UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
AUGUST MACK ENVIRONMENTAL, INC.,	)	Docket No. _____
	)	
Requestor.	)	
	)	
Officials to Whom Request is Directed:	)	
	)	
SCOTT PRUITT, U.S. EPA Administrator,	)	
	)	
and	)	
	)	
LYDIA GUY, Review Officer, U.S. EPA Region III Regional Hearing Clerk.	)	

REQUEST FOR HEARING

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I. INTRODUCTION

This Request for Administrative Hearing asks the Administrator, through his administrative law judges, to direct his Region III to reimburse August Mack Environmental, Inc. ("AME" or the "Requestor"), for more than $2.6 million in response costs AME incurred at the Big John's Salvage – Hoult Road Superfund Site (the "BJS Site") in Fairmont, West Virginia. AME, an Indiana-based environmental consulting company, was selected as the "Supervising Contractor" to perform removal actions at the BJS Site pursuant to a Consent Decree. Beginning in October 2012 and continuing to May 2016, AME diligently performed removal actions at the BJS Site that were not only designed by EPA but also were approved by EPA prior to being performed. During this time, AME continued to accrue unpaid invoices with the specific assurance that AME would eventually be paid from the ***$37 million*** Region III had amassed in site-specific funding. This never occurred and Region III has consistently refused to pay AME from this site-specific funding.

AME then sought to recover its costs from the potentially responsible parties ("PRPs") at the BJS Site who include Exxon Mobile Corporation ("Exxon"), CBS Corporation ("CBS"), and Vertellus Specialties, Inc. ("Vertellus"). Exxon and CBS rejected AME's request, and Vertellus has filed for bankruptcy. Finally, left with no other alternative, AME sought reimbursement from the Hazardous Substance Superfund (the "Fund") via its Response Claim for Payment from the Hazardous Substance Superfund (the "Claim") submitted to EPA.

On February 8, 2017, in a letter just over a page long (which was sent to the wrong address), a Senior Assistant Regional Counsel from Region III curtly denied AME's request. According to Region III, the only way preauthorization can be obtained is if it an application for preauthorization is submitted and the agency's decision to grant the application is "memorialized in a Preauthorization Decision Document (PDD)." Region III then surmised that because AME

did not submit an application and no PDD was issued, AME was never preauthorized and simply may not access the Fund—no matter how many times Region III reviewed and approved AME's response actions. Region III's February 8th denial amounts to nothing more than a form-over-substance justification of an EPA bureaucracy run amuck.

As explained below, Region III is attempting to drive the square peg of AME's claim into the round hole of its preauthorization procedure – a constricted procedure that simply does not apply here. What Region III fails to acknowledge is that preauthorization was not warranted when AME began work at the BJS Site because, at that time, the work was being performed for a viable PRP with financial assurances guaranteed by a federally-enforceable Consent Decree. AME could not foresee that the PRP would declare bankruptcy or that Region III would unilaterally and arbitrarily withhold payment from the available financial assurances (*i.e.* the site-specific funding) established under the Consent Decree. It was this arbitrary and inequitable action that required AME to seek reimbursement from the Fund. Region III should not now be allowed to invoke an inapplicable procedure to once again fail to pay AME for work it performed to the benefit of EPA.

Indeed, to uphold Region III's denial will have dire consequences on AME's business and employees. For instance, in 2015, AME's total billings were approximately $17 million. The nearly $2.7 million EPA has blocked AME from receiving represents more than 15% of that revenue. This shortfall in revenue is felt by everyone of the company's 150 employees and is a shortfall AME still struggles to overcome. AME requests that it be reimbursed from the Fund for its unpaid response costs, or, in the alternative, that it be reimbursed from the site-specific funds established by EPA's Consent Decree.

II. FACTUAL BACKGROUND

A. The BJS Site

1. The BJS Site is located in Fairmont, Marion County, West Virginia on Hoult Road[1] near the east bank of the Monongahela River. (Ex. B to the Claim, Action Memo at 3.)

2. The former industrial property covers 38 acres, approximately 20 of which were used for coal tar refining, salvage operations, and waste disposal (referred to as the "Uplands Area"). (*Id.*) The remaining 18 acres include a low lying drainage area that discharges to the Monongahela River on the western portion of the property and wooded hillsides on the property's northern and eastern portions.

3. Predecessors to Vertellus, CBS, and Exxon either operated or were otherwise involved in activities at the site. (Ex. A to the Claim, Consent Decree at pp. 3-4.)

4. The BJS Site has a long history of oversight from both the State of West Virginia and the federal government. From 1940 through the 1970s, West Virginia conducted various investigations into activities at the site and made efforts to address identified issues. (Ex. B to the Claim, Action Memo at p. 6.) Both West Virginia and EPA have been involved with the site since the early 1980s. (*Id.* at pp. 6-9.)

5. Various parties including Vertellus' predecessor at the site and EPA completed cleanup actions in 1993, 1998, 2001, 2003, and 2007 following investigations by EPA and West Virginia. (*Id.* at pp. 7-9.)

B. EPA's initiation and direction of the ongoing removal activities.

6. In 2000, EPA placed the BJS Site on the National Priorities List ("NPL"). (Ex. A to the Claim, Consent Decree at p. 4.) The BJS Site remains on the NPL today.

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[1] The street address according to EPA information is simply: Hoult Road, Fairmont, WV 26554. *EPA Superfund Program: BIG JOHN SALVAGE – HOULT ROAD, FAIRMONT, WV*, US EPA, https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0302947 (last visited Mar. 5, 2017).

7. In June 2002, EPA sent special notice letters to certain PRPs requesting that they conduct a Remedial Investigation and Feasibility Study ("RI/FS"); however, none of the PRPs did so. (*Id.*)

8. As a result, in 2005, EPA initiated a site-wide Remedial Investigation (RI) for the BJS Site, including the Monongahela River. (*Id.*) This investigation and study was completed in 2009. (*Id.*)

9. EPA then conducted an Engineering Evaluation/Cost Analysis ("EE/CA") pursuant to the NCP after concluding that a "non-time critical removal action" was the best approach for the BJS Site. (*Id.* at p. 5.) EPA accepted public comments on a proposed EE/CA and completed the final EE/CA on September 24, 2010. (Ex. C to the Claim, Final EE/CA.)

10. EPA detailed its final decision regarding the response action to be taken at the BJS Site in its Action Memorandum executed on September 30, 2010. (Ex. A to the Claim, Consent Decree at p. 5.)

11. The Action Memorandum selected "River Sediment Alternative RS2" which called for the excavation and off-site treatment or disposal of black semi-solid deposits and visibly stained sediment deposits in the Monongahela River near its confluence with Sharon Steel Run. (Ex. B to the Claim, Action Mem. pp. 26-28.)

12. According to the Action Memorandum, the selected removal action was "designed to mitigate direct contact risk to human and potential ecological receptors associated with buried wastes, contaminated soils, and sediment in drainage ways." (*Id.* at p. 26.) Moreover, the remedy would also "prevent contaminated groundwater from migrating beyond the waste management area" and "prevent exposure to concentrations of hazardous substances in excess of performance standards and achieve EPA's target risk range." (*Id.* at p. 27.)

13. Moreover, the Action Memorandum also determined that the total costs of the removal action "that will be eligible for cost recovery are estimated to be $34,674,000." (*Id.* at 33.)

C. Litigation filed by the EPA

14. On June 10, 2008, the United States Department of Justice on behalf of EPA filed suit against Exxon. (Complaint, *United States v. ExxonMobil Corp.*, No. 1:08-CV-00124-IMK (N.D. W. Va. Oct. 10, 2012), ECF No. 1.) By this complaint, the United States and EPA sought to recover past costs associated with EPA's initial activities at the site and to require performance and funding of certain future removal activities. (Ex. A to the Claim, Consent Decree at p. 2.)

15. At the same time, EPA lodged a Consent Decree with the court that purported to resolve Exxon's liability. Notice of Lodging Consent Decree, *ExxonMobil*, No. 1:08-CV-00124-IMK, ECF No. 3.

16. Both Vertellus and CBS intervened in the action as defendants fearing that EPA was offering Exxon contribution protection and other favorable settlement conditions. Mem. Op. and Order Granting Mots. to Intervene of CBS Corp. and Vertellus Specialties Inc., *ExxonMobil*, No. 1:08-CV-00124-IMK, ECF No. 91.

17. Eventually, the West Virginia Department of Environmental Protection ("WVDEP") also intervened as a plaintiff. Order Granting Mot. to Intervene, *ExxonMobil*, No. 1:08-CV-00124-IMK, ECF No. 179.

D. The 2012 Consent Decree and EPA's preapproval of the removal activities.

18. On October 10, 2012, the United States District Court for the Northern District of West Virginia entered the Consent Decree which resolved the litigation as to all the parties. (Ex. A to the Claim, Consent Decree, at p. 7.)

19. The Consent Decree required Vertellus to act as the Performing Defendant to conduct all response actions at the BJS Site. (*Id.* at p. 15.)

20. In contrast with Vertellus' role as the Performing Defendant, Exxon and CBS were designated "Non-Performing Defendants" whose function was to provide funding for the work Vertellus was to perform. (*Id.*)

21. EPA, and to a lesser extent WVDEP, had broad oversight and approval functions of the work and funding under the Consent Decree. (See *id.* at pp. 16-25.)

22. As the Performing Defendant, Vertellus was required to "perform the Work in accordance with [the] Consent Decree, the Action Memorandum, and all work plans and other plans, standards, specifications, and schedules set forth [in the Consent Decree] or developed by [it] and approved by EPA pursuant to [the] Consent Decree." (*Id.* at p. 15.)

23. Vertellus was required to create (and did create) a Removal Design Work Plan ("RDWP") to guide the overall completion of the response actions called for in the Action Memorandum and achievement of certain performance standards. (*Id.* at p. 19.) The RDWP had to include information regarding the project approach, sampling and quality assurance, and a schedule for completion of certain milestones. (*Id.*)

24. In addition to the broad RDWP, Vertellus was also required to prepare various other plans addressing specific items such as site safety. (*Id.* at pp. 20-22.)

25. All of these plans were required to be submitted to EPA for approval, generally in consultation with WVDEP, before being implemented. (*Id.* at pp. 19-22.)

26. Once approved, it was Vertellus' responsibility to implement the plans in accordance with their terms and the terms of the Consent Decree and Action Memorandum. (*Id.* at p. 16.)

27. Under the Consent Decree, the work to be performed fell into two categories—Upland Area Work and River Removal Action Work.

28. The Upland Area Work was specifically defined to mean "all portions of the BJS Site, excluding any portion of the Monongahela River." (*Id.* at p. 14.) And, for "the avoidance of doubt," the definition went on to specifically include: "the Unnamed Tributary # 1 and Surrounding Area, Unnamed Tributary #2, groundwater affected by the release of Waste Material from the BJS Site, and areas where BJS contamination has come to be located," and to specifically exclude the Monongahela River. (*Id.*)

29. The River Removal Action Work was broadly defined to mean any work necessary to implement the "River Removal Action." (*Id.* at p. 11.) The River Removal Action was then specifically defined to mean "the removal action set forth in the Action Memorandum to address the black semi-solid deposits (BSD) and visibly stained sediment deposits (SSD) in the Monongahela River near the confluence with the Unnamed Tributary #1." (*Id.*)

E. Under the terms of the Consent Decree, EPA amasses $37.5 million to address contamination at the BJS Site.

30. As a way of ensuring performance of the work noted above, the Consent Decree required certain funding to be available to pay for the work; however, based on information and belief, only a small fraction of these funds have been used to pay for work completed at the BJS Site.

31. First off, the Consent Decree created a qualified settlement fund trust ("QSF Trust"). (*Id.* at p. 46.) The QSF Trust was created and funded with a $6,000,000 payment from Exxon and a $5,000,000 payment from CBS. (*Id.*) It is important to note that these QSF Trust funds were to be "immediately accessible to Performing Defendant to meet its obligations hereunder." (*Id.*)

32. Next, the Consent Decree created the BJS Site River Removal Action Work Trust which was funded with a $5,000,000 payment from Exxon (*Id.* at p. 47) and a $56,000 payment from Vertellus. (Appendix E to Consent Decree, at p. 1.)

33. Finally, the Consent Decree also required an irrevocable letter of credit in the amount of $10,500,000 to be obtained as a guarantee of performance. (*Id.* at p. 35.)

34. The war chest EPA accumulated to fund the work at the BJS Site is considerable. It mandated the establishment of two trust funds with a combined value of $16,056,000 and the procurement of a $10,500,000 irrevocable letter of credit. The Consent Decree makes clear that these funds were to be used to pay for the work required at the BJS Site. (*Id.* at p. 33-38.)

35. But this is not all. EPA established yet another source of funding the work at the BJS Site by placing considerable sums in a "special account" (the "BJS Site Special Account"). (*Id.* at p. 50.) The amounts in this account were "to be retained and used to conduct or finance response activities at or in connection with the BJS Site, or to be transferred by EPA to the [Fund]." (*Id.*) Initially, this "special account" was funded by Vertellus' required payment of $11,000,000 for past response costs. (*Id.* at p. 47, 50.) Further funding would come from compounding interest, any future response costs, or related penalties billed to Vertellus by EPA. (*Id.* at p. 47, 50.)

36. It is also important to note that any irrevocable letters of credit obtained and trust funds established for the benefit of EPA were to be transferred into the BJS Site Special Account if EPA instituted a "work takeover" under the Consent Decree. (*Id.* at p. 49.) Upon information and belief, EPA has instituted a "work takeover" under the Consent Decree.

37. All-in-all, EPA has at its disposal $37 million to address contamination at the BJS Site. An amount nearly $2.5 million *greater* than the total costs outlined in the Action Memorandum.

F. EPA approves AME as the Supervising Contractor of removal work being performed by Vertellus.

38. The Consent Decree required Vertellus to select a Supervising Contractor. (*Id.* at p. 16.) Upon selection, the Supervising Contractor was required to demonstrate that it met certain EPA requirements relating to quality. (*Id.*)

39. Additionally, EPA retained the right to reject Vertellus' selected Supervising Contractor and require Vertellus to propose a different Supervising Contractor subject to EPA's approval. (*Id.* at 17.)

40. After being selected by Vertellus and approved by EPA, the Supervising Contractor's role was to complete the actual work required by the Consent Decree on behalf of Vertellus. (*Id.* at 16.)

41. On October 29, 2012, Vertellus notified EPA that it had selected AME as its Supervising Contractor for the BJS Site.

42. On November 6, 2012, EPA confirmed that it had reviewed the selection and accepted AME as the Supervising Contractor.

G. Work performed by AME with EPA oversight and approval.

43. AME prepared the RDWP for both the Uplands Area and the River Removal Action following a November 12, 2012 meeting with EPA.

44. These documents were reviewed, commented on and specifically approved by EPA.

45. In order to implement the RDWP, AME initiated Pre-Design Investigation ("PDI") activities to support the design and proposed removal actions selected in the Consent Decree starting in September of 2013.

46. The PDI included evaluation of sediment, soil, and groundwater in the Uplands Area and evaluation of sediment and water quality in the Monongahela River.

47. Prior to any field activities related to the PDI, a Field Sampling Plan ("FSP") was prepared for review and approval by EPA.

48. Indeed, AME has not performed work of any kind at the BJS Site without EPA's prior authorization and approval to perform that work. EPA has reviewed, authorized and approved the following PDI and design activities at the Site which AME has since completed:

a. FSP (9/13) implemented in October 2013;

b. FSP Amendment #1 (12/2013), FSP Amendment #2 (3/2014), and FSP Amendment #3 (4/2014) implemented in May 2014;

c. Preliminary River Design submitted August 2014;

d. FSP Amendment #4 (7/2014) and FSP Amendment #5 (11/2014) implemented in December 2014;

e. Preliminary Uplands Design submitted in October 2014;

f. Intermediate Uplands Design submitted in March 2015;

g. Revised Preliminary River Design submitted April 2015;

h. Revised Intermediate Uplands Design submitted in April 2015;

i. FSP Amendment #6 (5/2015) implemented in June 2015;

j. FSP Amendment #7 (9/2015) and FSP Amendment #8 (9/2015) implemented in October 2015;

k. Intermediate River Design submitted January 2016; and

l. FSP Amendment #9 (2/2016).

49. EPA has approved all FSP Amendments and reviewed and provided comments for the Preliminary Design documents (River and Uplands) and the Intermediate Uplands

Design. Upon information and belief, EPA has not yet completed review of the Intermediate River Design submittal.

H. Vertellus files for federal bankruptcy protection and seeks to discharge fees it owes to AME.

50. On May 31, 2016, Vertellus and ten of its affiliates (collectively, "Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Code"). The cases (collectively, the "Bankruptcy Cases") are being jointly administered under Case No. 16-11290 before the Honorable Christopher S. Sontchi in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court").

51. In the Bankruptcy Cases, Vertellus has scheduled AME as holding a nonpriority unsecured claim for only $214,551.56 (see Vertellus' Schedules of Assets and Liabilities, Doc. 0193), which is far less than Vertellus owes AME for AME's Prebankruptcy Debts.[2]

52. On October 20, 2016, AME timely filed a proof of claim against Vertellus for an as-yet undetermined amount in excess of $2,627,891.46, which claim Vertellus has assigned Claim No. 397.

53. The Bankruptcy Code prevents AME from trying to collect – and Vertellus from paying – any portion of the Prebankruptcy Debts owed to AME outside of a confirmed plan of reorganization (or liquidation) or court order.

54. Under the most current draft of *Debtors' Plan of Liquidation under Chapter 11 of the Bankruptcy Code*, Debtors state that the approximate allowed amount of claims of General Unsecured Creditors is "undetermined," and that the approximate percentage recovery for General Unsecured Creditors is "Less than 10%" of their claims.

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[2] One possible reason for this extremely low unsecured claim amount is that Vertellus believed the remaining costs incurred by AME at the BJS Site were to be paid by from the over $37 million in site-specific funding, as discussed above.

55. AME thus anticipates that any dividend to unsecured creditors in Debtors' Bankruptcy Cases will be de minimis, if anything.

I. AME seeks payment from the Fund.

56. On August 30, 2016, AME requested payment from CBS. On September 22, 2016, AME requested payment from Exxon. Both rejected AME's request.

57. On January 12, 2017, AME submitted the Claim to EPA seeking payment for the necessary response costs it incurred at the BJS Site from the Fund or, in the alternative, from the site-specific funding available to EPA.

58. On February 8, 2017, Region III denied the Claim and stated three reasons for its denial. *First*, Region III believed that it was prohibited from granting AME access to the Fund because it never received an application for preauthorization. *Second*, without regard to the purpose or intent of CERCLA § 111, Region III flatly dismissed that its Consent Decree or its constant involvement in and preapproval of AME's work could constitute preauthorization under 40 C.F.R. § 307.22. And, *third*, Region III denied AME's request because preauthorization was not "memorialized in a Preauthorization Document."

III. STATEMENT OF AUTHORITY FOR THIS REQUEST

1. AME submits this request for administrative hearing under Sections 111 and 112 of CERCLA and under 40 C.F.R. Pt. 305.

2. Under Section 111, money in the Fund is to be used to pay "any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan." 42 U.S.C. § 9611(a)(2).

3. Section 112 of CERCLA provides the procedure for submitting such claims to the Fund. *Id.* at § 9612.

4. A claimant may request an administrative hearing if the President (or, in this case, the EPA) declines to pay the claim. *Id.* at § 9612(b)(2).

5. EPA promulgated regulations governing such requests for administrative hearings and the hearings themselves. 40 C.F.R. § 305.1. *See generally* 40 C.F.R. Pt. 305.

6. AME performed work at the BJS Site and incurred necessary response costs as a result of carrying out the NCP.

7. On January 12, 2017, AME submitted its Claim to EPA for payment of these necessary response costs from the Fund. A true and accurate copy of the Claim is attached hereto as **Appendix 1** and incorporated by reference.

8. On February 8, 2017, EPA denied the Claim. A true and accurate copy of EPA's letter denying the Claim (the "Denial Letter") is attached hereto as **Appendix 2** and incorporated by reference.

9. Thus, AME submits this Request for Hearing based on the authority granted to it specifically by 42 U.S.C. § 9611(a)(2) and 42 U.S.C. § 9612(b)(2) and generally by CERCLA and its implementing regulations.

IV. CONCISE STATEMENT OF REASONS FOR DISPUTING DENIAL OF CLAIM

1. *Region III wrongly concluded that AME was required to submit an "application for preauthorization" prior to performing work.*

The first reason Region III[3] gave for denying AME's claim against the Fund was that all such claims "are limited to preauthorized response actions." It then concluded that the only way work may be preauthorized is by submitting a particular "application for preauthorization" before work is conducted. However, in reaching this conclusion Region III misinterprets both the statutory text of CERCLA and the regulatory text of the NCP. As explained below, Region III's interpretation of the statute and the NCP is badly flawed and cannot be used to justify its denial.

First off, Region III cites to Sections 111(a)(2) and 112(b) of CERCLA for the proposition that all "[c]laims against the Fund are limited to preauthorized response actions." However, neither Section 111 (a)(2) nor Section 112(b) contain this limitation. Indeed, CERCLA's statutory text makes no mention of "preauthorized" actions or costs of any kind when it addresses "Uses of the Fund" in Section 111 or the "Claims Procedure" in Section 112. Instead, Section 111(a)(2) provides:

> The President shall use the money in the Fund for the following purposes . . .
>
> (2) Payment of any claim for necessary response costs incurred by any other person [i.e., not the government] as a result of carrying out the national contingency plan established under section 1321(c) of Title 33 and amended by section 9605 of this title: *Provided, however,* That such costs must be approved under said plan and certified by the responsible Federal official.

Thus, under Section 111(a)(2) once "any other person" has incurred "necessary response costs" as a result of carrying out the NCP, EPA "shall" use the money in the Fund to reimburse those

[3] Under 40 C.F.R. §305.2, the term "Claims Official" means the Assistant Administrator or the Regional Administrator or his delegatee who makes the initial decision awarding or denying a claim in whole or in part. Here, "Claims Official" and "Region III" are used synonymously.

costs. This statutory directive is subject only to the requirements that the costs are approved under the NCP and certified by the "responsible Federal official." There is simply no statutory requirement for "preauthorization" or even "prior approval" under Section 111(a) or Section 112.

Instead, EPA's practice of "preauthorization" is a creature of the agency's administrative regulations. But even here, EPA's "preauthorization" regulations found at 40 C.F.R. § 307.22 simply do not apply due to the clear requirement of "intent." As Region III partially provided in its Denial Letter, Section 307.22(a) starts out: "No person may submit a claim to the Fund for a response action unless the person notifies the Administrator of EPA or his designee prior to taking such response action and receives preauthorization by EPA."[4] However, in language that Region III fails to provide, Section 307.22 then goes on to state: "In order to obtain preauthorization, any person ***intending to submit a claim*** to the Fund must fulfill the following requirements . . . [.]" 40 C.F.R. § 307.22(a) (emphasis added). Thus, under the plain language of the regulation, a person must first *intend to submit a claim* before being required to submit an application for preauthorization. Here, AME never had an "intent to submit a claim" when it began work at the BJS Site– a fact that Region III simply ignores in its Denial Letter. Rather, AME "intended" to be paid by Vertellus or from the $37 million Region III had amassed to pay for removal actions at the site.

Indeed, it is clear that both AME and EPA expected Vertellus, the Performing Defendant under the Consent Decree, would be capable of completing the work and would not enter bankruptcy before the work at the BJS Site was complete. In fact, in the Consent Decree, EPA

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[4] This language is itself ambiguous. While it requires notice, it does not say "notice that the person will eventually make a claim against the Fund." Rather, this language can easily and appropriately be interpreted to require notice only of the fact that response actions will be performed. As discussed above, AME provided this notice over and over again. (*Supra* at pp. 13-16.)

stated: "Based on the information presently available to EPA, EPA believes that the Work will be properly and promptly conducted by [the] Performing Defendant if conducted in accordance with the requirements of this Consent Decree and its appendices." (Ex. A to the Claim, Consent Decree at p. 5, ¶ Q.) This point is further illustrated by language that is absent from the Consent Decree. Namely, that document has no provision addressing the bankruptcy of the Performing Defendant and no provision addressing recovery from the Fund. Given that EPA did not foresee Vertellus' bankruptcy (even with its authority to obtain Vertellus' financial information), there is no reason to believe that AME could have expected it. Because both EPA and AME expected Vertellus to pay for the work at the BJS Site, AME had no reason to submit an application for preauthorization.

Similarly, AME had no reason to seek preauthorization because the Consent Decree also provided ample funding to ensure the work at the site was completed. As noted above, the Consent Decree established two trust funds with a combined value of $16,056,00, and a $10,500,000 irrevocable letter to fund remediation of the BJS Site. (Ex. A. to the Claim, Consent Decree, at pp. 35, 46-47.) EPA also established a Special Account for the site, and the Consent Decree required Vertellus to pay $11,000,000 into that account to be used to cover removal costs at the site. (*Id.* at p. 50.) With site-specific funding totaling ***$37,556,000***, AME could feel comfortable that its costs would be paid regardless of what happened to Vertellus.[5] Given this site-specific funding, AME had no reason to submit an application for preauthorization prior to conducting response actions at the Site. Indeed, it was EPA's

[5] Indeed, in its Action Memorandum, EPA concluded that the total cost of the removal actions at the Site that would "be eligible for cost recovery" would be $34,674,000. (*Supra* at p. 8, ¶ 13.) Thus, the EPA has access to nearly $3 million *more* than the estimated costs of the removal actions at the Site.

unexpected—and arbitrary—refusal to reimburse AME from the site-specific funds which forced AME to submit its Claim against the Fund.

However, even if AME could have foreseen the series of unfortunate and unforeseen events that lead to its claim against the Fund (which it could not), there is still another reason that requiring an application for preauthorization in this case is unreasonable. While EPA's regulations contain a procedure for requesting preauthorization, there is no indication that EPA still follows this practice. For instance, EPA's own "Application for Preauthorization of CERCLA Response Action" expired, by its own terms, on December 31, 1994 – ***over 22 years ago***. (The form is designated as "Form 2075-3" at 40 C.F.R. § 307.22(a)(2) and incorporated directly into the regulations as Appendix A to 40 C.F.R. Pt. 307.) In fact, other than the worn and barely legible form included in the Code of Federal Regulations, AME was unable to located a new, electronic version of the form.[6] It is hard to imagine that EPA would continue to use this long-expired form if submitting applications for preauthorization were a common practice.

What is more, even if EPA's preauthorization form had not expired, it nevertheless contains inaccurate information regarding submission. The form's instructions state that once completed applicants must send it to the attention of the "Director of the Office of Emergency and Remedial Response." *Id.* However, that office does not even exist! It has been replaced by the Offices of Site Remediation Enforcement and of Superfund Remediation and Technology Innovation which both claim to either manage or implement CERCLA, but neither of which contain any institutional knowledge about the form or applications for preauthorization.[7, 8]

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[6] The same is true for the claim form contained at 40 C.F.R. Pt. 307, App. B.

[7] *See About the Office of Enforcement and Compliance Assurance (OECA): Office of Site Remediation Enforcement (OSRE)*, US EPA, https://www.epa.gov/aboutepa/about-office-enforcement-and-compliance-assurance-oeca (last visited Mar. 5, 2016); *About the Office of Land and Emergency Management: Office of Superfund Remediation and Technology Innovation*

EPA's preauthorization regulations are woefully out of date and clearly signal that submitting an application for preapproval would have been a frivolous.

Finally, EPA would not have preauthorized reimbursement from the Fund before AME performed the work because at that time Vertellus was still viable and its decision to arbitrarily sequester the site-specific funding had not been made. As such, any attempt to submit the forms would have been futile, and the law does not require a party to undertake a futile act.

2. *Region III misinterpreted AME's argument regarding preapproval and wrongly concluded that EPA did not preauthorize AME's work at the BJS Site.*

In the third paragraph of EPA's Denial Letter, Region III provides its second basis for rejecting the Claim stating, "The [Consent Decree] does not constitute preauthorization and EPA never specified otherwise." However, this conclusion misinterprets AME's arguments regarding preauthorization. In the Claim, AME showed that EPA's direction, review, approval, and oversight regarding each and every remedial activity AME undertook at the BJS Site constituted preauthorization under CERCLA. AME never advanced the position that the mere existence of a Consent Decree creates a blanket preauthorization for all work conducted at the BJS Site.

(OSRTI), US EPA, https://www.epa.gov/aboutepa/about-office-land-and-emergency-management (last visited Mar. 5, 2016).

[8] The Office of Superfund Remediation and Technology Innovation (OSRTI) is located within the Office of Land and Emergency Management (OLEM). OLEM is the new name for the Office of Solid Waste and Emergency Response (OSWER). *OSWER to OLEM*, US EPA, https://www.epa.gov/aboutepa/oswer-olem (last visited Mar. 5, 2016). The Office of Emergency and Remedial Response (OERR) – where the completed forms are supposed to be sent – apparently used to be part of OSWER. *See* Risk Assessment Guidance for Superfund: Volume 1 – Human Health Evaluation Manual Supplement to Part A: Community Involvement in Superfund Risk Assessments, US EPA (March 1999), https://hero.epa.gov/hero/index.cfm/reference/download/reference_id/664509 (showing guidance from OERR after an OSWER cover page). Thus, it would seem that the functions of the Office of Emergency and Remedial Response would now be housed OLEM (possibly OSRTI), but there is no positive indication of that anywhere on EPA's website or in publicly available documents.

Because Region III ignored AME's actual arguments, EPA's denial of its Claim is arbitrary and AME requests that its arguments regarding preauthorization be considered here.

a. EPA approved and certified the costs included in the Claim.

The plain language of Section 111(a)(2) imposes only three requirements on "other persons" seeking to recover from the Fund: (1) that the costs are "necessary response costs incurred . . . in carry out the [NCP]"; (2) that these costs are "approved under" the NCP; and (3) the costs are "certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2). As noted above, EPA's action before and after entering into the Consent Decree clearly establish that AME's costs were "necessary response costs" incurred to carry out the NCP. (*Supra* at § D, pp. 9-11.) In addition, the Consent Decree prescribed a specific procedure for submitting work to the EPA for preapproval and certification. (Ex. A to the Claim, Consent Decree, ¶ 10 at pp. 19-23 (addressing "Work to Be Performed") and § IX at pp. 31-33 (addressing "EPA Approval of Plans and Other Submissions").) For instance, AME was required to submit a removal design work plan and a quality assurance plan to EPA for the agency's approval. (*Id.* at pp. 19-20; 24-25.) AME also had to submit written reports to EPA on the progress of the work at the Site. (*Id.* at pp. 29-31.)

To be clear, AME's point in providing this explanation in its Claim was that a procedure existed under the terms of the Consent Decree for EPA to approve and certify all work conducted at the Big John Site. AME then provided facts clearly demonstrating that this procedure had been followed and that EPA had in fact approved and certified AME's work at the Site. (*See supra* at ¶ F, pp. 12-13, and ¶ G, pp. 13-14.) Thus, there simply is no question on this record that EPA approved and certified all of the activities AME performed at the Site as noted above. (*Id.*) Nor is there any question, under the terms of the Consent Decree, that the "activities conducted

pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." (Ex. A to the Claim, Consent Decree at p. 15.)

b. Region III provides no justification for refusing to exercise its discretion under 40 C.F.R. § 307.22(j).

In its denial, Region III invoked 40 C.F.R. § 307.22(j), which provides:

> Unless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a court judgment, Consent Decree, administrative order (whether unilateral or on consent), or any other consensual agreement with EPA requiring a response action do not constitute preauthorization to present a claim to the Fund.

It then asserted, without explanation, that neither the Consent Decree nor EPA's extensive "correspondence and communications with AME regarding the work performed by AME at the Site" constituted preauthorization under Section 307.22(j). Again, AME never asserted that the mere existence of the Consent Decree or the mere existence of extensive communications by themselves constituted preauthorization under EPA's regulations. And, again, AME continues to assert those preauthorization regulations do not apply here.

But apart from these legal arguments, AME asks why won't Region III allow AME access to the Fund to reimburse these costs? Section 307.22(j) certainly suggests EPA has the discretion to do so. Were the costs AME incurred inconsistent with the NCP? Were the costs incurred unnecessary? Were the costs incurred without EPA approval and oversight? Without a doubt the answer to each of these questions is, NO. What is more, Region III cannot argue (and, in fact, has not argued) that AME's work did not advance the remediation of the Big John Site. All of these facts about AME's work at the Site point to one inescapable conclusion – Region III clearly should agree to treat AME's work as preauthorized and allow it to recover its costs from the Fund.

Indeed, the primary purpose of EPA's preauthorization regulations is to give the agency notice about what activities are proposed and who will be performing those activities. *See* 40

C.F.R. §§ 300.700(d)(4)(i)-(ii), 307.22(b)-(c). The regulations then allow EPA to approve the work as proposed or to make alterations to the work before it is performed. *Id.* Here, EPA was given all the information it needed for each of AME's proposed activities. AME was the Supervising Contractor and was required to submit information to EPA about its abilities to complete the work in a timely and proficient manner. (Ex. A to the Claim, Consent Decree at p. 16.) AME was required to submit detailed plans for each stage of the work at the site for approval by EPA. (*Id.* at p. 19-23.) EPA had the ability to reject AME as the Supervising Contractor (*id.* at 17) and to reject, in whole or in part, any subsequent plan AME submitted (*Id.* at 19-23). Thus, EPA had full control over what actions AME took at the Site. This more than satisfies the goal of the regulatory preauthorization requirements to ensure EPA has notice of proposed activities and the ability to accept or reject them.

3. *Region III wrongly concluded that EPA must issue a Preauthorization Decision Document before allowing reimbursement from the Fund.*

In the fourth paragraph of EPA's Denial Letter, Region III offers its final reason for denying AME's claim. There, EPA asserts that all decisions to grant or deny preauthorization must be memorialized in a "Preauthorization Decision Document" called a "PDD." However, this argument fails for the same reasons its first argument fails. Namely, that neither CERCLA nor the NCP required AME to apply for preauthorization and, therefore, there was no concomitant requirement to obtain a PDD. Thus, Region III's denial based on this rationale is arbitrary and capricious.

4. *Region III ignored the fact that AME "substantially complied" with the preauthorization requirements in the NCP.*

AME substantially complied with the preauthorization requirements in the NCP, and its Claim should therefore be paid from the Fund. Although AME presented this argument in the

Claim, Region III failed to properly consider it or address it in the Denial Letter. Such a failure is arbitrary and capricious. Thus, AME presents this argument again here.

Setting aside EPA's expired preauthorization application form and its outdated preauthorization regulations for a moment, courts have consistently held that "strict" compliance with the NCP is not required to demonstrate conformity with the plan. "Substantial compliance," they hold, will suffice. *See, e.g., City of Colton v. Am. Promotional Events, Inc.-West*, 614 F.3d 998, 1003 (9th Cir. 2010); *Cnty. Line Inv. Ct. v. Tinney*, 933 F.2d 1508, 1514 (10th Cir. 1991). It is clear that the "substantial compliance" standard applies with equal force to EPA's other Superfund regulations.

EPA itself supports the "substantial compliance" approach because it too had "concerns that rigid adherence to a detailed set of procedures should not be required in order to recover costs under CERCLA for private party cleanups." Nat'l Oil and Hazardous Substances Pollution Contingency Plan, 55 Fed. Reg. 8666, 8793 (March 8, 1990). Further, EPA has acknowledged that "a list of rigid requirements may serve to defeat cost recovery for meritorious cleanup actions based on a mere technical failure by the private party that has taken the response action." *Id.* This shows a recognition by EPA that achieving CERCLA's cleanup goals is more important than requiring strict adherence to every single procedural rule – especially when a private party is involved. The same reasoning applies to AME's Claim here.

AME provided all the information EPA needed to evaluate, approve, and oversee the project and all proposed work, and, by doing so, AME has complied with the spirit and intent of the regulations. EPA's rejection of AME's claim was based solely on "a list of rigid requirements" which only serve "to defeat cost recovery" for AME's "meritorious cleanup

actions" based on what amounts to an supposed "technical failure." This is not a reasonable outcome in this case. Therefore, the Claim can and should be paid from the Fund.

5. *Region III ignored the fact that AME complied with all statutory requirements for submitting the Claim.*

AME complied with all the statutory requirements in submitting a claim to the Fund so its Claim should have been approved. Although AME presented this argument in the Claim, Region III again failed to properly consider it or address it in the Denial Letter. Such a failure is arbitrary and capricious. Thus, AME presents this argument again in this Request.

In passing CERCLA, Congress included specific requirements for payment from the Fund. These requirements demonstrate Congress' intent that EPA receive fair notice and an opportunity to approve or reject proposed work before persons can seek payment from the Fund for cleanup costs. AME more than complied with these statutory requisites when it worked closely with EPA to design and implement work that satisfied EPA's Consent Decree and Action Memorandum. As such, EPA may—and clearly should—release money from the Fund, the BJS Special Account, the River RAT Fund, or any combination of these to reimburse AME for costs it has incurred.

a. Under the statutory provisions, the Fund may be used to pay for the costs of AME's cleanup work.

AME is a party who may submit a claim against the Fund, and the type of work AME performed may be paid for from the Fund. EPA, pursuant to power delegated by the President, is directed to use money in the Fund for "[p]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the [NCP]." 42 U.S.C. § 9611(a)(2). While this is a broad directive to pay "any claim," there are three limitations: (1) the claim must constitute "necessary response costs;" (2) those costs must be incurred by "any other person;"

and (3) those costs must be incurred "as a result of carrying out the [NCP]." AME's Claim satisfies each of these three requirements.

First, the Claim can be paid from the Fund because AME's costs were "necessary response costs." CERCLA defines the term "response" to include removal actions and the actions taken during the course of such removal actions to clean up contaminated areas. 42 U.S.C. § 9601 (23), (25). The Consent Decree specifically defines "removal action" as "those activities undertaken to implement the response action set forth in the Action Memorandum . . . in accordance with . . . plans approved by EPA." (Ex. A to the Claim, Consent Decree at p. 11.) Taking these two definitions together, any costs related to the work carrying out the Action Memorandum's activities are response costs under CERCLA as long as they were included in plans approved by EPA. As noted in the factual background above, AME submitted plans for all work it has performed to EPA and received EPA approval before beginning any work. Thus, all AME's claimed costs constitute response costs. However, these response costs can only be paid by the Fund if they are necessary. "Response costs are deemed necessary when an actual and real threat to human health or the environment exists." *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 961 (9th Cir. 2013) (citations and internal quotation marks omitted). EPA unequivocally stated that such a threat existed at the BJS Site. (Ex. B to the Claim, Action Mem. at p. 17. ("An imminent and substantial threat to human health, welfare, and the environment exists . . . .")) Thus, AME's Claim consists of "necessary response costs" that can be paid for from the Fund.

Second, AME can submit a claim for payment from the Fund because it falls within the category of "any other person." The phrase "any other person" for purposes of this CERCLA provision means any nongovernmental entity. *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 n.4

(1986), *superseded by statute on other grounds as stated in Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 125 (3rd Cir. 1991). AME is a closely-held company, not a governmental entity. Thus, AME constitutes an "other person" that can submit a claim against the Fund under CERCLA.

Third, AME's work was completed "as a result of carrying out the NCP" pursuant to the Consent Decree and EPA's approval. According to the Consent Decree, "[t]he activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." (Ex. A to the Claim, Consent Decree at p. 15.) As noted in the factual background above, EPA approved all of AME's plans and work according to the provisions of the Consent Decree before AME started any work. Further, throughout the Consent Decree and Action Memorandum, EPA references its rights and duties under the NCP as the impetus for initiating the BJS Site cleanup activities. (*See, e.g.*, Ex. A to the Claim, Consent Decree at p. 2; Ex. B to the Claim, Action Mem. at p. 17.) Since AME was the party that actually completed the work called for in the Consent Decree and Action Memorandum, its work was necessarily a result of carrying out the NCP. Thus, according to the terms of the EPA-drafted Consent Decree, all of AME's work was performed, and the related costs incurred, consistent with, and for the express purpose of carrying out, the NCP.

b. EPA approved and certified these costs.

EPA approved and certified all the costs included in the Claim so the Claim can be paid from the Fund. All necessary response costs sought to be paid by the Fund "must be approved under [the NCP] and certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2). Compliance with this statutory requirement is shown in Part 2(a) above.

c. AME sought payment from all PRPs and these requests were rejected.

AME requested payment from all PRPs and was refused. CERCLA provides that any potential claimant must present the claim to PRPs for payment prior to submitting the claim to

EPA for reimbursement from the Fund. 42 U.S.C. § 9612(a). AME complied with this requirement by sending a written request to CBS on August 30, 2016 and to Exxon on September 22, 2016. CBS refused AME's request in writing on September 28, 2016. Exxon refused on October 11, 2016. As to Vertellus, AME complied with this requirement by regularly sending invoices for all work to Vertellus prior to Vertellus declaring bankruptcy. As discussed above, Vertellus did not pay the invoiced amounts and it is unlikely that any significant payment will be made out of the bankruptcy. Lack of payment within sixty days of presentment is an effective denial of the claim opening the door to submitting the claim for payment from the Fund. 42 U.S.C. § 9612(a). Additionally, any further requests for payment from Vertellus would be futile given the current bankruptcy proceeding. Thus, AME has properly requested payment of the amounts in this Claim from PRPs as required by CERCLA, and those requests have been rejected.

6. *Region III ignored the fact that AME complied with the NCP's notice requirements for submitting claims to the Fund.*

AME complied with the NCP's notice requirements for submitting claims to the Fund, but Region III arbitrarily and capriciously ignored this point in its denial. Because EPA did not consider this argument that was properly before it, AME advances it again here.

Last revised nearly 22 years ago, certain provisions of EPA's Superfund regulations place a premium on obtaining preauthorization from the agency *before* removal activities are performed by a party who will eventually seek reimbursement from the Fund. *See* 40 C.F.R. §§ 300.700(d)(2), 307.21(b)(1), 307.31(a)(1). The dual purpose of these regulatory "preauthorization" provisions is clear. They first provide EPA with notice that a party is seeking to perform removal activities and then provide the agency with the ability to approve or reject the proposed work before reimbursement from the Fund is sought helping to assure that work is

reasonable, necessary and consistent with the NCP. Specifically, the regulations discuss three requirements: (1) preauthorization of work and completion of work in a manner consistent with the NCP and the preauthorization; (2) necessity of the work; and (3) requesting payment from PRPs prior to submitting a claim to the Fund.[9]

AME complied with each of these three regulatory requirements. *First*, EPA preauthorized AME's work through its review, approval, and oversight of all work conducted at the BJS Site, as discussed in Part 2(b) above. This conclusion that EPA preauthorized AME's work is further supported by the fact that only substantial compliance with the regulations is required rather than strict compliance, as discussed in Part 4 above. *Second*, AME's work was necessary as discussed in Part 5(a) above. *Third*, AME requested payment from the PRPs – Exxon, CBS, and Vertellus – prior to submitting its Claim but was rejected, as shown in Part 5(c) above. Because AME complied with each of these requirements, its Claim should have been approved.

7. *Region III ignored the fact that its denial of the Claim was directly opposed to the established purposes of CERCLA.*

EPA's denial of AME's Claim was directly opposed to CERCLA's established purposes. AME included this argument in its Claim, but once again Region III failed to properly consider it or address it in the Denial Letter. Such a failure is arbitrary and capricious. Thus, AME presents this argument again in this Request.

Region III's denial of the Claim is in direct opposition to the purposes of CERCLA. CERCLA was enacted "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009). It

[9] The first requirement is shown in 40 C.F.R. §§ 300.700(d)(2), 307.21(b)(1), 307.31(a)(1). The second requirement is shown in 40 C.F.R. §§ 307.14, 307.31(a)(4). The third requirement is shown in 40 C.F.R. §§ 307.30, 307.31(a)(3).

"was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Id.* (citations and internal quotation marks omitted). Thus, the primary purposes of the statute are to: (1) obtain quick cleanup of contaminated sites and (2) require responsible parties to pay for cleaning up contamination they cause. *See Chubb Custom Ins. Co.*, 710 F.3d at 968. "Because CERCLA is a comprehensive remedial statutory scheme, . . . courts must construe its provisions liberally to avoid frustrating the legislature's purpose." *Axel Johnson, Inc. v. Carroll Carolina Oil Co.*, 191 F.3d 409, 416 (4th Cir. 1999) (citations and internal quotation marks omitted). EPA's denial of AME's Claim for reimbursement from the Fund, clearly frustrates the purposes of CERCLA not only by delaying (perhaps indefinitely) response actions at the Site, but also by requiring AME – an innocent party – to bear the costs of cleaning up a Site it did not contaminate.

V. REQUEST FOR ADMINISTRATIVE HEARING

Pursuant to 42 U.S.C. § 9611(a)(2), 42 U.S.C. § 9612(b)(2), and 40 C.F.R. Part 305, AME hereby requests an administrative hearing regarding Region III's denial of its Claim.

VI. STATEMENT OF AMOUNT DEMANDED

1. AME demands payment from the Fund of all necessary response costs it incurred at the BJS Site which amounts to $2,661,150.98.

2. This total amount includes $2,399,874.69 in necessary response costs associated with the River Removal Action Work and $261,276.29 in necessary response costs associated with the Uplands Work.

VII. ITEMS ATTACHED HERETO AND FILED AS REQUIRED BY REGULATIONS

1. Because EPA's forms for obtaining preauthorization expired over 22 years ago and EPA has not updated its regulations concerning preauthorization in those intervening 22 years, AME did not and could not have obtained a PDD referenced in the regulations. However, information concerning EPA's affirmative review, preauthorization, and oversight of the work involved in the Claim is included herein and attached hereto.

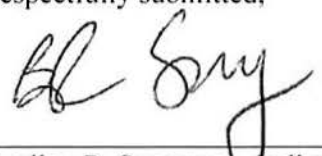
2. Two copies of the Claim are attached hereto as **Appendix 1**.

3. Two copies of the Denial Letter are attached hereto as **Appendix 2**.

VIII. CONCLUSION

For all of the reasons stated above, EPA's denial of AME's Claim is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law and should be reversed. For these same reasons, Requestor, August Mack Environmental, Inc. hereby submits its Request for Administrative Hearing and requests payment of $2,661,150.98 from the Fund.

Respectfully submitted,



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Hoult Road, Fairmont, WV 26554
EPA ID: WVD054827944

Date: March 9, 2017

APPENDICES

Appendix 1 (the Claim and all Exhibits thereto) is contained within the attached CD.

Appendix 2 (the Denial Letter) is contained within the attached CD.

CERTIFICATE OF SERVICE

I certify that the foregoing Request for Hearing and its appendices dated March 9, 2017 were sent this day by FedEx Overnight delivery and electronic mail (e-mail) to the addressees listed below:

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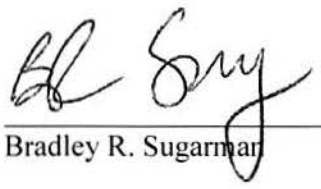

Bradley R. Sugarman

Dated: March 9, 2017

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