UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

JUN 29 2006

VIA OVERNIGHT MAIL
Evan Goldenberg, Esq.
White & Case, LLP
Wachovia Financial Center, Suite 4900
200 South Biscayne Blvd.
Miami, Florida 33131-2352

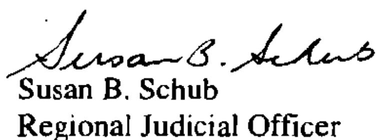
VIA HAND DELIVERY
Rudolph C. Tanisijevich, Esq.
Office of Environmental Accountability
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303-8960

Re: Florida Petroleum Reprocessors Superfund Site

Dear Messrs. Goldenberg and Tanisijevich:

Enclosed please find the Recommended Decision in the above-captioned Superfund Lien Proceeding.

Yours truly,



Susan B. Schub
Regional Judicial Officer

cc: Lien Filing Record
Ms. Beverly Banister, Acting Director, Waste Management Division
U.S. EPA Region 4

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF)
) CERCLA Lien Proceeding
Florida Petroleum Reprocessors, Inc.)
Davie, Florida)
)

HEARING CLERK
2005 JUN 29 PM 2:00
RECEIVED
EPA REGION IV

RECOMMENDED DECISION

This matter was heard by the Regional Judicial Officer for the United States Environmental Protection Agency ("EPA"), Region 4, to determine whether EPA had a reasonable basis to perfect a lien, pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9607(*l*), on property known as the Florida Petroleum Reprocessors Site (the "Site" or the "Property"), located in Davie, Florida. An informal hearing was conducted pursuant to the Supplemental Guidance on Federal Superfund Liens ("Supplemental Guidance"), dated July 29, 1993 (OSWER Directive Number 9832.12-1a), after which a Transcript ("Tr.") was prepared and made part of the Lien Filing Record ("LFR").

CERCLA Lien Provisions

Section 107(*l*) of CERCLA, 42 U.S.C. § 9607(l), provides that all costs and damages for which a person is liable to the United States in a cost recovery action shall constitute a lien in favor of the United Sates upon all real property and rights to such property which 1) belong to such person and 2) are subject to or affected by a removal or remedial action.

Under the Supplemental Guidance, as the neutral designated to conduct this proceeding and to make a written recommendation, I am to consider all facts relating to whether EPA had a reasonable basis to believe that the statutory elements for perfecting a

lien under Section 107(l) of CERCLA had been satisfied. Specific factors for my consideration under the Supplemental Guidance include:

Element 1: Whether the property was subject to or affected by a removal or remedial action.

Element 2: Whether the United States has incurred costs with respect to a response action under CERCLA.

Element 3: Whether the property is owned by a person who is potentially liable under CERCLA.

Element 4: Whether the property owner was sent notice by certified mail of potential liability.

Element 5: Whether the record contains any other information which is sufficient to show that the lien should not be filed.

Factual Background

The property at issue in this proceeding is located at 3211 S.W. 50th Avenue, Davie, Broward County, Florida. The Florida Petroleum Reprocessors ("FPR") Facility, was a former waste oil reprocessing facility that operated from 1977 to 1992. More than 15 million gallons of waste oil were collected at the FPR Facility from many sources. The operations at the FPR facility resulted in the contamination of surface and subsurface soils and groundwater from oil and grease, chlorinated organic chemicals common to gasoline, and chlorinated cleaning and decreasing solvents. (See Administrative Order on Consent, In the Matter of Florida Petroleum Reprocessors Site, Docket No. CER 04-2004-3789) In 1986, solvent-related contaminants were detected by the City of Fort

Lauderdale in drinking water which prompted a series of investigations by EPA and other regulatory bodies, to assess the contamination.

Through a series of investigations between 1981 and 1987, EPA back-tracked a trail of contamination to the FPR facility. However, in 1995, FPR, which had ceased business operations in 1992, advised the State of Florida that it could not afford to continue its ongoing cleanup.

Thereafter, through various EPA and Potentially Responsible Parties ("PRPs"), removal and remedial actions were conducted, ultimately leading to contaminant levels reduced to levels less than health based regulatory standards. As part of the Record of Decision, issued on March 1, 2001, the selected remedy includes protection of the Peele-Dixie Wellfield through potential pumping and treating of groundwater at the Wellfield, in the event concentrations above health based limits reach the Wellfield. For this purpose extensive groundwater sampling was to occur over several years to determine the need to implement the pump and treat Wellfield remedy component. It is the groundwater sampling and monitoring wells which are the primary subjects of this proceeding.

EPA issued Special Notice letters to 125 PRPs in June 2001. On April 25, 2002, 2238 N.W. 86th Street, Inc. ("2238") purchased the FPR, Inc. facility through a tax sale for $19,100. Approximately one year later, a representative of 2238 contacted the EPA Remedial Project Manager, Brad Jackson, about environmental conditions at the Site. (See EPA Memorandum of Law, p. 4). According to EPA, Mr. Jackson updated the representative, regarding the status of the cleanup at the site, including the fact that several million dollars had been spent by EPA and PRPs, and that a final settlement

agreement was about to be entered into calling for spending several million dollars more on cleanup.[1]

On February 9, 2004, EPA became aware of unauthorized work on the 2238 Property which involved the removal of all but five of the 70 groundwater monitoring and injection wells on the Property. In response, EPA sent a letter to 2238 and other entities involved with damaging the Site, to cease from further work that could disturb the implementation of the EPA cleanup efforts.

On July 6, 2004, EPA sent to 2238 a Notice Letter, notifying it of its potential liability, as defined by Section 107(a) of CERCLA, 42 U.S.C. 9607(a), as amended, that it may have incurred at the site. The other recipient of this letter was AND Realty, Inc. ("AND") whose involvement in this matter will be discussed further below.

According to EPA documents, the parties attempted to reach informal resolution addressing the unauthorized removal and destruction of the wells. However, negotiations ultimately failed sometime in the Spring of 2005, so that on April 18, 2005, EPA sent to 2238, a Notice to perfect a lien upon the property, under Section 107(l) of CERCLA, as amended, 42 U.S.C. § 9601 et. seq. On April 25, 2005, 2238 responded to the Lien Filing Notice, requesting a meeting to discuss the Notice and resolution of the matter.

Procedural Background leading to a Post-Perfection Lien Proceeding

Upon designation as the Agency Neutral for the lien filing proceeding, a conference call was convened on October 18, 2005, to review preliminary procedural matters, and set the date and time for the superfund lien meeting. Later that same day, EPA notified the undersigned and 2238 that a lien had been perfected on the Property and

[1] The RD/RA Consent Decree was ultimately lodged with the Federal District Court on July 29, 2005, and entered on January 24, 2006.

that EPA was sending a post perfection lien Notice to 2238. After exchange of letters and electronic messages among the participants, the lien filing meeting was rescheduled to take place on December 16, 2005. However, due to an unfortunate fire at the EPA regional offices, the meeting was postponed, and took place on January 12, 2006, after which additional memoranda of law and reply briefs were submitted into the LFR.

Disputed Matters:

The property owner has stipulated to the following: a) receipt of notice from EPA of potential liability; b) that the Property was subject to or affected by a CERCLA response action and c) that EPA has incurred costs with respect to the response action. [2] See Tr. 17-19. Therefore the issue in dispute is limited to Element 3 above, whether the property is owned by a person who is potentially liable under CERCLA Section 107(a)(1). While it is undisputed that 2238 is the current owner, it is 2238's CERCLA liability in that capacity that is in dispute in this proceeding. This issue will be addressed first.

Whether the property is owned by a person who is potentially liable

2238 raises, as a defense to liability, what is referred to as the "third party defense" under CERCLA, found at 107(b)(3) of CERCLA, 42 U.S. C. § 9607(b)(3). That section provides in pertinent part, that,

> "There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused by ...(3) an act or omission of a third-party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly with the defendant...if (a) he exercised due care with respect to the hazardous substances concerned,

[2] Although 2238 does not dispute that there have been response costs, it disputes what if any portion should be attributable to 2238. This issue is addressed further below. See Transcript p. 20.

taking into consideration the characteristics of such hazardous substances, in light of all relevant facts and circumstances, and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions..."

Both parties agree that 2238 took title to the property on April 25, 2002, via a tax deed sale, has retained title and is, therefore, the current owner. However, applying the third party defense to this proceeding, 2238 would be absolved from liability under CERCLA Section 107(a) if it can establish that the release of hazardous substances was caused by FPR, a *party with no contractual relationship to* 2238, that 2238 exercised due care with respect to the Property, and lastly, that 2238 took precautions against foreseeable acts of any such third party. Should 2238, meet its burden to establish this defense to liability, there would be no reasonable basis for a lien on the Property.

At the core of the dispute is whether or not the aforementioned tax deed purchase constitutes a contractual relationship between 2238 and FPR. While there is certainly support for the principle that deeds transferring property, in general, are contracts for this purpose, one case in particular relied upon by 2238, specifically addresses tax deeds and concludes they are not contracts for this purpose. In the case, Continental Title Co. v. The Peoples Gas Light & Coke Co., Case No. 96 C 3257, 1999 WL 1250666 (N.D. Ill. March 18, 1999), the Court held that the acquisition of property pursuant to a tax deed sale did not constitute a "contractual relationship," as that term is defined in CERCLA, between the tax purchaser and the prior owner. The Court noted that a tax deed proceeding not only divests title from the owner, but extinguishes all prior interests, and conveys a cleaner title to the tax purchaser than that held by the prior owner. Therefore, the Court noted that,

> "It defies logic to say that such a transformation, being a divestiture, without consideration to the previous titleholder or lienholder, can create a contractual relationship between the holder of an encumbered title and a tax purchaser who following a tax sale receives a new and independent title free of all prior encumbrances. *This Court concludes that a tax deed does not create a contractual relationship within the meaning of CERCLA...*" 1999 WL 1250666 at 7-8 (emphasis added)

The Magistrate Judge distinguished several cases in which courts found that certain instruments, other than tax deeds, formed the bases for contractual relationships between current and previous owners, both direct and indirect. Furthermore, the Magistrate Judge's findings were adopted on review by the District court which reiterated that, "[a]s the magistrate judge explained, it defies common sense to conclude that the divestiture of Paschen's property interest crated a contractual relationship between Continental and Paschen. Indeed, the tax deed proceeding terminated Paschen's interest in the Pitney Court site, and Paschen therefore had no property interest to convey to Continental, which under Illinois law, created a "new and independent title, free and clear from all previous titles and claims of every kind." Therefore, the Court agrees with Magistrate Judge Ashman that Continental was not in a contractual relationship with Paschen." [3] Continental Title Co., v. The Peoples Gas Light and Coke Co, 1999 U.S. Dist. LEXIS 14729 (Sept. 10, 1999).

EPA vehemently argues that the Continental Title interpretation of the tax deed is wrong because a) it is inconsistent with Congressional intent to consider existence of contractual relationships that are both direct or indirect with the third party and property owner; b) it is contrary to the plain meaning of a tax deed

[3] As correctly stated by 2238, the principles of the Illinois tax deed process discussed in Continental Title are equally applicable under Florida law. § 197.501 et seq., Fla. Stat. (2002)

falling under the definition of a "deed", and c) even if a tax deed is not a "deed" it is an "instrument transferring title or possession" which the magistrate intended, but failed, to examine.

Perhaps in the absence of the Continental Title decision, applying EPA's logic, along with the cases cited in its briefs, I might have reached another conclusion. However, applicability of the Continental Title decision to the case at hand is compelling, and cannot simply be ignored as an anomaly. For purposes of this proceeding, based upon the aforementioned facts supported by the LFR, I find that 2238 has met its burden with respect to the first prong of the third party defense - that the release, caused undeniably by FRP, was an act by one without a contractual relationship, directly or indirectly with 2238. This finding leads to an examination of whether the other requirements of the third party defense have been met - whether 2238 exercised due care and prevented foreseeable acts of the third party.

Due Care and Precautions against Foreseeable Acts:

The third party defense also requires that 2238 prove that it "exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances." CERCLA § 107(b)(3)(a).

The degree of care a property owner must take to prevail on the third party/innocent landowner defense to liability is highly dependent on the facts. See Chris Dunsky, Taking Due Care, Michigan Bar Journal, Dec. 2001. The scenario leading to the lien-filing proceeding is relatively straight forward and

uncontested. As set forth in the February 7, 2006, Amended Declaration of Glenn Mee, an officer and director of 2238, on August 1, 2003, 2238 entered into a commercial contract for sale of the Property to D.S. Realty, Inc., which later assigned its right to purchase the property to AND. Thereafter, on January 28, 2004, 2238 entered into a Preoccupany Agreement (POA) with AND. According to the POA, the parties expressly agreed, among other things, that: AND would be fully responsible for all repairs and damages to the Property; keep and maintain the premises in good condition and repair; and protect, indemnify and hold harmless 2238 from any loss, cost, damages and expenses resulting from AND's occupancy of the Property. In addition, the parties agreed that the property would continue to be used only and exclusively for lawful purposes, and that AND would not make any alterations or changes on the premises. According to 2238, by including these terms and conditions in the POA, 2238 took due care with respect to the hazardous substances at the Property and took precautions against foreseeable acts and omissions of third parties. Mee Declaration paragraph 7.

EPA, on the other hand, views the POA as no more than a simple legal mechanism designed to do nothing more than protect 2238's financial interest in the Property, rather than the property itself.

The case law addressing due care for purposes of CERCLA third party/innocent landowner defense, runs that gamut. As noted by counsel for EPA, some courts find that due care requires some affirmative action by the owner. See Kerr-McGee Chem. v. Lefton Iron & Metal, 14 F.3d 321 (7th Cir. 1994), and

United States v. A & N Cleaners and Launderers, Inc., et al., 854 F. Supp 229 (S.D.N.Y 1994). Other courts resolve this issue by finding due care as long as actions by the owner do not worsen the problem. See Geo Engineering Co., Inc. v. Physicians Formula Cosmetics, Inc., et al., 1997 U.S. Dist. LEXIS 236127 (C.D. Cal. June 5, 1997). See EPA's Memorandum of Law at 14-16. Indeed, there is a relatively broad spectrum of what constitutes due care.

While 2238 should not be faulted for sound business judgment in entering into a contract to protect itself against financial loss should AND damage the property, neither should it be allowed to rely solely upon that one small measure to escape liability under CERCLA. I cannot agree with the position advocated by 2238 that, as long as they got AND to contractually agree not to alter the Property, neither AND's intended use of the Property nor its specific purpose in preoccupying the Property was pertinent information for them to gather as current owners of the Site. See Tr. 144, 151. As in taking precautions against foreseeable acts of third parties, so too in exercising due care, CERCLA does not sanction what is tantamount to "willful or negligent blindness on the part of absentee owners". U.S. v. Monsanto Co., 858 F2d 160, 169 (4th Cir. 1988), In the Matter of Prestige Chemical Company Site, 2002 EPA RJO Lexis 8, March 26, 2002.

The case, New York v Lashins Arcade Co., 91 F.3d 353 (2nd Cir. 1996), serves as guidance on this issue as well. The Court, in holding that the property owner exercised due care, was apparently influenced by the fact that in addition to instructing tenants to avoid discharging hazardous substances

into the waste and septic systems, and incorporating this requirement into the tenant leases, the property owner also "conducted periodic inspections to assure compliance with this obligation" Id at 361, footnote 6. While 2238 has established through the Mee Declaration and the POA that it incorporated some very generic care requirements into the POA, it never specifically covered the hazardous waste issues, and certainly failed to conduct inspections to assure compliance. Access to the Property to conduct such inspections was certainly not an obstacle, as the POA itself, in paragraph 5, provided for right of entry "at any reasonable time after first notifying buyer for the purpose of inspecting said premises and determining whether same is in good order, condition, and repair". It is the extent and degree of its omissions, as opposed to the more perfunctory and self-serving action of entering into the POA that leads me to conclude that 2238 failed to exercise the requisite level of care. Therefore, I find that 2238 has failed to meet its burden as to the second prong of the third party defense to CERCLA liability in this matter.

Failure to prove one element of a Section 107(b)(3) claim defeats the third party defense, so that it is unnecessary to examine the third element of the defense, whether 2238 "took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions". CERCLA 107(b)(3)(b). Furthermore, courts are split with regard to whether the "foreseeable precautions" issue would even apply to the

facts of this case, if applied only to the acts of third party FPR, which was no longer contributing to the hazardous releases at the Site.[4]

I find that while a third party, FPR, caused the release in this case and that these acts of FPR did not occur in connection with a contractual relationship, 2238 failed to prove by a preponderance of the evidence that it exercised due care. 2238 has failed to prove at least one of the elements which are all independently necessary to prove in order to prevail on the CERCLA section 107(b)(3) third party defense. Therefore, I conclude that the property is owned by a person who is potentially liable under CERCLA.

Whether the record contains information which is sufficient to show that the lien notice should not be filed:

Divisibility:

2238 argues that joint and several liability does not apply if the defendant can show that the harm caused is divisible. Accordingly, 2238 argues that EPA's authority to perfect a lien should be limited to 2238's divisible share of CERCLA liability, which is zero, because it considers none of the response costs that EPA intends to secure with the lien as "fairly attributable to 2238". See 2238 Reply Memorandum and Tr. p 124.

However, for purpose of determining whether there is a reasonable basis to perfect a lien, it is sufficient to find that EPA has incurred costs at this site. See "Element 2" above. The costs constituting the lien are then recoverable in an

[4] Assuming, in the alternative, that 2238 was to have taken precautions against additional releases by a new third party, in this case AND, then 2238 would have to prove it did so, notwithstanding its failure to explore the use of the Site by AND or its purpose in seeking early occupancy. Without reaching judgment on this issue, I note that this would present quite a challenge to 2238 under the facts in this case.

action in rem in the United States district court in which the removal or remedial action is occurring or has occurred." Section 107(1)(4). At this point in time it is simply too early to reach a conclusion as to allocation, or divisibility, of costs. See In the matter of Paoli Rail "Yard Superfund Site CERCLA Lien Proceeding, Docket No. III-03-004L, 1995 EPA RJO LEXIS 27 (November 30, 1995). CERCLA liens, by their very nature, are often filed early in the history of a response action, at a time when EPA would not know the full cost of its response action. In the Matter of Iron Mountain Mine, Inc., CERCLA Lien Recommended Decision (EPA Region 9, May 4, 2000). Lastly, as noted during the informal meeting, there are past costs and on-going costs at this site, so that making such allocations is, by necessity, beyond the scope of this proceeding. See Tr. 190.

Exceptional Circumstances:

As discussed above, on April 18, 2005, EPA sent 2238 a Notice to perfect a lien upon the property to which 2238 filed a response. Subsequent to designation of the undersigned as Agency Neutral and communication by the parties with the undersigned, on October 18, 2005, counsel for EPA notified 2238 and the undersigned that a lien had been perfected.[5] EPA also mailed to 2238 a post-perfection lien notice notifying it that it may request a lien hearing regardless of perfection of the lien. By agreement of the parties, and with certain scheduling adjustments, the lien filing matter proceeded as planned, as a post-perfection lien filing matter, with the clear understanding that 2238

[5] A teleconference, convened by the undersigned, was held with the parties that morning to discuss preliminary matters regarding a pre-perfection lien meeting to be scheduled. EPA did not raise the anticipated perfection of the lien during the call.

opposed the perfection of the lien and intended to raise its objections at the lien filing meeting.

With respect to perfection of a lien prior to a meeting, the Superfund Guidance states, in pertinent part:

> "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 the meeting. ... 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 transfer of all or a portion of the property... or indications that these events are about to take place.... Regional staff should document any such circumstances in the Lien Filing Record."

The Supplemental Guidance also makes very clear that the sole issue at the lien meeting is whether EPA has (in a pre-perfection) or had (post-perfection) a reasonable basis to believe that the statutory elements have been satisfied for the perfection of a lien. It specifically identifies the elements for consideration, as already described above, which are identical, for both pre-and post- perfection lien proceedings. The issue of exceptional circumstances, is discussed separately in the Supplemental Guidance and is not among, or included within, the elements for consideration. The Supplemental Guidance does not provide for the Neutral to make any assessment, reach any conclusion, or even include in the scope of the meeting, whether or not EPA has sufficiently established that exceptional circumstances occurred to perfect the lien.

However, given the timing and particular circumstances in which this lien was perfected, I believe that some discussion of this issue is appropriate, notwithstanding the

fact that it will have no bearing or impact upon the sole issue in this probable cause determination, which is whether there was a reasonable basis to perfect the lien.

Adhering to the Supplemental Guidance, EPA submitted Declarations of Brad Jackson into the LFR, to document that exceptional circumstances existed for perfecting the lien. Mr. Jackson's March 9, 2006, declaration indicates that during one telephone conversation with Mr. Howell Abrams, President of Signal Technology, Inc., lessee of the Property from 2238, Mr. Abrams indicated that one of the corporate officers of 2238 offered to sell the Property to him, and indicated that another person was interested in purchasing the Property if he declined the offer. Mr. Jackson was not present at the lien meeting, so that further inquiry could not be made about this conversation, either by 2238 or the undersigned. Furthermore, counsel for 2238 objected to the fact that no further personal contact was made about any anticipated sale with 2238, or with Signal Technology, a fact that was not rebutted by EPA. Finally, 2238 contends that there was nothing unusual, let alone exceptional, about a commercial property owner interested in selling its property, and that given its status as an NPL-listed site, there was no real threat of an imminent sale.

The fact that it is Superfund guidance which refers to imminent transfer of all or a portion of the property as a factor that could be considered an exceptional circumstance, I have to assume that EPA, in issuing the guidance, took NPL-listed and non-NPL listed sites into consideration, so that such listing does not negate the possibility that a transfer could be imminent. Furthermore, while I do not find the facts as set forth by Mr. Jackson overwhelmingly convincing that the sale was imminent, and agree that contact with the parties on this issue would have been prudent, the Guidance is silent as to EPA's burden

to prove the existence of exceptional circumstances. The Supplemental Guidance does not direct the Neutral to make any recommendation or finding on this issue. Ordinarily, once there is a Recommended Decision that EPA has a reasonable basis to perfect a lien in a pre-perfection lien proceeding, the decision to perfect the lien is at the Agency's discretion. Similarly, upon finding a reasonable basis to perfect a lien in a post-perfection lien proceeding, the Agency's prior perfection of the lien was within its discretion as well.

Conclusions:

Based upon stipulations by the parties and the LFR, I find that the property was subject to or affected by a removal action; that the United States has incurred costs with respect to a response action under CERCLA and that the property owner was sent notice by certified mail of potential liability. Based upon my conclusions above, with respect to the third party defense, 2238 is potentially liable under CERCLA. Furthermore, the record contains no other information which is sufficient to show that the lien notice should not have been filed. **Therefore, I conclude that EPA has made the prima facie showing necessary to impose a CERCLA lien on the FPR Site and had a reasonable basis to perfect the lien.**

This Determination does not bar EPA or 2238 from raising any claims or defenses in later proceedings. This is not a binding determination of liability. This recommended decision has no preclusive effect, nor shall it be given deference or otherwise constitute evidence in any subsequent proceeding.

Dated: June 27, 2006

Susan B. Schub
SUSAN B. SCHUB
Regional Judicial Officer