UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	
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	)	
Rocket Oil Company Superfund Site	)	CERCLA Lien Proceeding
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RECOMMENDED DECISION

Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (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. This proceeding involves the question of whether the United States Environmental Protection Agency Region 5 (U.S. EPA) has a reasonable basis to perfect a lien pursuant to Section 107(*l*) of CERCLA on certain property, known as the Rocket Oil Company Superfund site in Canton, Ohio, owned by the Carlton B. Coen Land Company. In this Recommended Decision, I conclude that U.S. EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.

This proceeding has been conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens (Supplemental Guidance)*, OSWER Directive No. 9832.12-1a, issued July 29, 1993. A Lien Filing Record (LFR)[1] has been compiled in this matter. U.S. EPA gave notice to the Carlton B. Coen Land Company (also referred to herein as "the Land Company") by letter dated October 19, 2004, that it was potentially liable for the costs to be incurred or already incurred at this property. LFR 7. By letter dated August 27, 2007, U. S. EPA notified the Company that it intended to perfect a lien upon "property parcels 02-06471 and 02-06478, located at 1900 19th Street, N.E., Canton, Ohio." LFR 12. Through its president, Donald C. Coen, the Carlton B. Coen Land Company objected to U.S. EPA's imposition of the lien. LFR 13. In his objection, Mr. Coen raised two specific issues: that the drums found at the site produced no contamination, and that the U.S. EPA cleanup efforts were conducted only on parcel 02-06478, and not on parcel 02-06471. LFR 13.

An informal lien conference was held on January 17, 2008. A court reporter attended and a transcript of the proceedings has been added to the Lien Filing Record as recommended by the

[1] References to documents contained in the Lien Filing Record shall be "LFR" followed by a specific document number.

Supplemental Guidance.[2] Present at the conference were: Mark Palermo (Attorney), Partap Lal (On-Scene Coordinator), Kaushal Khanna (Program Analyst), and the undersigned, all of U.S. EPA. Donald C. Coen, President of the Carlton B. Coen Land Company, participated by telephone, as did Robert Darnell, Attorney, U.S. Department of Justice. At the conference, Mr. Coen withdrew his second objection to the lien, that being that U.S. EPA's removal action was conducted only on parcel 02-06478 and not 02-06471, and this contention is no longer an issue in this matter. Tr. at 6.

At the conclusion of the lien conference, each party was given the opportunity to submit written statements or summaries of their positions or to otherwise supplement the record of this matter. The parties agreed that such written statements or summaries were not necessary and the Lien Filing Record was held open for one week for any additional information the parties wished to submit. Tr. at 61-62. No such additional information has been submitted by either party. I have reviewed the entire Lien Filing Record and taken it into consideration in arriving at this Recommended Decision.

I. LEGAL CRITERIA

Section 107(*l*)(1) of CERCLA, 42 U.S.C. § 9607(*l*)(1), provides in relevant part:

> All costs and damages for which a person is liable to the United States under subsection (a) of this section. . . shall constitute a lien in favor of the United States upon all real property and rights to such property which –
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> (A) belong to such person; and
> (B) are subject to or affected by a removal or remedial action.

Section 107(*l*)(2), 42 U.S.C. § 9607(*l*)(2), states that a lien arises when costs are first incurred by the United States from a response action or when the property owner is notified by written notice of potential liability, whichever is later. The lien shall continue until the liability for the costs is satisfied or becomes unenforceable through operation of the statute of limitations provided by section 113(g) of CERCLA, 42 U.S.C. § 9613(g).

The *Supplemental Guidance* sets forth five factors that should be considered in determining whether U.S. EPA has a reasonable basis to believe that the statutory elements for perfection of a lien have been satisfied. Those factors are:

(1) Was the property owner 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 lien notice should not be filed, such as a showing that (a) EPA erred in

[2] Citations to the transcript are noted as "Tr."

believing it had met the requirements of (1)-(4) or (b) EPA made a material error with respect to these factors?

Supplemental Guidance at 7.

CERCLA lien proceedings have aptly been described as "probable cause" determinations. *See, e.g., In re Copley Square Plaza Site,* EPA Region 5 (RJO June 5, 1997). This characterization follows the reasoning in *Reardon v. United States,* 947 F.2d 1509 (1st Cir. 1991) and the procedures established by U.S. EPA in the *Supplemental Guidance,* which states, in relevant part:

> The sole issue at the meeting 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 meeting will not be concerned with issues not relating to the proposed perfection of the lien, including, but not limited to, EPA's selection of a remedy or contents of remedy selection documents, such as records of decision or action memoranda.

Supplemental Guidance at 8.

II. BACKGROUND

The Rocket Oil Company Superfund site is located at 1900 19th Street in Canton, Stark County, Ohio. A Norfolk & Western Railroad line borders the site to the west, 19th Street borders the site to the north, Middle Branch Creek and Harrisburg Road border the site to the east, and an open field borders the site to the south. LFR 9. The site consists of a 4-acre property containing three buildings, one vacant, one a warehouse, and one the Rocket Oil office building. LFR 9. The site is located in a mixed residential commercial area with a tributary of the Tuskarawas River flowing approximately 100 years from the site. LFR 9.

U.S. EPA contracted for a title search report (LFR 19) which indicates that the Carlton B. Coen Land Company owned the entire site since October 1, 1958. According to Mr. Coen, the company leased the property to an operating company that used the site as a bulk storage plant and for storage of drums of waste materials, mostly water contaminated with motor fuel. LFR 11. The site had been used as a petroleum product bulk storage and blending facility since the 1930s. It was operated under several names, including Union Oil, Pep Oil and Coen Oil Company. The Coen Oil Company was the last company to use the site as a bulking facility. LFR 9.

The Ohio Environmental Protection Agency and Canton city officials requested U.S. EPA's assistance at the site. U.S. EPA and its Superfund Technical Assistance and Response Team (START) conducted a site assessment in April 2004, which revealed the presence of hazardous materials and leaking drums of petroleum products. LFR 9. Seven aboveground storage tanks (ASTs) were located in the central portion of the site, and at least five underground storage tanks (USTs) were present on the property when U. S. EPA mobilized to conduct

removal activities at the the site in October 2004. LFR 9. The USTs had historically been used to store heating oil, kerosene, gasoline and solvents. The ASTs had once contained gasoline and kerosene. AST 6 reportedly contained a mixture of solvents, methanol and gasoline. AST 7, which reportedly contained unusable product consisting of the same type of mixture, had rusted through and released all of its contents to the ground. LFR 9. Approximately 200 drums were found along the eastern fence line. Many appeared to have been leaking into the soil. It was believed that they contained wastes from tank cleaning, again similar to the solvent mixture contained in AST 6. LFR 3.

From November 3 - 8, 2004, U.S. EPA conducted additional removal activities at the site. U.S. EPA packaged waste paints, solvents and oil-water mixtures from approximately 200 drums and disposed them at an offsite disposal facility. High BTU flammable liquids from the above-ground tank were pumped into tankers for disposal to an off site recycling facility. Contaminated soils were shipped to a landfill. Following the removal and disposal of contaminated soil, the site was regraded. LFR 9.

III. DISCUSSION

The issue is whether the information contained in the Lien Filing Record establishes that U.S. EPA has a reasonable basis to perfect a lien in Carlton B. Coen Land Company's property located on 19th Street in Canton, Ohio. In order to make that determination, both statutory and guidance factors will be considered.

Factors (1), (3) and (4) as set forth in the Supplemental Guidance are not in dispute: the property owner was sent notice of potential liability by certified mail on October 19, 2004 (LFR 7); the property has been subject to or affected by a removal or remedial action (LFR 3, 4, 5, 6, 7); and the United States has incurred costs with respect to a response action under CERCLA (LFR 2). The remaining factors are disputed by the parties and are discussed in greater detail below.

A. Is the property owned by a person who is potentially liable under CERCLA?

Under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), a person is liable for response costs if, *inter alia*, that person is the owner or operator of a facility from which there has been a release or threatened release of a hazardous substances, unless such person can establish that it is entitled to a defense under Section 107(b) of CERCLA, 42 U.S.C. § 9607(b). In this matter, it is undisputed that the Carlton B. Coen Land Company is the current owner of the two parcels which were subject to the removal action and upon which U.S. EPA seeks to place a lien. LFR 1, 8, 11.

During the lien conference, Mr. Coen vigorously argued that the content of AST 6 was not hazardous and that there was no release or threat of a release of a hazardous substance. Specifically, he contended that the material in that tank, thought to be methanol contaminated water, had "completely dissipated" (Tr. at 22); that the material in the tank was not explosive

because it had a potential explosion level at 50 percent of the Lower Explosive Limit[3] (Tr. at 23); that there was no danger that the AST was about to collapse (Tr. at 24); and that it presented no fire hazard (Tr. at 29).

The Lien Filing Record contains substantial evidence presented by U.S. EPA to the contrary. At the time of the site assessment conducted by U.S. EPA, AST 6 contained an estimated 15,000 gallons of flammable liquid exposed to the atmosphere. LFR 3. Testing of samples collected from AST 6 showed the mixture had a Lower Explosive Limit (LEL) of 50% and a flash point of 58° F. LFR 3 at 3. These analytical results confirm that the mixture was a characteristic hazardous waste under the Resource Conservation and Recovery Act as defined by waste code D001[4], and thus was a hazardous substance under CERCLA.[5] Sampling of AST 6 also revealed a high concentration of BTEX chemicals,[6] which are listed hazardous substances under CERCLA.[7] Mr. Coen stated during the conference that his sampling data was not "anything drastically different from what the EPA found" (Tr. at 27) but he presented no evidence of sampling data during this proceeding. Tr. at 51.

It was apparent to U.S. EPA that the integrity of AST 6 was quite compromised. The AST was found to have a "tank saddle support problem, as well as major rust problems" (LFR 3) which posed the risk of a failure of that tank and, thus, the threat of a release. In addition, at the time of the site assessment, many of the 200 drums that were found along the eastern fence line were leaking into the soil. LFR 3. Thus, U.S. EPA had a reasonable basis to conclude that hazardous substances had been released or that a threat of a release existed. In addition, as ably pointed out by U.S. EPA counsel at the lien conference, the CERCLA third party defense (42 U.S.C. § 9607(b)(3)) and innocent landowner defense (42 U.S.C. § 101(35)), do not apply on the facts of this matter. Tr. at 52-55.

On the basis of this information contained in the Lien Filing Record, it is clear that U.S. EPA had a reasonable basis to conclude that the property was owned by a potentially responsible party and that a release or threatened release of hazardous substances existed at the site.

B. Does the record contain any other information which is sufficient to show that the lien notice should not be filed?

At the lien conference, Mr. Coen presented several arguments to the effect that the risk to human health or the environment posed by the site was minimal at best and, thus, the proposed lien should not be filed by U.S. EPA. These arguments are addressed in turn.

First, Mr. Coen pointed out that the area surrounding the site is commercial, not residential (Tr. at 28-29). From that, it could be implied that the risk to human health was low. This argument, however, does not account for risk posed to persons who venture onto the site, or

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[3] Lower Explosive Limit means the concentration of a compound in air below which the mixture will not catch on fire. LFR 3 at 3 n.1.

[4] See 40 C.F.R. § 261.21.

[5] See Section 101(14)(C) of CERCLA, 42 U.S.C. § 9601(14)(C).

[6] BTEX refers to the chemical compounds benzene, ethylbenzene, toluene and xylene. LFR 3 at 3 n.5.

[7] See 42 U.S.C. § 9602(a); 40 C.F.R. § 302.4.

to the environment in general. Second, Mr. Coen argued that the environmental harm caused by hydrocarbons in the groundwater is minimal because hydrocarbons tend to stabilize at relative short distances from wherever the release occurs and are often bioremediated by naturally occurring processes. Tr. at 32-35. Mr. Coen pointed out at the meeting that there is no evidence in the record that the hazardous substances ever migrated offsite. No sheen ever appeared on nearby Nimishilen Creek (Tr. at 39) and no contamination ever emanated offsite. U.S. EPA countered with the fact that not all of the contamination at the site was petroleum related and bioremediation would not have been effective. Tr. at 46-47. In addition, U.S. EPA noted that contamination does not have to travel offsite for there to be a risk to the environment requiring a response under CERCLA. Tr. 48-49. Mr. Coen also argued that the carcinogen benzene is only a human health problem if it is found in high concentrations in the air, but that its presence in small amounts in groundwater do not pose a significant risk. Nonetheless, as counsel for U.S. EPA pointed out, benzene is a listed hazardous substance under CERCLA and, thus, its release or the threat of its release into the environment at the Rocket Oil site can trigger a response action by the U.S. EPA as well as liability for the property owner under CERCLA. Tr at. 50.

Mr. Coen further argued that because the operating company that was responsible for placing the hazardous materials onto the site paid over $800,000 into the Superfund during the period it operated, the Carlton B. Coen Land Company should not have to pay additional money now nor should a lien be placed on the property, since the money paid by the operating company more than covers the costs expended by U.S. EPA to remediate the site. Tr. at 30. Mr. Coen is referring the taxes on petroleum and certain chemicals that were required to be paid by industry into the Superfund trust fund under the authority of the original Superfund statute, which authority has since expired. The statute, however, simply provides no support for such a concept. *See City of Merced v. Fields*, 997 F. Supp. 1326, 1335 (E.D. Ca. 1998).

I have carefully considered and evaluated all of the arguments and facts presented by Mr. Coen at the lien conference and in the Lien Filing Record and conclude that there is no information sufficient to show that a lien notice should not be filed in this case. The record does not show that U.S. EPA erred with respect to the factors set forth in the *Supplemental Guidance.*

IV. CONCLUSION

On the basis of information contained in the Lien Filing Record and presented at the lien hearing, I am of the view that U.S. EPA has a reasonable basis to conclude that the statutory elements to perfect the lien are satisfied. The property owner has not established any issue of fact or law that should alter EPA's decision to file a notice of lien. Neither EPA nor the property owner is barred from any claims or defenses by this recommended decision. This recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to this decision, nor shall this decision be given deference or otherwise constitute evidence in any subsequent proceeding.

This decision should be placed in the Lien Filing Record by U.S. EPA counsel, and a

copy is being forwarded to Richard C. Karl, the Region 5 Superfund Division Director, who has been delegated the authority to sign liens. A copy is also being sent to the property owner.

Dated: March 20, 2008

Marcy A. Toney
Regional Judicial Officer