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

JUN 16 2010

VIA OVERNIGHT MAIL-
RETURN RECEIPT REQUESTED
Robert Norman Jr., Esq.
Jones Cork & Miller LLP
Fifth Floor Sun Trust Bank Building
435 Second Street
Post Office Box 6437
Macon, Georgia 31208-6437

VIA INTRA-OFFICE MAIL
F. Marshall Binford, Esq.
Assistant Regional Counsel
U.S. EPA, Region 4
61 Forsyth Street
Atlanta, Georgia 30303

Re: Circle Environmental Site #1 Superfund Lien Proceeding

Dear Messrs. Norman and Binford:

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

Yours truly,

Susan B. Schub

Susan B. Schub
Regional Judicial Officer

cc: Lien Filing Record
Mr. Franklin Hill, Director, Waste Management Division
U. S. EPA Region 4

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 4

IN THE MATTER OF:	)	
	)	CERCLA Lien Proceeding
Circle Environmental #1 Site	)	
Dawson, Terrell County, Georgia	)	
	)	

RECOMMENDED DECISION

This is a proceeding to determine whether the United States Environmental Protection Agency ("EPA") has a reasonable basis to perfect a lien pursuant to Section 107(*l*) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") on property known as the Circle Environmental #1 Superfund Site (the "Site" or the "Property"), located in Dawson, Terrell County, Georgia.

As Regional Judicial Officer for EPA Region 4, I am the neutral EPA official designated to conduct this proceeding and to make a written recommendation as to whether EPA has a reasonable basis to perfect the lien. This proceeding is being conducted in accordance with the Supplemental Guidance on Federal Superfund Liens dated July 29, 1993, OSWER Directive No. 9832.12-1a ("Supplemental Guidance").

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 under CERCLA 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. The lien arises at the time costs are first incurred by the United States with respect to a response action under CERCLA or at the time the landowner is provided written notice of potential liability, whichever is later. CERCLA § 107(*l*)(2), 42 U.S.C. § 9607(*l*)(2). The lien also applies to all future costs incurred at the site. The lien continues until the liability for the

costs or a judgment against the person arising out of such liability is satisfied or becomes unenforceable through operation of the statute of limitations. CERCLA § 107(*l*)(2), 42 U.S.C. § 9607(*l*)(2).

Under the Supplemental Guidance, 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.[1] Specific factors for my consideration under the Supplemental Guidance include:

(1) Whether the property was subject to or affected by a removal or remedial action;

(2) Whether the United States has incurred costs with respect to a response action under CERCLA;

(3) Whether the property is owned by a person who is potentially liable under CERCLA;

(4) Whether the property owner was sent notice by certified mail of potential liability;

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

"Reasonable basis" is the standard found in the Supplemental Guidance which sets forth that "[t]he neutral Agency 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."[2] In addition, the Supplemental Guidance provides that ". . . 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."[3]

---

[1] Supplemental Guidance, at p. 7
[2] *Id*
[3] *Id.*

Factual Background and Procedural History:

The subject of this proceeding is commercial warehouse property of Walter G. Mercer, Jr., ("Mercer") located at 170 5th Avenue in downtown Dawson, Georgia (the "Site" or the "Property"). The warehouse is of brick and wood construction and measures approximately 120 feet by 60 feet. On or about September 7, 2007, City of Dawson and Terrel County personnel alerted the Georgia Environmental Protection Division ("EPD")of complaints of odor from the Property. Reports originally indicated this was "an inactive waste management facility that cleaned oil and solvent tainted wipe rags."[4] The primary chemicals of concern were believed to be waste oil and tetrachloroethylene.

Following EPD's request to take action on September 10, 2007, EPA dispensed an On-Scene Coordinator ('OSC') to the Site. EPA found approximately 500 drums of suspected waste, many of which carried labels indicating waste oil and oil sorbents, flammable materials and tetrachloroethylene wastes. It was reported that temperatures in the 90s lent to liquids seeping from the containers.[5] Air monitoring inside the warehouse found elevated volatile organic compounds levels (8 to 10 parts-per-million). The OSC also reported that the majority of drums were in "questionable condition" and a number had developed minor leaks.[6] Some of the drums were thrown in piles outside the warehouse.[7] Based upon the OSC observations, it was determined the Site conditions met criteria identified under the National Contingency Plan, 40 C.F.R. § 300.415(b), for initiation of an Emergency Removal Action.

---

[4] Pollution Reports 2-9 at Tab 7 Lien Filing Record (LFR) The LFR consists of documents contained in a binder and filed by the Region upon initiation of this proceeding, as well as documents filed by each party and at my direction thereafter. The initial documents are referenced by the tab number in the initial binder. Subsequent documents are referenced by title or description only.
[5] Pollution Report 3 "Current Activities" LFR Tab 7
[6] Pollution Report 4 LFR Tab 7
[7] Pollution Report 1 LFR Tab 7

Mercer had leased the Site to Scott Harpole, owner of Circle Environmental of Dawson ("CED") for two separate periods, from 1994 to 1999, and again from 2005 to 2007. Understanding the parties' positions with regard to both periods is of some importance. According to EPA, CED operated an industrial dry cleaning and waste recycling service to companies which used rags and other absorbent materials to absorb liquid waste generated as part of their operations. President and owner, Gregory Scott Harpole ("Scott Harpole" or "Harpole"), operated under a franchise agreement with Richard Middleton ("Middleton"), owner and founder of Circle Environmental, Inc. of South Carolina. Middleton licensed the use of his "patented dry-to-dry cleaning system to Harpole. CED operations entailed the picking up of contaminated absorbents from a number of industrial customers, and transporting them to its dry cleaning facilities, where the absorbents were saturated with CERCLA "hazardous substances," principally "waste oil" but also hazardous substances, such as commercial solvents, chemical varnishes, and hazardous paint waste. One such waste was perchloroethylene. CED would store the contaminated materials at its facilities in 55 gallon drums until they could be cleaned and returned to customers for reuse.[8] However, according to Mercer, his understanding was that the operations conducted at the Site though 1998 consisted only of a recycling process that took industrial mats from Proctor and Gamble and Miller Brewing Company that contained oil and separated the oil, then recycled both the mats and oil. Mercer's understanding of the CED operations was that they did not involve hazardous substances, or generate or produce any waste as a byproduct.[9] Lease of the Site for the CED operations terminated in 1999, when Harpole moved CED's operations to a nearby facility elsewhere in Dawson. Mercer points out that none of the containers discovered and removed by EPA were related to or left over from the prior

[8] See Agency's Memorandum of Law at p. 2; Final Emergency Response Report from Tetratch LFR Tab 19
[9] Letter from Robert Norman, Esq. and accompanying Affidavit of Walter G. Mercer, Jr., LFR Tabs 11, 12

CED recycling conducted at the Site and that EPA makes no assertions to the contrary. However, more relevant to the matter at hand, in March 2005, Harpole and Mercer entered into a verbal lease agreement for additional storage space for his business. Again, Mercer understood that the materials to be stored consisted only of the same recyclable absorbent mats containing lubricating oil to be used in a recycling process similar to that which Harpole had previously conducted in his warehouse. Apparently after a number of months Mercer became aware that Harpole was closing his operations and requested that Harpole remove the containers. However, Mercer agreed to allow the storage to continue well beyond that time, and received rental payments from Harpole for doing so.

Ultimately, what was discovered to have been stored in the warehouse included drums containing waste oil, considered a CERCLA hazardous waste; drums from hazardous waste generators collected for recycling by Middleton, owner of the franchiser Circle Environmental, Inc. of South Carolina; and drums containing hazardous substances used in the CED recycling process conducted at a separate Dawson, Georgia location.

By letter dated October 2, 2007, EPA notified Mercer, of his potential liability under CERCLA Section 107(a) as the current owner of the Site.[10] Thereafter, by letter dated April 13, 2009, EPA notified Mercer of its intent to perfect a lien on the subject Property and of his right to request an informal hearing before a neutral. In response to verbal notice of EPA's intent to perfect a lien, on April 21, 2009, Robert Norman, Esq., submitted a letter setting forth the position that Mercer does not have CERCLA liability solely by reason of his ownership of the Property, raising the assertion that he is entitle to the third party defense pursuant to CERCLA 107(b)(3), 42 U.S.C. § 9607(b)(3). Based upon this letter, on July 9, 2009, EPA forwarded the matter, along with what the Agency had compiled as the Lien Filing Record (LFR), to the

[10] LFR Tab 8

undersigned as Agency neutral for an informal hearing. Upon clarifying that Mercer requested the matter be determined without an informal meeting, telephonic or in person, the parties were directed to submit position statements relating to the relevant issues.[11] Upon submission of subsequently filed memoranda, additional supporting documents and responses to questions raised by the undersigned, most recently on May 7, 2010, the matter became ripe for determination.

In asserting the third party defense to liability, discussed further below, Mercer disputes the third factor set forth above for consideration, whether the property is owned by a person who is potentially liable under CERCLA. Although not in contention, I will briefly address whether EPA has a reasonable basis to believe that all other elements are met for the perfection of a lien on the subject property.

Discussion of the Factors for Review:

1. The property was subject to or affected by a removal or remedial action: It is undisputed that EPA has undertaken remedial and/or removal actions on the subject property as reflected in the Final CERCLA Emergency Response Report and Appendices.[12]

2. The United States incurred costs with respect to a response action under CERCLA: It is undisputed that EPA incurred costs with respect to a response action on the property. The Cost Summary for Circle Environmental #1 indicates that the Agency's total Site costs for the period through March 10, 2009, totaled $521,797.58.[13]

3. Notice of Potential Liability: It is undisputed that the property owner was sent

[11] October 2, 2009 letter from Susan B. Schub to Marshall Binford
[12] LFR Tabs 19 – 22
[13] LFR Tab 9

written notice by certified mail on April 13, 2009, advising him of potential liability and EPA's intent to perfect a lien on the subject Property.[14]

Disputed Matter:

4. Property owned by a by a person who is potentially liable under CERCLA:

EPA holds Mercer liable as current owner of the Site.[15] EPA has sufficiently established, and is it undisputed, that Mercer is current owner, as evidenced by property records contained in the LFR.[16] However, the issue disputed by Mercer is his liability under CERCLA based on the Section 107(b)(3) "third party defense" to liability. 42 USC § 9607(b)(3).

Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3) provides in pertinent part as follows:

"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, 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 of omissions..."

Applying the third party defense to liability, Mercer would be absolved from liability under CERCLA Section 107(a) if he can establish, by a preponderance of the evidence, that the release or threat of release of hazardous substances was caused by a third party with whom he

---

[14] EPA's April 13, 2009, Notice to Perfect Lien LFR Tab 10 The initial General Notice Letter sent to Mr. Mercer on October 2, 2007, indicates "Express Mail with Certified," although there is no return receipt included in the LFR. However, according to the Supplemental Guidance, reference to previous notice of potential liability is satisfied via the Notice of Intent to perfect the lien, if notice had not already been furnished.

[15] General Notice letter LFR Tab 8; Notice to Perfect Lien LFR Tab 10. Although the Agency's Memorandum of Law indicates Mercer's liability rests on his being owner of the Site, "both now, and at the time that hazardous substances were disposed," for purposes of this proceeding I regard his having been deemed by EPA liable as current owner in accordance with the two notice letters. Agency's Memorandum of Law, p. 4-5.

[16] LFR Tabs 1 - 5

had no contractual relationship, that he exercised due care with respect to the hazardous substances, and lastly, that he took precautions against foreseeable acts of any such third party.

To best determine whether Mercer has met the burden of establishing that he is not liable under the third party defense, I will address each element of the defense separately.

1. Whether another party was the sole cause of the release or threat of release:

There is some disagreement as to what constitutes the "release" or "threat of release" in this case, which holds somewhat greater importance when applying other elements of the defense, such as the exercise of due care and taking precautions against foreseeable acts or omissions of any third party causing the release or threat of release. However, for purposes of determining whether the release or threat thereof was the sole cause of another party, suffice to say, it was. Regardless of which scenario is accepted - a) Mercer's, that a release of hazardous substances had not occurred until such time as containers were removed from the warehouse by Harpole and unsupervised laborers hired by Harpole; or b) EPA's, that well prior to the removal, the ongoing threat of a release evidenced by flammable and leaking drums constituted a release as defined in CERCLA - it is nonetheless sufficiently established that a party other than Mercer was sole cause of the release or threat of release at this Site.

2. Whether the act of the third-party occurred in connection with a contractual relationship existing directly or indirectly with Mercer:

This particular element was the parties' primary focus in this proceeding. While the Property owner acknowledges that a property rental agreement is a contractual relationship as defined in the law, he contends that the case law establishes that the "in connection with" clause in CERCLA 107(a) requires more than the mere existence of the contract in order for a property owner to be barred from using the defense. Relying upon several

such cases, most notably particular Second Circuit decisions, he claims that what is required is a causal connection and nexus between the contractual relationship and the handling of hazardous substances by the third party that caused the release in question.[17] Mercer argues that to the extent courts have disallowed the third party defense finding there was a sufficient "connection with" the contract and the release of hazardous substances, they did so on the basis that the property owners could have reasonably foreseen that the activity for which their properties were leased contemplated activities on the leased premises typically involving use of hazardous substances and/or generation, storage and disposal of waste byproducts containing those substances. Such activities included electroplating operations, *see* Briggs and Stratton Corporation v. Concrete Sales and Services, 20 F.Supp. 2d 1356 (N.D. Ga. 1998), manufactured gas operations, *see* New York v. Westwood-Squibb Pharmaceutical Company, Inc., 138 F.Supp. 2d 372 (W.D.N.Y 2000), and dry cleaning, *see* United States v. A & N Cleaners and Launderers, Inc., 788 F. Supp. 1317 (S.D.N.Y. 1992). In essence, he argues, there was a foreseeable risk by the property owner of a release of hazardous substances. Mercer distinguishes his situation on the basis that he could not reasonably foresee the presence and release of hazardous substances as a result of the limited activity he contends this lease was intended to cover - storage of oily soaked mats utilized in a process that would not involve use or generation of hazardous substances.

EPA on the other hand, takes a very different view of the case law and its application to the facts at hand. As to the requirement that there be a connection between the release of hazardous substances and the lease agreement, EPA argues that the majority of courts even

[17] See Norman April 21, 2009 letter citing Westwood Pharmaceuticals, Inc., v. National Fuel Gas Distribution Corp., 964 F. 2d 85, 91-92 (2nd Cir. 1992); State of New York v. Lashins Arcade Company, 91 F. 3d 353, 360 (2nd Cir. 1996); State of New York v. Fried, 430 F. Supp. 2d 151, 156-57 (S.D.N.Y 2006); Emerson Enterprises, LLC v. Crosby Acquisition Corp., et. al., 2004 U.S. Dist. LEXIS 12245 (W.D.N.Y 2004). LFR Tab 11

considering the "in connection with" language find that an owner of a facility may be liable simply for contracting with a tenant which handles hazardous substances on-site as part of its business, regardless of the extent to which the owner either participated in the disposal of hazardous waste and regardless of his level of knowledge about the tenant's business. Furthermore, with respect to the facts on record, EPA contends there is insufficient basis to accept Mercer's representations as to the scope and substance of the verbal lease agreement he had with CED. Emphasizing that the "third party defense" is an affirmative defense for which Mercer has the burden of proof, EPA points to absence of any representations corroborating Mercer's testimony that storage of hazardous substances was prohibited by the lease agreement, especially in light of the clear labeling of the contents of the drums to indicate hazardous substances, chemical solvents and flammable materials.[18] To bolster its position, over Mr. Norman's objections, EPA was allowed to submit Harpole's written testimony in which Harpole claims that a) "there were no stated or agreed restrictions or limitations on the use of the property" under the verbal lease agreement, and b) that there was no specific conversation with Mr. Mercer about the material or substances to be stored in the warehouse. [19]

Before me are two opposing sets of facts pertaining to the terms of the lease, a material matter raised in Mercer's defense. Mercer has submitted two sworn Affidavits addressing these matters while EPA has submitted a response to questions posed to Harpole, responded to through counsel.[20]

To reiterate and summarize Mercer's position with respect to facts germane to this issue, Mercer claims that: He had a verbal rental agreement with Scott Harpole that did not authorize

[18] Agency's Second Memorandum, p.4.
[19] April 29, 2010, letter from Mr. Binford to Susan Schub, and enclosure A.
[20] Mr. Mercer correctly asserts that the term "testimony" is a misnomer to responses provided through counsel by an individual not under oath.

the activities leading to the release of hazardous substances at the Site; to the contrary, he did not rent the property for use that would typically or necessarily involve the generation, use, or storage of waste or materials containing hazardous substances or involve the disposal of any waste or other materials of environmental concern; he neither had nor assumed any control over the lessee's activities on the property nor conducted inspections; he verbally agreed to allow Harpole to rent the building to store materials consisting of recyclable mats containing oil to be used in a recycling process that was similar to what Harpole conducted previously on the Property; and only after the fact did he learn that products stored at his warehouse contained materials not intended for recycling or that any materials contained regulated hazardous substances or posed any environmental concern. Furthermore, Mercer's contention with respect to the release of hazardous substances is that such release occurred when a crew hired by Harpole to remove the containers at the building dumped the contents of a number of the containers of materials onto the floor of the building and into a dumpster at the rear, where they were left overnight.[21]

EPA, as a preliminary matter suggests that since the lease was verbal, and Mercer did not submit any evidence supporting his claims (presumably in addition to his sworn Affidavits), those claims as to the terms and conditions of the lease are questionable at best. Furthermore, EPA contends Harpole's responses not only cast doubt upon Mercer's assertions, but establish that there were in actuality "no stated or agreed restrictions or limitations on the use of the property" under the verbal lease agreement.[22]

Whether or not this forum affords a sufficient avenue for reaching a conclusion as to the actual terms of the lease, and recognizing limitations on accepting the parties' Affidavits and

[21] April 21, 2009, letter from Robert Norman, Esq. with accompanying Affidavit of Walter G. Mercer, Jr., attesting to contents of the letter. LFR Tabs 11, 12; Responses to Information Request Letter. LFR Tab 13
[22] See Response to Questions ## 7 and 8, p. 9 Enclosure A to EPA's April 29, 2010 submission.

responses for the truth of what they contain, suffice to say that material terms and conditions of the verbal lease agreement are in dispute by its parties. I emphasize that this inquiry is a preliminary one, and my recommended decision as the neutral official is not a binding determination of liability or non-liability.[23] However, even if I were to assume facts regarding the terms of the lease most favorable to Mercer, that the agreed upon use of the warehouse was limited to the storage of oil soaked pre-treated mats, I find Mercer fails to meet his burden of showing that EPA erred in its belief that it has a reasonable basis to perfect the lien.

The case law on the contractual relationship exclusion's effect on the third party defense runs the gamut, ranging from courts disregarding the clause to those giving it a good deal of consideration, the latter most notably those in the Second Circuit.[24] While I recognize that the third party defense to liability is a narrowly carved exception to an otherwise broad net of liability for owners of facilities from which there has been a release or threat of release of hazardous substances, it appears to have broadened well beyond what EPA considers the prototypical case of the tanker truck upset or a trespassing midnight dumper.[25] Furthermore, while United States v. Monsanto, 858 F. 2d 160, 167 (4th Cir. 1988) does appear to be, as EPA describes, the "seminal" decision in this area, and similar to the facts at hand in that the lease agreement in that case was verbal, several decisions rendered since Monsanto emphasize that fact-driven nature of establishing this third party defense to liability and recognize and consider the "in connection with" clause. However, contrary to that which Mercer argues, I also do not read the case law supporting the notion that the connection between a contractual relationship and release and/or threat of release needs to be all that close, or the nexus all that tight, before an

---

[23] Supplemental Guidance at p. 9

[24] *See* Jeff Civins, Mary Mendoza and Christine Fernandez, "The Third Party and Transaction-Related Defenses of CERCLA: An Overview" Environmental Litigation and Toxic Torts Committee Newsletter, Vol. 7, No. 1, July, 2005

[25] See Agency's Memorandum of Law p. 5

owner is to be barred from asserting the third party defense to liability. Mercer's contention that, absent direct knowledge on the part of the property owner, the courts bar use of the defense based upon the extent to which use of hazardous substances was, to the property owner, a foreseeable aspect of the lessee's operations, is simply not borne out by case law. [26]

Even in one such Second Circuit case holding that a sales contract did not "relate to" the release in question, Westwood Pharmaceuticals v. National Fuel Gas Distribution Corp., 964 F.2d 85 (2nd Cir. 1992), the Court reasoned that the "in connection with" language bars application of the third party defense when the contract "somehow is connected with the handling of hazardous substances" or "either relate[s] to the hazardous substances or allow[s] the landowner to exert some element of control over the third party's activities." Id. at 89, 91-92. The Court in Emerson Enterprises, LLC v. Kenneth Crosby Acquisition Corp., 2004 WL 1454389 (W.D.N.Y. 2004), also involved a sale as opposed to a lease and relied upon the reasoning in Westwood Pharmaceuticals, that the contract must either relate to the hazardous substances or allow the landowner to exert some control over the third party's activities in order to negate the third party defense. Elaborating further, the Court also cited State of New York v. Westwood-Squibb, 138 F. Supp. 2d 372 (W.D.N.Y. 2000), for the proposition that a lease relates to hazardous substances if it relates to operation of the type of plant which typically produces the pollutants found on the premises. In Briggs & Stratton Corporation v. Concrete Sales & Services, et. al., 20 F. Supp. 1356 (M.D.GA. 1998), relied upon by EPA and distinguished by Mercer, the Court upheld owner liability finding that such connection was established regardless of the level of knowledge the owner had about the tenant's business, which was in that case Peach Metal Industries, Inc. (PMI), a metal plating and finishing business, "since the lease

[26] March 31, 2010 letter from Robert Norman, Esq.

existed for the purpose of allowing PMI to operate its business necessarily involving the use of such hazardous substances on the premises." Id. at 1367.

In essence, Mercer distinguishes the matter at hand from Briggs & Stratton as well as the other decisions finding defense barring contracts, arguing that this lease was not for the purpose of Harpole operating a business necessarily involving use of hazardous substances within the warehouse. I disagree. Although Mr. Mercer attempts to put a greater wedge between the lease and Harpole's business, even on occasion describing his lease as one with Scott Harpole personally, that was simply not the case.[27] Even Mercer's scenario presumes use of the leased property for Harpole's business purposes, that being CED, an entity that by its own description, was a recycling business which "eliminates RCRA liability associated with dumping used oil and absorbents into landfills." [28] This was the case whether or not Mercer was intimately knowledgeable about the operations of the business itself. The fact that Mercer may have misunderstood, or incorrectly assumed, based upon historic business practice, that the CED operations consisted only of a recycling process that took industrial mats from two specific companies - Proctor Gamble and Miller Brewing Company - was to his detriment. The hazardous substances that were released, and the barrels containing hazardous substances that posed a threat of release were at the very minimum "somehow" connected with and related to the recycling business of CED – a) 60 barrels of pre-soaked mats which were to be used in the CED's recycling operations and b) hundreds of barrels stored for Middleton, owner of the franchiser of Harpole's business. Even if the lease existed for the purpose of allowing a particular aspect of Harpole's business – storage of oil soaked mats – it was nonetheless for the purpose of and related to operating a business which involved the use of hazardous waste and

[27] May 6, 2010 Affidavit of Walter G. Mercer, Jr., at p. 2
[28] Attachment to Information Request Response by Alcan Composites USA, May 26, 2009

was in and of itself for the "handling" of hazardous substances. Of significance is the nature of the business entity with which Mercer contracted, rather than the particular aspect of the business for which he understood the facility would be used. While I understand and appreciate Mercer's efforts in drawing such distinctions in order to overcome a bar to his defense, and have given this a great deal of consideration, finding on Mercer's behalf necessitates an interpretation of the "in connection with" clause for which I simply do not find sufficient precedent.

3. Whether Mercer Exercised Due Care and Took Precautions against Foreseeable Acts:

Even if Mercer had met this difficult burden of establishing that his lease with Mercer was not in connection with the release or threat of release of hazardous substances, the third party defense also requires that he prove "...that (a) he "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, 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 of omissions..." CERCLA §107(b)(3); 42 U.S.C. § 9607(b)(3)

As referred to above, that which constitutes the release or threat of release has particular relevance to this element of the defense. Contrary to Mercer's contention that the release of hazardous substances first occurred at the time the laborers dumped contents of drums while removing them from the warehouse,[29] I am in agreement with EPA that the record sufficiently establishes releases and the threat of additional releases at the Site well before this incident. The majority of drums found at the Site were found to be in questionable condition, a number having minor leaks with liquids seeping. [30]

[29] Mercer November 10, 2009 Letter at pp 2 and 3
[30] Pollution Reports ## 3 and 4 LFR Tab 7

With respect to that which constitutes exercising due care and taking precautions against foreseeable acts, I find Mercer's position to be circuitous: he could not take precautions against releases that were not foreseeable, and absent knowledge of what Harpole was storing, he had no basis upon which to foresee any release or threat of release. To buttress this argument Mercer made several references to the fact that he did not inspect Harpole's activities at his warehouse.[31] However, such failure to obtain information about the operations taking place on his own property cannot then serve as an excuse for not exercising due care or taking reasonable precautions. Mercer had every reason to at least inspect his warehouse to examine its condition while being occupied over a number of years by an environmental recycling company. He would have seen drums marked with labels indicating, among other things, flammable materials," and "tetrachloroethylene wastes." Failure to inspect the use of a leased property found to contain hazardous substances has even been viewed as "willful or negligent blindness" on the part of an absentee owner, not sanctioned by the third-party defense. United States v. Monsanto, 858 F. 2d at 168

Therefore, having concluded that the lease at hand was in connection with the hazardous substances released and threatened to be release, and that Mercer also failed to exercise due care or take reasonable precautions against foreseeable acts, I find that there is a reasonable basis to believe that the Property is owned by a person who is potentially liable under CERCLA.

Conclusion:

EPA has made the prima facie showing necessary to impose a CERCLA lien on the Circle Environmental # 1 Superfund Site. Mercer has failed to prove the elements necessary to prevail on the CERCLA Section 107(l)(b)(3) third party defense. The record contains no other

[31] April 21, 2009, Norman letter p. 7 LFR Tab 11; Response to Information Request p. 2 LFR Tab 13; Mercer May 6, 2010, Affidavit, p. 4

information sufficient to show the lien should not be filed. Therefore, I find that EPA has a reasonable basis to perfect its lien.

This Determination does not bar EPA or the Property owner, Walter G. Mercer, Jr., 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 16, 2010

Susan B. Schub
SUSAN B. SCHUB
Regional Judicial Officer