



Windfall Lien Administrative Procedures Guidance: Frequent Questions

Office of Site Remediation
Enforcement

The following frequently asked questions are based on the *Windfall Liens Administrative Procedures* guidance document issued by EPA on January 8, 2008. EPA also issued a frequently asked questions document in July 2003 with the *Interim Enforcement Discretion Policy Concerning "Windfall Liens" Under Section 107(r) of CERCLA*. These documents are available on the Superfund enforcement policy and guidance database at <http://cfpub.epa.gov/compliance/resources/policies/cleanup/superfund/>.

1. What is a "windfall lien" under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA, commonly known as "Superfund")?

A lien is a legal right or interest in real or personal property in exchange for the satisfaction of some debt or duty by the property owner. A CERCLA § 107(r) statutory lien on a property, "the windfall lien," is a lien for either the *increase in the fair market value* of that property attributable to EPA's cleanup efforts *or* EPA's unrecovered response costs, whichever is less. Unlike a CERCLA § 107(l) lien, the windfall lien is *not* a lien for all of EPA's unrecovered response costs.

2. To which property owners does the windfall lien apply?

The windfall lien, under CERCLA § 107(r), applies to properties that are or may be acquired by bona fide prospective purchasers (BFPPs) as described in CERCLA § 101(40). CERCLA provides for another type of lien, under § 107(l), that applies to properties owned or once owned by potentially responsible parties (PRPs) as set forth in CERCLA § 107. Both types of liens can only arise on properties where the United States spends money cleaning up the property. More information regarding CERCLA § 107(l) liens is available from the 2002 memorandum *Use of Federal Superfund Liens to Secure Response Costs*, available on EPA's Web site at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/lien-response-cost.pdf>.

3. How will a property owner know if EPA intends to file a windfall lien on his or her property?

If EPA intends to file a notice of a windfall lien on a property, EPA will generally send a letter to the current owner prior to filing the notice. The letter will summarize the factual basis for EPA's reason to believe that the CERCLA § 107(r) statutory criteria are satisfied and give the owner an opportunity to request a meeting with a neutral EPA official before the intended date of

filing. Only in exceptional circumstances will EPA file a windfall lien without sending a letter to the property owner. EPA's *Model Notice of Intent to File a Windfall Lien Letter* is available at <http://www.epa.gov/compliance/resources/policies/cleanup/superfund/wf-notice-mod.pdf>.

4. What if a property owner wants to resolve a windfall lien on his or her property?

Both before and after providing the property owner with a Notice of Intent to File a Windfall Lien Letter, EPA will often provide the owner with an opportunity to negotiate a resolution of the windfall lien with the Region having jurisdiction over the property.

5. Does EPA maintain an administrative record during the process of filing a windfall lien?

Yes. The Region having jurisdiction over the property at issue will develop and maintain a Lien Filing Record. This record is available for review and copying by the public, including the property owner.

6. What if a property owner disagrees that EPA has a reasonable basis to file notice of a windfall lien on his or her property?

If a property owner disagrees that EPA has a reasonable basis to file a windfall lien on his or her property, the property owner may request a meeting before a neutral EPA official to explain why he or she believes EPA does not have a reasonable basis under the statute for filing a windfall lien.

7. How does a property owner administratively contest EPA's intent to file notice of a windfall lien to a neutral EPA official?

The property owner may request a meeting before a neutral EPA official. The Region having jurisdiction over the property will select an EPA employee who is uninvolved with the site at issue. The neutral EPA official will be given the Lien Filing Record and will consider all facts related to the filing of the notice of the lien. The neutral EPA official will set up a time and location of the meeting, or offer the property owner a meeting via teleconference.

8. What are the procedures for an administrative appeal before the neutral EPA official?

The property owner may present information or submit documents purporting to establish that EPA has made a material error in concluding that there is a reasonable basis to file a notice of a windfall lien. The neutral EPA official will consider all facts in the Lien Filing Record and all presentations made at the meeting. The property owner (and/or an attorney, at the property owner's option), regional enforcement staff, and the official will attend the meeting. The meeting will ordinarily be held at the EPA Regional office in the Region having jurisdiction. The official will ensure a record of the meeting is kept and added to the Lien Filing Record, and conduct the meeting informally, facilitating the exchange of information between the Region and the property owner. The official will allow both the property owner and the regional

representative to present evidence supporting their positions, ask questions, and discuss evidence, and the official may also pose questions to the regional representative or the property owner.

9. What may be presented to the neutral EPA official?

Property owners may present any information or documents reflecting their view that the work performed at the property at issue has not resulted in an increase in the fair market value of the property. The official will ultimately consider only information relevant or material to EPA's decision as to whether it has a reasonable basis for filing a notice of a windfall lien.

10. What are the factors considered by the neutral EPA official?

The official will determine whether EPA has a reasonable basis under CERCLA 107(r) for filing the notice of a windfall lien. To do so, the official will 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 increased the fair market value of the property above the fair market value of the property that existed before the response action was initiated;
- whether the property owner is appropriately considered a BFPP for purposes of the proceeding before the official; and
- whether the record has any other information sufficient to show that the lien should not be filed.

11. What will the neutral EPA official decide?

The official will decide whether EPA has a reasonable basis under the statute for filing the notice of a windfall lien or whether the property owner has established any issue of fact or law to alter EPA's decision to file the notice.

12. How will the property owner who requested a meeting know what was decided?

Within a reasonable time, the official will issue a written Recommended Decision. A copy of this decision will be forwarded to the property owner as well as placed in the Lien Filing Record.

13. What is the effect of the neutral EPA official's decision?

The Recommended Decision does not bar EPA or the property owner from asserting any claims or defenses in any future proceeding. The Recommended Decision will be placed in the Lien Filing Record and a copy sent to the property owner. The official's Recommended Decision is not a binding determination of ultimate liability or non-liability.