



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

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

January 8, 2008

MEMORANDUM

SUBJECT: Windfall Lien Administrative Procedures

FROM: Susan E. Bromm, Director /s/
Office of Site Remediation Enforcement

TO: Superfund Division Directors, Regions I-X
Regional Counsel, Regions I-X

I. Introduction

This memorandum discusses the United States Environmental Protection Agency's ("EPA" or "Agency") implementation of Section 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9607(r). Section 107(r) is known as the "windfall lien" provision of the Small Business Liability Relief and Brownfields Revitalization Act ("Brownfields Amendments"), P.L. 107-118, that amended CERCLA in 2002. EPA has previously issued interim guidance explaining how EPA will generally exercise its enforcement discretion in the context of the new CERCLA § 107(r) windfall lien provision. "Interim Enforcement Discretion Policy Concerning 'Windfall Liens' Under Section 107(r) of CERCLA," Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement (OSRE), EPA, and Bruce S. Gelber, Chief, Environmental Enforcement Section, United States Department of Justice (DOJ), July 16, 2003 (hereinafter "Interim Windfall Lien policy").¹

Today's guidance builds on the Interim Windfall Lien policy by providing EPA guidance on the timing for filing notice of a windfall lien on a property after acquisition by a bona fide prospective purchaser (BFPP)² and the EPA administrative procedures that should accompany filing a windfall lien notice.

1 The Interim Windfall Lien policy can be found on the Internet at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>.

2 In order to qualify as a statutorily defined "bona fide prospective purchaser," an entity must meet certain specified criteria. See CERCLA §§ 107(r) and 101(40) (A)-(H). EPA has issued other guidances discussing the bona fide prospective purchaser criteria. See "Bona Fide Prospective Purchasers and the New Amendments to CERCLA," Memorandum from Barry Breen, Director, Office of Site Remediation Enforcement, U.S. EPA, May 31, 2002; "Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner, or Innocent Landowner Limitations on CERCLA Liability ("Common

This memorandum is intended solely for the guidance of EPA employees and it creates no substantive rights for any persons. It is not a regulation and does not impose legal obligations. EPA will apply this guidance only to the extent appropriate based on the facts. In addition, the word “should” as used in this document is intended solely to recommend or suggest and does not connote a requirement.

II. Background

Under CERCLA, there are two lien provisions, CERCLA § 107(l) and CERCLA § 107(r). The latter is the windfall lien and is the focus of this guidance. EPA has previously issued guidances on the two different CERCLA liens and those policies are not superseded by this guidance. Rather, EPA’s earlier CERCLA lien policies provide the foundation for this guidance.

Prior to the issuance of the Interim Windfall Lien policy, EPA issued guidances concerning the implementation of the pre-Brownfields Amendments lien authority under CERCLA § 107(l).³ Those guidances identified the circumstances and the procedures for filing notice of a CERCLA § 107(l) lien – including the procedures EPA should take internally to ensure that a property owner has been notified and has an opportunity to be heard when EPA intends to file, or has filed, a lien on the owner’s property. Regions should continue to file CERCLA § 107(l) liens on properties owned by potentially responsible parties (PRPs) consistent with those earlier guidances.

Under the newer CERCLA § 107(r), a BFPP is not liable as an owner or operator for CERCLA response costs. However, the property a BFPP acquires may be subject to a windfall lien if the United States has unrecovered response costs and a response action by the United States has increased the fair market value of the property above the fair market value of the property as it existed before the response action. On July 16, 2003, EPA and DOJ jointly issued

Elements”),” Memorandum from Susan E. Bromm, Director, Office of Site Remediation Enforcement, U.S. EPA, March 6, 2003 (hereinafter “Common Elements guidance”). Although the term *bona fide prospective purchaser* implies future acquisition, the statutory definition connotes a person that has acquired the property.

3 See, “Guidance on Federal Superfund Liens,” Memorandum from Thomas L. Adams, Jr., Assistant Administrator, Office of Enforcement and Compliance Monitoring, U.S. EPA, September 22, 1987 (hereinafter “Superfund Lien Guidance”); “Supplemental Guidance on Federal Superfund Liens,” Memorandum from William A. White, Enforcement Counsel, Office of Enforcement/Superfund, and Bruce M. Diamond, Director, Office of Waste Programs Enforcement, July 29, 1993 (hereinafter “Supplemental Guidance” attached as Appendix A).

the Interim Windfall Lien policy. The Interim Windfall Lien policy explains the circumstances when EPA generally will, and will not, seek to perfect a windfall lien to facilitate recovery of EPA's response costs that increase a property's fair market value.

Today's guidance focuses on the timing for filing notice of a windfall lien and the internal administrative procedures EPA will use when EPA files notices of a windfall lien on a property acquired by a BFPP.⁴

III. Timing for Filing Notice of A Windfall Lien

A fundamental element of the Interim Windfall Lien policy is that the Agency should use the windfall lien statutory authority to prevent unjust enrichment at taxpayer expense, and the timing for filing notice of a windfall lien should be guided by this principle. If EPA applies the Interim Windfall Lien policy and concludes that filing notice of a windfall lien is appropriate, it will generally file notice of a windfall lien when it appears a BFPP could receive a significant windfall from the Agency's cleanup efforts on the property.

Filing notice of a windfall lien accomplishes two things. First, it provides notice to the current BFPP, as well as all subsequent owners and prospective purchasers, of EPA's lien on the property. Second, it preserves EPA's priority with respect to other subsequent interests in the property. Failure to file the lien could mean that EPA's lien becomes subordinate to subsequent encumbrances on the property.

The timing for filing notice of a windfall lien may be affected by the existence of a CERCLA § 107(l) lien on the property. Where EPA already has filed a CERCLA § 107(l) lien on the property, filing notice of a windfall lien will often not be necessary. EPA's interest in the property, including any windfall, is secured by the CERCLA § 107(l) lien.⁵

Nonetheless, in some circumstances even though EPA has an existing CERCLA § 107(l) lien on the property, filing notice of a windfall lien would be appropriate. For example, if EPA

4 Whether EPA may, in limited circumstances, file a notice of a windfall lien in advance of acquisition of the property by a BFPP raises statutory and due process issues different from those implicated by filing notice of the lien after acquisition by a BFPP and is beyond the scope of this guidance. If a Region is interested in filing a notice of a windfall lien in advance of BFPP acquisition, a case-by-case evaluation and consultation with OSRE will be necessary.

5 The CERCLA § 107(l) lien legislative history makes clear that the section 107(l) lien was intended not only to facilitate the United States' recovery of response costs, but also to prevent unjust enrichment. S. Rep. No. 99-11, at 45 (1985) (107(l) lien provision added to "enable the United States to recover its response costs through an *in rem* action against the real property that is the subject of the response action. Such protection for the United States will also enable it to recover the increase in land value resulting from the response action, thus preventing unjust enrichment of the owner."); see also H.R. Rep. No. 99-253, at 17 (1985) ("Response actions may cause substantial increases in the value of the land on which these actions are taken. Thus, the purpose of these liens is to ensure that the owners of the property where a cleanup has occurred will not receive a windfall profit as a result of the cleanup.")

is resolving the CERCLA § 107(l) lien with a liable party and accounting for any fair market value increase up to acquisition by a BFPP, but EPA will be conducting more cleanup work on the property during the BFPP's ownership, EPA could release the CERCLA § 107(l) lien and file notice of a windfall lien on the property to avoid the BFPP receiving a windfall at taxpayer expense. Another example is where a BFPP acquires property encumbered with a CERCLA § 107(l) lien, EPA increases the property's fair market value after BFPP acquisition, and the cost recovery statute of limitations applicable to the CERCLA § 107(l) lien expires, or is about to expire. Because a windfall could accrue to the BFPP, a Region should generally file notice of the windfall lien prior to the CERCLA § 107(l) lien's statute of limitations expiration in order to provide notice and establish the priority of its windfall lien interest.⁶

In other instances, EPA may perform a response action on a property acquired by a BFPP on which EPA had not filed a CERCLA § 107(l) lien. This could either be because EPA did not initiate its response action until after BFPP acquisition or because EPA did not file a CERCLA § 107(l) lien prior to acquisition of the property by a BFPP. In those instances, the Region should promptly evaluate whether EPA's response action could result in a significant increase in the property's fair market value. If so, and if consistent with the Interim Windfall Lien policy, EPA should consider filing notice of a windfall lien on the property, thereby protecting EPA's rights and providing notice to the current BFPP and prospective owners of EPA's interest in the property.

IV. Administrative Process Accompanying Filing Notice of a Windfall Lien

Since 1993, the Agency has had an administrative process for notifying property owners that EPA intends to file a CERCLA § 107(l) lien on a property. See generally, Supplemental Guidance, attached as Appendix A. In the Supplemental Guidance, EPA outlined its administrative procedures for notifying property owners and providing them an opportunity to be heard when EPA intends to file a CERCLA § 107(l) lien on a property. Those procedures include:

- notifying the property owner of EPA's intent to file a CERCLA 107(l) lien;
- developing and maintaining the administrative record; and
- identifying appropriate hearing procedures before a neutral EPA official.

When EPA intends to file a windfall lien notice on property acquired by a BFPP, EPA intends to follow the same general administrative procedures framework identified in the Supplemental

⁶ Unlike the CERCLA § 107(l) lien, the windfall lien is not subject to a statute of limitations. See CERCLA § 107(r)(4)(D)(ii).

Guidance. A windfall lien is subject to the “notice and validity” requirements applicable to a CERCLA § 107(l) lien found in CERCLA § 107(l)(3). See CERCLA § 107(r)(4)(C). However, due to the different statutory requirements of CERCLA’s two lien provisions, modifications to some substantive aspects of the procedures are appropriate.

The CERCLA statutory prerequisites for the CERCLA § 107(l) lien and the CERCLA § 107(r) lien on a property acquired by a BFPP are identified in the table below.

CERCLA § 107(l)	CERCLA § 107(r)
-the property is a facility as defined in CERCLA § 101(9);	-the property is a facility as defined in CERCLA § 101(9);
-the person is an owner of the facility and is a PRP under CERCLA § 107(a);	-the property owner qualified as a BFPP;
-the property is subject to or affected by a removal or remedial action;	-a response action is carried out at the facility;
-costs have been incurred by the United States with respect to a response action at the property; and	-the United States has unrecovered costs for the response action carried out at the facility; and
-EPA has provided the owner of the facility notice by certified or registered mail of the owner’s potential liability.	-the response action at the facility increases the fair market value of the facility above the fair market value of the facility before the initiation of the response action.

1. Letter Providing Notice of Intent to File a Windfall Lien

Where EPA intends to file notice of a windfall lien on a property acquired by a BFPP, EPA should send a letter to the current owner prior to filing the notice. The letter should summarize the factual basis for EPA’s reason to believe that the CERCLA § 107(r) statutory criteria are satisfied. The letter should inform the property owner that EPA intends to file notice of a windfall lien by a date certain and give the owner an opportunity to request a meeting with a neutral EPA official before that date. The letter should be addressed to the property owner and sent by certified mail to the property owner’s last known address. The letter should identify the location of the administrative record supporting EPA’s decision to file notice of the windfall lien and make clear that the record is available for review and copying. A model Notice of Intent to File a Windfall Lien Letter is attached to this document as Attachment 1.

In addition, the letter should provide a precise identification of the property using the street address and a deed, or reference to a deed or other legal description in the state or county land records and explain that:

- the land records of the appropriate state or county indicate that the letter recipient is the owner of the property and the property was acquired after January 11, 2002, with a citation to those records;
- the property is part of a facility as defined in CERCLA § 101(9);
- EPA has unrecovered response costs that have been incurred by the United States at the facility;
- based on the incurrence of those EPA response costs, EPA has a reasonable basis for believing that EPA's response action is increasing, or has increased, the property's fair market value;
- EPA has a reasonable basis to believe the owner could currently be considered a BFPP;
- the value of the lien is the lesser of the increase in fair market value attributable to the United States' response action or the United States' unrecovered response costs; and
- a CERCLA § 107(r) lien is not subject to a statute of limitations.

The letter should invite the property owner to:

- provide to the Regional attorney assigned to the site, before the date certain identified in the letter, a written submission with relevant documents or information related to the windfall lien explaining why the property owner believes EPA does not have a reasonable basis under the statute for filing notice of a windfall lien; and
- submit a written request to the Regional attorney, in advance of the identified filing date, for a meeting before a neutral EPA official to explain why the property owner believes EPA does not have a reasonable basis under the statute for filing notice of a windfall lien.

The letter should also make plain that:

- the meeting before the neutral official will be limited to whether there is a reasonable basis for EPA's filing notice of a windfall lien; and
- no claims or defenses of either EPA or the property owner are waived or prohibited by a submission of information, a request for a meeting, participation in a meeting, or a Recommended Decision by a neutral EPA official.

If the Region chooses, the letter may also provide the owner with an opportunity to meet with the Regional attorney prior to meeting with the neutral EPA official, to discuss the issues raised by the proposed windfall lien and, if appropriate, negotiate a resolution of those issues. If after a written submission, or meeting with the Regional attorney, the Region agrees that EPA does not have a reasonable basis for filing notice of a windfall lien, EPA should so notify the property owner.

Consistent with EPA's approach identified in the Supplemental Guidance for a CERCLA § 107(*l*) lien, only in exceptional circumstances should EPA file a CERCLA windfall lien notice before sending a letter to the property owner or prior to a requested meeting with a neutral EPA official. In these circumstances, the Region should immediately notify the property owner after filing notice of the windfall lien. Exceptional circumstances include those identified in the Supplemental Guidance, such as an imminent sale of the property, and should be well documented in the Lien Filing Record.

Where EPA files notice of a windfall lien prior to notifying the landowner of its intention, the letter should, in addition to the above:

- describe the circumstances and reasons for EPA filing notice of the windfall lien before notifying the property owner; and
- offer the property owner the opportunity to submit relevant documents and request an expedited meeting before a neutral EPA official to explain why the property owner believes EPA does not have a reasonable basis under the statute for filing notice of a windfall lien.

2. Lien Filing Record

Regions should develop and maintain a Lien Filing Record for a windfall lien. The Lien Filing Record should be available for review and copying by the property owner and the public. Similar to a Lien Filing Record for a CERCLA § 107(*l*) lien, such a record should include the following categories of documents:

- documentation of property ownership (e.g., deed, legal description in land records, property tax record);
- summary report of EPA's unrecovered response costs incurred at the facility/property;
- documentation of response actions at the facility/property;
- if applicable, documents describing the exceptional circumstances necessitating filing notice of a windfall lien without prior notification to the property owner;
- EPA's letter to the property owner notifying the owner of EPA's intent to file notice of a windfall lien with documentation of receipt by the property owner (or proof of mailing to the last known address);
- documents related to the property owner's status as a BFPP;
- documents related to an increase in the property's fair market value attributable to EPA's response action;
- any written submission(s) made to EPA by the property owner with respect to EPA's windfall lien;
- any Regional response(s) to a property owner's submission(s);

- any other correspondence between EPA and the property owner regarding the windfall lien;
- if a meeting is held before a neutral EPA official, any form of a record of that meeting; and
- where applicable, any Recommended Decision of a neutral EPA official.

3. Procedures for Meeting with Neutral EPA Official

While the factors reviewed as part of a CERCLA § 107(r) windfall lien meeting before a neutral EPA official will differ from those for a CERCLA § 107(l) lien, the meeting procedures themselves will be the same. Thus, the selection of the neutral official and the nature of the meeting (e.g., attendees, informal) should follow the Supplemental Guidance that is attached as Appendix A.

4. Factors to Review

Because the statutory language of CERCLA §§ 107(l) and 107(r) are different, the statutory factors that a neutral EPA official must review in evaluating the filing of a windfall lien notice under CERCLA § 107(r) are also different from the factors the official must use in evaluating a lien filed under CERCLA § 107(l). However, the standard of review for a neutral’s determination under (l) and (r) will remain the same - whether EPA has a *reasonable basis* under the statute for filing the lien.

In evaluating whether EPA has a reasonable basis for filing notice of a windfall lien, the neutral EPA official should consider:

- whether the United States has unrecovered response costs at the facility containing the property;
- whether EPA has a reasonable basis to believe that the response action increases the fair market value of the property above the fair market value of the property that existed before the response action was initiated;⁷
- whether the property owner is appropriately considered a BFPP for purposes of the proceeding before the neutral EPA official; and
- whether the record has any other information sufficient to show that the lien should not be filed.

⁷ For purposes of settling windfall liens, EPA will use its enforcement discretion to “generally seek only the increase in fair market value attributable to a response action that occurs after a [BFPP] acquires the property at fair market value.” Interim Windfall Lien policy at 8. However, under certain limited circumstances identified in the Interim Windfall Lien policy, EPA may “seek the increase in fair market value that occurred prior to ownership by the [BFPP] to avoid a potential windfall at taxpayer expense.” *Id.* at 4, 10.

A property owner who contends that EPA does not have a reasonable basis for filing a windfall lien may present, to the neutral EPA official at the meeting, information or documents supporting the owner's contention.

a. Fair Market Value Increase for Purpose of Filing Notice of Windfall Lien

As a general matter, EPA's view is that the incurrence of response costs beyond those for a CERCLA preliminary assessment (PA) or site investigation (SI) at a property provides a reasonable basis for EPA's belief that EPA's response action could cause an increase in the fair market value of the property.⁸ As one court has noted, even short of remediation, investigation and characterization can provide positive benefits for a contaminated property in both avoided costs and removing uncertainty about the property. Hendler v. United States, 175 F.3d 1374, 1381 (Fed. Cir. 1999). Nonetheless, before filing notice of a windfall lien, Regions should look to the facts of their particular situation and consider whether there are site-specific facts that would undermine EPA's reasonable basis to believe that EPA's response action at the site contributed to an increase in the fair market value of the property.

Property owners can respond to EPA's view by submitting information or documents reflecting their view that the work performed at the property has not resulted in an increase in the fair market value of the property. The neutral official should consider all aspects of the Lien Filing Record, including information and documents presented at the meeting, in making its Recommended Decision. The neutral official will not be making an ultimate determination whether there has been an increase in fair market value due to the response action, but whether EPA has a reasonable basis for its belief that there has been an increase in the property's fair market value due to EPA's response action.

b. BFPP Status for Purpose of Filing Notice of Windfall Lien

Under the statute, a property owner claiming BFPP status bears the burden of proving it meets the BFPP statutory requirements set out at CERCLA § 101(40). The statute requires that the property owner acquire the property after the date of enactment of the Brownfields Amendments – January 11, 2002. CERCLA § 101(40). CERCLA § 101(40) further requires, *inter alia*, that the property owner establish that “[a]ll disposal of hazardous substances at the facility occurred before the person acquired the facility.” CERCLA § 101(40)(A). In the Common Elements guidance (see footnote 1), EPA provided guidance on the other criteria a

⁸ In the Interim Windfall Lien policy, EPA specifically identified sites where the only costs are PA or SI costs, and no further removal or remedial action is anticipated, as a situation in which EPA would generally not seek to perfect a windfall lien on the property. Id. at 5-6. Thus, as a matter of policy, EPA does not anticipate filing a windfall lien notice where the only costs at the site are PA or SI costs. Similarly, EPA does not anticipate filing windfall lien notices at any properties where the only federal involvement at the site is the expenditure of Brownfield monies. Id.

BFPP must satisfy to establish and maintain BFPP status. To be considered a BFPP, a landowner must meet certain “threshold criteria” and satisfy “continuing obligations.” See generally, Common Elements guidance. The threshold criteria for being considered a BFPP are the performance of “all appropriate inquiry” and demonstrating no “affiliation” with a liable party. Id. at 2.

EPA believes that it is appropriate to notify a landowner of its intent to file notice of a windfall lien and initiate these informal proceedings (or, in exceptional circumstances, file notice of a windfall lien prior to notification of the current property owner) when EPA has a reasonable basis to believe a property owner is a BFPP. **Solely** for the purposes of the informal proceedings, and without effect on any ultimate legal determination on whether a person qualifies as a BFPP, EPA’s view is that it has a reasonable basis to believe a property owner is a BFPP when EPA establishes acquisition after January 11, 2002 and EPA has a reasonable basis to believe: (a) all disposal of hazardous substances at the facility occurred prior to the property owner’s acquisition; (b) the property owner has conducted all appropriate inquiry (in accordance with EPA’s recently promulgated regulations if the property was acquired after the effective date of those regulations);⁹ and (c) the property owner is not affiliated with a potentially liable party.¹⁰

In some cases, EPA may have a long-standing involvement or a fully developed record regarding activities on the property and potentially liable parties, and may rely on the information already available to the Agency to form a reasonable basis to believe that a property owner is a BFPP.

In other cases, EPA could gather more information to form a reasonable basis to believe a party is a BFPP. One way for EPA to gather this information is to ask a property owner claiming BFPP status to provide EPA a written representation that: (a) all disposal of hazardous substances at the facility occurred prior to the property owner’s acquisition; (b) the property owner has conducted all appropriate inquiry in accordance with EPA’s recently promulgated regulations; and (c) the property owner is not affiliated with a potentially liable party. EPA’s experience to date has been that most property owners claiming BFPP status are willing to stipulate to their BFPP status. As the informal proceeding with the neutral EPA official is not a binding determination of BFPP status and is designed primarily to provide procedural safeguards

9 70 Fed. Reg. 66,070 (Nov. 1, 2005).

10 EPA recognizes that there are additional conditions to BFPP status for a property owner (identified as “continuing obligations” in the Common Elements guidance). **Solely** for purposes of EPA having a reasonable basis to file notice of a windfall lien, EPA will consider the criteria described above. However, if EPA learns that a property owner did not or does not satisfy the continuing obligations, EPA should consider whether to pursue other enforcement options (e.g., pursuing the property owner as a PRP, filing a CERCLA § 107(l) lien).

for property owners, EPA may accept the property owner's written representation as a sufficient demonstration of BFPP status without further Agency inquiry.¹¹

Alternatively, EPA could gather information by issuing an information request pursuant to CERCLA § 104(e) and rely on the property owner's response to form a reasonable basis to believe the property owner is a BFPP. Property owners unable or unwilling to certify to their BFPP status, or respond to a CERCLA § 104(e) information request, may be considered PRPs and could be subject to a CERCLA enforcement action.¹² EPA should consider filing a CERCLA § 107(l) lien or initiating other enforcement activities where the property owner has not provided written representation as to its BFPP status or responded satisfactorily to a CERCLA § 104(e) information request.

5. Recommended Decision

The neutral EPA official should issue, in a timely manner, a written Recommended Decision following the meeting with the property owner. The Recommended Decision will be limited to, and should explain that it is limited to, evaluating whether EPA had a reasonable basis to file notice of a windfall lien on the property. The Recommended Decision should provide the basis for that determination.

The Recommended Decision should also explain that it bars neither EPA nor the property owner from asserting any claims or defenses in future proceedings.¹³ The neutral EPA official should forward the Recommended Decision to the property owner and the Regional official with the delegated authority to file liens. The Recommended Decision should also be placed in the Lien Filing Record.

Because a Recommended Decision that EPA does not have a reasonable basis for filing a notice of a windfall lien is based on information available to the Agency at the time, if EPA receives new information, the Agency may initiate procedures to file notice of a windfall lien based on that new information, notwithstanding the earlier Recommended Decision.

Except as provided by CERCLA § 113(h), a property owner may not obtain judicial review of a Recommended Decision concluding that EPA had a reasonable basis for filing a windfall lien notice.

¹¹ Of course, if EPA has independent information that the representation is inaccurate and the property owner is not a BFPP, EPA should consider pursuing other enforcement options (e.g., pursuing the property owner as a PRP, filing a CERCLA § 107(l) lien).

¹² In some limited instances, certain property owners may believe that they are entitled to another CERCLA exemption and may be unwilling to identify themselves as BFPPs. In those limited instances, the proceeding before the neutral EPA official will require an evaluation of the property owner's claim and whether EPA has a reasonable basis to file notice of a windfall lien.

¹³ This includes a later EPA claim that a property owner was not, or is not, a BFPP and may be subject to CERCLA enforcement as a PRP.

V. Further Information

If you have any questions or comments regarding this policy, please contact Greg Madden at (202) 564-4229 or at madden.gregory@epa.gov; if you have site-specific implementation questions, please contact Helen Keplinger at (202) 564-4221 or at keplinger.helen@epa.gov. Bob Roberts at (202) 564-4267 or at roberts.robert@epa.gov is the OSRE contact on CERCLA § 107(l) liens. This document and the attachments can be found on the internet at: <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wf-admin-proc.mem.pdf>.

Attachment: Model Notice of Intent to File a Windfall Lien Letter

Appendix A: "Supplemental Guidance on Federal Superfund Liens," U.S. EPA, July 29, 1993.

cc: Mary Kay Lynch, Associate General Counsel for Solid Waste and Emergency Response
Office of Regional Counsel, Superfund Branch Chiefs, Regions I-X
David Lloyd, Director, Office of Brownfields and Land Revitalization
Jim Woolford, Director, Office of Site Remediation and Technology Innovation
Debbie Dietrich, Director, Office of Emergency Management
Regional Judicial Officers
Bruce Gelber, U.S. Department of Justice
Windfall Lien Workgroup
Regional Superfund Program Enforcement Contacts

Attachment 1
MODEL NOTICE OF INTENT TO FILE A WINDFALL LIEN LETTER

[Regional Letterhead]
United States Environmental Protection Agency
Region []
[Address]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

Re: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency (“EPA”) intends to file a notice of a windfall lien on property located at [Street address], the legal description of which is contained in Attachment 1 to this letter (“Property”). The Property is part of the [] Superfund Site. EPA believes that you are the current owner of the Property. The lien that EPA intends to file against the Property arises under Section 107(r) of the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), 42 U.S.C. §9607(r). The lien is intended to secure payment to the United States, pursuant to Section 107(r) of CERCLA, of the lesser of the United States’ unrecovered response costs or the increase in fair market value of the Property attributable to the United States’ response action at the Property.

EPA believes that a release or threat of release of hazardous substances has occurred at or from the Property. EPA initiated a response action at the Property, beginning on _____ [and ending on _____]. Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. §§ 9607(a) and 9601(9), a person that currently owns any “facility,” including a site or area where a hazardous substance has been deposited, stored, disposed of, placed, or otherwise come to be located, may be liable for all costs of removal or remedial action at the site. However, under CERCLA Sections 101(40) and 107(r), 42 U.S.C. §§ 9601(40) and 9607(r), the owner of a “facility” who qualifies as a *bona fide* prospective purchaser (“BFPP”) may be protected against CERCLA liability. Any property for which BFPP status is asserted must have been acquired after the date of enactment of the Brownfields Amendments, January 11, 2002.

EPA published guidance on March 6, 2003, titled “Interim Guidance Regarding Criteria Landowners Must Meet in Order to Qualify for Bona Fide Prospective Purchaser, Contiguous Property Owner or Innocent Landowner Limitations on CERCLA Liability ‘Common Elements’” which explains how a prospective owner may achieve and thereafter maintain BFPP status. The guidance is available on the web at “<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/common-elem-guide.pdf>”.

However, the liability protection afforded to a BFPP does not relieve a BFPP’s property from a windfall lien. See, CERCLA Section 107(r), 42 U.S.C. § 9607(r). To the extent that the United States has unrecovered response costs for work performed at a BFPP’s property, the United States has a windfall lien on the property for an amount not to exceed the increase in fair market value attributable to the response action at the time of a sale or other disposition of the property. The windfall lien continues until the earlier of satisfaction of the lien by sale or other means, or, notwithstanding any statute of limitations under CERCLA Section 113, recovery of all response costs incurred at the facility.

In order to avoid EPA filing its Section 107(r) windfall lien on the Property, the United States may, by agreement with the owner, obtain from the owner a lien on any other property of that owner, or may obtain other assurances of payment satisfactory to the Administrator of EPA.¹ For more information about agreements for release and waiver of any windfall lien, see EPA’s guidance from June 16, 2003, titled “Interim Enforcement Discretion Policy Concerning Windfall Liens Under Section 107(r) of CERCLA” which is available on the web at “<http://www.epa.gov/compliance/resources/policies/cleanup/superfund/interim-windfall-lien.pdf>”.

The EPA intends to file a notice of its CERCLA Section 107(r) windfall lien on the Property because it has a reasonable basis to believe that the following statutory criteria are met: a response action for which there are unrecovered costs of the United States is being, or has been, carried out at the Property; the response action has increased the fair market value of the Property above the fair market value of the property that existed before the response action was initiated; and the Property was acquired by a BFPP.

[Note: The Region should briefly summarize the factual basis for EPA’s belief that the statutory criteria are met. The Region should identify response action performed, costs incurred, and whether there are unrecovered costs above the amount expended for PA/SI. The Region should also note the date of acquisition of the Property after January 11, 2002, and EPA’s belief that disposal of all hazardous substances occurred prior to that date, as well as noting EPA’s belief that the owner conducted all appropriate inquiry prior to acquisition and is not affiliated with a

¹ EPA’s settlement model for the 107(r) windfall lien, accepts either cleanup work or money as consideration for resolving the lien.

party potentially responsible for the response cost incurred at the facility. This summary will comprise the reasonable basis upon which the existence of the windfall lien rests.]

EPA has established a Lien Filing Record consisting of documents relating to its decision whether to file a notice of the lien. This record is kept at the EPA Region [] offices, and may be reviewed and copied at reasonable times by arrangement with:

[Name], Assistant Regional Counsel
United States Environmental Protection Agency
Region []
Street
City
State
Telephone number

EPA has reviewed the information in the Lien Filing Record and believes that EPA has a reasonable basis to believe that the statutory conditions for filing a notice of a CERCLA Section 107(r) lien are satisfied. After [] days from the date of this letter, EPA intends to transmit a notice of lien to the [] County Recorder's Office in [] County. The effect of this filing is to establish a priority for the encumbrance on the Property.

You may notify EPA in writing within [] calendar days from the date of the mailing of this letter if you believe that EPA's information or belief is in error. Also, within those [] days, you may request in writing to meet with a neutral EPA official to present any information that you have that indicates that EPA does not have a reasonable basis to file a notice of its windfall lien. You should describe in your written request your reasons for believing that EPA does not have a reasonable basis to file a notice of a windfall lien. Any written submissions or request for a meeting should reference the [] Superfund Site, be addressed to the above-referenced Regional Attorney, and may include documents or information that you believe support your contentions. **[Optional Language:** If you would like an informal meeting with EPA staff, in person or by telephone, prior to submitting anything in writing, or prior to meeting with the neutral EPA official selected to review your written submission, please contact [name of Regional attorney].]

If EPA receives a written submission or a request for a meeting from you within [] calendar days from the date of the mailing of this letter, EPA will review your submission or request for a meeting. If EPA agrees, based on your submission, that it does not have a reasonable basis to file a notice of a windfall lien on the Property, EPA will not file its notice of a windfall lien and will so notify you. If EPA disagrees, the written submission or request will be referred, along with the Lien Filing Record, to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting.

If you have requested an opportunity to meet, a meeting will be scheduled. You may choose to attend this meeting via a telephone conference. EPA will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting. The meeting will be held before a neutral EPA official. This will be an informal meeting in which you may provide EPA with information as to why EPA's position requires reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting will be whether EPA has a reasonable basis to file a notice of a windfall lien based upon CERCLA Section 107(r), 42 U.S.C. § 9607(r).

After reviewing your written submission, or conducting a meeting if one is requested, the neutral EPA official will issue a recommended decision based upon the Lien Filing Record, any written submission and any information provided at the meeting. The recommended decision will state whether EPA has a reasonable basis to file a notice of a windfall lien and will be forwarded to an EPA official authorized to execute liens. You will be furnished a copy of the recommended decision and notified of the Agency's action.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participating at a meeting, or issuance of a recommended decision by a neutral EPA official that EPA has, or does not have, a reasonable basis to file a notice of a windfall lien.

If you have any question pertaining to this letter, please contact [name] at [number].

Sincerely yours,

[Signature---Regional Administrator, Waste Management
Division Director, or the regional official with delegated signature
authority]

Attachment 1 [legal description of Property]



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

EC-G-1998-94

JUL 29 1993

MEMORANDUM

SUBJECT: Supplemental Guidance on Federal Superfund Liens

FROM: William A. White *[Signature]*
Enforcement Counsel
Office of Enforcement/Superfund

Bruce M. Diamond *[Signature]*
Director
Office of Waste Programs Enforcement

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

The purpose of this guidance document is to supplement the "Guidance on Federal Superfund Liens" issued on September 22, 1987, by memorandum signed by Thomas L. Adams, Jr., Assistant Administrator of the Office of Enforcement and Compliance Monitoring (now Office of Enforcement). This Supplement is in addition to, and does not supersede the 1987 document, which provided criteria for the decision to file liens under Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9607(1). This Supplement outlines procedures for Regional staff to follow to provide notice and opportunity to be heard to potentially responsible parties on whose property liens are to be perfected.

I. SUMMARY

The Agency should provide notice to property owners who are potentially responsible parties ("PRPs") under CERCLA that the Agency intends to perfect a lien on their property prior to filing papers to perfect. The Agency will give such property owners¹ the opportunity to be heard through their submission of documentation or through appearing before a neutral EPA official, or both. In exceptional circumstances, EPA may perfect a lien

¹ For purposes of this guidance, owner means persons possessing title to real property or rights to such real property, as set forth in Section 107(1)(1) of CERCLA, 42 U.S.C. § 9607(1).

MAR -2 1993
ECDIC

prior to giving notice to a property owner of EPA's intention to perfect the lien, but the Agency should concurrently notify the owner and offer an opportunity to be heard at the earliest practicable time.

The Agency should send a letter by certified mail notifying property owners of the Agency's intention to perfect a lien, or, if appropriate, immediately upon perfection. The letter should summarize the factual basis for EPA's reason to believe that the statutory criteria for perfecting a lien are satisfied. The letter should inform the recipient property owner of his or her opportunity to be heard, either by submitting documentation or by obtaining a meeting conducted by a neutral official. The meeting will consist of an informal proceeding in which the property owner may provide EPA with information as to why EPA's assumptions require reconsideration.

II. PROCEDURES

Record of Decision to File

After consulting the 1987 Guidance on Federal Superfund Liens to determine whether the perfection of a Superfund lien is of value, staff designated by the Region should assemble a Lien Filing Record, bringing together in one place all the documents relating to the decision to perfect.

Provisions for maintenance of the Lien Filing Record are at the discretion of the Region, and it may choose to maintain the record in the same manner that it maintains other Superfund records. At a minimum, however, the Region should ensure that certain personnel are designated to add relevant documents, maintain the integrity of the record, and make the record reasonably available, upon request, to the property owner. The Region may wish to have the Regional Hearing Clerk maintain the Lien Filing Record once a property owner requests a meeting.

The following categories of documents should be assembled:

1. Documentation that the potentially responsible party is the owner of the property, e.g., the file contains a deed, legal description from a survey or tax record, a title search, etc.
2. Documents showing that EPA has actually incurred costs at the site (a summary report of costs is sufficient for this purpose; underlying documentation is not necessary).
3. Documents showing that the property owner was provided (by certified mail) written notice of potential liability, pursuant to CERCLA Section 107(1).

4. Documents describing the property showing that the property or that part of a property is contaminated and showing that the property has been subject to or affected by a removal or remedial action. Examples include action memoranda, removal response reports, Preliminary Assessment or Site Inspection forms, or National Priorities List listing documents. (The Region may choose to include a declaration by the On-Scene Coordinator or Remedial Project Manager ("RPM") incorporating these elements.)
5. Where applicable, any documents describing exceptional circumstances which support EPA's decision to perfect a lien prior to offering an opportunity to be heard. Such circumstances include instances in which the property owner is about to take some action that would render the property unavailable to satisfy a judgment for clean-up costs or where EPA's interest in the property would be impaired. Examples include, but are not limited to, imminent bankruptcy of the property owner, imminent transfer of all or part of the property, or imminent perfection of a secured interest which would have priority under applicable state law, or indications that these events are about to take place. Where the Regional staff are depending on factual information that is not a matter of public record, they should include in the file a supporting statement (a) from someone with first hand knowledge of the facts, or (b) indicating the factual basis on which the Agency proposes to act, and the source of the Agency's information.

The Region should continue to add relevant documents to the Lien Filing Record, such as the following:

1. EPA's notice of intent to file a lien (see below) sent to the property owner, with proof of receipt (or proof of mailing to the last known address).
2. Any documentation submitted by the property owner to show that EPA did not satisfy the statutory criteria for perfection of a lien or that EPA was in error when it concluded that the criteria were satisfied. This documentation may include correspondence, or documents submitted at or after any meeting request by the property owner.
3. Any responses by the Region to the property owner's submissions.
4. Any correspondence between the Region and the property owner relating to the filing of a lien.

5. Any form of record of a meeting held regarding the perfection of the lien.

The Region should maintain the Lien Filing Record and, upon request made to the Regional Attorney, make it reasonably available to the property owner.

The Notice of Intent to Perfect a Superfund Lien

This guidance includes a model notice letter (See Attachment 1) to inform the property owner of the Region's intention to file and perfect a notice of lien. A notice letter should be mailed to the owner by certified mail, return receipt requested. The letter should state that EPA intends to perfect its lien after a set number of calendar days, e.g., 14 days, from mailing. In the letter, the Region should also notify the property owner of the location and availability for review and copying of the Lien Filing Record.

The notice of intent to perfect should contain the following elements:

1. A statement that land records of the appropriate state or county indicate that the recipient is the owner of the subject property, with a citation to those records.
2. A precise identification of the property, using the street address and a deed, or reference to a deed or other legal description in land records.
3. Statements that: EPA has a reasonable basis to perfect its lien; the property is a facility as defined in CERCLA Section 101(9); the Agency has reason to believe that the owner "owns" the facility and that the owner is a liable person pursuant to CERCLA Section 107(a); the property is subject to or affected by a removal or remedial action; and costs have been incurred by the United States with respect to a response action at the property.
4. In satisfaction of CERCLA Section 107(1)(2)(B), reference to previous written notice of potential liability furnished to the property owner, or notice via this letter, if notice has not already been furnished.
5. Notice that the lien shall remain in effect until liability for the costs is satisfied or the lien becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

6. A statement that the property owner may submit any documents or information relevant to the issues raised by the lien in writing to the Regional attorney assigned to the site prior to the expiration of the time period stated in the notice.
7. An invitation for the recipient to request, prior to the expiration of the time period stated in the notice, an opportunity to be heard before a neutral EPA official. This request should be in writing and addressed to the named Regional attorney.
8. A statement that the subject of any requested meeting shall be whether EPA has [or had] a reasonable basis to perfect a lien upon the property based upon the statutory elements.
9. A statement that neither EPA nor the property owner waives or is prohibited from asserting any claims or defenses by the submission of information, a request for and participation in a meeting, or a recommended decision by the neutral official whether or not EPA has a reasonable basis to perfect a lien.
10. Where EPA has perfected its lien prior to sending this notice of intent, a statement describing the circumstances that led the Agency to perfect the lien in order to protect EPA's interest in the property and how those interests were about to be impaired. The statement should further indicate that the property owner may still make a timely request for a meeting to demonstrate that the EPA had no reasonable basis to perfect its lien.

Perfection of a Lien Prior to a Meeting

The Agency may, in exceptional circumstances, perfect a lien prior to offering or providing a property owner with a meeting. Thus, even where the Region has notified a property owner that he or she has an opportunity to request a meeting, under certain exceptional circumstances, the Region may perfect a lien prior to providing that meeting. The Region shall send notice to the property owner, return receipt requested, immediately upon perfection. A model letter for post-perfection notification is included as Attachment 2. Exceptional circumstances for this course of action include, but are not limited to, instances in which EPA's interest in the property could be impaired, such as imminent bankruptcy of the property owner, imminent transfer of all or a portion of the property, imminent perfection of a secured interest which would have priority under applicable state

law, or indications that these events are about to take place. As noted in the section on the Lien Filing Record, Regional staff should document any such circumstances in the Lien Filing Record.

While the procedures and standards to be followed for a post-perfection meeting are similar to those for a pre-perfection meeting, the Region should expedite to the extent possible the holding of a post-perfection meeting, if one is requested.

Property Owner's Response

- Failure of Property Owner To Timely Respond

If a property owner does not respond within the period set for response, the Region may proceed to perfect the lien. At the time of perfection, the Region should send a letter notifying the owner of the date the lien was perfected.

- Timely response: Written Response and No Request for Meeting

If a property owner presents written documentation in a timely manner purporting to show that the lien should not be perfected, but does not request a meeting, the Regional site attorney should review the documentation furnished. If the Region agrees that the property owner has produced facts to alter EPA's determination that it has a reasonable basis to file the lien, EPA should so notify the property owner.

If the Regional attorney determines that EPA still has a reasonable basis to perfect its lien, the Region should select a neutral official in accordance with the process described below to review the documentation furnished. At the conclusion of the neutral official's review, he or she should provide the property owner and Regional staff with a brief written recommended decision on whether EPA has a reasonable basis to perfect a lien. The document should set out the informational basis upon which the recommended decision is made, and should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action.

- Timely Response: Request for Meeting

If a property owner requests a meeting, the Region shall select a neutral official in accordance with the process described below to conduct the meeting. The neutral official shall set up the time and location of the meeting, or offer the property owner a meeting via teleconference.

Meeting Procedures

- Selection of Neutral Official

The neutral official selected by the Region should be an attorney who is a permanent or temporary employee of the Agency and who may perform other duties within the Agency. The person selected should not have performed any prosecutorial, investigative, or supervisory functions in connection with the case or site involved.

Regions may have judicial or presiding officers already appointed pursuant to other EPA programs who possess the qualifications outlined above. Where the Regions do not wish to select separate neutral officials to hear lien matters on a case-by-case basis, they may allow these hearing officers to conduct lien meetings.

Upon selection of the neutral official, the designated keeper of the Lien Filing Record should provide the official with a copy of the Lien Filing Record, which includes any written response by the property owner and any subsequent supporting documentation submitted by the property owner.

- Factors to Review

The neutral EPA 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. In particular, the neutral official should consider whether:

- The property owner was sent notice of potential liability by certified mail.
- The property is owned by a person who is potentially liable under CERCLA.
- The property is subject to or affected by a removal or remedial action.
- The United States has incurred costs with respect to a response action under CERCLA.
- The record contains any other information which is sufficient to show that the lien notice should not be filed.

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 based on the above factors, or has made a material error with respect to the

above factors. In making his or her decision, the neutral EPA official should consider all facts in the Lien Filing Record established for the perfection of a lien and all presentations made at the meeting, which will be made part of the Lien Filing Record.

- Nature of the Meeting

The persons at the meeting normally should include the property owner (and/or an attorney, at the property owner's option); Regional enforcement staff (RPM and Regional attorney and any other appropriate Region officials); and the neutral official.

The meeting ordinarily should be held at the EPA Regional office. As stated above, the neutral official may offer to conduct the meeting by telephone for the convenience of the property owner. The neutral official should also ensure that a record of the meeting is made. If a summary of the meeting is prepared as a record, it should indicate who was in attendance, what information was presented, and what issues were discussed. Any such summary should be provided to the property owner. The record of the meeting, and any comments submitted by the property owner on the summary should be included as part of the Lien Filing Record.

The neutral official should conduct the meeting as an informal exchange of information, not bound by judicial or administrative rules of evidence. Because of the informal nature of these proceedings, EPA will not apply the Administrative Procedure Act provisions for formal adjudication.

The neutral official should begin the meeting by making an opening statement, containing the following elements:

1. The proceeding is informal, and not bound by rules of evidence nor provisions of the Administrative Procedure Act.
2. Neither EPA nor the property owner waives any claims or defenses by the conduct of the meeting or the outcome.
3. The sole issue at the meeting 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 meeting 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, such as records of decision or action memoranda.

4. The neutral official will make a recommended decision, based on the Lien Filing Record and any new information presented at the meeting, whether EPA has (or had) a reasonable basis to perfect the lien.
5. The recommended decision is not admissible as evidence in any future proceeding.

The neutral official should conduct an orderly and fair meeting. Regional staff may present EPA's reason to believe that a lien may be perfected upon the property. The property owner or his or her counsel shall have a reasonable opportunity to address relevant issues and present his or her views. The neutral official may also allow discussions and interchanges between the parties, including responses to questions to the extent deemed appropriate. It is not the Agency's intent to provide EPA or the property owner an opportunity to engage in direct examination or cross-examination of witnesses. The neutral official may address questions to the property owner or his or her counsel or to EPA's representatives during the meeting.

While the neutral official should place no limitations other than reasonableness on the type or volume of information presented or issues discussed, he or she may caution that only information and issues which are relevant or material to EPA's decision as to whether it has a reasonable basis to perfect the lien will be ultimately considered.

Recommended Decision

In a timely manner, the neutral official should issue a written recommended decision. The recommended decision should state whether the property owner has established any issue of fact or law to alter EPA's decision to file a notice of lien and the informational basis upon which the decision is based. The recommended decision should contain a statement that neither EPA nor the property owner is barred from any claims or defenses by the recommended decision. The recommended decision should be placed in the Lien Filing Record, with a copy forwarded to the official in the Region delegated with the authority to sign liens for action, and a copy sent to the property owner.

Because of the preliminary and informal nature of the proceedings under this guidance, and the fact that the neutral officer's recommended decision is limited to whether EPA has a reasonable basis to perfect the lien, the neutral official's recommended decision is not a binding determination of ultimate liability or non-liability. No preclusive effect attaches to any decisions made in the course of any proceeding pursuant to the guidance, nor shall any such decisions be given deference or otherwise constitute evidence in any subsequent proceeding.

The Agency may subsequently provide notice of intent to perfect a lien with an opportunity to be heard with respect to the same property under these procedures if new information indicates that a previous decision not to file is in error.

Except as provided by CERCLA Section 113(h), property owners may not obtain judicial review or reconsideration of the Agency's decision that it has a reasonable basis to perfect a lien.

III. DISCLAIMER

This memorandum and any internal procedures adopted for its implementation are intended solely as guidance for employees of the U.S. Environmental Protection Agency. They do not constitute a rulemaking by the Agency and may not be relied upon to create a specific right or a benefit, substantive or procedural, enforceable at law or in equity, by any person. The Agency may take action at variance with this memorandum or its internal implementing procedures.

IV. FURTHER INFORMATION

For further information concerning this policy, please contact Patricia Mott in the Office of Enforcement at (202) 260-3733 or Gary Worthman in the Office of Waste Programs Enforcement at (703) 603-8951.

Attachments (2)

Attachments (2)

----- ATTACHMENT -----

ATTACHMENT 1

MODEL: PRE-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION []
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") intends to perfect a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA intends to perfect against the Property arises under Section 107(l) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(l). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section 101(22) has occurred at or from the Property. The Property is part of the [] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified or registered mail of your potential liability under CERCLA [or EPA hereby furnishes notice, if notice has not already been furnished.] You may avoid the perfection of a lien upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. After [14 calendar days or other period, set by the Region] from the date of this letter, EPA intends to transmit a notice of lien to [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. The effect of this filing is to perfect the lien upon your property.

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA does not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA does not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and reconsider its intention to perfect a lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency does not have a reasonable basis upon which to perfect a lien, EPA will not perfect its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA has a reasonable basis to perfect a lien based upon CERCLA Section 107(1).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA has a reasonable

basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether perfection or the decision not to perfect) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to perfect a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator

----- ATTACHMENT -----

ATTACHMENT 2

MODEL: POST-PERFECTION NOTICE

[REGIONAL LETTERHEAD]
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION []
[ADDRESS]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Date]

[Name and address of owner of property]

RE: [Name and location of the site]

Dear [Name of property owner]:

This letter informs you that the United States Environmental Protection Agency ("EPA") has perfected a lien upon property located at [street address], the exact legal description of which is contained in Attachment 1 to this letter. The Property is part of the [] Superfund Site. EPA has determined that you are the owner of this property (the "Property"). The lien which EPA has perfected against the Property arises under Section 107(1) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), commonly known as the "Superfund," 42 U.S.C. Section 9607(1). The lien is intended to secure payment to the United States of costs and damages for which you, as the owner of the Property, would be liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. Section 9607(a).

Under CERCLA Sections 107(a) and 101(9), 42 U.S.C. Sections 9607(a) and 9701(9), liable persons include persons who own any "facility," including a site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located. EPA has determined that a release or threat of release of hazardous substances pursuant to CERCLA Section

101(22) has occurred at or from the Property. The Property is part of the [] Superfund Site, at which [hazardous substances] came to be located, and is subject to or affected by a removal or remedial action. As the owner of a facility, you are a person liable for all costs of removal or remedial action at the site. Costs and damages include the costs incurred by the United States in responding to a release or threat of release at the [] Superfund Site.

The lien arising in favor of the United States on the Property continues until the liability for the costs is satisfied or until the liability for the costs becomes unenforceable through operation of the statute of limitations in CERCLA Section 113.

On [date], EPA notified you by certified mail of your potential liability under CERCLA. You may satisfy the lien placed upon your property by paying all costs and damages for which you are liable.

EPA has assembled a Lien Filing Record consisting of documents relating to its decision to perfect the lien. This record is kept at the following address, and may be reviewed and copied at reasonable times by arrangement with:

[Regional Attorney]
[Address and Telephone Number]

EPA has reviewed the information in the Lien Filing Record and believes that the Agency has a reasonable basis to believe that the statutory elements for perfecting a lien are satisfied. EPA has perfected its lien by filing a notice of lien with [the appropriate office within the state (or county or other governmental subdivision), as designated by State law, where the real property is located, or with the District Court of the United States for the district in which the real property is located]. EPA perfected its lien prior to notifying you of its intention because [].

You may notify EPA within [14 calendar days or other period, set by the Region] from the date of mailing of this letter in writing if you believe EPA's information or determination is in error. You may also request to appear before a neutral EPA official to present any information that you have indicating that EPA did not have a reasonable basis to perfect a lien. You should describe in your letter or written request your reasons for believing that EPA did not have a reasonable basis to perfect its lien, because EPA may, as described below, agree with your reasons and release its lien without further review or a meeting. Any written submissions or requests for a meeting should reference the Superfund Site, be addressed to the above referenced Regional Attorney, and may include documents or information which support your contentions.

If EPA receives a written submission or a request for a meeting from you within [14 calendar days or other period, set by the Region] from the date of mailing of this letter, Agency staff will review your submission or request for a meeting. If, after review and consultation, EPA agrees that the Agency did not have a reasonable basis upon which to perfect a lien, EPA will release its lien, and will so notify you. If EPA disagrees, the written submission or request will be referred to a neutral EPA official selected for the purpose of reviewing the submission or for conducting the meeting, along with the Lien Filing Record.

If you have requested an opportunity to appear, a meeting will be scheduled. You may choose to attend this meeting via teleconference. The Agency will be represented by its enforcement staff, including a representative from the Office of Regional Counsel. You may be represented by counsel at this meeting.

The meeting will be an informal hearing in which you may provide EPA with information as to why the Agency's assumptions require reconsideration. The meeting will not be conducted using rules of evidence or formal administrative or judicial procedures. The sole issue at the meeting would be whether EPA had a reasonable basis to perfect its lien based upon CERCLA Section 107(1).

After reviewing your written submissions, or conducting a meeting, if one is requested, the neutral EPA official will issue a recommended decision based on the Lien Filing Record. The recommended decision will state whether EPA had a reasonable basis to perfect the lien and will be forwarded to the Agency official delegated to execute liens for action. You will be notified of the Agency's action (whether the lien will stay in place or be released) and furnished a copy of the recommended decision.

Neither you nor EPA waives or is prohibited from asserting any claims or defenses in any subsequent legal or administrative proceeding by the submission of information, a request for and participation at a meeting, or recommended decision by the neutral EPA official that EPA has a reasonable basis to file a lien.

If you have any questions pertaining to this letter, please contact [ORC attorney] at [].

Sincerely,

Waste Management Division Director/Regional Counsel/Regional Administrator
