UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	)	
	)	
Paul J. Mraz, owner of:	)	
	)	
Spectron, Inc.	)	**Docket No. CERC-III-1999-005L**
Superfund Site, Elkton, Maryland	)	
	)	
	)	

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 III ("EPA") has a reasonable basis to perfect a lien pursuant to Section 107(*l*) of CERCLA on the "Spectron, Inc. Superfund Site" (or "Spectron Site"), a Superfund Site in Elkton, Maryland. In this Recommended Decision I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.

This proceeding is being conducted in accordance with EPA's *Supplemental Guidance on Federal Superfund Liens ("Supplemental Guidance"),* OSWER Directive No. 9832.12-1a, issued July 29, 1993. EPA gave notice to Paul J. Mraz ("the property owner") by letter dated March 19, 1990, that he was potentially liable for the costs to be incurred or already incurred at this property and by letter dated July 20, 1999, which provided him "Notice of Opportunity to be Heard and Notice of Federal Lien for the Spectron, Inc. Superfund Site." By letter dated July 26, 1999 Mr. Mraz requested an informal hearing on the matter. On October 22, 2002, the Regional Counsel of EPA, Region III issued an Order of Assignment designating the undersigned as the neutral EPA official to conduct this proceeding and to make a recommendation as to whether EPA has a reasonable basis to perfect the lien. On April 29, 2003, a conference call was held with Mr. Mraz, who is pro se, and representatives of EPA. At that time, the issues of this case was discussed in accordance with the *Supplemental Guidance.* An informal lien hearing was conducted on June 26, 2003. A court reporter attended and transcribed notes of the informal hearing have been added to the Lien Filing Record ("LFR") as recommended by the *Supplemental Guidance.*

At the conclusion of the informal lien hearing, each party was given the opportunity to brief the matter. An undated Memorandum of Paul J. Mraz, Owner, in Opposition to Perfection of Lien on the Spectron Superfund Site ("Opposition Memorandum") was received in late August, 2003. EPA Region III's Response to Memorandum of Paul J. Mraz in Opposition to Perfection of Lien on the Spectron Superfund Site is dated September 25, 2003 ("EPA's Response Brief"). I have taken the entire LFR into consideration in writing this Recommended Decision.

I. SCOPE AND STANDARD OF REVIEW

The *Supplemental Guidance* sets forth that 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, must be considered. "Superfund lien proceedings have been described as "probable cause" hearings. See, e.g., Harbucks, Inc. Revere Chemical Site, 1995 WL 1080544 (EPA 1994) (probable cause determination). This characterization follows the reasoning in Reardon v. United States, 947 F.2d 1509 (1st Cir. 1991)." *Supplemental Guidance* which states, in relevant part:

> [T]he sole issue [in the proceeding] 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 [proceeding] 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...(Guidance at pg. 8).

II. RELEVANT LEGAL CRITERIA

Section 107(*l*)(1) of CERCLA, 42 U.S.C. § 9607(*l*)(1), provides that a lien in favor of the United States arises with respect to costs and damages for which a person is liable under Section 107(a), upon all property which belongs to the person liable and which is subject to, or affected by, a removal or remedial action. Section 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.

In addition to the statutory criteria, the following specific factors set forth in the *Supplemental Guidance* will also be considered. The 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?

III. RELEVANT FACTS

The Spectron Site is approximately eight acres in size and is located at 111 Providence Road, Elkton, Maryland, in a semi-rural residential area. Providence Road forms the southern and eastern boundaries of the Site. A wooded area and residential homes form the northern and western boundaries. A stream, Little Elk Creek, bisects the Site from northwest to southeast. This stream, both on and adjacent to the Site, is used by local residents for fishing. Chemical handling, processing and storage facilities are located on the southwest portion of the Site. The Site office and parking area are located across the creek on the northeast portion of the Site. (LFR 28 at p. 2).

Paul J. Mraz has been the owner of the Spectron site since 1981, and was so, at the time of the hearing. (LFR 2 and Tr. at pg. 4). Mr. Mraz owned and/or operated a solvent reclamation businesses on the property, under the names Galaxy, Inc., Solvent Distillers, Inc., and Spectron, Inc., from approximately 1961 until 1988. (LFR 17 at p. 2 and Mraz Ex. 10). During the facility's operations, hazardous substances were disposed of at the facility. (LFR 17 at p. 2 and Mraz Ex. 10 and Tr. at pp. 34-35).

When Spectron ceased operating in August 1988 many of the substances which had been received, generated and used in its operations, were left onsite. On April 12, 1989, EPA, at the request of the Maryland Department of the Environment ("MDE"), conducted an emergency assessment of the conditions at the Site. EPA found approximately 1300 drums and 62 tanks containing substances onsite. (LFR 28 at pg. 3).

On May 24, 1989, an EPA On-Scene Coordinator ("OSC") began a removal action at the Site, using CERCLA authority delegated to him. The actions taken included commencement of 24 hour site security and fire watch and containment of leaks in drums and tanks onsite. On June 1, 1989, the Regional Administrator of EPA Region III approved the expenditure of funds, pursuant to Section 104 of CERCLA, to address the releases and threat of releases at the Site. (LFR 28 at pg. 5).

In July 1989, Spectron, Inc. entered into a Stipulation with EPA, allowing EPA, its contractors and any other persons under the Administrative Order ("AO") with EPA, to conduct the necessary response action at the Site. On several occasions, members of the Mraz family appeared at the Site requesting access to the site or seeking to remove materials or equipment from the Site. (LFR 28 at pg. 7).

According to an Administrative Order (Docket No. III-90-10-DC), dated February 1, 1990, the hazardous substances present onsite and released offsite include human and environmental toxins, as well as known or suspected human carcinogens. (LFR 28 at pg. 5).

Another Administrative Order (Docket No. III-90-20-DC) was issued on April 17, 1990, "to ensure that a proper removal action, as defined in Section 101(23) of CERCLA, 42 U.S.C.

§ 9601(23), was conducted and carried out without interruption, to abate, mitigate and /or eliminate the release or threat of release of hazardous substances at the Site, and to properly dispose of the hazardous substances located" on the Site. This Order gave Spectron, Inc. and the Mrazs' "the opportunity to remove certain materials from the Site prior to the time EPA or its authorized representatives were to remove or dispose of those materials and that, in the event they did remove those materials, the removal was to be done consistent with the NCP and in a manner protective of public health and welfare." Spectron, Inc. and the Mrazs' were given this same opportunity in the first AO, dated February 1, 1990. (LFR 29 at pg. 7).

It is not in dispute that costs were incurred during the implementation of these AOs.

IV. DISCUSSION

The issue is whether the information contained in the LFR supports the position that EPA has a reasonable basis to perfect a lien. In order to make that assessment both statutory and guidance factors will be considered.

During the informal status conference call on April 29, 2003, Mr. Mraz stipulated to four of the five factors set forth in the "*Supplemental Guidance*," dated July 29, 1993, and found on page 7, as follows:

(1) Mr. Mraz is the owner of the property located at 109-111 Providence Road (LFR 2; Transcript ("Tr.") at pp. 4, 7-8);

(2) Mr. Mraz was sent notice of potential liability by certified mail (LFR 8; Tr. at pp. 7-8);

(3) the property is subject to or affected by a removal or remedial action (e.g. LFR 15, 16, 17; Tr. at pp. 7-8) and

(4) the United States has incurred costs with respect to a response action under the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA") (LFR 4 and 5; Tr. at pp. 7-8). (EPA's Response Brief at p. 1).

The remaining factor for consideration, "(5) Does the record contain any other information which is sufficient to show that the lien notice should not be filed?" was not stipulated to by Mr. Mraz. Notwithstanding his stipulations, Mr. Mraz, in his brief, presented arguments on each of the above mentioned factors. Each argument will be discussed below.

First, Mr. Mraz argues that he "is not a 'covered person' under 42 U.S.C. § 9607 (a)(1), (2), (3) and (4)." In his Opposition Memorandum, Mr. Mraz claims that he was the owner and operator until October 31, 1986, his last day on the site. On page 2 of this same document, he

explains that "pursuant to the terms of a Settlement Agreement among the MDE, Spectron, and FLACC (Families Linked Against Chemical Contamination) and the understanding among them, owner's incidents of ownership - namely, his right to entry on the site and dominion and control over it - and his right to operate the Spectron facility were absolutely removed from him." He states that he was away from the Spectron Site for 2 years and 7 months.

EPA asserts that Mr. Mraz is a "covered person" liable under Section 9607(a)(1) and is, therefore, properly subject to the lien provision of Section 9607(*l*). EPA contends that, as a current owner of the property, Mr. Mraz is a liable person under Section 9607(a)(1). See State of New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985) which states that "section 9607(a)(1) applies to all current owners and operators, while section 9607(a)(2) primarily covers prior owners and operators. Moreover, section 9607(a)(2)'s scope is more limited than that of section 9607(a)(1). Prior owners and operators are liable only if they owned or operated the facility 'at the time of disposal of any hazardous substance'; this limitation does not apply to current owners..."

EPA contends that the case law is clear that Section 9607(a)(1) must be read in the disjunctive, such that an owner *or* operator of a facility is liable under CERCLA, consistent with the legislative history and intent of Superfund. See United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990); United States v. Maryland Bank & Trust, 623 F. Supp. 573 (D. Md. 1986); City of Toledo v. Beazer Mat'ls and Services, Inc., 923 F.Supp. 1013 (N.D. Oh. 1996)(citing 3 AM Int'l v. International Forging Equip. Corp., 982 F.2d 989, 997 (6th Cir. 1993). In his Opposition Memorandum, Mr. Mraz argues that the meaning of this particular section of the Statute is that the owner must be both the owner and operator simultaneously.

According to the State of New York v. Shore Realty Corp, (supra) the current owner is responsible and liable. Regardless of Mr. Mraz's claim that he did not "own" the property for 2 years and 7 months (during the time of the release of hazardous substances), at no time did he give up title to the property. He was and is the owner and therefore is liable under section 9607(a)(2). Upon review of all documents presented to me, I find that Mr. Mraz is a "covered person" and is therefore liable under CERCLA, Section 9607(*l*).

Mr. Mraz's second argument is that "EPA is barred from perfecting a lien on the owner's property by the doctrine of Res Judicata and Collateral Estoppel." He claims that the 1982 Settlement Decree between U.S. EPA and Paul Mraz and Spectron, Inc. prohibits EPA from pursuing another claim, based on the same issues, under the doctrine of *res judicata*. Mr. Mraz cites the General Provisions Section VII(H), p.21, titled "Binding Effect" of the Settlement Decree which states: "[T]he provision of this Decree shall apply to and be binding upon the Defendants, their officers, ... This Decree shall have Res Judicata effect." He goes on to argue that the lien proceeding is a form of litigation. He contends *res judicata* applies because the same issues and same parties are involved in this instant action.

EPA, on the other hand, argues that *res judicata* and *collateral estoppel* do not apply to this case. EPA argues that this is an informal process, one which does not involve "litigation." In addition, the Settlement Decree was signed in 1982, four years before CERCLA came into effect. EPA contends that the provision regarding *res judicata* in the Settlement Decree did not intend to apply to laws which did not exist at the time. See United States v. Fisher, 864 F.2d 434, 439 (7th Cir. 1988)(Rejecting facility owner's *res judicata* argument that a 1982 RCRA Decree barred EPA from bringing a subsequent lawsuit for site access under CERCLA Section 104(e), which was enacted with SARA in 1986).

In their Response Brief, EPA asserts that "Mr. Mraz misquotes EPA as stating that the present action is a "cost recovery" action. [Opposition Memorandum at p. 6]. To the contrary, EPA pointed out at the Informal Hearing that this lien proceeding is *not* a cost recovery action, which would involve a lawsuit against Mr. Mraz, filed in federal District Court, pursuant to CERCLA § 107(a). [Tr. at p. 37.]" (EPA's Response Brief at p. 4).

As set forth on page 4 of EPA's Response Brief,

> [T]he 1982 Settlement Decree referenced by Mr. Mraz, which was entered into under the Resource Conservation and Recovery Act, 42 U.S.C. § 6973 ("RCRA"), expressly provided for EPA to take additional action if circumstances changed. Specifically, the Decree provided that '[t]he United States and/or EPA may take other legal and /or administrative action to enforce compliance with applicable laws and/or regulations not resolved or addressed in this Decree. This Decree shall not limit the rights of the United States regarding claims which arise or exist subsequent to the entry of this Decree.' [LFR 21, Settlement Decree at VII, ¶ D]. When EPA initiated its removal response action in 1989, circumstances, in fact, had changed significantly. Specifically, Spectron, Inc. was bankrupt and had been shut down, and Mr. Mraz was in default of the Decree for failure to provide an adequate performance bond [Mraz Ex. 11], leaving more than 1,000 unattended drums of hazardous substances and flammable liquids at the Property. [LFR 12 at p. 3]. It is inconceivable that the Settlement Decree's reference to res judicata concerning parties bound [LFR 21, Settlement Decree at VII, ¶ H] could preclude future EPA actions to protect the public from the releases and threat of releases at the Site, as Mr. Mraz contends, especially in light of the express reservations of the Decree discussed above. See Keith v. Aldridge, 900 F.2d 736, 740-41 (4th Cir. 1990)(claim preclusion will not apply if parties to a consent judgment intended to settle only one part of a single claim and intended to leave another part open for future litigation).

It is EPA's contention that, based on their foregoing argument, *collateral estoppel* is inapplicable and irrelevant to the instant lien proceeding. In light of the above, I conclude that the Agency's position is correct.

Mr. Mraz's third argument is that "Paul Mraz is not liable under Subsection (a) of 42 U.S.C. § 9607 because he can establish by a preponderance of the evidence that any alleged release or threat of a hazardous substance and the damage resulting therefrom were caused solely by the act or omission of a third party not connected with the Owner or Spectron." Mr. Mraz states, in his Opposition Memorandum, that members of the Waste Management Administration of State of Maryland, intentionally designed to shut Spectron down. According to Mr. Mraz, the Spectron site would have been completely remediated at this time by procedures set in motion in the early 1980's in compliance with the terms of the Federal District Court's Settlement Decree. Essentially, this argument is the third party defense, also known as the " innocent landowner defense."

As set forth in the cases cited by EPA, one must be able to "demonstrate by a preponderance of the evidence that a 'totally unrelated third party is the sole cause of the release'" in order to escape liability under CERCLA's third party defense. United States v. Maryland Sand, Gravel and Stone, 1994 WL 541069, *8 (D. Md. 1994)(quoting O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988)). The innocent landowner defense found at CERCLA 107(b)(3) provides, in pertinent part, that,

> [T]here shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substances and the damages resulting therefrom were caused solely by ...(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...

This defense absolves from liability a current owner who can demonstrate that the release of hazardous substances was caused by a third party with no contractual relationship to the current owner.

According to EPA, the contrary is true. On page 5 of EPA's Response Brief, they point out that "Mr. Mraz has admitted that groundwater contamination occurred at the facility during the time he was the owner and operator there [Tr. at pp. 33-35; Mraz Ex. 10]..." Mr. Mraz claims that the third party involved were officials with the State of Maryland's Department of Environment, etc. EPA states, on page 6 of its Response Brief, that "[W]hen EPA conducted its Emergency Response Action in 1989, it found an unmanned solvent reclamation facility with improperly stored hazardous solvents, including over 1,000 drums and tanks, many of which were leaking and/or deteriorated; an unlined evaporation lagoon; and evidence of groundwater contamination at the Site. [See LFR 17, Action Memorandum at pp. 2-3]. Moreover, the Site had a history of contamination and environmental violations long before EPA first initiated its removal action. [LFR 17 at p. 2]."

Other than conclusory statements, Mr. Mraz has provided no evidence in support of his assertion. Taking into consideration all of the above, I find that Mr. Mraz has not established by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by a third party. Mr. Mraz is not an innocent landowner and therefore, this is not a valid defense.

The fourth argument Mr. Mraz puts forth is that "the EPA does not have a reasonable basis for believing the statutory elements for perfecting a lien have been satisfied." He claims, in his brief, that "...Spectron was allowed to propose a removal program to be conducted by its own personnel and a deadline was imposed for presenting the plan. Well before the deadline arrived the Spectron plans were brushed aside and the EPA contractors were brought in to commence their work." (Opposition Memorandum at p. 10).

Mr. Mraz claims that Spectron personnel were engaged in a successful removal program before EPA's takeover. According to Mr. Mraz, he and other former employees "observed the EPA contractors pumping liquid materials out of tank storage secondary containment structures directly into the stream after heavy rains,..." Mr. Mraz's argument is that Spectron did not cause further contamination, but that EPA contractors did. (Opposition Memorandum at p. 10).

While Mr. Mraz acknowledges that EPA claims to have found new contamination from leaking drums, etc., Mr. Mraz contends that the Settlement Decree bars against future claims. His argument continues that "EPA had no reasonable basis to be on the site, had no reasonable basis to proceed with first a 'removal' and then a 'remediation' in light of the minuscule remnants of contamination that remained there when they arrived..." (Opposition Memorandum at p. 11).

EPA believes that its justification for its response action at the Site is well documented in the LFR (LFR 12 at p. 3 and LFR 17 at pp. 2-4). However, EPA cites the following case to support its argument that Mr. Mraz's challenges to the reasonableness of EPA's response action are not properly raised in this proceeding. In the Matter of Rogers Fibre Mill Superfund Site, 2001 EPA RJO LEXIS 15, at p. 4 (Reg. I, July 27, 2001), Region I's Regional Judicial Officer found that: "[T]he sole issue in this matter is whether EPA has a reasonable basis to believe that the statutory elements for perfecting a lien were satisfied. Under this process, issues not relating to the proposed perfection of a lien, including issues such as the remedy selected, the contents of a remedy selection and the selection of documents such as action memorandums, should not be considered by the Agency neutral. Supplemental Guidance at 8. Therefore, the issue of whether the actions taken and costs incurred by EPA were necessary and reasonable are not within the scope of this proceeding." Based on the above, I conclude that EPA's choice of response actions is not properly before me in this lien proceeding.

Mr. Mraz's fifth argument is that "the owner has not been unjustly enriched as a result of the EPA activities conducted on the Site." Mr. Mraz states that his buildings have been destroyed and his machinery removed. His argument is that "the owner would not be enriched

were the EPA to leave the scene without perfecting a lien on the property." (Opposition Memorandum at pp. 11-12).

EPA disagrees with Mr. Mraz's argument. It argues that Mr. Mraz could, after several more years of cleanup, benefit from EPA's efforts. As stated in EPA's Response brief, "[W]hile it is true that the CERCLA lien provision was enacted to allow EPA 'to recover the enhanced value of property, and thus prevent the owner from realizing a windfall from cleanup and restoration activities,' In the Matter of Copley Square Plaza Site, 1997 EPA RJO LEXIS 15, p. 4 (Reg. 5, June 5, 1997)(quoting 131 Cong. Rec. S11580 (Statement of Sen. Stafford)(September 17, 1985)), the present valuelessness of the owner's property has no bearing on the sole issue to be determined by the Lien Hearing, which is whether EPA has a reasonable basis to perfect the lien. See id.; In the Matter of Rogers Fibre Mill Superfund Site, 2001 EPA RJO LEXIS 15, p. 4 (Reg. 1, July 27, 2001). Presuming that EPA has a reasonable basis to perfect the lien, it is within EPA's discretion whether to protect its investment and to actually perfect. Id." (EPA's Response Brief at p. 7).

Regardless of the value of the property, the issue here is whether or not EPA has a reasonable basis to perfect the lien. Based on the findings above, I conclude that EPA has a reasonable basis to believe that the statutory elements to perfect the lien are satisfied.[1] 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: March 10, 2005

Renée Sarajian
Regional Judicial Officer
U.S. EPA, Region III

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[1]On June 10, 2004, Humane Zia, Attorney for EPA, Region III, submitted a letter which stated that EPA recently became aware that Paul Mraz transferred the subject Site property to "The Paul J. Mraz Irrevocable Retirement Trust Dtd 06/13/96" ("the Trust") on May 11, 2004, while a decision in the underlying matter was pending. EPA subsequently sent notice of potential liability to the Trust on May 26, 2004, and perfected its lien against the Trust on May 28, 2004, in the Circuit Court of Cecil County, Maryland and the United States District Court for the District of Maryland. On June 9, 2004 a post-perfection Notice and Opportunity to be Heard concerning the subject property was mailed to The Paul J. Mraz Irrevocable Retirement Trust (Mr. Christopher K. Mraz and John R. Mraz, Trustees), the current owner of the property. Mr. Paul Mraz responded to the perfection of the lien by letter dated June 23, 2004.