



**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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VIA E-FILING

November 14, 2022

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1 200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Re: August Mack Environmental, Inc. (AME)
Docket No. CERCLA-HQ-2017-0001

Dear Judge Biro,

On behalf of the United States Environmental Protection Agency (EPA), I enclose for your consideration the "EPA's Response in Opposition to AME's Motion to Strike Exhibits to EPA's Motion for Accelerated Decision." According to past practice before this Tribunal, my understanding is that a Proposed Order is not necessary.

Respectfully submitted,

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Enclosures

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	Docket No.: CERCLA-HQ-2017-0001
)	
August Mack Environmental Inc.)	
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)	
Requestor)	

**EPA’S RESPONSE IN OPPOSITION TO AME’S MOTION TO STRIKE EXHIBITS TO
EPA’S MOTION FOR ACCELERATED DECISION**

August Mack Environmental, Inc.’s (“AME’s”) Motion to Strike all of the Exhibits to EPA’s Motion for Accelerated Decision (“Motion to Strike”) has no basis in fact or law and should be denied for the following reasons.¹

**Consistent with this Tribunal’s Prehearing Order, EPA may supplement the record with Mr.
Newman’s affidavit**

AME’s Motion to Strike claims that “Mr. Newman’s affidavit runs afoul of the Tribunal’s Prehearing Order because it is not part of the prehearing exchange, and EPA has not received permission from the Tribunal to add this document to the prehearing exchange.” Motion to Strike at 2. AME disregards relevant provisions of the Court’s Order of Redesignation and Prehearing Order (Sept.8, 2021)(“Prehearing Order”).² According to the Prehearing Order, because the parties are not within 60 days of a scheduled hearing, EPA need not seek permission of the court to supplement its initial prehearing exchange (“EPA PHE”). See Prehearing Order at 4 (Supplement to Prehearing Exchange). Furthermore, upon adequate notice to AME, EPA

¹ Nor is AME’s Motion to Strike consistent with the rules governing this proceeding (“Part 305”). Under Part 305, the ALJ recognizes that she “shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value[.]” 40 C.F.R. 305.31(a). See ALJ Order on EPA’s Motion *In Limine* to Exclude Evidence and Testimony (May 12, 2022). See also EPA’s First Supplemental Prehearing Exchange.

² Mr. Newman’s Affidavit doesn’t even fall within the scope of Judge Biro’s Prehearing Order restricting use of documents at trial that are not part of the prehearing exchange. Moreover, it was filed in accordance with 40 C.F.R. 305.23 (stating that Motions shall be “accompanied by an affidavit...”) Thus, while supplementation of the record is not necessary, EPA has nonetheless done so out of an abundance of caution.

explicitly reserved the right to supplement its prehearing exchange “as otherwise may become necessary.” EPA PHE at 4.³ Pursuant to this Court’s Prehearing Order, EPA filed its first supplemental prehearing exchange on November 8, 2022 which includes, *inter alia*, Mr. Newman’s affidavit.⁴

Mr. Newman’s Affidavit is consistent with the scope of his Anticipated Testimony as set forth in EPA’s PHE

Next, AME wrongly interprets Mr. Newman’s own words and argues that “Mr. Newman’s affidavit contains statements outside the scope of his anticipated testimony described in [EPA’s] prehearing exchange and should be stricken.” Motion to Strike at 3 (misconstruing paragraphs 14-17 of Mr. Newman’s testimony). AME argues that EPA “limited Mr. Newman’s anticipated testimony” and that “Mr. Newman’s affidavit goes far beyond this limited scope...” *Id.* To the contrary, the statements listed in paragraphs 1-17 of his affidavit are well within the general parameters of Mr. Newman’s expected testimony as described in EPA’s PHE. Both the Part 305 Rules of Practice and the ALJ Order of Redesignation and Prehearing Order (Sept. 8, 2021) call for a “brief narrative summary” of witness testimony. 40 C.F.R. § 307.26(b). Accordingly, EPA’s PHE stated that its witnesses’ anticipated “testimony is expected to include, but may not be limited to, the matters described generally below.” EPA PHE at 1 (emphasis added). Hence, EPA’s generalized description of Mr. Newman’s testimony is not overly prescriptive or limited, contrary to AME’s assertion, and his sworn statements are consistent with the categories of information generally described in EPA’s PHE.

Mr. Newman’s anticipated testimony includes aspects of his duties pertaining to, *inter alia*, “any and all action [he] undertook to assure compliance with the CD, including correspondence and interactions with Vertellus and/or its contractors.” EPA PHE at 2. Clearly Mr. Newman is competent to testify as to what those interactions did or did not entail – based upon his personal knowledge of what he did or did not do or say while “monitoring, overseeing, and enforcing the terms and conditions of the BJS CD.” EPA PHE at 2. *See* Aff. Newman, ¶¶ 13-17.

Contrary to AME’s assertions, Mr. Newman’s affidavit reflects facts and information which the affiant has personal knowledge of – based upon his familiarity with and duty to “assure compliance with the...consent decree”⁵ and based upon “correspondence and interactions with Vertellus[,]” AME, and other stakeholders. EPA

³ *See also* EPA PHE at 1 (reserving the right to supplement its prehearing exchange).

⁴ EPA notes that on several occasions, and without objection by EPA, AME has supplemented its prehearing exchange which now includes over 331 unauthenticated exhibits.

⁵ *See* NCP at 40 C.F.R. § 300.120(f)(2)(enumerating general responsibilities of On-Scene coordinators and remedial project managers).

PHE at 2.⁶ As such, the statements listed in paragraphs 1-17 of the affidavit are well within the general parameters of Mr. Newman's expected testimony, and he is competent to testify on the matters stated therein. Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602 (a fact witness may testify to a matter if there is evidence to support a finding that he "has personal knowledge of the matter").

Mr. Newman's affidavit does not contradict his deposition testimony

AME mixes apples and oranges when it alleges that Mr. Newman's affidavit is contrary to his deposition testimony. Motion to strike at 4. AME is confusing two separate processes, two separate purposes and two separate sets of cost documentation. At deposition, Mr. Newman was questioned about the status of Site-specific funds as it pertained to "Claims Certificates" submitted by Vertellus "pursuant to the BJS Site River Removal Action Trust Agreement (Appendix E of the Big John's Salvage Site (BJS) Consent Decree)." RX 324 at 1.⁷ But in his affidavit, Mr. Newman speaks to whether or not AME submitted any costs relevant to its claim against the Superfund in 2017. Mr. Newman states on his personal knowledge that AME did not submit any costs pertaining to its claim against the Fund while working for Vertellus. Newman Aff. at ¶ 14. In paragraphs 19 through 22 of AME's Motion to Strike, AME describes Mr. Newman's deposition testimony (Dep. Newman, pp.99-103; RX 324) in order to establish that Mr. Newman received and reviewed AME's invoices associated with Vertellus' "claim in the amount of \$244,732.56", which was the subject of Vertellus' July 7, 2014 letter to Mr. Newman (RX 324). Motion at 4.⁸ To be clear, these Claim Certificates pertained exclusively to Vertellus' claims against Site specific funding under the CD –not AME's alleged costs against the Fund. See Newman Aff. at ¶ 14.

AME mischaracterizes Mr. Newman's clarifying affidavit in order to set up a false equivalency between the costs associated with AME's superfund claim and Vertellus' claims asserted against the Site-specific funding under the CD. To be clear, the costs claimed by Vertellus against Site specific funds (2012-2016) cannot substitute for AME's after-the-fact request for reimbursement *from the Fund* in January 2017. "Now, having escaped cross examination, Mr. Newman states in his affidavit that AME

⁶ Mr. Newman testified that he was generally familiar with the preauthorization process and with PDDs. (Dep. Newman, pp. 22, 108-109).

⁷ EPA Counsel repeatedly objected to this line of questioning as not relevant (p.102; ll 5,16,19). Furthermore, this Tribunal affirmed same when it denied further discovery on issues pertaining to site-specific funding: "Whether August Mack substantially complied with the preauthorization process is unrelated to the status of Site-specific funds. Further, the Fourth Circuit has ruled that August Mack does not have a right to be reimbursed from the Site-specific funds. August Mack, 841 Fed. App'x at 522 n.5." ALJ Order on Requestor's Motion to Compel Discovery and for Sanctions (May 12, 2022) at 7.

⁸ Contrary to AME's allegations, Mr. Newman did not review AME's invoices. (Dep. Newman, pp.102-103, ll.12-25; 1-3)(Mr. Newman does not recall the amount of payments because he "would not have been looking at specifically what Vertellus's expenses would be...")

did not provide him with costs ‘during the period that AME was working under contract for Vertellus...” Motion to Strike at 5 (mis-citing to paragraph 14 of Mr. Newman’s affidavit). This is a blatant mischaracterization of Mr. Newman’s affidavit. Mr. Newman actually states as follows: “[a]t no point during the period that AME was working under contract for Vertellus *did AME submit to me any costs claimed against the Superfund*, including the alleged costs that now form the basis for AME’s \$ 2.66 million dollar claim against the Superfund. Nor have I ever subsequently approved or certified such alleged *claims made against the Superfund*.” Newman Dep. at ¶ 14 (emphasis added). This statement, when cited to in context, demonstrates that Mr. Newman’s affidavit and deposition testimony are not contradictory or conflicting -- the affidavit is clearly speaking only to whether AME submitted its costs claimed against the Superfund “during the time period that AME was working under contract for Vertellus”, whereas the deposition testimony is addressing the costs claimed by Vertellus against Site specific funds (2012-2016).

In addition, while Mr. Newman testified that he received a copy of AME’s 2017 Claim (Dep. Newman, pp.28-29), his receipt was effectuated after AME ceased working for Vertellus in May 2016 – so there is no contradiction between his affidavit and deposition testimony – because the deposition testimony pertains to Vertellus’ submittal of Claim Certificates made during the time period 2012-2016 (when AME was still working under contract for Vertellus).

Finally, the fact that Mr. Newman never testified at deposition that he did not purport to grant AME preauthorization is not an example of a contradiction between affidavit and deposition. Mr. Newman was never asked by AME Counsel whether the CD provided for the process of preauthorization, or whether he preauthorized or purported to preauthorize AME, and his clarification regarding preauthorization made in the affidavit does not conflict with statements made at deposition. In fact, they are consistent. (Dep. Newman, p.22) (stating he has no authority to review and approve requests for preauthorization); *Id.*, p.28-29 (preauthorization and processing/denial of AME’s 2017 Claim was “outside my world, outside my . . . responsibilities...”); *Id.* at p.22:15 (“like, I have no authority related to that”).

Mr. Newman’s affidavit contains permissible fact-based opinions and inferences derived from his personal knowledge and experience as an RPM at the BJS Site, and does not contain improper legal conclusions

While it may be appropriate for courts to strike legal arguments and legal conclusions from an affidavit, courts should not strike an affiant’s statements that derive from personal observation or experiential knowledge. *Duro Inc. v. Walton*, 2021 WL 4453741 at *10 (N.D. Ind. Sept. 29, 2021)(“*Duro*”)(declining to strike a fact witness’s “characterization of the facts based on his own personal knowledge gained through the years...”). “It is true that ‘personal knowledge’ includes inferences – all knowledge is

inferential – and therefore opinions.” *Visser v. Packer Eng’g Assoc.*, 924 F.2d 655, 659 (7th Cir. 1991)(en banc)(“*Visser*”). But all that is required for inferences to be admissible is that they are “grounded in observation or other first-hand personal experience” rather than “flights of fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.” *Id.* See also *Searles v. First Fortis Life Ins. Co.*, 98 F. Supp. 2d 456, 461 (S.D.N.Y. 2000)(“*Searles*”)(stating, “[a]n affiant’s conclusions based on personal observations over time...may constitute personal knowledge, and an affiant may testify as to the contents of records [he] reviewed in [his] official capacity.”

Far from being simply “a lay person” without professional or specialized knowledge in a particular subject (Motion to Strike at 6), Mr. Newman has over 30 years of “experiential knowledge” as a Remedial Project Manager (“RPM”). As such, he is charged with acting in accordance with the legally defined duties of his position, and is familiar with the parameters of his delegated authority. Aff. Newman at ¶¶ 1-2 (citing to 40 C.F.R. § 300.120)(remedial project managers: general responsibilities). Among other things, Mr. Newman has direct working knowledge of a *legal and technical framework* of complex regulations known as the National Oil and Hazardous Substances Pollution Contingency Plan (“NCP”). The role of an RPM is defined in the NCP.⁹ RPM responsibilities include, among other things, assuring compliance with the NCP and consent decrees (Aff. Newman at ¶ 2-3). In instances where those consent decrees provide for preauthorization,¹⁰ RPM’s assure that the response action “[is] consistent with the terms of such preauthorization in cases where claims are filed for reimbursement.” 40 C.F.R. § 300.120(f)(2) and (3).¹¹ Mr. Newman is also competent to testify to his “general knowledge” of both the preauthorization process at large (see Dep. Newman, p.22, ll:6-25)(affirming that Mr. Newman is “generally” familiar with the process) and his general knowledge of preauthorization decision documents (See Dep. Newman, p.108, ll: 9-25)(affirming that Mr. Newman is “generally” familiar with PDDs). In other words, Mr. Newman is competent to testify as to whether he did or did not review work performed by AME on behalf of Vertellus to determine if such work was consistent with any CD terms or provisions providing for preauthorization (of which there were none). Dep. Newman at ¶¶ 10-17). Moreover, it is within Mr. Newman’s “own personal knowledge gained through the years” (*Duro Inc.* at *10) to testify as to whether he has authority to provide preauthorization and whether he is designated as a responsible Federal official or otherwise delegated preauthorization authorities. Mr. Newman’s “inferential knowledge” or “opinion” as to these matters is undoubtedly “grounded in observation or other first-hand personal experience” rather than “flights of

⁹ See 40 C.F.R. § 300.120 (stating that the RPM coordinates, directs, and reviews the work of other agencies, responsible parties, and contractors *to assure compliance with the NCP...consent decree...and lead agency approved plans applicable to the response*”. (emphasis added).

¹⁰ See CERCLA § 122(b)(1)(describing “mixed funding” settlements).

¹¹ As has already been established of record, the BJS CD was not a mixed funding agreement, and provided no mechanism whatsoever for preauthorized mixed funding. CD at ¶ 77 (barring preauthorization). See also 40 C.F.R. § 307.22(j)(CDs do not constitute preauthorization unless expressly stated so and agreed to by EPA). See e.g. AX 3, 8, and 17 (examples of preauthorized mixed funding consent decrees with attached PDDs).

fancy, speculations, hunches, intuitions, or rumors about matters remote from that experience.” *Visser* at 659.

Mr. Newman is also the RPM for the Site charged with assuring compliance with the BJS CD. Clearly Mr. Newman is competent to testify as to what his interactions with AME did or did not entail – based upon his personal knowledge of what he did or did not do or say while “monitoring, overseeing, and enforcing the terms and conditions of the BJS CD.” EPA PHE at 2. See *Aff. Newman*, ¶¶ 13-17. It is not only Mr. Newman’s responsibility to ensure that Vertellus was in compliance with the BJS CD, but it was also his responsibility to ensure that EPA acted consistent with the terms and conditions of the BJS CD. The BJS CD explicitly provided that its terms and conditions did not constitute preauthorization (Consent Decree at ¶ 77). Therefore, it is well within Mr. Newman’s role as the RPM to testify to the fact that EPA had no obligation to pay or otherwise reimburse AME from the Fund for work performed pursuant to the contract between AME and Vertellus, given that AME’s performance under that contract arose from the BJS CD to which AME was not a party. *Searles* 461 (S.D.N.Y. 2000)(stating, “[a]n affiant’s conclusions based on personal observations over time...may constitute personal knowledge, and an affiant may testify as to the contents of records [he] reviewed in [his] official capacity.”¹²

This Tribunal may take judicial notice of EPA’s Exhibit C, which need not be authenticated in the context of a motion for accelerated decision

Lastly, AME seeks to strike Exhibit C to EPA’s MFAD (Superfund Delegations of Authority 14-9: “Claims Asserted Against the Fund for Response Costs”) on the basis that it was not part of EPA’s initial prehearing exchange and is “unauthenticated”. Motion to Strike at 7. As stated above, both parties have the unilateral right to supplement their respective prehearing exchanges at this stage of the proceedings, and EPA is filing its first supplemental prehearing exchange concurrently herewith.

Moreover, Exhibit C should not be stricken because it is currently “unauthenticated”. *American Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, (D.D.C. 2011): “And as for AMVAC’s second argument, while the Court may not be capable of taking judicial notice of some documents submitted by EPA, the relevant standard on summary judgment is not whether a particular document is subject to judicial notice, but rather whether it is capable of being converted into admissible evidence. Fed.R.Civ.P. 56. In this instance, EPA submits internal documents that can presumably be authenticated if necessary and therefore constitute admissible evidence of any delegation of authority within the Agency. *Wolf v. CIA*, 473 F.3d 370, 375 n. 5 (2007).” Moreover, Judicial notice of EPA’s publicly available delegations of authority is

¹² Aside from the administrative record, Mr. Newman has also seen almost all of the exhibits in this case, and is intimately familiar with the multiple years of litigation of this matter.

appropriate. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 269 n.1, 298 (1986) (noting that the Court is not precluded from “taking notice of items in the public record”); *U.S. v. White*, 620 F. 3d 401, 416 (4th Cir. 2010) (same).¹³

For the above stated reasons, AME’s Motion to Strike should be denied.

Respectfully submitted on behalf of EPA’s Claims Official,

Date

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¹³ EPA’s delegations of authority are publicly available and can be found on EPA’s website: nepis.epa.gov. See also EPA’s National Service Center for Environmental Publications (NSCEP)” (EPA’s MFAD at 39, n.40).

CERTIFICATE OF SERVICE

I certify that the foregoing EPA Response in Opposition to AME's Motion to Strike Exhibits to EPA's Motion for Accelerated Decision *in the Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001 ("EPA's Response"), was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

I also certify that an electronic copy of EPA's Response was sent this day by e-mail to the following e-mail addresses for service on Requestor's counsel: Bradley Sugarman @ bsugarman@boselaw.com; Philip Zimmerly @ pzimmerly@boselaw.com; and Jackson Schroeder @ jschroeder@boselaw.com.

Date

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