a lien. 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 Iron Mountain Mine, Inc., supra; In the Matter of Picollo Farm Superfund Site, supra. As noted above, the record shows that NYSDEC did in fact work with Mereco to cleanup up the Site for years. A further delay in filing a lien is not contemplated by either the statutes or the case law on CERCLA liens.

I conclude that the equitable considerations presented by 26 Railroad do not impact the reasonableness s 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. 26 Railroad has not submitted any information that would rebut EPA's claim that it has a reasonable basis to perfect a lien. Many of the issues raised by 26 Railroad 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: June 11, 2002

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

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1. LFR Document 9.

2. LFR Documents 10 and 11, respectively.

3. 26 Railroad is a wholly owned subsidiary of Mereco.

4. LFR Document 10, page 4 and Exhibit 1 thereto.

5. LFR Document 10, page 2.

6. LFR Document 10, page 2 and Document 11, Attachment A, page 2.

7. LFR Document 9 and LFR Document 10, page 3.

8. LFR Document 10, page 4 and Document 11, Attachment A, page 3.

9. LFR Document 10, page 4.

10. LFR Document 10, page 6.

11. LFR Document 7 and Document 11, Attachment A, pages 2-5.

12. LFR Document 7 and Document 11, Attachment A, pages 2-5.

13. LFR Document 7.

14. LFR Documents 9 and 10, page 7.

15. LFR Document 10, page 8 and Exhibit 2 thereto.

16. LFR Document 10, page 8.

17. LFR Document 9, page 26.

18. LFR Documents 9 and 10, page 9.

19. LFR Document 11, Attachment A, Exhibit A.

20. LFR Document 11.

21. LFR Documents 10, pages 9-10.

22. The *Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12, issued September 22, 1987, was supplemented, not superseded, by the *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993.

23. LFR Document 10, page 6.

24. LFR Document 8.

25. LFR Document 7.

26. LFR Document 7.

27. LFR Document 10, page 9.

28. LFR Document 8.

29. LFR Document 10.

30. LFR Document 11.

31. LFR Document 11, Attachment A.

32. LFR Document 9, page 38.

33. LFR Document 9, page 39.

34. LFR Document 11, Attachment A, pages 4-5.

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