UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
John F. Kennedy Federal Building
Boston, Massachussetts 02203-0001

IN THE MATTER OF	)	
	)	
	)	
Picillo Farm Superfund Site	)	CERCLA LIEN PROCEEDING
Coventry, Rhode Island	)	
	)	
	)	

RECOMMENDED DECISION

Section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. §9607(l), provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. This proceeding involves the issue of whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l) of CERCLA on the Picillo Farm Superfund Site in Coventry, Rhode Island. Title to the Picillo Farm has been conveyed by tax sale to the Town of Coventry, but the Picillo family retains a right of redemption under Rhode Island law. Region I of the United States Environmental Protection Agency (EPA-New England) has indicated its intention to perfect a lien against the Picillo's right of redemption. The Picillos oppose the lien since it would further encumber the family farm.

This proceeding, instituted at the Picillo's request, is being conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993. EPA-New England's Director of the Office of Site Remediation and Restoration designated me as the neutral EPA official to conduct this proceeding and to make a recommendation as to whether EPA has a reasonable basis to perfect the lien. This designation was ratified by Regional Administrator John P. DeVillars . In accordance with the *Supplemental Guidance* I held a meeting by telephone with the Picillos' representative and with representatives of EPA-New England. The meeting notes have been transcribed and added to the Lien Filing Record as required by the *Supplemental Guidance*. I have also added to the Lien Filing Record a post-meeting submission, dated July 3, 1997, filed by EPA-New England. The Picillos chose to make no post-meeting submission.

Under the *Supplemental Guidance* I am to consider all facts relating to whether

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

(1) Was the property owner sent notice by certified mail of potential liability?

(2) Is the property owned by a person who is potentially liable under CERCLA?

(3) Is the property subject to or affected by a removal or remedial action?

(4) Has the United States incurred costs with respect to a response action under CERCLA?

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

The Picillos acquired their farm by Deed dated December 4, 1957, a certified true copy of which is included in the record. This deed was recorded in the Kent County, Rhode Island, Deed Book 56 at page 1053. Title to the Picillos' farm passed to the Town of Coventry by Collector's Deed dated July 28, 1983. A certified true copy of this deed, which is recorded in Land Evidence Book 149, pages 582-583, is included in the record. Under Rhode Island law, [R.I. Gen. Laws § 44-9-12(1996)] the Picillos retain a right of redemption in the farm, and this right has not been foreclosed. This right of redemption is within the meaning of the term "rights to such property" as the term is used in CERCLA § 107(l), 42 U.S.C. § 9607(l), and is therefor subject to a lien in favor of the United States by operation of law. Although the factors listed for consideration in the *Supplemental Guidance* mention only "the property," the statute clearly imposes a lien upon "all real property and rights to such property which (A) belong to such person; and (B) are subject to or affected by a removal or remedial action." Id. (Emphasis added). In this case, the Picillos' unforeclosed right of redemption is the "right to such property" that is subject to the statutory federal lien provision of CERCLA § 107(l), 42 U.S.C. § 9607(l).

EPA officials gave the Picillos formal notice of potential CERCLA liability by certified mail on several occasions. The record contains copies of: a letter dated December 15, 1981, from William Sullivan, EPA's national Enforcement Counsel; a letter dated January 20, 1983 from Merrill S. Hohman, Director of Region I's Waste Management Division; a letter dated March 8, 1993, also from Merrill S. Hohman, Director of Region I's Waste Management Division; and a letter dated March 30, 1994, from Frank Ciavattieri, Acting Director of Region I's Waste Management Division.

EPA's notices of potential CERCLA liability are form notifications drafted for issuance to all CERCLA potentially responsible parties, including persons who are current or former owners and/or operators of a site, persons who arranged for disposal of hazardous substances found at a site, or persons who accepted hazardous substances for transport to a site

selected by such persons. See CERCLA § 107(a), 42 U.S.C. § 9607(a). William Sullivan's December 15, 1981 letter refers to "the site you either own or owned and either operate or operated in Coventry, Rhode Island." Merrill Hohman's March 8, 1993 letter stated: "...EPA has reason to believe that you were a former owner/operator of the Site at the time of disposal of hazardous substances at the site." (*sic*). These notices bear references such as "Picillo Waste Disposal Site" (Sullivan letter of December 15, 1981; Hohman letter of January 20, 1993) or "Notice of Potential Liability at Picillo Farm Superfund Site" (Hohman letter of March 8, 1993). I read these references to mean that EPA considers the Picillos to be potentially liable under CERCLA because of their owner/operator status. This reading is bolstered by a pre-CERCLA EPA letter, dated May 8, 1980, referring to discharges of hazardous substances "from your property," and invoking the authority of "Section 311(c)(1) of the Clean Water Act (33 U.S.C. 466 et seq.)" Finally, in stating EPA's intention to perfect the CERCLA lien, Regional Administrator John P. DeVillars asserted that, "As the owner of a facility at the time of disposal of hazardous substances, you are a person liable for all costs of removal or remedial action at the site. (DeVillars' letter dated October 31, 1996).

According to the Record of Decision (dated September 27, 1993) (ROD) "...drums containing hazardous wastes and bulk wastes were illegally disposed into several trenches within a 7.5-acre of the farm over a period of months in 1977." (ROD, p. 3). It is clear from the dates of the deeds described above that the Picillos were the owners of the farm at that time. A sodium aluminum hydride explosion and fire brought the site to the attention of regulatory agencies in September of 1977. ROD, p. 3.

The ROD also summarized the extensive CERCLA response acitivities at the site. In the early 1980's "...approximately 10,000 drums and contaminated soil were removed and disposed off site" and in 1985 a Remedial Investigation/Feasibility Study (RI/FS) was released. ROD, p.4. Regional Administrator DeVillars' October 31, 1996 letter directly asserts that the property is subject to or affected by a removal or remedial action.

The record contains an Itemized Cost Summary Report indicating that between January 1, 1991 and April 30, 1996, total Site Costs were $5,249,443.06. By letter dated April 8, 1993, EPA Assistant Regional Counsel Willis G. Wand transmitted to the Picillos an Itemized Cost Summary dated March 12, 1993, indicating Total EPA Expenditures "thru 12/92-adjusted" of $8,288,688.51. Both of these summaries bear the notation "FINAL RECONCILIATION PENDING." During the April 23, 1997 meeting, EPA Senior Enforcement Counsel Marcia Lamel stated that an Updated Cost Summary would reflect a much smaller amount of EPA costs, since ongoing settlement negotiations with other parties have been reducing EPA's unrecovered costs. Although the precise amount of unrecovered costs, which will define the extent of the lien, seems to be decreasing significantly, the record clearly shows that the United States has incurred costs with respect to response actions under CERCLA at the Site.

With one exception, the Picillos have not contested in this proceeding any of the information in the lien filing record relating to the first four factors for review. The exception is

that during the April 23, 1977 meeting the Picillos contended that all barrels were removed from the ground before 1979 (Transcript, p. 21), while the ROD indicated this occurred between 1980 and 1982 (ROD, p.3). In O'Neil v Picillo, 682 F. Supp. 706 (D. R.I., 1988), the court stated that 3300 drums of toxic waste were discovered in 1982, during the fourth of four phases of excavation at the Site. O'Neil, 682 F. Supp. 724. With no reflection on the credibility of the Picillos' representations intended, their contention that all barrels were removed from the ground prior to 1979 is rejected as utterly inconsistent with the judicial findings.

Turning to the fifth factor, "other information," the Picillos would have EPA focus on the impact the tragic loss of their family farm has had upon them, and offer to work out some kind of arrangement in cooperation with EPA to avoid the perfection of the lien. The Picillos produced no real evidence of that the harm caused to their farm was not of their doing, although clearly other parties were involved. Nothing in this recommended decision precludes a cooperative arrangement, but I see no reason in this record to urge EPA-New England to consider one.

The Picillos suggest that EPA's lien notice was prompted by the Picillos' inquiry, in the Spring of 1996, into possible uses to which portions of the farm might be put. Because the lien arose by operation of law and not by any action of an EPA official, the notice could have been issued at almost any time since 1981, when EPA's William Sullivan notified the Picillos of their CERCLA liability. No objective evidence in the record supports the Picillo's assertions that the lien notice was issued because of the Picillo's Spring, 1986 inquiry.

The Picillos' letter requesting a hearing and their representations at the April 23, 1997 meeting highlight the 1993 satisfaction of a judgement in favor of the State of Rhode Island, which, they say, EPA might have shared. As counsel for EPA-NEW England pointed out at the meeting, this is a false issue, already decided in the federal court. United States of America v American Cyanamid Co. 794 F.Supp.61 (D.R.I. 1990).

The Picillos assert that other parties involved in the contamination of the Site have not been fined, have not had their assets seized, have not had liens filed against their properties and have not had to pay cleanup costs. Finally, the Picillos assert the statutory provisions limiting natural resource damage claims to those arising after CERCLA's enactment and the provisions regarding pre-CERCLA litigation as "defenses" to the perfection of the lien in this case. None of these arguments constitute " any other information which is sufficient to show that the lien notice should not be filed" under the *Supplemental Guidance.*

While I believe EPA has some discretion in perfecting CERCLA liens, it should never refrain from doing so where there is a possibility of a windfall benefit to an irresponsible landowner whose property became contaminated as a result of his own actions and was then cleaned up under CERCLA.

I find that the lien filing record supports a determination that EPA has a

reasonable basis to perfect a lien under Section 107(l) of CERCLA. The Picillos have not submitted any information that would rebut EPA's claim that it has a reasoable basis to perfect a lien. The Picillos' arguments against the lien do not reach the issue of the reasonable basis to file the lien; they address matters of discretion within the prerogative of EPA-New England's management.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien and whether or not the property owners have proven any of the defenses under Section 107 of CERCLA. This recommended decision does not compel the filing of the lien; it merely clears the way for such a filing by confirming the existence of a reasonable basis for doing so. This recommended decision does not bar EPA or the Picillos from raising any claims or defenses in later proceedings; it is not a binding determination of liability. The recommendation has no preclusive effect and shall not be given any deference or otherwise constitute evidence in subsequent proceedings.

Benjamin Kalkstein

August 27, 1997

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