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RE: ***Response Claim for Payment from the Hazardous Substance Superfund***
Big John's Salvage – Hoult Road Superfund Site
EPA ID: WVD054827944

Dear Ms. Pugh:

Pursuant to 42 U.S.C. § 9612 and 40 C.F.R. § 307.31, August Mack Environmental, Inc. ("AME") hereby submits its claim for outstanding necessary response costs against the Hazardous Substance Superfund (the "Fund"). AME has incurred $2,399,874.69 in necessary response costs associated with the River Removal Action Work and $261,276.29 for the Uplands Work. AME requests that EPA award it the full amount of this claim in accordance with the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended, and EPA's prior authorization and direction of AME's work. Alternatively, AME requests that EPA pay the costs incurred by AME and detailed in this claim from the over $37 million EPA has accumulated in site-specific funding – which consists of the BJS Site Special Account, the River Removal Action Trust Fund (the "River RAT Fund"), the qualified settlement funds trust, and the Uplands Area Work Letter of Credit. Please note that AME is prepared to vigorously pursue payment of this claim and protection of its rights via an administrative hearing and judicial review if EPA denies this claim.

INTRODUCTION & SUMMARY

On October 10, 2012, the United States District Court for the Northern District of West Virginia entered a Consent Decree[1] concerning the cleanup of the Big John's Salvage – Hoult Road Superfund Site (the "BJS Site"). Among other conditions, the Consent Decree included provisions for the recovery of costs incurred by the federal government as well as an EPA-drafted "Action Memorandum"[2] requiring performance and funding of future removal activities. AME has served as the Supervising Contractor of the removal work required by the Consent Decree at the BJS Site for the past several years, and EPA has provided oversight of the removal process by preauthorizing work to be done. AME has performed significant work – under constant EPA supervision – including remedial design, additional sampling and investigation, project management, and construction. To date, the total, *unpaid* cost of this work is ***$2,661,150.98***. AME has not received payment for these costs, and – as EPA is well aware—the Performing Defendant, Vertellus Specialties, Inc., is in bankruptcy and has sought to discharge its obligation to pay these debts. Moreover, AME has sought reimbursement for these costs from the financial assurances established by the Consent Decree. Unfortunately and without reason, EPA Region 3 has chosen to block reimbursement from these sources. Thus, AME is left with no other alternative but to pursue payment of this claim from the Fund.[3]

There is absolutely no question that AME is entitled to full payment of this claim from the Fund because it complied with the explicit requirements of CERCLA. Not only was the work AME performed done pursuant to publically-noticed and judicially-

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[1] Consent Decree, *United States et al. v. ExxonMobil Corp. et al.*, Case No. 1:08-CV-124, Docket Entry 183. The Consent Decree is attached as **Exhibit A** hereto.

[2] The Action Memorandum was incorporated into the Consent Decree as Appendix A and is separately attached as **Exhibit B** hereto.

[3] EPA is placing a significant financial burden on AME by refusing to release funds to cover the nearly $2.7 million AME has spent at the Site. AME is a small, Indiana-based consulting company. In 2015, its total billings were approximately $17 million. Thus, these unpaid fees represent more than ***15%*** of AME's 2015 revenue.

approved Consent Decree, it was done in compliance with EPA's own Action Memorandum, under EPA's direct supervision and approval, and in substantial compliance with CERCLA and the National Oil and Hazardous Substances Pollution Contingency Plan, 40 C.F.R. Pt. 300 (more commonly called the National Contingency Plan or "NCP"). Indeed, EPA required that AME keep it involved in every phase of work AME conducted, and AME did exactly that. Moreover, AME has followed the requirements of CERCLA and the Consent Decree in efforts to recover its costs. Once AME realized Vertellus would not honor its obligations to pay, AME promptly sought payment from the financial assurance the Consent Decree established. Then, after EPA arbitrarily blocked payment from these sources, AME sought payment from Exxon and CBS. Both rejected AME's claims (and understandably so). Because AME followed all the statutory requirements to submit this claim and completed all its work pursuant to EPA oversight and approval, EPA should approve this claim.

AME is also entitled to full payment of this claim because it substantially complied with the regulations implementing CERCLA. The requirements of these regulations are threefold: *first*, they ensure that EPA is given sufficient notice of proposed work and the ability to approve the work that is reasonable and necessary; *second*, they confirm that the work actually done is completed consistent with EPA's approval; and, *third*, they require that the party seeking reimbursement from the fund is not itself liable under CERCLA and has sought reimbursement from those who are before turning to the Fund. Here, AME has satisfied each of these requirements.

A denial of this claim would be directly opposed to CERCLA's purposes. CERCLA was enacted to clean up contamination quickly and impose the costs on parties responsible for that contamination. Denying this claim would frustrate the first purpose by freezing current cleanup efforts and delaying all future efforts. Denying this claim would also frustrate the second purpose by imposing the costs of this cleanup on AME, an entirely innocent party who is in no way responsible for the contamination. This result is not reasonable in this case when EPA has control over disbursements from the Fund and over ***$37 million*** in site-specific funding.

FACTUAL BACKGROUND

1. *The BJS Site.*

The BJS Site is located in Fairmont, Marion County, West Virginia on Hoult Road[4] near the east bank of the Monongahela River. (Ex. B, Action Memo at 3.) 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. Predecessors to Vertellus Specialties Inc. ("Vertellus"), CBS Corporation ("CBS"), and Exxon Mobil Corporation ("Exxon") either operated or were otherwise involved in activities at the site. (Ex. A, Consent Decree at pp. 3-4.)

The BJS Site has a long history of environmental oversight from both the State of West Virginia and the federal government. From 1940 through the 1970s, West Virginia state officials conducted various investigations into activities at the site and made efforts to address identified issues. (Ex. B, Action Memo at p. 6.) Both West Virginia state officials and EPA officials have been involved with the site since the early 1980s. (*Id.* at pp. 6-9.) 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 state officials in 1985. (*Id.* at pp. 7-9.)

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

In 2000, EPA placed the BJS Site on the National Priorities List ("NPL"). (Ex. A, Consent Decree at p. 4.) In June 2002, EPA sent special notice letters to certain potentially responsible parties ("PRPs") requesting that they conduct a Remedial Investigation and Feasibility Study ("RI/FS"); however, none of the PRPs did so. (*Id.*)

[4] 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 Dec. 6, 2016).

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

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

3. *Litigation Filed by the Environmental Protection Agency.*

On June 10, 2008, the United States 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, Consent Decree at p. 2.) At the

[5] The Final EE/CA was attached to the Action Memorandum as Attachment 1 and is separately attached as **Exhibit C** hereto.

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

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

On October 10, 2012, the United States District Court for the Northern District of West Virginia entered a Consent Decree which resolved the litigation as to all the parties. (Ex. A., Consent Decree, at p. 7.) The Consent Decree required Vertellus to act as the Performing Defendant to conduct all response actions at the BJS Site. (*Id.* at p. 15.) 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.*) 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.)

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.) Vertellus was to create the Removal Design Work Plan ("RDWP") to guide the overall completion of the response action 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.*) 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.) 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.) 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.) Under the Consent Decree, the work to be performed fell into two categories—Upland Area Work and River Removal Action Work.

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.*)

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.*)

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

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, none of these funds have been used to pay for work completed at the BJS Site to AME's knowledge. A qualified settlement fund trust ("QSF Trust") was created and funded with a $6,000,000 payment from Exxon and a $5,000,000 payment from CBS. (*Id.* at p. 46.) These QSF Trust funds were to be "immediately accessible to Performing Defendant to meet its obligations hereunder." (*Id.*) The BJS Site River Removal Action Work Trust

was created and funded with a $5,000,000 payment from Exxon (Ex. A., Consent Decree, at p. 47.) and a $56,000 payment from Vertellus. (Appendix E to Consent Decree, at p. 1.) Finally, an irrevocable letter of credit in the amount of $10,500,000 was also obtained as a guarantee of performance. (*Id.* at p. 35.) 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.

What is more, 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.) As a final source of funding, any irrevocable letters of credit obtained and trust funds established for the benefit of EPA administered by certain trustees were to be transferred into the BJS Site Special Account upon an EPA takeover of work at the BJS Site. (*Id.* at p. 49.)

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

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.*) 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.) 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, the Performing Defendant. (*Id.* at 16.)

On October 29, 2012, Vertellus notified EPA that it had selected AME as its Supervising Contractor for the BJS Site. On November 6, 2012, EPA confirmed that it had reviewed the selection and accepted AME as the Supervising Contractor.

7. *Work Performed by AME with EPA oversight and approval.*

AME prepared the RDWP for both the Uplands Area and the River Removal Action following a November 12, 2012 meeting with EPA. These documents were reviewed, commented on and specifically approved by EPA. 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. The PDI included evaluation of sediment, soil, and groundwater in the Uplands Area and evaluation of sediment and water quality in the Monongahela River. Prior to any field activities related to the PDI, a Field Sampling Plan ("FSP") was prepared or amended for review and approval by EPA. Indeed, no work of any kind has been performed at the BJS Site without EPA's preauthorization to perform that work. The following PDI and design activities have been completed to date:

- FSP (9/13) implemented in October 2013;
- FSP Amendment #1 (12/2013), FSP Amendment #2 (3/2014), and FSP Amendment #3 (4/2014) implemented in May 2014;
- Preliminary River Design submitted August 2014;
- FSP Amendment #4 (7/2014) and FSP Amendment #5 (11/2014) implemented in December 2014;
- Preliminary Uplands Design submitted in October 2014;
- Intermediate Uplands Design submitted in March 2015;
- Revised Preliminary River Design submitted April 2015;
- Revised Intermediate Uplands Design submitted in April 2015;
- FSP Amendment #6 (5/2015) implemented in June 2015;
- FSP Amendment #7 (9/2015) and FSP Amendment #8 (9/2015) implemented in October 2015;
- Intermediate River Design submitted January 2016; and

- FSP Amendment #9 (2/2016).

EPA approved the submitted FSP Amendments and reviewed and provided comments for the Preliminary Design documents (River and Uplands) and the Intermediate Uplands Design. EPA has not yet completed review of the Intermediate River Design submittal. Exxon was given the opportunity to review all FSP amendments and design documents related to the River removal action prior to submittal to EPA, and comments provided by Exxon were discussed and integrated into FSP and design submittals prior to final submittal to EPA.

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

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").

Pursuant to the Bankruptcy Code, a debtor is afforded certain protections against its creditors. For instance, the Bankruptcy Code prohibits creditors from taking certain actions related to debts that may have been owing prior to the commencement of the Bankruptcy Cases (the latter, "Prebankruptcy Debts"). 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. 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. Regardless of Vertellus' reasoning, 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. 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.

Pursuant to the Bankruptcy Court's September 8, 2016 *Order (A) Approving And Authorizing Sale of Substantially All of Debtors' Assets Pursuant to Purchaser's Asset Purchase Agreement, Free and Clear of All Liens, Claims, Encumbrances and Other Interests, (B) Approving the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto, and (C) Granting Related Relief* (Doc. 0392), substantially all of the non-environmentally-challenged assets owned by Debtors were sold to the Stalking Horse Purchaser for Debtors' assets, namely a special purpose entity established to hold and bid the secured claims of the Debtors' secured lenders. Thereafter, on November 23, 2016, Debtors filed their *Motion for an Order (I) Approving Disclosure Statement, (II) Establishing Solicitation and Voting Procedures, (III) Scheduling a Confirmation Hearing, and (IV) Establishing Notice and Objection Procedures for Confirmation of the Plan* (Doc. 0559), which was set for hearing December 19, 2016. Under the most current draft of *Debtors' Plan of Liquidation under Chapter 11 of the Bankruptcy Code* (the "Plan"), which is attached as an exhibit to Debtors' November 11, 2016 *Disclosure Statement* (Doc. 0536), 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. AME thus anticipates that any dividend to unsecured creditors in Debtors' Bankruptcy Cases will be de minimis, if anything.

DISCUSSION

1. *AME complied with all statutory requirements for submitting this claim.*

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 statute, 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 direction for the payment of "any claim," there are three requirements for payment: (1) the claim constitutes "necessary response costs;" (2) those costs were incurred by "any other person;" and (3) those costs were 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, 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 has 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, 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, 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, Consent Decree at p. 2; Ex. B, 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 this 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). As noted above, AME was required to submit work plans to EPA for approval before doing any work detailed in the plan. It complied with this requirement and obtained approval from an EPA official before beginning its work. EPA approved each step of AME's work as the Consent Decree required. Because EPA initiated and oversaw the cleanup activities at the BJS Site pursuant to CERCLA and the NCP and AME completed all its work following the requirements of the Consent Decree as shown above, all AME's costs were approved under the NCP. As a result, payment for these costs can come from the Fund.

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.

2. *AME complied with the NCP's notice requirements for submitting claims to the Fund.*

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.[6] The second and third requirements have already been discussed above so they will not be reviewed again in this section. AME's compliance with the first "preauthorization" requirement is discussed below.

a. AME obtained preauthorization by submitting work proposals to EPA for the agency's review and oversight.

AME obtained adequate preauthorization from EPA before completing any work. The Superfund regulations require preauthorization by EPA of any work to be done. 40 C.F.R. §§ 300.700(d)(2), 307.21(b)(1), 307.31(a)(1). The main goal of preauthorization is to give EPA 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). EPA can then make informed decisions as to whether it should use the power found in its standard consent decrees to reject or require alterations to a proposed contractor or action. (*See* Ex. A, Consent Decree at pp. 19-23.) Here, EPA was given all the information it needed for each of AME's proposed activities. AME was the Supervising Contractor and was required by the Consent Decree to submit information to EPA about its abilities to complete the work in a timely and proficient manner. (*Id.* at p. 16.) Further, 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.

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[6] 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).

What is more—just as EPA's regulations require—AME completed the work at the Site in a manner consistent with the NCP and EPA's pre-approval, and EPA oversaw AME's work and ensured this happened. *See* 40 C.F.R. §§ 307.21(b)(2)-(3), 307.31(a)(2). AME's work was consistent with the NCP because the Consent Decree provides that "[t]he activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." (Ex. A, Consent Decree at p. 15.) There simply is no question that EPA approved all of the activities AME performed at the Site as noted above. Moreover, the Consent Decree also provided EPA with a number of ways to monitor AME's work to ensure it was actually completed as it was proposed and approved. For instance, AME was required to submit a quality assurance plan to EPA and conduct confirmatory sampling. (*Id.* at pp. 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.) EPA had unlimited access to the Site to monitor, investigate, and sample the site and work done there. (*Id.* at pp. 26-29.) Finally, EPA's ultimate tool to ensure that work was completed according to its approval and the NCP was its ability to take over the work at the site. (*Id.* at pp. 72-74.) Thus, EPA itself ensured that AME's work was completed according to its approval and the NCP.

b. Strict compliance with the "preauthorization" regulations is not required – only "substantial compliance" is necessary.

While its regulations contain a procedure for requesting preauthorization, there is no indication that EPA still follows this practice. For instance, the "preauthorization" application form contained at 40 C.F.R. Pt. 307, App. A is so old that it expired in 1994 – ***22 years ago***—by its own terms. 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. Thus, it is clear that EPA has little interest in actually receiving scripted "applications" for preauthorization.[7] But 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

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

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 in this claim.

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. If EPA rejects AME's claim, it will be based solely on "a list of rigid requirements" which would only serve "to defeat cost recovery for [this] meritorious cleanup action[] based on a mere technical failure" by AME after it had already completed its cleanup work at the BJS Site. That is not a reasonable outcome in this case given AME's strict compliance with CERCLA itself, AME's compliance with the spirit and intent of the CERCLA regulations, and EPA's continuous involvement in AME's work at the BJS Site. Therefore, this claim can and should be paid from the Fund.

3. *It was entirely reasonable for AME not to seek "preauthorization" through EPA's outdated procedure.*

In addition to AME's substantial compliance with CERCLA and its regulations, AME's costs should be reimbursed from the Fund because it is entirely reasonable that AME did not seek formal "preauthorization." There is no question that neither EPA nor AME had any reason to believe Vertellus, the Performing Defendant under the Consent Decree, would enter bankruptcy before the work at the BJS Site was complete. Nor is there any question that AME could not have foreseen EPA's refusal to reimburse AME's costs – incurred under the Consent Decree and with EPA's approval – given that EPA has more than $37 million of site specific funding. Given these unexpected events,

adhering to any expectation that AME needed to submit "preauthorization" forms (forms that expired 22 years ago) would be entirely arbitrary and unreasonable.[8]

The first point – that neither EPA nor AME expected Vertellus to enter bankruptcy during the pendency of the BJS Site cleanup – is made clear by the language of the Consent Decree. For instance, it is safe to assume that EPA would not have selected Vertellus as the Performing Defendant if it thought Vertellus might go into bankruptcy before completing the work. (Ex. A, Consent Decree at p. 15.) Indeed, EPA thought so little of the possibility of bankruptcy, the Consent Decree has no provision discussing the eventuality and makes only one mention of "bankruptcy" – while addressing the site history. (*Id.* at p. 3.) 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 preauthorization forms.

AME had another reason to believe it did not need to submit the "preauthorization" forms. It knew EPA had procured and established site-specific 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. EPA also established a Special Account for the site, and the Consent Decree required Vertellus to pay another $11,000,000 into that fund to be used to cover removal costs at the site. With site-specific funding totaling ***$37,556,000***, AME could feel comfortable that its costs would be paid regardless of what happened to Vertellus. Given EPA's access to funding far in excess of the costs claimed here, AME did not have a reason to submit the "preauthorization" forms for payment from the Fund. EPA's unexpected—and arbitrary—refusal to reimburse AME for its costs incurred performing work under the EPA Consent Decree and with EPA's authorization has required AME to submit this claim against the Fund.

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[8] That being said, if EPA prefers the format of this long-expired form, AME has attached a completed copy as **Exhibit D** hereto. Similarly, it has attached a completed copy of the long-expired claim form (EPA Form 2075-4) as **Exhibit E** hereto.

Finally, even if AME could have predicted the Vertellus bankruptcy and EPA's arbitrary refusal to release funding to reimburse its costs, there is still another undisputable fact that demonstrates that AME acted reasonably. As noted above, EPA Form 2075-3 entitled "Application for Preauthorization of CERCLA Response Action" (attached as Appendix A to 40 C.F.R. Pt. 307) expired, by its own terms, on December 31, 1994 – nearly 22 years ago. Yet, for nearly a quarter of a century, EPA's regulations have nevertheless required Fund claimants to submit this expired form as an apparent prerequisite to reimbursement from the Fund. And, what is more, even if the form had not expired, it nevertheless contains outdated and 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 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.[9, 10] EPA's preauthorization regulations are woefully out of date and clearly signal that submitting an application for preapproval would have been a frivolous enterprise sending AME on the administrative equivalent to a snipe hunt.

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[9] *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 Dec. 6, 2016); *About the Office of Land and Emergency Management: Office of Superfund Remediation and Technology Innovation (OSRTI)*, US EPA, https://www.epa.gov/aboutepa/about-office-land-and-emergency-management (last visited Dec. 6, 2016).

[10] 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 Dec. 6, 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.

4. *A denial of this claim would be directly opposed to the established purposes of CERCLA.*

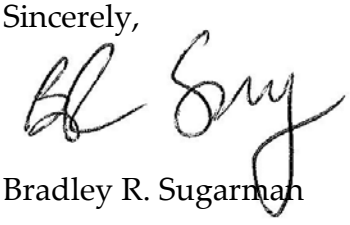
If EPA denies this claim, it will do so in direct opposition to the purposes of CERCLA. CERCLA was enacted "in response to the serious environmental and health risks posed by industrial pollution." *Burlington N. & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009). It "was designed to promote the timely 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). If EPA were to deny AME's claim for reimbursement from the Fund, it would clearly frustrate the purposes of CERCLA not only by delaying (perhaps indefinitely) response actions at the Site, but also by placing AME – an innocent party – to bear the costs of cleaning up a Site it did not contaminate.

CONCLUSION

AME is entitled to recover response costs it incurred at the BJS Site from the Fund. All AME's work was done pursuant to CERCLA, the NCP, the Consent Decree, and EPA's approval. Indeed, but for EPA's seemingly arbitrary denial to reimburse AME's costs from the more than $37,000,000 worth of site-specific funding, AME would not now be forced to seek reimbursement from the Fund. For these and the foregoing reasons, AME's claim should be approved.

Please contact me at your earliest convenience to further discuss this matter.

Sincerely,



Bradley R. Sugarman

BRS/AFT
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