UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

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**IN THE MATTER OF:**

**Burnt Fly Bog Superfund Site**
**Monmouth County, New Jersey** **CERCLA LIEN PROCEEDING**

## RECOMMENDED DECISION

This matter is a proceeding to determine whether the United States Environmental Protection Agency ("EPA") erred in believing that it had 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 Monmouth County, New Jersey owned by Dominick and Carmella Manzo (the "Manzos").

This proceeding, instituted at the request of Counsel for the Manzos, is being conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens*, OSWER Directive No. 9832.12-1a, issued July 29, 1993 ("*Supplemental Guidance*"). I have been designated as the neutral EPA Region 2 official to conduct this proceeding and to make a written recommendation to the Regional Counsel (the Region 2 official authorized to file liens) as to whether or not EPA had a reasonable basis to perfect the lien.

In accordance with the *Supplemental Guidance*, I held a meeting on February 3, 2004 with the Manzos' Counsel and with Counsel for EPA-Region 2. The meeting notes have been transcribed and added to the Lien Filing Record (LFR),[1] as required by the *Supplemental Guidance.*

Section 107(l) of CERCLA, 42 U.S.C. § 9607(l) provides that all costs and damages for which a person is liable to the United States in a cost recovery action under CERCLA shall constitute a lien in favor of the United States upon all real property and rights to such property

which (1) belong to such person and (2) are subject to or affected by a removal or remedial action. The lien arises at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided written notice of potential liability, whichever is later. CERCLA § 107(l)(2); 42 U.S.C. § 9607 (l)(2). The lien also applies to all future costs incurred at the site. The lien continues until the liability for the costs or a judgment against the person arising out of such liability is satisfied or becomes unenforceable through operation of the statute of limitations. CERCLA § 107(l)(2); 42 U.S.C. § 9607(l)(2).

Under the *Supplemental Guidance*, I am to consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien under Section 107(l) of CERCLA have been satisfied. Specific factors for my consideration under the *Supplemental Guidance* include:

1) 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 which has been filed should be withdrawn?

## Due Process Requirements

While CERCLA does not provide for challenges to the imposition of a lien under Section 107(l), in accordance with the *Supplemental Guidance* 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 Mercury Refining Superfund Site, CERCLA Lien Recommended Decision (Region 2, June 11, 2002); In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Determination of Probable Cause (Region 9 , May 4, 2000).

## The Standard to be Applied

The "reasonable basis" standard applied here is that used in the *Supplemental Guidance*: "The neutral Agency official should consider all facts relating to whether EPA has a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien." *Supplemental Guidance* at page 7. In addition, the *Supplemental Guidance* provides that ".. . the property owner may present information or submit documents purporting to establish that EPA has erred in believing that it has a reasonable basis to perfect a lien . . ." *Id.*

## Factual Background

Because most of the facts concerning the Burnt Fly Bog Superfund Site ("Site") are not in dispute, a brief summary of the facts will suffice. The Site is located near the intersection of Texas and Spring Valley Roads in Marlboro Township, Monmouth County, New Jersey. The Site consists of two basic areas: the Uplands Area and the Westerly Wetlands. The Uplands Area includes several abandoned oil storage and treatment lagoons containing residual oil sludges and aqueous wastes, contaminated waste piles, and buried or exposed drummed wastes. The Westerly Wetlands area has contamination in the surface water, surface soil, and the shallow subsurface soil as a result of uncontrolled discharges and runoff from the Uplands Area. The Site is located in a fringe area of the New Jersey Pine Barrens. The New Jersey Pine Barrens is an environmentally sensitive area of the State. The interior of the bog is considered an undisturbed wilderness area with documentation of extensive wildlife.[2]

EPA and the New Jersey Department of Environmental Protection ("NJDEP") divided the Site remediation into three separate operable units. EPA issued a Record of Decision ("ROD1") for Operable Unit 1 ("OU1") in 1983 selecting a remedy to address contamination in the Uplands Area as well as other areas of the Site. Between 1985 and 1990, NJDEP removed lagoon liquids and approximately 85,000 tons of contaminated soil at the Site in accordance with the requirements in ROD1. On September 29, 1988, EPA issued a Record of Decision 2 ("ROD2") for Operable Unit 2 ("OU2") which required, *inter alia*, an interim remedy for the Westerly Wetlands and another area of the Site called the Downstream Area. NJDEP hired a contractor, *inter alia*, to excavate sediments in the Downstream Area and construct a sedimentation basin to prevent further migration of contaminated soils. On September 30, 1998, EPA issued Record of Decision 3 ("ROD3") for Operable Unit 3 ("OU3") which required, *inter alia*, additional excavation of contaminated soils and the reestablishment of damaged wetland areas or creation of replacement wetlands.[3]

The Manzos acquired the Site property which is the subject of EPA's lien between 1963 and 1968.[4] At least in part through earth moving activities conducted by Dominick Manzo, contamination migrated from the Uplands Area throughout the Site.[5] The United States District Court for the District of New Jersey concluded, on this and other bases in two separate opinions, U.S. v. Manzo, 182 F.Supp.2d. 385 (D.N.J. 2000) and U.S. v. Manzo, Slip Op. Civ. Act. No. 97-289 (MLC) (D.N.J. Aug. 1, 2003 ), that the Manzos were jointly and severally liable for the United States response costs associated with OU2 and OU3.[6]

Subsequent to the second decision by the Court, the United States filed a lien against the subject properties which was recorded in the County Clerk's Office, Monmouth County, New Jersey, on September 11, 2003. The lien secured a liability of the Manzos for costs of "at least twelve million dollars ($12,000,000)" incurred at the Site relating to the subject properties.[7] By letter dated October 21, 2003, EPA Deputy Regional Counsel Eric Schaaf notified the attorney for the Manzos that EPA had filed the lien without prior notice to the Manzos since part of the subject property was unencumbered and could be sold to prospective buyers without notice to the federal government[8]. By letter dated November 10, 2003, Counsel for the Manzos requested a lien hearing[9].

## Factors for Review

### *1) Notice of Potential Liability*

There is no dispute that the property owners, Dominick and Carmella Manzo, were sent notices of potential liability, dated February 8, 1982, March 18, 1982 and June 28, 1983, by certified mail, return receipt requested (Documents 3-7 in the LFR).

### *2) Property Owned by Potentially Liable Party*

There is no dispute as to the Manzos' ownership of subject property, Block 147, Lot 8, since December 16, 1963. See *Deed*, Document 1 in the LFR. Nor is there any dispute as to the Manzos' ownership of subject property, Block 146, Lot 7, since July 23, 1968. *Deed*, Document 2 in the LFR. Counsel for the Manzos stated for the record that there is no dispute that the properties described in the deeds attached as Documents 1 and 2 in the LFR are the same properties against which the EPA lien was filed. The difference in the property lot and block identification between the deeds and the lien is attributable to the Marlboro Township having refiled its township map and redesignated the lot and block identifications.[10] Under CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1), liable persons include persons who presently own a facility. It is not disputed that the Manzos own a portion of the Site.[11] Therefore, the Manzos are potentially liable parties. Moreover, as discussed above, the United States District Court for the District of New Jersey has determined that the Manzos are jointly and severally liable for the United States response costs associated with OU2 and OU3.

### *3) Property Subject to Removal or Remedial Action*

There was no dispute at the lien hearing that the two properties that are owned by the Manzos have been the subject of removal and remedial actions.[12] The remedial action for OU3 has not been completed,[13] and so the two properties will continue to be the subject of removal and remedial actions.

At the lien hearing, Counsel for the Manzos requested that the lien should be restricted

to the approximate 10 or 15 acres covered by the response actions as opposed to the entire two lots which comprise 123 to 133 acres[14].

Section 107(l) of CERCLA provides that a lien in favor of the United States would exist "upon all real property and rights to such property which – ... are subject to or affected by a removal or remedial action." EPA's *Guidance on Federal Superfund Liens,* OSWER Directive No. 9832.12, issued September 22, 1987 (*Guidance*) provides that the "[l]ien applies to all property owned by the PRP upon which the response action has been taken, not just the portion of the property affected by cleanup activities." Id. at 1. The *Guidance* relies upon the House Judiciary Committee Report on H.R.2817 which contained the lien provision enacted as part of the Superfund Amendments and Reauthorization Act of 1986. That report stated that "the lien should apply to the title to the entire property on which the response action was taken." Id. at 1-2. In United States v. Glidden Co., 3 F. Supp. 2d 823, 830-831 (N.D. Ohio 1997), *aff'd in relevant part sub nom.* U.S. v.150 Acres of Land, 204 F.3d 698 (6th Cir. 2000), the court determined that three contiguous parcels, listed as separate parcels in the land records, which were transferred by one deed constituted one "facility" under CERCLA for purposes of the lien even though the contamination at issue was restricted to only one of the three parcels. For all these reasons, an EPA lien rightfully attaches to the entire parcel affected by a response action and EPA is not required to place a lien on just the portion of a parcel directly affected by a response action. *See* In the Matter of The Asbestos Dump – Millington Site, CERCLA Lien Recommended Decision (Region 2, May 16, 2001).

***4) United States Incurred Costs***

There is no dispute that the United States has incurred response costs at the Site. The United States seeks costs only with respect to OU2 and OU3 and does not seek costs with respect to OU1 because it admits it is time-barred from doing so[15]. The Court in U.S. v. Manzo found that, as of December 1999, the United States had incurred at least $8 million of response costs in connection with OU2 and OU3[16]. LFR Document 10 consists of an EPA Cost Summary that enumerates response costs for OU2 and OU3 in the sum of $12,910,646.43 as of June 10, 2003[17].

There was some dispute at the hearing concerning the delineation of response costs into removal and remedial costs and the import of any such delineation. The District Court, however, determined that the United States was entitled to recovery of both remedial and

removal costs with respect to OU2 and OU3 and therefore the Court stated that there was no need for to make a categorization of costs between remedial and removal costs[18]. Moreover, although there still may be some dispute concerning the amount of response costs to which the United States may be entitled, EPA is not required to specify the total amount of recoverable costs associated with its liens. In the Matter of Herculaneum Lead Smelter Site, CERCLA Lien Recommended Decision (Region 7, February 12, 2003) at 7; *see* In the Matter of Rogers Fibre Mill Superfund Site, CERCLA Lien Recommended Decision (Region 1, July 27, 2001) at 7.

***5) Other Information Showing Lien Should Not Be Filed***

In his November 10, 2003 request for a hearing concerning the lien filed by EPA, Counsel for the Manzos raised three issues concerning why the lien should not have been filed:

(a) Counsel for the Manzos argued that the decision in Colorado v. Sunoco, Inc., Slip Op. No. 02-1014 (10th Cir. August 5, 2003) would indicate that the District of New Jersey's opinion in United States v. Manzo would be reversed on appeal to the Third Circuit Court of Appeals;

(b) The EPA lien rendered impossible any potential settlement by the Manzos of the State of New Jerseys claim against them for natural resource damages with respect to the Site; and

(c) The Manzos have filed a claim against third parties, including the United States, and EPA's perfection of the lien, prior to a determination of the amount of damages each party ultimately would be responsible for, was premature.[19]

All three of these issues are beyond the scope of this proceeding, i.e. a determination of whether EPA had a reasonable basis to believe that the statutory elements for the filing of a lien had been satisfied.

With respect to the first issue, as discussed above, the two District Court decisions in United States v. Manzo found that the Manzos were jointly and severally liable for the United States' response costs for OU2 and OU3 at the Site. The Court found "... that the statute of limitations does not bar compensation for operable units qualifying under the limitation even if the plaintiff is barred from seeking compensation for earlier operable units.[20]" Counsel for the Manzos maintains that the contrary ruling by the Tenth Circuit Court of Appeals in Colorado v.

Sunoco, Inc., to the effect that there was only one statute of limitations period and not separate periods for each operable unit, would likely result in a reversal of the U.S v. Manzo decisions on appeal.

The District Court opinions in U.S v. Manzo, however, constitute the law of the case. The presiding officer in an EPA lien hearing charged with determining if EPA had a reasonable basis for perfecting a lien has absolutely no basis, and indeed no jurisdiction, to question a decision of a United States District Court. Any appeal from the decisions of the District Court in United States v. Manzo is within the jurisdiction of the Court of Appeals for the Third Circuit; it is not within the purview of a lien hearing pursuant to the *Supplemental Guidance.*

With respect to the issue alleging that the EPA lien renders impossible the Manzos' potential settlement of the State of New Jersey's claim for natural resource damages, again the issue is irrelevant in a lien hearing pursuant to the *Supplemental Guidance.* The State's natural resource damages claim has been consolidated in the U.S. District Court litigation.[21] The EPA attorney stated at the lien hearing that EPA would be open to consideration of removing its lien in the future if it would allow a natural resources settlement to take place.[22] Presumably the natural resource damages issue ultimately will be resolved in the context of the litigation in the federal district court. This issue is equitable in nature, however, and again is not within the purview of a lien hearing pursuant to the *Supplemental Guidance.*

Finally, there is no merit to the claim by Counsel for the Manzos that the perfection of the lien is premature prior to a final determination of the respective liabilities of all potentially responsible parties at the Site. As discussed above, the U.S. District Court for the District of New Jersey has determined that the Manzos are jointly and severally liable for the United States response costs for OU2 and OU3. Section 107(l) of CERCLA provides that all costs for which a person is liable "shall constitute a lien in favor of the United States upon all real property and rights to such property which–

(A) belong to such person; and

(B) are subject to or affected by a removal or remedial action." 42 U.S.C. § 9607(l).

Since the Manzos have been adjudicated to be severally liable for the United States' response costs for OU2 and OU3, there is no basis either on the face of § 9607(l), or in the law of the case, to impose an additional requirement that the United States must await a final

determination of a conjectural apportionment of damages before a lien can be filed.

Such a delay is not contemplated by either the statute or the case law on CERCLA liens. One purpose of a lien is to ensure that there is property available to reimburse EPA for its unrecovered costs. The amount of the potential liability of the party against whose property a lien is to be filed need not be established with any exactitude prior to the filing of the lien. Furthermore, in light of this underlying purpose of a CERCLA lien, to protect the United States' ability to recover public funds expended on the cleanup of contamination on the property, as a matter of policy the Agency will consider perfecting a lien on subject property whenever settlement negotiations have not yet resulted in appropriate assurance that the United States will be able to recover the funds it has expended at the site. *Guidance*, Section IV.

## Conclusion

I find that the LFR supports a determination that EPA had a reasonable basis to perfect a lien under Section 107(l) of CERCLA. The Manzos have not submitted any information that would rebut EPA's claim that it had a reasonable basis to perfect a lien. Issues such as the potential for a United States District Court decision (which is the law of the case in this matter) to be overturned on appeal based upon a contrary precedent from another Circuit, are beyond the scope of this proceeding. Similarly, the Manzos' request that the lien be withdrawn to facilitate a settlement with the State of New Jersey does not reach the issue of the reasonable basis to file the lien, but rather addresses matters of discretion within the prerogative of Region 2's management. The decision to actually file a lien remains within the Regional Counsel's discretion. Finally, the issue alleging that the lien was prematurely filed is facially inconsistent with the statutory provision authorizing such liens.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA had a reasonable basis to perfect its lien. This Recommended Decision does not compel a determination that the lien should not be released; it merely establishes that there is a reasonable basis for leaving the lien in effect. This Recommended Decision does not bar EPA or the property owner from raising any claims or defenses in later proceedings; it is not a binding determination of liability. The recommendation has no preclusive effect and shall not be given

any deference or otherwise constitute evidence in subsequent proceedings.

Dated: June 8, 2004

George A. Shanahan
EPA Neutral Official

1. LFR Document 20.

2. LFR Document 8 at 1.

3. LFR Document 11, U.S. v. Manzo, 182 F.Supp.2d 385, 392-393 (D.N.J. 2000).

4. LFR Document 12, U.S. v. Manzo, Slip Op. Civ. Act. No. 97-289 (D.N.J. August 1, 2003) at 7, ftn. 8.

5. LFR Document 12, U.S. v. Manzo at 22.

6. LFR Document 12, U.S. v. Manzo at 35; LFR Document 11, U.S. v. Manzo at 413.

7. LFR Document 14.

8. LFR Document 15.

9. LFR Document 17.

10. Transcript, LFR Document 20, at 9-10.

11. LFR Document 11, U.S. v. Manzo at 397; Transcript, Document 20 at 7 and 10-12 .

12. Transcript, LFR Document 20 at 7-15.

13. LFR Document 12, U.S. v. Manzo at 8, ftn.9.

14. Transcript, LFR Document 20, at 10-12, 16.

15. Id.; LFR Document 11, U.S. v. Manzo at 399-404; Transcript, Document 20 at 12-14.

16. LFR Document 11 at 393.

17. The EPA attorney at the hearing represented that all costs contained in the cost summary were for OU2 and OU3. (Transcript, LFR Document 20 at 7-8). Counsel for the Manzos stated at the hearing that "... there is no doubt that the lien as presently filed in the amount of $12 million includes all the costs for operable Units 2 and 3 ...." (Transcript, LFR Document 20 at 14). The Lien Filing Record by itself, however, does not provide enough information to conclusively demonstrate that all of the costs represented in the cost summary total of $12,910,646.43 (as of June 10, 2003) are costs associated only with OU2 and OU3 and do not include any costs associated with OU1. For purposes of this proceeding, no inferences are to be drawn from the discussion of dollar amounts in this Recommended Decision with respect to the actual amount of OU2 and OU3 costs that remain to be proven in subsequent phases of the litigation.

18. LFR Document 11, U.S. v. Manzo at 403-404, ftn.15.

19. LFR Document 17.

20. LFR Document 11, U.S. v. Manzo at 402.

21. Transcript LFR Document 20 at 31.

22. Transcript LFR Document 20 at 20.