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BEFORE THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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HEARINGS CLERK  
EPA -- REGION 10

In the Matter of:	)		DOCKET NO. CWA-10-2018-0253
BMC EAST, LLC	)		
Everett, Washington	)		
Respondent.	)		Proceedings Under Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g)

**ORDER TO SHOW CAUSE**

A Consent Agreement and proposed Final Order have been presented to the Undersigned by Complainant, Director of the Office of Compliance and Enforcement for the United States Environmental Protection Agency, Region 10, and Respondent, BMC East, LLC. The Consent Agreement sets forth the terms of a settlement between Complainant and Respondent (together "the Parties") of penalty claims that arise under Section 309(g) of the Clean Water Act ("CWA"), 33 U.S.C. § 1319(g). The settlement is subject to approval of the Undersigned. 40 C.F.R. § 22.18(b)(3). Before the Undersigned will consider issuance of a final order, the Parties must adequately address the matters identified in this Order to Show Cause.

1. In Counts 5, 7, and 9 of the Consent Agreement, Complainant alleges there were violations by Respondent of the CWA and associated regulations which transpired over periods of time that include months or quarters at the beginning of calendar year 2013. There is a five-year statute of limitations that applies to the civil penalty claims for these alleged violations. 28 U.S.C. § 2462. At least a portion of the alleged violations occurred more than five years ago; yet it appears that the total penalty in this matter includes amounts for the alleged violations during that time. It is requested that the Parties explain how the assertion of claims in Counts 5, 7, and 9 of the Consent Agreement, and the associated assessment of civil penalties for those alleged

violations, is consistent with the applicable statute of limitations. In the alternative, the Parties may provide refined settlement terms which address the penalty limits for those Counts.

2. In Paragraph 4.3 of the Consent Agreement, there are statements about Complainant having considered the required statutory factors in determining an appropriate penalty. Although these statements reference several of the statutory factors, they do not identify all of them. There is a catch-all phrase included in Paragraph 4.3 which indicates that “other relevant factors” were considered when determining the penalty, but it is not possible for the Undersigned to know whether this phrase is meant to include all the unstated statutory factors. It is requested that the Parties inform the Undersigned whether all the required statutory factors in Section 309(g)(3) of the CWA, 33 U.S.C. §1319(g)(3), were considered when determining an appropriate penalty.

3. In Paragraph 4 of the proposed Final Order, the Undersigned is asked to elaborate on the rights which Respondent will have waived by agreeing to the settlement. According to 40 C.F.R. § 22.18(b)(2), Respondent is required to agree to waive its right to appeal the proposed Final Order, and Respondent has done so in Paragraph 4.12 of the Consent Agreement. As a result, it is requested that the Undersigned be provided with an explanation of the legal basis and necessity for having the Undersigned seemingly expand on the waiver of rights by Respondent.

4. In Paragraph 5 of the proposed Final Order, the Undersigned is asked to attest to Complainant having consulted with the Washington Department of Ecology about the penalty to be assessed against Respondent. This request is not supported by an accompanying declaration or other documentation. It is requested that the Undersigned be provided with a declaration or

other satisfactory documentation which shows that there has been compliance with the state consultation requirement in Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1).

5. In Paragraph 6 of the proposed Final Order, the Undersigned is asked to attest to Complainant having conducted public notice and comment as prescribed by Section 309(g)(1) of the CWA, 33 U.S.C. § 1319(g)(1), and 40 C.F.R. § 22.45(b). There are some shortcomings with this request.

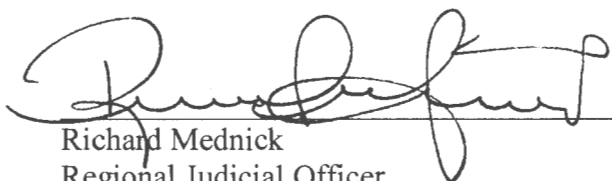
a. A two-page document has been provided to the Undersigned which appears to be a copy of a public notice that was prepared for the proposed settlement. However, there was no explanation submitted along with this document, so it is not possible to know for sure whether the document is a copy of a written notice that was provided to the public. Further, there is no information which shows that this document or any other one was published, where it was published, or the date it was published. It is requested that the Undersigned be provided with information which identifies the form of public notice used in this matter, and includes the date and place of publishing, in conformance with Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 1319(g)(4)(A), and 40 C.F.R. § 22.38(b).

b. The two-page document referenced above indicates there are 30 days to submit written comments. According to 40 C.F.R. § 22.45(b)(1), 40 days must transpire from the publication of a public notice before there may be issuance of an order assessing a civil penalty. Assuming the referenced two-page document represents the public notice in this matter, it is requested that the Undersigned be provided with an explanation reconciling these varying amounts of time, and showing that the public comment period was “reasonable” within the

meaning of Section 309(g)(4)(A) of the CWA, 33 U.S.C. § 319(g)(4)(A).

c. The Undersigned is asked to state, in part, that “[m]ore than 40 days have elapsed since issuance of this public notice and EPA has received no petition to set aside the Consent Agreement contained herein.” The Undersigned has not been provided with a declaration or other form of proof which supports this statement. Further, the statement itself appears to muddle the requirements of Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C), and 40 C.F.R. § 22.45(c)(4). Under those provisions, if no comments are provided during the public comment period, then there is no commenter who is to receive 30 days beyond the public comment period to petition to set aside the Consent Agreement and proposed Final Order. *Id.* If the Undersigned is asked to sign a statement which attests to the results of the public comment period, it is requested that the statement describe only what occurred during that time in terms of public comments, as per Section 309(g)(4)(C) of the CWA, 33 U.S.C. § 1319(g)(4)(C), and 40 C.F.R. § 22.45(c)(4), and that the statement be supported by a declaration or other form of proof.

SO ORDERED this 11<sup>th</sup> day of April, 2018

  
Richard Mednick  
Regional Judicial Officer  
U.S. EPA, Region 10

**Certificate of Service**

The undersigned certifies that the original of the attached **Order to Show Cause, Docket No.: CWA10-2018-0253**, was filed with the Regional Hearing Clerk and served on the addressees in the following manner on the date specified below:

The undersigned certifies that a true and correct copy of the document was delivered to:

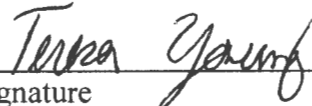
Richard Mednick  
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U.S. Environmental Protection Agency  
1200 Sixth Avenue, ORC-113  
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Seattle, WA 98101

Leah Brown  
U.S. Environmental Protection Agency  
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Further, the undersigned certifies that a true and correct copy of the aforementioned document was placed in the United States mail certified/return receipt to:

Ted Hopkins  
3333 Vaca Valley Parkway, Suite 2000  
Vacaville, CA 95688

DATED this 11 day of April, 2018

  
\_\_\_\_\_  
Signature  
Teresa Young  
Regional Hearing Clerk  
EPA Region 10