UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 9
75 Hawthorne Street
San Francisco, CA 94105-3901

IN THE MATTER OF	)	
	)	
	)	
Pacific States Steel Removal Site	)	CERCLA Lien Proceeding
	)	
	)	
	)	

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 issue of whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l) of CERCLA on the properties located at 38363 Mission Boulevard and 35124 Alvarado Niles Road, Union City, California. The properties are owned by Pacific States Steel Corporation, which filed for bankruptcy in 1984. The properties are currently in the control of a Special Master with receivership powers, appointed by United States District Judge Marilyn H. Patel in Cardoza et al. v. Pacific States Steel Corporation, U.S.D.C. N.D.Cal. Case No. 82-4209MHP. The Special Master opposes the lien for the reasons stated below.

As Regional Judicial Officer for EPA's Region 9, I am the neutral EPA official designated to conduct this proceeding and to make a written recommendation to the Regional Counsel (the Region 9 official authorized to file liens) as to whether EPA has a reasonable basis to perfect the lien. This proceeding is being conducted in accordance with the Supplemental Guidance on Federal Superfund Liens dated July 29, 1993 (OSWER Directive No. 9832.12-1a). In accordance with the Supplemental Guidance, a meeting was held on July 24, 1995 with the Special Master, his attorney, and representatives of EPA, at which each party made oral presentations in support of its position. The lien filing record required by the Supplemental Guidance consists of 31 documents.

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) Was the property owner sent notice by certified mail of potential liability?
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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 record contain any other information which is sufficient to show that the lien should not be filed?

In order to demonstrate that EPA lacks a reasonable basis for perfecting the lien, the Special Master will need to show by a preponderance of the evidence that:

> The property owner is not liable for cleanup or that the property is not subject to or affected by a removal or remedial action.

CERCLA §107(a).

EPA has requested that I issue a recommendation in this proceeding as soon as possible, due to the Special Master's announced intent to ask Judge Patel to approve a revised reorganization plan which would limit or extinguish EPA's right to file a lien.

Factual Background

The property at issue in this proceeding consists of approximately twelve contiguous legal parcels located in Union City and Fremont, California. See the site map, document no. 31 in the lien filing record. Until 1978, Pacific States Steel Corporation operated a steel plant on a 61 1/2 acre portion of the property referred to by the Special Master as the "phase III parcel." All of the phase III parcel, consisting of five legal parcels in the title report, lies generally south of the Southern Pacific railroad tracks.[1] The phase I-A parcel consisting of 5 1/2 acres and the phase II parcel consisting of 16 1/2 acres

[1]The preliminary title report, document no. 19 in the lien filing record, refers to these as the Central Pacific railroad tracks.

(totalling 22 acres and sometimes referred to together as the "phase I parcel") both lie generally north of the Southern Pacific railroad tracks. The Special Master states that the phase I-A and phase II parcels were purchased by Pacific States Steel separately from the phase III parcel, and were not used in the actual operation of the steel plant. At some point, slag from the steelmaking operations was stored on the phase I-A and phase II parcels, but the slag was transferred back to the phase III parcel or transferred offsite before EPA's removal activities began. There is also a "Fremont" parcel, consisting of 1.26 acres in the city of Fremont, California. Although this parcel is not in Union City, and therefore may not correspond to the Union City street addresses listed above, a legal description of the Fremont property is included in the notice of intent to perfect a lien, and it is therefore apparently included among the parcels on which EPA intends to impose a lien.

Since 1975, various state and local agencies have pursued cleanup and abatement actions with respect to the hazardous waste left on the property as a result of Pacific States Steel Corporation's steelmaking operations. In June, 1990, the California Department of Health Services requested EPA's assistance in removing over 800 drums of hazardous waste, 450 PCB capacitors, and several large PCB transformers from the property. All waste was located on, and all removal activities took place on, the phase III parcel.

During the July 24th meeting, EPA's on-scene coordinator stated that the personnel involved in the removal drove through the phase I-A and phase II parcels in order to reach the phase III parcel and, seeing that the phase I and phase II parcels were "a vacant lot," did not undertake any investigation on those parcels.

Factors for Review

With respect to the five factors listed for consideration in the Supplemental Guidance:

(1) There appears to be no dispute that the property owner was sent notice by certified mail of potential liability. See document no. 1 in the lien filing record.

(2) The property is owned by a person who is potentially liable under CERCLA, in that Pacific States Steel Corporation is liable under CERCLA for the cost of the removal activities undertaken by EPA on the property. Actions of the Special Master and the United States District Court to date have acknowledged that liability. See the administrative consent order approved January 17, 1991, document no. 5 in the lien filing record.

(3) The Special Master disputes EPA's assertion that the

entire property is subject to or affected by a removal or remedial action. Specifically, the Special Master argues that the phase I-A and phase II parcels were not "subject to" the removal because none of the actual removal activities took place on those parcels, and that the phase I-A and phase II parcels have also not been shown to be "affected by" the removal.

(4) It is not disputed that the United States incurred costs with respect to a response action under CERCLA, i.e., with respect to the removal. See documents no. 4, 5, 7, and 8 in the lien filing record.

(5) With respect to the fifth issue, the Special Master argues that the lien should not be filed because the lien will confer little if any benefit on EPA due to the current posture of the litigation in Cardoza et al. v. Pacific States Steel Corporation, while filing the lien "will substantially impair the Special Master's ability to proceed with ongoing environmental remediation work," because it will interfere with the Special Master's efforts to obtain funding for its planned development of the property. The Special Master's arguments are set out in detail in documents no. 13, 15, 24, and 26 in the lien filing record.

Issues in Dispute

With respect to the first issue in dispute, EPA concedes that the physical removal activities all occurred on the phase III parcel only (no removal activities were conducted north of the Southern Pacific railroad tracks), but argues that the different legal parcels should be considered as all making up one site. In support of its position, EPA states that Pacific States Steel Corporation's operations took place on the entire property.

In addition, EPA argues that the phase I-A and phase II parcels were benefitted by the removal and therefore should be considered to be "affected by" the removal within the meaning of Section 107(l) of CERCLA.

EPA's arguments are not convincing on the facts presented in this proceeding. EPA does not cite any authority for the proposition that a lien under Section 107(l) of CERCLA may be imposed on all of the property (i.e., on all separate legal parcels) used for a particular business activity by a person who is potentially liable under CERCLA. To the contrary, the wording of Section 107(l) would seem specifically to preclude this, since it limits the imposition of a lien to property "subject to or affected by" a removal. Where, as here, a business activity is conducted on several contiguous legal parcels, the language of Section 107(l) would seem quite clearly to require a showing that each legal parcel is subject to or affected by the removal before a lien can be imposed on that particular parcel.

With respect to EPA's second argument, there is nothing in the lien filing record that shows how the phase I-A and phase II parcels have been benefitted by the removal which took place on the phase III parcel. As noted above, EPA's on-scene coordinator stated that the personnel involved in the removal merely drove through the phase I-A and phase II parcels in order to reach the phase III parcel, and did not undertake any investigation on the phase I-A and phase II parcels beyond the visual observation they could do from their automobile. Therefore, the present case is unlike the situation in Bohaty Drum Site, Medina, Ohio, (Recommended Decision by the Regional Judicial Officer, EPA Region 5, June 22, 1995), where the Regional Judicial Officer found there was a basis for perfecting a lien under Section 107(l) of CERCLA as to parcels on which EPA conducted an investigation for the presence of drums, but found no drums. In that case, the Regional Judicial Officer determined that the investigation itself fell within the definition of a "removal" under Section 101(23) of CERCLA and that the investigation contributed to an improvement in the value of the parcels. In contrast, the very casual visual observation of the phase I-A and phase II parcels described by the on-scene coordinator apparently did not result in any formal finding that the parcels are free of hazardous waste, and it is difficult to see how such a cursory examination could have added any value to the property.

While the cleanup of one parcel of land might in some instances confer a very real benefit on an adjacent parcel, there is nothing in the lien filing record to indicate that this has occurred in the present case. For example, a significant benefit might be conferred by controlling groundwater contamination that threatened to migrate to adjacent parcels or by controlling asbestos contamination that might be spread to adjacent parcels by the wind. However, the removal did not address the potential groundwater contamination under parcel III nor did it clean up the surface asbestos contamination found there.[2] See document no. 4. There are no other facts evident in the lien filing record to indicate that the removal activities on the phase III parcel actually affected the value or marketability of the phase I-A and phase II parcels.

The Special Master's argument that the lien should not be filed because the lien will confer little if any benefit on EPA while interfering with the Special Master's efforts to obtain funding for its planned development of the property, addresses policy questions rather than the legal prerequisites for perfecting a lien under Section 107(l) of CERCLA. Upon careful review, this argument appears to be one that is not susceptible of resolution through the procedures of the Supplemental

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[2]Some on-site asbestos was stabilized to protect the personnel carrying out the removal.

Guidance, but instead is more appropriately addressed to the discretion of EPA management.

The Fremont Parcel

Very little factual information was provided by either party with respect to the Fremont parcel. EPA gave notice of its intent to perfect a lien on the Fremont parcel. The Special Master opposes the lien on the same theory as he opposes a lien on the phase I-A and phase II parcels. Under ordinary circumstances, I would request that the parties supplement the lien filing record with respect to the Fremont parcel before issuing my recommended decision. As noted above, however, EPA has requested that I issue a recommendation as soon as possible, due to the Special Master's announced intent to ask Judge Patel to approve a revised reorganization plan which would limit or extinguish EPA's right to file a lien. On the record presently before me, I do not have sufficient facts to determine whether factors (3) or (5) in the Supplemental Guidance have been satisfied with respect to the Fremont parcel.

In order to issue a recommendation promptly with respect to the other parcels while still attempting to resolve disputed issues with respect to the Fremont parcel, I will allow the parties until August 23, 1995 (or such later date as the parties may agree to) to provide additional information to me regarding the Fremont parcel. If additional information is submitted by either party, I will issue a supplement to this recommendation with respect to the Fremont parcel.

Recommended Decision

After considering all the facts in the lien filing record and all presentations made by the parties at the July 24th meeting, I make the following recommendations:

(1) With respect to the phase I-A and phase II parcels, I find that neither parcel has been shown to be subject to or affected by a removal or remedial action. Accordingly, no basis has been demonstrated for imposing a lien under Section 107(l) of CERCLA on either parcel.

(2) With respect to the Fremont parcel, I do not have sufficient facts at present to determine whether factors (3) or (5) in the Supplemental Guidance have been satisfied. If the parties provide sufficient additional information to me by August 23, 1995, or by a later date agreed to by the parties, I will issued a supplemental recommendation with respect to this parcel.

(3) With respect to the phase III parcel, I find that the lien filing record supports a determination that EPA has a reasonable basis to perfect a lien under Section 107(l) of CERCLA. The Special Master has not established any issue of fact

or law which rebuts EPA's claim that it has a reasonable basis to perfect a lien. I note, with respect to the Special Master's argument that that the lien should not be filed because the lien will confer little if any benefit on EPA while interfering with the Special Master's efforts to obtain funding for its planned development of the property, that my recommended decision with respect to parcel III merely clears the way for the filing of a lien by confirming that a basis exists under Section 107(l) of CERCLA for doing so. The decision whether 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 and whether or not the property owner has proven any of the defenses available under Section 107 of CERCLA. This recommended decision does not bar EPA or the property owner from raising any claims or defenses in further proceedings. This recommended decision is not a binding determination of ultimate liability or non-liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

/s/
Steven W. Anderson
Regional Judicial Officer

Dated: August 14, 1995