Before the
United States Environmental Protection Agency
Region 5

In the matter of:	)
	)
Copley Square Plaza Site	)
	)
CERCLA Lien Proceeding, pursuant to Supplemental Guidance on Federal Superfund Liens, dated July 29, 1993 (OSWER Directive Number 9832.12-1a).	)

DETERMINATION OF PROBABLE CAUSE

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA), Region 5, has a reasonable basis to perfect a lien, pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9607(l), on property known as the Copley Square Plaza Superfund Site (the Site).

The proceeding has been conducted pursuant to the "Supplemental Guidance on Federal Superfund Liens," dated July 29, 1993, OSWER Directive 9832.12-1a (Supplemental Guidance). 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. The Agency neutral hearing the matter is the Regional Judicial Officer, Regina M. Kossek.

As will be described infra, the Lien Filing Record(LFR) in this matter supports a determination that EPA has a reasonable basis to believe that the statutory elements for the perfection of a lien have been met.

CERCLA Provisions

1. Liability

CERCLA is a strict liability statute. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), states in pertinent part:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--
>
> (1) the owner... of a... facility,... shall be liable for...
>
> > (A) all costs of removal or remedial action incurred by the United States Government... not inconsistent with the national contingency plan...

2. Affirmative Defenses

Section 107(b) of CERCLA, 42 U.S.C. 9607(b) provides the only affirmative defenses to liability. For purposes of this proceeding, the property owner (or the Trust) raises the Section 107(b)(3) defense which states as follows:

> There shall be no liability under subsection (a) of the this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by--
>
> > (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of evidence that (a) he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts and omissions of any such third party and

the consequences that could for seeably result from such acts or omission....

3. Statutory Lien Provision

Section 107(l) of 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 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 stated purposes of the lien provision are to facilitate the United States' recovery of response costs and prevent windfalls. "A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from cleanup and restoration activities." 131 Cong. Rec. S11580 (Statement of Sen. Stafford) (September 17, 1985). See also House Energy and Commerce Report on H.R. 2817, p.140, indicating that the lien provision was to prevent unjust enrichment.

Due Process Procedures

Although the CERCLA statute does not provide for challenges to imposition of a CERCLA lien, in response to the decision in Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991), the Agency, through the procedures set forth in the Supplemental Guidance, affords property owners an opportunity to present evidence and be heard when the Agency files notice of intent to perfect a CERCLA lien.

The Supplemental Guidance requires 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. [1]

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[1] The Supplemental Guidance sets out the elements as follows:

(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.

Background Facts

The property which is the basis of this dispute is located at 2777-2799 Copley Road, Summit County, Ohio. It has been listed on the National Priorities List as a site requiring cleanup. The United States has expended approximately $724,454 on activities at the Site. Paul D. Emery, Trustee of the Paul D. Emery Revocable Living Trust (Trust) was a principle of Copley Plaza, Inc., a corporation which owned the Site from December 8, 1959 through December 28, 1988. Copley Plaza, Inc. developed the property and constructed two buildings on the Site, a grocery store and a small multi-unit commercial structure. On December 28, 1988, the Site was purchased by Copley Sparkle Market, Inc., a totally unrelated corporation. As part of the transaction, Copley Plaza, Inc. took a note and mortgage on the property. Copley Sparkle Market, Inc. leased space in the multi-unit building to various tenants, including Danton Cleaners, a dry cleaning establishment.

In April 1990, Copley Sparkle Market, Inc. submitted a water odor complaint to the Ohio EPA. When the Ohio EPA sampled wells in the immediate vicinity of Danton Cleaners, it found contamination due to tetrachloroethylene and its degradation products, chemicals commonly associated with dry cleaning establishments. Ohio EPA immediately directed the tenants of the affected buildings to cease the use of the contaminated wells and an alternative water supply was established. By the spring of 1994, Copley Sparkle Market, Inc. had ceased making mortgage or tax payments on the property. While Copley Sparkle Market, Inc. appeared to have abandoned the building containing the grocery

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(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.

store, the multi-use building continued to be occupied. Concerned about further deterioration in the property, the Trust took a default judgment on the property which was transferred to the Trust on May 11, 1994. The Trust promptly terminated Danton Cleaners. Later in 1994, upon discovery of further contamination, U.S. EPA took over remediation of the Site.

U.S. EPA has indicated that it views the Trust as a Potentially Responsible Party and has demanded that the Trust undertake any and all necessary investigation and remediation activities at the property. The Trust has indicated that it is unable to finance or undertake the necessary activities and that the Site is the only asset of the Trust.

Prima Facie Case

As an initial matter, there is little dispute that EPA has, for the purposes of this proceeding, established a prima facie case against the Paul D. Emery Revocable Living Trust. The Lien Filling Record shows that the property owner was sent notice of potential liability by certified mail, the property is owned by a person who is potentially liable under CERCLA, the property is subject to or affected by a removal or remedial action and the United States has incurred costs with respect to a response under CERCLA. Thus the Trust may be held strictly liable for response costs, and the property is properly subject to a CERCLA lien, unless the Trust can satisfy one of CERCLA's affirmative defenses.

Arguments of the Property Owner Against Imposition of a Lien

The Trust, makes two major arguments in support of its position that a CERCLA lien should not be imposed on the property. The first argument is that the trust is not a liable person under Section 106(a) of CERCLA, 42 U.S.C. 9606(a), because of the "third party" defense to liability found in Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3) ["Section 107(b)(3)"]. As will be discussed in detail below, the third party defense absolves from liability a current owner who can demonstrate that the release of hazardous substances was caused by a third party with no contractual relationship to the current owner and that the current owner exercised "due care."

The second argument of the Trust goes to the equities of this matter. The Trust argues that the Agency should use its discretion and refrain from imposing a lien on property which has

no value. The Trust further argues that it is unfair to impose the whole cleanup cost on the Trust without pursing recovery from other parties such as Copley Sparkle Market, Inc. and Danton Cleaners.

I. Third Party Defense

Trust Argument

The property owner argues that it meets the conditions for the "third party" defense because the releases were caused by: 1) a third party, Danton Cleaners, which has no contractual relationship with the Trust, and 2) the Trust exercised "due care" with respect to the hazardous substances.

The Trust argues that it acquired the property from Copley Sparkle Market, Inc., not Danton Cleaners, the party which the Trust alleges was solely responsible for the releases. In the view of the Trust, Copley Sparkle Market, Inc. did not cause the contamination and there is no contractual link between the Trust and Danton Cleaners. The Trust also asserts that, in conformity with the requirements of Section 107(b)(3), after acquisition of the property, the Trust exercised "due care" by evicting the offending tenant and cooperating with the Ohio EPA.

In support of its position, the Trust cites to New York v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996), a case in which the Second Circuit recognized the validity of the "third party" defense. In Lashins, an individual operated a dry cleaning business and dumped dry cleaning wastes on the ground outside of his space in a shopping plaza from 1963 to 1971. In 1979 the Westchester County Department of Health (WCDOH) discovered ground water contamination caused by the disposal of dry cleaning wastes at the shopping plaza. WCDOH and U.S. EPA investigated the contamination from 1982 until 1986.

In 1986 Lashins Arcade Co. entered negotiations for the purchase of the shopping plaza with the property owner, an individual unrelated to the dry cleaning operator. Despite the long term existence of federal and state investigations, Lashins claimed that it was not aware of the serious environmental problems. Upon inquiry as to the property's environmental status, Lashins was informed that there were chemicals in the ground which required treatment. The property seller did not transmit any notices concerning the government investigations to Lashins. No

public notice of the investigations had been issued to the Arcade tenants and the Town of Bedford and the local bank were allegedly unaware of the situation. Id. at 358.

Lashins purchased the property. When sued by the State of New York (New York) for remediation of the shopping plaza site, Lashins filed a motion for summary judgment arguing that it was not liable as the current owner of the property due to the existence of a valid Section 107(b)(3) "third party" defense. The District Court for the Southern District of New York agreed with Lashins as to its nonliability. The District Court noted that "Lashins had no direct or indirect contractual relationship with either of the third party dry cleaners who released the VOCs, or with the owners of the Shopping Arcade at the time the dry cleaners operated and when the pollution occurred." New York v. Lashins Arcade Co., 856 F. Supp. 153, 157(S.D.N.Y. 1994).

The District Court was also sensitive to the policy issue of avoidance of unfair surprise to a non-wrongdoer:

> Under all the circumstances, the purposes of the law would not be served by finding liability. To find liability under these circumstances would mean that sites long ago abused by original owners would become unsalable and open to neglect because no one would dare to acquire them....
>
> A fifteen year lapse of time between the problem causing events and purchase by defendant Lashins makes it most unlikely that the original owner could have profited by attempting to sell the property free of risk to the new owner.... Id. at 158.

On appeal, the Second Circuit affirmed the District Court decision. State of N.Y. v. Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996). The Second Circuit found significant the fact that the release was caused by a third party. The Court held that the chain of title necessarily created by a real estate conveyance was not the type of contractual relationship which defeated the availability of the third party defense.

The Second Circuit also focused on the lapse of time. "Given that the last release in the instant case happened more that

fifteen years before Lashins' purchase of the Arcade, there was obviously nothing Lashins could have done to prevent the actions leading to a release." Lashins, 91 F.3d 353, 360.

The Circuit Court then determined that the actions taken by Lashins after acquisition of the property met the "due care" requirements of Section 107(b)(3).

EPA Argument

In response, EPA distinguishes the facts of the Copley Square Plaza Site from Lashins. EPA argues that the property purchasers in Lashins had no direct or indirect contractual relationships with the third party dry cleaners who released the contamination or with the owners of the Shopping Arcade at the time the dry cleaners operated (and the pollution occurred). EPA contrasts this to the long-term relationship of Paul Emery to the Copley Square Plaza Site and Paul Emery's actual knowledge of contamination at the Site prior to its conveyance to the Trust.

From 1959 through 1988, Paul Emery was a principle of Copley Plaza, Inc., the corporation which developed and owned the Site. In 1988 the corporation took a security interest in the Site upon its sale to Copley Sparkle Market, Inc. In 1994, the corporation took a default judgment and conveyed the Site to the Trust. Therefore, from 1959 through the present, Paul Emery, in some capacity, has had a direct or indirect contractual relationship to the Site.

Furthermore, as early as 1990, and certainly by May 5, 1994, the date that the Trust purchased the property upon default, Paul Emery had actual knowledge of the contamination. On January 1, 1994, the Ohio EPA sent Paul Emery a letter describing the groundwater contamination at the Site (LFR 9). Prior to May 1994, Copley Sparkle Market, Inc. filed an action in fraud concerning the contamination at the Site, naming Paul Emery as a defendant (LFR 10) and at the CERCLA Lien Informal Hearing, Paul Emery acknowledged that he had actual knowledge of the contamination prior to purchasing the Site in 1994.

EPA asserts that these facts stand in contrast to the arms length transaction, with alleged lack of knowledge of contamination, and fifteen year lapse that the courts found compelling in Lashins.

Discussion

Assuming arguendo that Danton Cleaners is the sole source of contamination at this Site, the facts in this matter are sufficiently distinguishable from Lashins to allow a different conclusion. Rather than a fifteen year lapse between the contamination and purchase, for close to forty years, Paul Emery has had a continuous relationship with the Site. Unlike Lashins, Paul Emery had actual knowledge of the contamination. Because of this knowledge, as distinguished from the facts noted by the District Court, there is no policy issue in this case concerning unfair surprise by a purchaser as to the condition of the land.

Furthermore, the limited evidence in the LFR does not clearly reflect that Danton Cleaners was the sole source of contamination at the Site. The limited evidence similiarly does not show that the contamination was limited to the period when Copley Sparkle Market owned the premises.

Per the Ohio EPA Fact Sheet dated February 1994 concerning Copley Square Plaza, dry cleaning establishments have operated at this location since 1960 (Attachment to Respondent's Memorandum in Opposition). If contamination occurred during the period of ownership by the Trust or Copley Plaza, Inc., the third party defense will not lie. The Trust does assert in its Memorandum in Opposition, p.9, "As stated previously, the offending release was clearly caused by Danton Cleaners at some point in time after the purchase of the property by Copley Sparkle Market, Inc. but before April of 1990 when the contamination was discovered." However, no proof has been submitted in support of this statement. At this point, it cannot be said that Danton Cleaners was the sole source of contamination. Similarly, the record does not contain the factual basis for the statement that the contamination stopped when it was discovered in April 1990. While the Trust asserts that it promptly evicted Danton Cleaners, the record of bereft of any information concerning Danton's practices from April 1990 through eviction, sometime after May 1994.

Based upon the limited LFR, EPA has made the required showing that it has a reasonable basis to believe that a Section 107(b)(3) defense is not applicable. It is reasonable to interpret the facts in the LFR to reflect either a "direct or indirect contractual relationship" between the Trust and the third party(ies) whose act(s) or omission(s) caused the release. As a consequence of finding a contractual relationship (prong 1 of the

Section 107(b)(3) defense), I do not reach the issue of deciding whether the Trust exercised due care with respect to the hazardous substances (prong 2 of the defense).

This is not to preclude the Trust from making this argument and submitting more detailed evidence in the actual cost recovery litigation of this matter. However, for purposes of this CERCLA Lien Determination, EPA has met its burden of proof on this issue.

II. Equity Issues

The Trust cites to OSWER Directive 9832.12 for the proposition that CERCLA liens should be imposed where the property has substantial value and the value of the property will increase significantly due to the removal action. The Trust argues that the Copley Square Plaza Site was virtually valueless at the time it was acquired by the Trust in May of 1994, and that despite the expenditure of over $700,000 by the United States, the Site remains valueless at this time. Therefore, the Trust argues that a lien should not be imposed.

The value of the Site at the conclusion of the removal or remedial action is currently unknown. It is well within the United States' prerogative to protect its investment of Superfund monies and impose a CERCLA lien. The value of the Site may increase.

The Trust also makes the argument that it is fundamentally unfair for EPA to impose a lien on the Site for the full value of costs incurred, while the Agency is not pursuing other potentially responsible parties such as the previous property owner, Copley Sparkle Plaza, Inc., or Danton Cleaners. These arguments go to EPA's exercise of enforcement discretion and will not be addressed in this probable cause determination. These arguments more appropriately addressed to the discretion of EPA management.[2]

Conclusion

The Lien Filing Record in this proceeding supports a

In re Pacific States Steel Removal Site, CERCLA Lien Proceeding (EPA IX RJO Anderson Aug. 14, 1995); In the Matter of Harbucks, Inc., EPA Docket No. III-93-004L, Probable Cause Determination, November 2, 1994.

determination that EPA has a reasonable basis to believe that the statutory elements for the perfection of a lien have been met and EPA may file the proposed notice of Federal Lien. There are past costs and on-going costs at this Site, for which the Trust is potentially liable. A CERCLA lien is a valid encumbrance on the land as long as the owner could be liable for any damages or costs. Reardon dissent at 1526, (emphasis in the original). Until the Trust's liability for costs is satisfied, EPA may perfect a CERCLA lien. Section 107(l)(2).

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

Dated: June 5, 1997

Regina M. Kossek

REGINA M. KOSSEK
Regional Judicial Officer

In the MATTER of Copley Square Plaza Site
CERCLA Lien Determination

CERTIFICATE OF SERVICE

I certify that the foregoing Determination of Probable Cause dated June 5, 1997, was sent this day in the following manner:

Original hand delivered to:

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Copy hand delivered to Attorney for Complainant:

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Copy by U.S. Mail, First Class and facsimile, to: Return Receipt Requested, to:

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Dated: 6-5-97.

By: _____
Mary Ortiz
Office Automation Clerk