

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

In the Matter of:)	Docket No.: CERCLA-HQ-2017-0001
)	
August Mack Environmental, Inc.)	EPA’S FIRST SUPPLEMENTAL
)	PREHEARING EXCHANGE
Requestor)	

EPA’S FIRST SUPPLEMENTAL PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 305.26 of the CERCLA Administrative Hearing Procedures for Claims Against the Superfund (“Part 305 Consolidated Rules of Practice”) and in response to Chief Administrative Law Judge Susan L. Biro’s September 8, 2021 Order of Redesignation and Prehearing Order (“Prehearing Order”), the United States Environmental Protection Agency (“EPA” or “Agency”) and its designated Claims Official, by and through its undersigned attorneys, hereby submits its First Supplemental Prehearing Exchange. EPA respectfully reserves its right to further supplement its Prehearing Exchange in accordance with 40 C.F.R. § 305.26 and by this Court’s Prehearing Order.

I. WITNESSES

EPA’s new office address is:

US Environmental Protection Agency
4 Penn Center
1600 John F. Kennedy Boulevard
Phila. PA 19130

II. EXHIBITS

EPA intends to introduce the following additional exhibits at hearing, copies of which are attached hereto in accordance with the OALJ E-Filing System:

Exhibit Number	Description of Exhibit	No. of Pages
AX 19	Eric Newman Affidavit	6
AX 20	Excerpted Pages from Eric Newman’s Deposition	5
AX 21	CERCLA Delegation 14-9	2

Note: At hearing, EPA may present enlargements of one or more of these exhibits in the nature of demonstrative aids.

III. ADDITIONAL TIME NEEDED FOR HEARING AND TRANSLATION SERVICE NEEDS

Based on AME's 334+ exhibits and dozens of witnesses (some of whom are not a party to this litigation), Counsel for EPA currently estimates that the time needed to present its direct case will require more than one full business day. EPA also anticipates that it will need over five business days to present its rebuttal and to cross-examine AME's dozens of witnesses. Complainant does not anticipate that translation services will be necessary in regard to the testimony of any of its witnesses.

Respectfully submitted,

Date

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CERTIFICATE OF SERVICE

I certify that the foregoing Agency's First Supplemental Prehearing Exchange in the *Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-00001, was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

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

Date

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EXHIBIT "A"

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

AFFIDAVIT OF ERIC NEWMAN
IN SUPPORT OF EPA's AMENDED MOTION FOR ACCELERATED DECISION

I, Eric Newman, declare as follows under penalty of perjury:

1. I am employed as a Remedial Project Manager in the Hazardous Site Cleanup Division of the United States Environmental Protection Agency ("EPA"), Region 3. I have held that position since April 1988. The role of a Remedial Project Manager is established in the National Contingency Plan ("NCP") at 40 C.F.R. § 300.120.

2. My duties as Remedial Project Manager ("RPM") include, among other things, responding to releases and threats of releases of hazardous substances under the National Contingency Plan and overseeing removal actions and remedial actions conducted under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"). As an RPM, I coordinate, direct, and review the work of other agencies, responsible parties, and contractors to assure compliance with the NCP, agency decision documents such as Action Memoranda, consent decrees and EPA-approved plans applicable to the response.

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3. Since March 13, 2006, my duties as a Remedial Project Manager have included overseeing response activities at the Big John's Salvage-Hoult Road Superfund Site ("BJS Site" or "Site"), located along the east bank of the Monongahela River in Fairmont, Marion County, West Virginia. A Removal Administrative Record has been previously compiled for the BJS Site, and was most recently updated July 17, 2013, to document historic plant operations, response actions, EPA decision documents and related enforcement documents, including a Consent Decree (Civil Action No. 1:08-CV-124) entered on October 10, 2012 in U.S. District Court for the Northern District of West Virginia ("BJS CD", "CD" or "Consent Decree"). The Administrative Record is available to the public on the EPA website (www.epa.gov/arweb).

4. Reilly Tar and Chemical Corporation ("Reilly"), a predecessor to Vertellus Specialties, Inc. ("Vertellus"), owned the Site from 1932 until 1973. Reilly received crude coal tar from the adjacent Sharon Steel-Fairmont Coke Works facility. The coal tar was processed and refined into various products which included creosote, phenol, road tar and naphthalene on the BJS Site.

5. Coal tar is a dark, oily, viscous material, consisting mainly of hydrocarbons. It is a by-product from manufacturing coal gas and/or making coke for the steel industry. The crude tar contains a large number of organic compounds, such as benzene, naphthalene, and phenols which can be obtained by distillation. Crude tar also contains various larger polycyclic aromatic hydrocarbons ("PAHs"), such as benzo(a)pyrene which are less volatile. Many PAHs, including naphthalene and benzo(a)pyrene (both contaminants of concern at the BJS Site) are "hazardous substances" within the meaning of Section 101(14) of CERCLA, 42 U.S.C § 9601(14), because they are listed at 40 C.F.R. § 302.4.

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6. During the period of operation by Reilly, historical records document that coal tar wastes and by-products from the Big John's Salvage Site were spilled on the ground surface and discharged to a tributary flowing to the Monongahela River.

7. On September 30, 2010, EPA issued an Action Memorandum documenting that soil and groundwater at the BJS Site and sediments in the Monongahela River adjacent the Site are contaminated with PAHs at levels that present or may present an imminent and substantial endangerment to the public health or welfare or to the environment. The Non-Time Critical Removal Action ("Removal Response Action") to be implemented at the Site is also embodied in the Action Memorandum.

8. Major components of the Removal Response Action include the following "Work" as that term is defined in the BJS CD: a) constructing a RCRA subtitle D-type cap over an area of the Site referred to as the "Upland Area"; b) upgrading an existing groundwater containment and treatment system in the Upland Area; and c) excavating a mass of tar waste deposits and associated contaminated sediments from the Monongahela River for disposal at an appropriately permitted facility.

9. Vertellus' obligation to implement the Removal Response Action is memorialized in the BJS CD as follows: Vertellus "shall perform the Work in accordance with this Consent Decree, the Action Memorandum, and all work plans and other plans, standards, specifications, and schedules set forth herein or developed by [Vertellus] and approved by EPA pursuant to this Consent Decree." The BJS CD requires that Vertellus provide a copy of the Decree to each contractor hired to perform Work required by the Decree and condition all contracts entered into for performance of the Work in conformity with the terms of the Decree. The BJS CD states that

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Vertellus remains responsible for ensuring that its contractors perform the Work required by the Consent Decree.

10. In 2012, Vertellus notified me that it had retained August Mack Environmental, Inc. ("AME") as its "Supervising Contractor" to perform the Work required by the BJS CD. On November 6, 2012, EPA accepted Vertellus' selection of AME as its Supervising Contractor in advance of Vertellus performing any work pursuant to the CD. In that role, AME coordinated or conducted certain design-related Work on behalf of Vertellus pursuant to the terms of the CD. I reviewed and commented on that Work in accordance with the approval process set forth in Section IX (EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS) of the Consent Decree. At all times relevant to AME's claim, I coordinated with Vertellus, and its supervising contractor AME, as appropriate to ensure that Vertellus' was proceeding with the Work consistent with the CD.

11. Work performed by AME in its capacity as Supervising Contractor on behalf of Vertellus was limited to partial performance of Removal Design Work Plans, such as Pre-Design Investigation Activities, and initial or conceptual design reports. At the point that Vertellus filed for bankruptcy and stopped performing Work required by the CD, it had not yet completed any substantive clean-up work beyond basic conceptual planning and environmental sampling, and no final design documents were submitted to me by or on behalf of Vertellus.

12. I coordinated technical review of Work Plans and other deliverables submitted to me by Vertellus, or by AME on behalf of Vertellus. Such technical review usually involved input from WVDEP and other stakeholders. As RPM, and consistent with Section XII of the BJS CD, I

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approved or disapproved (with conditions or modifications, as needed) various Work plans and deliverables, which Vertellus was required to submit pursuant to the CD.

13. EPA was not party to the contract between Vertellus and AME. As such, EPA had no obligation to pay or otherwise reimburse AME for work performed pursuant to that contract.

14. At no point during the period that AME was working under contract for Vertellus did AME submit to me *any* costs claimed against the Superfund, including the alleged unreimbursed costs that now form the basis for AME's \$2.66 million dollar claim against the Superfund. Nor have I ever subsequently approved or certified such alleged claims made against the Superfund. The scope of my oversight of Vertellus' compliance with the BJS CD pertained to review and approval of work plans and deliverables submitted by AME on behalf of Vertellus. In doing so, I evaluated whether the submittals were consistent with the Work defined in the CD and the response action selected in the Action Memorandum. None of those required submittals contained any claimed costs against the Superfund, which would have been irrelevant to my review.


15. I do not have authority to provide EPA's prior approval to submit a claim against the Superfund; nor did I represent to Vertellus or AME that I could or was attempting to provide EPA's prior approval or preauthorization to submit a claim against the Superfund. I have never been designated as a responsible Federal official as that term is used in Section 111(a)(2) of CERCLA, or otherwise been delegated preauthorization authorities.

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16. All Work performed at the BJS Site by AME on behalf of Vertellus was done under AME's express representation to EPA that all such Work was being performed as Vertellus' Supervising Contractor pursuant to the Consent Decree.

17. In summary, as EPA's RPM and Project Coordinator overseeing the cleanup being conducted at the BJS Site under the BJS CD, I reviewed and approved certain aspects of the Work conducted by AME as Vertellus' Supervising Contractor. My oversight of the Work was limited to ensuring compliance with the CD. I have never had authority to preauthorize claims against the Superfund, and nor did I purport to grant any such preauthorization with regard to the Work that Vertellus was required to perform at the BJS Site or that AME performed on Vertellus' behalf.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.



Eric Newman

8/24/22

Date

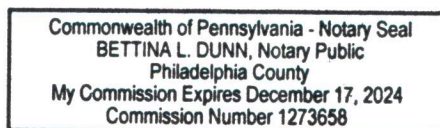
SUBSCRIBED AND SWORN TO BEFORE ME THIS 24 DAY OF August, 2022.



Notary Public

12-17-2024

Commission Expiration Date



8 this case would be the action memo. So it's, yeah,
9 the consent decree and its documents. That's
10 what --

11 Q Sure.

12 A I was trying to make sure I didn't miss that
13 because that's the technical part.

14 Q Right. And so when -- right.

15 There's a lot of information in the consent
16 decree itself, but the technical part of it is in
17 the action memo attached to and made a part of the
18 consent decree; right?

19 A Yes.

20 MS. BERG: Objection to form.

21 MR. MCNEIL:

22 Q The final general category that's been identified
23 for you as a potential witness is any and all
24 action you undertook to assure compliance with the
25 consent decree, including correspondence and

22

1 interactions with Vertellus and/or its contractors.

2 Just as a general matter, anything else that
3 you could -- that you would describe fitting within
4 that category that you haven't already touched on?

5 A That covers it.

6 Q Okay. Do you know what the preauthorization
7 process is at EPA?

8 A I'm generally familiar with it.

9 Q Do you have any role in reviewing preauthorization
10 requests?

11 A So that's very rare that we would have something
12 like that. But I would not have a major role in
13 that.

14 Q So what --

15 A Like, I have no authority related to that.

16 Q Sure.

17 A Just the technical, like, information that might be
18 related to that project and then I would have some
19 input on that, but that's it.

20 Q So when you say -- you used the word rare.

21 What's rare?

22 A I've only heard of a handful of cases ever
23 happening at Region 3 over my 30 years.

24 Q So you've heard of a handful of cases. Did -- in
25 your 30 years.

23

1 Did you have any particular task assigned to
2 you as part of the preauthorization process in
3 those instances?

21 A So I don't get claims made on my sites. You know,
22 I have invoices that are submitted in accordance
23 with the contract if it's an EPA contractor.
24 That's the only way that I would be looking at
25 costs, like a monthly invoice-type of thing.

28

1 Q So when you get an invoice on an EPA site, what do
2 you do with it?

3 A Yeah, I confirm that it was -- that the work was
4 performed in accordance with the scope of work of
5 the contract that they were working under, and then
6 I recommend to the CO, based on what I see, if the
7 costs were incurred within the technical scope and
8 using professional levels that have been pre-agreed
9 to under the contract.

10 Q Are you looking at whether or not the costs
11 incurred were necessary and reasonable?

12 MS. BERG: Objection, form.

13 MR. COHAN: Objection.

14 A In that case -- in the case where I would be
15 reviewing an invoice, I'm comparing it to the scope
16 of work that the -- that was entered into by the
17 contracting officer, and I'm their representative.
18 I'm the contracting officer's representative --

19 technical representative. So that's kind of my
20 role.

21 Q August Mack submitted a claim to EPA for payment in
22 roughly January of 2017.

23 Did you play any role in reviewing that claim?

24 A That -- it was out of the blue. I didn't know what
25 it was. You know, I just passed it up. It was

29

1 outside my normal, you know, RPM world. So that
2 was --

3 Q Did you receive a copy of the claim from somebody,
4 whether inside EPA or from August Mack?

5 A Well, the document -- the big document came in to
6 me directly, and I didn't -- you know, every time I
7 get a submittal, I always know why I'm getting the
8 submittal, and I know what to do with it. This was
9 outside my world, outside my RPM responsibilities,
10 so I handed it off to the attorney and my
11 supervisor without much else. I didn't know what I
12 would be doing with it, you know. I pretty much
13 have a full schedule every day, so I don't just
14 dive into things that come into my desk.

15 Q Then after you passed it off to the attorney and
16 your supervisor, did you have any follow-up role in

17 reviewing any part of the submitted claim?

18 A I was part of a group, like, talking about, you
19 know, "What is this?" and trying to put it into
20 context. But it was --

21 Q Go ahead.

22 A Yeah, just, you know, as the group, trying to
23 figure out, "What is this?" Because it didn't fit
24 in any box.

25 Q Who was -- who did this group include?

30

1 A It would include my assigned attorney. The legal
2 was number one. I think the attorney also received
3 it concurrently. And then my management.

4 Q Who was included in your management?

5 A It would probably be the whole chain, you know.
6 We've had a little reorganization. I think it was
7 our branch chief, who now is referred to as section
8 chief. But it was branch chief, associate division
9 director, director -- everybody was aware that this
10 had come in. It was -- you know, we were alerted,
11 but we didn't know how to handle it. It wasn't
12 expected as a group. That's all I could say. We
13 were just -- didn't know what to do.

14 Q Do you know who Silvina Fonseca is?

14-9. Claims Asserted Against the Fund for Response Costs

1200 TN 547

07/24/2002

Administrative Update 10/16/2016

1. **AUTHORITY.**

Pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), Sections 111, 112 and 122; 40 CFR Part 300, "National Oil and Hazardous Substances Pollution Contingency Plan" (NCP); 40 CFR Part 307, "CERCLA Claims Procedures"; and 40 CFR Part 305, "CERCLA Administrative Hearing Procedures for Claims Against the Superfund":

- a. To preauthorize claims against the Hazardous Substance Superfund for necessary response costs;
- b. To approve reimbursement for claimed response costs; and
- c. To serve as the Review Officer.

2. **TO WHOM DELEGATED.**

- a. Regional Administrators are delegated the authorities in 1.a and 1.b above.
- b. The Assistant Administrator for Land and Emergency Management (AA/OLEM) is delegated the authority in 1.c.

3. **LIMITATIONS.**

- a. Regional Administrators must obtain approval from both the AA/OLEM and the Assistant Administrator for Enforcement and Compliance Assurance (AA/OECA) or his/her designee before exercising the authorities in 1.a (for the original preauthorization and any modifications thereto). The AA/OLEM and the AA/OECA or his/her designee may waive this limitation by memorandum.
- b. Regional Administrators must obtain approval from the AA/OLEM before exercising the authorities in 1.b. The AA/OLEM may waive this limitation by memorandum.
- c. The Review Officer may not be the same official who approved 1.a and 1.b authorities.
- d. These authorities shall be exercised subject to approved funding levels.

4. REDELEGATION AUTHORITY.

- a. These authorities may be redelegated to the division Director level or equivalent, and no further.
- b. An official who redelegates an authority retains the right to exercise or withdraw the authority. Redelegated authority may be exercised by any official in the chain of command to the official to whom it has been specifically redelegated.

5. ADDITIONAL REFERENCES.

- a. EPA Delegation 14-13-B, Concurrence in Settlement of Civil Judicial Actions
- b. EPA Delegation 14-14-C, Administrative Actions Through Consent Orders