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

VIA E-FILING **August 16, 2017**

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Re: August Mack Environmental, Inc.
Docket No. CERCLA-HQ-2017-0001

Dear Judge Biro,

On behalf of Respondent, the United States Environmental Protection Agency, I enclose for your consideration a Motion to Dismiss and a Memorandum in Support of Respondent's Motion to Dismiss. According to my discussions with Michael B. Wright of your office, he indicated that a Proposed Order was not necessary with respect to this matter.

Sincerely,

Benjamin M. Cohan
Senior Assistant Regional Counsel

Enclosures

cc: Bradley R. Sugarman at bsugarman@kdlegal.com
Aaron F. Tuley at atuley@kdlegal.com
Karen Melvin, Region III Claims Officer

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

RESPONDENT'S MOTION TO DISMISS

Pursuant to 40 C.F.R. Part 305, *Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund,* the United States Environmental Protection Agency (EPA) respectfully moves that the Presiding Officer enter an Order dismissing with prejudice August Mack Environmental,

Inc.'s Request for Hearing. The reasons for this Motion to Dismiss, filed pursuant to 40 C.F.R. § 305.23(a), are detailed in the Attached Memorandum of Law.

Respectfully submitted,

8/16/17

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Date

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Big John Salvage **Hoult Road** **Fairmont, West Virginia**	)	
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MEMORANDUM IN SUPPORT OF RESPONDENT'S MOTION TO DISMISS

The United States Environmental Protection Agency (EPA) respectfully submits this memorandum of law in support of its Motion to Dismiss August Mack Environmental, Inc.'s (AME's) Request for Hearing to review EPA's determination that AME failed to assert an eligible claim against the Hazardous Substance Response Trust Fund (the Fund). Because AME's claim is not eligible under 40 C.F.R § 307.21(b) due to AME's failure to receive preauthorization, AME is barred from submitting a claim to the Fund pursuant to 40 C.F.R. § 307.22(a). Therefore, AME's Request for Hearing must be dismissed with prejudice.

Introduction

On January 12, 2017, AME requested that EPA reimburse it for costs AME allegedly incurred as the supervising contractor for Vertellus Specialties, Inc. (Vertellus) at the Big John Salvage-Hoult Road Superfund Site (Site) located in Fairmont, West Virginia. (Letter dated January 12, 2017 from Bradley Sugarman to Bonnie Pugh, p.1). 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 AME to perform the work on its behalf. On May 31, 2016, Vertellus filed for bankruptcy. Consequently, AME was allegedly unable to collect the money owed to it by Vertellus and AME now turns to EPA in an attempt to recover that money.

The regulations setting forth the procedures by which a party may obtain payment under CERCLA §112 are found in the National Contingency Plan at 40 C.F.R. § 300.700(d) and in 40 C.F.R. Part 307. Specifically, Part 307 prescribes the procedures for submitting eligible claims and, in 40 C.F.R. § 307.21, sets forth the criteria for costs to be considered eligible for payment from the Fund. The first pre-requisite or criterion is that, "[t]he response action is preauthorized by EPA pursuant to § 307.22." 40 C.F.R. § 307.21(b)(1). 40 C.F.R. § 307.22(a), in turn, provides that "no person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA . . . prior to taking such response action *and* receives preauthorization by EPA." (emphasis added)

By its own admission, AME did not receive preauthorization by EPA prior to conducting work at the Site as required by 40 C.F.R. § 307.22. (Request for Hearing dated March 9, 2017, p. 6) (claiming that AME never sought preauthorization because "…preauthorization was not warranted when AME began work at the BJS Site…"). While AME did perform work at the Site, it did so as the supervising contractor for Vertellus which was the Performing Defendant under a Consent Decree. The regulations governing preauthorization for disbursement under the Fund specifically state that a consent decree "[u]nless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a…Consent Decree… do not constitute preauthorization to present a claim to the Fund." 40 C.F.R. § 307.22(j). Since EPA neither specified nor agreed to do so, AME cannot rely upon the work that it performed pursuant to the Consent Decree as a substitute for preauthorization. Thus, AME has failed to establish a *prima facie* case for an eligible claim set forth in section 40 C.F.R. § 307.21(b).

AME's Request for Hearing should be dismissed for failure to state a *prima facie* case or on other grounds upon which it has a right to relief. Moreover, EPA is specifically precluded by statute from approving AME's claim against the Fund. CERCLA § 112(a), 42 U.S.C. § 9612(a), states, in relevant part that "[n]o claim against the fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim." AME admits that the very costs which are the subject of its Request for Hearing are also the costs currently pending before the United States Bankruptcy Court for the District of Delaware. (Request for Hearing dated March 9, 2017; p.15, paragraphs 50-55). As such, EPA is statutorily prohibited from granting AME the relief it seeks in its Request for Hearing.

For the forgoing reasons, EPA respectfully requests that EPA's Motion to Dismiss the Request for a Hearing be granted.

Statutory and Regulatory Background

Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended, 42 U.S.C. §§ 9601 *et seq.*, often called the "Superfund" law, in 1980 in response to the serious environmental and public health problems posed by the disposal of hazardous substances exemplified by such infamous sites as Love Canal and Valley of the Drums. *Accord Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986). Its overriding purpose is "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup of hazardous waste sites," *Pritikin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001), while at the same time "placing the ultimate financial responsibility for cleanup on those responsible for hazardous wastes." *Wash. State Dep't Transp. v. Wash. Natural Gas Co.*, 59 F.3d 793, 799 (9th Cir. 1995).

To carry out these goals, CERCLA authorized the United States to create a Fund, also known as "the Superfund", to finance such federal cleanup actions. CERCLA § 111(a)(2), 42 U.S.C. § 9611(a)(2), further provides for reimbursement from the Fund under certain circumstances. 40 C.F.R. Part 307 and 40 C.F.R. § 300.700(d) specify the prerequisites a party must satisfy before EPA is authorized to consider reimbursing a party from the Fund. A party may be reimbursed by the Fund only after it first "notifies the Administrator of EPA prior to taking such response action *and* receives preauthorization by EPA." 40 C.F.R. 307.22(a)(emphasis added). To preauthorize a claim, EPA must have an opportunity to 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, November 12, 1985. The preauthorization decision document is necessary to give EPA the opportunity to consider whether the proposed work is "one of the most urgent priorities" that warrant use of the limited Superfund. The D.C. Circuit confirmed this in upholding the preauthorization regulations: "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).[1] Congress appropriates limited money from the Fund, which in fact covers only a fraction of the costs of CERCLA cleanups.

Standard of Review

40 C.F.R. Part 305 governs the administrative hearing procedures for claims against the Fund. Specifically, this Motion to Dismiss is governed by the standard set forth in 40 C.F.R. § 305.27(a), which provides, in pertinent part, that:

> The Presiding Officer . . . may at any time dismiss a Request for a Hearing without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the Requestor.

EPA is not aware of any administrative or judicial decisions interpreting the Section 305.27(a) standard for a motion to dismiss. In the absence of any Part 305 case law regarding a Motion to Dismiss, EPA looks to the language set forth in 40 C.F.R. Part 22, because the language of 40 C.F.R. § 305.27(a) mirrors that set forth in 40 C.F.R. § 22.20(a) of the Consolidated Rules of Practice (Consolidated Rules). [2] Administrative case law interpreting

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1 In upholding EPA's preauthorization regulations 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.

2 40 C.F.R. § 22.20(a) provides, in relevant part, that "[t]he Presiding Officer, upon motion of the respondent, may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant.

Section 22.20(a) holds that this provision is "[a]nalgous to a motion to dismiss for failure to state a claim upon which relief may be granted under the Federal Rules of Civil Procedure (FRCP)(Rule 12(b)(6)), [thus] Respondent's Motion may be considered against the same [FRCP 12(b)(6)] standard." *In The Matter of Hanson's Window and Construction, Inc.,* (Order Denying Respondent's Motion to Dismiss and Granting Complainant's Motion to File Amended Complaint)(Docket No. TSCA-05-2010-0013) (Dec.1, 2010). Thus, as a matter of administrative law, the FRCP, although not binding on administrative agencies, does provide useful guidance in applying the Consolidated Rules.[3] The Environmental Appeals Board has also affirmed that ALJs and the Board may, "in [their] discretion, refer to the FRCP for guidance when the Consolidated Rules of Practice do not clearly resolve a procedural issue." *In re B&L Plating, Inc.,* 11 E.A.D. 183, 188 n.10 (EAB 2003); *see also In re Zalcon, Inc.,* 7 E.A.D. 482, 490 n.7 (EAB 1998) (Remand Order).

Because this tribunal has previously looked to cases construing FRCP 12(b)(6) as instructive in determining the legal standard under 40 C.F.R. § 22.20(a), EPA urges that the Presiding Officer should look to cases construing FRCP 12(b)(6) as instructive in determining the legal standard for failure to state a claim upon which relief can be granted and/or failure to establish a *prima facie* case under 40 C.F.R. § 305.27(a). This is why we now turn to the legal standard of review under FRCP 12(b)(6).

In resolving a Rule 12(b)(6) motion, the court must treat the complainant's factual allegations, including mixed questions of law and fact, as true and draw all reasonable inferences there from in the complainant's favor. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 165, 357 U.S. App. D.C. 35 (D.C. Cir. 2003); *Browning v. Clinton*, 292 F.3d 235, 242, 352 U.S. App. D.C. 4 (D.C. Cir. 2002). However, the Supreme Court has established that, "[t]o survive a motion to dismiss, a complaint must ... state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (citation omitted) (internal quotation marks omitted). In other words, the moving party (i.e. EPA) must show that the complainant can prove no facts entitling it to relief. *In re: Argonics, Inc.*, CW A 6-1631-99 (2003), 2003 EPA RJO LEXIS 11,8 (EPA RJO 2003) (citations omitted). See also *D.C. Oil, Inc.v. ExxonMobil Oil Corp.*, 746 F. Supp. 2d 152, 155-156 (D.D.C. 2010). As we show

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3 *In Re Wego Chemical & Mineral Corporation*, 1992 EPA AW Lexis 58 (April 15, 1992); TSCA Appeal No. 92-4, 4 E.A.D. 513 at 13 n.10 (E.A.B. February 24, 1993).

below, AME's Request for Hearing fails to state a claim upon which relief can be granted under the standard of review established pursuant to FRCP 12(b)(6) case law.

AME's Failure to Establish a Prima Facie Case or Other Grounds Upon Which Relief Can Be Granted

In the absence of preauthorization for the performance of work at the BJS Site, AME's costs in performing work at the Site are not eligible for payment from the Fund under § 112 of CERCLA, 42 U.S.C. § 9612, and under 40 C.F.R. § 307.22(a). Therefore, EPA does not have the authority to approve AME's claim asserted against the Fund. In the absence of preauthorization, there is no process through which to reimburse costs from the Fund. Moreover, were EPA to reimburse AME from the Fund, such use of the Fund would be contrary to federal law. CERCLA §§ 111, 112, 42 U.S.C. §§ 9611 9612; 40 C.F.R. § 307.22(a); § 307.21(b); § 305.20(b).

AME's factual allegations, read in the light most favorable to AME, fail to establish a prima facie case that AME has an eligible claim against the Fund under 40 C.F.R. § 307.21. AME acknowledges that it did the work at the Site as a contractor for Vertellus. AME further acknowledges that it did not submit an application for preauthorization to EPA pursuant to 40 C.F.R. § 307.22(a)(2) prior to performing work at the Site. (Request for Hearing dated March 9, 2017, Section I p. 5-6). Moreover, AME never intended to submit a claim before it began work at the Site because as the contractor for the Responsible Party to the CD, AME expected to be paid by Vertellus, the Consent Decree signatory that hired it to do the work. (Letter dated January 12, 2017 from Bradley Sugarman to Bonnie Pugh @ p.18). Nonetheless, AME seeks payment from the Fund pursuant to 40 C.F.R. 307, even though, by its own admission, it did not submit to EPA an application for preauthorization prior to beginning work at the Site because "pre-authorization was not warranted when AME began work at the BJS Site because, at the time, the work was being performed for a viable PRP with financial assurance guaranteed by a federally-enforceable Consent Decree. (Letter dated January 12, 2017 from Bradley Sugarman to Bonnie Pugh, p.6).

1. **The claim asserted by AME is not an eligible claim under 40 C.F.R. § 307.21(b).**

40 C.F.R. § 307.21(b) establishes four prerequisites all of which must be met before EPA may consider costs to be eligible for disbursement under the Fund. The four prerequisites are:

1) The response action is preauthorized by EPA pursuant to § 307.22;

2) The costs incurred are for activities within the scope of EPA's preauthorization;

3) The response action is conducted in a manner consistent with the NCP; and

4) The costs incurred are necessary pursuant to 307.11.[4]

AME has failed to demonstrate that it has satisfied these prerequisites and EPA affirmatively asserts that they were not met. The work AME performed at the Site was not preauthorized; and, therefore, could not have been incurred within the scope of EPA's preauthorization. By its own admission, AME did not submit an application for preauthorization pursuant to 40 C.F.R. § 307.22. (Request for Hearing dated March 9, 2017, Introduction @ p.5-6)). AME explains that such an application "was not warranted when AME began work at the BJS Site because, at that time, the work was being performed for a viable PRP with financial assurances guaranteed by a federally-enforceable Consent Decree." (Request for Hearing dated March 9, 2017, Introduction @ p.6.) As AME states, it performed work at the Site as the supervising contractor for Vertellus, the Performing Defendant under the Consent Decree. That Consent Decree required Vertellus to conduct all response actions at the Site. Vertellus, in turn, contracted with AME to conduct the response actions at the Site on Vertellus' behalf. Indeed, "EPA approved all of AME's plans and work according to the provisions of the CD before AME started any work at the Site." ." (Request for Hearing dated March 9, 2017, @ p.29.) The regulations governing when EPA may reimburse a party from the Fund specifically state that a consent decree "does not constitute preauthorization to present a claim to the Fund." 40 C.F.R. § 307.22(j). Vertellus itself would have to adhere to the preauthorization process to obtain reimbursement from the Fund. Even Vertellus's status as a party to the Consent Decree would be no substitute for preauthorization. AME has acquired no capacity to circumvent the preauthorization requirement by contracting with Vertellus.[5]

In the absence of preauthorization for the performance of work at the BJS Site, AME's costs in performing work at the Site are not eligible for payment from the Fund under § 112 of CERCLA, 42 U.S.C. § 9612, and under 40 C.F.R. § 307.22(a). Therefore, EPA does not have

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4 Respondent does not address the 3rd and 4th prerequisites because AME does not satisfy the 1st and 2nd prerequisites; therefore, the Presiding Officer need not consider whether the 3rd and 4th prerequisites have been met.

5 To the extent that AME has argued that any document such as a work plan "or any other consensual agreement with EPA requiring a response action" constitutes some form of preauthorization, 40 C.F.R. § 307.22(j) expressly nullifies any such claim.

the authority to approve AME's claim asserted against the Fund. In the absence of preauthorization, there is no process through which to reimburse costs from the Fund. Moreover, were EPA to reimburse AME from the Fund, such use of the Fund would be contrary to federal law. CERCLA §§ 111, 112, 42 U.S.C. §§ 9611 9612; 40 C.F.R. § 307.22(a); § 307.21(b); § 305.20(b).

The requirement(s) for preauthorization is not a technicality, as AME suggests. (Request for Hearing dated March 9, 2017, Introduction). The preauthorization process establishes the terms and conditions which must be met. It ensures that the Fund is spent only for the "most urgent priorities." *See State of Ohio, supra.*

AME also argues that its failure to get preauthorization is excused because it substantially complied with the National Contingency Plan (NCP). (Request for Hearing dated March 9, 2017, p.25-27). Even if AME had complied with the NCP, such compliance would not excuse AME from obtaining preauthorization. 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). 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 . . . . "

Given that AME did not receive preauthorization by EPA prior to conducting work at the Site and given that AME is precluded from relying on the Consent Decree to constitute as preauthorization by virtue of 40 CFR § 307.22(j), AME's claim against the Fund is barred as matter of law. Specifically, AME is barred pursuant to the express language of 40 C.F.R § 307.22(a) which provides that "No person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA . . . prior to taking such response action and receives preauthorization by EPA." In other words, the Presiding Officer cannot

adjudicate this matter because, even when taking the facts in the light most favorable to AME, there is no legally cognizable claim that can be brought by AME.

2. **AME's Request for Hearing is precluded by its pending claim against Vertellus in Bankruptcy Court.**

CERCLA § 112(a), 42 U.S.C. § 9612(a) precludes EPA from approving AME's claim against the Fund. That provision states, in relevant part that "[N]o claim against the fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim." As such, EPA is statutorily prohibited from granting AME the relief it seeks in its Request for Hearing.

In its letter dated January 12, 2017 captioned "*Response Claim for Payment from the Hazardous Substance Superfund Big John's Salvage – Hoult Road Superfund Site; EPA ID: WVD054827944*", AME made its request to EPA for payment from the Fund pursuant to Section 112 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9612, and 40 C.F.R. § 307.31. In that letter, AME states that Vertellus filed for federal bankruptcy protection on May 31, 2016. (Letter dated January 12, 2017 from Bradley Sugarman to Bonnie Pugh, p.10). Furthermore, AME states that it filed a timely proof of claim against Vertellus for "an as-yet undetermined amount in excess of $2,627,891.46", which represents the same costs at issue in AME's Response Claim for Payment from the Fund. *Id.* AME's statements in its January 12th letter regarding the Vertellus bankruptcy are reiterated *verbatim* in paragraphs 50-55 of its Request for Hearing dated March 9, 2017.

Conclusion

For the foregoing reasons, AME has failed to establish a *prima facie* case or other grounds that it has an eligible claim for payment against the Fund. AME has not sought preauthorization, as required by 40 C.F.R. Part 307. Moreover, the very costs which are the subject of AME's Request for Hearing are also the costs currently pending before the United States Bankruptcy Court for the District of Delaware, and AME is barred from reimbursement from the Fund pursuant to CERCLA § 112(a), 42 U.S.C. § 9612(a). Therefore, since AME has

failed to state a claim upon which relief can be granted, EPA respectfully requests that EPA's Motion to Dismiss the Request for Hearing be granted.

Respectfully Submitted on Behalf of EPA's Claims Official,

8/16/17

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Date

CERTIFICATE OF SERVICE

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

I certify that an electronic copy of this Motion and Memorandum was sent this day by e-mail to the following e-mail addresses for service on Requestor's counsel: Bradley R. Sugarman at bsugarman@kdlegal.com, and Aaron F. Tuley at atuley@kdlegal.com.

8/16/17
Date

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