IN THE MATTER OF:

Lawrence Aviation Industries, Inc. and
Gerald Cohen

Lawrence Aviation Industries, Inc. Superfund Site
Port Jefferson Station
Town of Brookhaven
Suffolk County, New York **CERCLA LIEN PROCEEDING**

RECOMMENDED DECISION

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect three liens pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain property in Suffolk County, New York. One proposed lien is on a parcel of property owned by Lawrence Aviation Industries, Inc. (Lawrence or LAI) and two proposed liens are on three parcels owned by Gerald Cohen (Cohen), Chief Executive Officer (CEO) of Lawrence (together, Property Owners). As explained by EPA in its Post-Lien Hearing Submission (EPA's Submission), one lien hearing was sought for the filing of the three liens in order to streamline the lien filing process in this matter.[1]

This proceeding, instituted at Property Owners' 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 (*Supplemental Guidance*). As Regional Judicial Officer (RJO) for EPA's Region 2, I am the neutral EPA official designated to conduct this proceeding and to make a written recommendation to the Regional Counsel (the Region 2 official authorized to file liens) as to whether EPA has a reasonable basis to perfect the lien.

In accordance with the *Supplemental Guidance*, I held a meeting with the following people in attendance: John J. Hart of Pelletreau & Pelletreau, LLP, Counsel to Property Owners; Gerald Cohen; Elizabeth Leilani Davis, Assistant Regional Counsel in the Office of Regional Counsel's New York Caribbean Superfund Branch; Tom Lieber, Team Leader of the New York Caribbean Superfund Branch; Sal Badalamenti, Remedial Project Manager for EPA, Region 2; and Angela Grant, a court reporter. The meeting notes (Transcript) have been transcribed and added to the Lien Filing Records (LFR) as LAI LFR Document 10, Cohen LFR Document 12, as

required by the *Supplemental Guidance*. Post-meeting submissions filed by Counsel for Gerald Cohen and LAI on February 17, 2005 (Property Owners' Submission) and by Counsel for EPA on February 18, 2005, have also been added to the LFR, as LAI LFR Document 15, Cohen LFR Document 17, and LAI LFR Document 18, Cohen LFR Document 20, respectively. A copy of the Index to each LFR has been included as *Attachment A* and *Attachment B*, hereto.

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 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. The lien arises at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided written notice of potential liability, whichever is later. CERCLA § 107(l)(2); 42 U.S.C. § 9607 (l)(2). The lien also applies to all future costs incurred at the site. The lien continues 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. CERCLA § 107(l)(2); 42 U.S.C. § 9607(l)(2).

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) Were the Property Owners 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 liens should not be filed?

Due Process Requirements

While CERCLA does not provide for challenges to the imposition of a lien under Section 107(l), in accordance with the *Supplemental Guidance,* EPA affords property owners an opportunity to present evidence and to be heard when it files CERCLA lien notices. The *Supplemental Guidance* was issued by the Agency in response to the decision in Paul D. Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991). Under Reardon, the minimum procedural requirements would be notice of an intention to file a lien and provision for a hearing if the property owner claimed that the lien was wrongfully imposed. *Id.* at 1522; In the Matter of Scorpio Recycling Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, July 2, 2002); In the Matter of Mercury Refining Superfund Site, CERCLA Lien Recommended Decision (EPA

Region 2, June 11, 2002); In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

The Standard to be Applied

The "reasonable basis" standard applied here is that used in the *Supplemental Guidance*: "The neutral Agency 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." *Supplemental Guidance* at page 7. In addition, the *Supplemental Guidance* provides that the "property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien . . ." *Id.* at page 7.

Factual Background

The Site, covering approximately 125 acres, includes parcels of property owned either by Lawrence or Cohen. An active commercial/industrial establishment, which consists of about ten manufacturing buildings, lagoons, and drum staging areas, is located on a portion of the Site owned and operated by Lawrence (hereinafter referred to collectively as the Manufacturing Property).[2] From approximately 1959 to the present, Lawrence has manufactured products made from titanium sheet metal at the Site, including products for use in the aeronautics industry and golf clubs.[3]

The Subject Parcels are four parcels located in the northeastern and eastern portions of the Site, comprising approximately 85 acres. Several parcels owned by Lawrence or Cohen, including the Subject Parcels, surround the Manufacturing Property. EPA stated that it chose to file notice of liens on the four Subject Parcels at the same time because EPA believes that Cohen controls all of these properties, either as the individual owner or as CEO and sole shareholder of LAI, and all properties are part of the Site.[4] These EPA claims will be discussed further, below.

Prior to EPA's involvement, in August 1970, an owner of property adjacent to the Site informed the Suffolk County Department of Health Services (SCDHS) that a sump at the Manufacturing Property occasionally overflowed onto his property, disturbing the plant vegetation. Over the years, SCDHS performed several investigations at the Site and identified several environmental concerns. In November 1983, the New York State Department of Environmental Conservation (NYSDEC) listed the Site on its Registry of Inactive Hazardous Waste Disposal Sites due to the possibility of groundwater contamination.

By letter dated August 5, 1999, NYSDEC requested that EPA place the Site on the National Priorities List (NPL) of hazardous substance releases, promulgated pursuant to Section 105(a)(8)(B) of CERCLA, 42 U.S.C. § 9605(a)(8)(B). According to EPA,[5] it caused the Site to be promulgated for listing in accordance with procedures described in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), 40 C.F.R. Part 300, to determine the risk posed at the Site. EPA states that, based on the score the Site received on EPA's Hazard

Ranking System (HRS)[6], EPA proposed the Site for listing on the NPL in a Federal Register Notice in 1999 (64 Fed. Reg. 56992, October 22, 1999).[7] No adverse comments were received during a public comment period on the proposed listing of the Site.

The Site was placed on the NPL on March 6, 2000 by publication in the Federal Register, (65 Fed. Reg. 5435, February 4, 2000).[8] While EPA claims that the listing included a 124.6-acre land area,[9] of which the Subject Parcels are a part, I note that the listing itself does not specify the boundaries or acreage of the area to be included in the listing (see discussion beginning at page 9, below).

EPA issued a Notice of Potential Liability and Request for Information to LAI dated April 12, 2000 (LAI LFR Document 4), notifying LAI of its potential liability as owner and operator of the Site and offering the company the opportunity to complete the Remedial Investigation/Feasibility Study (RI/FS). Because LAI did not agree to perform the RI/FS FN, EPA undertook the RI/FS; EPA gave a work assignment under the EPA Response Action Contract program to CDM Federal Programs Corporation (CDM) to complete the RI/FS. CDM issued a document entitled *Final Work Plan, Volume I, LAI Superfund Site, Remedial Investigation/Feasibility Study* dated April 22, 2003 (Work Plan) (LAI LFR Document 6, Cohen LFR Document 8). The Work Plan describes the RI/FS study area as covering the entire Site, including the Manufacturing Property and the "Outlying Parcels.," which, according to a map provided by EPA, are the same properties as the Subject Parcels.[10]

According to EPA, the RI/FS involved *inter alia* taking extensive soil and groundwater samples at the Site and analyzing that data, and will result in a determination of what remedies, if any, are needed to address contamination which is found on the Site. EPA has received preliminary soil data on the Subject Parcels, which has previously been provided to the Property Owners and was brought to the lien hearing by Property Owners. See *Outlying Parcel Soil Sampling Results, Technical Memorandum, LAI Superfund Site, Remedial Investigation/Feasibility Study* prepared by CDM and dated August 13, 2004 (LAI LFR Document 9, Cohen LFR Document 11). EPA states that the preliminary data from the RI/FS shows elevated levels of hazardous substances, including arsenic, mercury, chromium, and zinc on each of the subject Parcels. As explained by EPA, a full analysis of the data which may very likely affect the potential remedy at the Site will be done during the next phase of the RI/FS.[11]

Early in 2003, EPA apparently learned that LAI was engaged in negotiations to sell its business and the property on which it was located.[12] Consequently, on March 6, 2003, EPA perfected liens on the Manufacturing Property in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens* without prior notice to Lawrence. The liens were perfected by filing notices of the liens with the Suffolk County Clerk's Office. By letter dated April 3, 2003 to both Cohen and LAI, EPA notified Cohen and LAI of its perfected liens, given them an opportunity to request a hearing and/or submit any information demonstrating that EPA's actions were in error (Cohen LFR Document 6). By the same letter, EPA notified Cohen of his individual liability "as owner or operator of the Site."[13]

LAI sent notice to the RJO that it would seek a lien hearing. However, after numerous efforts on the part of the undersigned to schedule a hearing, LAI failed to follow through to schedule a hearing or submit information to challenge whether EPA had reason to believe that the statutory elements for perfection of a lien on the Manufacturing Property had been satisfied. As stated above, perfection of these earlier liens are not the subject of this lien hearing.

On December 9, 2003, during a routine visit to the Site, EPA officials observed, among other items at the Site, two tanks, one containing nitric acid, the other containing hydrofluoric acid, both of which had reportedly leaked on separate occasions, and hundreds of drums labeled flammable solids, stored in precarious conditions, and scattered throughout the Site. EPA's request for access to the Site to conduct a removal action was denied, and therefore, on February 4, 2004, EPA issued to Lawrence an administrative order pursuant to Section 104(e) of CERCLA, 42 U.S.C. § 9604 (e), directing compliance with EPA's request for access, which was needed to conduct the removal action. According to EPA, it has been conducting a time-critical removal action at the Site since early 2004, in accordance with Section 300.415 of the NCP, 40 C.F.R. § 300.415, to address the above conditions which have been shown to have constituted a release or a threat of release of hazardous substances at the Site.[14]

As of November 13, 2002, as set forth in EPA's *Superfund Cost Recovery Package and On-Line System (SCORPIOS) Report* (LAI LFR Document 1, Cohen LFR Document 1), EPA had incurred costs of over $186,000. Additional costs have been incurred since that date, and will continue to be incurred.[15]

By separate letters to LAI and Cohen dated December 1, 2004 (LAI LFR Document 5 and Cohen LFR Document 7, respectively), EPA notified each Respondent of EPA's intent to file liens on the Subject Parcels. The Property Owners objected to the filing of the liens, and requested that a lien hearing be held. As set forth above, the lien hearing, with the undersigned presiding, was held on January 11, 2005 at EPA's Region 2 office.

The four Subject Parcels are shown on a copy of Suffolk County tax map (Exhibit 3 to EPA's Submission) and described by EPA in its Submission[16] as follows:

-Parcel 1 and Parcel 2, described on the Suffolk County tax map as Section 159, Block 2, Lot 20 and Section 180, Block 4, Lot 2, respectively are owned by Cohen having been acquired by him in a deed dated January 23, 1984 and recorded at the Suffolk County Clerk's Office at Liber 10972, Page 569 (Cohen LFR Document 4). As explained by EPA, because Parcel 1 and 2 "were conveyed together on the most recent deed on file at the Office of the Suffolk County Clerk, EPA has chosen to file one lien covering both parcels." [17]

-Parcel 3, described on the Suffolk County tax map as Section 180, Block 4, Lot 1, is owned by Cohen having been acquired by him by deed dated October 2, 1989, and recorded at the Suffolk County Clerk's Office at Liber 11002, page 306 (Cohen LFR Document 5).

-Parcel 4, described on the Suffolk County tax map as Section 136, Block 2, Lot 22, is owned by LAI, having been acquired by it by deed dated April 30, 1959, and recorded at the Suffolk County Clerk's Office at Liber 4654, page 98 (LAI LFR Document 3).

At the lien hearing, the parties requested an opportunity to file post lien hearing submissions in further support of their respective positions. The due date for these submissions, as agreed to by the parties, was February 8, 2005.[18] At the request of EPA's attorney, I extended the deadline for these submissions through February 18, 005 by Order dated January 25, 2005 (LAI LFR Document 11, Cohen LFR Document 13). Property Owners submitted correspondence and further documentation by letters dated February 8, 9, 15 and 17, 2005.[19] EPA filed its Submission, together with attachments thereto, on February 18, 2005.[20]

In addition, two third parties corresponded with the undersigned regarding the proposed liens on Subject Parcels. On February 16, 2005, I received a letter from Frederick Eisenbud, Counsel to Global Home Group, LLC (Global), which claims it has entered into a contract to purchase three parcels owned by Cohen (LAI LFR Document 15, Cohen LFR Document 17). That letter objected to the fact that the lien filing hearing was conducted without prior notice to Global, and set forth various arguments against the filing of liens against the property owned by Cohen. On the same date, I received a letter from Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, representing Maryhaven Center of Hope, Inc. (Maryhaven) holder of judgments against both Property Owners and a party to a contract to purchase property from both Cohen and LAI (LAI LFR Document 16, Cohen LFR Document 18). Maryhaven requested a separate lien hearing in order that it may present its arguments against the filing of the proposed liens on Subject Parcels.

By separate letters to Counsel for Global and Counsel for Maryhaven, dated March 15, 2005 (LAI LFR Document 20, Cohen LFR Document 22 and LAI LFR Documents 21, Cohen LFR Document 23, respectively), the undersigned informed each that they were not entitled to notice of the lien filings or to participate in the lien filing hearings. However, I did inform the attorney for Global that, because his client's legal arguments were resubmitted and adopted by attorney for LAI and Cohen in their post hearing submission,[21] I would consider these arguments prior to issuing this Recommended Decision.

Factors for Review

1) Notice of Potential Liability

There is no dispute that the Property Owner, LAI, was sent notice of potential liability, dated April 12, 2000, by certified mail, return receipt requested (LAI LFR Document 4). However, in Property Owners' Submission, it is stated that Cohen has never received written notice of his potential liability. More specifically, Counsel for Property Owners states that the December 1, 2004 letter which "the claimant alleges provided notice to Mr. Cohen individually

of his individual potential liability," upon careful reading, "makes clear that only LAI is identified as 'a potentially responsible party."[22]

However, while the December 1, 2004 letter from EPA (LAI LFR Document 5) from which Mr. Hart quotes and a copy of which he attached as Exhibit A to Property Owners' Submission, is the Notice of Intent to Perfect Superfund Lien letter sent to Gerald Cohen as CEO of LAI, regarding LAI's potential liability as owner of the site, EPA sent out a similar letter to Mr. Cohen individually (Cohen LFR Document 7) by certified mail, return receipt requested, notifying him of its intent to perfect superfund liens upon property owned by him, and referring back to an EPA letter dated April 3, 2003.

In this April 3rd letter (Cohen LFR Document 6), sent by Federal Express to both LAI's address, attention to Cohen as CEO, and to Cohen, individually, at 18 Bridle Path in Nissequoque, New York, EPA informed Mr. Cohen that "EPA has reason to believe that you individually are also a potentially responsible party with respect to the Site, as an owner or operator of the Site." While this letter did not refer directly to the Cohen parcels upon which EPA is currently proposing to perfect two liens, it did specifically and unequivocally provide Mr. Cohen with notice of his potential liability.

According to the *Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12, effective September 22, 1987 (*Guidance*)[23] written notice of potential liability may be "a general notice letter...notifying the recipient that he or she has been identified as a party who may be responsible for clean up of the site or the cost of cleanup." *Guidance* at page 2.

The December 1st letters, providing notice of EPA's intent to perfect the liens, set forth the specific pieces of property which the liens would cover, and included all the information required by both the *Guidance* and the *Supplemental Guidance*.[24]

I conclude that the April 3, 2003 letter sent to Cohen provided him with the required notice of potential liability. Therefore, despite Mr. Hart's arguments to the contrary, both Property Owners received notice of potential liability.

2) Property Owned by Potentially Liable Party

There is no dispute that LAI has owned Parcel 4 of Subject Parcels since 1959; and Cohen has owned Parcels 1 and 2 since 1984, and Parcel 3 since 1989. See Deeds, LAI LFR Document 3 and Cohen LFR Documents 4 and 5, respectively.

Under CERCLA § 107(a)(1) and (2), 42 U.S.C. § 9607(a)(1) and (2), liable persons include persons who presently own a facility or who owned the facility at the time of disposal of

a hazardous substance. It is not disputed that LAI is a person (as defined in CERCLA § 101(21), 42 U.S.C. § 9601(21)) that owns a facility (as defined in CERCLA § 101(9), 42 U.S.C. § 9601(9)), at which there was a disposal (as defined in CERCLA § 101(29), 42 U.S.C. § 9601(29)). Therefore, it appears on its face that LAI, which currently owns a great deal of the property comprising the Site *and* owned this property during the disposal of hazardous substances, is a potentially liable party.

Similarly, it is not disputed that Cohen is a person (as defined in CERCLA § 101(21), 42 U.S.C. § 9601(21)). However, Cohen disputes the fact that he owns a facility (as defined in CERCLA § 101(9), 42 U.S.C. § 9601(9)), at which there was a disposal (as defined in CERCLA § 101(29), 42 U.S.C. § 9601(29)), at least with respect to the Parcels 1 and 2, deeded to him from the estate of his mother, Rita Cohen. [25]

Specifically, the Property Owners' post hearing submission states at page 2, in response to the question as to whether the Site is a facility as defined in the statute:

> Again, the answer is no. The property in question at no time was ever used for any purpose connected with or attached to the Lawrence Aviation Industries, Inc....Superfund Site. You will note that in the letter dated December 01, 2004, addressed to LAI, of copy of which is attached hereto...that LAI is identified as the owner or operator to the site; which is not true. Gerald Cohen individually is the owner of the premises described as the outlying premises. This proceeding is against Gerald Cohen, Respondent; an individual and "innocent owner" of the premises by deeds from the estate of Rita Cohen, Respondent's mother.[26]

Further, Counsel for Global argues that the property owned by Cohen is not part of the NPL site and therefore not part of the facility.[27] Specifically, Global's submissions states that there is no mention of the scope of the site in the proposed or final listing. Global argues that documents supporting the listing show that only LAI property was "scored" and that only LAI parcels were included in the diagrams.[28] In addition, Global challenges whether the Subject Parcels owned by Cohen were part of the facility because there was no definitive evidence that contamination has migrated to the parcels at issue.[29] Property Owners appear to be defining the facility as including the LAI Manufacturing Property only upon which, as mentioned above, EPA liens have already been perfected. To the extent that their arguments challenge whether EPA had a reasonable basis to believe that the statutory elements for perfecting a lien have been met, I will address each of Property Owners' arguments.

A facility is defined as a site or area where a hazardous substance has been deposited,

stored, disposed of, placed, or otherwise come to be located (CERCLA § 101(9), 42 U.S.C. § 9601(9)). First, it appears that, in denying that Cohen owned a facility, Mr. Hart continues to confuse the letters providing notice to LAI and notice to Cohen. This confusion has been addressed by the discussion of the adequacy of notice to the Property Owners at page 7, above. In addition, it must be noted that it is not necessary that the parcels at issue were used as part of the manufacturing operation of LAI. For purposes of CERCLA liability, a facility can go beyond boundaries of a manufacturing plant and include areas where a hazardous substance has been stored, disposed of, placed on otherwise come to be located, in accordance with the definition set forth above

From the record, it appears that EPA had reason to believe that these parcels were part of the facility for purposes of CERCLA liability, even if they were not part of the manufacturing operation. As indicated in the Transcript, EPA's Submission, the Work Plan and the Sampling Results,[30] there were several factors which justified EPA's belief that the Subject Parcels constituted a facility. These include, but are not limited to, roads leading off the Manufacturing Property to the parcels at issue, as well as disturbed ground on the parcels themselves. More specifically, photographs showed that Parcel 4 had a large sand gravel pit containing fill. Parcel 3 housed chicken coops which were operated by a previous owner. There were also allegations from neighboring resident of dumping of wastes and burying drums on the Subject Parcels. There was evidence of contamination beyond the Site, even as broadly defined by EPA to include the Manufacturing Property and the Subject Parcels.[31] Finally, these four parcels were contiguous to the Manufacturing Site, and owned by either LAI or Cohen. Therefore, the Manufacturing Site and the Subject Parcels have been under common control and been owned by either Cohen or a corporate entity, LAI, related to the Cohen family, for at least 60 years.

Finally, we address Global's arguments that these outlying areas should not be included in the lien because they were not part of the site as listed on the NPL.[32] First of all, the NPL does not define boundaries of a site or responsible parties. As stated in Section I.F. of the *Supplementary Information* of both the proposed (64 Fed. Reg. 56992, October 22, 1999),[33] and final (65 Fed. Reg. 5435, February 4, 2000)[34] rule,

> The NPL does not describe releases in precise geographical terms: it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so.
>
> Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance release has "come to be located" (CERCLA § 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases...

> ...When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the "boundaries" of the site. Rather the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which the contamination has come to be located...
>
> ...The precise nature and extent of the site are typically not known at the time of listing. Also, the site name is merely used to help identify the geographic location of the contamination. For example, the name "Jones Co. plant site," does not imply that the Jones company is responsible for the contamination located on the plant site.
>
> ...Indeed the known boundaries of the contamination can be expected to change over time...
>
> Further, as noted above, NPL listing does not assign liability to any party or to the owner of any specific property.

I believe that this extensive explanation of the purpose, scope and limits of the information set forth in the NPL listing address each and every argument advanced by Global. These comments specifically provide that the boundaries of the Site will be altered as time progresses. Therefore, we need not address EPA's statement that the entire 124.6 acre parcel was included in the listing. In light of the above provisions, the fact that the NPL listed subject site as 'Lawrence Aviation Industries, Inc.' does not limit it either to the boundaries of the manufacturing property or to property owned by LAI.

While it may be true that only LAI properties were scored and HRS scoring led to the listing of the site, according to the provisions set forth above, it is not uncommon for a site to include all the contaminated areas within the site as listed, as well as all additional areas where contamination originating from the site has come to be located. So even if Global is correct and only LAI property was scored and included in diagrams, Subject Parcels would logically become part of the NPL listing if contamination was suspected on these parcels.

I also agree with EPA's contention that the current challenge by Property Owners and Global to the inclusion of the parcels on the NPL listing is untimely,[35] and reject Global's argument that Cohen had no notice that property owned by him was the subject of the NPL listing. The public was notified of EPA's proposal of the Site for listing on the NPL, and advised of its right to submit comments within sixty days of the publication of the notice. As EPA points

out, neither LAI nor Cohen submitted comments regarding the proposed listing of the Site.

I believe, despite Global's assertion to the contrary, that the NPL designation of the LAI site could reasonably be expected to put Cohen on notice regarding the Subject Parcels which he owned. First of all, Global's position ignores the common control of parcels owned by LAI, of which Cohen was the CEO and only shareholder, and parcels owned by Cohen individually. In addition, Cohen, as CEO of the company that caused the releases on the Manufacturing Property and the Subject Parcels, should have known that there was a probability, or at least a possibility, that the NPL listing would eventually include some if not all of the contiguous parcels owned by both LAI and himself.

The rule, as summarized in Global's submission, is that "a person who has reasonable notice that his property is 'potentially affected by the ...site listing' as an NPL site who fails to seek judicial review within the 90 day limitations period imposed by statute is barred from challenging the original designation."[36] For the reasons set forth above, I believe that Cohen had reasonable notice to conclude that the Subject Parcels which he owned were potentially affected by the NPL designation, Therefore, I reject Global's request that the "secret decision to make Mr. Cohen's parcels part of the NPL site be deemed invalid."[37]

Finally, Cohen's attorney makes brief mention of Cohen as an "innocent owner" of the premises which were deeded from the Estate of Rita Cohen, Cohen's mother. While this brief statement hardly constitutes a fully developed defense of innocent landowner under CERCLA, I will briefly address whether Cohen is an innocent landowner as defined in CERCLA § 107(b)(3). in order to conclude my inquiry into whether Cohen is in fact a potentially responsible party (PRP). This section provides in pertinent part, that:

> There shall be no liability under subsection (a) of 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 that third-party other than an employee or agent of the defendant, or other than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant....if (a) he exercised due care with respect to the hazardous substances concerned, taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions...".

Thus this defense absolves from liability a current owner of property who successfully demonstrates that the release of hazardous substances was caused by a third party with no contractual relationship to the current owner and that, in addition, the current owner exercised due care. In the Matter of Far Star Superfund Site, CERCLA Lien Recommended Decision (EPA Region 4).

Cohen can not establish that the act that caused the release and resulting damages was caused by someone with whom Cohen did not have a contractual relationship as relationship is defined in Section 101(35)(A) because he is, after all, CEO and sole shareholder of LAI, the company that caused the release. In evaluating this claim, one must keep in mind that Cohen was CEO of LAI during the time period when hazardous substances were released on the Manufacturing Property; in effect, he was running the enterprise that is alleged to have contaminated the Site, including perhaps these two parcels of which he is "innocent owner." Therefore, I can not believe that Cohen did not have reason to know that hazardous substances were present. After all, Cohen had a continuous relationship with the Site, as discussed in In the Matter of Copley Square Plaza Site, CERCLA Lien Recommended Decision (EPA Region 5, July 5, 1997). As operator of the business, overseeing operations at the Site, Cohen must have known about the hazardous releases, even if he did not know exactly where they were or how serious they were. In the Matter of Boharty Drum Site, CERCLA Lien Recommended Decision (EPA Region 5, June 22, 1995); In the Matter of CryoChem, Inc., EPA Docket No. III-93-003L, November 29, 1993; In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

To summarize, as CEO of the corporation that allegedly caused releases on the Site, Cohen can not convincingly argue that the release was caused solely by an act or omission of a third-party with which he did not have a contractual relationship, that Cohen exercised due care with respect to any hazardous substances and that Cohen took precautions against LAI's foreseeable acts and foreseeable consequences. In the Matter of Far Star Superfund Site, CERCLA Lien Recommended Decision (EPA Region 4); In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

Based on these conclusions, I do not accept the innocent landowner defense on the part of Cohen with respect to any of the parcels which he owned which are the subject of the proposed liens. *See also* In the Matter of Eastland Woolen Mill Site, CERCLA Lien Recommended Decision (EPA Region I); In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region I); In the Matter of Copley Square Plaza Site, CERCLA Lien Recommended Decision (EPA Region 5, July 5, 1997).

Therefore, despite Cohen's arguments to the contrary, the four parcels of property upon which EPA proposes to perfect liens are owned by a potentially liable party.

3) Property Subject to Removal or Remedial Action

The Property Owners, by their attorney and attorney for Global, dispute that the Subject Parcels have been subject to a removal or remedial action as defined in CERCLA § 101(23). The Property Owners argue that the proposed liens, especially on the two parcels inherited by Cohen from his mother's estate, are too broad because these Subject Parcels were never part of the LAI manufacturing operation, have never been used in connection with operations of LAI, and have never been subject to any removal or remediation. In addition, both Property Owners and Global argues that, if in fact, the property has been subject to a removal or remedial action, said actions were unreasonable and unjustified and can not be the basis for the perfection of EPA liens. They argue that the reasonableness and necessity for the removal and remedial action must be established before there are liens perfected on the property.

EPA's position is that the lien attaches to the entire parcel which comprises the site that is affected by a removal or remedial action, and is owned by the PRP, and EPA is not required to limit its lien to only that portion of the property affected by a cleanup. Moreover, EPA emphasizes that, while the Subject Parcels comprising the site may not have been used for manufacturing or other operations of LAI, EPA has taken soil samples and conducted other investigatory activities on this part of the Site, and continues to conduct the RI/FS, as well as a time critical removal action, throughout the Site. Therefore, each parcel at issue has been subject, and continues to be subject, to a removal action.

Certain of the points made by the Property Owners are not within the scope of my present inquiry. In addition, EPA's position, in part, oversimplifies the complex issue presented by the Subject Parcels. However, as all the challenges summarized herein are related, I will consider each of them to the extent that they are related to the question of whether there was a removal or remedial action on the Subject Parcels. CERCLA defines a removal action to include action necessary to "monitor, assess, and evaluate the release or threat of release of hazardous substances." Section 101(23) of CERCLA, 42 U.S.C. § 9601(23). In deciding this question, it is informative to review other recommended decisions that considered the issue of whether a removal or remedial action had occurred.

However, first I must clarify that I feel that those cases that, in determining that more than one parcel are subject to or affected by a removal actions, rely very heavily on the fact that those parcels have been under common ownership and have been treated as one parcel over the years, are not definitive here. The case law is consistent in supporting EPA's position that each lien rightfully attaches to the entire parcel owned by a PRP upon which the lien is proposed, and that EPA is not required to place a lien just on that portion of a parcel directly affected by a removal or remedial action. United States v. 150 Acres of Land, 3 F. Supp. 2d 823 (N.D. Ohio 1997), *aff'd in relevant part* 204 F.3d 698 (6th C. 2000); In the Matter of the Asbestos Dump -

Millington Site, EPA Docket No. II-CERCLA-90113, May 15, 2001. As stated in the *Guidance:* "The lien apples to all property owned by the PRP upon which response action has been taken, not just the portion of the property directly affected by cleanup activities." This *Guidance* cites H.R. 2817 (page 18), enacted as part of Superfund Amendments and Reauthorization Act of 1986 (SARA), which states that "the lien should apply to the title to the entire property on which the response action was taken."

However, in the case before me, the nature of the Subject Parcels does not present a clear cut example of parcels that constitutes one property for purposes of our analysis.

With the exception of Parcel 4, the Subject Parcels are in fact not owned by the same party as the remainder of the Site. In addition, the two parcels owned by Cohen by deed from his mother's estate are distinct from, were legally under different ownership, and were transferred to Cohen by different legal instrument and at different times than the LAI property which was transferred to him. In addition, according to Work Plan, the nature and uses of the Subject Parcels vary, including, for example, some residential houses and a pond.[38]

Despite the fact, as discussed above, that there appears to have been, in reality, common control of the entire Site including the Subject Parcels, and the Subject Parcels are contiguous with the Manufacturing Property and each other, these Subject Parcels do not form the same sort of single property as those discussed in many of the legal precedents, including United States v. 150 Acres of Land, the case cited by EPA in its Submission. Therefore, in the case before me, I find the definitive factor to be whether there were actual removal or remedial actions on the Subject Parcels. In addition, based on the well reasoned decision in In the Matter of Prestige Chemical Company Site, CERCLA Lien Recommended Decision (Region 4, March 26, 2002), I will treat Parcels 1 and 2, Parcel 3 and Parcel 4 as three distinct properties because of the different ownership, histories, transfers, etc. of each, and review each property to ascertain whether each has been affected by or subject to a removal action.

There are many RJO recommended decisions which speak to the issue of whether subject property has been affected by or subject to a removal or remedial action. In the Matter of Maryland Sand Gravel and Stone Company, CERCLA Lien Recommended Decision (Region 3, June 22, 1999), the RJO determined that a lien on two contiguous pieces of property was reasonable, although there was no contamination of the second parcel and no further investigation or remedial activity was recommended on that parcel. In addition to the fact that the Property Owner had always treated both parcels, though legally separate, as a single site (which is not the case in the matter before me), there had been groundwater testing, as well as other monitoring and investigative activities, on the second parcel to determine if there had been off site migration from the first parcel. The Maryland case cites proximity of the parcels, common ownership, similarity of conditions, more than minimal connection to the clean up, and the

impossibility of separating costs as factors to consider when evaluating whether a proposed lien should cover all the parcels at issue.

In In the Matter of Prestige Chemical Company Site, CERCLA Lien Recommended Decision (Region 4, March 26, 2002), the RJO found that the establishment of an EPA Command Center on a parcel constitutes the type of removal activities contemplated by the Act, and therefore, that the total property, including that parcel, was subject to a remedial or removal action, and properly subject to a lien. The RJO reached that conclusion despite the fact that there was no release on that portion of the Site and therefore, no removal of hazardous waste. It was not conclusive that no release was found on that parcel, because a threat is tantamount to a release as defined in CERCLA.

Similarly, in the case In the Matter of Bohaty Drum Site, CERCLA Lien Recommended Decision (Region 5, June 22, 1995), although drums of hazardous waste were physically removed from only one parcel of property, the RJO found that all three parcels in question were subject or affected by a removal action based upon the fact that investigatory activities were conducted on each parcel. The RJO in Region 5 cited Kelly v. E. I. DuPont DeNemours and Co., 17 F.3d.836 (6th Cir.1994), in relying upon the proposition that investigatory activity was included in the definition of removal as "such actions as may be necessary to . . . assess, and evaluate the release or threat of release."

To determine whether each of the Subject Parcels have each been subject to or affected by a removal or remedial action, I have carefully reviewed the record, including the Work Plan and Sampling Results. The Sampling Results shows that, in accordance with the Work Plan, significant removal activity was conducted throughout the Site, and, more specifically, on each of the Subject Parcels. According to the Work Plan,[39] the remedial investigation (RI) focused *inter alia* on collecting soil, groundwater, surface water and sediment data on the entire Site, including the Manufacturing Site and Subject Parcels, to ascertain the nature, extent and areas of site-related contamination. A complete evaluation of sampling results will be one of the products of the RI.[40]

The Work Plan set forth an initial evaluation based on existing data that covered the Subject Parcels.[41] In addition, the Sampling Results summarized substantial investigatory work that was completed in preparation for the sampling. This included, but was not limited to, the review of historical aerial photographs and systematic site reconnaissance of the Subject Parcels to determine the appropriate locations of surface and subsurface soil sampling locations. A surface geophysical investigation of the Subject Parcels was included in the RI to locate buried objects, including buried drums that may be a source of soil and groundwater contamination. In addition, the clearing of vegetation on the Subject Parcels was necessary to provide access to sampling locations.[42]

Forty subsurface soil borings were conducted on the Subject Parcels to determine if improper disposal of chemical wastes was conducted there. According to the Sampling Results, over one hundred thirsty subsurface soil samples were taken from these soil borings located on Subject Parcels.[43] From Figure 1-3 of the Sampling Results, it is obvious that EPA has taken a significant number of soil samples on each of the Subject Parcels. According to the Work Plan, the RI will be followed by a Risk Assessment (RA) to evaluate public health and ecological risks from contamination found at the Site and Feasibility Study (FS) to develop and screen remedial alternatives and provide detailed analysis of selected alternatives. In addition, as discussed in EPA's Submission, EPA has observed tanks and drums scattered through the Site, and has been conducting an ongoing time critical removal action to address releases or threat of releases of hazardous substances at the Site

In accordance with the precedents discussed above, I conclude that such evaluations, surveys, and samples, taken in an effort to monitor, assess and evaluate the release or threat of release of hazardous substances at the Site, constituted a removal action in accordance with CERCLA on each distinct property: Parcels 1 and 2, Parcels 3, and Parcel 4. EPA continues to performance the RI/FS at the Site in order to assess and evaluate the release of hazardous substances, as well as the time critical removal action.

The facts in the case before me can easily be distinguished from those in recommended decisions where the RJO found the lien proposed by EPA to be too broad. For example, in In the Matter Pacific States Steel, CERCLA Lien Recommended Decision (Region 9, August 14, 1995), the RJO rejected EPA's contention that while removal activity was only completed on one of three parcels, the others were affected by the removal where personnel has merely driven through these parcels in order to reach the one on which physical removal took place. The other two parcels were bought separately and were not used in actual operation of the steel plant, which is similar to the facts pertaining to Parcels 1 and 2 in the case before me. However, these two parcels were not subject to any investigation or other removal or remedial activities by EPA. The distinction appears to be the extent to which any investigative activity took place on the parcel from which hazardous wastes were not actually removed.

The Property Owners also stated throughout the lien hearing that EPA's sampling data on the Subject Parcels was in error, and EPA did not have a basis to investigate and study the parcels under the RI/FS. See for example pages 20-22, 34-36, and 42-49 of the Transcript.[44]

The Property Owners did not offer any specific challenge to the sampling data collected at the Site by EPA, other than a general allegation that the data is flawed. Given the lack of specific allegations regarding the data, and more importantly, that the quality of EPA's data is not within the scope of this hearing, I accepted EPA's contention that the "data has been thoroughly

validated and all quality assurance and quality control standards implemented by EPA have been satisfied and the screening criteria set for the Site was well within EPA protocols."[45] I have also reviewed the Work Plan and Sampling Results, and there is no indication that that adequate quality control was not in place.[46]

This brings me to the next prong of Property Owners' argument regarding this third factor: that EPA's decision to conduct any removal action on these Subject Parcels was unreasonable. It is well established in the legal precedents that review of EPA response actions is barred until a civil enforcement action under Section 113 of CERCLA, 42 USC § 9613 is brought by EPA.

As stated in In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region I), issues not relating to the proposed perfection of a lien, including the remedy selected, and whether the actions taken and costs incurred by EPA were necessary and reasonable, are not within the scope of this proceeding.

I stated in In the Matter of Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, June 2, 2002), quoting the Region 8 RJO:

> The review can not focus on the selection of the remedy or other matters which are only reviewable in a cost recovery action under Section 107, or are not subject to review. See, Section 113(h), 42 USC § 9613(h). In the Matter of Layton Salvage Yard Site, CERCLA Lien Recommended Decision (EPA Region 8) at 4.

In the Exact Anodizing case, the property owner, who had wanted more time to develop and institute his own removal or remedial action, argued that as there was no danger at the Site, the action taken by EPA was unreasonable, and the property owner was therefore not liable for the costs of an unnecessary and unreasonable removal or remediation. Despite the fact that a selection of remedy is not at issue, as RJO I interpreted this argument to constitute a claim that the property was not subject to or affected by a valid removal or remedial action, and reviewed that issue. Therefore, to the extent that Property Owners' argument that these parcels were not properly within the scope of the RI/FS are part of. the larger argument that the liens are overbroad, I will briefly address Property Owners' position.

The Property Owners argue that "whether outlying parcels are properly subject for removal or remedial action is a conclusion based upon surmise and speculation,"[47] taking the position that the actions taken by EPA must be fully justified before a lien can be imposed. As

noted by the Property Owners, the Sampling Results state at page 4-1, referring to the Subject Parcels, "No additional sampling is recommended at this time."[48] The Property Owners cite this in support of their position that any removal action was unjustified and therefore can not support EPA's decision to file liens. Global, on behalf of Property Owners, argues that surface geophysical surveys completed by CDM do not justify any further removal or response actions. It also argues that funding for removal or remediation action under this section in response to a release or threat or release of a naturally occurring substance in its unaltered form, which they believe may be the nature of the removal action on the Subject Parcels, is excluded pursuant to CERCLA § 9604(a)(3), 42 USC § 103(a)(3). They reason that, because EPA does not yet know whether or not the elevated levels found by CDM were naturally occurring, they can not know whether the expenditure on testing or other removal or remedial actions are justified.

It is irrelevant whether EPA finds hazardous substances on the parcels. Regardless of the results of tests, EPA appeared to have good reason to believe there was a release or threat of release on this parcels, and therefore to include Subject Parcels in the RI/FS. As indicated in the Transcript, EPA's Submission, the Work Plan and the Sampling Results, and discussed above at page 9, there were several factors which justified EPA's decision to investigate and perform sampling on each of these parcels as part of the RI/FS. To summarize, these factors included: roads leading off the Manufacturing Property to the parcels at issue, disturbed ground on the parcels themselves, allegations from neighboring resident of dumping of wastes and burying drums on the Subject Parcels, and evidence of contamination beyond the Site. As stated in a Region 5 recommended decision, given the fact that there was contamination beyond the boundaries of the Site, EPA's decision to include the entire site in its lien notice was very persuasive. In the Matter of Avanti Site, CERCLA Lien Recommended Decision (EPA Region 5, February 4, 1997). Finally, these four parcels were contiguous to the Manufacturing Site, and under common control.

As previously discussed, whether EPA took the correct action is not at issue here and will not be established until the RI/FS is completed. This issue can be litigated if and when EPA sues the property owners for recovery of costs. According to the *Guidance* and the case law reviewed herein, EPA does not need to establish that there was an actual release on the subject property, or the extent and costs of any removal or remedial actions on that property before filing a lien. A discussion of the impropriety of delaying these proceedings in order to have more definitive information is at page 20 below.

Therefore, I find that each parcel of the Subject Parcels was in fact subject to or affected by a removal or remedial action for purposes of Section 107(l) of CERCLA.

4) United States Incurred Costs

There is no dispute that the United States incurred costs. As set forth above, as of November 13, 2002, EPA had incurred costs of over $186,000.[49] A significant amount of work was done subsequent to that date, and currently EPA in the midst of a time critical removal action as well as the ongoing RI/FS. Therefore, additional costs have been incurred since that date, and will continue to be incurred.[50]

At page 5, the *Guidance* states that the statute does not require that an exact sum of costs be specified as a prerequisite to perfection of a lien, especially since the lien includes the cost of ongoing response work. As noted in one recommended decision, "it was anticipated that CERCLA liens would often be filed early in the history of a response action, at a point where EPA would not know the full cost of its response action." In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

However, it must be noted that, to the extent that the Property Owners are arguing that the response on the Subject Parcels was unnecessary or unreasonable, they are challenging the necessity and reasonableness of the resultant costs. In addition, the Property Owners question the amount of the costs incurred to date, arguing, for example, that the *SCORPIOS* report should describe the work for which each EPA employee or contractor is charging.[51] The broad challenge to the validity of the removal actions, and therefore, the reasonableness of the resultant costs, is addressed in the preceding section. In addition, the case law is consistent is finding that the consideration of appropriate costs is not a subject of this review. Our only inquiry is whether the LFR shows that costs have in fact been incurred. In the Matter of Herculaneum Lead Smelter Site, CERCLA Lien Recommended Decision (EPA Region 7, February 12, 2003) at page 7. As stated in a Region I case, In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region I):

> ...Under this process, issues not relating to the proposed perfection of a lien, including issues such as the remedy selected...should not be considered by the Agency neutral. *Supplemental Guidance* at 8. Therefore, the issue of whether the actions taken and costs incurred by EPA were necessary and reasonable is not within the scope of this proceeding.

Global, in one of its numerous arguments adopted by the Property Owners, proposes that if a lien must be placed on Cohen's property, that property should only be subject to liens in the amount of the removal costs incurred on those parcels only. Their position seems to stem from their belief that this property was not really part of or connected with the manufacturing operations, and that little if any contamination was found on this property. Also, Global states

that it is improper to include removal costs associated with LAI's property in a lien on property owned solely by Cohen.[52]

First, this proposal ignores the reality of the situation before me. I agree with EPA's position that the property, whether owned by LAI or Cohen individually, is actually under the control of Cohen as sole shareholder of LAI, a business run and controlled by Cohen's family for many years. Further, it appears that EPA is justified in viewing the entire property, both Manufacturing Property and Subject Parcels, as part of the Site for the reasons discussed in the previous section.

Global also ignores the fact, as set forth above, that the statute does not require that an exact sum of costs be specified. In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000). In addition, the statute and earlier RJO decisions do not require the postponement of perfection of a lien until the extent of the contamination is ascertained or the remedy is selected and the removal and remedial costs are know with certainty. As stated in the Reardon case, the CERCLA statute contemplates the filing of a notice of lien well before cleanup procedures are completed, with the result that the lien is not for any sum certain, but for an indefinite amount. Paul D. Reardon v. U.S., 947 F.2d 1509 (1st Cir. 1991).

In this case, EPA contracted for the preparation of a *Work Plan* which covered the entire Site, including the Subject Parcels. In determining the scope of the RI, EPA and CDM relied on studies and data regarding the entire Site, resulting in investigation and sampling on both the Manufacturing Property and the Subject Parcels. In addition, a time critical removal precipitated by the observation of drums and tanks throughout the Site was also conducted. It would be impractical, if not impossible, to break out the planning, survey, sampling and other removal costs that were related solely to the Subject Parcels, and more specifically, only to those Subject Parcels owned by Cohen by deed from his mother's estate. Moreover, in numerous recommended decisions, the RJOs have refused to break down the costs by parcel.

For example, in Maryland, EPA argued that CERCLA 107(l) precluded the Agency from parceling out the costs of response actions, the costs could not be broken down by parcel and the lien increases by operation of law as EPA continues to incur costs, regardless of on which parcel the additional costs are incurred. The RJO understood the Property Owner's desire to have a certain parcel, on which there had been a remedial investigation that concluded there was no evidence of waste disposal and that further investigation or remedial activity was not warranted, omitted from the lien. However, the RJO concluded that the EPA should not be forced into making this a special case by segregating response costs by parcel. In the Matter of Maryland Sand Gravel and Stone Company, CERCLA Lien Recommended Decision (Region 3, June 22, 1999) at page 4. *See also* In the Matter of Herculaneum Lead Smelter Site, CERCLA Lien

Recommended Decision (EPA Region 7, February 12, 2003); In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region I); In the Matter of Burnt Fly Bog Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, June 8, 2004).

In addition, this proposal ignores the fact that CERCLA § 107(a) provides for joint and several liability. As stated in numerous prior RJO recommended decision, each potentially liable party may be liable for the entire amount of removal and remedial actions. As discussed at length in the recommended decision in In the Matter of the Asbestos Dump – Millington Site, EPA Docket No. II-CERCLA-90113, May 15, 2001, it is inappropriate to delay the perfection of the lien solely on the basis that some future administrative or judicial action may determine the exact apportionment of liability among the potentially responsible parties. Even if LAI was not controlled and owned by the Cohen family, nothing included in the LFR has established a basis for apportionment of liability between LAI, and Cohen, CEO and sole shareholder of LAI, and it would be inappropriate to attempt to establish that basis at this juncture. *Id.*, In the Matter of Piccollo Farm Superfund Site, CERCLA Lien Recommended Decision (EPA Region 1, August 27, 1997).

Therefore, I find that the United States has incurred costs with respect to a response action under CERCLA.

5) Other Information Showing Liens Should Not Be Filed

The Property Owners present a number of additional arguments in support of their position that EPA does not have a reasonable basis upon which to perfect liens against Subject Parcels. First of all, I must emphasize that these allegations do not have any bearing on the reasonableness of EPA's belief that all the statutory elements for perfecting a lien have been satisfied. As I have emphasized throughout this decision, the scope of my review of EPA's proposal to file a notice of lien is limited to this inquiry. However, in an effort to provide the parties with as much information as possible, I will briefly address each argument set forth by Cohen and LAI.

Constitutionality

During the lien hearing, Counsel for property owners argued that the process adopted by EPA to address the court's decision in Paul D. Reardon v. US, 947 F.2d 1509 (1st Cir. 1991) is inadequate to correct the constitutional deficiency of the CERCLA provision.[53]

As stated above in the section entitled ***Due Process Requirements***, I believe that the *Supplemental Guidance*, which requires that the property owner be provided with a notice of intention to file a lien and an opportunity to be heard, through the submission of documentation

and/or through a hearing before a neutral EPA official, complies with the procedural requirements set forth in the Reardon case. *See* In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000).

As noted in EPA's Submission, the constitutionality of EPA's procedures under the *Supplemental Guidance* has withstood challenge. In the Matter of Mercury Refining Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, June 11, 2002). In United States v. 150 Acres of Land, supra, the court upheld the lower court's decision that the property owners appearing before the Region 5 RJO in the Lien Proceeding, In the Matter of Bohaty Drum Site, received sufficient due process. As in the case before me, the property owners were provided with notice of intention to perfect the lien, an informal hearing before a neutral EPA official, and the opportunity to submit information as to whether EPA had a reasonable basis to perfect a lien.

As discussed in the Mercury case, there are a number of regulatory safeguards in place to ensure the RJO's neutrality. First, as set forth in 40 C.F.R. § 22.4(b), the RJO should not be employed by either the enforcement division or by the division directly associated with the type of violation in issue at the proceeding. In addition, 40 C.F.R. § 22.4(b) mandates that the RJO should not have performed prosecutorial or investigative functions associated with any hearing in which he or she is RJO or with any factually related hearing. In the Matter of Mercury Refining Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, June 11, 2002).

As the RJO in this case, I can assure the parties that these safeguards have been met in this instance. I do not work for the Regional branch responsible for proposing the filing of this lien, the Office of Regional Counsel's New York Caribbean Superfund Branch. In addition, I have not performed prosecutorial or investigative functions related to the Site. I find that the procedures which have been implemented in this case, which comply with the guidelines set forth the in the *Supplemental Guidance* as well as the applicable regulations, have been found to comply with the due process requirements set forth in the Reardon case. Paul D. Reardon v. US, 947 F.2d 1509 (1st Cir. 1991). Therefore, I conclude that the lien filing procedures followed by EPA are constitutional.

Equitable Considerations

The Property Owners' final argument, submitted initially by Global, is that EPA should exercise its discretion and not perfect liens against those Subject Parcels owned by Cohen. First, Property Owners argue that if Global is able to close on this contract to purchase these parcels, a substantial number of liens against Cohen will be satisfied, which will benefit all creditors, including EPA. Conversely, Property Owners argue that if the liens as proposed are filed against Cohen's property, the parcels will be rendered much less valuable, the contracts of sale will not be completed and numerous liens on the property will remain unsatisfied, to the detriment of all

creditors, including EPA.[54]

In the alternative, as discussed and resolved beginning on page 20, above, Global has requested that if the undersigned does exercise its discretion and recommend that EPA perfect a lien on Cohen's property, that lien should exclude removal costs incurred elsewhere on the Site. Global reasons that any lien limited in amount to the removal costs on Cohen's property would be significantly less in amount, and argues that such a limitation of the lien may permit the sale of Cohen's property to be completed. Related to this is Global's position that is incorrect and inequitable to place a lien on property owned by Cohen if that lien includes the cost of any removal and remedial action on property owned by LAI.

Regardless of the Property Owners' argument regarding the benefit to creditors of retiring the existing liens against Cohen, I must consider the underlying purposes of a CERCLA lien, which are to protect the United States' ability to recover public funds expended on the cleanup of contamination on the property and to avoid a windfall to the landowner. As discussed in the *Guidance* and other recommended decisions in CERCLA Lien Proceedings, some of which are cited below, as a matter of policy the Agency will consider perfecting a lien whenever settlement negotiations have not yet resulted in appropriate assurance that the United States will be able to recover the funds it has expended at the site. *Guidance,* Section IV. *See* In the Matter of Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (Region 2, February 14, 2002); In the Matter of the Asbestos Dump – Millington Site, EPA Docket No. II-CERCLA-90113, May 15, 2001.

In a Region 1 case, the Property Owners argued that equitable considerations, including the fact that there were other parties who contaminated the site who had not been fined or paid cleanup costs and the tragic consequences imposition of the lien would have on the Property Owners, should preclude the filing of the lien. The RJO noted that these types of assertions do not constitute "any other information which is sufficient to show that the lien notice should not be filed under the *Supplemental Guidance*. In the Matter of Picollo Farm Superfund Site, CERCLA Lien Recommended Decision (Region 1, August 27, 1997).

Moreover, the potential financial consequences to the Property Owners of a lien filing are not relevant to the issue of whether EPA is reasonable in believing that such a lien should be filed. As discussed in the recommended decisions issued by RJOs in other Regions where the property owners presented similar hardship arguments, those financial difficulties are of the same nature as those anticipated by EPA to warrant filing of a lien notice under EPA's applicable policy. *See* In the Matter of Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, June 2, 2002); In the Matter of CryoChem, Inc. EPA Docket No. III-93-003L, November 29, 1993; In the Matter of Harvey and Knotts Drum Site, EPA Docket No. III-93-001L, November 10, 1993.

As set forth in the *Guidance*, at pages 3-4:

> 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;
> (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.

It appears that the first and fifth factors are present in this case.

EPA need not consider the value of the property before seeking to perfect a lien against the property. The RJO in Region 5 rejected an argument that EPA should, in its discretion, not impose a lien where the property was valueless. In the Matter of Copley Square Plaza Site. CERCLA Lien Recommended Decision (EPA Region 5, July 5, 1997). Similarly, the RJO in Region 1 found that the decision whether to perfect a lien is the Agency's even if the property owner's assertion that the property was currently valueless was correct, given that the value of the site at the conclusion of the removal or remediation action is currently unknown. In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (EPA Region I). *See also* In the Matter of Scorpio Recycling Superfund Site, CERCLA Lien Recommended Decision (EPA Region 2, July 2, 2002), where, as RJO, I noted the property owner's argument that the filing of the lien would decrease the value of the property to both the property owner's and EPA's detriment, but concluded that I had to consider the underlying purpose of the lien, which, as set forth above, is to recover public funds expended on the cleanup of contamination on the property and to avoid a windfall to the owner.

It is important to consider this second element of the purpose of CERCELA liens, the prevention of windfalls to the property owner. It is usually a fair assumption to state that the value of the site will increase and the site will become more marketable as a result of EPA's response action. The Subject Parcels may very well have been rendered unmarketable or less marketable by any contamination of the Site. To the extent that EPA's efforts will ultimately render the entire Site, both the Manufacturing Property and the Subject Parcels, marketable and

more valuable, the entire parcel has been "affected" by the removal; where the value of the whole parcel has been enhanced by the removal and remediation, it is reasonable to subject that entire Site to liens.

As quoted on page 4 of In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000): "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." The RJO cites 131 Cong. Rec. S11580 (statement of Senator Stafford) (September 17, 1985). *See also* House Energy and Commerce Report on H.R. 2817, page 40, indicating that the lien provision was intended to prevent unjust enrichment. *See* In the Matter of Exact Anodizing Superfund Site, CERCLA Lien Recommended Decision (Region 2, February 14, 2002); In the Matter of the Asbestos Dump – Millington Site, EPA Docket No. II-CERCLA-90113, May 15, 2001; In the Matter of Copley Square Plaza Site, CERCLA Lien Recommended Decision (Region 5, June 5, 1997).

Property Owners also object to the fact that the notice of lien was filed before the RI/FS was completed, the extent of the contamination was known, the removal and remedial actions were complete and a sum certain for EPA removal and remedial costs could be established.[55] Closely connected to their argument that this process is unconstitutional, addressed above, the Property Owners feel that the notice of the lien filings needs to contain this information to be equitable.

The decision to actually file a lien remains within the Regional Counsel's discretion. In the Matter of the Asbestos Dump - Millington Site, EPA Docket No. II-CERCLA-90113, May 15, 2001. The Region 5 RJO, responding to the property owner's argument that it was unfair for EPA to impose a lien on the site for the total amount of costs incurred while it was allegedly not pursuing other potentially responsible parties, simply noted that these types of arguments "go to the EPA's exercise of enforcement discretion and will not be addressed in the probable cause determination." In the Matter of Copley Square Plaza Site, CERCLA Lien Recommended Decision (EPA Region 5, July 5, 1997).

Such a delay, in order to ascertain the exact location and extent of the contamination on the Subject Parcels and then identify the best remedy for those parcels, is not contemplated by either the statutes or the case law on CERCLA liens. One purpose of a lien is to ensure that there is property available to reimburse EPA for its unrecovered costs. As discussed above, the amount of the potential liability of the party against whose property a lien is to be filed need not be established with any exactitude prior to the filing of the lien.

I conclude that the equitable considerations presented by the Property Owners do not impact the reasonableness s of EPA in seeking to perfect a lien on the Site.

Conclusion

I find that the LFR supports a determination that EPA has a reasonable basis to perfect a lien under Section 107(l) of CERCLA. The Property Owners have not submitted any information that would rebut EPA's claim that it has a reasonable basis to perfect a lien. Many of the issues raised by the Property Owners do not reach the issue of the reasonable basis to file the lien, but address matters of discretion within the prerogative of Region 2's management. The decision to actually file a lien remains within the Regional Counsel's discretion.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect its lien. This Recommended Decision does not compel the filing of the lien; it merely establishes that there is a reasonable basis for doing so. This Recommended Decision does not bar EPA or the Property Owners 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.

Dated: April 22, 2005

Helen S. Ferrara
Regional Judicial and Presiding Officer
U.S. EPA-Region 2

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[1] However, two separate lien filing records have been maintained: the LAI Lien Filing Record (LAI LFR) and the Cohen Lien Filing Record (Cohen LFR).

[2] As explained in more detail below, the Manufacturing Property is not the subject of this lien hearing.

[3] LAI LFR Document 18, Cohen LFR Document 20 at 2.

[4] LAI LFR Document 18, Cohen LFR Document 20 at 2.

[5] LAI LFR Document 18, Cohen LFR Document 20 at 3.

[6] Promulgated as Appendix A of the NCP, 40 CFR Part 300, the HRS serves as a screening device to evaluate the relative potential of uncontrolled hazardous substances to pose a threat to human health or the environment.

[7] LAI LFR Document 18, Cohen LFR Document 20, Exhibit 1.

[8] LAI LFR Document 18, Cohen LFR Document 20, Exhibit 2.

[9] LAI LFR Document 18, Cohen LFR Document 20 at 3.

[10] LAI LFR Document 18, Cohen LFR Document 20, Exhibit 3.

[11] LAI LFR Document 18, Cohen LFR Document 20 at 3.

[12] LAI LFR Document 18, Cohen LFR Document 20 at 3.

[13] Cohen LFR Document 6 at 2.

[14] LAI LFR Document 18, Cohen LFR Document 20 at 4.

[15] LAI LFR Document 18, Cohen LFR Document 20 at 7.

[16] LAI LFR Document 18, Cohen LFR Document 20 at 4.

[17] LAI LFR Document 18, Cohen LFR Document 20 at 4, footnote 5.

[18] LAI LFR Document 10, Cohen LFR Document 12 at 68.

[19] LAI LFR Document 12, Cohen LFR Document 14; LAI LFR Document 13, Cohen LFR Document 15; LAI LFR Document 14, Cohen LFR Document 16; LAI LFR Document 17, Cohen LFR Document 19, respectively.

[20] LAI LFR Document 18, Cohen LFR Document 20.

[21] LAI LFR Document 17, Cohen LFR Document 19, Exhibit D.

[22] LAI LFR Document 17, Cohen LFR Document 19, pages 1 and 3.

[23] The *Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12, issued September 22, 1987, was supplemented, not superseded, by the *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993.

[24] There were some discrepancies between the body of each letter and the corresponding Notices of Federal Liens as to exactly where the deeds to subject parcels were recorded; however, this was not fatal to the adequacy of the notice as the proper property descriptions and place of filing were set forth in the Notices of Federal Lien (LAI LFR Document 2 and Cohen LFR Documents 2 and 3) and copies of the deeds (LAI LFR Document 3 and Cohen LFR Documents 4 and 5) which were attached to the December 1st letters.

[25] While Property Owners' Counsel does not challenge whether there was a facility on the property deeded to Cohen from LAI, and in fact appears to exclude this particular parcel from many of his arguments, I will include that parcel in my analysis as well.

[26] LAI LFR Document 17, Cohen LFR Document 19, at 2.

[27] I am assuming Global is referring to all three parcels owned by Cohen.

[28] LAI LFR Document 15, Cohen LFR Document 17 at 3.

[29] LAI LFR Document 15, Cohen LFR Document 17 at 4.

[30] LAI LFR Document 10, Cohen LFR Document 12; LAI LFR Document 18, Cohen LFR Document 20; LAI LFR Document 6, Cohen LFR Document 8; and LAI LFR Document 9, Cohen LFR Document 11, respectively.

[31] LAI LFR Document 6, Cohen LFR Document 8; LAI LFR Document 10, Cohen LFR Document 12 at 33.

[32] LAI LFR Document 15, Cohen LFR Document 17 at 3.

[33] LAI LFR Document 18, Cohen LFR Document 20, Exhibit 1.

[34] LAI LFR Document 18, Cohen LFR Document 20, Exhibit 2.

[35] LAI LFR Document 18, Cohen LFR Document 20 at 8.

[36] LAI LFR Document 15, Cohen LFR Document 17 at 3.

[37] LAI LFR Document 15, Cohen LFR Document 17 at 4.

[38] LAI LFR Document 6, Cohen LFR Document 8 at 2-1.

[39] LAI LFR Document 6, Cohen LFR Document 8 at 2-1.

[40] LAI LFR Document 18, Cohen LFR Document 20 at 3.

[41] LAI LFR Document 6, Cohen LFR Document 8, pages 3-1 through 3-23.

[42] LAI LFR Document 9, Cohen LFR Document 11 at 2-1. *See also* LAI LFR Document 6, Cohen LFR Document 8, pages 5-9, 5-11, and 5-13.

[43] LAI LFR Document 9, Cohen LFR Document 11 at 2-2, figs. 1-3 and 2-1.

[44] LAI LFR Document 10, Cohen LFR Document 12.

[45] LAI LFR Document 18, Cohen LFR Document 20 at 8.

[46] LAI LFR Document 6, Cohen LFR Document 8 at 5-3; LAI LFR Document 9, Cohen LFR Document 11, App. G.

[47] LAI LFR Document 17, Cohen LFR Document 19 at 3.

[48] LAI LFR Document 9, Cohen LFR Document 11.

[49] See *SCORPIOS Report, LAI* LFR Document 1, Cohen LFR Document 1.

[50] LAI LFR Document 18, Cohen LFR Document 20 at 7.

[51] LAI LFR Document 10, Cohen LFR Document 12 at 12.

[52] LAI LFR Document 15, Cohen LFR Document 17 at 2.

[53] LAI LFR Document 17; Cohen LFR Document 19 at 4.

[54] LAI LFR Document 15, Cohen LFR Document 17 at 2.

[55] LAI LFR Document 10, Cohen LFR Document 12; LAI LFR Document 17; Cohen LFR Document 19, pages 3 through 4.

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LAWRENCE AVIATION INDUSTRIES, INC. LIEN FILING RECORD

Notice of Federal Lien
Re: Lawrence Aviation Industries, Inc. Site
Port Jefferson Station
Suffolk County, New York

ATTACHMENT A

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COHEN LIEN FILING RECORD

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Re: Lawrence Aviation Industries, Inc. Site
Port Jefferson Station
Suffolk County, New York

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CERTIFICATE OF SERVICE

I hereby certify that the **Recommended Decision** by Regional Judicial Officer Helen Ferrara in the matter of **Lawrence Aviation Industries, Inc. Superfund Site,** was served on the parties as indicated below:

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Karen Maples

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: April 22, 2005