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

IN THE MATTER OF	)	
	)	
	)	
Iron Mountain Mine, Inc.	)	CERCLA Lien Proceeding
Iron Mountain Mine	)	
Superfund Site	)	
	)	
_____	)	

DETERMINATION OF PROBABLE CAUSE

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect a lien pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain property in Shasta County, California owned by Iron Mountain Mine, Inc. (IMMI).

The proceeding is being conducted in accordance with EPA's Supplemental Guidance on Federal Superfund Liens dated July 29, 1993 (OSWER Directive No. 9832.12-1a). In accordance with the Supplemental Guidance, I have been designated 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.

A telephone conference call was held on April 25, 2000 with the owner and chief executive officer of IMMI, IMMI's attorney, and representatives of EPA, at which each party made oral presentations in support of its position. IMMI also presented facts and arguments in support of its position in a letter dated March 9, 2000 to the Regional Counsel.

After considering the lien filing record and presentations made by the parties in the April 25, 2000 conference call, I find that the lien filing record supports the determination that EPA has probable cause, or a reasonable basis to believe that the requisite statutory criteria have been met, to file a CERCLA lien against this property.

CERCLA Lien Provision

Section 107(l) of CERCLA, 42 U.S.C. §9607(l), provides that all costs and damages for which a person is liable to the United States in a cost recovery action 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 Section 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 Section 107(l)(2); 42 U.S.C. 9607(l)(2).

Due Process Requirements

While CERCLA does not provide for challenges to imposition of a lien under Section 107(l), in accordance with the Supplemental Guidance the Agency 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 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. Reardon at 1522; In the Matter of Harbucks, Inc., Revere Chemical Site, EPA Docket No. III-93-004L, Probable Cause Determination, November 2, 1994.

Criteria for Review

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 include:

(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 should not be filed?

In order to demonstrate that EPA lacks a reasonable basis for perfecting the lien, IMMI must 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.

Factual Background

The property at issue in this proceeding consists of approximately thirty-six legal parcels located in Shasta County, California. See parcel maps in the lien filing record, and Attachments 1, 2, and 3 to the Notice of Intent to File Lien. According to IMMI, sulfide ore bodies on the property were mined from 1896 through 1962 by the Mountain Copper Company. IMMI purchased the property from Stauffer Chemical Company, a successor in interest to the Mountain Copper Company, in 1976.

IMMI states that it has not conducted mining activities on the property. However, the earlier mining activities have resulted in contining acid mine drainage and runoff of heavy metals into Keswick Lake and the Sacramento River from the property, causing significant environmental harm. See Declaration of James C. Pedri, Engineer-in-Charge of the Redding Office of the California Regional Water Quality Control Board, Central Valley Region. Beginning in August, 1977, the Regional Water Quality Control Board (RWQCB) issued a series of orders to IMMI directing it to abate the effects of the discharge of acid mine drainage and runoff containing heavy metals from IMMI's property; IMMI has not complied with the orders to the RWQCB's satisfaction. See Declaration of James C. Pedri.

In 1982 and thereafter, EPA notified IMMI that it considered IMMI to be a responsible party at the Iron Mountain Mine Superfund Site, and, in accordance with the provision for joint and several liability of Section 107 of CERCLA, demanded payment of costs incurred to date in excess of $7.75 million. Letters dated April 5, 1982 and [date illegible on file copy]. By letter dated January 25, 2000, EPA notified IMMI of its intent to perfect a lien on the property in order to secure payment to the United States of costs and damages for which IMMI, as the owner of the property, would be liable to the United States under Section 107(a) of CERCLA.

Issues Presented

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

(1) There is no dispute that the property owner, IMMI, was sent notice by certified mail of potential liability. See letters dated April 5, 1982 and [date illegible on file copy] in the lien filing record.

(2) IMMI disputes that the property is owned by a person who is potentially liable under CERCLA. IMMI appears to make two arguments in this regard: (1) that since IMMI "did not mine or aggravate the orebodies to cause AMD [acid mine drainage]" it should not be held liable for any response costs at the site, and (2) that IMMI is entitled to the "innocent landowner defense." IMMI's arguments are discussed below. As explained there, I find that IMMI has failed to show by a preponderance of the evidence that it is not liable under CERCLA for cleanup costs at the property.

(3) IMMI does not dispute EPA's assertion that the property is subject to or affected by a removal or remedial action.

(4) IMMI does not dispute that the United States incurred costs with respect to a response action under CERCLA.[1] See cost documents in the lien filing record.

(5) With respect to the fifth factor, IMMI argues (1) that "it was defrauded at the point of the property sale by

[1]IMMI does not concede the reasonableness of the costs.

Stauffer . . .” in that Stauffer “intentionally failed to disclose material facts about the AMD [acid mine drainage] problem at the property to IMMI,” and that Stauffer should bear all of the cost to remedy the acid mine drainage situation at the site, (2) that EPA has “waived its right to impose a lien against IMMI’s real property due to the EPA’s failure to exhaust its Administrative Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible parties” at the site, (3) that EPA should “mediate or discuss the lien issue” in ongoing settlement negotiations between the parties rather than filing a lien unilaterally, and (4) that because of pending cost recovery litigation involving EPA, IMMI, Stauffer and a third potentially responsible party, the lien “is premature and legally improper because the United States Federal District Court has superior jurisdiction over this matter.” IMMI’s arguments are discussed below. I find that none of IMMI’s arguments are sufficient to show that the lien should not be filed against the property.

Discussion

(1) With respect to IMMI’s argument that it should not be held liable for any response costs at the site because it did not mine or aggravate the orebodies to cause acid mine drainage, it is clear under the liability scheme of Section 107 of CERCLA that a subsequent landowner may be liable for response costs for environmental contamination it did not cause. CERCLA Section 107(a)(1); 42 U.S.C. Section 9607(a)(1). It should also be noted that one purpose of the lien authority in Section 107(l) is to prevent windfalls: “A statutory lien would allow the Federal Government to recover the enhanced value of the property and thus prevent the owner from realizing a windfall from cleanup and restoration activities.” 131 Cong. Rec. S11580 (statement of Senator Stafford)(September 17, 1985). See also House Energy and Commerce Report on H.R.2817, p.40, indicating that the lien provision was intended to prevent unjust enrichment. In the Matter of Copley Square Plaza Site, Determination of Probable Cause, June 5, 1997. Thus, IMMI’s assertion that it did not cause the contamination at the site is not a sufficient basis for finding that a CERCLA lien should not be filed.

(2) With respect to IMMI’s assertion that it is entitled to the “innocent landowner” defense against CERCLA liability, IMMI’s argument fails on several points. A potentially

responsible party [PRP] under CERCLA may have a defense to liability where the contamination at issue was caused by an act or omission of a third party, if it meets certain conditions specified in the statute.[2] See CERCLA Section 107(b); 42 U.S.C. Section 9607(b).

One such condition is that the PRP must establish by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance,

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[2]Section 107(b) of CERCLA provides that defenses to liability under CERCLA §107(a) include:

> The release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by:
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> (1) an act of God;
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> (2) an act of war;
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> (3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or
>
> (4) any combination of the foregoing paragraphs.

CERCLA §107(b); 42 U.S.C. Section 9607(b).

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. CERCLA Section 107(b)(3); 42 U.S.C. Section 9607(b)(3).

IMMI has failed to establish by a preponderance of the evidence that it has exercised due care with respect to the acid mine drainage and other contamination at the site. IMMI has not rebutted the Declaration of James Pedri, cited above, which states that for significant periods of time from 1977 through 1981, and for an unspecified period thereafter, IMMI failed to properly operate copper cementation plants on Slickrock Creek and Boulder Creek which were intended to reduce copper and other heavy metal contamination and acid mine drainage which otherwise would discharge into Keswick Lake and the Sacramento River. According to Mr. Pedri's Declaration, the Boulder Creek plant had been operated by the Stauffer Chemical Company (prior to the transfer of the property to IMMI) so as to achieve 95 percent removal of copper, but over a period of four years after IMMI purchased the property it generally failed to operate the plant so as to achieve the required reduction of copper. The Declaration states that the reduction is necessary to prevent toxic concentrations of copper from occurring in Keswick Lake and the Sacramento River. Declaration of James C. Pedri, par. 4. In view of the unrebutted statements in the Declaration, I find that IMMI has not established by a preponderance of the evidence that it exercised due care with respect to the preexisting contamination at the site.[3]

Another condition which a landowner who takes title from a third party who caused contamination must meet in order to avoid CERCLA liability is that the real property must have

[3] The Declaration and lien filing record also refer to cleanup orders issued to IMMI by state and federal regulatory agencies, and an injunction obtained by EPA to enjoin IMMI from interfering with EPA's cleanup activities at the site. Either a failure to obey cleanup orders or the described interference with Agency cleanup activities could constitute an independent basis for finding that IMMI has failed to show that it exercised due care with respect to the hazardous substances at the site.

been acquired by the PRP after the disposal or placement of the hazardous substances on, in, or at the facility,[4] and

> . . . [a]t the time the PRP acquired the facility the PRP did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility.

CERCLA Section 101(35)(A)(i); 42 U.S.C. §9601(35)(A)(i).

In order to establish that it had no reason to know of the disposal of hazardous substances at the facility, a defendant

> must have undertaken, at the time of acquisition, all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability. . . . The court shall take into account commonly known or reasonably ascertainable information about the property, the obviousness of the presence or likely presence of contamination at the property, and the ability to detect such contamination by appropriate inspection.

CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B).

IMMI has failed to show by a preponderance of the evidence that it meets this condition. While there is evidence that Stauffer Chemical Company attempted to withhold information "relating to environmental issues" from IMMI, see memorandum from T.J. Kent to L.E. Mannion dated February 4, 1977, there is no dispute that prior to the close of escrow on the property[5] IMMI was aware the property had been the site of large scale mining. This alone should have been enough to put a prospective buyer on notice of possible environmental problems at the site. In addition, IMMI was aware that the RWQCB was interested in having IMMI continue operation of the

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[4]IMMI asserts that all the contamination at the site was caused by previous owners; EPA notes that release of hazardous substances (for example, acid mine drainage) continues to occur at the site.

[5]IMMI entered into an agreement to purchase the property October 22, 1976; escrow closed December 15, 1976.

Boulder Creek copper cementation plant. Deposition of Theodore Arman dated August 12, 1996, vol. 1, at 166:11-24. While IMMI disputes that Mr. Pedri, the RWQCB engineer, told it at that time of the RWQCB's full environmental concerns regarding the property, even if Mr. Pedri only inquired whether IMMI would continue to operate the Boulder Creek copper cementation plant, that inquiry by a state regulatory official should have been enough to put a prospective buyer on notice of possible water contamination problems at the site. In addition, the RWQCB issued a cleanup and abatement order to Stauffer Chemical Company on November 5, 1976, which addressed the effects of the discharge of acid mine drainage into Spring Creek and the Sacramento River. A copy of the cleanup and abatement order was received by IMMI some time in November, 1976. Deposition of Theodore Arman dated August 12, 1996, vol. 1, at 129:5-22 and 161:8-17. Thus, before the close of escrow in December, 1976, IMMI had specific information as to a significant environmental problem at the property. IMMI has therefore failed to show by a preponderance of the evidence that it did not know and had no reason to know that hazardous substances had been disposed of on the property.

(3) IMMI argues that "it was defrauded at the point of the property sale by Stauffer . . ." in that Stauffer "intentionally failed to disclose material facts about the AMD [acid mine drainage] problem at the property to IMMI," and that Stauffer should therefore bear all of the cost to remedy the acid mine drainage situation at the site.

Without expressing any opinion as to the likelihood that IMMI would or would not prevail in civil litigation against Stauffer on grounds of fraud, I note that IMMI's argument does not present a defense to liability under Section 107 of CERCLA. As discussed above, in order to avoid CERCLA liability a purchaser of property must undertake "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability." CERCLA Section 101(35)(B); 42 U.S.C. §9601(35)(B). Stauffer appears to have withheld information from IMMI regarding environmental conditions on the property. See the Stauffer internal memorandum dated February 4, 1977 from T.J.Kent to L.E. Mannion, in which Mr. Kent states:

> . . . we agreed that you would not provide IMM [IMMI] with any geological or technical information not

> pertinent to the 1900 acres sold last year to IMM nor would you give up any correspondence, reports, etc. relating to environmental issues at Iron Mountain.

In spite of this, IMMI should have been able to inform itself about the acid mine drainage and other environmental problems at the property by reviewing RWQCB records or by conducting a thorough inspection of the property. I therefore find that, with respect to its liability under Section 107(a) of CERCLA, IMMI did not undertake an "appropriate inquiry into the previous . . . uses of the property" before purchase, regardless of any efforts by Stauffer to avoid disclosing environmental information in its possession.

(4) IMMI argues that EPA has "waived its right to impose a lien against IMMI's real property due to the EPA's failure to exhaust its Administrative Law Remedies prior to initiating its legal action against IMMI and the other potentially responsible parties" at the site. It is unclear what "administrative law remedies" are referred to, since CERCLA does not set any time deadlines or similar administrative requirements on EPA's decision to impose a lien on property subject to a removal or remedial action. See, CERCLA Section 107(l); 42 U.S.C. 9607(l) and CERCLA Guidance on Federal Superfund Liens dated September 22, 1987 at Section III. To the contrary, a CERCLA lien may be imposed at any time after EPA incurs costs and provides notice of potential liability to the landowner.[6] CERCLA Guidance on Federal Superfund Liens dated September 22, 1987.

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[6] "The lien imposed by this subsection shall arise at the latter of the following:

> (A) The time costs are first incurred by the United States with respect to a response action under this chapter.
> (B) The time that the person referred to in paragraph (1) is is provided (by certified or registered mail) written notice of potential liability.

CERCLA Section 107(l)(2); 42 U.S.C. 9607(l)(2).

(5) IMMI argues that EPA should "mediate or discuss the lien issue" in ongoing settlement negotiations[7] between the parties rather than filing a lien unilaterally. While EPA could elect to do so as an exercise of discretion, the fact that EPA and a PRP are currently in settlement negotiations does not in any way diminish the Agency's legal authority to file a lien under Section 107(l) of CERCLA. Furthermore, in light of the underlying purpose of a CERCLA lien, to protect the Government's ability to recover public funds expended on the cleanup of contamination on the property and to avoid a windfall to the landowner, as a matter of policy the Agency will consider perfecting a lien whenever settlement negotiations have not yet resulted in appropriate assurance that the Government will be able to recover the funds it has expended at the site. CERCLA Guidance on Federal Superfund Liens dated September 22, 1987, Section IV.

Since a CERCLA lien is "subject to the rights of any purchaser, holder of a security interest, or judgment lien creditor whose interest is perfected under applicable State law before notice of the federal lien has been filed," CERCLA Section 107(l)(3), 42 U.S.C. Section 9607(l)(3), any delay by EPA in filing the lien risks that EPA's ability to recover costs will be impaired.

(6) IMMI argues that because of pending cost recovery litigation brought by EPA against IMMI, Stauffer and other companies considered by EPA to be potentially responsible parties at the site, the lien "is premature and legally improper because the United States Federal District Court has superior jurisdiction over this matter."[8] IMMI suggests that EPA could "request" a lien if a judgment is rendered in that case against IMMI.

Contrary to the argument put forward by IMMI, a CERCLA lien can be filed irrespective of whether there is pending cost recovery litigation regarding the site. Section 107(l)

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[7]The "settlement negotiations" referred to is a mediation proceeding before Judge Julius Irving in United States and State of California v. Iron Mountain Mines, Inc., et al., No. CIV-S-91-0768 DFL JFM

[8]The matter is United States and State of California v. Iron Mountain Mines, Inc., et al., No. CIV-S-91-0768 DFL JFM.

of CERCLA provides for an independent in rem action against the property subject to the lien:

> The costs constituting the lien may be recovered in an action in rem in the United States district court for the district in which the removal or remedial action is occurring or has occurred.

CERCLA Section 107(l)(4); 42 U.S.C. Section 9607(l)(4). There is no requirement that EPA institute a civil cost recovery action under CERCLA as a prerequisite to the imposition of a CERCLA lien or for the purpose of recovering costs under the lien. To the contrary, 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, let alone have filed any type of cost recovery case. Reardon v. U.S., 947 F.2d. 1509, 1513 (1st Cir. 1991). Just as it is not necessary to institute a cost recovery action under CERCLA in order to impose a CERCLA lien, this CERCLA lien proceeding is not part of the pending cost recovery action referred to by IMMI, and EPA is free to proceed with lien filing regardless of the procedural posture of the pending cost recovery litigation. In the Matter of Paoli Rail Yard Superfund Site, EPA Docket No. III-93-004L, Determination of Probable Cause, November 30, 1995.

To the extent IMMI suggests that EPA could "request" a lien if a judgment is rendered against IMMI in the pending cost recovery litigation, IMMI is confusing a judgment lien with a CERCLA lien under Section 107(l).

As noted below, this determination of probable cause does not bar EPA or the property owner from raising any claims or defenses in further proceedings. Consequently, the present determination does not limit or foreclose any claims or defenses either EPA or IMMI may have in the pending cost recovery litigation.

Conclusion

After considering the lien filing record and presentations made by the parties in the April 25, 2000 conference call, 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 against the specified property owned by Iron Mountain Mine, Inc. in Shasta County,

California. IMMI has not established any issue of fact or law which rebuts EPA's claim that it has a reasonable basis to perfect a lien.

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: May 4, 2000