

90

BEFORE THE UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY-REGION III  
841 CHESTNUT BUILDING  
PHILADELPHIA, PA 19107

In the Matter of :  
: CryoChem, Inc. :  
Berks County, PA : EPA Docket No. III-93-003L  
:  
:  
:

PROBABLE CAUSE DETERMINATION

This proceeding involves the Federal Lien provision of Section 107(1) of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9607(1).<sup>1</sup> CryoChem, Inc. has challenged EPA's June 24, 1993 Notice of Intent to File Notice of Federal Lien on CryoChem's property, located partly in Earl Township and partly in Douglas Township, Berks County, Pennsylvania.

<sup>1</sup> Section 107(1) of CERCLA provides:

(1) In general

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

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

(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.
- (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(1).

EPA DOCKET NO. III-93-003L

Although CERCLA does not provide for such challenges, the Agency affords an opportunity to present evidence and to be heard to property owners when it files lien notices.

Although the case is not binding law in Region III (Third and Fourth Circuit Courts of Appeal), at least one court has decided that the Agency must provide some procedural safeguards to property owners whose property may be subject to CERCLA Federal Liens. Under Reardon v. United States, 947 F. 2d 1509 (CA 1, 1991),...the minimum 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...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. 947 F. 2d 1522.

PROCEDURAL HISTORY

CryoChem began metal fabricating operations on the property that is the subject of this proceeding in 1962. Between 1970 and 1982, CryoChem used chemical solvents to clean dye from metal welds in its operations on the property. In 1983 EPA detected various hazardous substances in the groundwater on the property and local residential wells. In 1986 the present owners purchased the business from its former owners and CryoChem acquired title to the property from the Berks County Industrial Redevelopment Authority. By letter dated July 14, 1989 EPA notified CryoChem of its potential liability under CERCLA for EPA costs incurred and to be incurred in connection with CERCLA response actions associated with the contamination at and around the property.

This proceeding was initiated under Federal CERCLA Lien Procedures issued August 5, 1992 by the Regional Counsel for EPA's Region III. By letter dated June 24, 1993, EPA notified CryoChem of EPA's intent to file a notice of Federal Lien on the property. CryoChem's July 16, 1993 letter responding to EPA's June 24, 1993 notice of intent, triggered the August 8, 1993 assignment of the Regional Judicial and Presiding Officer to preside over the lien proceeding. In accordance with the Region III procedures EPA filed its Reply to CryoChem's July 16, 1993 letter on August 25, 1993, together with the administrative record of the lien. By letter dated October 26, 1993, the Regional Judicial and Presiding Officer scheduled a conference call among the parties' representatives for November 4, 1993. That conference call was postponed until November 18, 1993.

By memorandum dated July 29, 1993 EPA's Enforcement Counsel for Superfund and Director of Waste Programs Enforcement issued Supplemental Guidance on Federal Superfund Liens (OSWER Directive

EPA DOCKET NO. III-93-003L

No. 9832.12-1a). Although the Region III procedures govern this proceeding, the Presiding Officer has striven to assure that no part of this proceeding is inconsistent with OSWER Directive No. 9832.12-1a.

Accordingly, the Regional Judicial and Presiding Officer has reviewed the administrative record and the parties' submissions and has taken into account the matters discussed during the November 18 conference call. The issue is whether EPA has probable cause, or a reasonable basis to believe it appropriate, to file a notice of CERCLA Federal Lien on CryoChem's property. There are five elements to this probable cause determination:

- a. CryoChem's ownership of the property in question;
- b. Whether the property is subject to or affected by a removal or a remedial action;
- c. Whether EPA incurred costs in the removal/remedial action;
- d. Whether CryoChem was notified in writing of its potential liability; and
- e. The apparent absence of a "third-party" defense.

THE PARTIES' POSITIONS

There is no dispute as to elements a.-d. CryoChem asserts that 1) the amounts secured by the lien are so large that CryoChem would never be able to pay them; 2) EPA's filing of the lien notice would force CryoChem to close its business operation; 3) CryoChem's lender would consider the filing of the notice as a default on CryoChem's already delinquent loan; 4) CryoChem's current owners had no responsibility or control over the property at the time of contamination; and 5) the past owners of the business grossly misrepresented the contamination of the property at the time the sale of the business was negotiated.

In its Reply EPA provided a clear and detailed summary of the relevant facts in this matter, which are not in dispute, and responded to each of the arguments made on behalf of CryoChem. As to the assertion regarding the EPA's costs, EPA argues that the amount of those costs is irrelevant to this proceeding and that the value of the property may be necessary for the recovery of its unreimbursed response costs. EPA also points out that the lien notice does not constitute a final determination of CryoChem's liability under CERCLA. Then EPA points out that CERCLA liability is strict, citing caselaw to that effect. Finally, EPA argues that it has no basis to believe that CryoChem is entitled to an

EPA DOCKET NO. III-93-003L

"innocent landowner" defense to liability under CERCLA.

FACTS

The relevant, undisputed facts are:

1. CryoChem, a "person" as defined in section 101 (21) of CERCLA, 42 U.S.C. § 9601 (21), is the sole owner and operator of the property that is the subject of this proceeding. (Administrative Record Document 1).
2. There has been a release of a hazardous substance at the CryoChem property. (Administrative Record Documents 2 and 5).
3. The CryoChem property is a "facility" as defined in section 101(9) of CERCLA, 42 U.S.C. § 9601(9).
4. As owner and operator of the facility, CryoChem is a potentially responsible party under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).<sup>2</sup>
5. EPA has incurred response costs associated with the CryoChem property. (Administrative Record Document 3).
6. CryoChem's property is subject to or affected by a removal and a remedial action. (Administrative Record, generally).
7. CryoChem was provided with written notice of potential liability by EPA letter dated July 14, 1989. (Administrative Record Document 2).
8. The liability for EPA's costs has not been fully satisfied nor has it become unenforceable through operation of the CERCLA statute of limitations. (Administrative Record, generally).

DISCUSSION

**A. THIRD PARTY DEFENSE**

Although this proceeding does not involve a final determination of liability, it is appropriate to examine CryoChem's assertions regarding alleged misrepresentation by CryoChem's prior owners since filing a lien notice in the face of an apparently valid

---

<sup>2</sup> ...the owner and operator of a vessel or a facility...from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for all costs of removal or remedial action incurred by the United States Government. 42 U.S.C. § 9607(a).

**EPA DOCKET NO. III-93-003L**

defense would be improper. Under CERCLA, if a landowner can establish that: 1) the property was acquired after disposal of the hazardous substance occurred; 2) the landowner did not know and had no reason to believe that hazardous substances were disposed of at the property; and 3) all appropriate inquiries were made prior to acquisition, that landowner may escape liability. CryoChem's representatives in this proceeding assert that they were misled by the prior owners of the business as to the degree of contamination at the property.

Yet the record shows that CryoChem the corporate entity, not the individuals representing CryoChem, is the landowner. According to CryoChem's representatives, the corporation purchased the property at about the same time they purchased the business from the former owners. As an entity, CryoChem had knowledge of the contamination of the property because it caused the contamination.

The argument regarding the prior owners' allegedly misrepresenting the property to the new owners has some human appeal but it ignores the legal realities and principles of corporate enterprise. The alleged bad faith of the prior owners of CryoChem does not entitle the corporation to raise the "innocent landowner" defense of CERCLA.

**B. FINANCIAL HARDSHIP**

EPA's total site costs as of January 28, 1993 were \$1,572,301.08. This figure will in all likelihood increase as time goes on, and may already be well beyond CryoChem's means. The record does not identify other potentially responsible parties, although CryoChem makes reference to them. At this point, it is simply premature to speculate as to how EPA's costs will be apportioned among all the responsible parties. CryoChem make specific predictions about the reaction of its commercial lender to the filing of a lien notice, but there is no evidence in the record to support these predictions. In any event, those potential consequences of a filing are not relevant to the issue of probable cause.

CryoChem's financial difficulties seem to be of the same nature as those anticipated by EPA to warrant filing of a lien notice in its applicable policy:

"Filing of notice of the federal lien will be particularly beneficial to the government's efforts to recover costs in a subsequent Section 107 action in the following situations:

- (1) the property is the chief or the substantial asset of the PRP;
- (2) the property has substantial monetary value;

EPA DOCKET NO. III-93-003L

- (3) there is a likelihood that the defendant owner may file for bankruptcy;
- (4) the value of the property will increase significantly as a result of the removal or remedial work; or
- (5) the PRP plans to sell the property."

Guidance on Federal Superfund Liens, issued September 22, 1987 by EPA's Assistant Administrator for Enforcement and Compliance Monitoring, pages 3-4.

CONCLUSION

CryoChem presents an appealing case for the exercise of EPA discretion in the timing of the filing of the lien notice, but there is simply nothing in the record of this proceeding to counter the lien filing record information, which supports a determination of probable cause, or a reasonable basis to believe it appropriate, to file the lien notice. As was emphasized during the conference call, a probable cause determination does not mandate the filing of the lien notice under the law and applicable procedures and guidance; it merely clears the way for such a filing by confirming the grounds for doing so.

The Regional Judicial and Presiding Officer finds probable cause exists for EPA to file the proposed notice of Federal Lien.

DATE:

NOV 29 1993

*Benjamin Kalkstein*

BENJAMIN KALKSTEIN

Regional Judicial and Presiding Officer