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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

IN THE MATTER OF: Lava Cap Mine Superfund Site	)))))))))	CERCLA Lien Proceeding

RECOMMENDED DECISION

This matter is a proceeding to determine whether the United States Environmental Protection Agency (EPA) has a reasonable basis to perfect liens pursuant to Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) on certain property in Nevada County, California, owned by Stephen P. Elder.

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 Superfund Branch Chief (the Region 9 official authorized to file liens) as to whether EPA has a reasonable basis to perfect the liens. 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 (*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.[1] 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.[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 liens under Section 107(l) of

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[1]CERCLA Section 107(l)(2); 42 U.S.C. § 9607(l)(2).

[2]*Id.*

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 the 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 liens should not be filed?

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. United States, 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.[3]

Legal Standard

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."[4] 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 . . .".[5]

Factual Background and Procedural History

The property at issue in this proceeding consists of three parcels of land located in the Mine Area Operable Unit, part of the Lava Cap Mine Superfund Site. The Operable Unit comprises seven land parcels totaling approximately 30 acres in the Sierra Nevada foothills, Nevada County,

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[3]Reardon, at 522.

[4]*Supplemental Guidance*, at p. 7.

[5]*Id.*

California. The property was once an active gold and silver mine, with gold and silver mining operations taking place from 1861 to 1943. In this mining process, ore was brought to the ground's surface from a series of subterranean shafts, where it was then crushed and processed. The native ore, in addition to gold and silver, contained naturally occurring arsenic and trace amounts of heavy metals such as lead. Following the processing of the ore, the arsenic and heavy metals remained in the finely ground mine tailings, a waste product resulting from the mining process.[6]

These waste tailings were disposed of in a ravine on the Lava Cap Mine site, and the ravine contained a natural stream channel known as Little Clipper Creek. The mill tailings pile was contained behind a 40-foot tall log dam until failures in 1979 and 1997 caused major releases of the arsenic-laden mill tailings into Little Clipper Creek. The January 1997 incident, which was the result of a major winter storm, released an estimated 10,000 cubic yards of tailings into Little Clipper Creek. This event led to removal actions by EPA in November 1997 and February 1998, during which the tailings pile at the mine property was stabilized to prevent further releases. Due to the remaining long-term cleanup issues posed by the escaped tailings, the Lava Cap Mine Site was subsequently listed on the Superfund National Priorities List in February 1999.[7]

EPA initiated a Remedial Investigation/Feasibility Study at the site in January 1999. Data collected during this investigation led to EPA's conclusion that the Site posed a risk to human health and the environment. Numerous samples collected by EPA and its contractor documented high concentrations of arsenic in water, soils, and sediment at the mine property and downstream areas. Arsenic is a "hazardous substance" as that term is defined under Section 101(14) of CERCLA. According to the record, arsenic was found onsite at levels as high as 34,000 parts per million (ppm).[8] Levels of arsenic found in residential wells onsite were found to be as high as 56.8 parts per billion (ppb).[9]

In July 2001 and April 2002, General Notice letters were sent out to Stephen Elder, the current property owner, and to the Lava Cap Gold Mining Corporation, Mr. Elder's now-defunct corporation. These letters, which were issued in conjunction with EPA's Potentially Responsible Party (PRP) search, notified Mr. Elder of the necessity for EPA to spend federal funds on the study and cleanup of the Site, costs for which he was potentially liable.[10]

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[6]*See generally,* Lien Filing Record (LFR), Document 4 (April 2003 Action Memorandum & September 2004 Record of Decision).

[7]LFR, Document 4 (April 2003 Action Memorandum).

[8]*Id.* According to the April 2003 Action Memorandum, the EPA Region 9 Non-Cancer Residential Preliminary Remediation Goal for arsenic is 22 ppm.

[9]*Id.* According to the April 2003 Action Memorandum, the federal Maximum Contaminant Level (MCL) for arsenic is 10 ppb.

[10]LFR, Document 3 (two separate letters).

From April 2003 to February 2004, EPA conducted a second removal action on the mine site, which included the offsite relocation of the occupants of two residences on the mine property and the installation of water filtration treatment units at three residences.[11]

In February 2004, EPA issued its Proposed Plan for cleanup of the Mine Area Operable Unit. It also held a public meeting on February 26, 2004, in Grass Valley, California, to present the plan and take comments. Following EPA's review of comments received at the meeting and during a public comment period which closed on March 26, 2004, a Record of Decision (ROD) was issued which contained EPA's selected remedy.[12]

On January 14, 2005, EPA served Mr. Elder with written notice of its intent to file liens on six parcels of land located in the Mine Area Operable Unit. These properties are located at 14484 Lava Cap Mine Road (Parcel 39-160-16); 14495 Lava Cap Mine Road (Parcel 39-160-25); 14499 Lava Cap Mine Road (Parcel 39-160-27); 11851 Lava Cap Mine Road (Parcel 39-160-28); 14515 Lava Cap Mine Road (Parcel 39-160-29); and 14501 Lava Cap Mine Road (Parcel 39-160-30). In its lien notices, EPA asserted that it had spent approximately $5.6 million thus far on the Lava Cap Mine site, and that it expected to spend "considerably more" to complete remediation actions on the site. It also provided Mr. Elder with 14 days to respond, and to request a meeting before a neutral EPA official, if he believed that EPA's determination to file the liens was in error.[13]

On January 27, 2005, Michael Brady, Esq., notified EPA that he represented Mr. Elder, and that his client believed that EPA's determination to file liens was in error. He also indicated that his client wished to meet with a neutral EPA official for the purpose of demonstrating that EPA did not have a reasonable basis to file the liens.[14]

Subsequently, Mr. Brady and Sara Goldsmith, EPA's counsel, resumed settlement discussions regarding Mr. Elder's potential liability at the Lava Cap Mine Superfund Site. In an effort to reach settlement, EPA agreed to stay the recording of liens on three of the parcels (39-160-16, 39-160-27, and 39-160-29). In addition, Ms. Goldsmith advised Mr. Brady to notify her, no later than February 22, 2005, if his client wished to have a meeting before a neutral EPA official with respect to the three remaining parcels.[15]

By letter dated February 22, 2005, Mr. Brady notified Ms. Goldsmith that his client did wish to meet with a neutral official regarding whether EPA had a reasonable basis to place liens on the

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[11]LFR, Document 4 (September 2004 Record of Decision).

[12]*Id.*

[13]LFR, Document 5 (three separate letters).

[14]LFR, Document 6.

[15]LFR, Document 7.

remaining parcels, 39-160-25 ("Parcel 25"), 39-160-28 ("Parcel 28"), and 39-160-30 ("Parcel 30").[16]

Accordingly, this meeting was scheduled for April 14, 2005, at 10:00 a.m., PST. Mr. Elder and his representative, Mr. Brady, advised me that they planned to participate in the conference by telephone. In the meantime, on April 12, 2005, Mr. Brady submitted a written statement on his client's behalf, setting forth arguments as to why EPA did not have a reasonable basis to place liens upon Mr. Elder's property.[17] On the morning of April 14, 2005, Mr. Brady advised me via telephone that he had a conflict with the scheduled meeting time. He also indicated that the only arguments he intended to present on his client's behalf were those contained in his April 12 letter, and that he had no additional evidence and/or argument to present at the meeting.[18]

As a result, I advised the parties that I would issue a recommended decision based solely upon the contents of the Lien Filing Record, which would include Mr. Brady's April 12, 2005 letter. In addition, I provided Ms. Goldsmith an opportunity to submit a written rebuttal to Mr. Brady's submission. I indicated that I would hold the record open until May 1, 2005, for this purpose.[19] On April 29, 2005, Ms. Goldsmith submitted a brief written rebuttal on behalf of EPA, which has been incorporated into the Lien Filing Record.[20]

Description of the Parcels at Issue

EPA seeks to perfect liens on three contiguous parcels in the seven-parcel area comprising the Mine Area Operable Unit. The seven parcels are located in Section 28, Township 16 North, Range 9 East, in an unincorporated area of Nevada County, California.[21] The following is a brief description of each parcel at issue:

Parcel 25 consists of approximately 33.6 acres, and is the largest parcel in the Mine Area Operable Unit. The record establishes that the current owner of this parcel is the Lava Cap Gold Mining Corporation (LCGMC). Mr. Elder has owned the parcel since approximately June 1989;

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[16]LFR, Document 8.

[17]LFR, Document 11.

[18]*See* my April 14, 2005 letter to the parties, at LFR, Document 12.

[19]*Id.* As I noted in the letter, the *Supplemental Guidance* provides for a recommended decision by the neutral EPA official in situations where the property owner timely responds to the notice of lien filing by providing written documentation purporting to show that the lien should not be perfected, but does not request a meeting. See *Supplemental Guidance,* at p. 6.

[20]LFR, Document 13.

[21]*See* LFR, Document 1, Final Title Search Report for the Lava Cap Mine Site.

in October 1998, he granted the parcel through a grant deed to LCGMC, his corporation.[22] The record also establishes that Parcel 25 contains the mine's process buildings and the main waste rock and tailings piles. It also contains one residence, which is currently unoccupied as a result of EPA's April 2003 response action. According to the September 2004 Record of Decision, the majority of the contaminated soil in the Mine Area Operable Unit exists on this parcel. The unoccupied residence relies on a residential well located on Parcel 39-160-16 for its water supply. According to data from EPA's monitoring program, water from this well has consistently exceeded 10 ppb, the MCL for arsenic.[23]

Parcel 28 is approximately 11 acres. The record establishes that the current owner of this parcel is Elder Development, Inc. Mr. Elder has owned the parcel since approximately June 1989; in April 2003, he granted the parcel through a grant deed to Elder Development, his corporation.[24] This parcel is located along part of the south border of Parcel 25. It contains the failed log dam and an additional quantity of waste tailings. There are no residences located on this parcel.[25]

Parcel 30 is approximately 8 acres, and is also located to the south of Parcel 25. The record establishes that Mr. Elder is the current owner of this parcel.[26] It contains one residence, currently unoccupied as a result of EPA's April 2003 response action. According to the 2004 Record of Decision, removable quantities of mine tailings are visible on this parcel. The unoccupied residence on this parcel relies on a residential well located on the parcel, and according to data from EPA's monitoring program, water from this well has consistently exceeded the MCL of 10 ppb.[27]

Discussion of the Factors for Review

(1) Notice of Potential Liability

There is no dispute that the property owner, Mr. Elder, was sent written notice by certified mail on January 14, 2005, advising him of potential liability and EPA's intent to perfect liens on the parcels at issue in this matter.[28]

(2) Property Owned by Potentially Liable Party

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[22]*Id.*

[23]LFR, Document 4 (September 2004 Record of Decision, at p. II-24).

[24]*Id.*

[25]LFR, Document 4 (September 2004 Record of Decision, at p. II-25).

[26]LFR, Document 1 (Final Title Report for the Lava Cap Mine Site).

[27]LFR, Document 4 (September 2004 Record of Decision, at pp. II-24-25).

[28]LFR, Document 5 (three separate letters).

There is no dispute as to Mr. Elder's ownership of the property at issue. Deed and title documents reflect his ownership of the three parcels, as discussed in the previous section. Further, Mr. Elder has not disputed his status as a PRP.

(3) Property Subject to Removal or Remedial Action

It is undisputed that EPA has undertaken remedial and/or removal actions on the three identified parcels.[29]

(4) United States Incurred Costs

There is no dispute that the United States incurred costs with respect to a response action on the property. In this case, EPA's Unreconciled Cost Summary for the Lava Cap Mine site (dated April 8, 2004) establishes that the Agency's total site costs for the period from September 1, 1997 through March 31, 2004 totaled approximately $5.1 million.[30]

(5) Other Information Showing Lien Should Not Be Filed

In the April 12, 2005 written submission, Mr. Elder posits five separate arguments in support of his assertion that EPA does not have a reasonable basis to file liens on the subject properties. First of all, I must emphasize that these allegations do not have any bearing on the reasonableness of EPA's belief that all the statutory elements for perfecting a lien have been satisfied. As I have noted, the scope of my review of EPA's proposal to file a notice of lien is limited to this inquiry. However, in an effort to provide the parties with as much information as possible, I will briefly address each argument set forth by Mr. Elder.

> *(a) EPA should not perfect the liens because the parcels subject to the liens are already mortgaged to their full post-remediation value.*

As stated in the *Guidance on Federal Superfund Liens,* OSWER Directive No. 9832.12, issued September 22, 1987 (*Guidance*),[31] one of the purposes of a CERCLA lien is to prevent unjust enrichment. It is usually reasonable to assume that the value of a site will increase and it will become more marketable as a result of EPA's response action(s). A statutory lien allows the federal government to recover the enhanced value of the property and thus prevent the owner from realizing

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[29]*See* LFR, Document 4 (October 1997 Action Memorandum; April 2003 Action Memorandum; and September 2004 Record of Decision).

[30]LFR, Document 2.

[31]The *Guidance on Federal Superfund Liens,* OSWER Directive No. 9832.12, issued September 22, 1987, was supplemented, not superseded, by the *Supplemental Guidance on Federal Superfund Liens,* OSWER Directive No. 9832.12-1a, issued July 29, 1993.

a windfall from cleanup and restoration activities.[32]

Thus, Mr. Elder seems to be arguing that he does not expect to receive any "windfall" as a result of the enhanced value of his property due to EPA's cleanup activities, since his property is already fully mortgaged. The *Guidance* notes that "it may not be worthwhile" to file a lien where existing perfected non-Superfund liens on the property equal or exceed the value of the property as enhanced by the Superfund expenditures. However, it goes on to state that in some cases, a foreclosing party may be liable under CERCLA Section 107, and further, that a lien notice should be filed as early as possible where there is a likelihood that the defendant owner may file for bankruptcy.[33]

More importantly, I find that Mr. Elder's argument in this regard addresses a policy question, and not the legal prerequisites for perfecting a lien under Section 107(l) of CERCLA. Determination of whether a lien is "worthwhile" given the property's mortgaged state is more appropriately addressed to the discretion of EPA's management.

(b) EPA should not perfect the liens because the act of recording the liens will make it impossible for Mr. Elder to secure any additional financing for future business projects.

Here, Mr. Brady asserts that his client is a "60 year old real estate developer with limited assets and minimal retirement savings," and that if EPA attaches a lien to his property, he will not be able to secure any additional financing for future business opportunities and will essentially be "put out of business." However, I find that the potential adverse financial consequences to Mr. Elder of a lien filing are not relevant to the issue of whether EPA is reasonable in believing that such a lien should be filed. In fact, the *Guidance* states that liens are particularly beneficial to the government's efforts to recover costs in situations such as these where the property is the chief or substantial asset of the responsible property owner, or where there is a likelihood that the owner may file for bankruptcy.[34]

(c) EPA should not perfect the liens because doing so will negatively affect Mr. Elder's ability to pay any future settlement with EPA.

Here, it is argued that the liens would result in Mr. Elder's income being "cut off," and he would consequently have difficulty providing EPA with any monetary compensation as part of a settlement. Again, however, I find that this argument has no bearing on whether EPA has a reasonable basis for believing that the statutory prerequisites for filing a lien have been met. Rather, the determination of whether a lien should be filed under these circumstances, as well as the extent

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[32]*Guidance,* at p. 2, *citing* 131 Cong. Rec. S11580 (statement of Senator Stafford) (September 17, 1985); *also citing,* House Energy and Commerce Report on H.R. 2817, page 40 (indicating that the lien provision was intended to prevent unjust enrichment).

[33]*Guidance,* at pp. 3-4.

[34]*Id.*

to which EPA will work out a financial arrangement with a property owner, is a matter committed to the discretion of EPA's management.

(d) EPA should not perfect the liens because EPA and Mr. Elder are currently conducting on-going settlement negotiations and EPA should await the outcome of these negotiations.

In this case, the record establishes that EPA filed notice of the liens only after settlement negotiations, which had been ongoing for at least two years, were not productive. As a matter of policy, the Agency will consider perfecting a lien 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.[35] Further, delay by EPA in filing the lien risks the impairment of EPA's ability to recover the costs. Therefore, I find that the filing of a lien should not be delayed simply because settlement negotiations are still continuing.

(e) EPA should not perfect the liens because Mr. Elder does not intend to sell the parcels; and *(f) EPA should not perfect the liens because Mr. Elder is not going to declare bankruptcy.*

The *Guidance* notes that filing a CERCLA lien is particularly beneficial in a number of situations. One of the situations listed is when the property owner "plans to sell the property," and another is when "there is a likelihood that the defendant owner may file for bankruptcy."[36] However, the Guidance also lists other situations in which a lien is recommended, such as where the property is the chief or substantial asset of the PRP, where the property has substantial monetary value, or where the value of the property will increase significantly as a result of removal or remedial work.[37]

More importantly, the determination of whether a lien would be "beneficial" in a given situation is a discretionary decision for EPA management, not a matter that has any bearing upon whether or not EPA has a reasonable belief that the statutory prerequisites for lien filing have been met.

Conclusion

I find that the LFR supports a determination that EPA has a reasonable basis to perfect its liens under Section 107(l) of CERCLA. Mr. Elder has not submitted any information that would rebut EPA's claim that it has a reasonable basis to perfect the liens. The equitable considerations that

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[35] *See* the *Guidance,* Section IV.

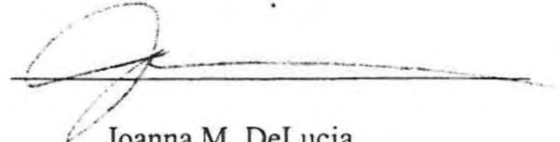
[36] Imminent bankruptcy is actually a criterion to be considered by EPA in determining whether to perfect a lien <u>prior</u> to offering a meeting, which was not the case in this proceeding. *See* the *Supplemental Guidance,* at pp. 5-6.

[37] *Guidance,* pp. 3-4.

he has raised cannot be addressed in a probable cause determination; rather, consideration of these arguments is a matter of discretion within the prerogative of Region 9's management. The decision to actually file a lien remains within the discretion of the Superfund Branch Chief.

The scope of this proceeding is narrowly limited to the issue of whether or not EPA has a reasonable basis to perfect the liens. This Recommended Decision does not compel the filing of these liens; it merely establishes that there is a reasonable basis for doing so. 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: May 20, 2005



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