UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION VII

In the Matter of:)
)
Herculaneum Lead Smelter Site)
Herculaneum, Missouri)
The Doe Run Resources)
Corporation,)
Owner)

RECOMMENDED DECISION

Background

This proceeding is governed by the Environmental Protection Agency's "Supplemental Guidance on Federal Superfund Liens," July 29, 1993, (OSWER Directive Number 9832.12-1a) (the "Guidance"). The proceeding was initiated when the Environmental Protection Agency ("EPA"), Region VII ("Region") gave notice to the Doe Run Resources Corporation ("Doe Run" or "Company") by letter dated October 3, 2002, that it had perfected liens on specified properties in Herculaneum, Missouri. See, item 1 of the Lien Filing Record ("LFR").[1] Shortly thereafter, in a letter dated October 17, 2002, Doe Run requested an informal proceeding to review EPA's action.

In a scheduling letter dated November 18, 2002, I requested that the parties submit statements of position relating to the issues relevant to the proceeding, and I scheduled an informal meeting

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[1]The LFR, or Lien Filing Record, consists of documents filed by the Region upon initiation of this proceeding, documents filed by each party after the commencement of the proceeding, and documents filed at my direction. The initial documents are referenced by the item number appearing in the Region's "Table of Contents" to the LFR. Subsequent documents are referenced by title or description..

pursuant to the Guidance. Each party submitted its respective statement in letters dated December 4, 2002. I conducted an informal meeting on December 20, 2002, summarized in my December 31, 2002, letter to the parties. At my direction, each party made an additional submission relating to one issue, addressed at length below, which was identified at the informal meeting. Doe Run's supplemental submission is dated January 15, 2003, and the Region's response is dated January 23, 2003.

As explained in detail below, upon review of all relevant documents in the LFR, I find that the record supports the Region's position that it had a reasonable basis to perfect liens on the properties owned by Doe Run in Herculaneum, Missouri. Therefore, I recommend that the Regional Administrator affirm the decision to file the liens on the subject property.

I. SCOPE AND STANDARD OF REVIEW

The resolution of the issues raised in this proceeding turns, to a significant extent, on the nature of the proceeding, and the limits placed on my review of the Region's action. Superfund lien proceedings have aptly been described as "probable cause" hearings. See, e.g., Harbucks, Inc. Revere Chemical Site, 1995 WL 1080544 (EPA 1994) (probable cause determination). This characterization follows the reasoning in Reardon v. United States, 947 F. 2d 1509 (1st Cir. 1991).[2] It reflects the procedures established by EPA in the Guidance, which states, in relevant part:

> The sole issue [in the proceeding] is whether EPA has (or had, in the case of a post-filing meeting) a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. The [proceeding] will not be concerned with issues not relating to the proposed

[2] In characterizing the proceeding necessary to meet due process requirements, the court stated that "EPA may only need to demonstrate probable cause or reason to believe" that the statutory criteria for perfecting a lien have been met. 947 F. 2d at 1522.

perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents... .(Guidance, at p. 8.)

Based on the Guidance, the inquiry is simply whether the LFR, including all relevant facts and argument presented by both parties, contains sufficient information to show a reasonable basis for the determination by EPA to perfect a lien, or conversely, whether the relevant information shows that EPA erred in perfecting the lien. The inquiry is a preliminary one, and does not resolve or impact the resolution of any ultimate issues with respect to liability. Guidance at p. 9.[3]

II. RELEVANT LEGAL CRITERIA

Section 107(l)(1) of CERCLA, 42 U.S.C. § 9607(l)(1), provides that a lien in favor of the United States arises with respect to costs and damages for which a person is liable under section 107(a), upon all property which belongs to the person liable and which is subject to, or affected by, a removal or remedial action. The lien arises when costs are first incurred by the United States with respect to a response action, or when the property owner is notified of potential liability, whichever is later. Section 107(l)(2). Section 107(a) provides, in relevant part, that the owner or operator of a facility from which there is a release or threat of release which causes the incurrence of response costs is liable for all costs incurred by the United States for a removal or remedial action consistent with the National Contingency Plan ("NCP"). Section 107(b) provides defenses to liability which must be established by the proponent of the defense by a preponderance of the evidence. Section 107(j)

[3]Although the Guidance itself was not addressed, at least one district court has held that a particular proceeding conducted pursuant to the Guidance was adequate to satisfy due process concerns. United States v. Glidden Company, 3 F. Supp. 2d 823 (N.D. Ohio 1997).

provides, in relevant part, that costs resulting from a "federally permitted release" cannot be recovered under section 107.[4]

Reflecting the statutory criteria for perfecting a Superfund lien, the Guidance (at p. 7) provides that the neutral official should consider the following factors in issuing a recommended decision:

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

III. RELEVANT FACTS

Because most of the facts are not in dispute, a brief summary will suffice. Doe Run operates a lead smelter in Herculaneum, Missouri, located immediately south of the St. Louis metropolitan area. Item 8 of the LFR at p. 1. The LFR characterizes the smelter as "the largest of its kind" in the United States. Id. The smelter began operation, under prior ownership, more than one hundred years ago, and remains an active facility. The Doe Run site (designated by the Region as the Herculaneum Lead Smelter site) consists of a number of areas, the most significant of which, for this proceeding, are the smelter plant, associated areas relating to plant operations including a slag pile (the plant and associated

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[4]The section 107(j) exemption will be examined in detail below.

areas are sometimes referenced herein as the "HLS"), and a number of residences in Herculaneum owned by Doe Run. Id. at 2.

The LFR contains two administrative orders on consent designed to address releases[5] of hazardous substances, primarily lead and other metals, from activities relating to the smelter operations. LFR items 4 and 7.[6] The first, bearing Docket No. RCRA-7-2000-0029, CERCLA-7-2000-0038, was signed by Doe Run, the Region, and the Missouri Department of Natural Resources in September and October, 2000, and became effective in May 2001 (the "May 2001 order"). The second, Docket No. 07-2002-0038, was signed by Doe Run and the Region in December 2001 (the "December 2001 order"). The May 2001 order requires Doe Run to undertake a number of activities, addressing contamination of residential areas in Herculaneum (e.g., sampling, analysis, and soil replacement)[7], contamination attributable to the slag pile (e.g., development and submission to EPA and the state of a runoff control plan, groundwater monitoring),[8] contamination attributable to "other areas" at the site

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[5]Doe Run's contention that some of the releases addressed by the orders are "federally permitted" will be discussed below in subsection IV.D.

[6]Doe Run noted quite correctly at the December 20, 2002, informal meeting that, as an operating facility, the Company has been regulated under a number of federal environmental programs through the years, and that Superfund is only one such program. Doe Run's involvement with state and federal environmental programs is detailed in the March 30, 1999, Preliminary Assessment Report (Attachment 1 to the Region's January 23, 2003, supplement to the LFR), and in the referenced consent orders. Doe Run's arguments relating to that fact are also discussed in subsection IV.D. below.

[7]LFR Item 4, Appendix A, section I.

[8]Id., section IV.

(e.g., stormwater runoff, sampling and analysis in areas not impacted by the slag pile).[9] In addition, the order requires Doe Run to address certain air emissions from the smelter operations.[10] The December 2001 order, more limited in scope, primarily addresses the clean up of residential structures.[11] Both documents provide for submission to EPA of certain documents prepared by Doe Run, and for EPA review and action on the documents. See, e.g., December 2001 order at pp. 21-23.

The LFR contains information indicating costs which have been incurred with respect to the site. LFR item 3. During the informal conference, the Region indicated that the amounts in the cost summary represent EPA costs in negotiating the orders, reviewing Doe Run submittals, and other investigation and oversight activities relating to the site. The Region's January 23, 2003, supplement to the LFR (Attachment 4) contains additional information concerning EPA activities at the site, including activities specifically relating to the slag pile and other areas associated with smelter operations, and activities relating to the site as a whole.

IV. DISCUSSION

As stated above, the issue is whether the LFR shows that EPA had a reasonable basis to perfect a lien, in light of any relevant information presented by the property owner to the contrary. I will first address the issues raised by Doe Run, followed by a discussion of the issue of the Region's compliance with the prerequisites to filing a lien notice.

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[9] Id., section V.

[10] Id., section III.

[11] LFR Item 7, pp. 12-19.

A. Issues Relating to the Procedures Afforded by the Agency

(1) Doe Run first argues that "procedural fairness" requires an inquiry into the amount of the costs incurred by EPA. The Company acknowledges that the Guidance does not "specifically" provide for such consideration, but argues, nonetheless, that the proceeding should encompass this issue.[12] The Region counters that the issue of the cost amount goes to the recoverability of costs (i.e., whether the costs are consistent with the NCP), and that issue is not ripe until EPA initiates an action to recover the costs.

The Guidance not only fails to specifically provide for consideration of appropriate cost amounts in this proceeding, but it specifically precludes consideration of the issue. Guidance at p. 8 ("The meeting will not be concerned with issues not relating to the proposed perfection of the lien... .") Section 107(l)(A) states, in relevant part, that a lien arises when "costs are first incurred by the United States... ." Nothing in the statute requires that EPA must account for those costs prior to perfecting the lien. EPA must show that costs have been incurred, but is not required, in this proceeding, to specify a total amount representing the recoverable costs associated with the liens. Therefore, I will inquire whether the LFR shows that costs have been incurred for which Doe Run may be liable, but I will not inquire into the total amount of those costs and their ultimate recoverability.

(2) As an outgrowth of the first argument, Doe Run argues that any costs attributable to the HLS would be insignificant in relation to the total costs "claimed" by EPA (in LFR item 3) and that the liens on the smelter property should be removed unless EPA can provide an accounting of costs

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[12]Doe Run's argument is presented at p. 2 of its December 4, 2002, letter, and is reiterated in other submissions included in the LFR.

associated with the smelter.[13] Again, I will examine below whether the LFR shows that costs for which Doe Run may be liable have been incurred with respect to the HLS. However, for reasons discussed above, this proceeding will not inquire into the amount of costs incurred by EPA, and my recommended decision is not dependent on such inquiry.

B. Effect of EPA Deferral of Oversight Cost Reimbursement

Doe Run argues that the intent of section 107(l) is "to allow EPA to recover from responsible parties who refused to pay costs that they were liable for."[14] Because the December 2001 order defers the Company's obligation pay costs relating to specified orders (LFR item 7, section X, pp. 23-24), including the May 2001 order, Doe run believes it is contrary to the statute to impose liens for reimbursement of costs not yet due. The Region counters with a different characterization of the lien provision of CERCLA, stating that the lien is designed to protect EPA's interest in recovering its cost in the event that Doe Run is unable to reimburse the costs. The Region also states that the December 2001 order does not affect EPA's ability to perfect the liens under CERCLA, and EPA's perfection of the liens does not negate the deferral provision of the order.[15]

Doe Run does not point to any statutory text in support of its contention that liens are intended to be imposed only when a responsible party is unwilling to pay. Under section 107(l)(2), a lien arises when costs are first incurred and the property owner is given notice of potential liability. The lien can then be perfected by filing the appropriate notice as provided in section 107(l)(3). Had Congress

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[13]Doe Run January 15, 2003, supplement at p. 5.

[14]Doe Run December 4, 2002, submission, at p. 3.

[15]Region December 4, 2002 submission, at p. 2.

intended the result advocated by Doe Run, it presumably would have included at least an additional requirement that EPA must make a demand for reimbursement of its costs prior to filing the lien notice. The additional criterion offered by Doe Run does not appear in the statute or the Guidance, and therefore cannot be considered in determining whether EPA had a reasonable basis to perfect the liens.

C. EPA Assumptions Regarding Doe Run's Financial Condition

Doe Run argues that EPA's assumptions concerning the financial viability of the Company are no longer valid, thus justifying a reconsideration of the perfection of the liens.[16] The Company notes that EPA perfected the liens without prior notice because of its "imminent bankruptcy." (Citing LFR item 1.) Doe Run states that its subsequent financial restructuring has resulted in an improved financial situation which justifies EPA's reconsideration of its action. The Region's counter argument is that the Company's financial condition is only relevant to the issue of whether EPA could file the lien notices prior to offering an opportunity for a meeting. The Region argues that notice and opportunity for a meeting is not required by section 107(l), and therefore not relevant to this proceeding.[17]

I find that the issue of Doe Run's financial condition is not relevant to the proceeding, but for somewhat different reasons than those offered by the Region. The Region correctly points out that "imminent bankruptcy" is a criterion to be considered by EPA in determining whether to perfect a lien prior to offering a meeting. Guidance at pp. 5-6. However, the Guidance provides that once EPA has made the decision to file prior to a meeting, the standards to be applied in the proceeding are similar to

[16]Doe Run December 4, 2002 supplement, at p. 4.

[17]Region December 4, 2002, supplement at 1.

those applied in a prefiling proceeding. Guidance at p. 6. Those standards do not include a criterion that the property owner's financial viability must be in doubt in order for EPA to perfect a lien. The issue of when to offer the property owner an opportunity for a meeting, which may involve the owner's financial condition, is one of due process.[18] It is not an issue relating to EPA's statutory basis for filing a lien notice. In other words, if EPA meets the criteria for perfecting a lien, the Company's restructuring is not a basis for me to recommend that the liens be removed. For these reasons, the issue is not relevant to the proceeding.[19]

D. Applicability of Other Laws to the Operation of the Facility

The bulk of Doe Run's argument for withdrawing the liens focuses on the fact that Doe Run is an operating facility subject to a number of environmental regulatory programs. Doe Run first questions its liability under CERCLA for activities which it characterizes as either voluntary, or which are regulated under other environmental programs, such as the Clean Air Act, Clean Water Act, and Resource Conservation and Recovery Act ("RCRA"). Second, Doe Run contends that some of the releases being addressed by the Company and EPA under CERCLA are not releases for which Doe Run is liable under section 107(a), because they are "federally permitted releases" exempt under section 107(j).

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[18]See generally, Reardon v. United States, 947 F. 2d at 1522-23.

[19]I note that the LFR contains information indicating EPA's basis for perfecting the liens prior to giving notice to the Company. See LFR item 10 and the Region's December 4, 2002 supplement. I also note that Doe Run does not argue that EPA should have provided opportunity for a meeting prior to the lien filing, but only that subsequent restructuring by the Company should cause EPA to reconsider its filing.

(1) With respect to the first contention, Doe Run points out that EPA performs a number of activities at the site under a number of authorities, and that the consent orders require Doe Run to take actions which could be characterized as actions pursuant to RCRA (e.g., monitoring activities at the HLS slag pile) or the Clean Air Act (minimizing emissions from truck traffic associated with smelter operation).[20] The Region counters that waste releases often involve overlapping authorities, but that the significant fact is that EPA chose to exercise its authority under CERCLA and has incurred costs under that authority.[21]

The potential for overlap between activities under CERCLA and activities which could be undertaken under the various regulatory programs is almost inevitable. The definition of a CERCLA "hazardous substance" includes pollutants designated for regulation under various environmental statutes, including RCRA, the Clean Water Act, the Clean Air Act, and the Toxic Substances Control Act. See, CERCLA, section 101(14), 42 U.S.C. § 9601(14). Clearly, as an active facility, Doe Run is subject to regulation under many of these other programs. However, that fact alone does not mean that costs incurred by EPA under CERCLA are not costs for which Doe Run is potentially liable under CERCLA. For reasons explained previously, this proceeding deals, in part, with whether the record shows that costs have been incurred under CERCLA. Doe Run's reasoning would require inquiry into the reasonableness of the costs, and whether some of the costs could have been avoided had EPA selected other authority to address some of the releases. That inquiry is beyond the scope of this proceeding.

[20]Doe Run January 15, 2003, supplement at pp. 4-5.

[21]Region January 23, 2003, supplement, at p. 3, n. 3.

(2) A related and somewhat more formidable contention by the Company is that some of the releases which EPA is addressing under the consent orders are "federally permitted releases" for which Doe Run is not liable under CERCLA.[22] See, CERCLA, section 101(10) for the definition of the phrase, and section 107(j) for the exemption. In essence, Doe Run contends that most of the work under the consent orders relates to residential cleanup, which, it contends, does not relate to the smelter operation and does not justify a lien on the HLS. Furthermore, Doe Run contends, the releases at the HLS are federally permitted, either under the state implementation plan (SIP) required by the Clean Air Act (lead emissions from the smelter and other operations on the smelter property, and from trucking operations being governed by the lead SIP submitted to EPA on January 10, 2001), or, with respect to the slag pile, under a Clean Water Act permit.[23] Therefore, according to Doe Run, EPA may not impose liens on the HLS based on any costs associated with air emissions from smelter operations.

In its January 23, 2003, response, the Region argues that EPA has incurred recoverable costs in several areas on the HLS facility property. The response does not address Doe Run's contention that the air releases are federally permitted, but relies instead on a contention that other releases at the HLS are not federally permitted. With respect to the slag pile, the Region argues, on a number of bases, that most, if not all, of the releases of hazardous substances, as well as the initial and ongoing

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[22]The Company briefly addressed this issue in its December 4, 2002, supplement, and discussed it in more detail during the informal meeting. I requested that the parties supplement the record on this issue. Doe Run submitted its supplement with its January 15, 2003, letter, and the Region submitted its response on January 23, 2003.

[23]January 15, 2003, supplement at pp. 2-5.

disposal of the slag, are not governed by permits under federal authority.[24] The Region also points to other activities on the site (e.g., review of groundwater and surface water conditions), which it asserts are unrelated to permitted activities.[25] The Region finally points to costs associated with the entire site, not attributable to specific areas.[26]

(A) The Air Releases from the HLS

As described above, in its January 15, 2003 supplemental submission, Doe Run presented information and argument supporting its contention that air emissions from the HLS are federally permitted releases not subject to CERCLA liability. For purposes of this proceeding, the Region does not dispute that contention. Because I have determined, as explained below, that the record shows that unpermitted releases have occurred to media other than air, I do not address whether the air releases are federally permitted, and offer no opinion regarding that issue. My determination that the LFR contains a reasonable basis to conclude that potentially recoverable costs are attributable to smelter operations does not rely to any extent on consideration of the HLS air emissions.[27]

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[24]January 25, 2003, response at pp. 2-4

[25]Id. at pp. 4-5.

[26]Id. at p. 5.

[27]Doe Run does not argue that other activities, such as soil removal in residential areas, are attributable to federally permitted releases, but only that EPA cannot place liens on the HLS property to secure costs associated with those activities. January 15, 2003, supplement at p. 5. Therefore, this discussion of federally permitted releases relates only to the liens on the HLS property.

(B) The Slag Pile

With respect to the federally permitted release issue, Doe Run contends, as discussed previously, that the slag pile involves stormwater runoff addressed in a permit under the Clean Water Act's National Pollutant Discharge Elimination System ("NPDES"). Doe Run argues that discharges regulated by the NPDES permit are federally permitted.[28] The Company did not provide or refer to any specific language from the permit relating to regulation of discharges from the slag pile.[29]

As a result of the Region's January 23, 2003, response to the Company's supplement, the LFR contains an NPDES permit for Doe Run, and a proposed amendment to the permit which would address stormwater discharges from the slag pile.[30] Doe Run has not provided any documentation that the proposed amendment has been incorporated into the permit. Therefore, I am unable to conclude that the record supports a determination that the stormwater runoff is a federally permitted release.[31]

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[28]January 15, 2003, supplement at p. 5.

[29]This is in contrast to the detailed documentation provided by Doe Run concerning regulation of its air emissions under other law.

[30]January 23, 2003, response, Attachments 5 and 7.

[31]Citing In re Acushnet River and New Bedford Harbor, 722 F. Supp. 893 (D. Mass. 1989), the Region argues that the burden is on Doe Run to prove that the discharge is a federally permitted release. I note that the Court characterized its discussion of the issue as a "memorandum" and a "working hypothesis" rather than a "definitive ruling." Id. at 894, n. 1. Notwithstanding, the memorandum is instructive on the issue, and in United States v. Freter, 31 F/ 3d 783, 787 (9th Cir. 1994), the Court expressly held that the party asserting a federally permitted release exception has at least the burden to present sufficient evidence to raise it as an issue. (Freter was a criminal case where the burden on defendant–because of the reasonable doubt burden on the prosecution--would presumably be less than here.) In any event, where the burden of proof falls need not be determined in this preliminary inquiry. It is sufficient to note that the LFR, as supplemented by each of the parties, does not contain any documentation that the slag pile discharge is federally permitted. Given the limited scope of this proceeding, that fact is enough for me to conclude that EPA did not err with respect to its

In addition, as the Region points out,[32] an NPDES permit for stormwater runoff would not regulate the initial disposal of slag in the slag pile area of the facility. Releases covered by CERCLA include "disposing into the environment" of hazardous substances. CERCLA, section 101(22).[33] Nothing in the LFR indicates that this slag disposal is "federally permitted." Therefore, the LFR contains sufficient information, for purposes of this proceeding, to show unpermitted releases associated with the slag pile.

(C) Other Areas and Activities Relating to the HLS

The Region's January 23, 2003, response discusses other activities undertaken by EPA regarding releases at the HLS which Doe Run has not contended are attributable to federally permitted releases. These include investigation of groundwater contamination from the slag pile,[34] investigation of ground and surface water contamination from other slag storage areas, staging areas for shipping, solvent use areas, and acid production areas. The Region also addresses costs incurred for the entire site, including evaluation of the site for the National Priorities List, and community and public involvement.[35] The LFR also contains a declaration of an EPA Remedial Project Manager describing his work regarding negotiation of the consent orders and oversight of work performed under them,

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belief that costs attributable to stormwater discharge releases from the slag pile are recoverable.

[32]January 23, 2003, response at p. 4.

[33]This section excludes certain releases resulting solely in workplace exposure, id., but there is no contention in this proceeding that the releases from the slag pile are so limited.

[34]The Region distinguishes this from the stormwater runoff releases which Doe Run contends are federally permitted. January 23, 2003, response at p. 4.

[35]Id.

general work relating to the site including community involvement, and general site strategy development and research.[36]

The supplemental information in the January 23, 2003, submittal, in conjunction with the information previously included in the LFR, is sufficient to support a finding that some of the releases from the HLS were unpermitted, notwithstanding that some of the releases, specifically some of the air releases which have occurred since January 10, 2001, when Missouri submitted the Doe Run state implementation plan to EPA (see, CERCLA, section 101(14)(H)) may be federally permitted. As discussed above, the LFR shows that other releases are clearly not federally permitted. Again, the purpose of this proceeding is not to determine the dollar amount of the EPA response costs attributable to unpermitted releases from the smelter. Because the LFR shows that some costs have been incurred to address releases at the HLS for which Doe Run is potentially liable, there is sufficient basis to determine that the Company has not shown that EPA erred in filing the lien notice for the HLS.

E. The Statutory Factors for Perfection of a Lien

Having discussed the Company's issues with respect to removal of the liens, I now turn to a review of the question of whether the LFR shows that EPA had a reasonable basis to believe that it met the statutory criteria for perfection of a lien. Those criteria were described above in Section II, and EPA's compliance with the criteria is discussed in this subsection.

[36] Id., Attachment 4.

(1) The property owner was sent notice of potential liability by certified mail

Although the parties do not point to any specific document in the LFR establishing this fact, the parties do not dispute that EPA has met this requirement. Paragraph 67 of the May 2001 order states that EPA has determined that Doe Run is liable under section 107(a) of CERCLA.[37] The May 2001 order was signed by a Doe Run representative, so the Company clearly had actual notice of EPA's finding. Similarly, paragraph 31 of the December 2001 order states that EPA has determined the Company is liable,[38] and a representative of the Company signed the document. Both orders were issued prior to EPA's filing of the lien notices.

(2) The property is owned by a person who is potentially liable under CERCLA

The LFR contains notices of lien for each of the properties in Herculaneum for which the liens were perfected by EPA. Attached to each notice is a general warranty deed for the property covered by the notice, showing that each property is owned by Doe Run.[39] The Company does not dispute that it owns the relevant properties. Doe Run's contention that it is not liable with respect to the smelter property is discussed above in subsection IV.D. EPA has met this criterion for filing the lien notices.

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[37]LFR item 4 at p. 27. As discussed above, the Company disputes its liability with respect to some of the activities at the site, but does not dispute that EPA has determined its liability.

[38]LFR item 7 at p. 11.

[39]LFR item 2.

(3) The property is subject to or affected by a removal or remedial action

Section 101(23) of CERCLA, 42 U.S.C. § 9601(23), defines "removal" to include, among other activities, "such actions as may be necessary to monitor, assess, and evaluate" a release or threatened release of a hazardous substance. With the exception of the HLS, the record contains sampling results for each of the properties on which liens were perfected.[40] The LFR contains information indicating that EPA has reviewed the sampling results and has used that information and other data to develop of a strategy for response actions at the site.[41] The LFR also contains information showing that EPA is performing, among other activities, oversight functions with respect to the Company's investigations of contamination from the slag pile at the HLS.[42] These activities and others described in the LFR fall within the definition of removal action, and EPA has shown that these activities relate to the properties, including the HLS, on which the lien notices were filed.

(4) The United States has incurred costs (which have not been reimbursed) with respect to a response action under CERCLA

For reasons detailed previously, my inquiry into costs incurred by EPA is solely to determine whether the LFR shows that this element for perfecting a lien has been met. I do not inquire whether EPA ultimately will be successful in recovering its costs, but only whether EPA has made a preliminary showing that it has incurred costs which may be recoverable.

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[40]Id. Doe Run asserts, without explanation, that no removal action has occurred on "certain" Doe Run residential property. Doe Run December 4, 2002, supplement at p. 3. I do not find this assertion sufficient to overcome the documentation to the contrary.

[41]Region December 4, 2002, supplement at p. 2; January 23, 2003, response, Attachment 4 at p. 2.

[42]January 23, 2003, response, Attachment 4 at p. 1.

The LFR contains an itemized summary indicating that as of September 26, 2002, EPA had incurred costs of $1,985,116.96 relating to the Herculaneum site.[43] The LFR also contains a description by an EPA Remedial Project Manager assigned to the site of activities performed at the site and a declaration that he charges his time spent on the site to the Superfund account for the site.[44] Doe Run's issues with respect to costs, addressed previously, relate to whether costs are ultimately recoverable, and, with respect to costs attributable to the HLS, whether they are so minimal that liens should be released on the property to which they relate.[45] Because the LFR shows that costs have been incurred with respect to a response action at the Herculaneum site, and have not been reimbursed,[46] EPA has met this element.

V. CONCLUSION

Notwithstanding Doe Run's substantial effort, I have determined, for the reasons stated above, that the Company has not established an issue of law or fact which should alter EPA's decision to file the lien notices. I have also determined that EPA had a reasonable basis for filing the lien notices. I therefore recommend that the Regional Administrator issue the attached Final Order, affirming the Region's decision to file the lien notices. EPA and Doe Run are not barred from any claims or defenses as a result of this recommended decision. This decision is not a binding determination of liability, and no preclusive effect attaches to it.

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[43]LFR item 3.

[44]January 23, 2003, response, Attachment 4 at p. 2.

[45]January 15, 2003, supplement at p. 5.

[46]See, subsection IV.B. above.

Dated: February 12, 2003

/s/
Robert L. Patrick
Regional Judicial Officer
Region VII