

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
v.)	
)	
ATLANTIC WOOD INDUSTRIES, INC.,)	CIVIL ACTION NO. 2:18CV-_____
and ATLANTIC METROCAST, INC.,)	
)	
Defendants.)	

COMPLAINT

The United States of America, by authority of the Attorney General of the United States and at the request and on behalf of the Administrator of the United States Environmental Protection Agency (“EPA”), the Secretaries of the United States Department of the Interior (“DOI”), acting by and through the U.S. Fish and Wildlife Service (“USFWS”), and the United States Department of Commerce (“DOC”), acting by and through the National Oceanic and Atmospheric Administration (“NOAA”), brings this action against Defendants, Atlantic Wood Industries, Inc. (“AWI”) and Atlantic Metrocast, Inc. (“AMI”) and alleges as follows:

1. This is a civil action pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act, as amended (“CERCLA”), 42 U.S.C. §§ 9606 and 9607. In this action, Plaintiff United States on behalf of EPA seeks to recover from AWI and AMI (collectively, “Defendants”) costs incurred and to be incurred by the United States in responding to releases or threatened releases of hazardous substances at the Atlantic Wood Industries Superfund Site (the “Site”) in the City of Portsmouth, Virginia,

together with interest as provided in Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). The United States on behalf of DOI and NOAA (collectively, the “Federal Natural Resources Trustees”) further seeks damages for injury to, destruction of, or loss of natural resources at the Site. In accordance with Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), Plaintiff also seeks a declaratory judgment that Defendants are liable for any additional response costs that may be incurred by the United States in connection with the Site in the future.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. §§ 1331, 1345 and 1355.

3. Venue is proper in this district pursuant to Section 113(b) of CERCLA, 42 U.S.C. § 9613, and 28 U.S.C. § 1391(b) and (c) because it is the location of the Site.

DEFENDANTS

4. AWI is a corporation organized under the laws of the State of Georgia.

5. AWI, including its predecessor companies, owns and at relevant times owned the property located at 3904 Burtons Point Road, Portsmouth, Virginia (“the AWI Property”) and formerly owned and operated a manufactured pressure-treated wood facility there.

6. AWI wholly owns AMI, which is currently operating a concrete casting business at the AWI Property.

7. AMI is a corporation incorporated under the laws of the State of Georgia in 1995.

8. Each Defendant is a “person” within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

GENERAL ALLEGATIONS

9. AWI currently owns the AWI Property, which is part of the Site. The Site includes approximately 48 acres adjacent to the Southern Branch of the Elizabeth River.

10. From approximately 1926 until at least 1992, AWI, including various predecessor companies, owned the AWI Property and owned and operated a wood-treating business at the Site. AWI manufactured pressure-treated wood at the AWI Property which required the infusion of two wood preservatives, creosote and pentachlorophenol ("PCP"), into the wood.

11. Creosote contains, among other chemicals, polycyclic aromatic hydrocarbons (PAHs), benzene, toluene, ethylbenzene, and xylenes. PCP contains dioxin. Each of these constitute a "hazardous substance" within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

12. AWI's facility at various times consisted of two wood treatment retorts, an office building, several maintenance buildings, and an above-ground tank farm, which included four open-top steel storage tanks, where wood preserving chemicals such as creosote were stored.

13. As result of its wood treating business and operations, AWI "released," as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), hazardous substances at the Site.

14. AWI discontinued the use of PCP as a wood treating preservative in 1985. All wood treating activities ceased by 1992.

15. Since approximately 1995, AWI's wholly-owned subsidiary AMI has operated a business that manufactures precast and pre-stressed concrete products and construction materials at the AWI Property.

16. The Norfolk Naval Shipyard ("NNSY") surrounds much of the Site and is itself an NPL Site. The Navy leased part of the AWI Property from AWI and disposed of waste

onsite, including spent abrasive blast media (“ABM”) from the sand blasting of ships. The Navy filled low lying areas of the AWI Property with contaminated material for use as a storage area. The Navy conducted sand blasting activities adjacent to the Site, and abrasive blast media contaminated with heavy metals such as copper, zinc, lead and arsenic have impacted the Site. The Navy also disposed of calcium hydroxide sludge from the production of acetylene gas in a wetland on the border of the Southgate Annex of the NNSY (adjacent to the southern border of the AWI Property) and the Site, ultimately contaminating the river.

17. These releases of hazardous substances at the Site required EPA to take various response actions to address the releases, as well as resulted in injuries to “natural resources,” as defined by Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

EPA RESPONSE ACTIONS

18. EPA began investigating the Property in the mid-1980s and found widespread creosote, PCP and heavy metal contamination in the soil, groundwater, and river sediments adjacent to the AWI Property. Sampling collected during a preliminary site assessment conducted by EPA, AWI and the Virginia State Water Control Board demonstrated that wastes on the AWI Property contaminated the groundwater and infiltrated a storm sewer that discharged into the Southern Branch of the Elizabeth River. Sediments in the Elizabeth River contained visible creosote.

19. The Property and adjacent river sediments were proposed for listing on the National Priorities List (“NPL”) on June 10, 1986 and the Site was formally added February 21, 1990.

20. The sampling at the Site of the soil, groundwater and river sediment showed elevated levels of PAH, dense non-aqueous phase liquid (“DNAPL”), benzene, toluene,

ethylbenzene, xylenes (“BTEX”), arsenic, copper, chromium, zinc, PCP, and dioxin. These contaminants are hazardous substances within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

21. On July 23, 1987 AWI entered into an Administrative Order by Consent (“AOC”) with EPA which required AWI to perform initial cleanup actions and conduct a remedial investigation and feasibility study (“RI/FS”) for the Site. AWI completed the RI/FS in 1992 for operable unit 1 (“OU1”), the soil, subsurface soil, and DNAPL at the Site, and EPA issued a Record of Decision (“ROD”) for OU1 in 1995.

22. In 1995, AWI, under a 1994 amendment to its AOC with EPA, cleaned the Elm Avenue storm sewer and installed a liner within all affected manholes, catch basins, and storm sewer lines to stop contaminant migration. AWI also excavated approximately 660 cubic yards of contaminated sediments from the intertidal drainage ditch and the Northern Inlet of the Southern Branch of the Elizabeth River.

23. In 2002 EPA and AWI, and then EPA and the Navy entered into an AOC that required excavation and disposal of the calcium hydroxide sludge offsite and wetland restoration. The Navy and AWI completed this removal action in 2003, and the Navy also removed calcium hydroxide sludge and ABM from other areas near and adjacent to the Site.

24. EPA took over the remedy as fund lead for the 1995 ROD. In the design phase, EPA discovered that the selected remedy in the 1995 ROD was not sufficient to address the harm. EPA undertook a focused feasibility study (“FFS”) for OU1, conducted an RI/FS for groundwater (“OU2”), and conducted the RI/FS for the river sediment (“OU3”). EPA issued a ROD on December 21, 2007 (the “2007 ROD”) for all three OUs.

25. EPA selected a remedy in the 2007 ROD to reduce risks to human health and the environment at the Site. The remedy is comprised of: a soil cover over the areas of contaminated soil; excavation of DNAPL hot spots found on the west side of the Site; disposal of the excavated soil in an onsite landfill; monitoring the groundwater through natural attenuation; dredging of contaminated sediment from the river; and installation of an off-shore sheet pile wall to prevent further DNAPL migration to the river and to provide an area for consolidation of the dredged contaminated sediment.

26. On August 6, 2012, EPA issued an Explanation of Significant Differences (“ESD”) to the 2007 ROD (the “2012 ESD”). The 2012 ESD documented an increase in the estimated costs of cleanup of the Site to \$98.2 million, based on EPA’s determination that the volume of soils requiring dredging as part of the Site cleanup were significantly greater than EPA’s estimate in 2007.

27. EPA has been implementing the remedy selected in the 2007 ROD and modified by the 2012 ESD. Among many other measures, in 2015, dredging of contaminated sediments began and was completed in the summer of 2017. Approximately 338,000 cubic yards of contaminated sediments were dredged and consolidated behind the off-shore sheet pile wall, creating new land along the waterfront of the Southern Branch of the Elizabeth River, or moved to the western portion of the Site for consolidation in the landfill.

28. On September 17, 2018, EPA issued a second ESD (“2018 ESD”). The 2018 ESD, among other things, modifies the selected remedy described in the 2007 ROD in three major ways: it adjusts the size and location of the landfill at the Site that will contain contaminated sediment dredged from the Southern Branch of the Elizabeth River as part of the Site cleanup; it provides for an improved cap over areas of the AWI Property that are currently

being used by AMI; and it provides for the construction of new concrete foundations on top of the landfill to replace ones being buried in the landfill and running electrical power to the new locations. It also proposes to increase the cost estimate for the remedial action to approximately \$126.6 million.

29. As of November 9, 2017, the United States had incurred past response costs of at least \$157,480, 086.32, exclusive of pre-judgment interest, in connection with the Site. Since that date, the United States has and will continue to incur costs in connection with the Site.

30. Hazardous substances released at or near the AWI Site also resulted in injuries to natural resources and the public has suffered the loss of natural resource services, for which the Federal Natural Resources Trustees seek compensation to restore habitat and make the public whole, as well as reimbursement of past costs associated with such injuries, including but not limited to assessment of the damage to natural resources and related administrative and enforcement costs.

FIRST CLAIM FOR RELIEF
(CERCLA § 107(a) - Recovery of Response Costs)

31. Plaintiff realleges and incorporates Paragraphs 1 through 30, above, by reference.

32. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part, as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

- (1) the owner and operator of a . . . facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,

* * *

from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable for --

(A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan;

* * *

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D).

33. The AWI Property is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9). The Site is a “facility” within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

34. AWI is the current owner of the Site, within the meaning of Section 101(20) and 107(a)(1) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(1).

35. AMI is the current operator of the Site, within the meaning of Section 101(20) and 107(a)(1) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(1).

36. AWI was an owner of the Site at the time of disposal of hazardous substances there, within the meaning of Section 101(20) and 107(a)(2) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(2).

37. AWI was an operator of the Site and facilities thereon at the time of disposal of hazardous substances there, within the meaning of Section 101(20) and 107(a)(2) of CERCLA, 42 U.S.C. §§ 9601(20) and 9607(a)(2).

38. Creosote, PCP, PAHs, copper, zinc, arsenic, high pH calcium hydroxide, and each of the substances identified in Paragraphs 11, 16, 8 and 20 above, is or contains a “hazardous substance” within the meaning of Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

39. There have been actual releases and threatened releases of hazardous substances, including creosote, PCP, PAHs, copper, zinc, arsenic, and high pH calcium hydroxide, into the environment at and from the Site, within the meaning of Sections 101(8), 101(22) and 104(a) of CERCLA, 42 U.S.C. §§ 9601(8), 9601(22), 9604(a).

40. As a result of releases and threatened releases of hazardous substances at the Site, the United States has undertaken response actions under the authority granted in Section 104 of CERCLA, 42 U.S.C. § 9604, including, without limitation, monitoring, investigating, and studying the nature and extent of releases or threats of release of hazardous substances into the environment; sampling the contents of storage tanks, sampling soil, groundwater, and river sediments; and overseeing response actions undertaken by other persons and entities.

41. The United States has and will continue to incur response costs in connection with the Site, including enforcement costs relating to this action.

42. The response actions and resulting response costs incurred by the United States in connection with the Site were not inconsistent with the National Contingency Plan as promulgated pursuant to Section 105(a) of CERCLA, 42 U.S.C. § 9605(a), and codified at 40 C.F.R. Part 300.

43. Pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), AWI and AMI are jointly and severally liable to the United States for all response costs, including enforcement costs, incurred by the United States in connection with the Site, together with prejudgment interest thereon.

SECOND CLAIM FOR RELIEF
(CERCLA § 107(a) damages to natural resources)

44. Plaintiff realleges and incorporates Paragraphs 1 through 43, above, by reference.

45. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides, in pertinent part, as follows:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section --

- (1) the owner and operator of a . . . facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,
- (3) any person who by contract, agreement, or otherwise arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances,

* * *

from which there is a release or threatened release which causes the incurrence of response costs, of a hazardous substance shall be liable for –

damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release.

46. There have been “releases” of hazardous substances from the Site into the environment within the meaning of Section 101(22) of CERCLA, 42 U.S.C. § 9601(22), including releases of PAHs, various heavy metals, and other hazardous materials identified herein.

47. The release or threatened release of hazardous substances at and from the Site has caused injury to, destruction of, or loss of “natural resources” within the meaning of Section 101(16) of CERCLA, 42 U.S.C. § 9601(16).

48. The natural resources so injured are under the trusteeship of NOAA and DOI, as the relevant federal agencies designated as Natural Resource Trustees pursuant to CERCLA Section 107(f)(2), 42 U.S.C. § 9607(f)(2), and Subpart G of the NCP, 40 C.F.R. § 300.600.

49. The Federal Natural Resource Trustees have incurred costs assessing the injury, destruction, or loss to natural resources and their services, as well as assessing the required restoration to restore, replace, or acquire the equivalent of such resources within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a). They also have incurred other administrative and enforcement costs in connection with this matter.

50. AWI and AMI are jointly and severally liable to the United States for injury to, destruction of, or loss of natural resources at the Site pursuant to Section 107(a)(4)(C) of CERCLA, 42 U.S.C. § 9607(a)(4)(C), and for reimbursement of the associated costs incurred by the Federal Natural Resources Trustees.

THIRD CLAIM FOR RELIEF
(Section 113 of CERCLA, 42 U.S.C. § 9613)

51. Plaintiff realleges and incorporates Paragraphs 1 through 50, above, by reference.

52. Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), provides, in part:

In any such action . . . [for recovery of the costs referred to in section 9607 of this title], the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

41. Because remedial work at the Site is ongoing, the United States may incur additional response costs at or in connection with the Site in the future.

42. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), the United States is entitled to a declaratory judgment that AMI and AWI are jointly and severally liable to the United States under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), for all future response costs incurred by the United States in connection with the Site.

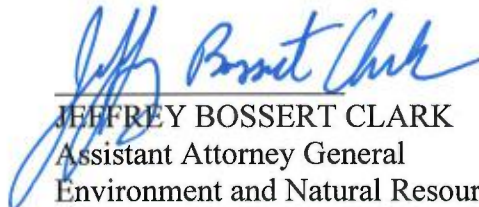
PRAYER FOR RELIEF


WHEREFORE, the United States respectfully requests that this Court:

1. Enter a judgment holding Defendants jointly and severally liable for all unreimbursed costs incurred by the United States in response to the release and threat of release of hazardous substances at the Site and for assessment, quantification and restoration of natural resource damages, including pre-judgment interest;
2. Enter a declaratory judgment under Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), establishing each Defendant's liability for any response costs that may be incurred by the United States in the future, that will be binding in any subsequent action by the United States against Defendants to recover such further response costs;

3. Award the United States its costs in this action; and
4. Grant such other relief as the Court deems just and proper.

Respectfully submitted,


JEFFREY BOSSERT CLARK
Assistant Attorney General
Environment and Natural Resources Division


NANCY FLICKINGER
Senior Attorney
Environmental Enforcement Section
Environment and Natural Resources Division
United States Department of Justice
P.O. Box 7611
Ben Franklin Station
Washington, D.C. 20044
(202) 514-5258

G. ZACHARY TERWILLIGER
United States Attorney
Eastern District of Virginia

/S/

VIRGINIA VANVALKENBURG
Assistant United States Attorney
Suite 8000
101 W. Main Street
Norfolk, VA 23510
Phone (757) 441-6331
Fax: (757) 441-6689
Email: Virginia.VanValkenburg@usdoj.gov
Virginia State Bar No. 33258

OF COUNSEL:

JOAN JOHNSON
Senior Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region III
1650 Arch Street
Philadelphia, PA 19104-2029