UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

January 28, 2020

VIA FIRST CLASS MAIL
& EMAIL

Brad Pollack, Esquire
753 South Main Street
Woodstock, VA 22664

Re: Magnate, LLC Site, Edinburg, Shenandoah County, Virginia: Lien Proceeding CERC 03-2019-0120LL

Dear Mr. Pollack:

Enclosed please find a copy of EPA's *Post-Hearing Brief* filed with the Regional Judicial Officer on this date.

Respectfully,

ANDREW S. GOLDMAN
Sr. Assistant Regional Counsel

Enclosure

cc: Regional Hearing Clerk

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 3

In the Matter of:	:	
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MAGNATE, LLC	:	**Docket No. CERCLA 03-2019-0120LL**
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Magnate, LLC Site,	:	
Edinburg, Shenandoah	:	
County, Virginia	:	
	:	

EPA'S POST-HEARING BRIEF

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EPA's Post-Hearing Brief

This brief is provided on behalf of the U.S. Environmental Protection Agency ("EPA") subsequent to (1) a telephone conference held by the Regional Judicial and Presiding Officer ("RJO") on December 12, 2019 ("Conference"), and (2) EPA's receipt of a "summation" included in a January 4, 2020 submission by Magnate LLC ("Magnate") ("*January 4 Magnate Submission*"). By letter dated January 7, 2020, the RJO provided the parties with an official copy of the transcript from the Conference and offered the parties an opportunity to file final briefs addressing issues raised during the Conference.[1] For the reasons set forth herein, EPA contends that Magnate's and arguments during the Conference and the *January 4 Magnate Submission* raise no issues which undermine EPA's conclusions that the legal predicates for the existence of the lien have been met, that EPA has a reasonable basis to perfect the lien, and that perfecting the lien is appropriate.[2]

I. Procedural History

By letter dated July 1, 2019, EPA notified Magnate of EPA's intent to perfect a lien on two of six parcels owned by Magnate and included within the Magnate,

[1] Magnate apparently obtained a copy of the transcript before the RJO issued this letter.

[2] Following submission of the final briefs, the RJO will make a recommendation to the EPA Region 3 Regional Counsel regarding perfection of the lien. The Regional Counsel will ultimately decide whether perfection of the lien is appropriate. All contentions and arguments in this response are those of the undersigned staff attorney and not the Regional Counsel.

LLC Site ("Magnate Site" or "Site"). *Rebuttal Exhibit 3.*[3] By email on July 28, 2019, Magnate's counsel notified EPA of its objections to EPA's perfection of the lien and of its desire to meet with a neutral EPA official. *Rebuttal Exhibits 4 & 5.*

On September 11, 2019, the EPA Region 3 Regional Counsel signed an *Order of Assignment* designating the RJO as the neutral official to review this matter. *Rebuttal Exhibit 6.* The *Order of Assignment* additionally required EPA to serve a copy of the Lien Filing Record and a written reply to Magnate's objections within 20 days. On September 12, 2019, the undersigned served the Lien Filing Record on Magnate. On September 26, 2019, the undersigned served EPA's *Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* ("*Rebuttal*") on Magnate. On November 14, 2019, Magnate submitted its responsive brief. On November 26, 2019, EPA filed its reply brief.

On December 12, 2019, the RJO presided over the Conference. On December 13, 2019, at the request of the RJO, EPA submitted a letter on scrapping at the Site. By email on December 23, 2019, Magnate submitted a response. On December 26, 2019, EPA responded to Magnate's letter.

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[3] "Rebuttal Exhibits" are exhibits associated with EPA's *Rebuttal to Arguments Presented by Magnate, LLC in its July 4 and July 28, 2019 Objection to EPA's Perfection of a CERCLA § 107(l) Lien* served on Magnate under cover of letter dated September 26, 2019.

During the Conference, the RJO requested that the parties seek agreement regarding corrections to the transcript taken at the Conference. *T (70:14-21).*[5] By email on January 4, 2020, Magnate approved the transcript and, in addition, provided a "summation." By letter dated January 7, 2020, the RJO provided the parties with an official copy of the transcript and offered the parties an opportunity to file final briefs by January 30, 2020. On January 8, 2020, EPA submitted a letter containing its proposed errata sheet for the transcript and asked Magnate to either approve or contact the undersigned counsel with questions. By email on January 16, 2020, the RJO requested that Magnate respond to the RJO's proposed change to the transcript. By email on January 21, 2020, Magnate accepted the RJO's change as well as EPA's corrections to the transcript.[6]

II. Objection by EPA to Consideration of New Arguments Not Presented in Magnate's Written Briefs/Scope of this Brief/ Incorporation of Prior Briefs By Reference

During the Conference, the undersigned counsel objected to Magnate's introduction of issues and arguments not previously raised in its written briefs. *T (19:13-16), (65:4-10).* The RJO overruled this objection. *Id.*, at *(20:1-20);*

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[5] Citations to the transcript from the Conference will hereafter take this form: *T* (10:5-7) where "T" is "Transcript," the number preceding the colon is the page number, and the number or range following the colon refers to line(s) on the cited page(s).

[6] Magnate's January 21, 2020 email additionally contained a copy of "its forthcoming Inspector General of EPA complaint." This brief does not address allegations or arguments contained in such complaint.

(65:12-24). The undersigned counsel again hereby objects to the RJO's consideration of any issues or arguments raised by Magnate during the Conference or included in the *January 4 Magnate Submission* that were not raised in its prior written briefs. Notwithstanding this objection, the undersigned counsel addresses the issues and arguments raised by Magnate during the Conference and in its "summation." This Post-Hearing Brief incorporates the arguments contained in EPA's September 26, 2019 and November 26, 2019 briefs, as well as all other EPA correspondence in the record for this matter.

III. Magnate's Arguments

During the Conference, and in the "summation" portion of the *January 4 Magnate Submission*, Magnate made a number of assertions in support of its objection to EPA's perfection of the lien. EPA contends that many of these assertions are beyond the scope of, and not relevant to, the sole issue to be decided in this proceeding—whether EPA has a reasonable basis to perfect the lien under section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(l)—and that such assertions should therefore not be further considered.[8] Magnate's assertions, and EPA's responses, are set forth below.

[8] *See* Section II of EPA's Rebuttal.

A. Magnate Assertion #1: EPA Followed No Legal Procedures In Performing a Removal Action at its Property.[9]

This assertion—a challenge to the actions performed by EPA--is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[10] Without waiving these arguments, EPA responds as follows. As explained in EPA's prior briefs and evidenced by the record in this case, EPA relied upon the following authorities in conducting actions at Magnate's property:

1. Section 104(a) of CERCLA 42 U.S.C. § 9604(a), authorizes EPA to investigate and perform response actions in response to actual and threatened releases of hazardous substances.

2. Section 300.410 of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), 40 C.F.R. § 300.400, describes the procedures for performing a Removal Site Evaluation to investigate actual and threatened releases of hazardous substances. EPA performed such an evaluation of the Magnate Site and reported its findings in its January 18, 2018 Threat Determination (*Rebuttal Exhibit* 9) and Action Memorandum (*LFR* 6).[11]

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[9] *T (9:12-15); (10:24-25); (41:9-12).* Note that these subsection headers are the undersigned counsel's summation of Magnate's arguments.

[10] During the Conference, the RJO made clear that challenges to EPA response actions are not relevant to this proceeding and are in fact barred by the prohibition on pre-enforcement review found in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h). *T (*12:8-25). *See also* Section II of EPA's *Rebuttal.*

[11] "*LFR* ___" refers to documents in the Lien Filing Record served on Magnate by letter dated September 12, 2019.

3. Section 300.415 of the NCP, 40 C.F.R § 300.415, describes procedures for evaluating risks to human health and the environment and determining whether a removal response action is appropriate. EPA followed these procedures and determined that a removal response action was appropriate. *See* EPA's Action Memorandum (*LFR* 6).

4. Section 300.415(b)(3) of the NCP, 40 C.F.R. § 300.415(b)(3), provides that "[i]f the lead agency determines that a removal action is appropriate, actions shall, as appropriate, begin as soon as possible to abate, prevent, minimize, stabilize, mitigate, or eliminate the threat to public health or welfare of the United States or the environment." EPA selected a removal response action (*LFR* 6) and implemented that action at the Site (*LFR* 8, Pollution Reports 6-13).

EPA has, both in its prior briefs and here, identified the authorities under which it responded at Magnate's property and documented its use of such authorities. Magnate has not identified any specific procedures or requirements in CERCLA or the NCP that EPA failed to follow in responding at its property. Even if it did allege specific transgressions of CERCLA or the NCP, such allegations would constitute a challenge to EPA's response; would be barred by the prohibition on pre-enforcement review established in Section 113(h) of CERCLA, 42 U.S.C. § 9613(h); and would not be relevant to this proceeding.

B. Magnate Assertion # 2: EPA Has Provided No Figure Quantifying its Costs.[12]

This assertion is incorrect. EPA identified costs expended in connection with Magnate's property through May 23, 2019 in the lien notice included as Attachment 3 to EPA's July 1, 2019 Notice of Intent to Perfect letter (*Rebuttal Exhibit* 3). The cost figure provided was $381,252.66. In addition, EPA provided a breakdown of these costs in a report included in the Lien Filing Record provided to Magnate on September 12, 2019 (*LFR* 9).

C. Magnate Assertion #3: EPA Has Not Produced the Bids or Contracts for the Work Performed at the Property.[13]

EPA is not required to produce bids or contracts in order to perfect the lien. EPA explained its reasonable basis to believe that it incurred costs at the Magnate property, citing the cost summary found at Lien Filing Record 9, in Section III.A.4 of its *Rebuttal.* Cost summaries such as this are routinely prepared by EPA financial and cost recovery staff drawing site-specific information from EPA's cost accounting systems.[14] EPA contends that the cost summary provided to Magnate provides a sufficient basis to believe that EPA has incurred costs in connection with the Magnate property. EPA does not routinely provide the

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[12] *T (*9:15-20); (11:2-8); (22:2-7); (26:13-14).

[13] *T (*11:9-21).

[14] The undersigned will provide an affidavit attesting to the methodology used to prepare such a summary if the RJO so requests.

underlying documentary support for these summaries because such support is typically voluminous and often must be redacted to protect confidential business information unless a confidentiality agreement or protective order is obtained. Nonetheless, cost packages containing the documentary support are available to the public via a Freedom of Information Act ("FOIA") request. Magnate has not filed a FOIA request seeking such information from EPA.

D. Magnate Assertion #4: The Lien Deprives Magnate of its Property Without Due Process.[15]

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[16] Without waiving these arguments, EPA responds as follows. Magnate has cited no caselaw in support of its claim that perfection of a lien would violate the 5th amendment to the U.S. Constitution and merely makes blanket allegations regarding the unconstitutionality of EPA's intended action.

The constitutionality of EPA's implementation of the Superfund lien provision has been tested. In *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991), the First Circuit found that EPA's implementation of CERCLA's lien provision deprived the landowner of significant property interests without due process *because EPA provided no procedural safeguards to prevent the erroneous*

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[15] *T (21:14-22); (22:7-15).*

[16] *See* Section II of EPA's *Rebuttal.*

filing of a lien (see Exhibit 1*)*. In *Reardon*, EPA performed a cleanup of soils contaminated with polychlorinated biphenyls ("PCBs") on Paul and John Reardon's Norwood, Massachusetts parcels and an adjacent parcel in 1983, noting that further investigation and cleanup was likely. *Id.*, at 1511. In 1985, EPA notified the Reardons of their potential liability for EPA's costs under CERCLA. *Id.* Further investigation by EPA in 1987 revealed PCB contamination in soils. *Id.* The Reardon's advised EPA that they wished to clean up their property by themselves. *Id.* In January 1989, the Reardons advised EPA that they had completed the cleanup. *Id.* In March 1989, EPA filed a lien notice in the Norfolk County, Massachusetts Registry of Deeds on all of the Reardon's parcels. *Id.* Five days later, EPA notified the Reardons of the lien notice. *Id.* The Reardon's filed a complaint against the United States in federal court arguing that (1) they were not potentially responsible parties ("PRPs"), (2) some of the parcels were not subject to or affected by EPA's response, and (3) imposition of the lien without a hearing violated the 5th amendment's due process clause. *Id.* The District Court held that Section 113(h) of CERCLA, 42 U.S.C. § 9613(h), foreclosed consideration of the Reardon's first two arguments. *Id.* On the due process claim, the District Court held that the lien perfection did not amount to a taking of a "significant property interest" protected by the 5th amendment. *Id.*, at 1512. The Reardons appealed. *Id.* The Circuit Court agreed with the lower court that filing a lien notice is a type of "enforcement activity" related to a removal or remedial

action and that CERCLA's pre-enforcement review bar precludes federal courts from hearing "pre-enforcement challenges to the merits of any particular lien—challenges, for example, to the liability which a lien secures, or to the conformity of that lien to the CERCLA lien provisions." *Id.* Moving to the due process claim, the Circuit Court described the U.S. Supreme Court's two-part test for due process challenges to statutes involving property interests—"One must first ask whether the statute authorizes the taking of a 'significant property interest' protected by the fifth amendment . . . . If there is no significant property interest involved, the inquiry is at an end. If there is, one proceeds to examine what process is due in the particular circumstances." *Id.*, at 1517. Noting that the U.S. Supreme Court issued an opinion on the issue of "significant property interests" in the context of an attachment statute after the *Reardon* District Court issued its opinion, the *Reardon* court stated:

> "In *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), a unanimous Court held that a Connecticut attachment statute violated the due process clause. The Court held that the attachment lien on plaintiff Doehr's real property deprived him of a significant property interest within the meaning of the due process clause. The Court stated:
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> > "For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

> "*Doehr*, 501 U.S. at ——, 111 S.Ct. at 2113. It concluded that 'even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection.' Id. (emphasis added).
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> . . .
>
> "In light of these comments, we cannot but conclude that the lien on real property created in 42 U.S.C. § 9607(l) amounts to deprivation of a 'significant property interest' within the meaning of the due process clause. The EPA's lien has substantially the same effect on the Reardons as the attachment had on the plaintiff in *Doehr*— clouding title, limiting alienability, affecting current and potential mortgages."

Reardon, at 1518. Moving to the process that is due, the Circuit Court referred to the Supreme Court's balancing test between (1) the private interests impacted by the official action, (2) the risk of an erroneous deprivation of such interest through procedures used and the value of any additional or substitute safeguards, and (3) the government's interest, including the burdens imposed by adding procedural safeguards. *Id.* With respect to the first element, the Court acknowledged that the deprivation of rights, though less than a deprivation of use and possession, is nonetheless significant. The Court additionally noted that:

> "[T]he CERCLA statute contemplates the filing of a notice of lien well before clean-up procedures are completed, with the result that the lien is not for any sum certain, but for an indefinite amount. This would seem to increase the lien's effect on the landowner's property interests, since a potential buyer or mortgage lender could not identify any limit on the government's interest in the property short of its full value."

Id., at 1519. On the second element—the risk of an erroneous perfection and the value of added safeguards—the Court noted that the Superfund lien falls in between "uncomplicated matters that lend themselves to documentary proof" and "highly factual" matters:

> "The initial issue of liability under CERCLA is quite straightforward. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), makes owners of 'facilities' strictly liable for, among other things, all response costs incurred by the United States 'not inconsistent with the national contingency plan.' Ownership of land, and the physical presence of hazardous substances on land, are matters that are subject to relatively simple resolution. Whether the response costs were incurred consistently with the national contingency plan is an issue which may be highly factual, but it is usually a matter of the amount, and not the existence, of liability. More likely to be 'highly factual' is the determination whether certain of the owner's parcels of land are 'subject to or affected by' EPA's response action. Similarly, on the issue of the landowner's liability, EPA admits in its brief that the 'concepts of due care, foreseeability, objective and subjective knowledge, some of which are unique in CERCLA to the innocent landowner defense, are extremely fact-intensive.'

Reardon, at 1519. Reviewing procedural safeguards, the Court considered the availability of a judicial hearing, posting of a bond, and an action for damages. The Court noted that (1) CERCLA provides neither a pre-deprivation hearing nor an immediate post-deprivation hearing and that the first "hearing" an owner may receive is at cost recovery, which may be years in the future; (2) CERCLA does not require EPA to post a bond prior to perfecting a lien, and (3) a "takings" action filed under the Tucker Act (28 U.S.C. § 1491(a)(1)) "would be, at best, questionable, and any potential relief or recovery would be inadequate." *Id.*, at

1519-20.

With respect to the third element--the government's interest--the *Reardon* court considered whether the government has an interest in the property itself, whether exigent circumstances excused prior notice and an opportunity for a hearing, and the added burden of procedural requirements. On the government's interest the Court stated:

> "[T]he government does not have any prior recognized interest in the Reardons' property. Under 42 U.S.C. § 9607(l), of course, a federal lien is created by operation of law before the government files a notice of lien. But that lien attaches to particular real property only if (1) the property is owned by a person who is liable to the United States for CERCLA clean-up costs, and (2) the property is 'subject to or affected by a removal or remedial action.' 42 U.S.C. § 9607(l). The Reardons assert that they are not liable, and that some of the property on which a federal lien has been noticed has not been subject to or affected by a removal or remedial action. Nor has any court ever found that either of these conditions has been satisfied. Thus we cannot say that the government has a present, recognized interest in the property."

Reardon, at 1521. On exigent circumstances, the Court stated:

> "[T]here is nothing in this case suggesting that a transfer or encumbrance of the parcels retained by the Reardons was imminent. And a special feature of CERCLA makes a claim of exigent circumstances even less likely than in the usual lien case. Under the CERCLA liability provisions, any subsequent owner of property who knew at the time of purchase that hazardous wastes were located on the premises would become liable for cleanup costs, and the property could be sold to satisfy a judgment against that subsequent owner. *See* 42 U.S.C. § 9607. Hence, the transfer of property would likely affect the government's interest in recovering cleanup costs less than the average transfer would affect the interest of the average potential judgment creditor."

Reardon, at 1522. Finally, on the burden of adding procedural safeguards, the Court said:

> "In this case, the minimum additional procedural requirements would be notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed. This would seem to be a relatively simple matter. Moreover, the Constitution certainly allows the process due to be tailored to fit the realities of the situation. *Mitchell v. W.T. Grant Co.*, 416 U.S. at 610, 94 S.Ct. at 1901. For example, EPA may only need to demonstrate probable cause or reason to believe that the land would be 'subject to or affected by' a cleanup, or that the landowner was not entitled to an 'innocent landowner' defense.

Reardon, at 1522. The Court concluded:

> "[W]e find that CERCLA § 9613(h) does not bar federal jurisdiction over the due process claim in this case; that the deprivation caused by the CERCLA lien is significant; that, at least when the landowner has raised a colorable defense, the issues may be quite factual; that the lien statute completely lacks procedural safeguards; that the government has no recognized pre-existing interest in the property; that the statute has no "exigent circumstances" requirement (nor have any such circumstances been shown in this case); and that additional procedural requirements are likely to place significant, but not overwhelming, administrative burdens on the government. As applied in this case, the statute thus deprives persons of property with far less process than the State of Connecticut provided in the attachment law found unconstitutional in *Doehr*. Thus, we are constrained to find that the CERCLA lien provisions, by not providing, at the very least, notice and a pre-deprivation hearing to a property owner who claims that the property to be encumbered is not 'subject to or affected by a removal or remedial action,' violate the fifth amendment due process clause."

Reardon, at 1523-24.

In 1993, after the *Reardon* decision was published, EPA issued the "Supplemental Guidance on Federal Superfund Liens" which "outline procedures

for Regional staff to follow to provide notice and opportunity to be heard to potentially responsible parties on whose property liens are to be perfected." (*Rebuttal Exhibit 1*). Among other things, the guidance sets forth procedures to:

- Compile a Lien Filing Record bringing together in one place all documents relating to the decision to perfect a lien
- Transmit notice informing the property owner of EPA's intent to perfect a lien, the owner's right to object to perfection and to submit documents in support of its objection, and to be heard before a neutral official
- Hold a conference to include the property owner (and counsel), EPA, and a neutral official in the event the property owner requests one
- Obtain, from the neutral official, a written recommended decision for consideration by the official with delegated authority to sign lien notices

Rebuttal Exhibit 1. These extensive procedures, all of which EPA followed in the present case, address the deficiencies found by the First Circuit in *Reardon* by providing pre-perfection notice and an opportunity to be heard or, in exceptional circumstances not relevant here, a post-perfection opportunity to be heard.

Further analysis of this issue without additional arguments and citations from Magnate as to the nature of, and support for, its due process claim would be speculative. EPA requests the opportunity to respond to any additional arguments Magnate may make on this issue.

E. Magnate Assertion #5: Magnate is Not a PRP Because It Did Not Operate the Former Factory on the Property and Contributed No Asbestos or PCBs.[17]

This assertion is incorrect. Magnate misreads the plain language of CERCLA's liability provision. As explained in Section III.A.1 of EPA's *Rebuttal* and during the Conference, Magnate is the "owner" of a "facility" within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1). Liability under that provision does not depend on operation of the facility giving rise to the release or threatened release of hazardous substances or the "contribution" of wastes. Under this provision—which describes one of four categories of liable parties—mere ownership is sufficient. *See, e.g., State of N.Y. v. Shore Realty Corp.*, 759 F.2d 1032, 1043-44 (2d Cir. 1985) (section 9607(a)(1) unequivocally imposes strict liability on the current owner of a facility from which there is a release or threat of release, without regard to causation); *Murtaugh v. New York*, 810 F. Supp 2d. 446, 478 (N.D. NY 2011) (owner who did not contribute to contamination may nonetheless be liable). As described in EPA's *Rebuttal,* EPA has a reasonable basis to believe that Magnate is liable under Section 107(a)(1) of CERCLA.[18]

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[17] *T (22:16-25)* through *(23:1-19).*

[18] *See* pages 14-16 of EPA's *Rebuttal* for a discussion of Magnate's liability under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

F. Magnate Assertion #6: EPA Has Not Identified a "Cause" of the Environmental Problems Addressed by EPA.[19]

This assertion—a challenge to the actions performed by EPA--is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[20] Without waiving these arguments, EPA responds as follows. Neither CERCLA nor the NCP require that EPA identify the "cause" of an actual or threatened release of hazardous substances as a predicate for action, and Magnate has not identified any such requirement. As a matter of course EPA attempts to identify such causes in order to avoid having to return to a site repeatedly to address contamination.[21]

G. Magnate Assertion #7: EPA Has No Reasonable Basis to Perfect the Lien Because EPA Fails to Meet the Requirements of Virginia Statutes Regarding Liens.[22]

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[23] Without waiving these arguments,

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[19] *T (24:15-21); (28:11-13).*

[20] See Footnote 10, *supra*. *See also* Section II of EPA's *Rebuttal*.

[21] The undersigned will provide an affidavit from an EPA On Scene Coordinator corroborating such practice if the RJO so requests.

[22] *T (26:16-20); January 4 Magnate Submission.*

[23] *See* Section II of EPA's *Rebuttal*.

EPA responds as follows. At the Conference, Magnate principal Darryl Bates said the following:

> "My biggest problem is we have a state statute for the perfection of liens. It's 43-4.01, and it states there [sic] three criteria necessary to file a perfection of lien in this state, and you don't satisfy those. You don't have an amount. You have not given me any notice of the compensation that that amount is for, and you certainly passed the 90 day restriction so that it comes in a timely manner."

T (26:16-24).

A copy of Va. Code § 43-4.01 is attached hereto as "Exhibit 2." Limitations and criteria for perfecting and enforcing liens appear, although not as described by Mr. Bates in the above-cited text, in subsection C of this provision *and are limited to liens "under this title with respect to a one or two family residential dwelling unit*." This state law provision is clearly not applicable here because (1) the Magnate Site is not a "one or two family residential dwelling unit," and (2) EPA seeks to perfect a lien under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), and not the provisions found in Title 43 of the Virginia Code.

Similarly, in its "summation" in the *January 4 Magnate Submission,* Magnate claims that:

> "EPA has no reasonable basis to perfect the lien, due to Virginia state statute 43-25 that requires three basic elements to perfect a lien within its jurisdiction: amount certain, stated compensation for amount certain and 90 days to file from completion of work to be compensated for."

Va. Code § 43-25 establishes criteria for perfection and enforcement of liens arising under Va. Code § 43-24. Va. Code § 43-24 discusses Virginia liens arising under circumstances unrelated to the Federal Superfund lien that is the subject of this matter. These provisions are clearly not applicable to a lien arising under Section 107(l) of CERCLA, 42 U.S.C. § 9607(l). A copy of Va. Code § 43-24 and § 43-25 are attached hereto as "Exhibit 3."

H. Magnate Assertion #8: EPA Never Gave Magnate an Opportunity to Perform a Cleanup.[24]

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[25] Without waiving these arguments, EPA responds as follows. Magnate seems to have forgotten that (1) EPA offered the company an opportunity to conduct a cleanup under EPA oversight and in accordance with an administrative consent order provided to it via letter dated February 13, 2018 (*LFR* 10), (2) Magnate did not offer to perform the work that EPA determined was necessary (*LFR* 12), and (3) EPA terminated discussions for a Magnate-lead cleanup via letter dated April 3, 2018 and requested access to perform the cleanup itself (*LFR* 12).

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[24] *T (27:20-22).*

[25] *See* Section II of EPA's *Rebuttal.*

I. Magnate Assertion #9: Conditions at the Site Did Not Rise to the Level of a Superfund Cleanup.[26]

This assertion—a challenge to EPA's response action--is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[27] Without waiving these arguments, EPA responds as follows. Mr. Bates suggests that "one small pile of previously secured friable asbestos on a pipe that somebody had taken down" that was "laying there on the ground" is a "two hour cleanup" that "doesn't rise to Superfund action." First, the friable asbestos to which Mr. Bates refers was not the sole hazardous substance posing a threat to human health or the environment at the Magnate Site (*see, e.g., Rebuttal Exhibit* 9, *LFR* 6). Second, there is no hazardous substance "volume" requirement in CERCLA or the NCP below which EPA's response authority is not triggered, and Magnate has not pointed to any. Third, as discussed in response to Magnate Assertion #1, *supra,* CERCLA and the NCP describe the triggers for action. Conditions at the Site were found by EPA to have met the triggers for action (*Rebuttal Exhibit 9 and LFR* 6).

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[26] *T (27:24)* through (*28:1-4*).

[27] See Footnote 10, supra. *See also*, Section II of EPA's *Rebuttal*.

J. Magnate Assertion #10: The Environmental Company That Oversaw the 2011 Asbestos Abatement Should be the Responsible Party.[28]

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[29] Without waiving these arguments, EPA responds as follows. During the Conference, Mr. Bates stated that the piles of debris at the Site observed by EPA were left over from Magnate's demolition of buildings, stated that the piles "should have been nothing else 'cause they were nothing more than a building that we had abated," and suggested that Magnate's environmental contractor should be the responsible party and not Magnate. *T (33:5-24)*. Mr. Bates later stated that "[t]here was no reason to think that the abatement that I had previously done wasn't sufficient." *Id.*, at *(35:17-19)*.

Here Mr. Bates seems to have forgotten that his own environmental contractor warned him about residual asbestos at the Magnate property following completion of the work for which the contractor was retained. The contractor's report stated:

> "There remains a significant amount of asbestos material in the facility that was not removed due to time and budget constraints, as well the materials not being damaged. These materials consist primarily of any non-fiberglass pipe insulation in the building, and all floor tiles remaining in the building. In the future, and [sic] materials found in the facility that were not tested by WECI in their inspection report dated 3/25/11 will need to be tested by a VA

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[28] *T (33:5-24)*.

[29] *See* Section II of EPA's *Rebuttal.*

licensed asbestos inspector prior to any work that may disturb it.

> "The basement of the facility (under section 3, refer to attached map) still contains small amounts of damaged asbestos material mixed in with the significant amount of debris in the area. Due to flooding, and current disuse of the area along with budget concerns this area was not abated. However, poly barriers and signage were posted to prohibit access to this area. These barriers should remain in place until the area can be properly abated."

Rebuttal Exhibit 8. Magnate has said absolutely nothing in its briefs, at the Conference, or in its "summation" in the *January 4 Magnate Submission* regarding any efforts it undertook to test residual asbestos prior to Magnate's performance of actions that disturbed such asbestos, including demolition of the buildings.

K. Magnate Assertion #11: Site Conditions Presented No Substantial Harm to the Public.[30]

This assertion—a challenge to EPA's response action--is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[31] Without waiving these arguments, EPA responds as follows. During the Conference, Magnate's counsel stated:

> "On a legal basis, there's no substantial—there was never any substantial harm to the public, no way in the world. Again, all the chemicals and all the problems happened 40 years ago. They didn't present a harm to the public back then. They didn't during this remediation. They don't today."

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[30] *T (40:10-16).*

[31] See Footnote 10, *supra*. *See also* Section II of EPA's *Rebuttal*.

T (40:10-16). On January 18, 2018, EPA determined that the actual and threatened release of asbestos and PCBs from the Site may constitute an imminent and substantial endangerment to the public health or welfare or to the environment in its threat determination (*Rebuttal Exhibit* 9). On May 31, 2018, EPA made the same finding in its Action Memorandum selecting a removal response action for the Site (*LFR* 06). Risk to public health and welfare are evaluated in this context using criteria set forth in the NCP. The NCP provides, at Section 300.415(b), 40 C.F.R. § 300.415(b):

> (1) At any release, regardless of whether the site is included on the National Priorities List (NPL), where the lead agency makes the determination, based on the factors in paragraph (b)(2) of this section, that there is a threat to public health or welfare of the United States or the environment, the lead agency may take any appropriate removal action to abate, prevent, minimize, stabilize, mitigate, or eliminate the release or the threat of release.
>
> (2) The following factors shall be considered in determining the appropriateness of a removal action pursuant to this section:
>
> (i) Actual or potential exposure to nearby human populations, animals, or the food chain from hazardous substances or pollutants or contaminants;
>
> (ii) Actual or potential contamination of drinking water supplies or sensitive ecosystems;
>
> (iii) Hazardous substances or pollutants or contaminants in drums, barrels, tanks, or other bulk storage containers, that may pose a threat of release;
>
> (iv) High levels of hazardous substances or pollutants or contaminants in soils largely at or near the surface, that may migrate;

(v) Weather conditions that may cause hazardous substances or pollutants or contaminants to migrate or be released;

(vi) Threat of fire or explosion;

(vii) The availability of other appropriate federal or state response mechanisms to respond to the release; and

(viii) Other situations or factors that may pose threats to public health or welfare of the United States or the environment.

40 C.F.R. §§ 300.415(b)(1) and (b)(2). EPA determined that the factors enumerated at 40 C.F.R. § 300.415(b)(2)(i), (iv), (v), and (vii) were relevant and analyzed Site-specific circumstances against these risks in both the Threat Determination (*Rebuttal Exhibit* 9) and Action Memorandum (*LFR* 6). EPA concluded that the risks presented at the Site warranted a response action. *Id.*

L. Magnate Assertion #12: Perfection of the Lien Will Ruin Investment In, or Leasing Of, the Property.[32]

This assertion is beyond the scope of this proceeding, is not relevant, and should therefore not be considered further.[33] Without waiving these arguments, EPA responds as follows. In the *January 4 Magnate Submission,* Magnate wrote:

> "Just the fact that EPA was ever concerned about the property, is enough the [sic] scare even the bravest away. With the perfection of the lien, no bank or financial institution will ever touch the property. No reasonable party will ever invest in a property with the EPA cloud

[32] *January 4 Magnate Submission*, at second paragraph.

[33] *See* Section II of EPA's *Rebuttal.*

> over it. No reasonable lessee will ever want to be subject to what I've gone through, and no lawyer will ever allow their client to be subject to the negative consequences that the uncertainty of this lien poses."

EPA does not deny that perfection of the lien will impact Magnate.[34] However, the fact that Magnate will be impacted by a perfected lien has no bearing on the issue whether EPA has a reasonable basis to believe that the statutory predicates to perfect the lien have been met. In painting its bleak picture of the property's future, Magnate overlooks two issues.

First, Magnate does not mention, let alone consider, the liability protections incorporated by Congress into CERCLA via the Small Business Liability Relief and Brownfields Revitalization Act enacted in 2002 ("Brownfield's Act").[35] Among other things, the Brownfields Act established and/or strengthened existing immunities from liability under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), to overcome many of the concerns articulated by Magnate. In EPA guidance entitled "*Enforcement Discretion Guidance Regarding Statutory Criteria for Those Who May Qualify as CERCLA Bona Fide Prospective Purchasers, Contiguous Property Owners, or Innocent Landowners ('Common Elements'*") (July 29, 2019),[36] EPA wrote:

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[34] *See, e.g.,* the discussion of "significant property interest" by the *Reardon* court at pp. 10-11, *supra.* EPA does not here concede that these impacts will in fact be visited upon Magnate if the lien is perfected.

[35] Pub. L. No. 107-118, 115 Stat. 2356.

[36] https://www.epa.gov/sites/production/files/2019-08/documents/common-elements-

> "[EPA] recognizes that environmental cleanup can help promote reuse or redevelopment of contaminated, potentially contaminated, and formerly contaminated properties (collectively referred herein as 'impacted properties') and thereby revitalize communities that may have been adversely affected by the presence of these impacted properties. The EPA also understands that parties interested in acquiring an impacted property for reuse and redevelopment, as well as parties that currently own an impacted property or land contiguous to an impacted property, may be concerned about the potential liabilities stemming from the presence of contamination to which they have not contributed.
>
> "Congress also understood these concerns, and in an effort to address them enacted the Small Business Liability Relief and Brownfields Revitalization Act ('Brownfields Amendments'), Pub. L. No. 107-118, in January 2002, which amended the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, also known as Superfund) to provide important liability limitations for landowners that qualify as: (1) bona fide prospective purchasers (BFPPs), (2) contiguous property owners (CPOs), or (3) innocent landowners (ILOs) . . . Congress intended these provisions to be self-implementing, enabling private parties to save time and costs, in part, by reducing EPA involvement in most private party transactions."

Common Elements Guidance, at 1. Thus the statute is designed to alleviate liability-related obstacles to reuse of contaminated sites.

Second, Magnate has ignored the means, previously explained by the undersigned counsel to Magnate's counsel, to reduce or eliminate such impacts. As described in Section III.A of EPA's *Rebuttal Brief*, Section 107(l) of CERCLA, 42 U.S.C. § 9607(l), describes the term of the Superfund lien:

> "(2) Duration. The lien imposed by this subsection shall arise at the later of the following:
>
> (A) The time costs are first incurred by the United States with respect to a response action under this chapter.

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guide-mem-2019.pdf)

> (B) The time that the person referred to in paragraph (1) is provided (by certified or registered mail) written notice of potential liability.
>
> *Such lien shall continue 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 provided in section 9613 of this title."

42 U.S.C. § 9607(l)(2) (emphasis added). Thus, settlement provides an additional pathway to ameliorate the impacts of a Superfund lien by eliminating the lien altogether. Magnate has been made aware of this pathway but apparently chose to ignore it.

By email on November 17, 2019, Magnate's counsel notified the undersigned that he had been elected to the Shenandoah County Board of Supervisors; that, come January 2020, he would have a governmental responsibility to see that the Site becomes productive again; and that he was interested in working with EPA toward that goal. *See* Exhibit 4. By email on November 21, the undersigned responded that, among other things, the lien can be resolved via a settlement with Magnate. *See* Exhibit 5. By email to the undersigned on November 28, 2019, Magnate counsel wrote:

> "Assuming you have no authority or ability to creatively and productively resolve this matter [sic]. That your role is just to grind through the legal proceedings and not see the bigger picture of making this property productive again. Assuming so, I will be

> reaching out to Ben Cline,[37] Mark Warner,[38] Tim Kaine[39] and the White House to see if they can sensibly help to resolve this."

See Exhibit 6. By email sent to Magnate's counsel on December 3, 2019, the undersigned wrote:

> "I recommend that you revisit the July 1, 2019 letter from the EPA Region 3 Acting Regional Counsel which describes the nature and purpose of the proceeding in which we now find ourselves. This proceeding is intended to give your client an opportunity to be heard prior to EPA's perfection of a lien on its property to secure response costs incurred by EPA. Neither this proceeding nor any lien notice which may be placed in the land records stand in the way of returning this property to productive use. As referenced in the Acting Regional Counsel's letter and in each of the briefs filed by EPA in this proceeding, resolution of your client's liability through settlement would terminate EPA's lien. Such a settlement would accomplish the dual objectives of recovering Federal funds expended to abate human health threats at the property and facilitate a return of the property to productive use which very well might have been impossible had EPA not responded to environmental conditions there. Despite your belittling remarks and apparent rejection of the administrative path for resolving this matter, EPA stands ready to both complete the lien proceeding to fully vet your client's concerns regarding perfection of the lien and work toward a mutually satisfactory resolution of your client's liability in the underlying Superfund matter. If your client has a settlement proposal you wish EPA to evaluate please forward it to me as soon as possible."

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[37] Mr. Cline is a U.S. Congressman for Virginia's 6th congressional district.

[38] Mr. Warner is the senior U.S. Senator for the Commonwealth of Virginia.

[39] Mr. Kaine is the junior U.S. Senator for the Commonwealth of Virginia.

See Exhibit 7. Despite Magnate's continual cries of injustice and harm associated with the lien, Magnate has not approached EPA to explore a settlement which would extinguish the lien.

IV. Conclusions

For the reasons stated above, EPA contends that nothing raised by Magnate on the record in this matter changes the fact that:

1. The lien arose by operation of law pursuant to Section 107(l) of CERCLA, 42 U.S.C. § 9607(l).

a. EPA has a reasonable basis to believe that Magnate is a responsible party as described in Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a), as the owner of the Site upon which a release or threatened release of hazardous substances occurred;

b. EPA has a reasonable basis to believe that the land upon which EPA seeks to perfect a lien was subject to or affected by removal action;

c. EPA has a reasonable basis to believe that it expended response costs at this Site in conducting removal actions at the Site; and

d. EPA has a reasonable basis to believe that it provided Magnate with written notice of its potential liability via certified mail.

2. Magnate has not offered any evidence to support a third-party defense under Section 107(b)(3) of CERCLA.

3. EPA has a reasonable basis to believe that Magnate cannot carry its evidentiary burden under Section 107(b)(3) of CERCLA.

a. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site because it (1) failed to secure the Site to prevent access by the public to friable asbestos and PCBs located there, (2) failed to maintain the Site to prevent the release of friable asbestos and PCBs into the environment, (3) failed to maintain the Site to prevent the creation and migration of friable asbestos from asbestos-containing sources that were not protected from weather and trespassers; and

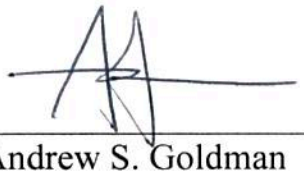
b. Magnate cannot establish, by a preponderance of the evidence, that it exercised due care with respect to asbestos and PCBs at the Site because it prevented, for over three hundred days, entry to EPA to perform necessary removal action to abate risks at the Site.

4. Magnate has not demonstrated that EPA lacks a reasonable basis to perfect a lien on the subject parcels.

5. EPA has demonstrated that it has a reasonable basis to perfect the lien.

6. Perfection of the statutory lien is therefore appropriate.

1/28/2020
Date



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List of Exhibits

1. *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) (printed from Westlaw).

2. Printout of Va. Code § 43-4.01 (effective October 1, 2019) from https://law.lis.virginia.gov/vacode/title43/chapter1/section43-4.01/.

3. Printout of Va. Code § 43-24 from https://law.lis.virginia.gov/vacode/title43/chapter2/section43-24/; Printout of Va. Code § 43-25 from https://law.lis.virginia.gov/vacode/title43/chapter2/section43-25/.

4. Email from Brad Pollack to Andrew Goldman, re: Magnate Lien Proceeding" (November 17, 2019).

5. Email from Andrew Goldman to Brad Pollack, re: "Magnate Lien Proceeding" (November 21, 2019).

6. Email from Brad Pollack to Andrew Goldman, re: Magnate Lien Proceeding (CERC-03-2019-012LL)" (November 28, 2019).

7. Email from Andrew Goldman to Brad Pollack, re: "Magnate Lien Proceeding (CERC-03-2019-0120LL)" (December 3, 2019).

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 1

947 F.2d 1509
United States Court of Appeals,
First Circuit.

Paul D. REARDON and John E. Reardon, Plaintiffs, Appellants,

v.

UNITED STATES of America and the United States Environmental Protection Agency, Defendants, Appellees.

No. 90–1319.
Heard May 8, 1991.
Decided Oct. 29, 1991.

Synopsis

Landowners brought action challenging lien filed against property by Environmental Protection Agency. The United States District Court for the District of Massachusetts, Andrew A. Caffrey, J., 731 F.Supp. 558, dismissed and landowners appealed. The Court of Appeals reversed. On rehearing en banc, the Court of Appeals, Torruella, Circuit Judge, held that: (1) CERCLA deprived federal court of jurisdiction to hear landowners' claims that they were innocent landowners or that the lien was overbroad; (2) CERCLA did not deprive court of jurisdiction to hear constitutional challenge to the lien; and (3) lien statute denies due process by failing to provide for notice and predeprivation hearing.

Affirmed in part, reversed in part, and remanded.

Cyr, Circuit Judge, dissented and filed an opinion.

West Headnotes (8)

Change View

1 **Environmental Law** Hazardous waste and materials
CERCLA barred owners of land against which Environmental Protection Agency (EPA) had filed notice of lien from maintaining action to have notice of lien removed on the grounds that they were innocent landowners and that the lien was overbroad, but CERCLA did not divest federal court of jurisdiction to consider claim that imposition of lien without a hearing violated due process. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(h), as amended, 42 U.S.C.A. § 9613(h); U.S.C.A. Const.Amend. 5.

14 Cases that cite this headnote

2 **Environmental Law** Hazardous waste and materials
Provision of CERCLA which deprives federal courts of jurisdiction to review challenges to removal or remedial action divests federal courts of jurisdiction over challenges to the Environmental Protection Agency's (EPA) administration of CERCLA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(h), as amended, 42 U.S.C.A. § 9613(h).

7 Cases that cite this headnote

3 **Environmental Law** Hazardous waste and materials
Landowner's challenge to imposition of notice of lien on their property by the Environmental Protection Agency (EPA) without notice to them was not a

challenge to any particular removal or remedial action by the EPA but, rather, was a challenge to the CERCLA statute itself, so that court was not deprived of jurisdiction to consider it by CERCLA's denial of jurisdiction to federal courts to consider challenges to removal or remedial action of the EPA. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 113(h), as amended, 42 U.S.C.A. § 9613(h); U.S.C.A. Const.Amend. 5.

21 Cases that cite this headnote

4 **Constitutional Law** Protections Provided and Deprivations Prohibited in General

In determining due process challenge to statute which involves property interest, court must first determine whether the statute authorizes the taking of a significant property interest; if there is no significant property interest involved, the inquiry is at an end, but, if there is a significant property interest involved, court proceeds to examine what process is due in the particular circumstances. U.S.C.A. Const.Amend. 5.

7 Cases that cite this headnote

5 **Constitutional Law** Hazardous waste or materials
Environmental Law Validity

CERCLA provision for Environmental Protection Agency (EPA) to place notice of lien on property whose owners may be subject to liability for cleanup costs violates due process by not providing notice and predeprivation hearing to a property owner who claims that the property to be encumbered is not subject to or affected by a removal or remedial action. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(*l*), as amended, 42 U.S.C.A. § 9607(*l*); U.S.C.A. Const.Amend. 5.

23 Cases that cite this headnote

6 **Constitutional Law** Hazardous waste or materials

Lien on real property created by CERCLA when Environmental Protection Agency (EPA) determines that property owners may be liable for cleanup costs amounts to deprivation of a significant property interest within meaning of the due process clause. Comprehensive Environmental Response, Compensation, and Liability Act of 1980, § 107(*l*), as amended, 42 U.S.C.A. § 9607(*l*); U.S.C.A. Const.Amend. 5.

18 Cases that cite this headnote

7 **Constitutional Law** Duration and timing of deprivation; pre- or post-deprivation remedies

Absence of notice and hearing may be justified by exigent circumstances. U.S.C.A. Const.Amend. 5.

3 Cases that cite this headnote

8 **Constitutional Law** Factors considered; flexibility and balancing

Constitution allows the process due to be tailored to fit realities of the situation. U.S.C.A. Const.Amend. 5.

2 Cases that cite this headnote

West Codenotes

Held Unconstitutional
42 U.S.C.A. § 9607(*l*).

Attorneys and Law Firms

*1510 Lynn Wright, with whom Robin F. Price and Edwards and Angell, New York City, were on supplemental brief, for plaintiffs, appellants.

George W. Van Cleve, Deputy Asst. Atty. Gen., with whom Barry Hartman, Asst. Atty. Gen., Washington, D.C., Wayne A. Budd, U.S. Atty., George B. Henderson, II, Asst. U.S. Atty., Boston, Mass., Stephen L. Samuels, Steve C. Gold, Jacques B. Gelin, Attys., Dept. of Justice, Charles Openschowski, Office of Gen. Counsel, E.P.A. and Luis Rodríguez, Asst. Regional Counsel, E.P.A., Washington, D.C., were on supplemental brief, for defendants, appellees.

Before BREYER, Chief Judge, CAMPBELL, TORRUELLA, SELYA and CYR, Circuit Judges.

OPINION EN BANC

TORRUELLA, Circuit Judge.

After removing hazardous substances from property belonging to the Reardons, EPA filed a notice of lien on the property for the amount spent. *See* 42 U.S.C. § 9607(*l*). The Reardons sued to have the notice of lien removed, arguing that they were not liable for the cleanup costs, that the lien was overextensive in that it covered parcels not involved in the clean-up, and that the filing of the lien notice without a hearing deprived them of property without due process. The district court, in *Reardon v. United States*, 731 F.Supp. 558 (D.Mass.1990), decided that it did not have jurisdiction to hear the Reardons' two statutory claims. It ruled that although jurisdiction existed to hear the constitutional claim, the filing of a lien did not amount to a taking of a significant property interest protected by the due process clause. It therefore denied the Reardons' motion for a preliminary injunction, and dismissed their complaint. The Reardons appealed and a panel of this court ruled in their favor on statutory grounds. *Reardon v. United States*, 922 F.2d 28 (1st Cir.1990) (withdrawn). We now consider the appeal en banc. After closely considering applicable law, including most notably the recent case of *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), we conclude that the district court correctly decided that it did not have jurisdiction to consider the Reardons' statutory claims, but we find that the CERCLA lien provisions do violate the fifth amendment due process clause.

I. BACKGROUND

A. *Facts*. In 1979, Paul and John Reardon purchased a 16–acre parcel in Norwood, Massachusetts, adjacent to an electric equipment manufacturing plant site *1511 known as the "Grant Gear" site, and named it "Kerry Place." In 1983, the Massachusetts Department of Environmental Quality Engineering, responding to a report of a nearby resident, tested soil samples from both properties and discovered extremely high levels of polychlorinated biphenyls ("PCBs") on the Grant Gear site and on Kerry Place where it bordered Grant Gear. EPA then investigated the site. Finding the same high levels of PCBs, it authorized an immediate clean-up of the contaminated areas. Between June 25 and August 1, 1983, EPA removed 518 tons of contaminated soil from the two properties. It then notified the Reardons that it had removed all soil with concentrations of PCBs known to be above the safe limit, but informed them that additional areas of contamination might exist, in which case EPA might undertake additional clean-up work.

In 1984, the Reardons subdivided Kerry Place into a number of parcels; they sold five of those parcels and retained ownership of the others. In October 1985, EPA notified the Reardons that, as current owners of Kerry Place, they might be liable under §§ 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606 & 9607, along with ten other present and prior owners of the properties, for the clean-up costs.

In August 1987, EPA again investigated the properties to assess the feasibility of a long-term remedy for any remaining contamination. New testing showed that soil in several

areas on Kerry Place was still contaminated with PCBs. In April 1988, EPA informed the Reardons of these results. The Reardons told EPA that they intended to clean up their property themselves. EPA advised the Reardons to coordinate any offsite disposal plans with EPA and to obtain EPA's approval of a treatment or disposal facility. In January 1989, the Reardons informed EPA that they had completed their own clean-up of Kerry Place, without having attempted coordination with or sought the approval of EPA.

On March 23, 1989, EPA filed a notice of lien with the Norfolk County Registry of Deeds pursuant to § 107(*l*) of CERCLA, 42 U.S.C. § 9607(*l*), on all of the Kerry Place parcels still owned by the Reardons. The lien was for an unspecified amount, as it secured payment of "all costs and damages covered by" 42 U.S.C. § 9607(*l*) for which the Reardons were liable under § 107(a) of CERCLA, 42 U.S.C. § 9607(a). Five days later, EPA notified the Reardons that it had filed the notice of lien. On July 12, 1989, EPA informed the Reardons that they could settle EPA's claims against them for $336,709, but noted that this amount did not limit the Reardons' potential liability. On September 29, 1989, EPA selected a long-term remedy for the Kerry Place and Grant Gear sites estimated to cost $16,100,000.

B. *Procedural History*. The Reardons filed a complaint and a motion for preliminary injunction in the United States District Court for the District of Massachusetts. They argued that they were entitled to have the notice of lien removed for three reasons. First, the Reardons maintained that they qualified as "innocent landowners" under § 107(b) of CERCLA, 42 U.S.C. § 9607(b), and therefore were not liable for any clean-up costs. Second, 42 U.S.C. § 9607(*l*) provides for a lien on only that property "subject to or affected by a removal or remedial action," 42 U.S.C. § 9607(*l*)(1)(B); the Reardons claim that since some of their Kerry Place parcels were not "subject to or affected by" the clean-up, EPA erred in filing a notice of lien covering all of those parcels. Third, they asserted that EPA's imposition of the lien without a hearing violated the due process clause of the fifth amendment to the United States Constitution.

The district court held that § 113(h) of CERCLA, 42 U.S.C. § 9613(h), divested it of jurisdiction to hear the Reardons' "innocent landowner" and "overbroad lien" claims. It found that the same section also purported to divest it of jurisdiction to hear the due process claim, but held that Congress was without power to place such a limitation on its jurisdiction. Turning to the merits of the due process claim, the ***1512** district court held that the lien imposed by § 107(*l*) did not amount to a taking of a "significant property interest" protected by the due process clause. The court therefore denied the motion for a preliminary injunction and dismissed the complaint.

The Reardons appealed, and a panel of this court found in their favor. The panel opinion construed § 9613(h) so as to permit judicial review of the statutory challenges to the lien, and did not reach the due process issue. In response to EPA's petition for rehearing, however, a majority of the court voted to grant a rehearing en banc. Although the court en banc finds for the plaintiffs, as did the panel, we do so on constitutional rather than statutory grounds.

II. JURISDICTION

1 We turn first to the question of jurisdiction. The district court, as we have noted, held that 42 U.S.C. § 9613(h) purported to divest it of jurisdiction over all three of the Reardons' claims. We agree that § 9613(h) bars review of the "innocent landowner" and "overbroad lien" claims, prior to the commencement of an enforcement or recovery action, but we conclude that this section does not bar review of the due process claim.

Section 9613(h), entitled "Timing of review," explicitly limits the jurisdiction of the federal courts to hear certain cases arising under CERCLA. The section states, in part:

> No federal court shall have jurisdiction under Federal law ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this

> title, in any action except one of the following: [listing 5 enumerated types of actions]

42 U.S.C. § 9613(h). The five exceptions to the jurisdictional bar are all actions filed by the government or by a private citizen seeking to enforce or recover costs for the enforcement of CERCLA; for this reason, the district court described § 9613(h) as barring "judicial review of EPA actions prior to the time that the EPA or a third party undertakes a legal action to enforce an order or to seek recovery of costs for the cleanup of a hazardous waste site." *Reardon v. United States*, 731 F.Supp. at 564 n. 8. As a convenient shorthand, we will say that § 9613(h) bars "pre-enforcement review" of certain claims.

The district court framed the question of jurisdiction as whether the filing of a lien constituted a "removal or remedial action selected under section 9604 of this title." As the district court noted, the terms "removal" and "remedial action" are defined terms under the CERCLA statute. 42 U.S.C. §§ 9601(23), (24). Another CERCLA provision says that these terms "*include enforcement activities related thereto.*" 42 U.S.C. § 9601(25) (emphasis added). The court found that placing a lien on property from which hazardous substances had been removed was a type of enforcement activity. It therefore concluded that any challenge the Reardons could make, whether statutory or constitutional, was a "challenge[ ] to [a] removal or remedial action" over which Congress intended it not to have jurisdiction unless and until EPA brought an enforcement action. *Reardon v. United States*, 731 F.Supp. at 569.

A. *Jurisdiction over the "innocent landowner" and "overbroad lien" claims.* We agree with the district court that filing a lien notice is a type of "enforcement activity" related to a removal or remedial action. And we agree that § 9613(h) bars the federal courts from hearing pre-enforcement challenges to the merits of any particular lien—challenges, for example, to the liability which a lien secures, or to the conformity of that lien to the CERCLA lien provisions. Several considerations lead to these conclusions.

First, we think that the language of the statute, read for its ordinary meaning, supports such an interpretation. Central to the entire CERCLA scheme is a provision that makes certain parties liable for the cost of removal and remedial actions. *See* 42 U.S.C. § 9607(a). When the government files a lien on property to secure payment of that liability, it can reasonably be described as seeking to enforce the liability *1513 provision. Thus, the activity of filing liens is, in ordinary language, an "enforcement activity."

Second, we believe that allowing challenges to the merits of particular liens would defeat some of the purposes of barring pre-enforcement review under § 9613(h). Congress was no doubt concerned, first and foremost, that clean-up of substances that endanger public health would be delayed if EPA were forced to litigate each detail of its removal and remedial plans before implementing them. Thus, the Senate Judiciary Committee Report stated that § 9613(h) barred pre-enforcement review because such review

> would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlement and voluntary cleanups.

S.Rep. No. 11, 99th Cong., 1st Sess. 58 (1985).

As long as the remedy upon review of a lien was limited to the invalidation or modification of the lien, of course, such review would not directly delay clean-up of hazardous substances. However, we do not believe that avoiding delay was the only purpose of postponing review. As the Fifth Circuit stated in a similar case:

> Although review in the case at hand would not delay actual cleanup of hazardous wastes, it would force the EPA—against the wishes of Congress—to engage in "piecemeal" litigation and use its resources to protect its rights to recover from any [potentially responsible party] filing such a[n] action.
>
> . . . . .
>
> Moreover, the crazy-quilt litigation that could result from allowing [potentially responsible parties] to file declaratory judgment actions prior to the initiation of government cost recovery actions could force the EPA to confront inconsistent results.

Voluntary Purchasing Groups, Inc. v. Reilly, 889 F.2d 1380, 1390 (5th Cir.1989).

The same practical considerations weigh against allowing pre-enforcement review in this case. And we add to these reasons one more: information needed to decide legal challenges to liens may not be available at the time such challenges are made. To decide, for example, the Reardons' claim that they are innocent landowners, a court must determine whether the contamination pre-dated their ownership; whether they had any knowledge or reason to know of the contamination; whether they had exercised due care with respect to the hazardous substances; and whether they took precautions to prevent releases by foreseeable acts of third parties. *See* 42 U.S.C. § 9607(a), (b)(3), EPA Supplemental Brief, at 16–17 (stressing complexity of resolving innocent landowner claim). Notices of liens are likely to be filed early in the history of a response action—shortly after EPA has begun to spend money on waste removal and the landowner has been notified of potential responsibility. *See* 42 U.S.C. § 9607(*l*) (providing for creation and filing of liens). At that point, EPA is likely not yet to know the full extent of the contamination, let alone when that contamination occurred, or whether it is likely that the owner exercised due care or took reasonable precautions. One purpose of § 9613(h), we believe, is to delay review until enough is known to decide these issues.

Third, legislative history supports the view that § 9613(h) is intended to bar challenges to liability, such as the Reardons seek to make by attacking the lien filing, as well as challenges to the remedy EPA has chosen. During floor debate on this section, Senator Thurmond, Chairman of the Judiciary Committee, which drafted the section, explained:

> Citizens, including potentially responsible parties, cannot seek review of the response action *or their potential liability for a response action* — other than in a suit for contribution—unless the suit falls within one of the categories in this section....

132 Cong.Rec. S14929 (daily ed. Oct. 3, 1986) (emphasis added). Senator Stafford, ***1514** Chairman of the Conference Committee, stated: "When the essence of a lawsuit involves the contesting [of] *the liability of the plaintiff for cleanup costs*, the courts are to apply the provisions of section 113(h), delaying such challenges until the Government has filed a suit." 132 Cong.Rec. S14898 (daily ed. Oct. 3, 1986) (emphasis added).

It is certainly possible that Congress inadvertently rather than purposefully included lien challenges in the judicial review bar. Congress amended the scope of "removal" and "remedial" actions to include "enforcement activities related thereto" primarily to ensure that EPA could "recover costs for enforcement actions taken against responsible parties." H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 66–67, *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835, 2848–49; *see* H.R.Conf.Rep. No. 962, 99th Cong., 2d Sess. 185, *reprinted in* 1986 U.S.Code Cong. & Admin.News 3276, 3278 ("This amendment clarifies and confirms that [enforcement activity] costs are recoverable from responsible parties."). Perhaps Congress did not realize that other provisions referring to removal and remedial actions—such as the judicial review bar—would also be affected. But even if this were so, we do not see how our conclusion is altered. First, as

outlined above, reading the statute to bar review of pre-enforcement challenges to liens is consistent with the language and the purpose of the judicial bar. Second, and more importantly, Congress amended a definitional section, thus changing the meaning of "removal" and "remedial" wherever they appear in CERCLA. We cannot give the definition inconsistent readings within the statute. As the above-quoted legislative history makes clear, the 1986 amendment was certainly intended to allow the government to collect attorney's fees in cost recovery actions. *See United States v. Ottati & Goss*, 694 F.Supp. 977, 997 (D.N.H.1988) (allowing attorney's fees to United States under § 9607(a)(4)(A)), *aff'd in part, vacated in part*, 900 F.2d 429 (1st Cir.1990). If liens to ensure the government's complete recovery of its remedial costs are not "enforcement activities" related to the removal or remedial action—the view suggested by the dissent—then we do not see how a suit to recover the government's clean up costs is an "enforcement activit[y]" either. And if "enforcement activities" in § 9601(25) is interpreted to exclude the expenses of cost recovery actions, this would have the effect of denying the government significant amounts of attorney's fees—which was certainly not the intent of Congress. We therefore conclude, as did the district court, that § 9613(h) precludes judicial review of the imposition of a lien until EPA commences an enforcement action.

2 3 B. *Jurisdiction over the due process claim.* Unlike the district court, however, we do not believe that § 9613(h) precludes federal court jurisdiction over the Reardons' due process claim. First, such a challenge does not fit into the literal language of § 9613(h). That section refers to "challenges to removal or remedial action selected under section 9604 of this title." Under our reading, it divests federal courts of jurisdiction over challenges to EPA's *administration* of the statute—claims that EPA did not "*select[ ]*" the proper "removal or remedial action," in light of the standards and constraints established by the CERCLA statutes. The Reardons' due process claim is not a challenge to the way in which EPA is administering the statute; it does not concern the merits of any particular removal or remedial action. Rather, it is a challenge to the CERCLA statute itself—to a statutory scheme under which the government is authorized to file lien notices without any hearing on the validity of the lien.

Second, we read § 9613(h) in light of the Supreme Court's oft-repeated pronouncement that "where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053–54, 100 L.Ed.2d 632 (1988); *see Weinberger v. Salfi*, 422 U.S. 749, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975); ***1515** *Johnson v. Robison*, 415 U.S. 361, 94 S.Ct. 1160, 39 L.Ed.2d 389 (1974).[1] We do not believe that the statute expresses a clear congressional intent to preclude the type of constitutional claim the Reardons are making—a challenge to several statutory provisions which form part of CERCLA. However, it is important to make clear that we are not holding that *all* constitutional challenges involving CERCLA fall outside the scope of § 9613(h). A constitutional challenge to EPA administration of the statute may be subject to § 9613(h)'s strictures. Such a claim may well be a "challenge[ ] to removal or remedial action selected under section 9604 of this title," and may thus fall within § 9613(h)'s bar. We find only that a constitutional challenge to the CERCLA *statute* is not covered by § 9613(h).

Third, extending jurisdiction to the Reardons' due process claim does not necessarily run counter to the purposes underlying § 9613(h). For example, resolution of the due process issue does not require any information that is not likely to be available until clean-up of a site is finished. Because it is a purely legal issue, its resolution in a pre-enforcement proceeding does not have the potential to force EPA to confront inconsistent results (as would a finding, for example, that a particular spill was caused by an act of God). Of course, if we decide that filing a notice of a CERCLA lien without any pre-enforcement review *does* violate due process, EPA's collection efforts will no doubt be hampered. However, we do not lightly assume that Congress intended to ease EPA's path even at the expense of violating the Constitution.

Fourth, although the two courts that have considered this issue have reached a different conclusion, *see Barmet Aluminum Corp. v. Reilly*, 927 F.2d 289, 293 (6th Cir.1991);

South Macomb Disposal Authority v. U.S.E.P.A., 681 F.Supp. 1244, 1249–51 (E.D.Mich.1988), we are unpersuaded by the reasoning of those cases.

Our disagreement commences with the phrasing of the issue to be decided. Both courts frame the question as whether § 9613(h) "prohibits constitutional as well as statutory challenges until the time pr[e]scribed by the statute." *South Macomb*, 681 F.Supp. at 1249–50; *see Barmet*, 927 F.2d at 292. We think that this question fails to make the distinction we have noted above, *see* pp. 1514–1515, *supra*, between two types of constitutional challenges—challenges to EPA's administration of CERCLA, and challenges to CERCLA itself.

Once we recognize this distinction, the reasoning of these two courts becomes less convincing. First, says the *South Macomb* court,

> Reading the language of § 9613(h) for its everyday meaning supports the notion that this subsection prohibits constitutional as well as statutory challenges until the time pr[e]scribed by the statute. The provision explicitly states that federal courts shall not have jurisdiction to review "any challenge" except for those enumerated.

South Macomb, 681 F.Supp. at 1249–50. But, the statute does not bar "any challenge," without qualification; rather, it delays federal court review of "any challenges *to removal or remedial action selected under section 9604 of this title.*" 42 U.S.C. § 9613(h). Because a due process challenge to the CERCLA lien provisions is not, we believe, a challenge to "removal or remedial action selected under section 9604 of this title," we do not find that the "everyday meaning" of § 9613(h) divests the federal courts of jurisdiction to hear such a challenge.

Both the *Barmet* and *South Macomb* courts contend that legislative history—House and Senate Reports, and House Judiciary Committee Hearings—suggests that Congress intended § 9613(h) to bar all pre-enforcement challenges, including all ***1516** constitutional challenges. Upon examination, we find these materials unconvincing as well. The Senate Report states, in part:

> As several courts have noted, the scheme and purposes of CERCLA would be disrupted by affording review of orders or response actions prior to commencement of a government enforcement or cost recovery action. *See, e.g., Lone Pine Steering Committee v. EPA*, [600 F.Supp. 1487 (D.N.J.1985)]. These cases correctly interpret CERCLA with regard to the unavailability of pre-enforcement review. This amendment [§ 9613(h)] is to expressly recognize that pre-enforcement review would be a significant obstacle to the implementation of response actions and the use of administrative orders. Pre-enforcement review would lead to considerable delay in providing cleanups, would increase response costs, and would discourage settlements and voluntary cleanups.

S.Rep. No. 11, 99th Cong., 1st Sess. 58 (1985). We see nothing in this discussion which would indicate an intent to divest federal courts of jurisdiction to consider a claim that the provisions of CERCLA itself authorize deprivations of property without due process of law. On the contrary, the reference to "review of orders or response actions" suggests that the writers of the Senate Report focused their concern on the problems that would arise if courts reviewed the *merits* of particular EPA actions.

Both *Barmet* and *South Macomb* attach great weight to the Senate Report's citation "with approval" of *Lone Pine*, a case decided before § 9613(h) was enacted, which they say held that CERCLA did not allow pre-enforcement review even of constitutional challenges. We think there are good reasons to discount this citation. For one thing, the 13–page opinion in *Lone Pine* contains *no discussion* of the question whether

constitutional challenges to the statute as well as challenges to administrative action are barred; one can only infer that the *Lone Pine* court held this view from the facts that (1) the plaintiff's complaint had one constitutional count alongside six statutory counts, and (2) the court dismissed the entire complaint. In fact, *Lone Pine* cites *Aminoil, Inc. v. EPA*, 599 F.Supp. 69, 72 (C.D.Cal.1984), the leading case holding that CERCLA *did not* bar jurisdiction to review constitutional challenges to the statute; and it does so, not to indicate any disagreement with that holding, but simply to agree with its holding that CERCLA *does* bar pre-enforcement review of administrative orders. *See Lone Pine*, 600 F.Supp. at 1497. For another thing, the Senate Report does not cite *Lone Pine* for the proposition that federal courts have no jurisdiction to hear constitutional challenges; rather, it cites it solely as an example of a group of cases, *sub silentio* holding that review "of orders or response actions" would disrupt the purposes of CERCLA. We do not see why this should indicate agreement with *Lone Pine's* purported holding regarding constitutional challenges, particularly since cases such as *Aminoil* would seem to fit just as easily into the group of cases described in the Report.

We do not find the House Report any more convincing. The pertinent passage in that Report, according to *Barmet* and *South Macomb*, is a statement that "there is no right of judicial review of the Administrator's selection and implementation of response actions until after the response action[s] have been completed...." H.R.Rep. No. 253(I), 99th Cong., 2d Sess. 81, *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835, 2863. *See Barmet*, 927 F.2d at 293 (quoting this passage); *South Macomb*, 681 F.Supp. at 1250 (same). This statement says nothing about judicial review of the CERCLA statute itself.

South Macomb also cites testimony of EPA and Justice Department officials during hearings on the bill that contained § 9613(h). In response to a query from Representative Glickman as to whether EPA and the Justice Department "might accept some form of accelerated [pre-enforcement] review," Mr. Habicht, the Assistant Attorney General for Land and Natural Resources, replied:

> Mr. Chairman, briefly, this issue has been litigated under the 1980 statute *1517 quite extensively, and there have been a number of decisions over the last several months that address the fundamental questions of the constitutionality of the procedures set forth in that law. Virtually across the board now the courts are finding that the scheme is constitutional as currently constituted.

Superfund Reauthorization: Judicial and Legal Issues, Hearings before the Subcomm. on Admin. Law and Governmental Relations, H. of Rep. Judiciary Comm., 99th Cong., 1st Sess. at 226 (July 17, 1985); *see South Macomb*, 681 F.Supp. at 1250 (quoting this passage). The *South Macomb* court comments: "Our reading of this exchange is that the EPA and the Department of Justice took the position that because the courts had already upheld the constitutionality of CERCLA, constitutional challenges could also await EPA enforcement actions." *Id.* We do not find this passage quite so clear. It would appear to be an expression of hope by EPA and the Department of Justice rather than a statement of congressional intent, particularly in light of the fact that Congress passed a provision, § 9613(h), that by its language does not bar constitutional challenges to the CERCLA statute.

Finally, the Supreme Court recently examined a statute with a judicial review provision not unlike the CERCLA section analyzed here. At issue in *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 111 S.Ct. 888, 112 L.Ed.2d 1005 (1991), was a provision of the Immigration and Nationality Act barring judicial review of a denial of "Special Agriculture Worker" ("SAW") status except in the context of a deportation order. The statute states: "There shall be no administrative or judicial review of a determination respecting an application for adjustment of status under this section except in accordance with this subsection." 8 U.S.C. § 1160(e) (as amended by the Immigration Reform and Control Act of 1986). The Court held that this bar did not preclude review

of "general collateral challenges to unconstitutional practices and policies used by the agency in processing applications." *McNary*, 111 S.Ct. at 896. Rather, it only barred review of individual denials of SAW status. *Id.*

The statute in *McNary* resembles the CERCLA provision at issue here in two respects. First, as here, judicial review of an administrative event is withheld until the agency instigates a second, independent proceeding. More significantly, the immigration statute is phrased so as to bar review of the agency's determination of SAW status in an individual action—an event comparable to EPA's selection of a removal or remedial action, which is the focus of the CERCLA bar. Neither statute mentions the availability of review of a constitutional challenge to the statute itself (as here) or to the agency's execution of the statute (as in *McNary*). Insofar as the Immigration and Nationality Act compares to CERCLA, we think that the holding in *McNary* supports our conclusion here. *See also Johnson v. Robinson*, 415 U.S. 361, 367, 94 S.Ct. 1160, 1165–66, 39 L.Ed.2d 389 (1974) (holding that similar jurisdictional bar precluded review only of administration of statute, not of challenge to statute itself); *cf. Weinberger v. Salfi*, 422 U.S. 749, 762, 95 S.Ct. 2457, 2465, 45 L.Ed.2d 522 (1975) (holding that more expansive language barred all challenges related to statute).

Thus, we conclude that we have jurisdiction to consider the Reardons' due process claim: that the CERCLA statutory scheme under which liens may be imposed on property without opportunity for a hearing violates the fifth amendment due process clause.

III. THE DUE PROCESS CLAIM

4 5 The Supreme Court has established a two-part analysis of due process challenges to statutes which, like this one, involve property rather than liberty interests. One must first ask whether the statute authorizes the taking of a "significant property interest" protected by the fifth amendment. *E.g., Fuentes v. Shevin*, 407 U.S. 67, 86, 92 S.Ct. 1983, 1997, 32 L.Ed.2d 556 (1972). If there is no significant property interest involved, the inquiry is at an end. If there is, one proceeds to examine what process is due in the particular circumstances. ***1518** *E.g., id.; Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). We shall address each issue in turn.

A. *The Deprivation.* The district court, relying primarily on *Spielman–Fond, Inc. v. Hanson's, Inc.*, 379 F.Supp. 997 (D.Ariz.1973) (three judge panel), *aff'd mem.*, 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), found that the filing of a federal lien under 42 U.S.C. § 9607(*l*) did not amount to a deprivation of a significant property interest; thus, the court did not reach the second step of the analysis. However, a Supreme Court case decided after the district court had issued its decision (indeed, after oral argument at the en banc rehearing of this appeal) has clarified the law in this area considerably, and has precluded continued reliance on the Court's summary affirmance in *Spielman–Fond.*

In *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 115 L.Ed.2d 1 (1991), a unanimous Court held that a Connecticut attachment statute violated the due process clause. The Court held that the attachment lien on plaintiff Doehr's real property deprived him of a significant property interest within the meaning of the due process clause. The Court stated:

> For a property owner like Doehr, attachment ordinarily clouds title; impairs the ability to sell or otherwise alienate the property; taints any credit rating; reduces the chance of obtaining a home equity loan or additional mortgage; and can even place an existing mortgage in technical default where there is an insecurity clause.

Doehr, 501 U.S. at ––––, 111 S.Ct. at 2113. It concluded that "even the temporary or partial impairments to property rights that attachments, *liens,* and similar encumbrances entail are sufficient to merit due process protection." *Id.* (emphasis added). And, in a footnote, it disposed of its summary affirmance in *Spielman–Fond* by

noting that "[a] summary disposition does not enjoy the full precedential value of a case argued on the merits and disposed of by a written opinion." *Id.* at ---- n. 4, 111 S.Ct. at 2113 n. 4 (citing *Edelman v. Jordan*, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359–60, 39 L.Ed.2d 662 (1974)). *See also id.* at ----, 111 S.Ct. at 2113 (Rehnquist, C.J., concurring) (*Spielman–Fond* should not be read to mean that the imposition of a lien is not a deprivation of a significant interest in property).

6 In light of these comments, we cannot but conclude that the lien on real property created in 42 U.S.C. § 9607(*l*) amounts to deprivation of a "significant property interest" within the meaning of the due process clause. The EPA's lien has substantially the same effect on the Reardons as the attachment had on the plaintiff in *Doehr*—clouding title, limiting alienability, affecting current and potential mortgages. We thus turn to the second, more difficult, part of the analysis.

B. *What Process is Due.* The *Doehr* Court reaffirmed the "now familiar threefold inquiry," *id.* at ----, 111 S.Ct. at 2112 required to determine what process is due. That inquiry requires a court to balance

> "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and lastly "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Id. (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)). We apply the *Mathews* test to the facts of this case.

(1) *The Affected Private Interest.* The federal lien here, like the attachment lien in *Doehr*, does not deprive the landowner of possession and use of his property. As *Doehr* said, the effect of such a lien—clouding title, impairing the ability to alienate the property, tainting credit ratings, and reducing the chance of obtaining any further mortgage—"is less than the perhaps temporary total deprivation of household goods or wages." *Id.* However, the interests that the federal lien affects—the same as the interests affected in *Doehr*— *1519 are "significant." *Id.* We note in addition that the CERCLA statute contemplates the filing of a notice of lien well before clean-up procedures are completed, with the result that the lien is not for any sum certain, but for an indefinite amount. This would seem to increase the lien's effect on the landowner's property interests, since a potential buyer or mortgage lender could not identify any limit on the government's interest in the property short of its full value.

(2) *The Risk of Current Procedures and the Value of Additional Safeguards.* This part of the analysis encompasses several considerations. First, we must weigh the nature of the issues which would indicate whether the federal lien in this case has been correctly filed. Are these issues "uncomplicated matters that lend themselves to documentary proof," *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 609, 94 S.Ct. 1895, 1901, 40 L.Ed.2d 406 (1974), thereby minimizing the risk that the lien would be wrongfully filed? Or are the issues "highly factual?" *Doehr*, 501 U.S. at ----, 111 S.Ct. at 2111.

This case falls somewhere between the two extremes. The initial issue of liability under CERCLA is quite straightforward. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), makes owners of "facilities" strictly liable for, among other things, all response costs incurred by the United States "not inconsistent with the national contingency plan." Ownership of land, and the physical presence of hazardous substances on land, are matters that are subject to relatively simple resolution. Whether the response costs were incurred consistently with the national contingency plan is an issue which may be highly factual, but it is usually a matter of the amount, and not the existence, of liability. More likely to be "highly factual" is the determination whether certain of the owner's parcels of land are "subject to or affected by" EPA's response action. Similarly, on the issue of the landowner's liability, EPA admits in its brief that the "concepts of due care, foreseeability, objective and subjective knowledge, some of which are unique

in CERCLA to the innocent landowner defense, are extremely fact-intensive." EPA Supplementary Brief at 16–17.

Second, we must consider what procedural safeguards, if any, CERCLA provides against erroneous filing of a lien.

a. *The right to a judicial hearing.* CERCLA provides no such safeguards. It provides for no pre-deprivation proceedings at all—not even the ex parte "probable cause" hearing judged insufficient in *Doehr*. *See Doehr* at ----, 111 S.Ct. at 2108 (describing Connecticut attachment procedure).

Nor does CERCLA provide for an immediate post-deprivation hearing. [2] The first hearing the property owner is likely to get is at the enforcement proceeding, or cost recovery action, brought by EPA. This action may be brought several years after the notice of lien is filed; it is limited only by a rather complicated statute of limitations, *see* 42 U.S.C. § 9613(g)(2), which gives EPA three years after a removal action is completed or six years after a remedial action is commenced to bring such a suit. The running of the statute of limitations is entirely within EPA's control. Since the government may take its own sweet time before suing, and since the removal or remedial action may itself take years to complete, the lien may be in place for a considerable time without an opportunity for a hearing.

"[M]ere postponement of judicial enquiry is not a denial of due process if the opportunity given for ultimate judicial determination of liability is adequate." ***1520** *Phillips v. Commissioner*, 283 U.S. 589, 596, 51 S.Ct. 608, 611, 75 L.Ed. 1289 (1931). But the CERCLA statute of limitations on liens throws the "ultimate judicial determination" so far into the future as to render it inadequate. Indeed, in this respect the CERCLA scheme resembles the replevin statutes in *Fuentes v. Shevin*, where the Court held that the debtor may not be "left in limbo to await a hearing that might or might not 'eventually' occur." *Mitchell v. W.T. Grant Co.*, 416 U.S. at 618, 94 S.Ct. at 1905 (discussing *Fuentes v. Shevin*).

b. *Posting of a Bond.* The Court has recognized that requiring the filing party to post a bond may provide the property owner important protection against wrongful filing; in *Doehr*, four members of the Court suggested that due process *always* requires a plaintiff's bond in the context of an attachment. *See Doehr*, 501 U.S. at ----, 111 S.Ct. at 2116 (plurality). CERCLA does not require EPA to post a bond when filing the notice of federal lien.

c. *Action for damages.* In *Doehr*, the State of Connecticut argued that the availability of a double damages remedy for suits that are commenced without probable cause was an important protection against misuse of the attachment provisions; however, four members of the Court did not find the availability of such a suit to be an adequate procedural safeguard. Four members of the court explained in detail why an action for damages would never prove adequate:

> The necessity for at least a prompt postattachment hearing is self-evident because the right to be compensated at the end of the case, if the plaintiff loses, for all provable injuries caused by the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held. An individual with an immediate need or opportunity to sell a property can neither do so, nor otherwise satisfy that need or recreate the opportunity. The same applies to a parent in need of a home equity loan for a child's education, an entrepreneur seeking to start a business on the strength of an otherwise strong credit rating, or simply a homeowner who might face the disruption of having a mortgage placed in technical default.

Doehr, 501 U.S. at ----, 111 S.Ct. at 2118 (plurality).

In this case, EPA asserts that the Reardons might recover damages for the wrongful filing of a lien by filing a suit under the Tucker Act, 28 U.S.C. § 1491(a)(1) claiming that the lien was a taking without compensation in violation of the fifth amendment. The Reardons counter that a Tucker Act suit would not be possible in this case. It appears to us that recovery under the Tucker Act would be, at best, questionable, and any potential relief or recovery would be inadequate in the same way described by the *Doehr* Court. *See Bowen v. Massachusetts*, 487 U.S. 879, 914, 108 S.Ct. 2722, 2742, 101 L.Ed.2d 749 (1988); *United States v. Testan*, 424 U.S. 392, 398, 96 S.Ct. 948, 953, 47 L.Ed.2d 114 (1976).

(3) *The Government's Interest.* The third consideration is " 'the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' " *Doehr*, 501 U.S. at ----, 111 S.Ct. at 2112 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)). This factor encompasses a number of points.

a. *Recognized Interest in the Property.* First, the Court has considered whether the party seeking to impose a lien on property has a recognized interest in the particular property which it is seeking to protect. *See Doehr*, 501 U.S. at ---- n. 4, ----, 111 S.Ct. at 2123 n. 4, 2121; *Mitchell v. W.T. Grant Co.*, 416 U.S. at 603, 94 S.Ct. at 1898. For example, in *Mitchell* the parties stipulated that defendant W.T. Grant Co., which had sold goods on installment to plaintiff Mitchell, had a vendor's lien on the goods. The Court found that an ex parte order to sequester those goods did not violate due process. *See Mitchell*, 416 U.S. at 604, 94 S.Ct. at 1898 ("The reality [in this case] is that both seller and buyer had current, real interests in the property.... ***1521** Resolution of the due process question must take account not only of the interests of the buyer of the property but those of the seller as well."). In contrast, in *Doehr* the attached property served only to ensure the availability of assets to satisfy a possible judgment in a tort action unrelated to the property. *See Doehr*, 501 U.S. at ----, 111 S.Ct. at 2115.

In this case, the government does not have any prior recognized interest in the Reardons' property. Under 42 U.S.C. § 9607(*l*), of course, a federal lien is created by operation of law before the government files a notice of lien. But that lien attaches to particular real property only if (1) the property is owned by a person who is liable to the United States for CERCLA clean-up costs, and (2) the property is "subject to or affected by a removal or remedial action." 42 U.S.C. § 9607(*l*)(1). The Reardons assert that they are not liable, and that some of the property on which a federal lien has been noticed has not been subject to or affected by a removal or remedial action. Nor has any court ever found that either of these conditions has been satisfied. Thus we cannot say that the government has a present, recognized interest in the property.

We believe this conclusion is consistent with the Court's remarks in *Doehr* about the *Spielman–Fond* case. The Court, explaining why its summary affirmance in *Spielman–Fond, Inc. v. Hanson's Inc.*, 417 U.S. 901, 94 S.Ct. 2596, 41 L.Ed.2d 208 (1974), did not control in *Doehr*, stated:

> The facts of Spielman–Fond presented an alternative basis for affirmance in any event. Unlike the case before us, the mechanic's lien statute in Spielman–Fond required the creditor to have a pre-existing interest in the property at issue. 379 F.Supp., at 997. As we explain below, a heightened plaintiff interest in certain circumstances can provide a ground for upholding procedures that are otherwise suspect.

Doehr, 501 U.S. at ---- n. 4, 111 S.Ct. at 2123 n. 4. In his concurrence, Chief Justice Rehnquist reiterates this distinction:

> But in Spielman–Fond, Inc., supra, there was, as the Court points out in fn. 4 [sic], ante, an alternate basis available to this Court for affirmance of that decision. Arizona recognized a pre-existing lien in favor of unpaid

> mechanics and materialmen who had contributed labor or supplies which were incorporated as improvements to real property. The existence of such a lien upon the very property ultimately posted or noticed distinguishes those cases from the present one, where the plaintiff had no pre-existing interest in the real property which he sought to attach.

Id. at ----, 111 S.Ct. at 2121 (Rehnquist, C.J., concurring). Although these comments are brief, we think the Court's reasoning is as follows. At the time *Spielman–Fond* was decided, the relevant Arizona statute provided:

> Every person who labors or furnishes materials, machinery, fixtures or tools in the construction, alteration, or repair of any building, or other structure or improvement whatever, shall have a lien thereon for the work or labor done of materials, machinery, fixtures or tools furnished.

Ariz.Rev.Stat. § 33–981 (1973). The landowners in *Spielman–Fond* apparently did not deny that "defendants Yanke and Hanson's furnished labor and materials to plaintiffs in connection with the development of plaintiffs' mobile home park." *Spielman–Fond*, 379 F.Supp. at 997. Thus, they could not deny that, under the terms of the Arizona statute, Yanke and Hanson's had a lien on the property. In the instant case, by contrast, the Reardons do not admit that the conditions under which the government would have a lien on their property are fulfilled.

Of course, the Reardons cannot claim that the underlying action is entirely unrelated to the attached property, as was the case in *Doehr*. But, taking the Reardons' 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.

*1522 Relying on the apparent constitutionality of a mechanic's lien as a basis for upholding the CERCLA lien fails for three further reasons. First, a *Spielman–Fond* type of mechanic's lien rests on a voluntary agreement between the contracting parties. Proof of an agreement establishes a connection between the parties, and, where the service has indisputedly been rendered, creates a rebuttable presumption of at least some liability on the part of the landowner. There is no such voluntary agreement here. Moreover, mechanic's lien statutes typically provide for dissolution of the lien unless the mechanic takes further action. For example, the Arizona statute in *Spielman–Fond* gave the property owner an opportunity to challenge the lien and provided a six month period after which the lien was dissolved if an action was not brought to enforce it. Ariz.Rev.Stat.Ann. § 33–998. *See also, e.g.*, Maine Rev.Stat.Ann. tit. 10, §§ 3253, 3255; Mass.Gen.L. ch. 254, §§ 8, 11; N.H.Rev.Stat.Ann. § 447:9. Finally, mechanic's liens, unlike CERCLA liens, are validated by their established place in the law of the land—pre-dating the Constitution itself.

7 b. *Exigent Circumstances.* The absence of notice and a hearing may be justified by exigent circumstances. As the Court said in *Doehr*, finding a lack of such circumstances:

> [T]here was no allegation that Doehr was about to transfer or encumber his real estate or take any other action during the pendency of the action that would render his real estate unavailable to satisfy a judgment. our cases have recognized such a properly supported claim would be an exigent circumstance permitting postponing any notice or hearing until after the attachment is effected. *See Mitchell, supra,* at 609, 94 S.Ct. at 1901; *Fuentes, supra,* at 90–92, 92 S.Ct. at 1999–2000; *Sniadach*, 395 U.S., 337 at 339, 89 S.Ct. 1820 at 1821, 23 L.Ed.2d 349. Absent such allegations, however, the plaintiff's interest in attaching the property

> does not justify the burdening of Doehr's ownership rights without a hearing to determine the likelihood of recovery.

Doehr, 501 U.S. at ----, 111 S.Ct. at 2115.

As in *Doehr*, there is nothing in this case suggesting that a transfer or encumbrance of the parcels retained by the Reardons was imminent. And a special feature of CERCLA makes a claim of exigent circumstances even less likely than in the usual lien case. Under the CERCLA liability provisions, any subsequent owner of property who knew at the time of purchase that hazardous wastes were located on the premises would become liable for cleanup costs, and the property could be sold to satisfy a judgment against that subsequent owner. *See* 42 U.S.C. § 9607. Hence, the transfer of property would likely affect the government's interest in recovering cleanup costs less than the average transfer would affect the interest of the average potential judgment creditor.

8 c. *The Added Burden of Additional Procedural Requirements.* The due process calculus also involves consideration of " 'the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.' " *Doehr*, 501 U.S. at ----, 111 S.Ct. at 2112 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976)). In this case, the minimum additional procedural requirements would be notice of an intention to file a notice of lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed. This would seem to be a relatively simple matter. Moreover, the Constitution certainly allows the process due to be tailored to fit the realities of the situation. *Mitchell v. W.T. Grant Co.*, 416 U.S. at 610, 94 S.Ct. at 1901. For example, EPA may only need to demonstrate probable cause or reason to believe that the land would be "subject to or affected by" a cleanup, or that the landowner was not entitled to an "innocent landowner" defense.

Of course, EPA might seek to place a lien on property during the very early stages of a response action, when it did not have sufficient proof that a particular parcel of property was going to be "subject to ***1523*** or affected by" that action. However, we do not believe that EPA has a legitimate interest in exceeding the limits of its authority under CERCLA, and we see nothing wrong with requiring EPA to delay filing a notice of lien until it can show that the statutory prerequisites for filing the notice have been satisfied.

EPA argues that the present case can be distinguished from *Doehr* in five respects: (1) the EPA's interest in the Reardons' property before attachment of the lien; (2) the availability of a Tucker Act damages action; (3) the presence of exigent circumstances; (4) the interest of the United States in protecting the federal fisc; and (5) the purportedly minimal risk of erroneous attachment in this case. Our discussion above has already addressed the first three of these arguments. We will now consider the last two.

It does not seem that the fact that the United States, rather than a private party, is seeking the lien, should weigh in favor of the statute's constitutionality. Indeed, since the due process clause protects against *government* deprivation, just the opposite would seem to be the case. There is one situation, the federal tax lien, where the government's financial well-being may justify the draconian deprivation of its citizens' property. But an EPA lien is not on the level of a federal tax lien. The tax lien is a law unto itself, and arises from administrative necessity (as well as direct constitutional authority, *see* U.S. Const. art. I, § 8) not present here.[3]

As for EPA's final point, we simply do not see how the risk of erroneous deprivation in this case can be characterized as minimal. Rather, the risk seems greater than it was in *Doehr*. In that case, a judge considered the merits *ex parte* before authorizing the attachment, the plaintiff could attain an immediate post-attachment hearing, and a double damage remedy was available to compensate for, and to deter, error. Here, there is no prior neutral proceeding, no double damage remedy, and no post-attachment review for what may be many years. Unless EPA is immune from error—which we doubt—the risk of mistake is not minimal.

IV. CONCLUSION

In sum, we find that CERCLA § 9613(h) does not bar federal jurisdiction over the due process claim in this case; that the deprivation caused by the CERCLA lien is significant; that, at least when the landowner has raised a colorable defense, the issues may be quite factual; that the lien statute completely lacks procedural safeguards; that the government has no recognized pre-existing interest in the property; that the statute has no "exigent circumstances" requirement (nor have any such circumstances been shown in this case); and that additional procedural requirements are likely to place significant, but not overwhelming, administrative burdens on the government. As applied in this case, the statute thus deprives persons of property with far less process than the State of Connecticut provided in the attachment law found unconstitutional in *Doehr*. Thus, we are constrained to find that the CERCLA lien provisions, by not providing, at the very least, notice and a pre-deprivation hearing to a property owner who claims that the property to be encumbered is not "subject to or affected by a removal *1524 or remedial action," violate the fifth amendment due process clause.

For these reasons, the judgment of the district court is *affirmed in part, reversed in part, and remanded for further proceedings.*

CYR, Circuit Judge (dissenting).

Although the majority makes a respectable case that 42 U.S.C. § 9613(h), as interpreted, violates the due process clause, I cannot accede to its failure to observe governing rules of statutory construction which warrant an interpretation more consonant with the CERCLA statute and the Constitution.

We are required to start with the well-settled theme that a court "will construe [a] statute to avoid [constitutional] problems *unless such construction is plainly contrary to the intent of Congress.*" *Edward J. De Bartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575, 108 S.Ct. 1392, 1397, 99 L.Ed.2d 645 (1988) (emphasis added). Recognizing "that Congress, like [the judiciary], is bound by and swears an oath to uphold the Constitution[,] [t]he courts will ... not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* Of course, the corollary "is that *every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Id.* quoting *Hooper v. California*, 155 U.S. 648, 657, 15 S.Ct. 207, 211, 39 L.Ed. 297 (1895) (emphasis added). Thus, the ultimate demonstration the majority must make is that every other reasonable interpretation of the terms "enforcement activity related to" a "removal or remedial action selected under section 9604" is plainly contrary to the intent of Congress. *De Bartolo Corp.*, 485 U.S. at 575, 108 S.Ct. at 1397.

We are required to respect a second settled tenet in determining whether there is an alternative interpretation more consonant with the Constitution. "[T]he 'starting point in every case involving construction of a statute is the language itself,' *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring) ... [but] ' " '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.' " ' " *Kelly v. Robinson*, 479 U.S. 36, 43, 107 S.Ct. 353, 357, 93 L.Ed.2d 216 (1986) (quoting *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 221, 106 S.Ct. 2485, 2493, 91 L.Ed.2d 174 (1986) (in turn quoting *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285, 76 S.Ct. 349, 359, 100 L.Ed. 309 (1956) (in turn quoting *United States v. Heirs of Boisdore*, 8 How. 113, 122, 12 L.Ed. 1009 (1849))).

Although sections 9613(h) and 9601(25), considered in isolation, might bear it, the interpretation adopted by the panel is unacceptable, as there exists an alternative at once constitutional and consistent with CERCLA's language, structure, policy and history.

Section 9613(h) provides in relevant part:

> No Federal court shall have jurisdiction ... to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order

issued under section 9606(a) of this title, in any action except one of the following:[4]

....

42 U.S.C. § 9613(h). Under amended section 9601(25), "[t]he terms 'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include *enforcement activities* related thereto" 42 U.S.C. § 9601(25) (1986) (emphasis added). The panel concludes that section 9613(h) bars preenforcement review because its language, history and purpose make clear that a CERCLA lien is itself an "enforcement activity" within the meaning of amended section 9601(25). I am unable to agree, since some of the same considerations which prompt the panel to construe the statute as unconstitutional seem to me ***1525** to point to a reasonable interpretation consistent with the Constitution.[5]

First, the panel adopts what it considers the "ordinary meaning" of the term "enforcement activity," as including a CERCLA lien. Whatever other arguments there may be for such an interpretation, I must confess that I cannot think that "ordinary meaning" is among them. Under any ordinary understanding, CERCLA liens created by statute, *see* 42 U.S.C. § 9607(*l*), no more resemble "enforcement activities" than a mechanic's lien resembles a credit purchase of construction materials. Instead, I suggest, under any ordinary meaning "enforcement activities related" to "a removal or remedial action" are *activities* undertaken to *enforce* the *removal* of a contaminant or the *remediation* of its effects. It seems to me quite extraordinary to characterize a statutory lien as an *activity* of any kind, let alone as an activity to *enforce* a removal or remedial action.

The panel conclusion that "a lien on property to secure payment of [the costs of removal and remedial actions] ... *can reasonably* be described as seeking to enforce the liability provision," at 1512 (emphasis added), while true, is predicated on a misapprehension of the section 9613(h) bar, insofar as the panel fails to inquire whether a CERCLA lien is an activity related to the enforcement of a remedial or removal action, the only enforcement activities precluded from preenforcement review by virtue of section 9613(h). Although there surely is a "cause and effect" relationship between a removal or remedial action and the response costs it entails, to suggest that a CERCLA lien contingently securing the recovery of response costs enforces the removal or remedial action is to argue that aging enforces the passage of time.[6]

Second, the panel opinion correctly notes that the *primary purpose* of section 9613(h) is to *prevent delay* in the cleanup of hazardous substances which could endanger the public health. The panel concedes that preenforcement review of the validity of a CERCLA lien would in no way delay cleanup. The panel nevertheless concludes that a *secondary* purpose served by section 9613(h)—the prevention of piecemeal review—would be hindered if section 9613(h) were interpreted to permit preenforcement review of a CERCLA lien. It is nonetheless clear, however, that the constitutional challenge the panel entertains as a necessary consequence of its construction of the statute ensures no lesser incidence of piecemeal review. Unless the panel ***1526** means to suggest that Congress has precluded any constitutional challenge to sections 9601(25) and 9613(h) however construed,[7] its interpretation would not prevent piecemeal litigation, since the panel entertains the present preenforcement challenge on constitutional grounds without apparent prejudice to a later challenge to the merits of a cost recovery action under sections 9607 and 9613(g)(2) & (h)(1).

The panel relies in particular on *Voluntary Purchasing Groups, Inc. v. Reilly*, 889 F.2d 1380 (5th Cir.1989). The primary concern in *Voluntary Purchasing* was that "[i]f [all potentially responsible parties] were allowed to file suits for declaratory judgment prior to cost recovery suits being filed by the EPA, much of the EPA's time and resources could end up being allocated to litigation in this area." *Voluntary Purchasing Groups*, 889 F.2d at 1390. But of course the concern over "crazy-quilt litigation" vanishes if the right to preenforcement review is restricted to alleged innocent owners of properties encumbered by CERCLA liens.

A further legislative purpose supposedly served by barring preenforcement review is avoidance of the difficulty of litigating the innocent owner issue, *see* 42 U.S.C. § 9607(a)(1) & (b), early in the response action when all the necessary facts may not be known. The panel concern is illusory. Relief from the CERCLA lien would either be deferred or denied until the owner was able to carry the burden of proving, *see id.* § 9607(b), innocent ownership. In any event, there would be no delay or interference with any removal or remedial action. Furthermore, an alleged innocent owner's preenforcement challenge to the *validity* of a CERCLA lien, *see id.* § 9607(*l*)(1), as distinguished from the *amount* of damages and costs secured by it, *see id.* § 9607(a)(4) & (c), normally will present a very narrow and straightforward question. The CERCLA lien would be a valid encumbrance on the land as long as the owner could be liable for *any damages or costs*. *See id.* § 9607(*l*) ("*All* costs and damages for which a person is liable to the United States ... shall constitute a lien in favor of the United States upon all real property and rights to such property"). The litigation complexity to which the panel adverts consists in determining whether the Reardons are innocent owners as to any portion of their property "subject to or affected by a removal or remedial action." *See id.* § 9607(*l*)(1)(B). The far more problematic liability issue—the assessment and apportionment of the actual costs to be borne by each potentially responsible party ("PRP")—need not even be addressed in an action for review brought by an allegedly innocent owner.

Nor would preenforcement review impair the specific legislative purpose that prompted the amendment to section 9601(25), which was to "*confirm* the EPA's authority to recover *costs* for enforcement actions taken against responsible parties."[8] H.R.Rep. No. 99–253(I), 99th Cong., 2d Sess. 66–67 *reprinted in* 1986 U.S.Code Cong. & Admin.News 2848–2849 (emphasis ***1527** added). If a CERCLA lien is an "enforcement action," as the panel believes, then the mere sending of a registered mail notice to the owner, *see* 42 U.S.C. § 9607(*l*) (1) & (2)(A) & (B), automatically triggers a CERCLA lien, *see id.* § 9607(*l*)(1)(B), which remains uncontrovertible by the owner, at the option of EPA, until the expiration of the statute of limitations on a cost recovery action, *see id.* § 9613(g)(2). I cannot think the language of sections 9601(25) and 9613(h) so plainly evinces a congressional intent to include CERCLA liens as *enforcement* activities related to a removal or remedial action, when the effect would be to deny an innocent owner the right to obtain judicial review of an encumbrance on the entire property even though the only "activity" involved was the sending of a registered mail notice of lien to the owner.

Third, the panel relies on legislative history for its conclusion that section 9613(h) was intended to bar any preenforcement challenge to the validity of a CERCLA lien. *But see supra* note 7. The panel implicitly concedes that there is no evidence that Congress *intended* to bar an alleged innocent owner's preenforcement challenge to the validity of a CERCLA lien when it amended the scope of "removal" or "remedial" actions to include "enforcement activities related thereto." *See id.* § 9601(25). What the panel does not acknowledge is that there is no historical evidence that Congress ever *considered* whether or how section 9613(h) was to apply to a CERCLA lien challenge. *See supra* note 8 & accompanying text.

As the panel indicates, Congress did make clear its general purposes in enacting section 9613(h) and its intention to preclude PRP's in general from mounting judicial challenges to "their *potential liability* for a response action" prior to the completion of the cleanup. *See* 132 Cong.Rec. S14929 (daily ed. Oct. 3, 1986) (Sen. Thurmond); 132 Cong.Rec. H9582 (daily ed. Oct. 8, 1986) (Rep. Glickman) (emphasis added). Nevertheless, owners of properties encumbered by CERCLA liens comprise a tiny fraction of the total universe of PRP's, *see* 42 U.S.C. § 9607(a), whereas their property interests are burdened far earlier, longer and more severely than other PRP's, *see id.* § 9607(*l*)(1) & (2), who are nonetheless entitled to mount an immediate judicial challenge to their alleged liability for response costs as and when a recovery action is brought against them, *see id.* §§ 9613(h)(*l*), (4) & 9607, and before there has been any deprivation of their property rights.

Congress' reasoning regarding PRP's in general simply does not have meaning for those whose property is encumbered by a CERCLA lien. Congress perceived no need to permit PRP's to challenge their liability for costs and damages prior to the completion of the cleanup, because "plaintiffs concerned with the monetary consequences of a response can be made whole after the cleanup is completed by reducing the amount of the Government's recovery.... Delay in the timing of suits seeking monetary damages does not diminish the court's ability to grant later and adequate relief." 132 Cong.Rec. S14898 (daily ed. Oct. 3, 1986) (Sen. Stafford). The statement by Senator Stafford, a floor leader, demonstrates that Congress did not consider the plight of innocent owners indefinitely deprived of their property rights and the right to challenge an invalid CERCLA lien.

Innocent landowners whose property rights remain encumbered for years by a CERCLA lien are not seeking to challenge their potential liability for cleanup costs but to terminate the confiscatory effects of the invalid lien. Nor can an innocent owner be made whole by "reducing the amount of the Government's recovery," since the deprivation sustained by the innocent owner does not result from a recent assessment of unwarranted cleanup costs but from the inability to dispose of the encumbered property while awaiting EPA's discretionary initiation of an *in rem* action to recover on an invalid CERCLA lien. *See* 42 U.S.C. § 9607(*l*)(4). Thus, it is beyond the court's power to "grant later and adequate relief." *See Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105, 2118, 115 L.Ed.2d 1 (1991) (White, J., plurality opinion) ("the right to be compensated at the end of the case ... for all provable injuries caused by *1528 the attachment is inadequate to redress the harm inflicted, harm that could have been avoided had an early hearing been held."). The panel conclusion that the CERCLA lien provision is unconstitutional well demonstrates the great disparity between the interests and burdens of innocent owners and those of PRP's generally.

The panel interprets section 9613(h) "to bar review of pre-enforcement challenges to liens" because (1) this interpretation is "consistent with the language and the purpose of the judicial bar"; and (2) the court "cannot give the definition [of 'removal' and 'remedial' action] inconsistent readings within the statute." Slip op. at 12. The first point, even if correct, is not determinative unless any alternative interpretation is "plainly contrary to the intent of Congress." *See De Bartolo Corp.*, 485 U.S. at 575, 108 S.Ct. at 1397. As to the second point, while the panel appropriately eschews changing interpretations of the term "removal" and "remedial" action, that is not the statutory term on which its conclusion hinges; instead, it hinges on the term "enforcement activities related to" a removal or remedial action. Moreover, the panel opinion does not demonstrate that excluding CERCLA liens from the undefined term "enforcement activities" would render the statute internally inconsistent. As I regard it more consistent with the language, purpose and history of the statute, *see Kelly v. Robinson*, 479 U.S. at 43, 107 S.Ct. at 357, that a CERCLA lien not be considered an "enforcement activity," I believe that constitutional interpretation must be accepted. *See De Bartolo Corp.*, 485 U.S. at 575, 108 S.Ct. at 1397.

The constitutionality of the CERCLA lien provision depends on whether the notice of lien and the opportunity for judicial review satisfy the three part analysis articulated in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18 (1976). As most recently explained in *Doehr*, due process analysis requires that the court balance

> "the private interest that will be affected by the official action"; "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards"; and lastly, "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Doehr, 111 S.Ct. at 2112 (quoting *Mathews*, 424 U.S. at 335, 96 S.Ct. at 903). As the Court has emphasized, the due process inquiry is fact specific. "Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Mathews*, 424 U.S. at 334, 96 S.Ct. at 902. "[A]s applied to

this case," *Doehr*, 111 S.Ct. at 2109, I believe that due process is satisfied by according the Reardons prompt judicial review of their innocent ownership claim.

I agree with the panel that the adverse effects of a CERCLA lien, indefinitely extended without the right to judicial review, would work a "significant" deprivation. I disagree, however, that there is a substantial risk of any unwarranted deprivation in the instant case, due to the very different purposes served by a CERCLA lien and the attachment lien involved in *Doehr*. Finally, I cannot agree that the government has no significant interest in the Reardons' property.

First, the Connecticut statute in *Doehr* permitted prejudgment attachment of the defendant's home to secure recovery of any future damage award to the plaintiff in an as-yet untried tort action. *Doehr*, 111 S.Ct. at 2113. The Supreme Court assumed that the statute permitted an attachment to issue on a sufficient showing that there was "probable cause" to believe that judgment would be rendered for the plaintiff. *Id.* 111 S.Ct. at 2114. [9] Since the "probable cause" determination in *Doehr* was based on the plaintiff's "one-sided, self-serving, and conclusory submissions," the Court ***1529** found the "potential for unwarranted attachment ... too great to satisfy the requirements of due process absent any countervailing consideration." *Id.*

A CERCLA lien, however, is very different from the attachment lien in *Doehr*. The CERCLA lien encumbering the Reardon property has been administratively determined to require priority cleanup. The Reardon property has been determined to be contaminated by large quantities of polychlorinated biphenyls (PCBs) and has been placed on the National Priorities List pursuant to 42 U.S.C. § 9605. Two hundred thousand dollars have been spent on the cleanup of the property, and total cleanup costs at the site are estimated at over $16 million. The preparedness of the *lienor* to commit such sums to clean up the Reardon property on a priority basis provides a substantial safeguard against any erroneous determination as to the presence or location of hazardous substances at the cleanup site. Unwarranted cleanup costs would not be recoverable from the property owner. *See* 42 U.S.C. § 9607(a) & (*l*)(1). Similarly, the elaborate statutory safeguards the administrative procedures for selecting removal and remedial actions, *see, e.g., id.* §§ 9604, 9613(k) and 9621, afford extraordinary protection against any such egregious error as an unwarranted cleanup. Thus, it would seem almost fanciful to presume significant risk of an unwarranted CERCLA lien on property previously determined so severely contaminated as to require priority response action entailing a substantial investment of government resources. [10]

The danger of an unwarranted CERCLA lien is further reduced by the very different standards governing the enforceability of the CERCLA lien and the attachment lien involved in *Doehr*. The prejudgment attachment lien in *Doehr* would be unenforceable unless the plaintiff eventually prevailed on the tort claim as to which he bore the ultimate burden of proof. The CERCLA statute, on the other hand, makes the owner, *see id.* § 9601(20), liable under section 9607(a) for all costs and damages resulting from the cleanup, *see id.* § 9607(*l*)(1), *unless the owner can show* by a preponderance of the evidence, *id.* § 9607(b), that he is an innocent holder, an extremely difficult burden, *see id.* §§ 9607(b) & 9601(35). Thus, CERCLA imports a virtual statutory presumption that the lien is valid and enforceable absent a preponderance of evidence demonstrating not only the owner's lack of responsibility and knowledge of the wrongful disposal, but the absence of any reason to believe the property is contaminated. *See id.* §§ 9607(b) & 9601(35). Given the extremely demanding criteria for establishing innocent ownership, the danger of an unwarranted CERCLA lien is insignificant in comparison with the risk presented in *Doehr*.

The lesser risk of unwarranted attachment similarly affects the evaluation of the sufficiency of the statutory safeguards. Given that a CERCLA lien encumbers only the real property rights of the owner of the contaminated property, *see id.* §§ 9601(20) & 9607(*l*)(1), and that the ownership and location of property subjected to or affected by a response action are almost invariably ascertainable by recourse to EPA and real property records, a prompt postdeprivation hearing at the instance of a putative innocent owner would provide adequate protection and remediation of the short term

effects of any mistaken encumbrance. Moreover, an innocent landowner in whose property the government proposes to invest more than $16 million normally would realize property improvements far in excess of any loss occasioned by any short term erroneous deprivation. Similarly, the absence of an indemnity bond seems immaterial where the federal government improves the affected property and remains answerable in damages. [11]

Finally, and perhaps most importantly, I cannot agree with the analysis of the governmental *1530 interest proposed by the panel. According to the panel, the government, like the plaintiff in *Doehr*, has no prior recognized interest in the liened property, slip op. at 29, because it has not yet been shown that the Reardons are liable for response costs.

First, the panel analysis overlooks the fact that property owners are answerable for response costs unless they can prove their innocence under the demanding standards prescribed in the statute. *See* 42 U.S.C. §§ 9607(b) & 9601(35). Second, the government has a legitimate interest in any incremental value occasioned by its cleanup of the Reardon property. Unlike the plaintiff in *Doehr*, whose "only interest in attaching the property was to ensure the availability of assets to satisfy his judgment if he prevailed on the merits of his action," *Doehr*, 111 S.Ct. at 2115, the government has expended more than two hundred thousand dollars in its cleanup effort to date and expects to expend millions more—substantial expenditures which should benefit the affected property significantly. The importance of according protection to the government's investment in the contaminated property is underscored by the fact that Congress amended the CERCLA statute to confirm EPA's right to recover "all costs of removal or remedial action." *See* 42 U.S.C. §§ 9601(25) & 9607(a)(4)(A).

The inability of the government to recover its costs from responsible parties would reduce the resources available for response actions at other contaminated sites. Congress enacted CERCLA to deal with "unfortunate human health and environmental consequences [of inactive hazardous waste disposal sites] ... amidst growing public and Congressional concern over the magnitude of the problem" and in recognition that "[e]xisting law [wa]s clearly inadequate to deal with this massive problem." H.R.Rep. No. 1016, 96th Cong., 2d Sess., pt. 1 at 17 (1980), *reprinted in* 1980 U.S.Code Cong. & Admin.News 6119, 6120. Since the CERCLA lien provision significantly affects the EPA's financial ability to cope with a health and environmental problem so massive that it hardly admits of cost quantification, the existence of a substantial governmental interest in recouping CERCLA response costs from the affected property appears manifest.

Due process analysis requires that we consider the effects of the CERCLA lien on the Reardons' property rights, *as applied* in this case. In my opinion, considering the important governmental interests involved and the relatively insignificant risk of any unwarranted, uncompensable, short-term deprivation of the Reardons' property rights, a prompt postdeprivation hearing at the instance of the Reardons would satisfy the due process analysis required by *Doehr* and *Mathews*. As I believe the statute is reasonably interpreted as permitting a prompt postdeprivation challenge at the instance of innocent landowners and is therefore constitutional, I respectfully dissent.

All Citations

947 F.2d 1509, 34 ERC 1070, 116 A.L.R. Fed. 667, 60 USLW 2306, 22 Envtl. L. Rep. 20,292

Footnotes

1 Of course, § 9613(h) is styled as a provision that merely delays review, rather than precludes it—indeed, it is titled "Timing of review." However, the only available review of the lien notice is in an enforcement action brought by EPA; and the judgment in that enforcement action will render moot the Reardons' due-process-based request for injunctive relief against

the filing of the lien, since it will decide whether or not the Reardons are liable under CERCLA. Hence, the effect of § 9613(h) is to preclude review altogether.

2 The Connecticut statute at issue in *Doehr* provided "expeditious" post-attachment review, *see* 501 U.S. at ----, 111 S.Ct. at 2115, but the Court nonetheless found the statute constitutionally deficient. Even under *Doehr*, though, post-attachment process is not always inadequate. *Doehr* notes the factors leading to the Court's approval, in *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 94 S.Ct. 1895 (1974), of a sequestration statute with no pre-deprivation review: "the plaintiff had a vendor's lien to protect, the risk of error was minimal because the likelihood of recovery involved uncomplicated matters that lent themselves to documentary proof, and plaintiff was required to put up a bond." *Doehr*, 501 U.S. at ----, 111 S.Ct. at 2114.

3 *See, e.g.*, *United States v. Snyder*, 149 U.S. 210, 214, 13 S.Ct. 846, 847–48, 37 L.Ed. 705 (1893), in which the Court held:

> The power of taxation has always been regarded as a necessary and indispensable incident of sovereignty. A government that cannot, by self-administered methods, collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name. If the United States, proceeding in one of their own courts, in the collection of a tax admitted to be legitimate, can be thwarted by the plea of a state statute prescribing that such a tax must be assessed and recorded under state regulation, and limiting the time within which such tax shall be a lien, it would follow that the potential existence of the government of the United States is at the mercy of state legislation.

Snyder, 149 U.S. at 214, 13 S.Ct. at 847–48. *See also Phillips v. Commissioner*, 283 U.S. 589, 595 & n. 5, 51 S.Ct. 608, 611 n. 5, 75 L.Ed. 1289 (1931) (reviewing the history of tax collection via summary administrative proceedings).

4 The specific instances listed in § 9613(h) are not implicated in the instant appeal.

5 The panel refrains from attempting to establish more than that the imposition of a CERCLA lien "can reasonably be described as [an enforcement activity]." More is required, however, "in order to save a statute from unconstitutionality." *De Bartolo Corp.*, 485 U.S. at 575, 108 S.Ct. at 1397 (quoting *Hooper*, 155 U.S. at 657, 15 S.Ct. at 211 ("every reasonable construction must be resorted to")).

6 Serious difficulties confound the effort to lump together attorney fees and CERCLA lien costs as "enforcement activities," on an "all or nothing" basis. *See* at 1514. First, since the CERCLA lien arises by operation of law, *see* 42 U.S.C. § 9607(*l*)(1), it entails only the *de minimis* expense associated with providing the landowner with a registered mail notice, *see id.* § 9607(*l*)(2)(B). The panel approach nonetheless assumes, absent historical evidence, that Congress considered recovery of these *de minimis* costs so compelling a concern as to warrant depriving innocent landowners of significant property rights *immediately*, *see id.* § 9607(*l*)(1) & (2), and *indefinitely*, *see id.* § 9613(g)(2), without due process of law, *see id.* § 9613(h).

I do not think it realistic to suppose that the congressional intent activating the 1986 amendment to § 9601(25) can be reliably determined without at least recognizing at the outset that CERCLA deprives no other potentially responsible party ("PRP") of any significant property interest

without due process. All other PRP's are entitled to have any claim for response costs (and attorney fees) promptly determined by the court as part of the cost recovery action itself, *see id.* § 9613(g)(2). Nevertheless, and in stark contrast, the panel concludes that Congress clearly intended that an innocent landowner must wait years for the government to commence a cost recovery action before obtaining judicial review of the validity of the CERCLA lien encumbering his property. To suggest that Congress clearly intended that its amendment of § 9601(25) should be so interpreted merely because amended § 9601(25) was intended to permit recovery of attorney fees incurred in connection with a cost recovery action, utterly ignores the great disparity in the benefits and burdens at stake in these radically different contexts.

7 Were this the case, of course, the court would lack jurisdiction to consider, *sua sponte* or otherwise, the constitutional difficulties posed by *Connecticut v. Doehr*, 111 S.Ct. 2105 (1991). *See* 42 U.S.C. § 9613(h) ("*No* Federal court shall have *jurisdiction ... to review any challenges* to removal or remedial action selected under section 9604...") (emphasis added). The panel concludes, however, that since the statutes expresses no "clear congressional intent to preclude the type of constitutional claim the Reardons are making," a constitutional challenge to the lien provision is not barred by 9613(h), at 1514–1515. *See Webster v. Doe*, 486 U.S. 592, 603, 108 S.Ct. 2047, 2053–54, 100 L.Ed.2d 632 (1988) ("where Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear"). The problem with the attempted distinction between constitutional and other preenforcement challenges is that § 9613(h) bars "*any challenges* to removal or remedial action selected under section 9604...." (emphasis added).

8 Section 9613(h), as well as the amendment to § 9601(25), were enacted as part of the "Superfund Amendments and Reauthorization Act of 1986." P.L. 99–499. It is not altogether clear that an amendment meant to *confirm*, not *change*, existing law, should be applied to a lien provision added to the statute at the same time as the definitional change. Instead, it seems more likely that Congress may have focused exclusively on the confirmatory effect of the amendment on existing statutory provisions.

9 The statute in fact was unclear as to the showing required. The Supreme Court determined, however, that even a "probable cause" showing would not prevent a substantial danger of erroneous deprivation. *Doehr*, 111 S.Ct. at 2114.

10 The risk of unwarranted cleanup is even more fanciful in the instant case, as the Reardons admit ownership and do not contest the presence of contaminants on their property.

11 An action for damages under the Tucker Act, 28 U.S.C. § 1491(a)(1), would appear to provide an adequate compensatory remedy for loss or damage sustained due to any relatively brief, unwarranted deprivation resulting from a violation of EPA regulations or the CERCLA statute. The Tucker Act provides:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department ... or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

End of

Document

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 2

Code of Virginia
Title 43. Mechanics' and Certain Other Liens
Chapter 1. Mechanics' and Materialmen's Liens

This section has more than one version with varying effective dates. Scroll down to see all versions.

§ 43-4.01. (Effective until October 1, 2019) Posting of building permit; identification of mechanics' lien agent in building permit; notice to mechanics' lien agent; effect of notice.

A. The building permit for any one- or two-family residential dwelling unit issued pursuant to the Uniform Statewide Building Code shall be conspicuously and continuously posted on the property for which the permit is issued until all work is completed on the property. The permit shall be posted on the property before any labor is performed or any material furnished on the property for which the building permit is issued. Nothing herein shall be construed to prohibit a permit being amended after it has been initially issued to name a mechanics' lien agent or a new mechanics' lien agent.

B. If the building permit contains the name, mailing address, and telephone number of the mechanics' lien agent as defined in § 43-1, any person entitled to claim a lien under this title may notify the mechanics' lien agent then named on the permit or amended permit that he seeks payment for labor performed or material furnished by registered or certified mail or by physical delivery. Such notice shall contain (i) the name, mailing address, and telephone number of the person sending such notice, (ii) the person's license or certificate number issued by the Board for Contractors pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1, if any, and the date such license or certificate was issued and the date such license or certificate expires, (iii) the building permit number on the building permit, (iv) a description of the property as shown on the building permit, and (v) a statement that the person filing such notice seeks payment for labor performed or material furnished. A return receipt or other receipt showing delivery of the notice to the addressee or written evidence that such notice was delivered by the postal service or other carrier to but not accepted by the addressee shall be prima facie evidence of receipt. An inaccuracy in the notice as to the description of the property shall not bar a person from claiming a lien under this title or filing a memorandum or otherwise perfecting or enforcing a lien as provided in subsection C if the property can otherwise be reasonably identified from the description.

In the event that the mechanics' lien agent dies, resigns, or otherwise becomes unable or unwilling to serve during the construction period, the owner or the general contractor shall immediately appoint a successor mechanics' lien agent with all the rights, duties, and obligations of the predecessor mechanics' lien agent. An amended permit shall be displayed as provided in subsection A. Until such time as the successor is named and displayed as provided, notice given hereunder to the predecessor mechanics' lien agent at the address shown shall be deemed good notice, notwithstanding the fact that the agent may have died, resigned or become otherwise unable or unwilling to serve.

C. Except as provided otherwise in this subsection, no person other than a person claiming a lien under subsection B of § 43-3 may claim a lien under this title or file a memorandum or otherwise perfect and enforce a lien under this title with respect to a one or two family residential dwelling unit if such person fails to notify any mechanics' lien agent identified on the building permit in accordance with subsection B above (i) within 30 days of the first date that he performs labor or furnishes material to or for the building or structure or (ii) within 30 days of the date such a permit is issued, if such labor or materials are first performed or furnished by such person prior to the issuance of a building permit. However, the failure to give any such notices within the appropriate 30-day period as required by the previous sentence shall not bar a person from claiming a lien under this title or from filing a memorandum or otherwise perfecting and enforcing a lien under this title, provided that such lien is limited to labor performed or materials furnished on or after the date a notice is given by such person to the mechanics' lien agent in accordance with subsection B above. A person performing labor or furnishing materials with respect to a one or two family residential dwelling unit on which a building permit is not posted at the time he first performs his labor or first furnishes his material or, if posted, does not state the name of the mechanics' lien agent, shall determine from appropriate

authorities whether a permit of the type described in subsection B above has been issued, the date on which it is issued, and the name of the mechanics' lien agent, if any, that has been appointed. The issuing authority shall maintain the mechanics' lien agent information in the same manner and in the same location in which it maintains its record of building permits issued.

No person shall be required to comply with this subsection as to any memorandum of lien which is recorded prior to the issuance of a building permit nor shall any person be required to comply with this subsection when the building permit does not designate a mechanics' lien agent.

D. Unless otherwise agreed in writing, the only duties of the mechanics' lien agent shall be to receive notices delivered to him pursuant to subsection B and to provide any notice upon request to a settlement agent, as defined in § 55-525.8, involved in a transaction relating to the residential dwelling unit.

E. Mechanics' lien agents are authorized to enter into written agreements with third parties with regard to funds to be advanced to them for disbursement, and the transfer, disbursement, return and other handling of such funds shall be governed by the terms of such written agreements.

F. A mechanics' lien agent as defined in § 43-1 may charge a reasonable fee for services rendered in connection with administration of notice authorized herein and the disbursement of funds for payment of labor and materials for the construction or repair of improvements on real estate.

1992, cc. 779, 787; 2001, c. 532; 2010, c. 341; 2013, c. 293.

§ 43-4.01. (Effective October 1, 2019) Posting of building permit; identification of mechanics' lien agent in building permit; notice to mechanics' lien agent; effect of notice.

A. The building permit for any one- or two-family residential dwelling unit issued pursuant to the Uniform Statewide Building Code shall be conspicuously and continuously posted on the property for which the permit is issued until all work is completed on the property. The permit shall be posted on the property before any labor is performed or any material furnished on the property for which the building permit is issued. Nothing herein shall be construed to prohibit a permit being amended after it has been initially issued to name a mechanics' lien agent or a new mechanics' lien agent.

B. If the building permit contains the name, mailing address, and telephone number of the mechanics' lien agent as defined in § 43-1, any person entitled to claim a lien under this title may notify the mechanics' lien agent then named on the permit or amended permit that he seeks payment for labor performed or material furnished by registered or certified mail or by physical delivery. Such notice shall contain (i) the name, mailing address, and telephone number of the person sending such notice, (ii) the person's license or certificate number issued by the Board for Contractors pursuant to Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1, if any, and the date such license or certificate was issued and the date such license or certificate expires, (iii) the building permit number on the building permit, (iv) a description of the property as shown on the building permit, and (v) a statement that the person filing such notice seeks payment for labor performed or material furnished. A return receipt or other receipt showing delivery of the notice to the addressee or written evidence that such notice was delivered by the postal service or other carrier to but not accepted by the addressee shall be prima facie evidence of receipt. An inaccuracy in the notice as to the description of the property shall not bar a person from claiming a lien under this title or filing a memorandum or otherwise perfecting or enforcing a lien as provided in subsection C if the property can otherwise be reasonably identified from the description.

In the event that the mechanics' lien agent dies, resigns, or otherwise becomes unable or unwilling to serve during the construction period, the owner or the general contractor shall immediately appoint a successor mechanics' lien agent with all the rights, duties, and obligations of the predecessor mechanics' lien agent. An amended permit shall be displayed as provided in subsection A. Until such time as the successor is named and displayed as provided, notice given hereunder to the predecessor mechanics' lien agent at the address shown shall be deemed good notice, notwithstanding the fact that the agent may have died, resigned or become otherwise unable or unwilling to serve.

C. Except as provided otherwise in this subsection, no person other than a person claiming a lien under subsection B of § 43-3 may claim a lien under this title or file a memorandum or otherwise perfect and enforce a lien under this title with respect to a one or two family residential dwelling unit if such person fails to notify any mechanics' lien agent identified on the building permit in accordance with subsection B above (i) within 30 days of the first date that he performs labor or furnishes material to or for the building or structure or (ii) within 30 days of the date such a permit is issued, if such labor or materials are first performed or furnished by such person prior to the issuance of a building permit. However, the failure to give any such notices within the appropriate 30-day period as required by the previous sentence shall not bar a person from claiming a lien under this title or from filing a memorandum or otherwise perfecting and enforcing a lien under this title, provided that such lien is limited to labor performed or materials furnished on or after the date a notice is given by such person to the mechanics' lien agent in accordance with subsection B above. A person performing labor or furnishing materials with respect to a one or two family residential dwelling unit on which a building permit is not posted at the time he first performs his labor or first furnishes his material or, if posted, does not state the name of the mechanics' lien agent, shall determine from appropriate authorities whether a permit of the type described in subsection B above has been issued, the date on which it is issued, and the name of the mechanics' lien agent, if any, that has been appointed. The issuing authority shall maintain the mechanics' lien agent information in the same manner and in the same location in which it maintains its record of building permits issued.

No person shall be required to comply with this subsection as to any memorandum of lien which is recorded prior to the issuance of a building permit nor shall any person be required to comply with this subsection when the building permit does not designate a mechanics' lien agent.

D. Unless otherwise agreed in writing, the only duties of the mechanics' lien agent shall be to receive notices delivered to him pursuant to subsection B and to provide any notice upon request to a settlement agent, as defined in § 55.1-900, involved in a transaction relating to the residential dwelling unit.

E. Mechanics' lien agents are authorized to enter into written agreements with third parties with regard to funds to be advanced to them for disbursement, and the transfer, disbursement, return and other handling of such funds shall be governed by the terms of such written agreements.

F. A mechanics' lien agent as defined in § 43-1 may charge a reasonable fee for services rendered in connection with administration of notice authorized herein and the disbursement of funds for payment of labor and materials for the construction or repair of improvements on real estate.

1992, cc. 779, 787; 2001, c. 532; 2010, c. 341; 2013, c. 293.

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 3

Code of Virginia
Title 43. Mechanics' and Certain Other Liens
Chapter 2. Liens on Franchises and Property of Transportation, Etc., Companies

§ 43-24. Liens of employees, suppliers, etc.

All conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics, traveling representatives or laborers, and all persons furnishing railroad iron, engines, cars, fuel and all other supplies necessary to the operation of any railway, canal or other transportation company, and all clerks, mechanics, traveling representatives, foremen, and laborers, and superintendents to the extent of not more than $100 per week, who furnish their services or labor to any one or more individuals trading under a real or fictitious name, or names, or to any partnership or other unincorporated body of persons, engaged in mining or manufacturing, or to any mining or manufacturing company, whether such railway, canal or other transportation or mining or manufacturing company be chartered under or by the laws of this Commonwealth, or be chartered elsewhere and be doing business within the limits of this Commonwealth, shall have a prior lien on the franchises, gross earnings and on all the real and personal property of such individual, partnership, unincorporated association or company which is used in operating the same, to the extent of the moneys due them by the individual, partnership, unincorporated association or company for such wages or supplies, which lien shall be superior to, and have priority over, any amount due by such individual, partnership, unincorporated association or company for rents, or royalties.

No mortgage, deed of trust, sale, hypothecation or conveyance executed since the first day of May, 1888, shall defeat or take precedence over such lien. The lien secured by this section to parties furnishing supplies, shall be subordinate to that allowed to clerks, mechanics, foremen, superintendents, and laborers for services furnished as aforesaid.

If any person entitled to a lien as well under § 43-3 as under this section, shall perfect his lien given by either section, he shall not be entitled to the benefit of the other.

No right to or remedy upon a lien which has already accrued to any person shall be extended, abridged or otherwise affected hereby.

Code 1919, § 6438; 1922, p. 13; 1932, p. 596; 1938, p. 17; 2010, c. 343.

1/7/2020

Code of Virginia
Title 43. Mechanics' and Certain Other Liens
Chapter 2. Liens on Franchises and Property of Transportation, Etc., Companies

§ 43-25. Perfection and enforcement of lien.

No person shall be entitled to the lien given by § 43-24 unless he shall, within ninety days after the last item of his bill becomes due and payable for which such supplies are furnished or service rendered, file in the clerk's office of the circuit court of the county or circuit court of the city in which is located the chief office in this Commonwealth of the company against which the claim is, or in the clerk's office of the Circuit Court of the City of Richmond when such office is in the city, or within that time shall file with the receiver, trustee or assignee of such company, a memorandum of the amount and consideration of his claim, and the time or times when the same is, or will become due and payable, verified by affidavit, which memorandum, if filed with the clerk or in his office, the clerk shall forthwith record in the miscellaneous lien book and index the same in the name of the claimant and also in the name of the company against which the claim is, as required by § 43-4. Any such lien may be enforced in a court of equity.

Code 1919, § 6439; 1928, p. 760.

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 4

Goldman, Andrew

From: Brad Pollack <bgpollack@gmail.com>
Sent: Sunday, November 17, 2019 5:12 PM
To: Goldman, Andrew
Subject: Re: Magnate Lien Proceeding

Mr. Goldman,

Thank you. I write you this evening with a different hat on. On Tuesday, November 5, I was elected to the Shenandoah County Board of Supervisors representing the district encompassing the Aileen plant. Come January, I will have a governmental responsibility to see that the site becomes productive again as soon as possible. In that spirit, the EPA and Magnate would expeditiously agree on an absolute and clear lien along with some sort of clean bill of health to allow for the site's future economic development. To the extent you can work with us on that, I hereby request it. To the extent that we need to get others in the EPA, the Trump Administration and/or Congress involved, let me know as I am determined to turn that site around just as soon as possible.

Thanks very much,

Brad Pollack
Attorney
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net
540-459-8600
540-459-8670 (fax)

On Wed, Nov 6, 2019 at 12:44 PM Goldman, Andrew <Goldman.Andrew@epa.gov> wrote:

Mr. Pollack—

In light of the RJO's letter of today (which was emailed to you earlier), I will send the correct Rebuttal attachments to you via UPA overnight.

ANDREW S. GOLDMAN (3RC10)

Sr. Assistant Regional Counsel

U.S. Environmental Protection Agency

1650 Arch Street

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 5

Goldman, Andrew

From: Goldman, Andrew
Sent: Thursday, November 21, 2019 2:00 PM
To: Brad Pollack
Subject: RE: Magnate Lien Proceeding

Mr. Pollack—

Thank you for informing me that you have been elected to Shenandoah County Board of Supervisors.

With respect to the requests in your email, first, the lien EPA intends to perfect is as absolute and clear as it can be. The lien involves two parcels, Shenandoah County Parcel Nos. 07101001B and 0701001G, of the Magnate LLC Site. The lien value is the total of all costs incurred by EPA in connection with response activities at the former Aileen plant property. As of May 23, 2019, such costs were $381,252.66. EPA's costs have increased since that time but we have not run a new report from the financial management system to generate a new cost figure. This should not adversely affect resolution of the lien issues.

As for a "clean bill of health," EPA is not in a position to make such a representation. EPA's removal action was taken in specific areas of the Site property to address discrete threats arising from identified releases and/or threatened releases of asbestos and PCBs. EPA's action abated such threats and will continue to do so in the future so long as the basement in Area 10 remains sealed and the signage stays up.

If, following the conclusion of the proceeding before the Regional Judicial Officer, EPA perfects the lien, the lien can be resolved via a settlement with Magnate LLC. It is not uncommon for such settlements to involve the sale of the site property with proceeds of the sale payable to EPA.

Your email is not clear whether you are making a request to work with EPA on behalf of Shenandoah County, for which you have said you will be a member of the Board of Supervisors come January 2020, or on behalf of Magnate LLC. Given the potentially different interests at stake, please clarify which entity you are representing in your email.

ANDREW S. GOLDMAN (3RC10)
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103
(215) 814-2487
Goldman.andrew@epa.gov

From: Brad Pollack <bgpollack@gmail.com>
Sent: Sunday, November 17, 2019 5:12 PM

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 6

Goldman, Andrew

From: Brad Pollack <bgpollack@gmail.com>
Sent: Thursday, November 28, 2019 7:59 AM
To: Goldman, Andrew
Cc: Darryl Bates
Subject: Re: Magnate Lien Proceeding (CERC-03-2019-0120LL

Mr. Goldman,

Thanks. Assuming you have no authority or ability to creatively and productively resolve this matter. That your role is just to grind through the legal proceedings and not see the bigger picture of making this property productive again. Assuming so, I will be reaching out to Ben Cline, Mark Warner, Tim Kaine and the White House to see if they can sensibly help to resolve this.

Best and Happy Thanksgiving,

Brad Pollack
Attorney
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net
540-459-8600
540-459-8670 (fax)

On Tue, Nov 26, 2019 at 10:57 AM Goldman, Andrew <Goldman.Andrew@epa.gov> wrote:

Mr. Pollack—

Attached find EPA's final brief in the above-captioned matter.

ANDREW S. GOLDMAN (3RC10)

Sr. Assistant Regional Counsel

U.S. Environmental Protection Agency

1650 Arch Street

Philadelphia, PA 19103

(215) 814-2487

Goldman.andrew@epa.gov

In Re Magnate, LLC

No. CERC-03-2019-0120LL

EPA Post Hearing Brief

Exhibit 7

Goldman, Andrew

From: Goldman, Andrew
Sent: Tuesday, December 3, 2019 11:57 AM
To: Brad Pollack
Subject: RE: Magnate Lien Proceeding (CERC-03-2019-0120LL

Mr. Pollack:

First, the Superfund removal program does not comprehensively evaluate a property for contamination. It identifies and responds to discrete threats that pose a threat to human health or welfare thereby warranting a removal response action. Such was the case at your client's property. The Superfund removal program conducted a removal response action at your client's property earlier this year to address a discrete threat to the public health posed by friable asbestos and certain PCB-contaminated sediments found at that property. The Superfund removal program did not identify threats warranting a removal response beyond that which was conducted at the property earlier this year. EPA is , however, aware that non-friable asbestos remains at the property and should be addressed in accordance with Virginia law. There may be other conditions, such as deteriorating buildings and debris piles, which may need to be addressed under Commonwealth law as well.

Second, with respect to redevelopment of the property, EPA is currently unaware of any exclusion from the definition of a "Brownfield" that may apply. Therefore, this property may very well meet the definition of a "Brownfield" under 42 U.S.C. § 9601(39). Note that that this is based upon the information currently available to EPA and the property conditions as they currently exist.

Lastly, in response to your suggestion that I lack the "authority or ability to creatively and productively resolve this matter" and that my role is "just to grind through the legal proceedings and not see the bigger picture of making this property productive again," I recommend that you revisit the July 1, 2019 letter from the EPA Region 3 Acting Regional Counsel which describes the nature and purpose of the proceeding in which we now find ourselves. This proceeding is intended to give your client an opportunity to be heard prior to EPA's perfection of a lien on its property to secure response costs incurred by EPA. Neither this proceeding nor any lien notice which may be placed in the land records stand in the way of returning this property to productive use. As referenced in the Acting Regional Counsel's letter and in each of the briefs filed by EPA in this proceeding, resolution of your client's liability through settlement would terminate EPA's lien. Such a settlement would accomplish the dual objectives of recovering Federal funds expended to abate human health threats at the property and facilitate a return of the property to productive use which very well might have been impossible had EPA not responded to environmental conditions there. Despite your belittling remarks and apparent rejection of the administrative path for resolving this matter, EPA stands ready to both complete the lien proceeding to fully vet your client's concerns regarding perfection of the lien and work toward a mutually satisfactory resolution of your client's liability in the underlying Superfund matter. If your client has a settlement proposal you wish EPA to evaluate please forward it to me as soon as possible.

ANDREW S. GOLDMAN (3RC10)
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103
(215) 814-2487
Goldman.andrew@epa.gov

Docket No. CERCLA 03-2019-0120LL

CERTIFICATE OF SERVICE

I hereby certify that a copy of the documents identified below were provided to the following persons:

By First Class Mail & Email:

Bradley G. Pollack, Esquire
753 South Main Street
Woodstock, VA 22664
bpollack@shentel.net

By Hand Delivery:

Joseph Lisa (3RC00)
Regional Judicial Officer
U.S. Environmental Protection Agency
1650 Arch Street
Philadelphia, PA 19103

	Documents Provided
1.	EPA's Post-Hearing Brief

Andrew S. Goldman, Esquire
Sr. Assistant Regional Counsel

1/28/2020
Date