BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 ARCH STREET
PHILADELPHIA, PENNSYLVANIA 19103-2029

IN THE MATTER OF:	:	
Maryland Sand, Gravel and Stone Company Elkton, Cecil County Maryland	:	CERCLA LIEN PROCEEDING Docket No. CERC-III-99-002L

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. This proceeding involves the question of whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l) of CERCLA on the "Maryland Sand, Gravel and Stone Site" ("the Site"), a Superfund Site in the Cecil County, Maryland. The Site owner is the Maryland Sand, Gravel and Stone Company (or "the property owner") and the only issue in dispute is whether EPA has a reasonable basis in the Lien Filing Record ("LFR") to perfect a federal lien. In this Recommended Decision I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.

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This proceeding is being conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993. The Acting Regional Counsel of EPA-Region III designated me as the neutral EPA official to conduct this proceeding and to make a recommendation as to whether EPA has a reasonable basis to perfect the lien. I held a conference call with the parties' representatives on April 15, 1999, and conducted a meeting as contemplated by the *Supplemental Guidance* on May 6, 1999. The meeting notes have been transcribed and added to the LFR as required by the *Supplemental Guidance*. I have also added to the LFR several pre-meeting and post-meeting submissions, and descriptions of these submissions have been incorporated into a revised Lien Filing Record Index. I have taken the entire LFR into consideration in writing this Recommended Decision.

The Maryland Sand, Gravel and Stone Site

The Site consists of two irregularly-shaped parcels of land off of U.S. Route 40, in Cecil County, near Elkton, Maryland. The parcels are referred to as the "Eastern Excavated Area" ("EEA") and the "Western Excavated Area" ("WEA")[1] . The EEA consists of about 70 acres and the WEA consists of about 71 acres. The Site's original use was as a quarry. There are about 150 residences housing about 570 residents within a mile of the site.[2]

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[1] A Plat map drawn on December 3, 1968, included in the LFR, appears to identify the EEA as Parcel # 256, and the WEA as Parcel 332. During the meeting, some of the participants may have on occasion misidentified these parcels by number. The transcript of the meeting, however, makes clear by context which parcel was being discussed at any given time.

[2] Remedial Project Manager Lesley Brunker's **NPL SITE CERTIFICATION**, contained in the LFR, includes a concise Site description and a description of the conditions there on April 10,

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Between 1969 and 1974 portions of the EEA were used for "disposal" of waste processing water, still bottoms, sludge and drums of solid and semisolid wastes.[3] An estimated 700,000 gallons of waste were dumped in three pits on the EEA.

There are apparently four aquifers under the site.[4] The "disposal" activity between 1969 and 1974 contaminated two of them. In earlier cleanup operations, not the subject of this proceeding, certain "potentially responsible parties" ("PRPs") removed buried drums from the EEA, treated contaminated shallow groundwater in one aquifer and restricted access to the site.

The actions involved in this proceeding included onsite and offsite PRP sampling of deeper aquifers and an evaluation of contaminant sources in the WEA. Groundwater sampling on the WEA was conducted from 1992 through 1997.[5] Future actions may entail contaminated soil removal, site closure and post closure operation and maintenance activities. All response activities have been conducted with EPA oversight, and this will continue.

1991, the day of Ms. Brunker's visit. The September, 1990 **Operable Unit 2 Record of Decision** for the Site, introduced by counsel for the property owner at the meeting into the record without objection, has a more detailed site description.

[3] Both the September, 1990 **Operable Unit 2 Record of Decision** for the Site and the **NPL SITE CERTIFICATION** refer to an area of some 3 acres as having been used for disposal.

[4] Transcript p. 57.

[5] Transcript p. 59. These actions are called for in the September, 1990 **Operable Unit 2 Record of Decision** for the Site. The groundwater sampling is considered "on-site" activity. Transcript p. 41.

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REVIEW FACTORS

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. The specific factors for my consideration under the *Supplemental Guidance* are:

(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?

1. Notice Of Potential Liability

EPA notified the Site owner, Maryland Sand Gravel and Stone Company ("MSGS" or "property owner") of its potential liability by letter dated June 22, 1984, but did not send the letter by certified mail, return receipt requested.[6] EPA did, however, use certified mail-return receipt requested, in notifying the property owner of EPA's intent to perfect a lien on the Site, and this letter indicates

[6] The *Supplemental Guidance* emphasizes the need to use this form of service. *Supplemental Guidance*, pp. 4, 7.

EPA's belief that the property owner is potentially liable under CERCLA.[7] There is no dispute as to this factor.

2. Property Owned By PRP

The deeds to both parcels of real estate that comprise the Site clearly show that MSGS owns the entire Site.[8] There is no dispute as to this factor.

3. Property Subject To Removal Or Remedial Action

The property owner argues that the WEA, or perhaps more accurately, the western parcel of real estate, Parcel 332, has not been the subject of a removal or a remedial action, has never been shown to be contaminated and was the subject of groundwater sampling only for purposes of determining whether there had been offsite migration of the contamination under the EEA, Parcel 326. Since this parcel (Parcel 332) is not contaminated, it is more readily marketable than the parcel with contamination. Indeed, the LFR contains correspondence from a person who appeared to be interested in such a purchase.

The property owner's position appears to be that the lien is over broad, and should be limited, if it is to be imposed at all, to the EEA, the parcel of real estate that was contaminated. Counsel for the property owner referred to the Reardon case, where the property owners made similar claims about

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[7] These letters are included in the LFR.

[8] Deed between Dorothy R. Summers, Executrix of the Estate of Lester R. Summers, and Maryland Sand Gravel and Stone Company, NDS 61/604, p. 332, November 21, 1980; Deed between W. Lester (husband) , Virginia R. Davis (wife) and Maryland Sand Gravel and Stone Company. WAS 119/286, p. 256, May 5, 1962. Both deeds are in the LFR.

the "lien [being] overexcessive in that it covered parcels not involved in the cleanup." United States v Reardon Bros. 947 F. 2d 1509, 1510. (1st Cir. 1991) "...taking the Reardon's contentions as true, a cleanup undertaken by EPA on portions of the Reardons' property is too minimal a connection to justify bootstrapping a lien on all the parcels." *Id.* At 1521. The Court of Appeals for the First Circuit was plainly concerned with the hardship imposed by the filing of a Superfund lien on properties that had not been the subject of removal or remedial action.[9]

The Reardon properties were residential parcels of land in a subdivision, many of them already owned by other parties. Many of them had had no environmental investigation performed upon them. In contrast, the WEA has had five years of aquifer monitoring on it to verify that contamination from the aquifers on the EEA had not spread to the WEA.[10] This monitoring is considered to be "on-site" monitoring.[11] Its proximity to the EEA, the common ownership and the similarity of conditions made it logical for EPA to treat the WEA as part of the Site from the beginning of its activities. This is much more than a minimal connection to the environmental cleanup and does not appear to me to be a means of bootstrapping the western parcel into having a lien imposed. EPA has always treated the two parcels as a single "site"; it literally cannot segregate out costs incurred on one parcel from those incurred on the other, and there were also costs incurred offsite that relate to both parcels. Because

[9] Actually, the greatest concern of the First Circuit was the absence of a pre-filing hearing, possibly constituting a due process violation. Reardon, at 1510. EPA responded to this concern with the *Supplemental Guidance* and the kind of proceeding in which we are now involved.

[10] Transcript p. 40.

[11] Transcript p. 41.

EPA has always treated both parcels as a single site, costs associated with investigation, off-site water sampling, community relations and "program support" cannot be "teased out" for the individual parcels.[12]

The property owner also argues that Parcel 332 should not be included in the lien notice because the September, 1990 **Operable Unit 2 Record of Decision** for the Site states that "...the remedial investigation concluded that there was no evidence of waste disposal in the Western Excavated Area..."[13] and that "...no further investigation nor remedial activity is proposed to deal with surface contamination in this area."[14] Counsel for the property owner argues that neither remedial nor removal actions can be the basis for a lien on Parcel 332, the WEA, because in 1994 the property owner settled all removal claims the United States had in a federal court consent decree. According to his counsel, this functionally means there can be no lien for the response action costs.

It is EPA's position that the language of the statute makes the Agency's approach entirely proper:

> All costs and damages for which such person is liable to the United States under subsection (a) of this section (other than the owner or operator of a vessel under paragraph (1) of subsection(a) of this section shall constitute a lien in favor of the United States upon all real property and rights to such property which-

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[12] Transcript p. 98.

[13] September, 1990 **Operable Unit 2 Record of Decision** for the Site, p. 28

[14] September, 1990 **Operable Unit 2 Record of Decision** for the Site, p. 7.

(A) belong to such person;and
(B) are subject to or affected by a removal or remedial action.

42 U.S.C. § 9607(l)

Counsel for EPA argues that the language of CERCLA 107(l) actually precludes the Agency from "parcelling out" the costs of response actions incurred at the Site. She views the position of the property owner to be a demand to break down the Site costs by parcel, something the Agency cannot do.[15] The Agency's argument continues: the lien against Parcel 332 increases in amount by operation of law as EPA continues to incur costs at the Site, for which MSGS is liable to the United States, regardless of whether the additional costs are incurred during response actions occurring on Parcel 332 or elsewhere.

EPA points out that there were response costs incurred in a removal action on the parcel prior to 1990, as monitoring and investigative activities were performed. The parties agree that a 1994 Consent Decree [16] addressed the property owner's liability for those costs incurred through September 30, 1990. The Decree apparently also preserved EPA's rights to pursue costs incurred subsequent to September 30, 1990, and EPA asserts that imposition of the lien is meant to do precisely that - to secure the United States' interest in those later-incurred costs. The monitoring oversight performed

[15] Ms. Kelly, EPA's Cost Recovery specialist, was quite firm that the costs could not be "parcelled out", inasmuch as many activities, such as community relations, simply do not lend themselves to "parcelling." Transcript, pp. 50, 98.

[16] The Consent Decree was NOT made part of the LFR.

pursuant to the September, 1990 **Operable Unit 2 Record of Decision** for the Site was remedial action, according to EPA counsel.

On this record I conclude that the entire Site, comprised of both Parcel 256 and Parcel 332, has been the subject of removal or remedial action. Documentation in the LFR and statements made at the meeting sustain the Agency's position that both parcels have always been treated as a single site; the fact that a property boundary line has always existed on the Site does not make it unique. While I can understand the desire of the property owner to have Parcel 332, which appears to be free of contamination, removed from under the cloud of the federal lien, I cannot agree that EPA should be forced into making this a special case by segregating Site response costs by parcel. Indeed, the LFR indicates that such segregation is impossible.[17]

4. United States Incurred Costs

The LFR contains a detailed accounting of the cost EPA has incurred in connection with the activities at the site. Certain of the costs incurred have been paid by PRPs, including Maryland Sand Gravel and Stone Company. A concern about overhead billing raised by counsel for the property owner was addressed to his satisfaction in correspondence from EPA counsel. There is no dispute regarding the costs EPA had incurred as reflected by documents in the LFR.

5. Other Information Showing Lien Should Not Be Filed

The other open question is the dollar amounts mentioned in the lien notice. The lien notice, contained in the LFR, shows the EPA's unreimbursed costs from 10/7/90 through 11/4/97 (oversights

[17] Transcript p. 50.

of groundwater monitoring) at $251,262.47. The notice also provides EPA's estimate of future response costs at $40,000,000. Counsel for MSGS objected initially to this figure as having been pulled out of thin air.[18]

This figure is based upon the Remedial Project Manager's best professional judgment, and it is a conservative estimate at that, based upon her experience in working on other sites and, specifically, her estimate of the amount of soil that may have to be decontaminated, and the technologies that may have to be utilized to complete that soil cleanup.[19] The Remedial Project Manager reported that the PRPs performing work at the Site recently estimated the future costs at $41,000,000.[20] Counsel for EPA stated that inclusion of the cost figures in the lien notice was necessary to save the Agency's resources in responding to public inquiries about costs associated with the site.[21]

Counsel for MSGS introduced some early EPA CERCLA Lien Guidance[22] to suggest that the $40,000,000 figure was unecessary and inappropriate, as it was such a huge figure it would deprive MSGS of all real prospect of selling any of the property. Counsel quoted Mr. Adams' memo, which states in pertinent part: "However, since the statute does not require specification of costs, the notice

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[18] Transcript p. 62.

[19] Transcript, pp. 64, 75.

[20] Transcript, p. 64.

[21] Transcript, p. 78.

[22] *Guidance on Federal Superfund Liens*, Thomas L. Adams, Jr., Assistant Administrator for Enforcement, dated September 22, 1987.

should clarify that, where response work is ongoing, the amount of the lien will increase as the costs incurred increase."[23] Counsel argued that the lien notice should not have a specific estimate, but should instead incorporate the language of the Adams memo about increased costs increasing the lien. The Agency personnel maintained that prospective purchasers ought to have notice of both the costs already incurred and the Agency's best estimate of future costs.[24]

I find EPA's approach reasonably consistent with the Adams memo, much fairer to the public than the approach suggested by counsel for MSGS, and likely to serve the intended purpose of conserving the Agency's resources. To state simply that there will be additional costs would invite inquiries about the cost estimate from prospective purchasers who would have to be told the same hard estimates contained in the lien notice. In the end, this would not help the property owner either.

Conclusion

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien. I find that EPA does, indeed, have a reasonable basis to perfect the lien. This Recommended Decision does not compel the filing of the lien; it merely clears the way for such a filing by confirming the existence of 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

[23] *Id*. p. 5.

[24] Transcript, p. 65.

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.

DATE: June 22, 1999

BENJAMIN KALKSTEIN
Regional Judicial and Presiding Officer
U.S. EPA-Region III