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,
	)	as amended
	)	42 U.S.C. § 9611(a)(2)
	)	
	)	[Before Chief Administrative Law Judge
	)	Susan L. Biro]
Requestor.	)	
Big John Salvage Hoult Road Fairmont, West Virginia	)	
Facility.	)	

ANSWER OF RESPONDENT UNITED STATES EPA TO REQUESTOR AUGUST MACK ENVIRONMENTAL, INC.'S REQUEST FOR HEARING

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Pursuant to 40 C.F.R. § 305.22 (Answer to the request for a hearing), the United States Environmental Protection Agency ("EPA" or "Respondent") and its designated Claims Official, Karen Melvin, by and through its undersigned attorney(s), hereby answer the August Mack Environmental, Inc. ("AME" or "Requester") Request for Hearing ("Request"), paragraph by paragraph, presenting its arguments and grounds for defense as follows:

INTRODUCTION

Since the Introduction to AME's Request is not enumerated paragraph by paragraph, EPA hereby designates AME's opening introductory paragraph as paragraph number one (1), and follows each subsequent paragraph sequentially through paragraph number five (5) on page 2 of the Request.

1. The first two (2) sentences in this first paragraph are admitted; the remaining sentences are denied. By way of further explanation, Vertellus Specialties, Inc. ("Vertellus") was the Performing Defendant under a Consent Decree entered by the United States District Court for the Northern District of West Virginia on October 10, 2012, Civil Action No.1: 08CV124 ("Consent Decree") and had hired, among others, AME to perform the work required by the Consent Decree on its behalf. On May 31, 2016, Vertellus filed for bankruptcy. Subsequently, AME filed a proof of claim for $2.6 million against Vertellus in the United States Bankruptcy Court for the District of Delaware. That claim, which Vertellus values at $214,000, is now pending before the Bankruptcy Court. AME, thus far, allegedly being unable to collect money owed to it by AME now asks EPA to substitute the Fund as a source for payment of the $2.6 million it claims it is owed by Vertellus.

   Since EPA has never been privy to the private contractual relationship between Vertellus and its multiple contractors, including AME, EPA is thus without sufficient knowledge to admit over what time period AME may have incurred costs, what the nature of all those costs were, and whether all costs relate to "diligently perform[ing]" the removal actions required by Vertellus under the operative Consent Decree. EPA documented that Vertellus and its contractors, at times, performed deficient work resulting in EPA's formal disapproval. No substantive cleanup work, beyond basic conceptual planning and environmental sampling was completed by Vertellus at the Site, and no final design documents were submitted to EPA from Vertellus.

   Respondent also denies AME's allegation that "specific assurances" were made "that AME would eventually be paid from the $37 million Region III had amassed ***in site-specific funding***" (emphasis added). EPA never made any such assurances, written, oral or otherwise, to AME. EPA does not have knowledge of any such assurances that Vertellus may have given AME. Moreover, the existence or availability of other

site-specific funds is not relevant to this proceeding as it is not a "material factual allegation" that EPA must rebut. AME has asserted a claim against the Hazardous Substance Superfund ("the Fund") pursuant to 40 C.F.R. Part 307. Monies in a site-specific special account established pursuant to the Consent Decree have no bearing on the merits of such a claim. In other words, AME's cause of action is against the Fund only – *not* "site-specific funding" that is now contained in EPA's special account – as expressly provided in CERCLA Sections 111 and 112, and its implementing regulations set forth in 40 C.F.R. Part 307. Thus, there is no legal basis for AME's "alternative" claim against site-specific monies established in the Consent Decree.

2. Admitted that Vertellus filed for bankruptcy. The remainder of the factual allegations and contentions in this second paragraph are denied. By way of further explanation,; EPA denies that AME was "left with no other alternative" other than to file its instant claim against the Fund. Indeed, AME filed a proof of claim with the United States Bankruptcy Court for the District of Delaware and has acknowledged that it is waiting for payment pursuant to the terms of the bankruptcy.[1]

3. Admitted that by letter February 8, 2017, a Senior Assistant Regional Counsel from EPA Region III denied AME's request. All other statements which purport to characterize said letter are denied. By way of further explanation, the document speaks for itself. With respect to AME's assertion that the "EPA bureaucracy [has] run amuck" in applying and enforcing 40 C.F.R. Part 307, EPA responds that not only has the Agency not "run amuck," but it is in fact following well-established law from the United States Court of Appeals for the District of Columbia Circuit. In upholding EPA's preauthorization regulations codified at 40 C.F.R. Part 307 against Petitioner's attacks that they are "impediments" not contemplated by the intent of Congress, the Court held that "[i]n light of the well-settled principles of administrative law set forth above and the absence of anything showing EPA's accommodation of policies to be unreasonable or inconsistent with the intent of Congress, we must deny the petition and let the regulations stand." *State of Ohio v. US EPA,* 838 F.2d 1325, 1331 (D.C. Cir. 1987). AME cannot now re-litigate the merits and applicability of the preauthorization regulations.

   Per *State of Ohio*, Congressional intent is clear on its face. Congress required that EPA establish an approval and certification process before monies could be released from the Fund. Moreover, to the extent that AME's arguments pertain to the applicability and fairness (i.e., policy, purpose and impact considerations) of

[1] In accordance with 40 C.F.R. § 307.31(c), "[c]laimants may not pursue both an action in court against potentially responsible parties and a claim against the fund at the same time for the same response costs." Further, this subpart directs EPA to return the claims presented when the Agency determines that the claimant has initiated action for recovery of the same costs, in court, against another party.

consistently applying a legal scheme which was first promulgated in 1982, such arguments are now barred. Indeed, the Part 307 preauthorization scheme was subject to notice and comment rulemaking, judicial review, and otherwise comports with the Administrative Procedure Act, 5 U.S.C. §§ 500 et. seq. . The regulated community had ample opportunity to comment upon the proposed regulation or petition for review of the final regulations, which were re-promulgated in 1993. AME failed to do so and cannot now successfully pursue its *post-facto* collateral attack on EPA's regulations. Therefore, AME's challenges to pre-authorization are now barred for lack of timeliness by CERCLA 113(a)(Review of regulations in Circuit Court of Appeals of the US for the District of Columbia)(setting forth a 90-day petition for review window), and related case law. See, e.g. *Natural Resources Defense Council v. Nuclear Regulatory Commission,* 215 U.S. App. D.C. 32, 666 F. 2d 595, 602 (D.C. Cir. 1981)(holding that the time limit for seeking judicial review is "jurisdictional in nature, and may not be enlarged or altered by the Courts.").

4. Admitted that AME was performing work at the Site for a PRP under a Consent Decree. Admitted that Setting Defendants established the requisite financial assurances, as required by the Consent Decree. The remainder of this paragraph states contentions and conclusions of law to which no response is required. By way of explanation, in general, financial assurance provisions in settlements, such as the Consent Decree, require PRPs to demonstrate that adequate financial resources are available to complete required cleanup work to ensure that response actions are completed without the need for public funding sources. It was never intended that financial assurance required by the Consent Decree function as "an insurer of last resort" in instances where the Performing Defendant failed to pay its contractor – be it because of bankruptcy, disagreements over reimbursable expenses, or any other circumstance in which a contractor, such as AME, feels it was not properly compensated.

   One of the critical functions of the Superfund is to assure that when there are not viable PRPs to finance and conduct the work, money in the Fund is available to EPA to secure cleanup of toxic waste sites. If EPA were to use special accounts required under site-specific settlements to pay the debts of the Performing Defendants, that money would not be available for its intended and prescribed purpose of funding remaining cleanup of contaminated sites and EPA would have to resort to using public funding, i.e., the Fund, to do so. In doing so, EPA would be running afoul of the Congressional mandate to administer the Fund. See, *State of Ohio* at 1327 (§ 111 of CERCLA, read in context, "makes it abundantly plain that EPA is required to serve as the protector and distributor of scarce government resources devoted to this program of national priority"). Indeed, if AME's scenario were to play out, the Fund would have been drained many years ago by bankrupt parties, those affected by bankrupt PRPs, and any other aggrieved party who claims it was not paid 100% on its alleged cleanup expenses at the Site.

5. Respondent is without sufficient knowledge to admit or deny the factual allegations in this paragraph.

EPA'S RESPONSES TO AME'S FACTUAL ALLEGATIONS

1. Admitted.
2. Admitted.
3. Admitted
4. Admitted that EPA provided oversight of cleanup activities conducted at the Site from 1983-2016. EPA lacks information and knowledge with respect to West Virginia's activity.
5. Admitted, however, the list of cleanup actions is not comprehensive.
6. Admitted
7. Admitted
8. Admitted
9. Admitted
10. Admitted
11. Admitted
12. Admitted
13. Admitted
14. Admitted
15. Admitted
16. Admitted that both Vertellus and CBS intervened. By way of further explanation, EPA is without sufficient knowledge to admit or deny the factual allegations as to Vertellus and CBS's reasons for intervening.
17. Admitted
18. Admitted
19. Admitted in so far as the Consent Decree requires Vertellus to implement the response actions required by the Consent Decree.
20. Admitted. By way of further explanation, the Consent Decree required the Non-Performing Defendants, ExxonMobil and CBS Corporation, to provide money in support of Performing Defendant's obligations under the Consent Decree. Such obligations included reimbursement of $11 million dollars toward EPA's past response costs, as well as future oversight costs to be incurred by EPA and the West Virginia Department of

Environmental Protection ("WVDEP"). (Consent Decree, p.15 and 45). The amount of money provided by the Non-Performing Defendants totaled $16,000,000.

21. Denied that EPA, or WVDEP, approved funding for the work being performed by AME for Vertellus. By way of further explanation, EPA, in consultation with WVDEP, reviewed technical plans and reports submitted by AME on behalf of Vertellus, the Performing Defendant, for consistency with the response action selected in the Action Memorandum. EPA did not approve any invoices that AME submitted to Vertellus.
22. Admitted
23. Admitted
24. Admitted
25. Admitted
26. Admitted
27. Admitted
28. Admitted
29. Admitted
30. Admitted that Performance Guarantee funds required under Section X of the Consent Decree were specifically established to ensure EPA would have funding necessary to perform the full and final completion of the "Work" as defined in the Consent Decree in the event of Vertellus' failure to perform same. However, EPA denies that any fraction of the Performance Guarantee funds spent to date has any relevance to this matter. By way of further answer, in November 2016, after Vertellus filed for bankruptcy and ceased to perform under the Consent Decree, EPA was compelled to execute a Work Takeover under the Consent Decree. Up to that time, no substantive cleanup work required by the Action Memorandum, beyond discrete environmental sampling and basic conceptual planning, had been completed. EPA estimated the total costs for the removal action, based on full-cost accounting practices, will be $34,674,000. 2010 Action Memorandum, p.32. Further, EPA's anticipated future response costs for this Site are not limited to the specific response actions set forth in the 2010 Action Memorandum. Additional response actions with additional associated costs are anticipated, and EPA estimates that total cleanup costs are likely to exceed the monies in EPA's Special Account.

    As explained earlier, site-specific funding is not relevant to this matter and is not a "material factual allegation." AME has asserted a claim against the Fund. Monies in the site-specific special account have no bearing on the merits of that claim. In other words, AME's claim can be potentially brought only against the Fund itself – *not* the "site-specific funding" that is now contained in EPA's special account – as expressly stated in CERCLA Sections 111 and 112, and its implementing regulations set forth in 40 C.F.R.

Part 307. Thus, there is no legal basis whatsoever to AME's "alternative" claim against Site-specific monies established in the Consent Decree.

31. Admitted with the caveat that all of the monies in the Qualified Settlement Fund Trust were submitted by Vertellus to EPA to pay for EPA's past costs in accordance with the terms the Consent Decree. *See* Consent Decree, paragraph 40, p.47.
32. Admitted
33. Admitted
34. Admitted that the Consent Decree requires that the performance guarantee required under Section X of the Consent Decree be used to ensure EPA would have funding necessary to perform the full and final completion of the "Work" in the event of Vertellus' failure to perform same. Denied as to the characterization that "[t]he war chest EPA accumulated to fund the work at the BJS Site is considerable." Additional response actions with additional associated costs are anticipated, and EPA estimates that total cleanup costs are likely to exceed the monies in EPA's Special Account.
35. Admitted
36. Admitted
37. Denied. EPA's Special Account balance is not $37 million; it is approximately $24 million as of June 1, 2017.
38. Admitted
39. Admitted
40. Denied to the extent that Vertellus, not AME, was required to complete work under the Consent Decree. Denied that EPA "approves" contractors. In accordance with the Consent Decree, AME's selection by Vertellus was "accepted" by EPA.
41. Admitted
42. Admitted
43. Admitted that there was a submission. EPA lacks information to respond to the remaining allegations. See explanation set forth in paragraphs 45 and 48, *infra.*
44. Admitted
45. EPA lacks information to admit or deny whether and why AME took these actions. By way of further explanation, EPA is aware that multiple contractors working for Vertellus in the office and in the field performed work on initial phases of the Pre-Design Investigation in accordance with the Consent Decree. EPA does not know the degree to which AME, in particular, performed specific work.
46. Admitted
47. Admitted that Vertellus submitted a Field Sampling Plan to EPA.

48. Admitted that EPA received and commented on the documents it received from Vertellus. EPA lacks information on the form and extent of AME's work on the documents. The remaining factual allegations are also denied.
49. Admitted that EPA reviewed, commented on and, in part, approved the preliminary design documents and the intermediate uplands design. EPA lacks information to admit or deny the remaining allegations in paragraph 49. It is noteworthy that no final design documents were developed and/or submitted by Vertellus contractors prior to its decision to cease performance of the Work.
50. Admitted
51. Denied. EPA lacks the information or knowledge as to why Vertellus has estimated the value of AME's work at the BJS Site to be $214,551.56.
52. Admitted
53. Admitted that AME has a claim pending before the Bankruptcy Court.
54. Neither admitted nor denied as to AME's characterization of its status before the Bankruptcy Court.
55. Respondent is without sufficient information or knowledge to admit the allegations stated in this paragraph. In addition, these allegations are denied to the extent that they state contentions, conclusions and suppositions to which no response is required.
56. Admitted
57. Admitted that AME submitted a document to EPA which AME styled as "Claim for payment from the Hazardous Substance Superfund".
58. Admitted that on February 8, 2017, Region III denied AME's alleged "claim". Denied as to AME's characterization that "without regard to the purpose or intent of CERCLA §111, Region III flatly dismissed that its Consent Decree . . . could constitute preauthorization . . . ."

EPA'S RESPONSE TO AME'S STATEMENT OF AUTHORITY

1. The paragraph states contentions and conclusions of law to which no response is required pursuant to 40 C.F.R. § 305.22(b).
2. The paragraph states contentions and conclusions of law to which no response is required pursuant to 40 C.F.R. § 305.22(b).
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5. The paragraph states contentions and conclusions of law to which no response is required pursuant to 40 C.F.R. § 305.22(b).
6. Admitted that AME performed certain clean-up work at the BJS Site; admitted that AME incurred certain costs that have not been verified by EPA; denied that all of the incurred costs were "necessary response costs as a result of carrying out the NCP." By way of further answer, EPA is not privy to the contractual relationship between AME and Vertellus, and has no information orknowledge as to these factual allegations that are denied.
7. Admitted that AME submitted a document to EPA which AME styled as "Claim for payment from the Hazardous Substance Superfund".
8. Admitted.
9. Denied that AME is allowed by 42 U.S.C. § 9611(a)(2) and 42 U.S.C. § 9612(b)(2) and generally by CERCLA and its implementing regulations to submit its Request.

EPA'S RESPONSES TO AME'S CONCISE STATEMENT OF REASONS FOR DISPUTING DENIAL OF CLAIM

1. The paragraphs in AME's argument entitled *"Region III wrongly concludes that AME was required to submit an 'application for preauthorization' prior to performing work"* state contentions and conclusions of law to which no response is required, except for the following (note that page references are to AME's Request):

   a. EPA has no knowledge as to whether AME intended to submit a claim when it began work at the Site. (p.19);
   b. Neither admitted nor denied that EPA foresaw Vertellus' bankruptcy. (p.20);
   c. Admitted that AME had no reason to seek preauthorization (p.20);
   d. Admitted that EPA would not have pre-authorized reimbursement from the Fund before AME performed the work (p. 22);
   e. Denied that with site-specific funding totaling $37,556,000, AME could feel comfortable that its costs would be paid regardless of what happened to Vertellus." (p. 20);
   f. Denied that EPA does not follow the regulatory scheme regarding pre-authorization (p.21);
   g. Denied that Form "2075-3" is "worn and barely legible" (p.21);
   h. Denied that EPA's preauthorization regulations are "woefully out of date." (p.22); and

i. Denied that EPA made a "decision to arbitrarily sequester the site-specific funding" at any point in time. (p.22)

By way of further explanation of the above denials, AME has asserted a claim against the Fund. As previously stated in this Answer, monies held in this Site-specific Special Account have no bearing on the merits of the claim.

While the Site-specific Special Account is irrelevant to AME's *prima facie* case against the Fund, given AME's reference to Special Account money throughout its Request, EPA is compelled to explain to this Tribunal why EPA's use of special account money at the Site is not arbitrary.

Section 122(b)(3) of CERCLA authorizes EPA to retain funds in a special account. Special accounts are funded with money paid to the United States pursuant to site-specific settlement agreements. Use of special account monies is ultimately determined by the agreement under which the funds were received. The United States received special account funds pursuant to specific provisions in the Consent Decree and is legally bound to use those funds according to the terms of that Consent Decree.

On November 22, 2016, EPA invoked the Work Takeover provision pursuant to paragraph 72 (Work Takeover) of the Consent Decree after Vertellus notified EPA that certain work required under the Consent Decree would be postponed indefinitely. Subsequently, monies secured for financial assurance pursuant to Paragraphs 29.b. and c. of the Consent Decree were transferred into the BJS Site special account to be retained and used to conduct or finance response activities at or in connection with the BJS Site in accordance to Paragraph 43 (Payments to Special Account) of the Consent Decree. EPA estimates that after using all of the special account monies, additional work required to cleanup the Site will remain unfunded.

To the extent that AME challenges EPA's use of special account funds, such use is governed by the Consent Decree. EPA notes that issues pertaining to the Consent Decree are subject to the authority and jurisdiction of the Court which entered the Consent Decree. This Tribunal lacks jurisdiction to interpret and enforce the terms of the subject Consent Decree, and thus has no authority to satisfy AME's claim for monies (a/k/a "site-specific funding") held pursuant to that agreement. See, Consent Decree, Section II, p.3 (establishing the U.S. District Court's jurisdiction under 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b)).

AME also argues that because CERCLA Section 111(a), 42 U.S.C. § 9611(a), does not require preauthorization, EPA's preauthorization regulations in 40 C.F.R. Part 307 do not apply and, as explained below, EPA disagrees.

CERCLA Section 111(a), 42 U.S.C. § 9611(a), provides for reimbursement from the Hazardous Substance Superfund ("Fund"). CERCLA Section 111(a) states, in relevant part, that:

> 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 person 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. (emphasis added)**

AME ignores that last sentence which provides the basis for its implementing regulations. The 40 CFR Part 307 preauthorization process flows from and is based on the approval and certification provision in the emphasized provision of section 111(a)(2) of CERCLA (above). As the Agency made clear at the time, "[t]his statutory provision contemplates Agency review of the necessity and priority of response claims ***before*** authorizing use of the money in the Fund for such claims." 54 FR 37892, 37898 (Sept. 13, 1989).

Relevant provisions of the preamble to the proposed Part 307 rule state as follows:

> Preauthorization achieves four important objectives. First, it enables the Agency to fulfill its role as Fund manager by ensuring appropriate uses of the Fund. In this way, Fund money available for claims is expended in accordance with environmental and public health priorities. Because the number of incidents that may give rise to claims is large, and because remediating a single incident can involve considerable expense, it is essential that the Agency screen possible claims to determine the importance of the response that may be undertaken relative to other response needs.

> Second, preauthorization of response actions reduces the likelihood that responses themselves will create environmental hazards…
>
> Third, preauthorization ensures that the claimant is aware of, and will carry out a response action in a manner consistent with the NCP.
>
> Fourth, preauthorization gives the claimant an assurance that if the response is conducted in accordance with EPA's approval and the costs are reasonable and necessary, monies may be had from the Fund.
>
> 54 FR 37892, 37898 (Sept. 13, 1989).

Thus, preauthorization is an essential first step in making an eligible claim for reimbursement from the Fund.

2. The paragraphs in AME's argument entitled "*Region III misinterpreted AME's argument regarding preapproval and wrongly concluded that EPA did not preauthorize AME's work at the BJS Site*" state contentions and conclusions of law to which no response is required, except that EPA denies the following:

   1) "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" (p.22).
   2) " EPA approved and certified the costs included in the Claim" (p.23)
   3) AME's costs were "necessary response costs" (p.23)
   4) AME was "required" to submit the documents or work enumerated in the first paragraph of page 23
   5) ". . . EPA had in fact approved and certified AME's work at the Site" (p.23)
   6) "EPA approved and certified all of the activities AME performed at the Site."(p.23)
   7) "Thus, EPA had full control over what actions AME took at the Site."(p.25)

   By way of further explanation of the above denials, as Vertellus' contractor, AME submitted work plans and other deliverables to EPA *on behalf of Vertellus* (the signatory to the Consent Decree and the entity bound by the requirements of the Consent Decree) pursuant to the terms of the Consent Decree. EPA reviewed and approved certain work plans and other deliverables submitted by AME *on behalf of Vertellus* pursuant to the

terms of the Consent Decree. Approving work plans and other deliverables under a Consent Decree is not synonymous with Preauthorization under Part 307. Indeed the governing regulations 40 C.F.R. § 307.22(j) spell out that EPA's review and approval under a Consent Decree specifically and explicitly does not constitute "preauthorization under CERCLA." The preauthorization process itself provides EPA with the information necessary to compare each potential claim relative to other response needs throughout the country.[2] In that way, the Agency is best able to manage public health priorities by using this process to manage the Fund. Preapproving work required by a Consent Decree has nothing to do with Fund management.

Significantly, the Consent Decree is silent as to preauthorization or claims against the Fund by third parties, let alone as to the critical preauthorization requirements that would establish EPA's "approval" and "certification" of AME's alleged costs. *See* CERCLA Section 111(a)(2). While EPA reviewed and approved certain work plans submitted by AME on behalf of Vertellus, EPA lacks knowledge of all of the activities AME may have performed on behalf of Vertellus at the Site. In addition, contrary to AME's repeated assertions, EPA never certified AME's costs or work. The Consent Decree does not provide any mechanism for EPA to have done so. Moreover, the Consent Decree provides that "[n]othing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Consent Decree." (Consent Decree, paragraph 79, p. 23). Thus, AME's assertion that the oversight/review/approval terms of the Consent Decree give rise to 3rd party rights or causes of action against EPA is patently incorrect.

AME also asserts that EPA somehow stated or implied that its approval of work plans and other "deliverables" substituted for preauthorization of any claim that AME might assert against the Fund. AME's assertion is frivolous. There was never an agreement with EPA, express, implied, oral or written, that could possibly have led AME to believe that EPA would substitute the terms of the Consent Decree, to which AME was not even a signatory, for the mandatory application of a regulatory requirement that has been established, upheld, complied with by others, and remains unchallenged for almost thirty (30) years. Had EPA contemplated that the Consent Decree provide for preauthorization, AME would have been a party to the Consent Decree, and the preauthorization requirements would have been explicitly stated therein.[3] In fact, EPA has drafted consent decrees providing for bona fide preauthorization – for example, in US v. Sequa Corporation, and John H. Thompson (Civ. Action No. 2:05-CV-01580-TON)(Exhibit A), EPA included the following provisions that comport with Part 307:

> The EPA funds referred to in the foregoing Paragraphs may be provided, at EPA's election, in the form of preauthorized mixed funding pursuant to **Sections 111(a)(2), 112, and**

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[2] The preauthorization decision document establishes the terms and conditions that must be met, including scope of work, maximum cost, and contracting processes established to ensure free and open competition, etc. See, generally, 40 C.F.R. § 307.23 (EPA's review of preauthorization applications).

[3] Moreover, had AME been a party to this Consent Decree, EPA would have established an explicit Covenant barring any claim for reimbursement from the Fund. See, Consent Decree, paragraph 74, p. 74 (Covenants by Setting Defendants).

> **122(b)(1) of CERCLA, and 40 C.F.R. 307**, mixed work, grants, or other mechanisms...and [Settling Defendants] shall document such costs as provided in **40 C.F.R. 307** (Sequa Consent Decree, Paragraph 67, 68, p.54)(emphasis added).

Thus, as much as AME would like to read a preauthorization process into the Consent Decree at issue, AME's argument simply has no basis in fact.

AME attempts to circumvent its burden of proof and shift it to EPA when it demands that EPA explain why it cannot use its discretion to post-facto determine that AME's claims have met the pre-authorization requirements (Request p.24). AME's attempt to flip the burden of proof ignores the unambiguous statutory mandate that "[i]n any proceeding...the Claimant shall bear the burden of proving its claim." CERCLA § 112(b)(3).

3. The paragraph in AME's argument entitled "*Region III wrongfully concluded that EPA must issue a Preauthorization Decision Document before allowing reimbursement from the Fund*" state contentions and conclusions of law to which no response is required, except that EPA denies that "neither CERCLA nor the NCP required AME to apply for preauthorization."

By way of further explanation, 40 CFR Part 307 provides that reimbursement is available only for claims authorized by a preauthorization decision document ("PDD") before the work is done (See, e.g. 40 C.F.R. § 307.3). A consent decree "does not constitute preauthorization to present a claim to the Fund" even for the signatory, let alone a contractor to a signatory. 40 C.F.R. § 307.22(j). To preauthorize a claim, EPA must, *inter alia*, determine the "...importance of the response activity when compared with competing demands on the Fund." 40 C.F.R. § 307.23(b)(2). "The preauthorization requirement is necessary for proper Fund management to ensure that Fund monies be available for the most urgent priorities." 50 Fed. Reg. 5862, 5873 (Feb. 12, 1985). When EPA has viable PRPs under contract to perform and finance all of the necessary work, spending Fund money to secure the cleanup is clearly not an urgent priority or otherwise in keeping with the objectives of CERCLA and Part 307. The DC Circuit confirmed this in upholding the subject preauthorization regulation: "EPA is required to serve as the protector and distributor of scarce government resources." *State of Ohio v. EPA*, 838 F. 2d 1325 (D.C. Cir., 1988). Congress appropriates limited money from the Fund, which does not cover all the response work EPA needs. Where PRPs agree to perform or pay for the response at a site, EPA will generally not preauthorize others to do

that response. At the BJS Site, viable PRPs, namely Exxon and CBS, agreed to perform and/or pay for the cleanup.

As AME admits, it never intended to submit a claim when it began working on behalf of Vertellus. Procedures for managing the Fund are not established to cover response costs after performance. AME is not persuasive in its argument that EPA should make an exception for AME to up-end regulatory requirements that every other member of the regulated community must abide by. This would be tantamount to demanding that EPA act in an arbitrary and capricious manner, and/or not otherwise in accordance with the law.

AME suggests that EPA is free to act contrary to the regulatory requirement and "conclude" that AME did not need to apply for preauthorization prior to performing work. We disagree. The regulations require that preauthorization must always be sought prior to performance.[4] As the steward of the Fund, EPA must enforce the regulation as it is written.

4. The paragraph in AME's argument entitled "*Region III ignored the fact that AME 'substantially complied' with the preauthorization requirements in the NCP*" state contentions and conclusions of law to which no response is required, with the following exceptions:

   a. Denied that "AME substantially complied with the preauthorization requirements in the NCP." (p.25)
   b. Denied that "AME provided all the information EPA needed to evaluate, approve, and oversee the project and all proposed work." (p.26).

   By way of further explanation of the above denials, AME's "substantial compliance" argument appears to relying on 40 C.F.R. § 300.700(c) which governs cost recovery from liable parties pursuant to CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B).

[4] In the absence of a Preauthorization Decision Document(PDD), there is no way for the claims official to "perfect" the claim. The initial review requires the Claims Official to affirm that all expenditures were incurred in conformance with the PDD. The PDD establishes the scope, allowable costs etc. for the claims official to consider when reviewing preauthorization claims under the criteria set forth in 40 C.F.R. 307.23.

Under 40 C.F.R. § 300.700(c)(3)(i), a private party volunteering to do cleanup can recover its costs from liable parties if, among other things, the cleanup is in "substantial compliance" with certain provisions of the NCP, specifically 40 C.F.R. § 300.700(c)(5) and (6). This is to ensure that cleanup costs are reasonably allocated among liable parties. While neither 40 C.F.R. § 300.700(c)(5) nor (6) addresses preauthorization, the following section, 40 C.F.R. § 300.700(d) (Section 111(a)(2) claims) does. That section applies to AME's claim and is not referenced in § 300.700(c)(3)(i) as being subject to "substantial compliance." Rather, 40 C.F.R. § 300.700(d)(2) requires that "In order to be reimbursed by the Fund, an eligible person must . . . receive prior approval, i.e., "preauthorization . . . . " The preauthorization requirement is more than a technicality as AME characterizes it. It is a critical step which provides EPA with the information necessary to determine how to prioritize use of limited Fund money. AME's efforts to conflate claims against the Fund with claims against other private parties are seriously misplaced, and as a legal matter, contrary to settled precedent. See, *Ohio* at 1331 (confirming that Congress intended to distinguish these disparate claims "since different policy considerations apply in private actions as opposed to claims against the Fund" and "obviously, the need to marshal scarce government resources necessarily underlying the administration of the Fund is uninvolved in the pursuit of private actions against responsible parties...") Without having undertaken the critical preauthorization process in this matter, EPA does not have all of the information necessary to evaluate and approve the legitimacy or illegitimacy of AME's alleged costs, invoices etc., as such an evaluation would have been a function of EPA's preauthorization process.

5. The paragraph in AME's argument entitled "*Region III ignored the fact that AME complied with all statutory requirements for submitting the Claim*" state contentions and conclusions of law to which no response is required, with the following exceptions:

   a. Admitted that the requisite submittals provided by Vertellus or submitted by AME on behalf of Vertellus relate to necessary work conducted in accordance with the NCP.
   b. Admitted that "AME complied with [CERCLA § 112(a)] by sending a written request to CBS on August 30, 2016 and to Exxon on September 22, 2016 and that

Exxon refused on October 11, 2016 and CBS refused AME's request in writing on September 28, 2016." (p.30)

c. Denied that "AME complied with all statutory requirements in submitting a claim to the Fund." (p.27)
d. Denied that "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." (p.27)
e. Denied that "AME's claim satisfies [the requirements]" in CERCLA § 111(a)(2). (p.28)
f. Denied that "all of AME's claimed costs constitute response costs" and "AME's Claim consists of 'necessary response costs' that can be paid for from the Fund". (p.28)
g. Denied that "AME's work was completed 'as result of carrying out the NCP' pursuant to the Consent Decree and EPA's approval." (p.29)
h. Denied that "EPA approved all of AME's plans and work according to the provisions of the Consent Decree before AME started any work." (p.29)
i. Denied that "all of AME's work was performed, and related costs incurred, consistent with, and for the express purpose of carrying out, the NCP." (p.29)
j. Denied that "EPA approved and certified all costs included in the Claim…." (p.29)
k. Denied that "AME has properly requested payment of the amounts in this Claim from PRPs as required by CERCLA, and those requests have been rejected". (p.30)
l. EPA is without sufficient knowledge to admit or deny that "as to Vertellus, AME complied with this requirement by regularly sending invoices for all work to Vertellus prior to Vertellus declaring bankruptcy" and that "Vertellus did not pay the invoiced amounts…." (p.30)

By way of further explanation, AME is not a party who may submit a claim against the Fund. AME's claim was presumably filed pursuant to 40 C.F.R. § 307.31 (letter to Bonnie Pugh from Bradley Sugarman, dated January 12, 2017; p.1). In its Request, AME, while invoking § 307.31 as the applicable regulation under which to file its claim, has apparently disregarded the implementing regulations (Part 307) which govern the merits of this matter. That Part establishes the five criteria which must be met and AME cannot meet any of the five criteria set forth in 40 C.F.R. § 307.31. Only parties who get prior approval via the preauthorization process have an eligible claim against the Fund. 40 CFR 300.700(d)(2). This is because "the preauthorization requirement [set forth again in 40 C.F.R. § 307.22] is based on the approval and certification provision in Section 111(a)(2) of CERCLA…" 54 Fed. Reg. 37898 (Sept.13, 1989).

AME presumably chooses to now disregard Part 307 because it has failed to meet each of the five criteria which must be met in order for EPA to evaluate the claim to determine whether it should be processed accordingly. AME also misinterprets §112(a) of CERCLA by failing to acknowledge that it is in fact barred from double dipping on its claim in both this forum and the Bankruptcy Court.

6. The paragraph in AME's argument entitled "Region III ignored the fact that AME complied with the NCP's notice requirements for submitting claims to the fund" states contentions and conclusions of law to which no response is required, and to the extent that AME recites factual allegations, those factual allegations have been denied, as stated in paragraph 5, immediately above.

7. The paragraph in AME's argument entitled "*Region III ignored the fact that its denial of the Claim was directly opposed to the established purposes of CERCLA*" states contentions and conclusions of law to which no response is required, and to the extent that AME recites factual allegations, those factual allegations have been denied, as stated in paragraph 5 above.

EPA'S RESPONSE TO AME'S REQUEST FOR HEARING

AME's "REQUEST FOR ADMINISTRATIVE HEARING" (p.33) presents contentions and conclusions of law to which no response is required.

EPA'S RESPONSE TO AME'S STATEMENT OF AMOUNT DEMANDED

Respondent is without sufficient knowledge to admit the factual allegations contained in either paragraph.

EPA's RESPONSE TO ITEMS ATTACHED HERETO AND FILED AS REQUIRED BY REGULATIONS

1. Denied that "AME did not and could not have obtained a PDD referenced in the regulations" (p.33). By way of further explanation, other claimants have successfully used the preauthorization application (Appendix A to 40 C.F.R Part 307), notwithstanding the expiration date issue. It is further Denied that AME includes information in its Request for Hearing "concerning EPA's affirmative review, preauthorization, and oversight of the work involved in the Claim" (p.33). By way of

further explanation, AME includes no information establishing preauthorization per se; rather, it presents its arguments as to why work conducted under a Consent Decree should substitute for the requisite preauthorization that every other claimant would have to comply with before EPA considers its claim(s), an argument that cannot prevail.

2. Admitted.
3. Admitted.

EPA'S RESPONSE TO AME'S CONCLUSION

The statements made in AME's "CONCLUSION" (p.34) present contentions and conclusions of law to which no response is required pursuant to 40 C.F.R. § 305.22(b).

EPA hereby incorporates by reference the Memorandum in Support of its accompanying Motion to Dismiss as if fully set forth herein.

CONCLUSION AND PRAYER FOR RELIEF

AME's claim is not eligible under 40 C.F.R. § 307.21(b) due to AME's failure to receive preauthorization; consequently, AME is effectively barred from submitting a claim to the Fund pursuant to 40 C.F.R. § 307.22(a). Therefore, for the reasons mentioned above, EPA requests that the Request for Hearing be denied with prejudice.

Respectfully Submitted,

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