

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]