

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of:

August Mack Environmental, Inc.,  
  
Requestor.

Docket No. CERCLA-HG-2017-0001

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**REQUESTOR’S MOTION TO COMPEL DISCOVERY, FOR SANCTIONS, AND  
MOTION TO EXTEND CASE MANAGEMENT DEADLINES**

In reversing and vacating this Tribunal’s order granting EPA’s motion to dismiss, the Fourth Circuit Court of Appeals clearly concluded that discovery was required to determine whether August Mack Environmental, Inc. (“AME”) substantially complied with the preauthorization process and is entitled to recover on its claim. *August Mack*, 841 Fed.App’x. 517, 524-525 (4th Cir. 2021). Nevertheless, in direct contradiction to the Fourth Circuit’s Order, the Prehearing Order, and EPA’s own regulations that permit the discovery AME seeks, EPA, without a good cause, has refused to engage in even basic discovery and claims that AME is barred from taking discovery without the agency’s consent or an order from this Tribunal.<sup>1</sup> EPA’s present position is consistent with its behavior post remand. Months earlier, EPA’s participation in the Settlement Conference, to which this Tribunal ordered the parties to appear, was perfunctory and not in good

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<sup>1</sup> EPA’s position that AME is entitled to no discovery is made clear in its letter responding to AME’s request for an acknowledgement of the overdue discovery and EPA’s recently filed motion for accelerated decision. (Ex. F.)

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. (AME Preliminary Statement, pp. 2-3.) Then, with its Initial Prehearing Exchange, EPA took a position that has no basis in the law arguing that this Tribunal's order granting EPA's motion to dismiss remains unreversed and the law of the case—an argument it repeats in its recently filed motion for an accelerated decision. (EPA's Initial Prehr'g Exch., pp. 7-9, 7 n.5.)

AME served EPA with written discovery nearly two months ago on October 29, 2021. As discussed below, the written discovery sought information and documents relevant to the pending substantial compliance issue and included 17 interrogatories, 22 request for production of documents, and 18 requests for admission. On November 22, 2021, AME served EPA with a second set of written discovery, consisting of only 4 interrogatories and 4 request for production of documents that were limited to seeking information and documents related to the exhibits EPA listed on its Exhibit List. EPA attempts to use these documents to defeat AME's claims and even cites to them to support its recently filed memorandum of law in support of motion for accelerated decision. (Mem. of Law in Support of Mot. for Accelerated Decision, pp. 27, 29-30.) Also included in the second set written discovery were requests for admission that sought to authenticate documents. Lastly, on November 22, 2021, AME requested dates for remote

depositions of the three witnesses EPA listed on its Initial Prehearing Exchange and EPA Administrator Michael Regan. In its request, AME proposed remote deposition dates, but was careful to ask if those dates proposed worked for EPA's counsel and the witnesses. EPA did not acknowledge, object or respond to AME's discovery within 30 days.

On December 6, 2021, having received no response to either the first set of written discovery or request for depositions, AME served EPA with a letter attempting to informally resolve the discovery disputes. EPA finally responded on December 8, 2021, stating it "does not believe additional discovery is warranted at this time and had AME requested additional discovery, *EPA would not have agreed to it (including depositions).*" (emphasis added). Thereafter, the parties exchanged more correspondence regarding AME's discovery and participated in a meet and confer teleconference on December 16, 2021. The parties did not reach a resolution of the discovery disputes at that time, but EPA's attorneys (Mr. Cohan and Mr. Swenson) stated they would take the issue back to their client for further consideration. AME requested a response by Monday, December 20, 2021, in order to have sufficient time to file the present motion. However, unbeknownst to AME, EPA was working on a motion for accelerated decision that argues this Tribunal may end this matter in the agency's favor without *any* discovery. Indeed, EPA informed AME that it would not agree to participate in any discovery or extend the discovery deadline in an email sent at 2:26 PM on December 20, apparently after having

taken the issue back to its client, and then filed its 36-page motion for accelerated decision approximately two hours later.

EPA's attempt to thwart discovery and deny AME due process is soundly at odds with the Fourth Circuit's Order, the Rules of Practice contained at 40 C.F.R. Pt. 305, the Prehearing Order, and the Constitution. As discussed below, AME's motion should be granted and sanctioning EPA for its conduct is appropriate in order to maintain the order of this proceeding, to deter such conduct in the future, and to allow an efficient and fair adjudication of the issues the Fourth Circuit remanded. In addition, EPA's motion for an accelerated decision should be held in abeyance to provide AME sufficient time to complete discovery.

### **Background Facts**

1. On January 7, 2021, the Fourth Circuit reversed and vacated this Tribunal's order granting EPA's motion to dismiss, concluding that "it was legal error for the EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim." *August Mack*, 841 Fed.Appx. at 524. The Fourth Circuit acknowledged its decision "does not mean that August Mack is necessarily entitled to recover on its claim for response costs." *Id.* at 524-525. Rather, the court was careful to point out that "no discovery was conducted" and that the issue of "whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings." *Id.* at 525.

2. On September 8, 2021, the Tribunal issued its Order of Resignation and Prehearing Order. When citing 40 C.F.R. § 305.26(f)(2), (f)(3), the Tribunal ordered that “Additional Discovery” could take place without participation of the Tribunal if it was mutually agreed and concluded by December 24, 2021 and that any further discovery would be allowed only by order. (Order, p. 4.) The order is silent as to initial discovery.

3. On October 29, 2021, AME served EPA with 17 interrogatories, 22 request for production of documents, and 18 requests for admission. (Ex. A.)

4. On November 10, 2021, EPA filed its Initial Prehearing Exchange that identified specific fact and expert witnesses it intended to call at hearing as well as 18 hearing exhibits. These exhibits included matters where EPA allegedly issued Preauthorization Decision Documents (or PDDs) and which were apparently relevant to the substantial compliance issue before the Tribunal.

5. On November 22, 2021, AME served EPA with a second set of written discovery and requested to take remote depositions of Eric Newman, Richard Jeng, Silvina Fonseca, and EPA Administrator Michael Regan. (Exs. B, C, D.)

6. On December 6, 2021, having received no response from EPA to either the first set of written discovery or request for depositions, counsel for AME served counsel for EPA with a letter seeking the discovery responses and deposition availability. (Ex. E.)

7. EPA responded on December 8, 2021, stating it “does not believe additional discovery is warranted at this time and had AME requested additional discovery, *EPA would not have agreed to it (including depositions).*” (Ex. F.) (emphasis added).

8. Counsel for the parties exchanged additional letters regarding the discovery and participated in a meet and confer teleconference on December 16, 2021. (Exs. G-K.)

9. The parties did not reach a resolution of the discovery disputes during the meet and confer teleconference, but EPA’s attorneys (Mr. Cohan and Mr. Swenson) stated they would take the issue back to their client for further consideration. AME requested a response by Monday, December 20, 2021, in order to have sufficient time to file the present motion. (Ex. J.)

10. EPA emailed AME on December 20 wherein it said it would not agree to extend the discovery deadline or participate in discovery. (Ex. K.) In this email, EPA gave a new reason for its refusal to participate in discovery: “[Your firm] also declines to explain why further discovery is warranted under the Rules of Practice.” (*Id.*)

11. This was the first time EPA claimed that it was not participating in discovery because AME’s counsel allegedly failed to explain why the discovery was warranted. (Exs. A-K.) Further, EPA never asked AME why it believed the discovery was relevant or warranted. (*Id.*)

12. Less than two hours later after sending the December 20, 2021 email, EPA filed a Motion for Accelerated Decision and 36-page Memorandum of Law in Support of that motion.

13. In its memorandum, EPA likens a motion for accelerated decision to a motion for summary judgment and expressly argues that discovery must be used to support the motion: “a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits . . . .” (Mem. of Law in Support of Mot. for Accelerated Decision, pp. 15.) EPA continues to say that if a moving party satisfies its burden, the non-moving party “must demonstrate the existence of a genuine issue of material fact *by proffering significant probative evidence*” and “*must produce some evidence* that places the moving party’s evidence in question[.]” (*Id.*) (emphasis added).

14. In its motion for accelerated decision, EPA also uses documents identified in its Initial Prehearing Exchange, and the subject of some of AME’s discovery, to attempt to defeat AME’s claims. (Mem. of Law in Support of Mot. for Accelerated Decision, pp. 27, 29-30.)

### Argument

**1. EPA’s position conflicts with the plain language of the Fourth Circuit’s Order, EPA’s regulations, and the Prehearing Order.**

First, EPA’s position that AME is not entitled to discovery conflicts with the Fourth Circuit’s Order. The Fourth Circuit remanded this case back to the Tribunal for full and

complete discovery as to the substantial compliance issue. *August Mack*, 841 Fed.App'x. at 524-525. Specifically, the Fourth Circuit stated:

At bottom, it was legal error for the EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim. Our decision today, however, does not mean that August Mack is necessarily entitled to recover on its claim for response costs. *No discovery was conducted, and whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings.* On remand, the EPA is entitled to dispute and litigate August Mack's compliance and any Superfund reimbursement that might be awarded.

*Id.* (emphasis added). Based on this language, it is clear that discovery must be conducted that is sufficient for this Tribunal to assess whether August Mack's activities at the BJS site substantially complied with the purposes of EPA's preauthorization process. *See id.* at 523-525. Anything less is a violation of the Order, will be reversed on appeal, and may subject the non-complying party to being held in contempt.

Second, with the backdrop of the Fourth Circuit's Order in mind, EPA's own regulations allow for initial discovery without mutual consent or requiring the party seeking discovery to move the Tribunal for permission. Specifically, 40 C.F.R. § 305.26(f) controls "other discovery" in this proceeding and is divided into essentially three categories. The first, found at § 305.26(f)(1) allows for initial discovery that "shall include any of the methods described in rule 26(a) of the Federal Rules of Civil Procedure." This regulation was enacted in 1993 and has not since been updated. *See* 58 Fed. Reg. 7704-01.

Thus, the reference to Rule 26(a) was to the then-version of the Federal Rules of Civil Procedure, which stated:

**(a) Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or thing or permission to enter land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

As a result, the discovery methods set forth in Federal Rules of Civil Procedure are directly applicable to this dispute pursuant to the Federal Regulations. The second category allows for additional “mutually agreed upon discovery” that is “voluntary” and may be “subject to such time limitations as the Presiding Officer deems appropriate.” 40 C.F.R. § 305.26(f)(2). And, finally, the third category which contains “further discovery” that the Presiding Officer can order include additional written discovery and additional depositions. 40 C.F.R. §§ 305.26(f)(3)-(6). Thus, AME’s initial discovery does not need EPA’s unilateral consent or this Tribunal’s order to proceed.

Lastly, the Prehearing Order clearly accounted for the Fourth Circuit’s command that there be discovery as to substantial compliance. The Order was made in accordance with the regulations set forth at 40 C.F.R. Part 305. (Order, p. 1.) Following 40 C.F.R. §§ 305.26(f)(2), (3), it allowed for “Additional Discovery” as long as it was mutually agreed upon and concluded by December 24, 2021, and any further discovery would be allowed by order only. (*Id.* at 4.) The Prehearing Order did not mention 40 C.F.R. § 305.26(f)(1).

Nor did it need to. As discussed above, under the rules, initial discovery (like the written discovery and depositions AME now seeks) are allowed by right, without a court order.<sup>2</sup>

EPA's position that AME must seek its unilateral approval or an additional order from the Tribunal before AME is allowed to conduct even one round of discovery is unsupported by the Rules of Practice that govern this proceeding and the Prehearing Order. No discovery has taken place to date. The inclusion of a provision on "Additional Discovery" in the Prehearing Order contemplates having original discovery or discovery as a matter of right (i.e., discovery pursuant to Federal Rule 26(a)).

In addition to being at odds with the controlling authority discussed above, EPA has waived its objections to AME's written discovery and requested depositions by failing to timely object, or even respond, to AME's discovery within 30 days. *See Wilhelm v. Cain*, No. 3:1—cv-109, 2011 WL 128568 at \*4 (N.D. W.Va. Jan. 14, 2011); *Essex Ins. Co. v. Neely*, 236 F.R.D. 287, 289 (N.D. W.Va. 2006) ("All objections must be stated with specificity and any objection not raised is waived."); Fed. R. Civ. P. 36(a)(3). Thus, in accordance with the Fourth Circuit's Order, 40 C.F.R. Part 305, and the Prehearing Order,

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<sup>2</sup> The fact that discovery is allowed as a matter of right under § 305.26(f)(1) of the Rules of Practice, which apply to this setting, is contrasted with the Consolidated Rules where a party must move for any discovery. *Compare* § 305.26(f)(1) ("Discovery shall include . . . .") *with* 40 C.F.R. § 22.19(e)(1) ("After the information exchange provided for in paragraph (a) of this section, a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted).").

AME's motion to compel and to deem first set of requests for admission admitted should be granted.

- 2. Alternatively, if AME must first seek an additional order from the Tribunal before conducting any discovery, there is good cause to order the discovery take place and extend the time for conducting discovery.**

Alternatively, if AME must first seek an additional order from the Tribunal before conducting even initial discovery, there is good cause to order the discovery take place and extend the time for conducting discovery. As stated above, in these proceedings, the Fourth Circuit has placed the burden on EPA to show why AME should not be reimbursed from the fund: "On remand, the EPA is entitled to dispute and litigate August Mack's [substantial] compliance and any Superfund reimbursement that might be awarded." *August Mack*, 841 Fed.App'x. at 525. The implication of this language is clear. AME must be allowed to recover its response costs from the Superfund unless EPA can demonstrate AME was not in substantial compliance with the preauthorization process.

AME's written discovery is designed to lead to the discovery of EPA's admissible evidence that the agency may seek to introduce at hearing or through motion to meet its burden. For instance, in its first set of written discovery, AME's interrogatories two and three sought information regarding witnesses EPA "may use to support your defense of this matter" and documents in the agency's control that would support "an argument that AME did not substantially comply with the preauthorization process." (Ex. A.) Similarly, interrogatories 4 and 5 sought information regarding EPA's testifying fact and

expert witnesses. (*Id.*) Finally, interrogatories 6-17 sought information related to EPA's administration of the preauthorization program. (*Id.*) Next, AME's requests for production of documents are similar in nature and sought to uncover documents regarding AME's preauthorization request (requests 2-7), EPA's experience with determining substantial compliance with the preauthorization process (request 8), documents regarding EPA's preauthorization process (requests 9-13), and AME's work at the BJS Site (requests 14-22). (*Id.*) Lastly, AME served requests for admissions that were designed to establish facts that should not be in dispute in this matter.<sup>3</sup> (*Id.*)

AME's second set of written discovery was similarly reasonable and was served after EPA filed its Prehearing Exchange. AME's interrogatories and requests for production of documents were specifically designed to discover facts regarding four sites where EPA purportedly preauthorized parties to recovery response costs including, the Doe Run matter, the Hows corner matter, the Mohawk matter, and the Whitehouse matter. (Ex. B.) These matters were specifically identified in EPA's Initial Prehearing Exchange. (*Id.*) AME's requests for admission then sought to authenticate exhibits identified in the parties' initial prehearing exchanges. (*Id.*)

All of AME's written discovery is immanently reasonable and was posed to uncover evidence of significant probative value regarding EPA's ability to demonstrate

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<sup>3</sup> AME's discovery requests are attached as Exhibits A and B, and the request for depositions are attached as Exhibits C and D.

that AME's work at the BJS Site did not substantially comply with the preauthorization process. Moreover, AME's discovery will not unreasonably delay the proceeding because no hearing date has been set. Finally, the information AME is not "otherwise obtainable" as it seeks information related to EPA's burden in this matter or regarding documents currently in the agency's possession or control. *See* 40 C.F.R. § 305.26(f)(4). EPA's responses to the discovery and responsive documents directly relate to the issues of substantial compliance and recovery from the Superfund. *Compare* Exs. A-D with Requestor's Initial and Rebuttal Prehearing Exch.; 40 C.F.R. § 307.21(b)(3)-(4); 42 U.S.C. § 9611(a)(2); *August Mack*, 841 F. App'x at 523 (citing 54 Fed. Reg. 37892-01, at \*37898 (Sept. 13, 1989)); *Duwall v. Heart of CarDon, LLC*, 2020 WL 1274992 at \*13 (S.D. Ind. March 17, 2020) (quoting *Delaware County v. Powell*, 393 N.E.2d 190, 192 (Ind. 1979)); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994); *Joseph A. by Wolfe v. New Mexico Dept. of Human Services*, 69 F.3d 1081, 1085-1086 (10th Cir. 1995).

Similarly, AME should be allowed to depose the three witnesses EPA named on its Witness List (Eric Newman, Richard Jeng, and Silvina Fonseca) and EPA Administrator Michael Regan. The requested deponents contain information regarding substantial compliance with the preauthorization process, AME's substantial compliance with the preauthorization process, the process of recovery from the Superfund, how awarding AME money from the Fund is appropriate, and the exhibits EPA uses to try to

defeat AME's claims and secure an accelerated decision. This information cannot be obtained by alternative methods of discovery. *See* 40 C.F.R. § 305.26(f)(5).

Moreover, allowing this case to proceed to Hearing or briefing on the motion for accelerated decision without allowing the discovery, especially depositions of EPA's witnesses, would deprive AME of its due process rights, be unduly prejudicial, and be unfair. *See generally Inferrera v. Wal-Mart Stores, Inc.*, 2011 WL 6372340 at \*3 (D.N.J. Dec. 20, 2011) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) ("modern instruments of discovery serve a useful purpose . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.")). Allowing discovery of relevant material in administrative setting is essential as the parties are typically bound by the record developed at the administrative level. *See generally Berman v. Department of Interior*, 447 Fed.Appx. 186, 193 (Fed. Cir. 2011) ("In the absence of collateral estoppel or a valid objection, the administrative judge's refusal to compel discovery of relevant information was an abuse of discretion."); *Baird v. Dep't of Army*, 517 F.3d 1345, 1350–51 (Fed. Cir. 2008); *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979) ("discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process."); *N.L.R.B. v. Tamper, Inc.*, 522 F.2d 781, 787 (4th Cir. 1975).

The need for discovery is buttressed by the issue in front of the Tribunal, which is whether the essential purposes of preauthorization were satisfied because a party who

satisfies the objectives of a regulation substantially complies with it. *See generally Duvall v. Heart of CarDon, LLC*, 2020 WL 1274992 at \*13 (S.D. Ind. March 17, 2020) (quoting *Delaware County v. Powell*, 393 N.E.2d 190, 192 (Ind. 1979)); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994); *Joseph A. by Wolfe v. New Mexico Dept. of Human Services*, 69 F.3d 1081, 1085-1086 (10th Cir. 1995). AME must be permitted to discover if EPA has any evidence rebutting AME's case to avoid undue prejudice, unfairness, and a due process violation. Failing to compel the discovery and extend the discovery deadline would constitute an abuse of discretion because the discovery is relevant and allowing this case to go forth without discovery would result in a trial by ambush.

**3. Sanctions for EPA's behavior are appropriate.**

Sanctions for EPA's conduct that has taken place since the Fourth Circuit vacated and remanded this case are appropriate. "In the Fourth Circuit, bad faith includes willful conduct, where the party 'clearly should have understood his duty to the court' but nonetheless 'deliberately disregarded' it." *Sines v. Kessler*, 339 F.R.D. 96, 109 (W.D. Va. 2021) (citations omitted). Defendants "cannot pick which discovery requests they respond to, refuse to acknowledge opposing counsel's efforts to obtain the discovery to which their client is entitled, or ignore court orders directing them to provide or permit discovery of the same material within their control." *Id.* at 110. (citations omitted). Sanctionable conduct includes situations where "Plaintiffs 'had to deal with unacceptable delays, obfuscations, and disregard,' . . . and 'their attorneys have expended time and

resources “well beyond that which are expected of a party to secure” discovery to which it is clearly entitled[.]” *Id.* at 110-111 (citations omitted). The need for deterring improper discovery behavior weighs heavily in courts’ minds when considering sanctions. *Brooks Sports, Inc. v. Anta (China) Co., Ltd.*, 2018 WL 7488924 at \*17 (E.D. Va. Nov. 30, 2018) (citing *Flame S.A. v. Industrial Carriers, Inc.*, 39 F. Supp. 3d 752, 765 (E.D. Va. 2014) (“with discovery’s important role in modern litigation, *deterrence is greatly needed.*”).

The Tribunal has authority to sanction EPA as it “shall conduct a fair and impartial proceeding, assure that the facts are fully elicited, adjudicate all issues, and avoid delay.” 40 C.F.R. § 305.4(b). Further, the Tribunal can “issue all necessary orders”; “[o]rder a party, or an officer or agent thereof, for good cause, upon motion, or sua sponte, to produce testimony, documents, or other nonprivileged evidence, and failing the production thereof without good cause being shown, draw adverse inferences against that party” ; and “[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient and impartial adjudication of issues arising in proceedings governed by this part . . . .” (*Id.*)

Here, AME served EPA with its first set of written discovery on October 29, 2021, a second set of written discovery and requests for depositions (including availability for depositions) on November 22, 2021, and received no response from EPA. (Exs. A-E.) EPA did not even acknowledge the discovery requests until two days after AME served its December 6, 2021 letter that inquired about the status of the discovery responses and

depositions. (Exs. E-F.) In its response, EPA said it “does not believe additional discovery is warranted at this time and had AME requested additional discovery, EPA would not have agreed to it (including depositions).” (Ex. F.) In additional communications, including a teleconference, AME explained why the discovery requests, including depositions, were proper. (Exs. G, I, J.)

AME in good faith tried to resolve the discovery dispute for weeks and was promised during the December 16, 2021 meet and confer teleconference that EPA’s attorneys would take the matter back to their client and would provide a status update by the end of the week. (Ex. J.) The following Monday, in an email dated December 20, 2021, EPA refused to respond to the overdue discovery and objected to extending the discovery deadline. (Ex. K.) Unbeknownst to AME, EPA had not been working to resolve the discovery dispute but had been preparing a motion for an accelerated decision in order to avoid the discovery as less than two hours after its December 20, 2021 email, EPA filed a 36-page memorandum in support of motion for accelerated decision. The record demonstrates that EPA strung AME along for weeks when it clearly had no intention to participate in discovery. At best, this is improper gamesmanship. *See Essex Ins. Co. v. Neely*, 236 F.R.D. 287, 289 (N.D. W.Va. 2006) (“Parties must respond truthfully, fully and completely to discovery or explain truthfully, fully and completely why they cannot respond. Gamesmanship to evade answering as required is not allowed.”); *Pistore v. Roper*, 2007 WL 9734175 at \*7 (N.D. W.Va. Jan. 8, 2007) (“Courts have often noted parties

may not engage in gamesmanship in discovery disputes.”); *Beach Mart, Inc. v. L & L Wings, Inc.*, 302 F.R.D. 396, 415 (E.D. N.C. Oct. 3, 2014) (imposing sanctions after “recogniz[ing] a need to deter both willful nondisclosure and gamesmanship”).

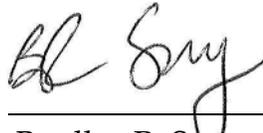
Under these facts, sanctions are appropriate. EPA has willfully and deliberately disregarded the Fourth Circuit’s Order, the relevant regulations, and the Prehearing Order. Discovery needs to take place. *See generally August Mack*, 841 Fed.App’x at 525; 40 C.F.R. § 305.26(f)(1) (using the word “shall”). It intentionally ignored AME’s discovery requests and request for depositions until AME threatened to file a motion to compel. (Exs. A-F.) It then led AME on just long enough to beat it to the courthouse with its motion for accelerated decision. EPA has no good faith basis for its actions and even if EPA’s position is accepted, there is no good faith basis for refusing to agree to any discovery. The discovery is unquestionably relevant, and the only reason given to AME for EPA’s refusal to participate in discovery is its mistaken belief that it can. (Ex. F.)

EPA’s actions have caused unacceptable delays and resulted in AME, its attorneys, and now the Tribunal expending “time and resources ‘well beyond that which are expected of a party to secure’ discovery to which it is clearly entitled[.]” *Sines v. Kessler*, 339 F.R.D. at 110 (citations omitted). These facts standing alone would make sanctions proper. In addition, sanctions are an appropriate tool to deter EPA’s conduct, especially given EPA’s behavior at the Settlement Conference. *See* AME Preliminary Statement, pp. 2-3.

**Conclusion**

For the foregoing reasons, AME's motion should be granted in its entirety.

Respectfully submitted,



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## Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on December 23, 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](mailto:cohan.benjamin@epa.gov) and [Swenson.erik@epa.gov](mailto:Swenson.erik@epa.gov).



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UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of:

August Mack Environmental, Inc.,  
  
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Docket No. CERCLA-HG-2017-0001

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**REQUESTOR'S FIRST SET OF WRITTEN DISCOVERY**

Pursuant to the Consolidated Rules of Practice and the Administrative Law Judge's order compelling additional discovery, Requestor August Mack Environmental, Inc. hereby serves the following interrogatories, requests for production of documents, and requests for admissions to be answered within thirty (30) days by the United States Environmental Protection Agency.

1. Definitions Applicable to All Discovery

1. The "Site" means the Big John's Salvage-Hoult Road Superfund Site that was used for coal-tar refining, salvage operations, and waste disposal.
2. The "Site-specific funds" mean the nearly \$37 million in cash and financial assurances provided to the EPA and to be used to clean up the Site.
3. The "Special Account" refers to the account in which the EPA placed the Site-specific funds after they were transferred to the EPA.

4. The “Consent Decree” means the October 10, 2012 settlement agreement that EPA entered into with the ExxonMobil Corporation, CBS Corporation and Vertellus Specialties, Inc. to resolve its CERCLA Section 107 claims brought in *United States v. ExxonMobil Corp.*, No. 1:08-cv-00124-IMK (N.D. W.Va. 2008).

5. “AME” refers to the Requestor, August Mack Environmental, Inc., an Indiana corporation.

6. “EPA” or the “Agency” refers to the United States Environmental Protection Agency and its Regional Offices.

7. “CERCLA” refers to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended.

8. The “Fund” means the Hazardous Substances Superfund created by 26 U.S.C. § 9507.

9. The “NCP” means the National Contingency Plan.

10. “Preauthorization” means EPA’s prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP.

11. “You” or “your” refers to the person to whom the discovery is directed or related persons, any attorney(s) representing you, and any agent or consultant employed by you or your attorney(s) in connection with this litigation.

12. “Document” refers to and includes, but is not limited to, all writings of any kind, including the original and all non-identical copies (whether different from the

original by reason of notations made on such copies or otherwise) of all letters, electronically stored information and electronic files, telegrams, memoranda, reports, forms, studies, calendar or diary entries, pamphlets, notes, charts, diagrams, plans, tabulations, proposals, minutes and records of meetings, conferences and telephone or other communications, and every other type of data compilation, including all forms of machine or computer storage or retrieval in the possession, custody or control of Plaintiff or his representatives, agents, or attorneys, whether tentative, preliminary or final.

13. “Electronically stored information” (“ESI”) includes, but is not limited to, all word processing documents, spreadsheets, slides, email, information concerning email (e.g., logs of email history and usage, header information, and deleted files), internet history files and preferences, graphical image files (including .jpg, .gif, .bmp, .pdf and TIFF files), databases, calendar and scheduling information, computer system activity logs and print reports, and all file fragments and backup files containing electronically stored information. Electronically stored information also includes all information, files, or data on computer hard drives in your possession, custody or control, email repositories, and web-based document repositories that may contain relevant documents and information.

14. “Communications” means all inquiries, discussions, conversations, negotiations, agreements, understandings, meetings, telephone conversations, letters, emails, texts, notes, telegrams, and all other forms of oral or written intercourse.

15. "Person" or "Persons" refers to and includes a corporation, partnership, joint venture, proprietorship, firm, company, unincorporated association, Individual, association of Individuals, or any other such entity.

16. "Individual" means a natural person.

17. "Hazardous Substance" shall have the meaning set forth in 42 U.S.C. § 9601(14).

## 2. Instructions Applicable to All Discovery

1. "Identify" means:

a. When used with reference to a Document, state:

- i. The type of Document (i.e., letter, memorandum, report, tape, printout, etc.);
- ii. The name of the Person who drafted or prepared the Document;
- iii. The present or last known location of the Document or the identity of the Person who has custody of the document; and
- iv. Such other information sufficient to enable AME and its counsel to identify the Document, such as the addressee(s), the approximate length in pages, Persons who received copies, and a synopsis of its contents.

b. When used with reference to a Person (as defined herein), state:

- i. Name;

- ii. Organizational status (i.e., corporation, partnership, etc.);
    - iii. Business address; and
    - iv. Other similar identifying information, with the exception that if the person to be identified is an Individual then identify as in subparagraph (c).
  - c. When used with reference to an individual, state his or her:
    - i. Name;
    - ii. Last known residence address and telephone number;
    - iii. Business address and employer, if any; and
    - iv. Position, profession, job title and association with the EPA and/or the EPA's attorneys.
  - d. When used with reference to a Communication:
    - i. If written, identify the Document as in subparagraph (a); and
    - ii. If oral, state the date of the Communication and the Persons who sent, received and otherwise participated or had knowledge of the Communication, and state the substance thereof.
- 2. In lieu of identifying the location or custodian of particular documents, such documents may, at your option, be attached to the Answer to these Interrogatories requesting identification of those documents.

3. Wherever appropriate in these Interrogatories, the singular form of a word shall be interpreted as plural and the masculine form of a word shall be interpreted as feminine.
4. "And" as well as "or" shall be construed either disjunctively or conjunctively as necessary to bring within the scope of these Interrogatories any information which might otherwise be construed to be outside their scope.
5. The term "relating to" means consist of, refer to, reflect, or be in any way legally, logically, or factually connected with the matter discussed, directly or indirectly.
6. With respect to any Document for which a privilege is being asserted, identify such Document by stating:
  - a. The name, title and job or position of the Document's author, its sender, and every Person who received or saw the document or any of its copies;
  - b. The date of the Document;
  - c. The physical description of the Document, including size, length, typed or handwritten, etc.;
  - d. A brief description of the Document's subject matter;
  - e. The basis for the privilege asserted; and
  - f. The name, title and job or position of all Persons on whose behalf the privilege is asserted.

7. With respect to any conversation for which a privilege is being asserted, identify by stating:
  - a. When the conversation occurred;
  - b. Where the conversation occurred;
  - c. The name, title and job or position of each Person who was present at or during the conversation whether or not such conversation was in-person or by telephone;
  - d. A brief description of the conversation's subject matter;
  - e. The basis for the privilege; and
  - f. The name, title and job or position of all Persons on whose behalf the privilege is asserted.
  
8. These Interrogatories shall be deemed to be continuing in nature such that you and your attorneys shall have an ongoing duty to supplement the answers to the extent that any additional information responsive to these Interrogatories becomes known.

## Interrogatories

1. Identify all individuals who assisted in answering the following interrogatories.

2. Provide the name and, if known, the address and telephone number of each individual likely to have discoverable information that you may use to support your defenses in this matter.

3. Provide a description by category and location of all documents, electronically stored information, and tangible things that you have in your possession, custody, or control and may use to support an argument that AME did not substantially comply with the preauthorization process.

4. Please identify any fact witness you intend to call at the hearing in this matter and provide a description of the testimony that such witness is expected to provide.

5. Please identify any witness you may use at the hearing in this matter to present an expert opinion, and for each such witness please provide:

a. A complete statement of all opinions the witness will express and the basis and reasons for them;

b. The facts or data considered by the witness in forming the opinions;

c. The witness's qualifications, including a list of all publications authored in the previous ten years;

d. A list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial, administrative hearing, or deposition; and

e. A statement of the compensation to be paid for the study and testimony in this matter.

6. Identify any and all persons EPA “preauthorized” under 40 C.F.R. § 307.22 since January 1, 2011.

7. Identify any and all response costs EPA “approved” under 42 U.S.C. § 9611(a)(2) since January 1, 2011.

8. When was the last time EPA authorized the release of money from the Fund to pay a private party for necessary response costs under 42 U.S.C. § 9611(a)(2)?

9. Identify the total sum of money EPA has authorized to be released from the Fund to pay private parties for necessary response costs under 42 U.S.C. § 9611(a)(2).

10. Identify how the present response actions are being funded at the Site.

11. Identify who is performing the work at the Site.

12. Identify all response actions that have been conducted at the Site since January 1, 2017.

13. Identify the person at EPA with settlement authority over this matter.

14. Identify those persons within the EPA with substantive knowledge of the administration of the agency’s preauthorization program established in 40 C.F.R. § 307.22.

15. Please identify the status of the Site-specific funds, including a description of where and how such funds have been spent and the amount of Site-specific funds still held by the EPA.

16. Do you allege that the AME failed to substantially comply with the preauthorization program set forth in 40 C.F.R. § 307.22? If so, please set forth an explanation of how and why you allege that AME failed to substantially comply.

17. If any of your responses to AME's Requests for Admission is anything but an unqualified admission, please state the facts upon which you fail to unqualifiedly admit such request for admission and each individual with knowledge of said facts in support of each such responses identified by request number.

### **Requests for Production of Documents**

1. All documents referred to or identified in your answers to interrogatories.
2. All documents and communications referring to the work performed by AME at the Site.
3. All documents and communications which relate to, or rely upon, the work performed by AME at the Site.
4. All communications between EPA personnel regarding AME's request for reimbursement from the Fund.
5. All communications between EPA personnel regarding the denial of AME's request for reimbursement from the Fund.
6. All communications between EPA personnel regarding AME's request for reimbursement from the Special Account.
7. All communications between EPA personnel regarding the denial of AME's request for reimbursement from the Special Account.
8. All internal memorandums or other documents relating to substantial compliance with the preauthorization requirements contained in 40 C.F.R. § 307.22.
9. All applications for preauthorization that EPA has received since January 1, 2011.
10. All approvals for preauthorization that EPA has issued since January 1, 2011.

11. All denials for preauthorization that EPA has issued since January 1, 2011.
12. All documents related to or regarding the available cash balance in the Fund.
13. All documents related to or regarding the available cash balance in the Special Account.
14. All documents provided by AME to the EPA in relation to the Site.
15. All proposed schedules for work to be performed by AME at the Site.
16. All schedules for work performed by AME at the Site.
17. All communications between AME and the EPA in relation to the Site between January 2012 and December 2016.
18. All documents relating to AME's compliance with rules for worker health and safety at the Site.
19. All invoices relating to AME's work performed at the Site.
20. All declarations, statements, affidavits, witness reports, notes of witness interviews, audio or videotape recordings, or similar documents obtained by you or anyone acting on your behalf which relate in any way to this lawsuit.
21. All documents you obtained from any third-party through a request for documents or subpoena in connection with this matter.

22. All documents not produced in response to any of the preceding requests for production that relate to AME's request that the EPA reimburse it from the Superfund or from the Special Account.

### **Requests for Admissions**

1. Admit that the EPA has never issued a preauthorization under 40 C.F.R. § 307.22 using a substantial compliance test.
2. Admit that the application for preauthorization form is legally obsolete.
3. Admit that AME prepared and submitted a Removal Design Work Plan that specifically identified the cleanup work to be conducted at the Site, which the EPA then reviewed and approved.
4. Admit that AME engaged in other pre-design investigation activities, including evaluation of sediment, soil, and groundwater, in support of the Removal Design Work Plan.
5. Admit that EPA approved AME's selection as the "Supervising Contractor" for response actions at the Site on or about November 6, 2012.
6. Admit that AME was qualified to serve as the Supervising Contractor for response actions at the Site.
7. Admit that AME is not a Potentially Responsible Party under CERCLA for liabilities at the Site.
8. Admit that EPA's approval of response actions at the Site occurred prior to the implementation of those response actions.
9. Admit that the work AME performed at the Site were necessary response costs.

10. Admit that the work AME performed at the Site was consistent with the NCP.

11. Admit that the work AME performed at the Site was incurred as a result of carrying out the NCP.

12. Admit that EPA approved all work AME performed at the Site.

13. Admit there is no provision in CERCLA that requires EPA's preauthorization or preapproval of response costs before EPA pays a claim made against the Fund.

14. Admit that the EPA has relied upon the work performed by AME at the Site.

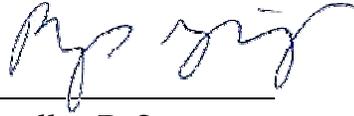
15. Admit that the EPA continues to rely upon the work performed by AME at the Site.

16. Admit that the work performed by AME at the Site did not create an environmental hazard.

17. Admit that the work performed by AME at the Site was reasonable and necessary.

18. Admit that the costs sought by AME for the work it performed at the Site are consistent with industry standards.

Respectfully submitted,



---

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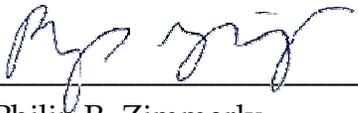
[PZimmerly@boselaw.com](mailto:PZimmerly@boselaw.com)

[JSchroeder@boselaw.com](mailto:JSchroeder@boselaw.com)

*Attorneys for August Mack Environmental, Inc.*

## Certificate of Service

I certify that on October 29, 2021, the foregoing Requestor's First Set of Written Discovery were served on opposing counsel, Benjamin Cohan and Erik Swenson, at the following e-mail addresses: [cohan.benjamin@epa.gov](mailto:cohan.benjamin@epa.gov) and [Swenson.erik@epa.gov](mailto:Swenson.erik@epa.gov).



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Philip R. Zimmerly

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of:

August Mack Environmental, Inc.,  
  
Requestor.

Docket No. CERCLA-HG-2017-0001

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**REQUESTOR'S SECOND SET OF WRITTEN DISCOVERY**

Pursuant to the Consolidated Rules of Practice and the Administrative Law Judge's order compelling additional discovery, Requestor August Mack Environmental, Inc. ("AME") hereby serves the following second set of interrogatories, requests for production of documents and requests for admissions to be answered within thirty (30) days by the United States Environmental Protection Agency ("EPA").

I. Definitions Applicable to All Discovery

1. AME incorporates the "Definitions Applicable to All Discovery" from its First Set of Written Discovery as if fully stated herein.

II. Instructions Applicable to All Discovery

1. AME incorporates the "Instructions Applicable to All Discovery" from its First Set of Written Discovery as if fully stated herein.

**Interrogatories**

Exhibit B

1. Identify all documents relating to the preauthorization granted in the Doe Run matter, which EPA submitted as Exhibit AX 8, including, but not limited to, all communications between EPA and the party requesting preauthorization.
2. Identify all documents relating to the preauthorization granted in the Hows Corner matter, which EPA submitted as Exhibit AX 10, including, but not limited to, all communications between EPA and the party requesting preauthorization.
3. Identify all documents relating to the preauthorization granted in the Mohawk matter, which EPA submitted as Exhibit AX 11, including, but not limited to, all communications between EPA and the party requesting preauthorization.
4. Identify all documents relating to the preauthorization granted in the Whitehouse matter, which EPA submitted as Exhibit AX 18, including, but not limited to, all communications between EPA and the party requesting preauthorization.

### **Requests for Production of Documents**

1. All documents relating to the preauthorization granted in the Doe Run matter, which EPA submitted as Exhibit AX 8, including, but not limited to, all communications between EPA and the party requesting preauthorization.
2. All documents relating to the preauthorization granted in the Hows Corner matter, which EPA submitted as Exhibit AX 10, including, but not limited to, all communications between EPA and the party requesting preauthorization.

3. All documents relating to the preauthorization granted in the Mohawk matter, which EPA submitted as Exhibit AX 11, including, but not limited to, all communications between EPA and the party requesting preauthorization.
4. All documents relating to the preauthorization granted in the Whitehouse matter, which EPA submitted as Exhibit AX 18, including, but not limited to, all communications between EPA and the party requesting preauthorization.

### **Requests for Admissions**

1. Admit that the following documents are authentic and admissible:
  - a. RX 001: 01.12.2017 Krieg Devault LLP Letter to Ms. Bonnie Pugh, Esq. at Region 3 EPA.
  - b. RX 002 - 9.13.13 Field Sampling Plan ("FSP")
  - c. RX 003 - 12.23.13 Sampling and Analysis Plan ("SAP), Proposed Amendment 1
  - d. RX 004 - 03.07.14 FSP Amendment #2
  - e. RX 005 - 4.25.2014 FSP Amendment
  - f. RX 008 - 07.28.14 SAP Amendment FINAL
  - g. RX 009 - 8.15.2014 Quality Assurance Project Plan ("QAPP") Amendment #1
  - h. RX 010 - Pace Analytical, Inc.'s ("Pace") Quality Assurance Manual
  - i. RX 011 - Pace's Chain of Custody ("COC") form
  - j. RX 012 - Pace's COC Instructions
  - k. RX 013 - Pace's Product Book dated 11.09.2012
  - l. RX 014 - Pace's Product Book
  - m. RX 015 - Standard Operating Procedure ("SOP"), Core Collection and Processing
  - n. RX 016 - SOP, Headspace Analysis of Soil Samples
  - o. RX 017 - SOP, Decontamination
  - p. RX 018 - SOP, Sample Packaging Shipping and COC
  - q. RX 019 - SOP, Data Reduction Validation and Reporting
  - r. RX 020 - SOP - Vibracore Collection and Processing
  - s. RX 035 - Primary Draft BJS QAPP Tables
  - t. RX 036 - Primary Draft BJS QAPP Tables

- u. RX 037 - 09.5.2014 QAPP
- v. RX 038 - 9.05.14 QAPP
- w. RX 040 - QAPP Fig 1 (organization chart)
- x. RX 044 - Red Lined - Primary Draft BJS QAPP Tables
- y. RX 045 - Red Lined - Primary Draft BJS QAPP Tables
- z. RX 047 - Red Lined QAPP Fig 1 (organization chart)
- aa. RX 049 - 10.31.2014 FSP Amendment DRAFT
- bb. RX 050 - 11.07.2014 SAP Amendment
- cc. RX 051 - 11.07.2014 SAP Amendment
- dd. RX 052 - EPA Approval of SAP Amendment 5 BJS 11-17-14
- ee. RX 054 - Table 4.1 - Summary By Media
- ff. RX 055 - 5.15.2015 FSP#6
- gg. RX 056 - 2015.06.15 FSP#6 Executive Summary
- hh. RX 071 - 2015.09.02 Split-Spoon Soil Sampling SOP
- ii. RX 075 - Slug Testing SOP - Draft
- jj. RX 076 - Slug Testing SOP
- kk. RX 077 - Figure 3-15
- ll. RX 078 - Figure 3-19 - Proposed Upland Sampling Locations
- mm. RX 079 - 2015.09.04 FSP Amendment #7
- nn. RX 087 - Tables Combined
- oo. RX 091 - BJS QAPP Tables (SAP7 Revision)
- pp. RX 092 - Table 2 - Uplands
- qq. RX 097 - 2015.10.2 SOP - Stilling Well Installation
- rr. RX 099 - Costs for Stream Well Siting
- ss. RX 101 - 4AE4C0C0
- tt. RX 102 - Costs for Volume Reduction
- uu. RX 103 - Elutriate Volume Estimate
- vv. RX 104 - Figure 2
- ww. RX 105 - Figure 3-20
- xx. RX 106 - Standard Elutriate Test Methods
- yy. RX 107 - 2015.09.04 FSP Amendment #7
- zz. RX 108 - FSP#8 Proposed River Cores
- aaa. RX 109 - Table 6.1 - Drill Rig Core Rationale
- bbb. RX 110 - Table 6.2 - River Hand Core Rationale
- ccc. RX 114 - HACH Residual Chlorine Testing Procedure
- ddd. RX 120 - QAPP Tables
- eee. RX 121 - Table 1
- fff. RX 122 - Table 5
- ggg. RX 131 - 2 Geophysical SOPs Combined
- hhh. RX 132 - 3 SOP for CPT-FFP-VST

iii. RX 163 - Figures Combined (FINAL)  
 jjj. RX 164 - Figures Combined  
 kkk. RX 165 - FSP 9 Alt Cover with results  
 ll. RX 166 - FSP 9 Proposed Borings  
 mmm. RX 185 - 2015.09.04 FSP Amendment #9  
 nnn. RX 186 - FSP Amendment #9  
 ooo. RX 187 - FSP#9 Proposed River Cores  
 ppp. RX 189 - FSP#9 Proposed Uplands Borings  
 qq. RX 190 - Table 7.1 FSP#9 Proposed River Cores  
 rrr. RX 191 - Table 7.1 FSP#9 Proposed River Cores  
 sss. RX 192 - Table 7.1 Proposed River Cores  
 tt. RX 193 - Table 7.1 Proposed River Cores  
 uuu. RX 194 - Table 7.2 Uplands Geotech  
 vvv. RX 195 - Table 7.2 Uplands Geotech  
 www. RX 196 - Tables Combined (FINAL)  
 xxx. RX 197 - Tables Combined  
 yyy. RX 215 - DQO Worksheet Final  
 zzz. RX 221 - BJS QAPP Tables (SAP9 Revision)  
 aaaa. RX 222 - Table 1 and 2  
 bbbb. RX 223 - Tables combined  
 cccc. RX 224 - Core Sample Location Log  
 dddd. RX 225 - Core Sample Locations Log  
 eeee. RX 232 - FSP#10 2017 (Redline) -WIP  
 ffff. RX 233 - Table 7.1 FSP#10 Proposed River Cores  
 gggg. RX 235 - DQO Worksheet (SAP10 Revision)  
 hhhh. RX 236 - BJS QAPP Tables (SAP10 Revision)  
 iii. RX 237 - Coagulation and Flocculation Dosage Study-Draft  
 jjjj. RX 238 - Coagulation and Flocculation Elutriate Study Draft  
 kkkk. RX 239 - SOP for CPT-FFP-VST  
 ll. RX 240 - 09.13.13 FINAL UARDWP  
 mmmm. RX 241 - 2016.01.08 River Initial Design (FINAL-COMBINED) [SUBMITTED] - Revised 01.11.16  
 nnnn. RX 242 - Monongahela River Removal Design Work Plan ("RDWP")  
 09.13.2013  
 oooo. RX 243 – Monongahela River RDWP 08.28.2014  
 pppp. RX 244 – Uplands Area Preliminary Design 10.10.14  
 qq. RX 247 - Clean QAPP 09.05.14  
 rrrr. RX 248 - Request for RDWP Amendment 01.22.16  
 ssss. RX 249 - Revised Uplands 60% Design Report 04.17.2015  
 ttt. RX 250 - 2014.09.26 Uplands Trip Report

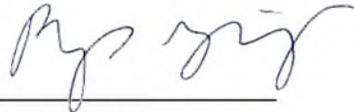
uuuu. RX 256 – EPA/WVDEP Approval of SAP and QAPP, 10.08.15  
vvvv. RX 257 – EPA/WVDEP Designation of Supervising Contractor, 11.06.12  
www. RX 258 – EPA/WVDEP Approval of SAP Amendment #7, 09.14.15  
xxxx. RX 259 – EPA/WVDEP Approval of SAP Amendment # 5, 11.17.14  
yyyy. RX 260 – EPA/WVDEP Approval of FSP #9 and QAPP #5, 05.05.16  
zzzz. RX 261 – EPA/WVDEP Approval of Monongahela River and Uplands  
RDWPs, 6.25.13  
aaaa. RX 262 – EPA/WVDEP Approval of QAPP Amendment #1, 08.29.14  
bbbb. RX 263 – EPA/WVDEP Approval of SAP Amendment #1, 01.06.14  
cccc. RX 264 – EPA/WVDEP Acceptance of Proposal to Amend RDWP,  
02.01.16  
dddd. RX 265 – EPA/WVDEP Approval SAP Amendment #6, 07.02.15  
eeee. RX 266 – EPA/WVDEP Approval of SAP Amendment #4, 08.13.2014  
ffff. RX 267 – EPA/WVDEP Approval of River Removal Preliminary Design,  
05.06.15  
ggggg. RX 268 – EPA/WVDEP Notice of Deficiency Letter regarding River  
Removal Revised Preliminary Design, 3-31-15  
hhhhh. RX 269 – WVDEP Comment Letter on Upland Design, 05.08.15  
iiii. RX 270 – EPA/WVDEP letter regarding Sediment Quality Triad  
Sampling, 04.15.15  
jjjj. RX 271 – EPA/WVDEP Comments on Uplands Design Work Plan,  
02.21.13  
kkkkk. RX 272 – EPA/WVDEP Comments on Uplands Removal Intermediate  
Design, 06-03-15  
llll. RX 273 – EPA/WVDEP Comments on River Removal Preliminary Design,  
10.30.14  
mmmm. RX 274 – EPA/WVDEP Comments Uplands Removal Preliminary  
Design, 12.03.14  
nnnn. RX 275 - Monthly EPA Status Report, 02.10.2014  
oooo. RX 276 – Monthly EPA Status Report, 03.07.2014  
ppppp. RX 277 - Monthly EPA Status Report, 04.10.2014  
qqqqq. RX 278 – REIC Sampling Report, 03.07.2014  
rrrrr. RX 279 - Monthly EPA Status Report, 05.07.2014  
sssss. RX 280 - Weekly Minutes, 04.08.2014  
tttt. RX 281 - Weekly Minutes, 04.15.2014  
uuuuu. RX 282 - Weekly Minutes, 04.22.2014  
vvvvv. RX 283 - Weekly Minutes, 04.29.2014  
wwwww. RX 284 - Monthly EPA Status Report, 06.10.2014  
xxxxx. RX 285 - Monthly EPA Status Report, 07.07.2014  
yyyyy. RX 286 - Monthly EPA Status Report, 08.07.2014

zzzzz. RX 287 – July 2014 Attachments, Stakeholder Log.  
aaaaaa. RX 288 - Monthly EPA Status Report, 09.09.2014  
bbbbbb. RX 289 - Monthly Progress Report for September 2014, 10.08.2014  
ccccc. RX 290 – September 2014 Attachments, Stakeholder Log.  
dddddd. RX 291 - Monthly Progress Report for October 2014, 11.07.2014  
eeeeee. RX 292 - Monthly Progress Report for November 2014, 12.10.2014  
ffffff. RX 293 - Monthly Progress Report for December 2014, 01.08.2015.  
gggggg. RX 294 - Monthly Progress Report for January 2015, 02.05.2015  
hhhhhh. RX 295 - Monthly Progress Report for January 2015, 02.09.2015  
iiiiii. RX 296 - Monthly Progress Report for February 2015, 03.09.2015  
jjjjjj. RX 297 - Monthly Progress Report for March 2015, 04.10.2015  
kkkkkk. RX 298 - Monthly Progress Report for April 2015, 05.11.2015  
llllll. RX 299 – Monthly Progress Report for May 2015, 06.08. 2015 Monthly  
EPA Status Report (Fairmont)  
mmmmmm. RX 300 - May 2015 Attachments to Monthly EPA Status Report  
nnnnnn. RX 301 – July 8, 2015 Monthly EPA Status Report (Fairmont)  
oooooo. RX 302 – June 2015 Attachments to Monthly EPA Status Report  
pppppp. RX 303 – August 10, 2015 Monthly EPA Status Report (Fairmont)  
qqqqqq. RX 304 - 2015 July Status Report Addendum  
rrrrrr. RX 305 – Draft September 8, 2015 Monthly EPA Status Report  
(Fairmont)  
ssssss. RX 306 – September 8, 2015 Monthly EPA Status Report (Fairmont)  
tttttt. RX 307 - August 2015 Attachments to Monthly EPA Status Report.  
uuuuuu. RX 308 – October 8, 2015 Monthly EPA Status Report (Fairmont)  
vvvvvv. RX 309 – November 10, 2015 Monthly EPA Status Report (Fairmont)  
wwwwww. RX 310 – December 9, 2015 Monthly EPA Status Report  
(Fairmont)  
xxxxxx. RX 311 – January 7, 2016 Monthly EPA Status Report (Fairmont)  
yyyyyy. RX 312 – February 10, 2016 Monthly EPA Status Report (Fairmont)  
zzzzzz. RX 313 – March 8, 2016 Monthly EPA Status Report (Fairmont)  
aaaaaaa. RX 314 – April 6, 2016 Monthly EPA Status Report (Fairmont)  
bbbbbbb. RX 315 – May 10, 2016 Monthly EPA Status Report (Fairmont)  
without attachments.  
cccccc. RX 316 – April 2016 Attachments to Monthly EPA Status Report,  
including Stakeholder Log, Meeting Minutes, Site Inspection Reports, and  
Site Map Showing upland Inspection Areas.  
ddddddd. RX 317 – May 10, 2016 Monthly EPA Status Report (Fairmont)  
eeeeeee. RX 318 – June 10, 2016 Monthly EPA Status Report (Fairmont)  
ffffff. RX 319 – July 8, 2016 Monthly EPA Status Report (Fairmont)  
ggggggg. RX 320 – August 7, 2016 Monthly EPA Status Report (Fairmont)

hhhhhh. RX 321 – July 2016 Attachments to Monthly EPA Status Report, including Stakeholder Log, meeting minutes, Site Inspection Reports, and Site Map Showing Upland Inspection Areas.

iiiiiii. RX 322: Consent Decree filed in the Northern District of West Virginia on October 10, 2012.

Respectfully submitted,



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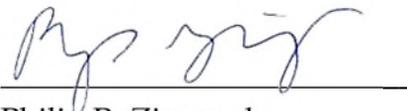
[PZimmerly@boselaw.com](mailto:PZimmerly@boselaw.com)

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*Attorneys for August Mack Environmental, Inc.*

### **Certificate of Service**

I certify that on November 22, 2021, the foregoing Requestor's Second Set of Written Discovery were served on opposing counsel, Benjamin Cohan and Erik Swenson, at the following e-mail addresses: [cohan.benjamin@epa.gov](mailto:cohan.benjamin@epa.gov) and [Swenson.erik@epa.gov](mailto:Swenson.erik@epa.gov).



Philip R. Zimmerly

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November 22, 2021

**Via Email**

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215.814.2618 (direct dial)  
215.814.2601 (fax)  
[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)

Erik Swenson  
[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)

RE: In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Request for deposition availability

Dear Ben and Erik,

Please allow this correspondence to serve as August Mack's request for the availability of Eric Newman, Richard Jeng, Silvina Fonseca, and EPA Administrator Michael Regan for remote depositions. Currently, we have availability on December 21, 22, and 23. Thank you for your attention to this matter.

Sincerely,

Jackson L. Schroeder

CC: Brad Sugarman  
Phil Zimmerman  
Taylor Horn

**Exhibit C**

December 6, 2021

**Via Email**

Benjamin M. Cohan  
Sr. Assistant Regional Counsel  
US EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103  
[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)

Erik Swenson  
[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)

RE: In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Informal attempt to resolve a discovery dispute

Dear Ben and Erik,

Please allow this correspondence to serve as an informal attempt to resolve a discovery dispute. On October 29, 2021, Requestor, August Mack Environmental, Inc. ("AME"), served EPA with its first set of written discovery, which included requests for admission, interrogatories, and requests for production of documents. AME served the first set of written discovery via email in accordance with the Tribunal's Order of Resignation and Prehearing Order<sup>1</sup> and EPA's Preliminary Statement wherein it consented to being served via email. EPA's discovery responses were due Monday,

---

<sup>1</sup> In part, this Order provides, "[I]t will be this Tribunal's practice to serve the parties by email only, and I find it necessary for the parties to proceed likewise . . . If a party is unable to receive service by email, the party shall affirmatively state that it is unable to accept service by email and provide a valid address at which it may be served by regular U.S. mail." (Order, p. 3 n.4.)

Name  
Date  
Page Two

November 29, 2021<sup>2</sup>, and that time has expired. As of the date of this letter, AME has still yet to receive EPA's discovery responses.

The failure to timely respond to the requests for admission has resulted in them being admitted as a matter of law. Fed. R. Civ. P. 36(a)(3) ("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney."). Please let us know when EPA will respond to the first set of written discovery and your availability to meet and confer to discuss these discovery issues. We would like to have the meet and confer teleconference this week.

In addition, on November 22, 2021, AME requested, via email, the availability of Eric Newman, Richard Jeng, Silvina Fonseca, and EPA Administrator Michael Regan for remote depositions. In the request for depositions, we indicated we were available on December 21-23. As of the date of the letter, we have not received a response to our request for depositions. We would also like to discuss EPA's failure to acknowledge AME's request for depositions and provide deposition availability during the teleconference.

Please acknowledge receipt of this letter no later than Wednesday, December 8.

Sincerely yours,

Bradley R. Sugarman

BRS

---

<sup>2</sup> 30 days after October 29, 2021 was Sunday, November 28, 2021.

EPA letter to AME's B. Sugarman 12.8.21Re: Discovery Demand



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

Via Email

12/8/2021

Bradley Sugarman  
Bose, McKinney & Evans, LLP  
[BSugarman@boselaw.com](mailto:BSugarman@boselaw.com)

**Re:** In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Informal discovery per Court Order 9/8/21

Mr. Sugarman:

This letter serves as a response to the issuance of your unilateral discovery demands purporting to “compel” additional discovery as set forth in your EPA letters dated December 6, 2021, October 29, 2021, and November 29, 2021 (“discovery letter demands”). Despite the plain text of the ALJ Order, AME has now three times deliberately misrepresented the ALJ Order and attempted to step into the shoes of the Court to demand an affirmative response within a certain number of days, contrary to this Court’s directive and the law. As you are aware, this matter is exclusively governed by the Administrative Law Judge’s Redesignation and Prehearing Order dated September 8, 2021 (“ALJ Order”) and 40 C.F.R Part 305, not the Federal Rules of Civil Procedure. As you are also aware, the ALJ Order does not compel additional discovery. To the contrary, the ALJ Order provides that “The parties may conduct any mutually agreed upon discovery without the participation of this Tribunal so long as such discovery concludes by **December 24, 2021.**” EPA does not believe additional discovery is warranted at this time and had AME requested additional discovery, EPA would not have agreed to it (including depositions). Accordingly, AME’s requests for admission have not been admitted.

Exhibit F



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EPA letter to AME's B. Sugarman 12.8.21Re: Discovery Demand

Sincerely,

Benjamin M. Cohan, Esq.

cc: Eric Newman  
Eric Swenson, Esq.



December 10, 2021

*Via Electronic Mail Only*

Mr. Benjamin M. Cohan  
Sr. Assistant Regional Counsel  
US EPA Region III  
Philadelphia, PA 19103  
[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)

Mr. Eric Newman  
US EPA, Office of General Counsel  
1200 Pennsylvania Ave. N.W.  
WJC Building North Room: 6204M  
Washington, DC 20460  
[Newman.Eric@epa.gov](mailto:Newman.Eric@epa.gov)

RE: *In re August Mack Environmental, Inc.*  
EPA Docket No. CERCLA-HQ-2017-0001

Dear Mr. Cohan:

We are in receipt of your December 8, 2021 letter sent at 6:45 PM. In it, the agency refuses to participate in “mutually agreed” discovery. There are numerous errors contained in your brief one-paragraph response. These are addressed below.

**1. *Federal Rules of Civil Procedure expressly apply to discovery before this Tribunal.***

First, your letter states that discovery in this matter is “exclusively governed” by the ALJ Order, “not the Federal Rules of Civil Procedure.” To the contrary, in enacting the Federal Regulations at issue, EPA expressly allowed parties to utilize all discovery methods allowed under the Federal Rules of Civil Procedure. Specifically, the Federal Regulations state that “Discovery shall include any of the methods described in Rule 26(a) of the Federal Rules of Civil Procedure.” 40 C.F.R. § 305.26(f)(1). This regulation was

**Exhibit G**

enacted in 1993 and has not since been updated. *See* 58 FR 7704-01. Thus, the reference to Rule 26(a) was to the then-version of the Federal Rules of Civil Procedure, which stated:

**(a) Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or thing or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

As a result, the discovery methods set forth in Federal Rules of Civil Procedure are directly applicable to this dispute pursuant to the Federal Regulations. Thus, EPA's position to the contrary is mistaken as a matter of law. Moreover, it would be an express violation of due process to limit discovery based on the minimum initial disclosure requirements in the current Rule 26(a). This clearly cannot be the intent of the procedural rules in the C.F.R. and would not stand up to scrutiny on appeal. Thus, EPA must participate in this administrative litigation through meaningful discovery.

2. *Any objection to August Mack's discovery has been waived.*

Second, any objections set forth in your letter to August Mack's October 29, 2021 discovery are untimely and have been waived. *Wilhelm v. Cain*, No. 3:10-cv-109, 2011 WL 128568, at \*4 (N.D. W.Va. Jan. 14, 2011) ("As a general rule, untimely objections to discovery requests are waived."). As detailed in our December 6, 2021 letter, AME served the first set of written discovery via email on October 29, 2021, in accordance with the Tribunal's Order of Redesignation and Prehearing Order and EPA's Preliminary Statement wherein it consented to being served via email. EPA's discovery responses were due Monday, November 29, 2021, and that time expired without any objection or response whatsoever. To the extent that EPA did "not believe additional discovery is warranted," it was incumbent upon it to raise a timely objection. EPA did not. Thus again, EPA is required to respond to the pending discovery without objection and to produce the witnesses requested for deposition without further objection.

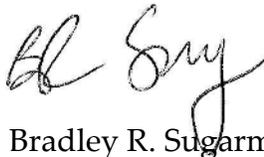
3. *EPA's position directly contradicts the 4<sup>th</sup> Circuit Order remanding this case for meaningful review.*

Finally, EPA's position as to discovery directly contradicts the decision of the United States Court of Appeals for the Fourth Circuit to remand this case. In doing so,

the Fourth Circuit recognized the need for discovery to allow for meaningful review. *August Mack Env't, Inc. v. EPA*, 841 F. App'x 517, 524–25 (4th Cir. 2021) (“Our decision today, however, does not mean that August Mack is necessarily entitled to recover on its claim for response costs. No discovery was conducted, and whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings. On remand, the EPA is entitled to dispute and litigate August Mack's compliance and any Superfund reimbursement that might be awarded.”). By now refusing to engage in discovery, EPA seeks to evade one of the primary purposes of the remand and is in contempt of the Fourth Circuit’s opinion.

We respectfully request that EPA immediately provide meaningful responses to the pending discovery requests by Wednesday, December 15, 2021, recognize that the request for admissions have been deemed admitted, and also make the requested deponents available for deposition. If EPA refuses to do so, please let me know when you will be available for a conference to discuss these issues prior to December 15, 2021, so that August Mack may file a motion to compel if a resolution is not reached at that time. If EPA continues its refusal to meaningfully participate in this matter, we will be required to file a motion to compel seeking the appropriate relief, including (but not limited to) requests for attorneys’ fees and other appropriate sanctions.

Sincerely yours,



Bradley R. Sugarman

BRS

EPA letter to AME's B. Sugarman 12.10.21Re: Discovery Demand



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION III  
1650 Arch Street  
Philadelphia, Pennsylvania 19103-2029

Via Email

12/14/2021

Bradley Sugarman  
Bose, McKinney & Evans, LLP  
[BSugarman@boselaw.com](mailto:BSugarman@boselaw.com)

**Re:** In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Informal discovery per Court Order 9/8/21

Mr. Sugarman:

This letter serves as response to your letter dated December 10, 2021. Contrary to your mischaracterizations of fact and law, EPA has participated in meaningful discovery as directed by the Administrative Law Judge's Redesignation and Prehearing Order dated September 8, 2021 ("ALJ Order") and the relevant Rules of Practice at 40 C.F.R. § 307.26(f)(2), (f)(3). Unfortunately, rather than seeking EPA's agreement or consent to additional discovery, AME unilaterally demanded additional discovery and sought to impose deadlines contrary to the ALJ Order. Indeed, AME's first request to discuss additional discovery with EPA came in your December 10, 2021 letter, well after AME's October 29, 2021; November 29, 2021 December 6, 2021 unilateral demands in which AME misrepresented the ALJ Order.

To be clear, EPA has *not* admitted your requests for admission.

If you wish to discuss additional discovery, EPA is available for a teleconference during these dates and times: 12/15 between 1:30-2:30 pm; or 12/16 between 10-11 am. Please provide an agenda at least 24 hours in advance of the call, and a list of participants. We can make ourselves available for a 30 minute call.

Exhibit H



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EPA letter to AME's B. Sugarman 12.10.21Re: Discovery Demand

Sincerely,

Benjamin M. Cohan, Esq.

cc: Eric Swenson, Esq.



**BOSE  
McKINNEY  
& EVANS LLP**

ATTORNEYS AT LAW

**Bradley R. Sugarman**

Direct Dial: (317) 684-5274

Fax: (317) 223-0274

E-Mail: [BSugarman@boselaw.com](mailto:BSugarman@boselaw.com)

December 15, 2021

**Via Email**

Benjamin M. Cohan  
Sr. Assistant Regional Counsel  
US EPA Region III (3RC43)  
1650 Arch Street  
Philadelphia, PA 19103  
215.814.2618 (direct dial)  
215.814.2601 (fax)  
[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)

Erik Swenson  
[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)

RE: In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Informal attempt to resolve a discovery

Dear Ben,

Please allow this correspondence to serve as a response to your December 14, 2021 letter and a continued attempt to informally resolve the discovery disputes without court involvement.

AME's position was detailed in its December 10, 2021 letter, and we will not repeat it in full here. EPA's claim that it "has participated in meaningful discovery" is unsupported by the record.

AME served EPA with written discovery on October 29, 2021. AME served EPA with a second set of written discovery on November 22, 2021 and also requested to take

**Exhibit I**

111 Monument Circle, Suite 2700 | Indianapolis, Indiana 46204 | (317) 684-5000 | (317) 684-5173 (fax) | [www.boselaw.com](http://www.boselaw.com)

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remote depositions of Eric Newman, Richard Jeng, Silvina Fonseca, and EPA Administrator Michael Regan. In our November 22, 2021 e-correspondence, we proposed dates to take their remote depositions and specifically asked if those dates proposed worked for you and the deponents. On December 6, 2021, having received no response whatsoever to the first set of written discovery or our request for depositions, we sent our first letter attempting to informally resolve these discovery disputes.

EPA's response came on December 8, 2021 wherein it said it "does not believe additional discovery is warranted at this time and had AME requested additional discovery, EPA would not have agreed to it (including depositions)." (emphasis added). AME and EPA exchanged additional correspondence relating to the discovery disputes on December 10 and 14 respectively. Notably, EPA refuses to respond to AME's written discovery or provide deposition availability, including the deposition availability of its named witnesses. Under these facts, EPA has failed to meaningfully participate in discovery, is in violation of the ALJ's pre-hearing order, and is likely in contempt of the Fourth Circuit's decision remanding this matter for meaningful discovery and disposition.

Moreover, EPA's position that "the relevant Rule of Practice" is found "at 40 C.F.R. § 307.26(f)(2), (f)(3)" is incorrect. As discussed in our December 10 letter, 40 C.F.R. § 305.26(f)(1), which was enacted in 1993 and has not since been updated, allowed discovery via "any of the methods described in Rule 26(a) of the Federal Rules of Civil Procedure" in effect at that time. The version of Federal Rule 26(a) that was in effect at that time allowed discovery via deposition, interrogatories, request for production of documents, and requests for admission. Thus, EPA's reliance on "40 C.F.R. § 307.26(f)(2), (f)(3)" to avoid discovery allowed by the relevant rules and regulations is misplaced.

Further, EPA incorrectly states in its December 14 letter that "AME's first request to discuss additional discovery with EPA came in your December 10, 2021 letter . . ." As discussed above, in our November 22, 2021 e-correspondence to you and Erik Swenson, we asked you to provide us with the availability of the requested deponents and asked if December 21-23 worked on your end. That was on November 22, and we did not receive a response until December 8, 2021, which was EPA's response to AME's December 6, 2021 26(F) letter. Also, we explicitly requested a meet and confer teleconference to discuss the

discovery that had been served on EPA and our request for depositions in our December 6, 2021 letter.

In a final attempt to informally resolve these discovery disputes, we are available on Thursday, December 16, 2021 at 10am for a teleconference and will call you at 215.814.2618 unless directed to a different number. The agenda for the call is the discovery served on EPA, the discovery issues described in AME's letters to EPA, and extending the discovery cutoff to allow for our previously requested depositions and the completion of written discovery. Counsel of record for AME will be present.

Sincerely yours,

Bradley R. Sugarman

BRS

**BOSE  
McKINNEY  
& EVANS LLP**

ATTORNEYS AT LAW

**Philip R. Zimmerly**

Direct Dial: (317) 684-5116

Fax: (317) 223-0116

E-Mail: [PZimmerly@boselaw.com](mailto:PZimmerly@boselaw.com)

December 16, 2021

**Via Email**

Benjamin M. Cohan  
Sr. Assistant Regional Counsel  
US EPA Region III  
1650 Arch Street  
Philadelphia, PA 19103  
[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)

Erik Swenson  
[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)

RE: In re August Mack Environmental, Inc.  
EPA Docket No. CERCLA-HQ-2017-0001  
Informal attempt to resolve a discovery dispute

Dear Ben and Erik,

Thank you for your time this morning to meet and confer regarding August Mack Environmental, Inc.'s ("AME") request for responses to the discovery and deposition requests. As I stated on our call, we believe that the discovery responses that were served on October 29, 2021, which include 17 interrogatories, 22 requests for production, and 18 requests for admission are eminently reasonable, as are the 4 interrogatories, 4 RFPs, and 1 RFA (regarding authenticity of documents) served on November 22, 2021. We respectfully request that EPA reconsider its position declining to respond to this discovery, work to schedule depositions of the four witnesses identified, and agree to a 60-day extension of the December 24, 2021 discovery deadline.

Based on our conversation and past correspondence, it is our understanding that EPA, to date, has taken the position that the prehearing exchange required by the ALJ's

**Exhibit J**

111 Monument Circle, Suite 2700 | Indianapolis, Indiana 46204 | (317) 684-5000 | (317) 684-5173 (fax) | [www.boselaw.com](http://www.boselaw.com)

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Order of Redesignation and Prehearing Order is considered meaningful discovery and constitutes full discovery. Likewise, it is our understanding that it is EPA's position that the methods of discovery outlined in the Federal Rules of Civil Procedure are only available to a party upon an additional order from the ALJ allowing the discovery. To the extent that we have misunderstood or misstated EPA's position, please let us know. As I stated on our call, we do not believe that this position comports with the federal regulations or with the Fourth Circuit's decision.

It is our understanding that you will confer with your client regarding AME's request and will provide a status update by the end of this week. As I stated on the call, if AME has not received an update and the requested discovery by Monday, December 20, 2021, AME will have no choice but to file a motion with the ALJ, which will include a motion to compel, a request for attorneys' fees for EPA's failure to respond to the discovery that was contemplated by the Prehearing Order and the Fourth Circuit's decision, and a request for additional relief under 40 C.F.R. § 305.26(f)(6). We remain hopeful that such a motion can be avoided and that the parties can reach agreement on these matters.

Sincerely,

Philip R. Zimmerly

PRZ

**From:** Schroeder, Jackson L.

**Sent:** Monday, November 22, 2021 4:55 PM

**To:** 'Cohan, Benjamin' <Cohan.Benjamin@epa.gov>; 'Swenson, Erik' <Swenson.Erik@epa.gov>

**Cc:** Sugarman, Bradley R. <BSugarman@boselaw.com>; Horn, Taylor M. <thorn@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>

**Subject:** RE: In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001 / 2nd set of discovery / request for depositions

Dear Ben and Erik,

Attached please find a word and pdf copy of the second set of written discovery that Requestor, August Mack Environmental, Inc., is serving on EPA.

In addition, per the attached letter, please provide us with the availability of Eric Newman, Richard Jeng, Silvina Fonseca, and EPA Administrator Michael Regan for remote depositions. We are currently looking at December 21, 22, and 23 if that works on your end.

Sincerely,

**Jackson Schroeder**

**Bose McKinney & Evans LLP**

111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204

jschroeder@boselaw.com | P 317-684-5159 | F 317-223-0159

Assistant Contact | Taylor Horn | thorn@boselaw.com | P 317-684-5119 | F 317-223-0119

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**From:** Schroeder, Jackson L.

**Sent:** Friday, October 29, 2021 2:44 PM

**To:** 'Cohan, Benjamin' <Cohan.Benjamin@epa.gov>; Swenson, Erik <Swenson.Erik@epa.gov>

**Cc:** Sugarman, Bradley R. <BSugarman@boselaw.com>; Horn, Taylor M. <thorn@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>

**Subject:** RE: In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001 / link to exhibits

Dear Ben and Erik,

Attached please find a word and pdf copy of the written discovery that Requestor, August Mack Environmental, Inc., is serving on EPA.

Sincerely,

**Jackson Schroeder**

**Bose McKinney & Evans LLP**

111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204  
jschroeder@boselaw.com | P 317-684-5159 | F 317-223-0159

Assistant Contact | Taylor Horn | thorn@boselaw.com | P 317-684-5119 | F 317-223-0119

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---

**From:** Cohan, Benjamin <Cohan.Benjamin@epa.gov>

**Sent:** Monday, October 25, 2021 11:34 AM

**To:** Schroeder, Jackson L. <jschroeder@boselaw.com>; Swenson, Erik <Swenson.Erik@epa.gov>

**Cc:** Sugarman, Bradley R. <BSugarman@boselaw.com>; Horn, Taylor M. <thorn@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>

**Subject:** RE: In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001 / link to exhibits

I will let you know if I have any problem downloading them to our local area network. Thanks.

---

**From:** Schroeder, Jackson L. <jschroeder@boselaw.com>

**Sent:** Monday, October 25, 2021 10:01 AM

**To:** Cohan, Benjamin <Cohan.Benjamin@epa.gov>; Swenson, Erik <Swenson.Erik@epa.gov>

**Cc:** Sugarman, Bradley R. <BSugarman@boselaw.com>; Horn, Taylor M. <thorn@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>

**Subject:** In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001 / link to exhibits

Ben and Erik:

Below is a link to the exhibits that were mailed Friday. The password is AMEEExhibits2021. The link expires October 27, 2021. Let us know if you have trouble accessing the documents.

[https://bosemckinney.sharepoint.com/:f:/s/AugustMackv.EPA/Eg9DeDhJlq1EtxkLasjMSAEBg0Lk\\_paGeOfEPB-yhDtIPw?e=MIKU3X](https://bosemckinney.sharepoint.com/:f:/s/AugustMackv.EPA/Eg9DeDhJlq1EtxkLasjMSAEBg0Lk_paGeOfEPB-yhDtIPw?e=MIKU3X)

**Jackson Schroeder**

**Bose McKinney & Evans LLP**

111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204  
jschroeder@boselaw.com | P 317-684-5159 | F 317-223-0159

Assistant Contact | Taylor Horn | thorn@boselaw.com | P 317-684-5119 | F 317-223-0119

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---

**From:** Cohan, Benjamin <Cohan.Benjamin@epa.gov>

**Sent:** Monday, December 20, 2021 2:26 PM

**To:** Schroeder, Jackson L. <jschroeder@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>; Sugarman, Bradley R. <BSugarman@boselaw.com>

**Cc:** Swenson, Erik <Swenson.Erik@epa.gov>

**Subject:** RE: AME v EPA / informal attempt to resolve discovery disputes

AME Counsel: In response to Mr. Zimmerly's unsigned letter of 12.16.21, you are on notice that you misrepresented some of my statements and legal references. I did not say that the Court Prehearing Order constitutes "full discovery". I conveyed (and I repeat again) that it constitutes court ordered administrative discovery, and that should you seek further discovery, you must abide by the principals of administrative practice and court order. Your firm declines to do so. It also declines to explain why further discovery is warranted under the Rules of Practice. As you remain silent on any reasoned justification for further discovery, EPA will not agree to your proposed motion to extend the deadline for mutual discovery.

BMC

---

**From:** Schroeder, Jackson L. <jschroeder@boselaw.com>

**Sent:** Thursday, December 16, 2021 8:33 PM

**To:** Cohan, Benjamin <Cohan.Benjamin@epa.gov>; Swenson, Erik <Swenson.Erik@epa.gov>

**Cc:** Horn, Taylor M. <thorn@boselaw.com>; Sugarman, Bradley R. <BSugarman@boselaw.com>; Zimmerly, Philip <pzimmerly@boselaw.com>

**Subject:** RE: AME v EPA / informal attempt to resolve discovery disputes

Ben and Erik:

As a follow up to this morning's call, attached please find a letter from Phil.

Sincerely,

**Jackson Schroeder**

**Bose McKinney & Evans LLP**

111 Monument Circle | Suite 2700 | Indianapolis, Indiana 46204

jschroeder@boselaw.com | P 317-684-5159 | F 317-223-0159

**Exhibit  
K**

**From:** Cohan, Benjamin <[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)>

**Sent:** Wednesday, December 15, 2021 1:33 PM

**To:** Schroeder, Jackson L. <[jschroeder@boselaw.com](mailto:jschroeder@boselaw.com)>; Swenson, Erik <[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)>

**Cc:** Horn, Taylor M. <[thorn@boselaw.com](mailto:thorn@boselaw.com)>; Sugarman, Bradley R. <[BSugarman@boselaw.com](mailto:BSugarman@boselaw.com)>; Zimmerly, Philip <[pzimmerly@boselaw.com](mailto:pzimmerly@boselaw.com)>

**Subject:** RE: AME v EPA / informal attempt to resolve discovery disputes

OK. Can someone in your firm please set up a bridge line that we can call into? Or if you use Teams, can you or your support staff send a link we can call into? I do not have numbers for the Counsel listed in your emails.

---

**From:** Schroeder, Jackson L. <[jschroeder@boselaw.com](mailto:jschroeder@boselaw.com)>

**Sent:** Wednesday, December 15, 2021 11:17 AM

**To:** Cohan, Benjamin <[Cohan.Benjamin@epa.gov](mailto:Cohan.Benjamin@epa.gov)>; Swenson, Erik <[Swenson.Erik@epa.gov](mailto:Swenson.Erik@epa.gov)>

**Cc:** Horn, Taylor M. <[thorn@boselaw.com](mailto:thorn@boselaw.com)>; Sugarman, Bradley R. <[BSugarman@boselaw.com](mailto:BSugarman@boselaw.com)>; Zimmerly, Philip <[pzimmerly@boselaw.com](mailto:pzimmerly@boselaw.com)>

**Subject:** AME v EPA / informal attempt to resolve discovery disputes

Ben and Erik:

Attached please find AME's response to EPA's December 14 letter. We look forward to speaking with you tomorrow morning.

Sincerely,

**Jackson Schroeder**

**Bose McKinney & Evans LLP**

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