UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON CROSS-MOTIONS FOR ACCELERATED ORDER AND RELATED MOTIONS

This proceeding was initiated on August 16, 2017, when the director of the Office of Superfund Remediation & Technology Innovation, Office of Land and Emergency Management, U.S. Environmental Protection Agency ("Agency") forwarded to this Tribunal a hearing request from August Mack Environmental, Inc. ("August Mack"). August Mack seeks review of the Agency's denial of the company's claim for reimbursement from the Hazardous Substance Superfund ("Fund") under Sections 111 and 112 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9611 and 9612, and CERCLA's implementing regulations.

Before me are the Agency's September 16, 2022 Renewed Motion for Accelerated Order ("Renewed MFAO"); August Mack's September 16, 2022 Motion for Accelerated Order ("MFAO"); August Mack's October 28, 2022 Motion to Strike three exhibits that the Agency submitted with its Renewed MFAO; August Mack's November 11, 2022 Motion for Remote Hearing on the pending motions; and August Mack's September 16, 2022 and November 11, 2022 Motions to Submit Additional Documents into the Record ("Motions to Submit").

For the reasons that follow, August Mack's Motions to Submit are **GRANTED**, August Mack's Motion for Remote Hearing is **DENIED**, August Mack's Motion to Strike is **GRANTED in part** and **DENIED in part**, the Agency's Renewed MFAO is **GRANTED**, and August Mack's MFAO is **DENIED**.

I. Background

On January 12, 2017, August Mack submitted to the Environmental Protection Agency's Region III Office of Regional Counsel a purported $2,661,150.98 claim against the Fund. Through its claim letter, the company sought reimbursement for work it performed on behalf of Vertellus Specialties, Inc. ("Vertellus") in preparation for cleanup of the Big John's Salvage-Hoult Road Superfund Site in Marion County, West Virginia (the "Site" or "BJS Site"). *See* Response Claim for Payment from the Hazardous Substance Superfund (January 12, 2017) ("Claim"), RX001. The Agency denied the claim, citing August Mack's failure to obtain

"preauthorization" of that claim from the Agency as required by federal law. *See* Letter to Bradley R. Sugarman, Esq. from Region III Senior Assistant Regional Counsel Susan T. Hodges (Feb. 8, 2017) ("Denial"), App'x 2 to AME Request for Hearing (Mar. 9, 2017).

August Mack submitted a Request for Hearing ("Hearing Request") challenging the Agency's denial, and that Hearing Request was referred to this Tribunal on August 16, 2017. On that same date, the Agency moved to dismiss the company's claim against the Fund.

On December 18, 2017, I granted the Agency's Motion to Dismiss August Mack's claim for payment because, among other reasons, I found that August Mack had failed to adequately plead its compliance with the claim preauthorization requirements set out in 40 C.F.R. Part 307. Order on Mot. to Dismiss (Dec. 18, 2017) ("Dismissal Order"). My Dismissal Order served as the Agency's final administrative decision, and August Mack appealed the decision in federal district court. *August Mack Envtl., Inc. v. EPA*, No. 1:18-CV-12 (N.D. W.Va. filed Jan. 17, 2018). The district court upheld the Dismissal Order. *See id.* (Order Granting Motion to Dismiss Amended Complaint (July 11, 2019)).

August Mack then appealed the district court's ruling to the U.S. Court of Appeals for the Fourth Circuit. *August Mack Envtl., Inc. v. EPA*, No. 19-1962 (4th Cir. filed Sept. 5, 2019). On January 7, 2021, the Court of Appeals issued an Opinion vacating the district court's order. *August Mack Envtl., Inc. v. EPA*, 841 F. App'x 517 (4th Cir. 2021). The Court found that the Agency's preauthorization application form was so outdated as to make strict compliance with its requirements impossible. *Id.* at 523–24 & n.6. Because the Agency's form was legally obsolete, the Court ruled, "it was legal error for the EPA to require *strict* compliance with its preauthorization process in order for August Mack to prove its Superfund claim." *Id.* at 524 (emphasis added). The Court accordingly remanded the case "for further administrative proceedings" to assess whether August Mack had instead "*substantially* complied with the preauthorization process" outlined in 40 C.F.R. Part 307. *Id.* at 525 (emphasis added). The District Court ordered the case be remanded to this Tribunal for further proceedings consistent with the Fourth Circuit Opinion. *See August Mack*, No. 1:18-CV-12 (N.D. W.Va. Aug. 3, 2021) (Order on Joint Motion for Remand to the U.S. Environmental Protection Agency).

On September 8, 2021, I issued an Order of Redesignation and Prehearing Order to govern the renewed proceeding. Order of Redesignation & Prehearing Order (Sept. 8, 2021). The parties made their initial prehearing exchanges in accordance with that Order, and on December 20, 2021, the Agency filed a motion for an accelerated order on August Mack's sole claim and a memorandum in support of its motion. EPA Mot. for Accelerated Order (Dec. 20, 2021). On December 23, 2021, August Mack filed a Motion to Compel Discovery, for Sanctions, and to Extend Case Management Deadlines, through which it argued that that the Agency's motion for accelerated order should be held in abeyance until August Mack was able to complete discovery. *See* AME Mot. to Compel 4 (Dec. 23, 2021). On May 12, 2022, I issued an Order granting in part August Mack's motion to compel discovery and extended the dispositive motions deadline through September 16, 2022. Order on Requestors Mot. to Compel Discovery & for Sanctions 11 (May 12, 2022). On September 16, 2022, and again on November 11, 2022, August Mack filed motions to submit additional documents into the record. AME Mot. to Submit Add'l Docs. into the Record (Sept. 16, 2022); AME 2nd Mot. to Submit Add'l Docs. into the Record (Nov. 11, 2022).

Also on September 16, 2022, the Agency filed a Renewed MFAO and August Mack filed its first MFAO. Both parties assert that no genuine dispute of material fact exists on the question of whether August Mack substantially complied with the preauthorization process. August Mack contends that the undisputed facts demonstrate its substantial compliance or, in the alternative, that August Mack must prevail because the Agency's preauthorization process is unlawful on its face or as applied. AME MFAO 32–33. For its part, the Agency asserts that the undisputed facts show August Mack did not substantially comply with the preauthorization regulations' lawful requirements. EPA Renewed MFAO 5-6.

The Agency filed three exhibits with its Renewed MFAO. *See* EPA Renewed MFAO Exs. A–C. On October 28, 2022, August Mack moved to strike the Agency's exhibits, arguing *inter alia* that the Agency had not disclosed the exhibits with its Initial Prehearing Exchange. AME Mot. to Strike (Oct. 28, 2022). On November 8, 2022, the Agency filed the contested exhibits as part of its First Supplemental Prehearing Exchange, and on November 16, 2022, the Agency filed an Opposition to the Motion to Strike. On November 11, 2022, August Mack filed a Motion for Remote Hearing on the parties' motions for accelerated order and on its motion to strike. The Agency opposed. This decision follows on all outstanding motions.

II. August Mack's Motions to Submit Additional Documents into the Record

On September 16, 2022, August Mack filed a Motion to Submit Additional Documents into the Record, through which it asked this Tribunal to "accept" various documents "into the record as evidence." *E.g.* AME Mot. to Submit ¶¶ 11–12. On November 11, 2022, August Mack filed its Second Motion to Submit Additional Documents into the record, requesting similar relief.

I construe both of August Mack's Motions to Submit as motions to supplement its prehearing exchange. August Mack's motions are **GRANTED.** However, August Mack is advised that the motions were not necessary, because no hearing has been scheduled and the parties may freely supplement their prehearing exchanges unless supplementation is sought within 60 days of the scheduled hearing. *See* Order of Redesignation & Prehearing Order 4.

III. August Mack's Motion for Oral Argument

By Motion dated November 11, 2022, August Mack requested a remote hearing on the parties' cross-motions for accelerated order and on its Motion to Strike. In support of its motion, August Mack asserts that "[t]hese motions present significant issues, and the outcome of these motions will materially affect the pending case." AME Mot. for Remote Hr'g (Nov. 11, 2022). The Agency opposes the motion on grounds that August Mack had sufficient opportunity to identify all relevant facts and law in its briefs and because oral argument would not assist the Tribunal in resolving the issues remaining before it. EPA Resp. to Requestor's Mot. for Remote Hr'g ¶¶ 2–3 (Nov. 16, 2022).

The procedural rules that govern this proceeding, 40 C.F.R. pt. 305 ("Procedural Rules"), provide that the presiding judge may permit oral argument on motions in her discretion. 40 C.F.R. § 305.23(c). In this instance, I dispense with oral argument because it would not aid the decisional process. The parties' factual and legal contentions are exhaustively and adequately

presented in the materials before me. August Mack's request for a hearing on the pending motions is **DENIED**.

IV. August Mack's Motion to Strike the Agency's Exhibits

On October 28, 2022, August Mack moved to strike the three exhibits that the Agency filed with its Renewed MFAO. These are Exhibit A, the August 24, 2022, Affidavit of Eric Newman, who served as the Agency's Remedial Project Manager at the BJS Site; Exhibit B, an excerpt from a rough copy of Mr. Newman's deposition transcript; and Exhibit C, a document titled "Claims Asserted Against the Fund for Response Costs" that, among other things, outlines the delegation of authority within the Agency to make Fund preauthorization decisions. EPA Renewed MFAO Exs. A–C. I address August Mack's objections to each Exhibit in turn.

A. Exhibit A, Affidavit of Eric Newman

August Mack argues that Mr. Newman's affidavit should be stricken because (i) it is not part of the Agency's prehearing exchange, (ii) it contains statements outside the scope of Mr. Newman's anticipated testimony as described in the Agency's prehearing exchange, (iii) it contains inadmissible statements for which he lacks personal knowledge, (iv) it conflicts with his deposition testimony, and (v) it contains improper legal conclusions. Except for a single statement, I deny the motion to strike Mr. Newman's affidavit.

The Procedural Rules do not address the standard for a motion to strike. *See generally* 40 C.F.R. pt. 305. While the Federal Rules of Civil Procedure do not specifically apply here, the Environmental Appeals Board ("EAB") and this Tribunal have routinely looked to the summary judgment standard of Rule 56 and associated jurisprudence for guidance in addressing motions for accelerated order. *E.g., BWX Techs., Inc.*, 9 E.A.D. 61, 74 (EAB 2000). I find it similarly appropriate to look to Rule 56 for guidance on the appropriate content of affidavits submitted in support of a motion for accelerated order. *See* 40 C.F.R. § 305.1(b) ("Procedural questions arising at any stage of the proceeding which are not addressed in this part shall be resolved at the discretion of the . . . Presiding Officer.").

Federal Rule of Civil Procedure 56(c)(4), provides that affidavits filed in support of a motion for summary judgment "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." "Thus, under Rule 56(c), a court may strike portions of affidavits that contain legal or factual argument, are not based on personal knowledge, . . . or rest on conclusionary statements." *Glass v. Anne Arundel Cty.*, 38 F. Supp. 3d 705, 712 (D. Md. 2014), *aff'd*, 716 F. App'x 179 (4th Cir. 2018). "If material in an affidavit is in contravention of Rule 56(c), *i.e.* it would not be permissible for the affiant to so testify in court, the Court need not, and should not, strike the entire affidavit." *Mance v. Owings Mills Autos, LLC*, No. CV JKB-17-2222, 2018 WL 1872529, at *4 (D. Md. Apr. 19, 2018). Instead, the court should strike only the offending material. *Id.* In other words, Rule 56(c) allows courts to strike those parts of a summary judgment affidavit that present testimony inadmissible under the Federal Rules of Evidence. I may make the same assessment here applying the Procedural Rules' evidentiary standard. *See* 40 C.F.R. § 305.31(a) ("The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value.").

August Mack first argues that Mr. Newman's affidavit should be struck because it contravenes this Tribunal's Order of Redesignation and Prehearing Order. AME Mot. to Strike ¶¶ 4–7. Not so. As discussed above, the Prehearing Order does not yet require the parties to obtain permission to supplement their prehearing exchanges. *Supra*, Part II. Assuming Mr. Newman's affidavit constituted new evidence, in this instance the Agency's inclusion of the affidavit as an exhibit to its Renewed MFAO sufficed to satisfy its obligation to supplement its prehearing exchange. August Mack's suggestion that it was prejudiced by the Agency's submission is incorrect. The introduction of affidavits in support of a motion for accelerated order is common practice, anticipated both by this Tribunal's governing procedural rules and Federal Rule of Civil Procedure 56's analogous summary judgment requirements. *See, e.g.*, 40 C.F.R. § 305.27(a) ("The Presiding Officer, upon motion of any party or sua sponte, may at any time render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require."); Fed. R. Civ. P. 56(c)(4) (outlining requirements for summary judgment affidavits). Furthermore, August Mack had an equal opportunity to present its own supplementary evidence to place the Agency's submission in dispute. Indeed, August Mack availed itself of that opportunity, supplementing its own prehearing exchange on the same day it filed its MFAO and again on the same day it filed its Reply in Support of that Motion. Mot. to Supply; 2nd Mot. to Supply.

August Mack next argues that Mr. Newman's affidavit goes beyond the scope of anticipated testimony described in the Agency's initial prehearing exchange. I again disagree. In its prehearing exchange, the Agency stated that:

> In connection with his role/responsibility as RPM for the BJS Site, Mr. Newman may be called to testify as a FACT WITNESS, either via direct testimony or in rebuttal, with respect to: a) the Removal Administrative Record compiled for the BJS Site (available at www.epa.gov/arweb), including decision documents and related enforcement documents; including a Consent Decree (Civil Action No. 1:08CV124) entered on October 10, 2012 in the U.S. District Court for the Northern District of West Virginia (BJS CD); b.) *his oversight function in monitoring, overseeing, and enforcing the terms and conditions of the BJS CD*; 3) his receipt, review, and approval/disapproval of pre-design field investigations and preliminary design documents submitted by Settling Defendant (Vertellus), or submitted by the contractor AME, on behalf of Vertellus; 4) *any and all action that Mr. Newman undertook to assure compliance with the CD, including correspondence and interactions with Vertellus and/or its contractors*.

EPA Initial Prehearing Exch. 2 (Nov. 10, 2021). August Mack asserts that Mr. Newman's affidavit falls outside the scope of this statement because it "[1] includes an analysis of the contract between AME and Vertellus, [2] a legal conclusion as to whether EPA has an obligation to reimburse AME, [3] discussion of the costs incurred by AME, [4] discussion of the

preauthorization scheme, and [5] discussion of whether he granted AME preauthorization." AME Mot. to Strike ¶ 10. August Mack's reading is overly narrow. Of August Mack's listed points, point 4 relates to Mr. Newman's oversight function or, more specifically, what that function did or did not entail. Points 1, 2, 3 and 5 reflect Mr. Newman's "interactions with Vertellus and/or its contractors" in the course of his work to ensure compliance with the BJS consent decree. Points 2 and 3 also relate to some extent to Mr. Newman's review of August Mack's submittals on behalf of Vertellus. Because I find Mr. Newman's statements fall within the scope of his proposed testimony, the motion to strike on this ground is denied.

August Mack's contention that Mr. Newman's affidavit was not made based on personal knowledge also fails. August Mack flatly asserts that "Mr. Newman has not established he has sufficient personal knowledge to state an opinion regarding AME's contract with Vertellus." AME Mot. to Strike ¶ 22. August Mack does not identify the paragraph(s) of Mr. Newman's affidavit to which this argument pertains or otherwise support the point. Mr. Newman's affidavit attests that the asserted testimony is true to the best of his knowledge. EPA Renewed MFAO Ex. A. It was August Mack's burden to explain why it believes otherwise. *See* 40 C.F.R. § 305.23(a) (motions must "state the grounds therefore with particularity".)

August Mack next asserts that portions of Mr. Newman's affidavit contradict his deposition testimony. An affidavit that contradicts a witness's prior sworn deposition testimony may be disregarded. *Riggins v. SSC Yanceyville Operating Co.*, 800 F. App'x 151, 159 (4th Cir. 2020). "However, to strike portions of an affidavit for this reason there must be a bona fide inconsistency between the prior deposition testimony and the affidavit." *Id.* at 159 (quotation marks and citation omitted). August Mack fails to identify such an inconsistency.

August Mack claims that Mr. Newman's statement that August Mack did not provide him with costs "during the period that AME was working under contract for Vertellus" conflicts with (i) his prior testimony that he received August Mack invoices in 2014, (ii) exhibits showing August Mack's submission of costs, and (iii) "AME's claim and supporting cost documents in January 2017." AME Mot. to Strike ¶¶ 19–22. I find no such conflict. The challenged portion of Mr. Newman's affidavit states that:

> 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 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.

EPA MFAO Ex. A ¶ 14. As the Agency observes, the invoices and testimony to which August Mack cites show information Vertellus submitted that related to claims against a site-specific trust fund, not claims against the Fund. RX 327; RX 330 at 99–103; RX 324. Likewise, August Mack's January 2017 Claim and supporting cost documents were not submitted "during the period that AME was working under contract for Vertellus," as that relationship ended in 2016. *E.g.* AME MFAO 6 ¶ 22. No bona fide inconsistency exists here.

August Mack also asserts that a conflict exists as to Mr. Newman's statements that he never told Vertellus or August Mack that he could provide preauthorization and that he did not purport to grant August Mack preauthorization, because Mr. Newman "never testified that he did not 'purport' to grant August Mack preauthorization and did not represent to Vertellus or August Mack that he could provide preauthorization." AME Mot. to Strike ¶ 21. August Mack does not identify any statement from Mr. Newman's deposition or any exhibit that conflicts with the challenged statements, nor does August Mack identify any deposition question on this issue that Mr. Newman declined to answer. August Mack cannot construe Mr. Newman's failure to spontaneously raise an issue during his deposition as creating a conflict with his subsequent affidavit. *See, e.g.*, *Newfrey LLC v. Burnex Corp.*, No. 07-13029, 2009 WL 3698548, at *4 (E.D. Mich. Nov. 5, 2009) ("The failure to uncover [a witness's] asserted source for drafting Claim 30 at [his] deposition is at least partially attributable to [Defendant's] failure to ask this rather obvious question. As a result, it would not be proper to sanction [Plaintiff] by striking [the witness's] declaration."). August Mack has failed to identify an actual inconsistency between the challenged statements and Mr. Newman's affidavit, and the motion to strike on this basis is denied.

As its final salvo, August Mack states that portions of Mr. Newman's affidavit should be struck because they constitute legal conclusions, specifically Mr. Newman's purported assertions that "[1] EPA has no obligation to reimburse AME from the Fund, [2] he does not have authority to provide preauthorization, and [3] he is not designated as a responsible Federal official." AME Mot. to Strike ¶¶ 26–27.

As the Agency observes in its response, Mr. Newman's affidavit describes his understanding of the limits of his authority in a position he has held for approximately 30 years. EPA Resp. to AME Mot. to Strike 5–6 (Nov. 14, 2022); EPA Renewed MFAO Ex. A ¶ 1. The second and third statements listed above are, in this context, more appropriately construed as matters of fact of which Mr. Newman would be expected to have personal knowledge. The motion to strike is denied as to these statements.

The result differs as to Mr. Newman's statement that the Agency "had no obligation to pay or otherwise reimburse [August Mack] for work performed pursuant to" August Mack's contract with Vertellus. EPA Renewed MFAO Ex. A ¶ 13. Whether August Mack's work for Vertellus under their contract created obligations for the Agency is a question of law—a point well illustrated by the Agency's considerable legal argument on a related issue in its Renewed MFAO. EPA Renewed MFAO 33–35 (discussing whether August Mack may be considered a third-party beneficiary to Vertellus's consent agreement with the Agency). August Mack's motion to strike Exhibit A is **GRANTED** solely as to the second sentence of ¶ 13. The remainder of its motion is **DENIED**.

B. Exhibit B, Rough Deposition Transcript

August Mack moves to strike the Agency's Exhibit B, portions of a "rough" version of Mr. Newman's transcript, on the grounds that a final version is now available in the record as RX 330. The Agency does not object to this portion of August Mack's motion, and the motion to strike is **GRANTED** as to Exhibit B. Where appropriate, I have looked to the corresponding sections of Mr. Newman's final deposition transcript, RX 330, in preparing this Order.

C. Exhibit C, Claims Asserted Against the Fund for Response Costs

August Mack moves to exclude Exhibit C on the grounds that it was not part of the Agency's prehearing exchange and because it is unauthenticated. As with Exhibit A, August Mack's procedural objection fails because Exhibit C is not an improper supplement. *See supra* Part IV.A.

August Mack's authenticity objection is based on an outdated legal standard. The company quotes *Article II Gun Shop, Inc. v. Gonzales*, 441 F.3d 492, 496 (7th Cir. 2006), for the notion that "[t]o be admissible, documents must be authenticated by and attached to an affidavit that meets the requirements of Rule 56(e) and the affiant must be a person through whom the exhibits could be admitted into evidence." AME Mot. to Strike ¶ 33. Even assuming Rule 56(e)'s requirements applied to this proceeding directly, which they do not, this is no longer the rule.

The 2010 amendments to Federal Rule of Civil Procedure Rule 56 struck the requirement for evidence to be presented in admissible form to be considered on summary judgment. *E.g. Grimes v. Merritt*, No. JKB–11–2687, 2015 WL 5158722, at *4 (D. Md. Aug. 31, 2015). "To avoid the use of materials that lack authenticity or violate other evidentiary rules, the new rule allows a party to object 'that the material cited to support or dispute a fact cannot be presented in a form that would be admissible as evidence.'" *Lee v. Offshore Logistical & Transp., L.L.C.*, 859 F.3d 353, 355 (5th Cir. 2017), *as revised* (July 5, 2017) (quoting Fed. R. Civ. P. 56(c)(2)) (trial court erred in striking witness's report solely because it was unsworn, "without considering [plaintiff's] argument that [the witness] would testify to those opinions at trial and without determining whether such opinions, as testified to at trial, would be admissible"). The proponent of the evidence may overcome this objection by satisfactorily "'explain[ing] the admissible form that is anticipated.'" *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 538 (4th Cir. 2015) (quoting Fed. R. Civ. P. 56(c)(2), Committee Notes, 2010 Amdts.).

The Agency is correct that, "[i]n this instance, EPA submits [an] internal document[] that can presumably be authenticated if necessary and therefore constitute admissible evidence of any delegation of authority within the Agency." EPA Resp. to AME Mot. to Strike 6 (quoting *Am. Vanguard Corp. v. Jackson*, 803 F. Supp. 2d 8, 13 (D.D.C. 2011)). This satisfactorily "explain[s] the admissible form [of Exhibit C] that is anticipated." August Mack's motion to strike Exhibit C is **DENIED**.

V. Cross-Motions for Accelerated Order

The parties have cross-moved for accelerated orders on August Mack's sole claim in this action. The Agency contends that the undisputed facts conclusively demonstrate that August Mack did not substantially comply with the preauthorization requirements set out in 40 C.F.R. pt 307 and that it therefore is entitled to judgment as a matter of law. EPA Renewed MFAO 6. August Mack contends the opposite—namely that the undisputed facts show its substantial compliance with all lawful regulatory requirements or that it should be excused from compliance with unlawful ones—and asks this Tribunal to find that it is eligible to collect in full on its claim against the Fund. AME MFAO 1-2, 32-33.

A. Legal Standard for an Accelerated Order

The Procedural Rules that govern this proceeding authorize Administrative Law Judges to

> render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law, as to all or any part of the proceeding.

40 C.F.R. § 305.27(a). This standard is analogous to the summary judgment standard prescribed by Rule 56 of the Federal Rules of Civil Procedure. Although the Federal Rules of Civil Procedure do not specifically apply to consideration of the parties' motions, the summary judgment standard in Rule 56 and associated jurisprudence provide guidance in addressing a motion for accelerated order. *E.g., BWX Techs.*, 9 E.A.D. at 74;[1] *see also P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) ("Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment.").

Under Rule 56, summary judgment is warranted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A dispute is genuine if a reasonable factfinder could resolve the point in favor of either party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could influence the outcome of the litigation. *Id.*

The party moving for an accelerated order bears an initial burden of production to show that there are no genuine issues to be tried. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970); *BWX Techs.*, 9 E.A.D. at 76 (moving party "assumes the initial burden of production on a claim and must make out a case for presumptive entitlement to summary judgment in his favor"). "This burden can be met either by presenting affirmative evidence or by demonstrating that the nonmovant's evidence is insufficient to establish his claim." *Miles v. Bollinger*, 979 F.2d 848 (4th Cir. 1992) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J., dissenting)). It then falls to the nonmoving party to show a genuine that dispute exists by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1).

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[1] The Procedural Rules permit accelerated orders in language functionally identical to that used in 40 C.F.R. § 22.20, which permits accelerated decision in EPA administrative enforcement actions. *Compare* 40 C.F.R. § 305.27 *with* 40 C.F.R. § 22.20. I therefore find that decisions interpreting 40 C.F.R. § 22.20 provide additional useful guidance in addressing the parties' cross-motions.

"[N]either party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX Techs.*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated order is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Assuming the moving party has satisfied its initial burden, the court must consider whether a factfinder could reasonably find in favor of the nonmoving party. *Anderson*, 477 U.S. at 252–55. In this analysis, the nonmoving party's evidence is to be believed and all justifiable inferences drawn in its favor. *Id.* at 255. When contradictory inferences may be drawn from the evidence, summary judgment is inappropriate. *United States v. McClellan*, 44 F.4th 200, 206 (4th Cir. 2022). Cross-motions for accelerated order are evaluated separately against this standard. *See Desmond v. PNGI Charles Town Gaming, L.L.C.*, 630 F.3d 351, 354 (4th Cir. 2011) (addressing summary judgment).

B. Legal Background

"Congress enacted CERCLA in 1980 'to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination.'" *CTS Corp. v. Waldburger*, 573 U.S. 1, 4 (2014) (quoting *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009)). The statute grants the Agency "'broad power to command . . . private parties to clean up hazardous waste sites' by or at the expense of the parties responsible for the contamination." *In re Idaho Conservation League*, 811 F.3d 502, 506 (D.C. Cir. 2016) (quoting *Gen. Elec. Co. v. EPA*, 360 F.3d 188, 189 (D.C. Cir. 2004)). "CERCLA also authorizes EPA to undertake 'response actions'—using funds from the Hazardous Substance Superfund—when there is a release or substantial threat of release of a hazardous substance, pollutant, or contaminant." *Id.* The Agency may then "replenish the expended funds through a cost recovery action against the parties responsible for the release." *Id.* (citing 42 U.S.C. § 9607(a)).

Section 111 of CERCLA, as amended, describes the purposes for which the Fund and its limited appropriations may be expended. 42 U.S.C. § 9611. Specifically, it authorizes payments from the Fund for certain enumerated purposes, including reimbursement of private parties for clean-up costs. That is, Section 111 directs that money in the Fund shall be used for "[p]ayment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan [("NCP")] . . . . *Provided, however*, that such costs must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2).[2]

Section 112 of CERCLA outlines procedures for a person to assert a claim against the Fund for response costs incurred. 42 U.S.C. § 9612. It defines the broad requirements with

[2] "The NCP is the federal government's blueprint for responding to oil spills and releases of hazardous substances." *August Mack*, 841 F. App'x at 522 n.4.

which a person must comply before making a claim and further authorizes the Agency to "prescribe appropriate forms and procedures" for filing a claim. 42 U.S.C. § 9612(b)(1).[3]

The Agency has promulgated regulations at 40 C.F.R. Part 307 that "prescribe[ ] the appropriate forms and procedures" for making a claim against the Fund. 40 C.F.R. § 307.10. These regulations set out the requirements that must be met before a claim is eligible for reimbursement:

> (1) The response action is preauthorized by EPA pursuant to § 307.22;
> (2) The costs are incurred 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 costs pursuant to § 307.11 of this part.

40 C.F.R. § 307.21(b). The Part 307 regulations define both "preauthorized" and "preauthorization."

> *Preauthorization* means EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of carrying out the NCP. The process of preauthorization consists of three steps:
>
> (1) EPA's receipt of the application for preauthorization;
>
> (2) EPA's review and analysis of the application; and
>
> (3) EPA's issuance of the Preauthorization Decision Document, which sets forth the terms and conditions for reimbursement.

40 C.F.R. § 307.14. "*Preauthorized* response actions are response actions approved through the preauthorization process." *Id.*

The regulations go on to outline information that "all applications for preauthorization must include, where available," as well as specific information required for different types of preauthorization applications. 40 C.F.R. § 307.22. The required information includes, in pertinent part:

> (6) A description of the applicant's capability (including financial and technical capability) to implement the proposed response action;
>
> . . .

[3] Section 9612(b)(1) more specifically grants this authority to the President, who in turn has delegated it to the Agency.

> (8) Projected costs of response activities, with the basis for those projections (projections shall be based on actual anticipated costs without a contingency for unanticipated conditions); [and a]
>
> (9) Proposed schedule for the submission of claims.

40 C.F.R. § 307.22(b). To obtain preauthorization, a claimant must fulfill the listed requirements "before commencing a response action." 40 C.F.R. § 307.22(a). "No person may submit a claim to the Fund for a response action unless that person notifies the administrator of EPA or his designee *prior to taking such response* action and receives preauthorization by EPA." 40 C.F.R. § 307.22(a) (emphasis added).

The regulations make special provision for response actions proceeding under a court or administrative order or under an agreement with the Agency, cautioning that:

> Unless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a court judgment, Consent Decree, administrative order (whether unilateral or on consent), or any other consensual agreement with EPA requiring a response action do not constitute preauthorization to present a claim to the Fund.

40 C.F.R. § 307.22(j). If a claim is filed against the Fund and the Agency "declines to pay all or part of the claim, the claimant may, within 30 days after receiving notice of the . . . decision, request an administrative hearing." 42 U.S.C. § 9612(b)(2). All administrative proceedings for the total or partial denial of claims asserted under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2), are governed by 40 C.F.R. Part 305. 40 C.F.R. § 305.1. The claimant bears the burden of proving its claim, both as to presentation and persuasion, by a preponderance of the evidence. 42 U.S.C. § 9612(b)(3); 40 C.F.R. § 305.33.

C. Factual Background[4]

1. The Big John's Salvage Superfund Site Consent Decree

The Site is a 38-acre former industrial property in Marion County, West Virginia that was previously used for coal tar refining, salvage operations, and waste disposal. Hr'g Req. ¶¶ 1–2;

[4] The following facts exist without substantial controversy, being drawn from admissions conveyed in the parties' pleadings, record materials that speak for themselves, and facts set out in the parties' cross-motions for accelerated order to which no objection or dispute was raised. Although August Mack objects to the Agency's presentation of undisputed facts, I have not shared August Mack's difficulty in locating the undisputed facts upon which the Agency's motion relies. *E.g.* EPA Renewed MFAO 18 (August Mack "did not seek, or attempt to seek, preauthorization before initiating response actions"); *id.* at 18-21 (supplying support for this factual statement). If August Mack means to argue that the Agency was required to include a numbered statement of facts with its motion, no such requirement exists under the Procedural Rules or under the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 56(c)(1), Committee Notes, 2010 Amdts. ("Subdivision (c)(1) addresses the ways to support an assertion that a fact

Answer ¶¶ 1–2. On July 27, 2000, the Agency placed the BJS Site on the National Priorities List, flagging it as warranting an investigation into the public health and environmental risks presented by the Site's contamination.[5] AME SOF ¶ 1;[6] National Priorities List for Uncontrolled Hazardous Waste Sites, 65 Fed. Reg. 46096 (Jul. 27, 2000) (final rule adding Site to the NPL).

The Agency identified Exxon Mobil Corp., CBS Corp., and Vertellus Specialties, Inc. as potentially responsible parties for contaminating the Site.[7] AME SOF ¶ 8; Hr'g Req. ¶ 3; Answer, ¶ 3. On June 10, 2008, the Agency sued ExxonMobil pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, for past and anticipated response costs at the Site. Hr'g Req., ¶ 14; Answer ¶ 14; *see also United States v. Exxon Mobil Corp*., No. 1:08-cv-00124-IMK (N.D. W.Va. June 10, 2008) (Doc.1-3). The Agency's suit resulted in a Consent Decree between Exxon Mobil, CBS and Vertellus. Hr'g Req., ¶¶ 14–18; Answer 14–18; AME SOF ¶ 7.

The Consent Decree tasked Vertellus with cleaning up the Site and required ExxonMobil and CBS to fund that cleanup. Hr'g Req., ¶¶ 19–20; Answer, ¶¶ 19–20. The Consent Decree also required Vertellus to contribute $11 million representing past response costs into a "special account" for the Site, to be used to conduct response activities at the Site. Hr'g Req. ¶ 35; Answer ¶ 35; RX 322 at 51.

The Consent Decree provided for various specifics of the planned cleanup. For example, the Consent Decree incorporated an Action Memorandum embodying EPA's decision on the response action to be implemented at the BJS Site. RX 322 at 6; Hr'g Req. Ex. B. The Action Memorandum evaluated and summarized the more detailed findings of a September 2010 Engineering Evaluation/Cost Analysis prepared for the BJS Site by TetraTech NUS, Inc. ("EE/CA"), which was itself included as an attachment to the Action Memorandum. Hr'g Req. Ex. C. The EE/CA analyzed several available response options for the Site and the projected

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can or cannot be genuinely disputed. It does not address the form for providing the required support. Different courts and judges have adopted different forms including, for example, directions that the support be included in the motion, made part of a separate statement of facts, interpolated in the body of a brief or memorandum, or provided in a separate statement of facts included in a brief or memorandum.").

[5] The National Priorities List ("NPL") is Appendix B to the NCP. It is "intended primarily to guide the [Agency] in determining which sites warrant further investigation to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA financed remedial action(s), if any, may be appropriate." National Priorities List for Uncontrolled Hazardous Waste Sites, 65 Fed. Reg. 46096, 46097 (Jul. 27, 2000) (final rule adding BJS Site to the NPL).

[6] Citations to "AME SOF ¶ __" refer to the specified paragraphs of August Mack's Statement of Undisputed Material Facts, set out at pages 3–31 of August Mack's MFAO.

[7] A Potentially Responsible Party under CERCLA means "any person who may be liable pursuant to section 107(a) of CERCLA, 42 U.S.C. 9607(a), for response costs incurred and to be incurred by the United States." *See* 40 C.F.R. § 304.12(m).

costs of pursuing those options. *See, e.g.*, Hr'g Req. Ex. C 167–170 (summarizing recommended removal action alternatives and costs).

The Consent Decree also required Vertellus to hire a supervising contractor to carry out the cleanup, subject to the Agency's acceptance. RX 322 at 17; Hr'g Req. ¶¶ 38–39; Answer ¶¶ 38–39. Vertellus hired August Mack for the role, and on November 6, 2012, the Agency accepted August Mack's selection. RX 257; Hr'g Req. ¶¶ 41–42; Answer ¶¶ 41–42.

2. August Mack's Engagement with the Agency as Vertellus's Supervising Contractor for the Site

August Mack began work on Vertellus's behalf related to the Site in October 2012. AME SOF ¶ 22. At that time, August Mack had not affirmatively sought preauthorization to make a claim against the Fund for the work it was contracted to perform. Hr'g Req. 6.

From October 2012 until May 2016, August Mack performed cleanup work at the Site. AME SOF ¶ 22. August Mack's principal point of contact with the Agency during its time working as Vertellus's Supervising Contractor was Eric Newman, the remedial project manager ("RPM") for the Site. AME SOF ¶ 3. Mr. Newman has worked as an RPM in EPA Region 3 since he started with the Agency in 1988, and first became involved at the Site in 2005. AME SOF ¶¶ 3–4.

August Mack engaged with Mr. Newman and the Agency in a variety of ways as it went about fulfilling its role as Vertellus's supervising contractor. For example:

- On behalf of Vertellus, August Mack prepared and submitted to the Agency a Removal Design Work Plan to guide overall completion of Vertellus's clean-up work. Hr'g Req ¶¶ 23, 43; Answer ¶¶ 23, 43. The Agency reviewed and approved the Plan. Hr'g Req. ¶ 44; Answer ¶ 44.

- Before any work was done at the Site, Vertellus—or August Mack, in its role as Vertellus's contractor—would make a submission of proposed work to the Agency. AME SOF ¶ 26; *see also, e.g.*, RX 267 (Agency approval of river removal design plan prepared by August Mack); RX 258 (Agency approval of sampling plan amendments prepared by August Mack).

- Mr. Newman would review these proposal submissions for consistency with the Consent Decree and its incorporated action memorandum and would offer comments on the Agency's behalf. AME SOF ¶¶ 27, 29, 32; *e.g.* RX 270 (EPA comments on sediment quality triad sampling trip report prepared by AME, requesting additional study to be conducted "during Vertellus's planned further analyses").

- Mr. Newman would also distribute the proposals to his site team, representatives from the West Virginia Department of Environmental Protection, and other interested agencies for their review and comment. AME SOF ¶ 28. Mr. Newman would collate these comments and pass them on to Vertellus or its representatives. AME SOF ¶ 28.

- August Mack provided Mr. Newman with a schedule for the work it planned to do onsite on Vertellus's behalf, including updates and revisions to the schedule. AME SOF ¶ 34.

- August Mack participated in weekly or biweekly meetings with the Agency regarding work on the Site. AME SOF ¶ 44.

There were limits to August Mack's engagement with Mr. Newman. Mr. Newman's role did not involve reviewing August Mack's costs. *See* AME SOF ¶ 92 ("[The Agency] has not reviewed AME's costs."). In general, Mr. Newman plays no role in reviewing claims for payment, though he sometimes reviews invoices submitted by Agency contractors. AME SOF ¶¶ 94, 95; RX 330 at 27:21–23. When does receive such an invoice, it is to confirm that "the work was performed in accordance with the scope of work of the contract that they were working under" and to "recommend[s] to the [site's contract officer], based on what [he] see[s], if the costs were incurred within the technical scope and using professional levels that have been pre-agreed to under the contract." AME SOF ¶ 96. Mr. Newman also did not assess August Mack's cleanup work after-the-fact. Mr. Newman is therefore not familiar with all the work August Mack completed or whether it was necessary. AME SOF ¶ 98.

3. Vertellus's Bankruptcy and August Mack's Fund Claim

On May 31, 2016, Vertellus filed a petition for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Hr'g Req. ¶ 50; Answer ¶ 50; AME SOF ¶ 67. Vertellus's bankruptcy filings listed August Mack as holding a nonpriority unsecured claim for $214,551.56. Hr'g Req. ¶ 51; Answer ¶ 51. On October 20, 2016, August Mack filed a proof of claim in the bankruptcy case for more than $2,627,891.46 for the work it performed as Vertellus's supervising contractor. Hr'g Req. ¶ 52; Answer ¶ 52. August Mack also requested payment from both CBS and ExxonMobil on August 30 and September 22, 2016, respectively, but both companies rejected the request. Hr'g Req. ¶ 56; Answer ¶ 56.

When Vertellus declared bankruptcy, the Agency took over cleanup of the Site. AME SOF ¶ 68. The Agency and the Army Corps of Engineers are currently paying Tetra Tech, an environmental engineering firm, for work via the special account established through the BJS Consent Decree. AME SOF ¶¶ 74, 87; RX 330 at 12:22–25. The Agency expects that payments to Tetra Tech will exhaust the special account, at which point the Agency will seek funding from the Fund to pay Tetra Tech. AME SOF ¶ 88; RX 330 at 12:22–25.

On January 12, 2017, August Mack submitted to the Agency a claim for response costs against the Fund, which incorporated a preauthorization application. On February 8, 2017, the Agency denied August Mack's claim. This action followed.

D. Party Arguments

The Agency argues that an accelerated order is warranted on August Mack's claim because (1) August Mack cannot have substantially complied with the preauthorization process because, by its own concession, it never intentionally sought preauthorization or otherwise gave notice to the Agency that it meant to seek reimbursement from the fund; (2) August Mack did

not incidentally supply the Agency with the substantial equivalent of a preauthorization application before beginning work on the Site, including because neither the Consent Decree nor August Mack's submissions to the Agency on behalf of Vertellus can be construed as an application on August Mack's behalf; (3) even if August Mack unintentionally supplied the Agency with the substantial equivalent of a preauthorization application before beginning work on the site, August Mack's claim fails because it has developed no evidence that it ever received preauthorization; and (4) assuming arguendo August Mack could both unintentionally seek and implicitly receive preauthorization, it could not have done so here because the only staff with whom AME claims to have interfaced lacked preauthorization authority. EPA Renewed MFAO 18-19, 28-33, 36-39.

August Mack asserts that it is entitled to an accelerated order because (1) it "incurred necessary costs while performing work consistent with the NCP," (2) it substantially complied with the preauthorization process by satisfying the purposes of preauthorization enumerated in the Fourth Circuit's order on appeal in this case, (3) it substantially complied with the preauthorization process because the Agency "possessed the information required by the obsolete [preauthorization] application before AME started its work," (4) its claim cannot be denied based on the Agency's preauthorization regulations because those regulations are *ultra vires*, and (5) even if the preauthorization regulations are not facially unlawful, they are unlawful as applied because the Agency's review process runs contrary to the regulations' stated purpose and because the Agency arbitrarily and capriciously limits the parties to whom it will grant preauthorization. AME MFAO 32.

E. Scope of Remaining Issues and Available Arguments

In its Response to August Mack's MFAO, the Agency argues that August Mack cannot pursue its contentions that the preauthorization regulations are unlawful—whether on their face or as applied—because those arguments are outside the scope of the Fourth Circuit's remand, waived, or otherwise barred. I therefore begin by addressing the scope of the remaining issues in this matter.

1. Whether August Mack's Attacks on the Preauthorization Process Are Outside the Scope of the Fourth Circuit's Mandate

As I have previously found, the remaining "narrow issue before this Tribunal is whether August Mack substantially complied with the preauthorization requirements. This question focuses on August Mack's actions related to its work at the Site. The validity of the preauthorization scheme as a whole is not within the purview of this proceeding." Order on Requestor's Motion to Compel Discovery & for Sanctions 7. Nothing in August Mack's MFAO has altered my view on this issue. August Mack cannot pursue its global attacks on the preauthorization program in this action, and with narrow exception August Mack's new "as applied" arguments are similarly foreclosed.

August Mack correctly identifies the doctrine underlying the Agency's objections as the mandate rule: "a more powerful version of the law of the case doctrine," *South Atlantic Ltd. P'ship of Tenn. v. Riese*, 356 F.3d 576, 583 (4th Cir. 2004), that "forecloses relitigation of issues expressly or impliedly decided by the appellate court" and "litigation of issues decided by the

district court but foregone on appeal." *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993). As the Fourth Circuit recently reiterated:

> The mandate rule requires that, on remand, the lower body must implement both the letter and spirit of the mandate. . . . A remand therefore does not throw open the floodgates. . . . [T]he mandate rule means that any issue that could have been but was not raised on appeal is waived and thus not remanded. So when a party fails to present an issue, it is not allowed to use the accident of a remand to raise . . . an issue that [it] could just as well have raised in the first appeal . . . [or that it] previously failed to bring . . . to the attention of the ALJ.

Edd Potter Coal Co. v. Dir., Off. of Workers' Comp. Programs, U.S. Dep't of Lab., 39 F.4th 202, 210 (4th Cir. 2022) (quotation marks and citations omitted). "Deviation from the mandate rule is permitted only in a few exceptional circumstances, which include (1) when 'controlling legal authority has changed dramatically'; (2) when 'significant new evidence, not earlier obtainable in the exercise of due diligence, has come to light'; and (3) when 'a blatant error in the prior decision will, if uncorrected, result in a serious injustice.'" *Doe v. Chao*, 511 F.3d 461, 467 (4th Cir. 2007) (quoting *Invention Submission Corp. v. Dudas*, 413 F.3d 411, 415 (4th Cir. 2005)). The EAB has confirmed that the mandate rule applies in full force to this Tribunal in its consideration of matters on remand. *Service Oil, Inc.*, 2011 WL 6140880, at *8 (E.A.B. Dec. 7, 2011) ("Administrative agencies[, which are bound by the law of the circuit in which a case arises,] are no more free to ignore this doctrine than are district courts." (alteration in original)); *see also* 18B Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.3 (3d ed. 2022) ("An administrative agency is bound by the mandate of a reviewing court much as a lower court is bound by the mandate of a higher court.").!

August Mack does not dispute that it is raising its arguments regarding the preauthorization regulation's legality for the first time in its MFAO. Instead, August Mack asserts that its new arguments are within the scope of remand. AME MFAO Reply 18–22. I disagree.

August Mack first claims that because the Fourth Circuit found the Agency's preauthorization application obsolete, the validity of the entire preauthorization process falls within the scope of remand. AME MFAO Reply 18. Quite the opposite is true: By striking the Agency's application form but remanding for a decision on whether August Mack substantially complied with the "preauthorization process," the Fourth Circuit implicitly assumed the process's validity. *August Mack*, 841 F. App'x at 525.

August Mack next argues that its legality arguments should be considered because the Fourth Circuit remanded not only for a determination of whether August Mack substantially complied with the preauthorization regulations, but also for a determination of "any Superfund reimbursement that might be awarded." *August Mack*, 841 F. App'x at 525. August Mack principally relies on *United States v. Henoud*, 81 F.3d 484 (4th Cir. 1996); this reliance is misplaced.

The appellant in *Henoud* was convicted of fraud and ordered to pay restitution to a local telephone company, C&P, and four long-distance carriers. 81 F.3d at 486. On Mr. Henoud's initial appeal of that conviction, the Fourth Circuit affirmed his sentence but noted inconsistencies in the record as to the amounts of restitution due each victim. *Id.* at 487. The court therefore vacated the restitution order and remanded "for a determination of the restitution amount actually owed." *Id.* On remand, the district court held an evidentiary hearing during which, for first time, Mr. Henoud argued that C&P should be excluded from his restitution calculation because it was not listed a victim in his indictment. *Id.* The government argued that this issue was waived and therefore barred from consideration on remand. The Fourth Circuit disagreed, stating that "[b]ecause the scope of our remand order reasonably encompasses those matters as relevant to determining the appropriate amount of restitution, we find consideration of the issues not blocked by the mandate rule." *Id.* at 487 n.8.

August Mack alleges that the same result should apply here because its legality arguments are "relevant to the issue on remand (*i.e.* how much money should be awarded) and establish that awarding AME money from the Fund is warranted." AME MFAO Reply 19. I disagree with August Mack's characterization. The Fourth Circuit remanded this matter for a determination of whether August Mack substantially complied with the preauthorization process. *August Mack*, 841 F. App'x at 525 (noting that "whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings" and that "[o]n remand, the EPA is entitled to dispute and litigate August Mack's compliance"). Again, the court's remand therefore implicitly assumed the viability of that process, taking it out of contention. In contrast, in *Henoud*, the initial decision on appeal fully reopened "the restitution amount actually owed." *Henoud*, 81 F.3d at 487. The existence or absence of an additional victim owed restitution was directly relevant to that computation.

August Mack's other cases are equally unhelpful to its position. *See* AME MFAO 19–20. *Dish Network Corp. v. Arrowood Indemnity Co.*, 772 F.3d 856 (10th Cir. 2014), is an out-of-circuit case and relies on a mandate rule standard that differs from the Fourth Circuit's prevailing rule. Unlike the Fourth Circuit standard, which assumes issues not previously raised are outside the scope of remand, the standard in *Dish Network* provides that matters not specifically limited by the remand remain open for adjudication. *Id.* at 865; *see also Bell*, 5 F.3d at 64 n.3 (noting difference between Tenth and Fourth Circuit rules). And *Dish Network* is distinguishable on its own terms. The court in *Dish Network* found that the mandate rule did not limit a group of insurers from raising new arguments rebutting their alleged duty to defend the plaintiff, because "nothing in the remand language in *DISH I* specifically limited or prevented the district court from allowing the Insurers to dispute the purported duty to defend on grounds other than those that were asserted in the Insurers' original motions for summary judgment." *Id.* 866. Here, by implicitly affirming the preauthorization process's viability, the Fourth Circuit did "limit[] or prevent[]" this Tribunal from entertaining new disputes on that issue. *See id.*; *see also Bell,* 5 F.3d at 66 (mandate rule forecloses re-litigation of issues impliedly decided on appeal). *United States v. Morris*, 259 F.3d 894 (7th Cir. 2001), counsels towards the opposite result that August Mack desires. The *Morris* court found that the appellant had, albeit barely, preserved his argument related to ineffective assistance of counsel in his initial appeal. *Id.* at 898–99. Had he not done so, the court would not have permitted him to address the issue on remand. *See id.* at 899 ("Because we have held that Morris preserved the argument and as we did not address it during Morris's first appeal, it falls within the third category of issues the district court may

properly address on remand."). That is the appropriate result here, where August Mack did not preserve its legality arguments at all.[8]

August Mack also argues that it did not forfeit its legality arguments because it lacked the incentive to raise them in the first instance and because "an issue is not considered waived, . . . if a party did not, at the time of the purported waiver, have *both* an *opportunity and* an *incentive* to raise it . . . on appeal." AME MFAO Reply 21 (quoting *Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83, 94 (N.D.N.Y. 2003)). Assuming this rule applies in the Fourth Circuit, August Mack's argument fails because August Mack had every incentive to question the preauthorization rule's legality from the outset of this action. In fact, August Mack raised related arguments in its Hearing Request, which asserted that (1) the preauthorization requirements did not apply to August Mack because neither 42 U.S.C. §§ 9611(a)(2) nor 9612(b) specifically limit claims against the Fund to preauthorized actions, and (2) August Mack's failure to comply with the preauthorization requirements should be excused because it had complied with all statutory requirements. Hr'g Req. 18–19, 27–30. The barest inferential space separates these arguments and August Mack's current position that CERCLA does not permit a preauthorization requirement. The contrast between *Oneida*'s procedural history and that of this case is also illustrative. In *Oneida*, the plaintiffs argued that they had not waived arguments related to an available remedy because, among other reasons, the case was a liability test case the outcome of which had been starkly uncertain. *See* 214 F.R.D. at 94 ("When the parties first began litigating this test case over 30 years ago, and indeed for many years thereafter, liability issues dominated with little or no thought given to the possible consequences of a finding of liability."). Here, August Mack has aimed to disavow the preauthorization regulations' application from this case's outset. August Mack's current suggestion to the contrary is incredible.

August Mack goes on to argue that even if its arguments would otherwise run afoul of the mandate rule, they come within the rule's limited exceptions. August Mack first claims that its new arguments follow a dramatic change in legal authority engendered by the Supreme Court's invocation of the major questions doctrine in *West Virginia v. EPA*, —— U.S. ——, 142 S. Ct. 2587 (2022). AME MFAO Reply 22; AME MFAO 62-65. But the "major questions doctrine" applies only in those "'extraordinary cases' in which the 'history and breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority." *W. Va.*, 142 S. Ct. at 2595 (alteration in original) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–60 (2000)). Here, Congress expressly assigned authority to the President "to prescribe appropriate forms and procedures for claims" against the Fund. 42 U.S.C. § 9612(b)(1). The President delegated that authority to an agency with expertise and

[8] August Mack also cites *Aguinaga v. United Food & Commercial Workers International Union*, for the proposition that "[l]ower courts are free to decide issues that were not resolved in a prior appeal, as long as the case remains open for further proceedings." AME MFAO Reply 20 (quoting 854 F. Supp. 757, 773 (D. Kan. 1994)). *Aguinaga* does not address the Fourth Circuit's standard for when parties may litigate new arguments upon remand and therefore provides no guidance on that issue. *Aguinaga* does, however, acknowledge that "law of the case principles may apply" to bar further litigation of an issue "when a court concludes that [the] issue was decided implicitly." *Aguinaga*, 854 F. Supp. at 772. As stated above, the Fourth Circuit implicitly affirmed the preauthorization regulations' validity in this matter.

experience in the specific areas of public health and the environment to administer a limited-purpose fund for projects within that area. The Agency has required preauthorization for more than 40 years, the Agency's preauthorization requirements are confined to its administration of the Fund, and the Agency claims no broader power to regulate the national economy. *See* 40 C.F.R. pt. 307. These facts present no "major question."[9]

August Mack next asserts that it may raise its legality arguments because they were based on evidence obtained during discovery in this matter. August Mack misstates the applicable standard, which asks not merely whether an argument is based on new evidence, but on "significant new evidence, not earlier obtainable in the exercise of due diligence." *Doe*, 511 F.3d at 467. Under either standard, this exception cannot save August Mack's facial challenge. The preauthorization regulations have remained unchanged throughout this proceeding and were within August Mack's awareness before discovery. Because August Mack's purported facial challenge is firmly beyond the scope of the mandate, it cannot serve as the basis for a motion for accelerated order.[10]

August Mack's purported "as-applied" challenges present a closer call. Neither party addresses whether August Mack could have obtained the new evidence upon which its "as applied" arguments are based through an earlier exercise of due diligence—a showing that falls to August Mack as the proponent of the exception. However, given that August Mack's evidentiary support for these arguments comes primarily from depositions of the Agency's staff, I will assume the exception applies.

The Agency claims that even if the Fourth Circuit's mandate does not bar August Mack's as-applied arguments, the standing doctrine does. Broadly, to establish standing to challenge an Agency's conduct, a party must allege that it suffered actual or threatened injury because of that conduct. *See MCN Oil & Gas Co.*, 2002 WL 31030985, at *10 & n.28 (E.A.B. Sept. 4, 2002) (Order Denying Review) (party lacked standing to raise concerns about technical violations in process of permit issuance because the party "failed to demonstrate how the alleged errors affected the proceedings during the public comment period, or how the person was in any way harmed or prejudiced by the alleged violations"); *see also Warth v. Seldin*, 422 U.S. 490, 499

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[9] August Mack claims that the current presidential administration's focus on environmental justice highlights allocation of the Fund as a major question and supports allowing August Mack's belated arguments. AME MFAO Reply 13, 20 n.3, 21. This point cuts the opposite way August Mack intends: It is not clear what room would remain for equitable allocation of scarce Superfund resources among communities if individual contractors like August Mack could claim those resources by fiat.

[10] To be clear, even if August Mack had not forfeited its arguments regarding the preauthorization requirements' legality, those arguments would not succeed. August Mack's arguments simply rehash points raised by the appellants in *Ohio v. EPA*, in which the D.C. Circuit upheld the preauthorization regulations as a valid exercise of the Agency's authority. 838 F.2d 1325 (D.C. Cir. 1988). August Mack's attempts to distinguish that decision are unconvincing, and I find no call to depart from the *Ohio* panel's reasoning.

(1975) ("[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights of third parties.").

Through its as-applied arguments, August Mack raises programmatic issues with the Agency's review of preauthorization applications, asserting that (1) the information the Agency reviews in connections with preauthorization applications does not allow the Agency to fulfill the preauthorization regulations' expressed purposes, and (2) the Agency has established an unwritten and overly restrictive policy against granting preauthorization outside of the settlement context. AME MFAO 42–51.

While it maintains its right to assert these arguments, August Mack appears to acknowledge that it would lack standing to bring a claim that the Agency's preauthorization practices are unlawful as applied to all applicants. AME MFAO 43 n.8 (noting that "[t]o be clear, an arbitrary and capricious as applied holding will only result in the preauthorization regulations being set aside in this case"). The difficulty facing August Mack is that, broadly speaking, its "as applied" arguments are nothing of the kind. It is now well-settled in this matter that August Mack did not apply to the Agency for preauthorization. August Mack therefore cannot argue that the Agency denied the company's reimbursement application because of the allegedly improper procedural approach or limiting criteria August Mack describes.[11] August Mack's "as applied" arguments are accordingly unavailing, regardless of whether the failing is construed as a lack of standing to pursue a generalized grievance or simply as a lack of relevance to the case at bar. August Mack is therefore left to argue that the erroneous practices of which it complains rendered it futile for August Mack to apply for preauthorization. AME MFAO 51–52. So limited, August Mack's "as applied" arguments survive for consideration. However, as discussed below, this does little to aid August Mack.[12]

2. Whether August Mack is Otherwise Excused from Demonstrating Substantial Compliance with the Preauthorization Regulations

In addition to its new legality arguments, August Mack argues that it is entitled to a grant of its claim solely because "it incurred necessary costs while performing work consistent with the NCP." AME MFAO 40. August Mack refers to 40 C.F.R. § 307.21, which states that "costs are eligible for reimbursement from the Fund if (1) the response action was preauthorized; (2) the costs result from activities within the scope of the preauthorization; (3) the response action was consistent with the NCP; and (4) the costs are necessary costs under 40 C.F.R. § 307.11." August Mack claims that "the Fourth Circuit struck requirements 1 and 2—for this specific

[11] August Mack's Reply in support of its MFAO includes a single statement that the Agency denied its *claim* application because "it was not a settling PRP." AME MFAO Reply 17. August Mack provides no support for this statement, nor have I identified any evidence in support of this statement in the record.

[12] Having found that August Mack's legality arguments are barred on various other grounds or limited in their application to August Mack, I do not address the Agency's argument that August Mack's facial challenges to the preauthorization regulations are time-barred or were required to be brought before the D.C. Circuit. EPA Resp. to AME MFAO 25-26.

case—when it held that EPA's preauthorization application was legally obsolete." AME MFAO 40.

August Mack misconstrues the CERCLA regulations and the Fourth Circuit's decision. The Fourth Circuit did not strike the preauthorization requirement for purposes of this case; it remanded for further consideration of whether August Mack "substantially complied with the preauthorization process" set out in 40 C.F.R. § 307.22. *See August Mack*, 841 F. App'x at 523–524 (determining that substantial compliance standard is appropriate even though "40 C.F.R. § 307.22(a), does not use 'substantial compliance' language"). August Mack errs by instead looking to the CERCLA regulations' overarching requirements for a successful claim against the Superfund, of which preauthorization is just one element. 40 C.F.R. § 307.21(b). August Mack's error leads it to ask this Tribunal to simply erase the preauthorization requirement from consideration. The Fourth Circuit demanded the opposite.

F. Whether August Mack Substantially Complied with the Preauthorization Regulations.

With the scope of the issues appropriately narrowed, the parties' remaining arguments relate to whether August Mack's conduct amounts to substantial compliance with the 40 C.F.R. Part 307 preauthorization regulations.

1. Substantial Compliance Standard

The parties dispute the applicable substantial compliance standard. In the context of this case, the Fourth Circuit described substantial compliance as follows:

> The doctrine of substantial compliance is a tool designed to "assist the court in determining whether conduct should, in reality, be considered the equivalent of compliance." *See Peckham v. Gem State Mut.*, 964 F.2d 1043, 1052 (10th Cir. 1992). It is "an equitable doctrine designed to avoid hardship in cases where the party does all that can reasonably be expected of him." *See Sawyer v. Sonoma Cnty.*, 719 F.2d 1001, 1008 (9th Cir. 1983).

August Mack, 841 F. App'x at 522–523. The Fourth Circuit has applied a similar rule to assess parties' substantial compliance with other regulatory requirements, asking, for example, "whether the 'essence' of the statutory framework has been violated by the [party's] failure to satisfy the literal requirements." *Atl. Veneer Corp. v. Comm'r*, 812 F.2d 158, 161 (4th Cir. 1987); *see also Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 211 (4th Cir. 2004) ("The doctrine of substantial compliance cannot be applied [where] it would excuse noncompliance with essential regulatory requirements."). Likewise, the CERCLA regulations describe "substantial compliance" with the NCP as excusing "immaterial or insubstantial deviations" from the NCP's requirements. *August Mack*, 841 F. App'x at 523 (quoting 40 C.F.R. § 300.700(c)(4)).

Both parties argue for additional or alternative measures of substantial compliance. I am not persuaded that these alternative formulations apply here or that, if they do, they require a meaningfully different showing than the rule stated above.

The Agency asserts that August Mack cannot demonstrate substantial compliance with the preauthorization process because, by its own admission, it did not intend to seek "preauthorization" until 2017. EPA Renewed MFAO 18–19. The Agency argues that the Fourth Circuit's substantial compliance jurisprudence requires a showing of intent to comply. EPA Resp. to AME MFAO 7–8; EPA MFAO Reply 6. August Mack vigorously disputes that the Fourth Circuit has instated such a requirement.

I agree with August Mack that the Fourth Circuit has not made intent a blanket element of substantial compliance. For example, *Volvo Trucks of North America, Inc. v. United States*, cited by the Agency, sets out a standard for substantial compliance with tax regulation requirements that makes no mention of the filer's intent. 367 F.3d at 210 ("[A] taxpayer may be relieved of perfect compliance with a regulatory requirement when the taxpayer has made a good faith effort at compliance or has a 'good excuse' for noncompliance, and (1) the regulatory requirement is not essential to the tax collection scheme but rather is an unimportant or 'relatively ancillary requirement' or (2) the regulatory provision is so confusingly written that it is reasonably subject to conflicting interpretations." (citation omitted)).

The ERISA cases from which the Agency principally derives its proposed intent requirement expressly limit their stated substantial compliance standard to that statute and are otherwise distinguishable. *See Phoenix Mutual Life. Ins., Co. v. Adams*, 30 F.3d 554, 565 (4th Cir. 1994) ("We do not hold that the federal common law of substantial compliance is applicable in any context other than that before the court in the instant case, the change of beneficiary provision in an ERISA plan."); *Metropolitan Life Ins., Comp. v. Gorman-Hubka*, 159 F. Supp. 3d 668, 674–75 (E.D. Va. 2016) (applying rule of *Phoenix Mutual*). Both cases were ERISA change-of-beneficiary actions, meaning they involved a deceased policyholder's alleged attempt to change the beneficiary of their ERISA life insurance plan. *Phoenix Mutual Life Ins.*, 30 F.3d at 556; *Metropolitan Life Ins.*, 159 F. Supp. 3d at 670. By requiring change-of-beneficiary plaintiffs to prove up the policyholder's intent, the *Metropolitan Life* and *Phoenix Mutual Life* courts ensured that the policyholders' alleged attempts to change their beneficiaries were just that, and not, for example, an administrative error or a passing thought that the policyholders never meant to formalize. The same requirement should not be necessary in a case like this one, where one would expect the preauthorization applicant to be able to speak for itself. *Atlantic Veneer Corp. v. Commissioner of Internal Revenue*, also cited by the Agency, focused not on whether the taxpayer intended to make a certain election, but on whether it notified the relevant agency of that election. 812 F.2d at 161 ("[C]ertain elements, which comprise the requirements of an election, can be either procedural or mandatory. The actual making of the election itself, particularly where the election is mandated by Congress, cannot be procedural."). This is not to say that the Agency's "intent" cases are not otherwise instructive, or that August Mack's admissions that it did not form an intent to seek preauthorization before 2017 are irrelevant. *See infra* Part V.F.2.a. I simply find that August Mack does not bear a separate burden to prove its intent to comply.

August Mack also argues for additions to the Fourth Circuit's articulated substantial compliance rule. Specifically, August Mack claims that under the Fourth Circuit's decision in this matter, the company is entitled to an accelerated order because the undisputed facts show it satisfied four specified "objectives" of the preauthorization process. AME MFAO 34–35. August Mack refers to the following set of objectives cited by the Fourth Circuit, which the court derived from the preamble to the preauthorization regulations' proposed rule:

> (1) ensuring appropriate use of the Superfund, (2) ensuring that response actions do not create environmental hazards; (3) ensuring that response actions are consistent with the NCP; and (4) ensuring that response actions are accomplished with the EPA's approval and are reasonable and necessary.

August Mack, 841 F. App'x at 523 (citing Proposed Rule, Response Claims Procedures for the Hazardous Substance Superfund, 54 Fed. Reg. 37892, 37898 (Sept. 13, 1989)).

The Agency responds that the Fourth Circuit did not, in discussing these objectives, mean to create a test for substantial compliance. EPA Resp. to AME MFAO 16–18. The Agency is correct. The referenced discussion related to whether the Fourth Circuit found it appropriate to apply a substantial compliance standard to the preauthorization regulations at all, not to what the contours of that standard should be. *August Mack*, 841 F. App'x at 523 (noting that "[e]ven if the substantial compliance doctrine can only be applied when it would not defeat the policies of the underlying regulatory provisions, the doctrine may still be applied here," and going on list those policies). While the identified objectives inform how far a claimant can stray from the preauthorization regulations' requirements before its conduct cannot be viewed as "the equivalent of compliance," they do not erase the stated regulatory requirements from consideration.

Furthermore, in articulating its proposed test, August Mack takes an overbroad view of the listed objectives and what conduct satisfies them. As one example, August Mack assumes that the only relevant input into whether use of the Superfund is "appropriate" is whether the funds are being used to pay a permissible type of claim—here, a claim from a nongovernment entity "for costs incurred pursuant to [the NCP]." AME MFAO 35–36. August Mack overlooks that the preauthorization regulations provide considerable context as to what uses are appropriate. For example, in promulgating the preauthorization regulations the EPA stated that:

> Preauthorization . . . 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*.

54 Fed. Reg. 37892-01, 37898 (emphasis added). Whether a proposed use of the Fund is "appropriate" therefore depends not only on whether the use is permissible, but also on whether that particular use should be prioritized over myriad other possible uses. *See Ohio v. EPA*, 838 F.2d 1325, 1331 (D.C. Cir. 1988) (observing, in upholding the preauthorization regulations, that "EPA is required to serve as the protector and distributor of scarce government resources devoted to this program of national priority. . . . [W]ithout the preauthorization procedure, private persons would proceed at the peril of their claim ultimately being disapproved or being invalid by reason of the exhaustion of available funds."); Final Rule, Response Claims Procedures for the Hazardous Substance Superfund, 58 Fed. Reg. 5460-01, 5461 (Jan. 21, 1993) ("Through its review of applications for preauthorization and response claims under the RCP, the Agency may grant preauthorization to pay for only those response actions that are of sufficient priority to merit Fund expenditures."). The preauthorization regulations translate this goal into concrete requirements. *See, e.g.*, 40 C.F.R. § 307.23(b)(2) (in evaluating an application for preauthorization Agency will consider the "seriousness of the problem or importance of the response activity when compared with the competing demands of the fund"). August Mack's proposed measure of appropriateness would frustrate this purpose. If a claimant could substantially comply with the regulations—and therefore collect from the Fund—solely by showing that they were a nongovernment entity that incurred costs pursuant to the NCP, that would eliminate the Agency's prioritization role.[13]

2. Analysis

Having addressed the parties' proposed substantial compliance standards, I return to the question of whether August Mack "did all that could reasonably be expected of it" such that its "conduct should . . . be considered the equivalent of compliance" with the preauthorization process. *August Mack*, 841 F. App'x at 522–23.

[13] Albeit in a different context, August Mack argues that the Agency plays no such role, because it does not evaluate whether preauthorized costs are a necessary and reasonable use of the Fund until after a party asserts its claim for the preauthorized funds. AME MFAO 43–44. August Mack elides two separate assessments. The first, focused on by August Mack, is whether preauthorized activity occurred in the manner the preauthorization anticipated. *See, e.g.*, AME MFAO 43 ("After that party submits a claim for payment, the region then evaluates whether the costs supporting the claim are reasonable and necessary and consistent with the NCP. . . . [A] claims adjuster 'review[s] the claim for the purposes of ensuring that the costs are actually incurred, like they have invoices, the invoices are legit invoices, and that the costs have the backup information required, and . . . that the costs were actually incurred and paid by the claimant.'" (quoting RX 331 at 39:1–14, 50:23–51:10)). The second, relevant to preauthorization, is whether a potential expenditure would be an appropriate use of the Fund as compared to other proposed uses.

a. August Mack did not substantially comply with the preauthorization requirements because it never sought preauthorization before starting work at the Site.

The Agency asserts that August Mack cannot have substantially complied with the preauthorization requirements, because it would have been reasonable to expect August Mack to make some effort to seek preauthorization. EPA Renewed MFAO 28–29. In the same vein, the Agency argues that to accomplish "the equivalent of compliance," August Mack must have notified the Agency of its planned claim against the Fund before starting work at the Site. *Id.* at 18–19; EPA MFAO Reply 2. August Mack cannot show that it met these expectations, the Agency says, because it is undisputed that August Mack did not apply for preauthorization or otherwise attempt to notify the Agency of its plan to make a claim against the Fund until 2017, after its site work had ceased and after Vertellus had filed for bankruptcy in May 2016.[14] EPA Renewed MFAO 18–19; EPA MFAO Reply 7–8. Indeed, the Agency emphasizes, August Mack has conceded that it did not possess the intent to make a claim until that time. EPA Renewed MFAO 18–19 (citing AME Resp. in Opp'n to EPA Mot. to Dismiss 9; Hr'g Req. 6).

August Mack responds that the Agency's arguments are foreclosed by the Fourth Circuit's decision in this action, because the Fourth Circuit struck the preauthorization application requirement. AME Resp. to EPA Renewed MFAO 16; AME MFAO Reply 4–5. I disagree with August Mack's reading. The Fourth Circuit "struck" only the preauthorization application *form*, by declaring the form legally obsolete. *August Mack*, 841 F. App'x 524 ("Put simply, the EPA should not arbitrarily fault August Mack for failing to strictly comply with the preauthorization process *when the EPA itself has declared the required form to be obsolete*." (emphasis added)). The Fourth Circuit did not otherwise excuse August Mack from substantial compliance with the preauthorization process, which includes, for example, a requirement to notify the Agency of its plans to eventually make a claim against the Fund. *See* 40 C.F.R. § 307.22(a) ("No person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA or his designee *prior* to taking such response action.") (emphasis added). It is appropriate to consider, under the doctrine of substantial compliance, whether August Mack may be excused for its failure to submit anything approximating an application to the Agency before it ceased its work: The Fourth Circuit did not predetermine the outcome of that question. *See August Mack*, 841 F. App'x at 525 ("[W]hether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings. On remand, the EPA is entitled to dispute and litigate August Mack's compliance.").

August Mack further argues that because of the deficiencies in the Agency's obsolete preauthorization application form, it would not, in fact, have been reasonable to expect August Mack to seek preauthorization before it began work on the Site. AME MFAO 11–12. August Mack emphasizes that the preauthorization form included outdated contact information and argues that it cannot have been expected (1) to have contacted Agency staff at random in hopes

[14] Because August Mack does not dispute this fact, I find no reason to address whether, as the Agency asserts, it constitutes the law of the case. EPA Renewed MFAO 21–25.

of identifying an appropriate contact person, or (2) to have raised the matter with its on-Site Agency contact Mr. Newman, who lacked preauthorization authority. *Id.*

August Mack's position is difficult to credit. As the Agency notes, August Mack ultimately submitted a "preauthorization" application to the Agency together with its 2017 claim request, EPA Resp. to AME MFAO 11 n.8, and August Mack has taken the position that its exchange of information with Mr. Newman constituted substantial compliance with the preauthorization process. AME MFAO 65–67. Regardless, August Mack has failed to refute the Agency's argument. August Mack has presented no evidence that it reviewed the Agency's form and threw up its hands. Quite the opposite: August Mack has conceded that it did not think to apply until it received the Agency's claim rejection letter, years after beginning work for Vertellus related to the Site. Hr'g Req. 6. The deficiencies of the Agency's form were, therefore, clearly not the impediment to August Mack's application.

The substantial compliance doctrine generally cannot excuse a party's wholesale failure to attempt compliance with a regulation's central requirements. *See, e.g.*, *Reg'l Airport Auth. of Louisville v. LFG, LLC*, 460 F.3d 697, 709 (6th Cir. 2006) (while under CERCLA, "'immaterial, insubstantial' deviations that do 'not affect the overall quality of the cleanup' will not bar recovery . . . wholesale failure to comply with the NCP's remedy-selection process and community relations provisions—the very heart of the NCP—cannot reasonably be characterized as 'immaterial' or 'insubstantial.'" (citation omitted)); *Volvo Trucks of North Am.*, 367 F.3d at 211 ("Volvo has actually acknowledged that it could have complied with [the disputed tax regulation] but chose not to. Instead, it relied on individual IRS agents' assurances that it did not have to comply with the regulation. No formulation of the substantial compliance doctrine would award a tax refund to a taxpayer in these circumstances.").

As discussed above, the preauthorization regulations' purpose cannot be satisfied if the Agency had no opportunity to evaluate the proposed expenditures against other possible uses of the Fund. This review informs whether a prospective claim would be an appropriate use of the Fund: One of the preauthorization regulations' overall aims. *August Mack*, 841 F. App'x at 523.[15] To undertake its review, the Agency must have some notice of the potential claim. It is eminently reasonable to expect the prospective claimant to attempt to provide that notice; August Mack did not do so.

August Mack argues that it cannot be faulted for its failure to give such notice to the Agency because any attempt to obtain preauthorization would have been futile. In support of this argument, August Mack points to the purported flaws it has identified in the Agency's application of the preauthorization regulations, and to various Agency statements to the effect that even if August Mack had timely applied for preauthorization before beginning work for the Site, the Agency would have denied the request because the preauthorization regulations

[15] August Mack's claim that the Agency does not perform such an assessment at the preauthorization stage is not supported by the testimony on which August Mack relies. *See supra*, note 9.

disallow claims that are already being paid for by someone else. AME MFAO 51–52; AME Resp. to EPA Renewed MFAO 22–23.[16]

August Mack's argument rests on a misconstruction of the futile gesture doctrine, which the Supreme Court established in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). *Teamsters*, on which August Mack relies, was an employment discrimination class action in which the plaintiffs argued they had been denied seniority on account of race or ethnicity. *Id.* at 324–25. The employer argued that the plaintiffs could not be afforded retroactive seniority as a remedy for employment discrimination unless the plaintiffs had previously applied for senior positions. *Id.* at 363. The Court rejected this argument, observing that under the employer's view "[v]ictims of gross and pervasive discrimination could be denied relief precisely because the unlawful practices had been so successful as totally to deter job applications from members of minority groups." *Id.* at 367.

Teamsters and its progeny are unhelpful to August Mack. Assuming the rule in *Teamsters* can be extended to this case, August Mack ignores half of that rule. The *Teamsters* Court went on to note that "to conclude that a person's failure to submit an application for a job does not inevitably and forever foreclose his entitlement to seniority relief under Title VII is a far cry, however, from holding that nonapplicants are always entitled to such relief." 431 U.S. at 367. Instead, the Court further held that an applicant asserting futility has "the not always easy burden of proving that he would have applied for the job had it not been for those practices." *Id.* at 368. Only "[w]hen this burden is met, [is] the nonapplicant . . . in a position analogous to that of an applicant" and entitled to the presumption that they would have applied for a promotion but for pervasive discrimination. *Id.*[17] Here, August Mack has presented no evidence that the Agency informed it before start-of-work on the Site that any preauthorization application would be denied, or that the Agency's position otherwise deterred August Mack from making its application.[18] To the contrary, August Mack has conceded that it did not consider preauthorization until years after the fact.

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[16] The Agency asks me to find that August Mack is judicially estopped from arguing that the Agency's obsolete preauthorization form rendered any application futile. EPA Renewed MFAO 25–28. August Mack correctly observes that it raised no such argument. AME Resp. to EPA Renewed MFAO 8 & n.6. To the contrary, in making its futility argument August Mack asserts that "AME does not need to show that the obsolete form was the reason it did not apply before it performed the response actions." AME MFAO 51–52.

[17] *Pinchback v. Armistead Homes Corp.*, also cited by August Mack, applied the futile gestures doctrine in the context of a housing discrimination action and likewise required a showing that "the plaintiff was reliably informed of th[e] policy of discrimination and would have taken steps to buy the property but for the discrimination." 907 F.2d 1447, 1452 (4th Cir. 1990).

[18] At best, August Mack is left to assert a contradiction: On the one hand, that it was entitled to preauthorization; and on the other hand, that the published preauthorization regulations themselves so plainly barred its request as to have made plain to August Mack its application

August Mack goes on to argue that because the Agency's application form was obsolete, it need not argue that the form prevented August Mack's compliance. AME MFAO 52. Perhaps so, but as just stated, August Mack *was* required to show that *something* the Agency did prevented August Mack from submitting an application it would otherwise have supplied. August Mack's support for this argument is not to the contrary. August Mack cites to *Williams v. Giant Food Inc.*, for the proposition that "relaxation of the application element of the prima facie case is especially appropriate when the hiring process itself, rather than just the decision making behind the process, is implicated in the discrimination claim or is otherwise suspect." 370 F.3d 423, 431 (4th Cir. 2004) (quoting *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 349 (3d Cir. 1990)). *Williams*, also an employment discrimination case, is inapposite. The "suspect" practice referenced in the quote on which August Mack relies was not a ministerial deficiency like a failure to update an address, but an allegedly deliberate failure to make job announcements available to the plaintiff. *Id.* at 426, 432. And, as in *Teamsters*, the *Williams* court made clear that relief would not be available to the plaintiff if the evidence showed she would not have applied regardless of the postings' availability. *Id.* at 432.[19]

Because it is undisputed that August Mack did not attempt to comply with the preauthorization regulations, I find that August Mack did not substantially comply with those regulations and that an accelerated order is warranted to the Agency. However, for purposes of completeness, I will address the parties' remaining substantial compliance arguments.

b. Even if August Mack could substantially comply with the preauthorization requirements through its performance at the Site, it did not do so in this case.

August Mack maintains that the Agency's review and approval of the response plans for the Site, including the materials August Mack submitted as Vertellus's supervising contractor, serve as an appropriate substitute for the review and approval the Agency would have performed as part of the preauthorization process. AME MFAO 34–40. August Mack also argues that it substantially complied with the preauthorization process because by the time it began work on the Site, the Agency possessed information equivalent to that it would have received from August Mack through a preauthorization application. AME MFAO 65–67.

In turn, the Agency argues that August Mack cannot rely on its submissions for Vertellus or on the information contained in the BJS Consent Decree to show August Mack's own

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should be denied. Particularly as August Mack is now foreclosed from arguing that the regulations themselves are unlawful, such a contention would necessarily fail.

[19] *EEOC v. Metal Serv. Co.*, 892 F.2d 341 (3d Cir. 1990), the referenced quote's source, also does not support August Mack's position. In that case, the court found that the EEOC had made out a prima facie case of employment discrimination on behalf of two Black applicants "who were required to undergo a burdensome application process while white applicants were being hired for apparently unskilled jobs through word-of-mouth in an all white workforce." *Id.* at 351. That is, the charging parties' claim in *Metal Services* arose out of an allegedly discriminatory hiring process in which they had participated.

substantial compliance with the preauthorization requirements, because the enforcement settlement process is distinct from preauthorization and because the referenced submissions provided no notice to the Agency that August Mack (or any party) might eventually make a claim against the fund. EPA Renewed MFAO 29–33; EPA Renewed MFAO Reply 7–8. I agree with the Agency.

As previously stated, to fulfill the preauthorization regulations' purpose the Agency must have had an opportunity to evaluate August Mack's proposed use of the Fund against other uses. *Supra* Part V.F.1. August Mack does not meaningfully dispute the Agency's argument that the information it received in connection with August Mack's work for Vertellus gave the Agency no reason to know August Mack would someday make a claim against the Fund. To the contrary, the documentary evidence on which August Mack relies includes (1) the Consent Decree; (2) submissions that August Mack made on Vertellus's behalf that related to performance of work under the Consent decree, (3) Agency responses to those submissions reflecting the Agency's review for consistency with the Consent Decree, and (4) status reports and meeting minutes discussing progress towards completion of the Consent Decree's requirements. AME MFAO 66–67 (citing RX 322 (Consent Decree); RX 256, 258–267, 270–274 (Agency approvals of or comments on various submissions on behalf of Vertellus, reflecting Agency review for consistency with the Consent Decree); RX 257 (Agency acceptance of Vertellus's selection of August Mack as supervising contractor); AX 12 at 3–4 (2016 Declaration of Eric Newman, submitted on Agency's behalf in Vertellus's bankruptcy, reiterating the cost-of-work estimate from the Consent Decree's appended Action Memorandum); RX 275–277, 279–321 (progress reports submitted by Vertellus to the Agency and minutes of status meetings that included the Agency and August Mack).[20]

The Agency is correct that none of these materials would have given it any indication that August Mack or any other party planned to submit a claim against the Fund related to work on the Site. The Consent Decree specifically provides that "[n]othing in this Consent Decree shall be deemed to constitute 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)." RX 322 ¶ 77. This statement reflects the CERCLA regulations' admonition that "[u]nless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a . . . Consent Decree . . . requiring a response action do not constitute preauthorization to present a claim to the Fund." 40 C.F.R. § 307.22(j). The testimony of RPM Eric Newman on which August Mack also relies, AME MFAO 66–67, likewise gives no indication that the Agency anticipated August Mack's eventual claim against the fund. Instead, it is uncontested that Mr. Newman's role was limited to assessing the consistency of Vertellus's plans with the Consent Decree, and August Mack fails to controvert the Agency's evidence that Mr. Newman neither had nor believed he had the authority to grant preauthorization. EPA MFAO Ex. A ¶ 15; EPA MFAO Ex. C; *see supra* Parts VI.A, VI.C. In the absence of any notice to the Agency that a claim against the fund was forthcoming, an

[20] August Mack also references its 2016 request for reimbursement from ExxonMobil and CBS, AX 7, and a declaration prepared for purposes of this litigation, Aff. Glanders, neither of which could have given timely notice to the Agency of August Mack's anticipated claim against the Fund.

essential component of the preauthorization process could not be fulfilled and August Mack cannot be said to have achieved substantial compliance.[21]

In the alternative, and assuming the preauthorization regulations' notice requirement can be set aside, the Agency argues that August Mack cannot show that it substantially complied with the preauthorization process because the evidence in the record that relates to August Mack does not approximate the information or requirements developed through the preauthorization process. EPA Renewed MFAO 32–33; EPA MFAO Reply 6–7; EPA Resp. to AME MFAO 15.

The Agency claims that multiple pieces of "essential" information were not submitted to the Agency, specifically (1) information about August Mack's financial capabilities, § 307.22(b)(6), (f)(4); (2) proposed contracting procedures, § 307.22(b)(10); (3) projected costs for response activities, with the basis for those projections, § 307.22(b)(8); (4) assurances of timely initiation and completion of the actions proposed, § 307.22(b)(12); (5) documentation of reasonable effort to obtain cooperation from a state or Tribe, § 307.22(f)(3); or (6) a proposed schedule for submission of claims against the Fund, § 307.22(9). EPA Renewed MFAO 32–33; EPA Resp. to AME MFAO 15; EPA MFAO Reply 6–7. August Mack fails to point to evidence to fill at least three of these purported gaps.

First, August Mack admits that the Agency never received from August Mack "a proposed schedule for the submission of claims" against the Fund as required by 40 C.F.R. § 307.22(9). AME Resp. to EPA Renewed MFAO 18 & n.11.[22]

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[21] It is important here to note once again that, pursuant to the Consent Decree, ExxonMobil and CBS were obliged to pay for the cleanup conducted by Vertellus. Hr'g Req. ¶¶ 19–20; Answer ¶¶ 19–20. Further, the Consent Decree required Vertellus to contribute $11 million representing past response costs into a "special account" for the Site, to be used to conduct response activities at the Site. Hr'g Req. ¶ 35; Answer ¶ 35; RX 322 ¶¶ 40, 41. At no point had the Agency committed to pay Vertellus' costs of the cleanup out of the Fund. *See* RX 322 ¶¶ 41–42 (contemplating that in the event of EPA takeover of work at the Site, EPA would bill Vertellus for response costs). Thus, August Mack is attempting here to turn the government into a *guarantor* of all site cleanup costs, something it clearly never intended or agreed to be. If August Mack desired a guarantor it could have sought a (private) surety bond assuring it third party payment in the event of Vertellus' default. *See, e.g.*, *Sheet Metal Workers' Loc. Union No. 100 Washington, D.C. Area Pension Fund v. W. Sur. Co.*, 187 F. Supp. 3d 569, 577 (D. Md. 2016) ("A surety bond is a tripartite agreement among a principal obligor, his obligee, and a surety. It is a three party arrangement intended to provide personal security for the payment of a debt or performance of an obligation." (quotation marks and citation omitted)); *see also* RX 322 ¶¶ 29–30 (requiring Vertellus to establish performance guarantee for Agency's benefit).

[22] August Mack suggests this requirement was fulfilled by Vertellus's submission of claims against the Site-specific funds. AME Resp. to EPA Renewed MFAO 18. August Mack is wrong. As the Fourth Circuit confirmed, August Mack had no authority to step into Vertellus's shoes to access the Site-specific funds, which were established under a Consent Decree to which August Mack was not a party, *August Mack* 841 F. App'x 522 n.5, and in any event Vertellus neither attempted to nor could have placed claims against the Superfund.

Second, August Mack fails to dispute that the Agency had not received *August Mack's* "projected costs for response activities, with the basis for those projections." 40 C.F.R. § 307.22(b)(8). In response to this purported deficiency, August Mack points to the overall response cost projections incorporated into the Consent Decree. AME MFAO 67 (citing RX 322 (Consent Decree)); AME Resp. to EPA Renewed MFAO 18 (same).[23] This showing is deficient in three respects. First, both the Consent Decree itself and the Part 307 preauthorization regulations explicitly preclude use of the Consent Decree to demonstrate preauthorization. Second, the referenced cost projections relate to the entire cleanup at the Site and are not disaggregated in such a way that they could be assigned to August Mack. And third, August Mack has admitted that the Agency did not, at any point, review its costs associated with the site.[24] AME SOF ¶ 92.

And *third* August Mack fails to present evidence that the Agency received "[a] description of the applicant's capability (including *financial and technical* capability) to implement the proposed response action." 40 C.F.R. § 307.22(6) (emphasis added). While August Mack presents evidence that the Agency received information about August Mack's *technical* capabilities before the Agency accepted it as Vertellus's supervising contractor, August Mack points to no record evidence that the Agency possessed any information about its *financial* capability before start-of-work. *See* AME MFAO 67 (citing RX 257 (Agency letter accepting August Mack as Vertellus's supervising contractor); RX 330 at 23:9–24:2, 24:11–18, 24:25–25:9, 25:9–12, 68:9–15 (confirming Agency could have rejected August Mack as supervising contractor if it was not satisfied with August Mack's qualifications)); *see also* RX 322 ¶ 9 (describing requirements for selection of supervising contractor, requiring demonstration of compliance with ANSI/ASQC E-4-1994, "Specifications and Guidelines for Quality Systems for Environmental Data Collection and Environmental Technology Programs," but no demonstration of financial qualifications).

The Agency also observes that its review of August Mack's work on behalf of Vertellus did not approximate the results of the preauthorization process. Most saliently, the Agency notes that during the preauthorization process it requires applicants to adopt various audit procedures and other financial controls that ensure the requestor's ability to complete performance of the response, and that the Agency had no occasion to make the same requirements of August Mack. EPA Renewed MFAO 32 (citing AX 10, 11, 15, 18 (preauthorization decision documents, memorializing audit, procurement, competitive bidding, and accounting procedure requirements)). August Mack fails to present evidence to the contrary.

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[23] August Mack also references a 2016 Declaration Mr. Newman submitted in Vertellus's bankruptcy, AX 12 at 3-4, and testimony from Mr. Newman's 2022 deposition estimating the cost of outstanding cleanup work, RX 330 at 110:2-11, neither of which relate specifically to August Mack's projected costs and neither of which was in the Agency's possession before August Mack began work on the Site.

[24] August Mack also relies solely on the Consent Decree to demonstrate its compliance with the regulations' requirements to submit proposed contracting procedures, § 307.22(b)(10), or documentation of reasonable effort to obtain cooperation from a state or Tribe, § 307.22(f)(3).

The question becomes whether August Mack can be said to have substantially complied with the preauthorization process despite these gaps. I find that it cannot. In other circumstances, the Agency's "acceptance" of August Mack as Vertellus's supervising contractor might be construed as the substantial equivalent of an Agency decision that a preauthorization applicant was qualified to complete work at the Site, obviating the need for information related to August Mack's financials. Indeed, the preauthorization decision documents that the Agency has provided reflect advance review only of applicants' *technical* expertise. *See, e.g.*, AX 10 at 2 (finding preauthorization applicant party had demonstrated engineering expertise, with no corresponding finding related to financial capacity). However, nothing in the record demonstrates that August Mack was subject to anything approximating the financial guardrails that the Agency requires preauthorization applicants to put in place. Thus, as to August Mack, the Agency was left with nothing to serve as the equivalent of the financial assurances generated by the preauthorization process. Similarly, the Consent Decree's incorporated cost estimates for the Site cleanup are materially distinct from a showing of the expected amount and timing of August Mack's anticipated claims against the Fund. A blunt statement that the Agency may expect a claim for some part of roughly $27 million at an undisclosed point in the future does not equate to a specified claim amount to be distributed along an established schedule—particularly when that estimated amount is encompassed by a Consent Decree that clearly proclaims "nothing" within it "shall be deemed to constitute preauthorization." RX 322 ¶ 77. In sum, considering the unrefuted deficiencies the Agency has identified, the information available to the Agency cannot "in reality, be considered the equivalent of compliance" with a preauthorization application. *August Mack*, 841 F. App'x at 522.

To succeed in demonstrating substantial compliance with the preauthorization regulations, August Mack must show that it did all that could reasonably be expected of it to comply with those regulations. August Mack's undisputed failure to attempt to obtain preauthorization before beginning work at the Site means that August Mack did not rise to this reasonable expectation. Further, assuming *arguendo* that a claimant can satisfy the preauthorization regulations' requirements without attempting to seek preauthorization, August Mack has failed to put forward evidence that the Agency possessed information that could "be considered the equivalent of compliance" with the preauthorization regulations' requirements before work began on the Site, or that the Agency's review of August Mack's work was tantamount to preauthorization. Because August Mack has failed to bring forward evidence sufficient to show its substantial compliance with the preauthorization regulations, an accelerated order is warranted to the Agency.[25]

VI. Conclusion

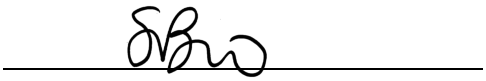
For the foregoing reasons, August Mack's Motions to Submit are **GRANTED**, its Motion for Remote Hearing is **DENIED**, and its Motion to Strike is **GRANTED in part** and **DENIED**

[25] Having found that August Mack has failed to rebut the Agency's arguments that August Mack lacks evidence sufficient to demonstrate its substantial compliance with the preauthorization regulations, I do not address the Agency's alternative argument that August Mack cannot succeed on its claim without having obtained a Preauthorization Decision Document.

in part. In addition, the Agency's renewed motion for accelerated order is **GRANTED** and August Mack's motion for accelerated order is **DENIED**.

No award is granted to August Mack. This Order constitutes the Tribunal's final order in this proceeding and is the final administrative decision of the Agency. Within **30 days** of notification of this decision, this Order may be appealed to the Federal district court for the district within which the Site is located. *See* 42 U.S.C. § 9612(b)(5); 40 C.F.R. §§ 305.3(a), 305.27(b), 305.36(a).

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: March 20, 2023
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Cross-Motions for Accelerated Order and Related Motions**, dated March 20, 2023, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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Paralegal Specialist

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Dated: March 20, 2023
Washington, D.C.