



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

REPLY TO THE ATTENTION OF:
C-29A

February 4, 1997

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Paul G. Roland, Esquire
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107 North Pennsylvania Street
Indianapolis, Indiana 46204

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Kevin C. Chow
Assistant Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Re: Avanti Site
CERCLA Lien Probable Cause Determination - Recommended Decision

Dear Counsel:

This letter serves as the Probable Cause Determination in the Avanti Superfund Site CERCLA Lien Proceeding.

On July 16, 1996, U.S. EPA sent Avanti Development Inc. (Avanti) a letter informing Avanti of EPA's intention to perfect a lien, pursuant to Section 107(I) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), on property owned by Avanti and located at 502-566 South Harris Street, Indianapolis, Indiana (the Site). By letter dated July 26, 1996, counsel for Avanti submitted a timely response to U.S. EPA's notice of intent. Therefore, this is a proceeding to determine whether U.S. EPA has a reasonable basis to perfect a lien pursuant to Section 107(I) of CERCLA.

This determination shall be made in conformity with the requirements and procedures set forth in the "Supplemental Guidance on Federal Superfund Liens," dated July 29, 1993, OSWER Directive 9832.12-1a (Supplemental Guidance).¹ The undersigned, in her role as Regional Judicial Officer, has been appointed to be the Agency neutral to decide this matter.

¹ The Supplemental Guidance supplements, but does not supersede, the "Guidance on Federal Superfund Liens" issued on September 22, 1987, by Thomas L. Adams, Jr., Assistant Administrator of the Office of Enforcement and Compliance Monitoring.

Section 107(I) of CERCLA provides that all costs and damages for which a person is liable to the United States in a cost recovery action 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. The purposes of the lien provision are to facilitate the United States' recovery of response costs and prevent windfalls. 131 Cong. Rec. S11580 (Statement of Sen. Stafford)(September 17, 1985).

The Supplemental Guidance states that the neutral EPA official should consider all facts relating to whether EPA has a "reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien." At p. 7.

The Supplemental Guidance then lists factors that the neutral official should consider. The neutral EPA official should consider whether:

- (1) The property owner was sent notice of potential liability by certified mail.
- (2) The property is owned by a person who is potentially liable under CERCLA.
- (3) The property is subject to or affected by a removal or remedial action.
- (4) The United State has incurred costs with respect to a response action under CERCLA.
- (5) The record contains other information which is sufficient to show that the lien notice should not be filed. At p.7.

The letter submitted by counsel for Avanti raises two arguments in opposition to EPA's notification of intention to file a CERCLA lien. Counsel for Avanti cites a Motion for Summary Judgment before the U.S. District Court for the Southern District of Indiana (Cause No IP 95-1359), which challenged the retroactivity of CERCLA. Avanti also claims that the proposed lien is overbroad and would, therefore, include property not subject to the removal or remedial action. The letter did not request a meeting.

On October 30, 1996, the U.S. District Court for the Southern District of Indiana rejected the challenge to CERCLA retroactivity raised in the motion for summary judgment cited by Avanti in its letter of July 26, 1996. In the Court's Order on Defendant's Motion for Summary Judgment, issued October 30, 1996, the Court held that CERCLA does apply retroactively.

As to the argument concerning the appropriate property to be covered by the lien, Avanti's letter states:

that said portion of the property is not and was not the subject of lead contamination and

lead operations on the property. In the event I have misread the legal descriptions attached to the letter, I am contending that it is only the property known as the east and west buildings and the land surrounding the same which are involved with the lead contamination.


The Lien Filing Record (LFR) supports EPA's claim that the entire property is subject to or affected by a removal or remedial action. In fact, the LFR contains evidence that the contamination goes beyond the boundaries of the Site, let alone the land surrounding the east and west buildings. The Site Assessment Report dated January 12, 1994, states that soil samples collected from residential properties within a two block radius of the Site showed lead levels as high as 1,000 ppm total lead. Given the high concentrations of lead levels beyond the perimeters of the Site, EPA's position that the entire Site is subject to or affected by a removal or remedial action is persuasive.

Avanti has raised no other objections to perfection of a lien. Review of the LFR substantiates EPA's position that it has met the statutory requirements to perfect a CERCLA lien. The property owner was sent notice of potential liability by certified mail on December 20, 1993. Avanti is a potentially liable person under CERCLA. The property is subject to a removal or remedial action (See Action Memorandum dated January 24, 1994) and the United States has incurred costs with respect to a response action (See Avanti Superfund Site Itemized Cost Summary Request dated March 28, 1996).

The Lien Filing Record in this proceeding supports a determination that EPA has a reasonable basis to believe that the statutory elements for the perfection of a lien have been met. The Regional Judicial Officer finds probable cause exists for EPA to file the proposed notice of Federal Lien.

This Probable Cause Determination does not bar EPA or Avanti Development, Inc. from raising any claims or defenses in further proceedings. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

As required by the Supplemental Guidance, I am forwarding a copy of this Probable Cause Determination to William Muno, Director of Superfund, the official in Region 5 delegated with the authority to sign liens for action.


REGINA M. KOSSEK
Regional Judicial Officer

cc: William Muno
Lien Filing Record