



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

May 28, 2002

MEMORANDUM

SUBJECT: Use of Federal Superfund Liens to Secure Response Costs

FROM: Barry Breen, Director /s/  
Office of Site Remediation Enforcement

TO: Directors, Waste Management Divisions, Regions I-X  
Regional Counsel, Regions I-X

**1. Purpose**

The purpose of this memorandum is to encourage the use of liens in appropriate Superfund enforcement cases pursuant to CERCLA Section 107(l). The use of liens to enhance Superfund cost recovery efforts can be an efficient enforcement tool, especially in cases where settlement discussions to date have not been productive. As described below, filing notice of a lien (i.e., “perfecting” a lien) can be a straight-forward legal matter and may provide an avenue to secure otherwise unattainable funds. This memorandum re-emphasizes the principles stated in two prior guidance documents: the 1987 “Guidance on Federal Superfund Liens” and the 1993 “Supplemental Guidance on Federal Superfund Liens.” *See* attached guidance documents.

**2. Importance of Superfund Liens/Regional Experiences**

Regional staff should seriously consider and analyze the use of liens at every site in order to protect the government's financial interest where reimbursement of costs incurred during cleanup may otherwise be difficult or impossible, and balance the prospect of more certain recovery for the government with the resources necessary to perfect the lien.

Regions 3 and 10 have centralized the process for filing notice of liens, with very positive results, by designating a single person to facilitate and encourage lien filing. Both regions have reached a number of favorable settlements that probably would not have occurred without liens. Region 5 brought the Agency's first Section 107(l)(4) *in rem* action in district court to force the sale of a piece of property for recovery of cleanup costs. *In rem* actions are now used more frequently

when the property is the owner's only real asset and EPA has unrecovered cleanup costs. Liens can be very beneficial because they:

- provide leverage to encourage settlement discussions at sites where negotiations have stalled or never taken place, especially where recalcitrant property owners may sell the clean portion of their land and divest their assets in an effort to avoid reimbursing EPA for the costs of cleanup;
- secure EPA's financial interest should the PRP file for bankruptcy or sell the property (the lien creates a secured instead of unsecured interest). It is important to note that once the owner of the affected property files for bankruptcy, EPA is barred from filing a lien;
- provide public transparency that a property is subject to a lien for CERCLA liability; and,
- encourage property owners to undertake further cleanup or freely allow access to others (EPA or performing PRPs) to undertake cleanup.

There are numerous demonstrated examples of the benefits described above. In one case, an owner offered to pay for the removal performed by Region 3 from the sale of the property's clean parcels, but then pocketed the money from the sales and for years refused to negotiate, claiming an inability to pay. Region 3 then sent notice of its intent to perfect a lien on all parcels and the threat of the lien ultimately resulted in the owner's agreement to market the parcels at full market value, with EPA receiving 60% of the proceeds, expected to be \$1 - 1.3 million, for reimbursement of its cleanup costs. In another example where an owner was uncooperative during negotiations, Region 3's persistence in filing the lien and willingness to proceed to the lien hearing over the owner's early objections, resulted in a settlement with the owner to recover over \$1 million of EPA's past cleanup costs. In Region 1, a property was sold at an auction conducted by the Bankruptcy Court for almost \$24 million after EPA prevailed in its *in rem* action in District Court. EPA recovered approximately \$10 million of the \$24 million in satisfaction of the 107(l) lien.

### **3. Prerequisites for Filing a Lien**

Section 107(l) provides that all costs for which a person is liable to the United States 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. As stated in the lien guidance documents, the Superfund lien applies to all property owned by the potentially responsible party upon which the response action has been taken, not just the portion of the property directly affected by cleanup activities. The lien applies to all future costs incurred at the site. Section 107(l)(2) states that EPA's federal lien arises at the later of: (A) the time costs are first incurred by the United States with respect to a response action, and (B) the time that the person is provided (by certified or registered mail) written notice of potential liability.

#### **4. Process for Filing a Lien**

The July 29, 1993 lien guidance covers the process for filing a lien step by step, from the “record of decision” to file a lien, including the assembly of appropriate documents, to the notice of intent to perfect the lien. It then discusses post-filing procedures, including the property owner’s opportunity to respond and the procedures involved in the actual meeting with the owner before a neutral EPA official. Please refer to the 1993 guidance if you have questions regarding lien filing procedures (<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/guide-liens-rpt.pdf>), or contact Bob Roberts at 202-564-4267, in the Office of Site Remediation Enforcement’s Regional Support Division, with any case-specific questions regarding Section 107(l) liens.

#### **5. Relationship to “The Small Business Liability Relief and Brownfields Revitalization Act”**

On January 11, 2002, the President signed H.R. 2869, “The Small Business Liability Relief and Brownfields Revitalization Act.” The new legislation creates an additional “windfall lien” applicable only to persons who purchase property after January 11, 2002, and who meet certain other conditions. Unlike the traditional 107(l) lien, the new windfall lien is limited to the increase in fair market value of the property attributable to the response action. We expect to implement the provisions in harmony with one another, seeking good stewardship of public funds at NPL and removal sites, as well as encouraging re-development wherever possible. This memorandum does not discuss the new lien under Section 107(r) of CERCLA. EPA is exploring possible guidance on the new windfall lien and might issue such guidance at a later date. Also, this memorandum is not intended to narrow the scope of the new prospective purchaser exemption in Section 107(r). For case-specific advice regarding Section 107(l) liens as they relate to “bona fide prospective purchasers,” regional staff may contact Greg Madden, at 202-564-4229, in OSRE’s Policy and Program Evaluation Division, or Bob Roberts, at 202-564-4267.

attachment (2)

cc: Mike Cook, OERR  
Bruce Gelber, DOJ