

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

-----	X	
UNITED STATES OF AMERICA,	:	
and STATE OF MAINE,	:	
	:	
Plaintiffs,	:	
	:	Civil No. 1:15-cv-00358-NT
v.	:	
	:	
MAINE MACK, INC., <i>et al.</i> ,	:	
	:	
Defendants.	:	
-----	X	

CONSENT DECREE

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I. BACKGROUND

A. The United States of America (“United States”), on behalf of the Administrator of the U.S. Environmental Protection Agency (EPA), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9607 (CERCLA), seeking reimbursement of response costs incurred or to be incurred for response actions taken or to be taken at or in connection with the release or threatened release of hazardous substances at the West Site/Hows Corner Superfund Site in Plymouth, Maine (“the Site”).

B. The State of Maine (the “State”) joined in the complaint against the defendants, alleging that the defendants are liable to the State under Section 107 of CERCLA, 42 U.S.C. § 9607, and 38 M.R.S. § 1367. The State in its complaint seeks recovery of its past and future response costs.

C. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and may undertake additional response actions in the future.

D. In performing response actions at the Site, EPA has incurred response costs and will incur additional response costs in the future.

E. The United States alleges that the defendants are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are liable for response costs incurred and to be incurred at the Site.

F. The United States and the State previously entered into a consent decree addressing the performance of the remedial action at the Site and the funding of that remedial action. See Order Entering Consent Decree, January 25, 2010, in *U.S. and State of Maine v. Allen Grieg & Perry, Inc.*, Civ. No. 1:09-cv-482 (D. Maine).

G. The defendants seek to make a contribution to the cleanup costs at the Site as did similarly-situated “cashout” parties in the consent decree in the *Allen Grieg & Perry* matter, and to resolve their liability regarding the Site to the same extent as the settling parties in the *Allen Grieg & Perry* matter.

H. In 2007, the Maine Legislature created the Waste Motor Oil Disposal Site Remediation Program (“Program”) to assist potentially responsible parties with the cost of cleanup at certain waste motor oil disposal sites, including the Site. 10 M.R.S. Section 1020 *et seq.* The Finance Authority of Maine (“FAME”) was authorized to administer the Program. With funds made available to FAME under the Program, FAME made payments to eligible persons in reimbursement of their payments for past costs. The defendants in this matter were determined by FAME to be eligible persons under the Program. The defendants wish to use the payments from FAME to resolve their liability regarding the Site.

I. The defendants that have entered into this Consent Decree do not admit any liability to Plaintiffs arising out of the transactions or occurrences alleged in the complaint.

J. The United States, the State, and Settling Defendants agree, and this Court by entering this Consent Decree finds, that this Consent Decree has been negotiated by the Parties in

good faith, that settlement of this matter without further litigation and without the admission or adjudication of any issue of fact or law is appropriate and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

THEREFORE, with the consent of the Parties to this Decree, it is ORDERED, ADJUDGED, AND DECREED:

II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331, 1345 and 1367 and 42 U.S.C. § 9607 and 9613(b) and also has personal jurisdiction over Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaint, Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. Settling Defendants shall not challenge entry or the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

III. PARTIES BOUND

2. This Consent Decree is binding upon the United States and the State, and upon Settling Defendants and their successors, and assigns. Any change in ownership or corporate or other legal status, including, but not limited to, any transfer of assets or real or personal property, shall in no way alter the status or responsibilities of Settling Defendants under this Consent Decree.

IV. DEFINITIONS

3. Unless otherwise expressly provided in this Consent Decree, terms used in this Consent Decree that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or its appendices, the following definitions shall apply:

“CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. §§ 9601-9675.

“Consent Decree” shall mean this Consent Decree. In the event of conflict between this Consent Decree and any appendix, this Consent Decree shall control.

“Day” or “day” shall mean a calendar day. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or federal or State holiday, the period shall run until the close of business of the next working day.

“DOJ” shall mean the U.S. Department of Justice and its successor departments, agencies, or instrumentalities.

“Effective Date” shall mean the date upon which approval of this Consent Decree is recorded on the Court's docket.

“EPA” shall mean the U.S. Environmental Protection Agency and its successor departments, agencies, or instrumentalities.

“Natural Resource Damages” shall mean damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such damages, as provided in Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and, for purposes of the State’s claim for Natural Resource Damages, damages for injury to, destruction of, loss of or loss of use of natural resources of the State, the reasonable costs of assessing natural resources damages, and the costs of preparing and implementing a natural resources restoration plan, as provided in 38 M.R.S. § 1367.

“Paragraph” shall mean a portion of this Consent Decree identified by an Arabic numeral or an upper or lower case letter.

“Parties” shall mean the United States, the State of Maine, and Settling Defendants.

“Plaintiffs” shall mean the United States and the State.

“RCRA” shall mean the Solid Waste Disposal Act, 42 U.S.C. §§ 6901-6992, also known as the Resource Conservation and Recovery Act.

“Section” shall mean a portion of this Consent Decree identified by a Roman numeral.

“Settling Defendants” shall mean Maine Mack, Inc. and Sanborn’s Motor Express, Inc./A-P-A Transport Corp.

“Site” shall mean the West Site/Hows Corner Superfund Site, encompassing approximately 17 acres, located on Sawyer Road in Plymouth, Penobscot County, Maine.

“State” shall mean the State of Maine.

“United States” shall mean the United States of America and each department, agency, and instrumentality of the United States, including EPA.

V. PAYMENT OF RESPONSE COSTS

4. Maine Mack, Inc. shall arrange for a payment of \$20,385.15 to be made to the Hows Corner Superfund Site Trust in accordance with Section X (Notices) within 30 days after the Effective Date.

5. Sanborn’s Motor Express, Inc./A-P-A Transport Corp. (“Sanborn’s”) shall arrange for a payment of \$78,024.29 to be made on its behalf to the Hows Corner Superfund Site Trust in accordance with Section X (Notices) within 30 days after the Effective Date. Sanborn’s hereby directs the Finance Authority of Maine (“FAME”) to make this payment on behalf of Sanborn’s from Program-related funds in this amount currently held by FAME and designated to Sanborn’s, instead of paying such funds directly to Sanborn’s.

VI. COVENANTS BY PLAINTIFFS

6. United States’ Covenants Not to Sue Settling Defendants. Except as provided in Paragraph 8, the United States covenants not to sue or to take administrative action against

Settling Defendants pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), and Section 7003 of RCRA, 42 U.S.C. § 6973, with regard to the Site, including Natural Resource Damages. These covenants shall take effect upon the Effective Date. These covenants are conditioned, with respect to each Settling Defendant, upon the satisfactory performance by such Settling Defendant of its obligations under this Consent Decree. These covenants not to sue (and all reservations thereto in this Consent Decree) and the contribution protection provisions of Paragraph 14 shall also apply to Settling Defendants' officers and directors, but only to the extent that the alleged liability of the officer or director is based on its status and in its capacity as an officer or director of a Settling Defendant, and not to the extent that the alleged liability arose independently of the alleged liability of the Settling Defendant. These covenants extend only to Settling Defendants and do not extend to any other person.

7. State's Covenants Not to Sue Settling Defendants. Except as provided in Paragraph 8, the State covenants not to sue or to take administrative action against Settling Defendants pursuant to Section 107(a) of CERCLA and 38 M.R.S. § 1367 regarding the Site, including Natural Resource Damages and assessment of State Natural Resource Damages. These covenants shall take effect upon the Effective Date. These covenants are conditioned, with respect to each Settling Defendant, upon the satisfactory performance by such Settling Defendant of its obligations under this Consent Decree. These covenants extend only to Settling Defendants and do not extend to any other person.

8. The United States and the State reserve, and this Consent Decree is without prejudice to, all rights against Settling Defendants with respect to all matters not expressly included within Plaintiffs' covenants not to sue. Notwithstanding any other provision of this Consent Decree, the United States and the State reserve all rights against Settling Defendants with respect to:

- a. liability for failure of a Settling Defendant to meet a requirement of this Consent Decree;
- b. criminal liability;
- c. liability based on the ownership or operation of the Site by a Settling Defendant when such ownership or operation commences after signature of this Consent Decree by Settling Defendant;
- d. liability based on a Settling Defendant's transportation, treatment, storage, or disposal, or arrangement for transportation, treatment, storage, or disposal of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Consent Decree by Settling Defendant; and
- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

VII. COVENANTS BY SETTLING DEFENDANTS

9. Covenants by Settling Defendants. Settling Defendants covenant not to sue and agree not to assert any claims or causes of action against the United States or the State, or their contractors or employees, with respect to the Site, including Natural Resource Damages, and this Consent Decree, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund, established by the Internal Revenue Code, 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the State Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, or at common law; or

c. any claim pursuant to Sections 107 or 113 of CERCLA, 42 U.S.C. §§ 9607 or 9613, Section 7002(a) of RCRA, 42 U.S.C. § 6972(a), or state law relating to the Site.

10. Except as provided in Paragraph 12 (claims against other PRPs) and Paragraph 17 (res judicata and other defenses), the covenants in this Section shall not apply in the event the United States or the State brings a cause of action or issues an order pursuant to any of the reservations in Paragraph 8, other than in Paragraph 8.a (liability for failure to meet a requirement of the Consent Decree) or 8.b (criminal liability), but only to the extent that Settling Defendant's claims arise from the same response action or response costs that the United States or the State is seeking pursuant to the applicable reservation.

11. Nothing in this Consent Decree shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

12. Settling Defendants agree not to assert any claims and to waive all claims or causes of action (including, but not limited to, claims or causes of action under Sections 107(a) and 113 of CERCLA) that they may have for response costs and for natural resource damages and assessment costs relating to the Site against any other person who is a potentially responsible party under CERCLA at the Site. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Defendant may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Defendant.

VIII. EFFECT OF SETTLEMENT/CONTRIBUTION

13. Except as provided in Paragraph 12 (claims against other PRPs), nothing 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. Except as provided in Section VII (Covenants by Settling Defendants), each of the Parties expressly reserves any and all rights (including, but not limited to, under Section 113 of CERCLA, 42 U.S.C. § 9613), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto. Nothing in this Consent Decree diminishes the right of the United States, pursuant to Section 113(f)(2) and (3) of CERCLA, 42 U.S.C. § 9613(f)(2)-(3), to pursue any such persons to obtain additional response costs or response action and to enter into settlements that give rise to contribution protection pursuant to Section 113(f)(2).

14. The Parties agree, and by entering this Consent Decree this Court finds, that this Consent Decree constitutes a judicially-approved settlement pursuant to which Settling

Defendants have, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(2) of CERCLA, 42 U.S.C. § 9613(f)(2), and are entitled, as of the Effective Date, to protection from contribution actions or claims as provided by Section 113(f)(2) of CERCLA and 38 M.R.S. § 348(4), or as may be otherwise provided by law, for the “matters addressed” in this Consent Decree. The “matters addressed” in this Consent Decree are (a) all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States, the State, or any other person, and (b) Natural Resource Damages, provided, however, that if the United States or the State exercises rights under the reservations in Paragraph 8, other than in Paragraph 8.a (liability for failure to meet a requirement of the Consent Decree) or 8.b (criminal liability), the “matters addressed” in this Consent Decree will no longer include those response costs or response actions or natural resource damages that are within the scope of the exercised reservation.

15. The Parties further agree, and by entering this Consent Decree this Court finds, that the complaint filed in this action is a civil action within the meaning of Section 113(f)(1) of CERCLA, 42 U.S.C. § 9613(f)(1), and that this Consent Decree constitutes a judicially-approved settlement pursuant to which Settling Defendants have, as of the Effective Date, resolved liability to the United States within the meaning of Section 113(f)(3)(B) of CERCLA, 42 U.S.C. § 9613(f)(3)(B).

16. Settling Defendants shall, with respect to any suit or claim brought by it for matters related to this Consent Decree, notify EPA, DOJ, and the State in writing no later than 60 days prior to the initiation of such suit or claim. Settling Defendants also shall, with respect to any suit or claim brought against it for matters related to this Consent Decree, notify EPA, DOJ, and the State in writing within 10 days after service of the complaint or claim upon it. In addition, Settling Defendants shall notify EPA, DOJ, and the State within 10 days after service or receipt of any Motion for Summary Judgment, and within 10 days after receipt of any order from a court setting a case for trial, for matters related to this Consent Decree.

17. In any subsequent administrative or judicial proceeding initiated by the United States or the State for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States or the State in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the enforceability of the Covenants by Plaintiffs set forth in Section VI.

IX. CERTIFICATION

18. Each Settling Defendant certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, documents, or other information (including records, reports, documents, and other information in electronic form) (other than identical copies) relating to its potential liability regarding the Site since notification of potential liability by the United States or the State and that it has fully complied with any and all EPA and State requests for information regarding the Site pursuant to Sections 104(e) and 122(e)(3)(B) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e)(3)(B), Section 3007 of RCRA, 42 U.S.C. § 6927, and state law.

X. NOTICES

19. Whenever, under the terms of this Consent Decree, notice is required to be given or a document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Parties in writing. Except as otherwise provided, notice to a Party by email (if that option is provided below) or by regular mail in accordance with this Section satisfies any notice requirement of the Consent Decree regarding such Party.

As to DOJ: EES Case Management Unit
U.S. Department of Justice
Environment and Natural Resources Division
Washington, D.C. 20044-7611
eesdcopy.enrd@usdoj.gov
Ref: DJ # 90-11-3-1733/11

As to EPA: Sarah Meeks
Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (OES04-3)
Boston, MA 02109
Ref: Site/Spill ID Number 01H2

As to the State: Rebecca Hewett
State Project Coordinator
Maine DEP
17 State House Station
Augusta, Maine 04333-0017

**As to Hows Corner
Superfund Site Trust:** Hows Corner Superfund Site Trust
c/o de maximis, inc.
450 Montbrook Lane
Knoxville, TN 37919

As to Maine Mack, Inc.: Shoshana Cook Mueller
Bernstein Shur Sawyer Nelson
100 Middle Street
P.O. Box 9729
Portland, ME 04104-5029
smueller@bernsteinshur.com

As to Sanborn's: Armand Pohan
4800 Avenue at Port Imperial
Weehawken, NJ 07086
pohan@nywaterway.com

XI. RETENTION OF JURISDICTION

20. This Court shall retain jurisdiction over this matter for the purpose of interpreting and enforcing the terms of this Consent Decree.

XII. INTEGRATION

21. This Consent Decree constitutes the final, complete, and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Decree. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Consent Decree.

XIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

22. This Consent Decree shall be lodged with the Court for a period of at least 30 days for public notice and comment. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations that indicate that this Consent Decree is inappropriate, improper, or inadequate. Settling Defendants consent to the entry of this Consent Decree without further notice.

23. If for any reason this Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any Party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XIV. SIGNATORIES/SERVICE

24. The undersigned representatives of Settling Defendants, the Assistant Attorney General, U.S. Department of Justice, Environment and Natural Resources Division, or his/her designee, the Assistant Attorney General for the State, and the Commissioner of the Maine Department of Environmental Protection each certifies that he or she is authorized to enter into the terms and conditions of this Consent Decree and to execute and bind legally such Party to this document.

25. Settling Defendants agree not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree, unless the United States has notified Settling Defendants in writing that it no longer supports entry of the Consent Decree.

26. Maine Mack, Inc. designates Shoshana Cook Mueller as its agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Sanborn's designates Armand Pohan as its agent who is authorized to accept service of process by mail on its behalf with respect to all matters arising under or relating to this Consent Decree. Settling Defendants agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including but not limited to, service of a summons. The Parties agree that Settling Defendants need not file an answer to the complaint in this action unless or until the Court expressly declines to enter this Consent Decree.

XV. FINAL JUDGMENT

27. Upon entry of this Consent Decree by the Court, this Consent Decree shall constitute the final judgment between and among the United States, the State, and Settling Defendants. The Court enters this judgment as a final judgment under Fed. R. Civ. P. 54 and 58.

SO ORDERED THIS _____ DAY OF _____, 20__.

United States District Judge

Signature Page for Consent Decree Regarding Hows Corner Superfund Site

FOR THE UNITED STATES OF AMERICA:

August 25, 2015

Dated

/s/ Ellen M. Mahan

ELLEN M. MAHAN

Deputy Chief

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

MARK A. GALLAGHER

Senior Attorney

U.S. Department of Justice

Environment and Natural Resources Division

Environmental Enforcement Section

Washington, D.C. 20044-7611

THOMAS E. DELAHANTY II

United States Attorney

District of Maine

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100 Middle Street Plaza

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Portland, Maine 04101

(207) 780-3257

john.osborn2@usdoj.gov

Signature Page for Consent Decree Regarding Hows Corner Superfund Site

**FOR THE U.S. ENVIRONMENTAL PROTECTION
AGENCY:**

/s/ H. Curtis Spalding

H. CURTIS SPALDING
Regional Administrator, Region 1
U.S. Environmental Protection Agency
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (ORA01-4)
Boston, MA 02109

SARAH MEEKS
Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square, Suite 100 (OES04-3)
Boston, MA 02109

Signature Page for Consent Decree Regarding Hows Corner Superfund Site

FOR THE STATE OF MAINE:

JANET T. MILLS
Attorney General

April 16, 2015

Dated

/s/ Mary M. Sauer
MARY M. SAUER
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, Maine 04333-0006

FOR THE MAINE DEPARTMENT OF ENVIRONMENTAL PROTECTION:

April 15, 2015

Dated

/s/ Patricia W. Aho
PATRICIA W. AHO
Commissioner
Maine Department of Environmental Protection
17 State House Station
Augusta, Maine 04333-0017

Signature Page for Consent Decree Regarding Hows Corner Superfund Site

FOR MAINE MACK, INC.:

April 5, 2015

Dated

/s/ Bruce Hartshorn

BRUCE HARTSHORN, President

Maine Mack, Inc.

31B Packard Rd.

Jericho, VT 05465

Signature Page for Consent Decree Regarding Hows Corner Superfund Site

**FOR SANBORN'S MOTOR EXPRESS, INC./
A-P-A TRANSPORT CORP.:**

April 1, 2015

Dated

/s/ Armand Pohan

ARMAND POHAN, President
Sanborn's Motor Express, Inc./A-P-A Transport Corp.
4800 Avenue at Port Imperial
Weehawken, NJ 07086