

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

Michigan Gravure Superfund Site

Cercla Lien Proceeding

RECOMMENDED DECISION

Section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(l), provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property which: (1) belong to such person and (2) are subject to or affected by a removal or remedial action. This proceeding involves the question of whether the United States Environmental Protection Agency, Region III ("EPA") has a reasonable basis to perfect a lien pursuant to Section 107(l) of CERCLA on the Michigan Gravure Superfund Site in Battle Creek, Michigan. In this Recommended Decision, I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.

This proceeding has been conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens ("Supplemental Guidance")*, OSWER Directive No. 9832.12-1a, issued July 29, 1993. A Lien Filing Record (LFR) has been compiled in this matter. EPA gave notice to the property owner TIG Ltd. by letter dated November 25, 2003, that it was potentially liable for the costs to be incurred or already incurred at this property. LFR 9. By letter dated October 4, 2004, EPA notified TIG Ltd., that it intended to perfect a lien upon the property "located at 301 West Michigan Avenue and 296 West Jackson Street, in Battle Creek, Michigan," consisting of five lots numbered 42, 43, 54, 55 and 56. LFR 21. TIG Ltd. objected to the scope of the proposed lien and argued that only lots 55 and 56 should be included in EPA's lien. LFR 22, 25. An informal lien hearing was conducted on October 14 and 28, 2005. A court reporter attended and a transcript of the proceedings has been added to the LFR as recommended by the *Supplemental Guidance*. LFR 55, 56. At the hearing, both parties stipulated that lots 55 and 56 are properly subject to EPA's proposed lien, but they disagree over whether lots 42, 43 and 54 are properly included. LFR 55 at 9-10.

At the conclusion of the hearing, each party was given the opportunity to brief the matter and those briefs have been included in the Lien Filing Record. LFR 57, 58, 59. I have reviewed and taken the entire LFR into consideration in writing this Recommended Decision.

I. RELEVANT LEGAL CRITERIA

Section 107(D)(1) of CERCLA, 42 U.S.C. § 9607(D)(1), provides in relevant part:

All costs and damages for which a person is liable to the United States under subsection (a) of this section . . . shall constitute a lien in favor of the United States upon all real property and rights to such property which –

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

Section 9607(D)(2) states that a lien arises when costs are first incurred by the United States from a response action or when the property owner is notified by written notice of potential liability, whichever is later. The lien shall continue until the liability for the costs is satisfied or becomes unenforceable through operation of the statute of limitations provided in Section 113 of CERCLA, 42 U.S.C. § 9613.

The *Supplemental Guidance* sets forth five factors that should be considered in determining whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien. Those factors are:

- (1) Was the property owner sent notice by certified mail of potential liability?
- (2) Is the property owned by a person who is potentially liable under CERCLA?
- (3) Is the property subject to or affected by a removal or remedial action?
- (4) Has the United States incurred costs with respect to a response action under CERCLA?
- (5) Does the record contain any other information which is sufficient to show that the lien notice should not be filed, such as a showing that (a) EPA erred in believing it had met the requirements of (1)-(4) or (b) EPA made a material error with respect to these factors?

CERCLA lien proceedings have aptly been described as “probable cause” hearings. *See, e.g., Harbucks, Inc. Revere Chemical Site*, EPA Region 3 (1995). This characterization follows the reasoning in *Reardon v. United States*, 947 F.2d 1509 (1st Cir. 1991) and the procedures established by EPA in the *Supplemental Guidance*, which states, in relevant part:

The sole issue [in the proceeding] is whether EPA has (or had, in the case of a

post-filing meeting) a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. The [proceeding] will not be concerned with issues not relating to the proposed perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents. . . .

Supplemental Guidance at 8.

II. BACKGROUND

The Michigan Gravure Superfund Site is located at 301 West Michigan Avenue and 296 West Jackson Street, Battle Creek, Michigan. LFR 21. The Site is bounded on the north by Michigan Avenue and on the south by West Jackson Street. LFR 54 item R-G-3(1). EPA maintains that the Site includes "one large main building with two, non-connected rooms, a shared loading dock, and a shed." LFR 11. TIG maintains that the one large building is really two buildings that were later connected by a ramp and a shipping area. LFR 33. The Site was used to conduct cylinder recycling and copper and chrome plating. LFR 2 at 2.

In February of 2003, the Michigan Department of Environmental Quality (MDEQ) received a complaint about potential leaking hazardous waste on the property. MDEQ conducted an inspection of the unoccupied property on February 20, 2003, and observed the presence of potentially hazardous substances inside the printing and engraving shop. LFR 2 at 2. In June 2003, MDEQ referred the Site to the U.S. EPA to assist in an environmental assessment, securing of the facility and performing a removal action. U.S. EPA requested and was granted access to the Site by the owner, TIG Ltd., and in October of 2003, mobilized its Superfund Technical Assistance and Response Team (START) contractor Tetra Tech EM Inc. to the Site. Activities performed during this Site Assessment included: documentation of current Site conditions; inventory of all containers, drums and tanks; calculating volume estimates of tank material; and collection of drum and tank samples and chemical analysis of samples. LFR 2 at 2-3. Beginning in May of 2004, EPA, its START contractor, and the Emergency and Rapid Response Services contractor mobilized to the Site. LFR 23. Approximately 440 drums, 170 small containers and 32 tanks were numbered, sampled and transported off-site for disposal. LFR 23.

III. DISCUSSION

The issue is whether the information contained in the LFR establishes that EPA has a reasonable basis to perfect a lien on TIG's property located on Michigan Avenue and West Jackson Street in Battle Creek, Michigan. In order to make that determination both statutory and guidance factors will be considered.

Factors (1), (2) and (4) as set forth in the Supplemental Guidance have been established: the property owner was sent notice of potential liability by certified mail on November 25, 2003

(LFR 9); TIG Ltd. is a current owner of the Site and is a potentially liable party under CERCLA (LFR 7, 9, 41); and the United States has incurred costs with respect to a response action under CERCLA (LFR 19, 20, 41). The remaining two factors are disputed by the parties and are discussed in greater detail below.

A. Were lots 42, 43 and 54 “subject to or affected by” a removal or remedial action?

As an initial matter, the parties have argued since the inception of this proceeding about whether the large structure on the Site was one building with two wings or two distinct buildings.¹ This is a distinction without a difference. The CERCLA lien provision refers to “real property,” not to buildings or structures. The record demonstrates that the building that fronts on Michigan Avenue (referred to herein as 301 Michigan) is located on lots 42, 43 and 54 and that the building that fronts on Jackson Street (referred to herein as 296 Jackson) is on lot 55. LFR 54 at R-G-3(1). The crucial, but disputed issue in this matter is the appropriate scope of the lien that should be placed on the subject real property, *i.e.*, whether lots 42, 43 and 54 are property that was “subject to or affected by a removal or remedial action.” That is both a factual and a legal inquiry.

At the lien hearing, EPA presented information consisting of photographs and other documents that it maintains establish that hazardous substances were present in the 301 Michigan building on lots 42, 43 and 54 and that those hazardous substances were the subject of the EPA removal action that occurred on the Site from May to August of 2004. EPA presented no eyewitness testimony regarding the location of drums or containers of hazardous materials at the Site. It instead relied on inferences from photographs taken by MDEQ and EPA personnel as well as a schematic “Site Inventory Map” (or “schematic map”) created by Tetra Tech EM Inc., the START contractor for the removal action. The schematic “Site Inventory Map” states on its face that it is not to scale and that it was “modified from site notes, Battle Creek, Michigan, 2001.” On its face, then, the schematic map is inherently unreliable. It does not purport to be, nor is it, an accurate representation of where the building or the hazardous substances were actually located on the Site.

At the lien hearing, EPA argued that drums, barrels and containers depicted in numerous photographs were located in certain areas of the 301 Michigan building as indicated on the schematic map. EPA then argued that the contents of the drums and containers allegedly found in the 301 Michigan building were set forth in a list of containers also referred to as the “Barrel List,” Attachment 3 to the Declaration of Jon Gulch,² EPA’s On Scene Coordinator who oversaw

¹ The record demonstrates that there were two separate buildings on the Site at one time and that a structure was built to connect the two. LFR 56 at 18, 22. The two buildings are separated by a fire door. LFR 56 at 116.

² Mr. Gulch’s Declaration is LFR 26.

under CERCLA. LFR 57 at 6.

Second, Mr. Weiler conceded at the hearing that an inactive plating tank was located in the 301 Michigan building at the time EPA began its removal activities. LFR 56 at 40, 44, 53, 58. Mr. Weiler identified it as containing "chrome plating solution," (LFR 56 at 40; LFR 54 item R) which is a CERCLA hazardous substance. LFR 57 at 5; 40 C.F.R. 302.4.

While the parties have been unable to agree as to the location of many of the drums and containers that were the subject of this removal action, neither EPA nor TIG Ltd. dispute that these containers were found in the 301 Michigan building. While the evidence presented at the hearing taken in its totality supports TIG's position that "the overwhelming percentage" (LFR 56 at 34) of hazardous substances removed from the Site were located in the 296 Jackson building, the undisputed presence of these materials in the 301 Michigan building, and the removal activities conducted by EPA to address the hazard that they posed, resulted in the incurrence of response costs by EPA. Thus, the 301 Michigan building was in fact "subject to or affected by" a removal action, and a lien on the property upon which the 301 Michigan building is located, that is, lots 42, 43 and 54, is justified. While not any EPA activity provides a basis for perfecting a lien under CERCLA Section 107(I), (*see In the Matter of Pacific States Steel*, EPA Region 9 (1995)), in this case, the lots in dispute were unquestionably the location of hazardous substances that caused EPA to incur response costs when they were removed. For this reason, the lien is appropriately placed on these lots, in addition to those upon which the 296 Jackson Building is located.

B. Does the record contain any other information which is sufficient to show that the lien notice should not be filed?

In its post-hearing brief (LFR 58), the property owner makes several additional arguments as to why the lien should not be perfected. First, it argues that it granted access to the 296 Jackson building, the 301 Michigan building and an ancillary shed on lot 56 "to facilitate the safest, and most efficient removal of the identified materials which had been stored in the 296 Jackson building." (LFR 58 at 1). As noted above, TIG admitted at the hearing that hazardous substances were located in the 301 Michigan building and subsequently removed by EPA. Thus, the lien is appropriately placed on the lots the 301 Michigan building occupied.⁵

Second, TIG protests that numerous pictures of the Site, never before produced by EPA were submitted with EPA's post-hearing brief filed on November 29, 2005. In addition, it argues

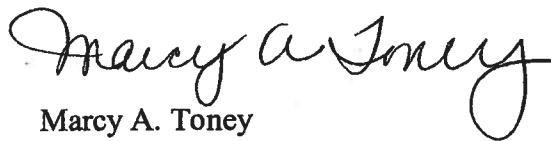
⁵ It should be noted, however, that in a Region 4 CERCLA lien matter, the Regional Judicial Officer concluded that the establishment of a "command center" on a portion of the property where there had been no release of a hazardous substance constituted the conduct of removal activities that properly gave rise to a CERCLA lien. *In the Matter of Prestige Chemical Company Site*, EPA Region 4 (2002).

that such “newly produced material is mere assumption as to interpretation and understanding.” LFR 58 at 2. Given that these pictures were indeed produced after the lien hearing and that the property owner was not given a fair opportunity to review and evaluate them prior to the hearing, they were not reviewed by the Regional Judicial Officer and have had no bearing on the recommended decision in this case.

Third, TIG argues that the “economic burden of the EPA lien, if attached to the balance of the . . . properties of TIG Ltd. will foreclose their revitalization.” LFR 58 at 3. Further, TIG argues that “it is highly unlikely that there will be any recovery of funds by EPA from any lien” and “that it is in the best interest of the community that the 296 Jackson Street building be torn down and properly removed” and that “a lien on that building will prevent such tear-down.” LFR 58 at 3. These are factors to be considered by EPA management in its enforcement discretion, and do not fall within the scope of review of this proceeding. *See In the Matter of Copley Square Plaza Site, EPA Region 5 (1977).*

IV. Conclusion

On the basis of information contained in the Lien Filing Record and presented at the lien hearing, I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied. The property owner has not established any issue of fact or law to alter EPA’s decision to file a notice of lien and the informational basis upon which the decision is based. Neither EPA nor the property owner is barred from any claims or defenses by this recommended decision. This recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to this decision, nor shall this decision be given deference or otherwise constitute evidence in any subsequent proceeding.



Marcy A. Toney
Regional Judicial Officer

Dated: March 8, 2006

MEMORANDUM

SUBJECT: Recommended Decision Concerning Imposition of a CERCLA Lien
Michigan Gravure Superfund Site, Battle Creek, Michigan
TIG Ltd. – property owner

FROM: Marcy A. Toney
Regional Judicial Officer

TO: Richard C. Karl
Director, Superfund Division

The attached Recommended Decision is directed to you in your capacity as the regional official with the authority to sign liens pursuant to section 107(*I*) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9607(*I*). See Regional Delegation 14-26.

As discussed in greater detail in the Recommended Decision, EPA has proposed to perfect a CERCLA lien on property owned by TIG Ltd. in Battle Creek, Michigan. The property owner has pursued its due process rights as set forth in Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991) to present its opposition to perfection of the lien. In accordance with procedures set forth in EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Dir. No. 9832.12-1a (July 29, 1993), an informal conference was held on October 14 and 28, 2005, and the parties have submitted documents and briefs.

As Regional Judicial Officer, I have determined that EPA has established a reasonable basis to believe that the statutory elements for perfection of a lien have been met in this case. I am transmitting the Recommended Decision to you for your consideration.

Attachment



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

March 8, 2006

REPLY TO THE ATTENTION OF:

C-14J

Certified Mail

Return Receipt Requested

Roger Weiler, President
TIG Ltd.
1070 Tower Lane Dr.
Bensenville, IL 60106

By Hand Delivery

Stephen Thorn
U.S. EPA Region 5
77 W. Jackson Blvd.
Mail Code C-14J
Chicago, IL 60604-3590

Re: Michigan Gravure Superfund Site
Battle Creek, Michigan

Dear Mr. Weiler and Mr. Thorn:

Enclosed is a copy of my Recommended Decision in this CERCLA lien matter. A copy should be placed in the Lien Filing Record. A copy has also been transmitted to Richard J. Karl, Superfund Division Director, the Region 5 official with authority to approve the filing of a lien on the subject property.

Sincerely,

A handwritten signature in cursive script that reads "Marcy A. Toney".

Marcy A. Toney
Regional Judicial Officer

Enc.