

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

August Mack Environmental, Inc.,

Requestor.

Docket No. CERCLA-HQ-2017-0001

PRELIMINARY STATEMENT OF REQUESTOR

Pursuant to the Prehearing Order of the Office of Administrative Law Judges (“OALJ”), Requestor August Mack Environmental, Inc. (“AME”), through counsel, submits the following Preliminary Statement:

1. ***Hearing Location.*** AME prefers that the hearing be conducted virtually by video conference or at the offices of Bose McKinney & Evans, LLP located at 777 6th Street, N.W., in Washington, D.C.
2. ***Document Service.*** AME consents to the service of orders and decisions issued by the Tribunal, and to the service of documents filed by other parties, by electronic mail during this proceeding.
3. ***Valid Email Addresses.*** AME provides the following valid email addresses for document service: bsugarman@boselaw.com; pzimmerly@boselaw.com; jschroeder@boselaw.com; and, thorn@boselaw.com.

4. *Other Matters:* On September 20, 2021, the EPA, by its counsel Benjamin Cohan, provided a Settlement Status Report to OALJ stating that the parties were not able to reach “any form of compromise on Plaintiff’s [sic] claim, and discussions were not constructive.” The Settlement Conference occurred virtually by video conference on that same day. AME’s owner and president, Geoff Glanders, and its legal counsel appeared on behalf of AME. EPA appeared only through its counsel of record. While it is true that those discussions were not fruitful, AME notes the government did not participate in good faith. In fact, the government appeared without a client representative with authority to settle this matter, without a substantive response to the AME’s written settlement demands made on February 19, 2021, and again on September 16, 2021, and without any settlement authority.

Based on the foregoing, AME submits that the EPA’s participation in the Settlement Conference, to which this body ordered the parties to appear, was perfunctory and not in good faith. Indeed, had the Settlement Conference occurred in federal court, the government’s conduct could easily be considered to be in bad faith and subject it to sanctions. *See, Nick v. Morgan’s Foods, Inc.*, 99 F.Supp.2d 1056 (E.D. Mo. 2000) (“Presence of the corporate representative is the cornerstone of good faith participation.”), *aff’d*, 270 F.3d 590 (8th Cir. 2001); *see also, Bartholomew v. Burger King Corp.*, 2014 WL 7419584 (D. Haw. Dec. 30, 2014). As such, the OALJ would be well within its authority to sanction EPA here and, regardless of imposing sanctions, should order EPA to meaningfully

participate in a settlement conference with an agency representative that has the authority to settle AME's claims. *See Angus v. Transnational Automotive Group, Inc.*, 2010 WL 11519624 (C.D. Cal. Sept. 20, 2010) (noting that "[a] settlement cannot be reached if a representative in a position to listen to his opponent's position and decide whether to change his settlement posture in response is not present.").

Respectfully submitted,



Bradley R. Sugarman
Philip R. Zimmerly
Jackson L. Schroeder
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204
Telephone: (317) 684-5000
Facsimile: (317) 684-5173
BSugarman@boselaw.com
PZimmerly@boselaw.com
JSchroeder@boselaw.com

*Attorneys for August Mack Environmental,
Inc.*

Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on September 30, 2021, through the Office of Administrative Law Judge's e-filing system, and that a copy of this document was also served on opposing counsel at the following e-mail addresses: cohan.benjamin@epa.gov and Swenson.erik@epa.gov.



Bradley R. Sugarman