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

In the Matter of:	)	**EPA Docket Number CERCLA-HQ-2017-0001**
August Mack Environmental, Inc.	)	**Proceedings Pursuant to Section 111(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act 42 U.S.C. § 9611(a)(2)**
Requestor.	)	**Before Chief Administrative Law Judge Susan L. Biro**
Big John Salvage **Hoult Road** **Fairmont, West Virginia**	)	
Facility.	)	

RESPONDENT'S MOTION TO FILE SUR-REPLY TO REQUESTOR'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Pursuant to 40 C.F.R. Part 305, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund,* the United States Environmental Protection Agency (EPA or Respondent) respectfully moves that the Presiding Officer grant EPA's Motion to File the subject Sur-Reply, and thus allow it to file the attached Memorandum of Law in support of the subject Sur-reply to August Mack Environmental, Inc.'s (AME's) Response in Opposition to Respondent's Motion to Dismiss and Memorandum in Support of Respondent's Motion to Dismiss, which was filed with

this Court on September 29, 2017. The basis for this Motion to File the attached Sur-Reply are detailed in the attached Memorandum of Law. In further support of EPA's Motion to File Sur-Reply, EPA states as follows:

1. On September 29, 2017, AME filed its Response in Opposition to Respondent's Motion to Dismiss and Memorandum in Support of Respondent's Motion to Dismiss (AME Response).
2. The AME Response raises additional factual allegations and argument that warrant the enclosed three (3) page Sur-Reply. EPA asserts that this Sur-Reply is helpful to the Court in clarifying relevant legal and factual matters in this case of national significance.
3. The enclosed Sur-Reply, which EPA believes is consequential to "the maintenance of order and for the efficient and impartial adjudication of issues arising in [these] proceedings,"[1] will not in any way delay the adjudication of this matter given the fact that it is hereby attached for your consideration and inclusion into the administrative record.
4. Specifically, this Motion is hereby filed pursuant to 40 C.F.R. § 305.4(b)(12) and § 305.23, respectively. Both of these provisions are silent as to whether EPA can file this Sur-Reply as a matter of right, and there is no case law on this issue. However, because 40 C.F.R. Part 22 closely mirrors 40 C.F.R. Part 305, it is appropriate to look to Part 22 for guidance.
5. 40 C.F.R. § 22.16 allows a movant, in this case, the Respondent EPA, to file the subject reply as a matter of right[2], and thus we believe it is reasonable to allow EPA to file a reply in the situation at bar.

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[1] See 40 C.F.R. § 305.4(b)(12).

[2] "A party's response to any written motion must be filed within 15 days after service of such motion. The movant's reply to any written response must be filed within 10 days after service of such response and shall be limited to issues raised in the response." 40 C.F.R. § 22.16(b).

6. Thank you for your consideration in allowing EPA to file the enclosed Memorandum in Support of this Motion.

Respectfully submitted,

10/6/17
Date

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August Mack Environmental, Inc.	)	**Proceedings Pursuant to Section 111(a)(2) of the Comprehensive Environmental Response, Compensation and Liability Act, as amended, 42 U.S.C. § 9611(a)(2)**
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MEMORANDUM IN SUPPORT OF RESPONDENT'S SUR-REPLY TO AME'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS AND MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

Respondent, the United States Environmental Protection Agency (EPA), by counsel, respectfully submits this memorandum of law in support of its Motion to File a Sur-Reply to August Mack Environmental, Inc.'s (AME's) Response to Respondent EPA's Motion to Dismiss

and Memorandum in Support of Respondent's Motion to Dismiss. Because AME, by its own admission, is not eligible to assert a claim under 40 C.F.R § 307.21(b) due to AME's failure to apply for and receive preauthorization, AME is barred from submitting a claim to the Fund pursuant to 40 C.F.R. § 307.22(a). Therefore, AME's Request for Hearing must be dismissed with prejudice, notwithstanding its albeit spurious *equitable* arguments pertaining to a judicial consent decree to which it is not a party.

AME ADMITS THAT IT FAILED TO SEEK AND RECEIVE PREAUTHORIZATION ACCORDING TO THE RELEVANT PROVISIONS OF PART 307

AME's Response to EPA's Motion to Dismiss states that, in fact, AME "did not intend to submit a claim to the fund *at the time*" because "AME never formed an 'intent' to submit a claim when it began work at the BJS Site" and that "AME had no reason to submit an application for preauthorization to conduct work". (AME's Response in Opposition to EPA's Motion to Dismiss, p. 9)(emphasis added).[1] AME goes on to claim that EPA's preauthorization regulations "do not apply to AME" (Response, p.9), and therefore "AME had no reason to submit an application for preauthorization to conduct work." (Response, p.9). Therefore, AME clearly admits it did not intend to seek preauthorization, and that it in fact did not do so.[2] Moreover, the approval process established pursuant to the judicial consent decree is not equivalent to the requisite preauthorization under Part 307. AME also admits that, even if AME had sought the

1 The qualifying words "...at the time" pertain to the timing of the receipt of any preauthorization by EPA – which must occur "before commencing a response action" as stated in 40 C.F.R. § 307.22. Note that AME's purely equitable arguments relate to some form of contractual *post*-authorization, contrary to Part 307. See, e.g. 40 C.F.R. 307.22(j).

2 AME argues that because at one time it did not "intend to submit a claim," it should be excused from complying with Part 307. That would mean that the regulations impliedly allowed persons like AME to be reimbursed from the Fund without being preauthorized under Part 307. There is no support for this claim in the text and preambles of the regulations and the decision in *State of Ohio v. EPA*, 838 F. 2d. 1325 (D.C. Cir. 1988). They all make clear that the regulations apply only to persons who intend to submit a claim.

requisite pre-authorization *prior* to beginning any response actions, "EPA would not have preauthorized reimbursement from the Fund before AME performed the work" for multiple reasons that AME postulates. (Response, p.10). Therefore, taking all of AME's factual allegations and all reasonable inferences therefrom as presumed true and in favor of AME, AME has no cause of action under Part 307 for any claim against the Fund.[3]

THIS TRIBUNAL LACKS JURISDICTION TO ADJUDICATE AME'S EQUITABLE ARGUMENTS FOR WHY A JUDICIAL CONSENT DECREE SHOULD BE CONSTRUED TO PROVIDE THE RELIEF AME BELIEVES IT IS ENTITLED TO UNDER THE LAWS AT ISSUE

To the extent that AME raises arguments in equity, AME is precluded from seeking relief in this administrative forum. Therefore, AME's demand for hearing must be dismissed with prejudice for failure to state a claim upon which relief can be granted under the relevant standard of review set forth in EPA's Motion to Dismiss. In other words, to the extent that AME is seeking monies that it believes it has a rightful claim to under the terms of a judicial settlement to which it is not a party, AME's claim lies outside the purview of Part 307, and is therefore beyond the jurisdiction of this administrative tribunal.

Respectfully Submitted on Behalf of EPA's Claims Official,

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3 AME's factual allegations regarding its lack of intent to seek preauthorization moot and void AME's argument that it would have been troublesome for AME to theoretically file an application for pre-authorization given that the OMB-designated number had expired. AME would have been able to determine how to properly route an application to the appropriate EPA office for processing with minimal effort– a task that other parties have successfully navigated in other cases.

CERTIFICATE OF SERVICE

I certify that the foregoing Respondent's Motion to File Sur-reply and Memorandum in support thereof ("Motion and Memorandum") in the *Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-00001, was filed and served on the Presiding Officer this day through the Office of Administrative Law Judge's E-Filing System.

I also certify that an electronic copy of this Motion and Memorandum was sent this day by e-mail to the following e-mail addresses for service on Requestor's counsel: Stephen A. Studer at sstuder@kdlegal.com and Aaron F. Tuley at atuley@kdlegal.com.

10/6/17
Date

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