



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

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

**ORDER ON EPA’S MOTION IN LIMINE
TO EXCLUDE EVIDENCE AND TESTIMONY**

In this proceeding, Requestor August Mack Environmental, Inc. (“August Mack” or “AME”) seeks reimbursement under the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) for its cleanup work at the Big John’s Salvage–Hoult Road Superfund Site (“Site”). This matter is currently before me on remand from the U.S. Court of Appeals for the Fourth Circuit to determine whether August Mack “substantially complied with the preauthorization process” for submitting a Superfund claim pursuant to 40 C.F.R. Part 307.

On September 8, 2021, I issued an Order of Redesignation and Prehearing Order (“Prehearing Order”) that set forth various deadlines for the prehearing exchange process, discovery, and the filing of dispositive motions. In accordance with the Prehearing Order, August Mack submitted its initial prehearing exchange on October 22, 2021 and a rebuttal prehearing exchange on November 29, 2021. Its initial prehearing exchange included 322 proposed exhibits—RX 1 through RX 322—and its rebuttal prehearing exchange contained six additional exhibits—RX 323 through RX 328. The initial prehearing exchange also names seven proposed witnesses plus an unidentified number of unnamed witnesses. The rebuttal prehearing exchange names five additional proposed witnesses.

On January 28, 2022, the U.S. Environmental Protection Agency Region III (“Agency” or EPA”) filed a Motion in Limine to Exclude Evidence and Testimony (“Motion”) from an evidentiary hearing in this matter. Specifically, the Agency seeks to exclude all but one of August Mack’s proposed exhibits and testimony from all of the potential witnesses identified in August Mack’s initial prehearing exchange. August Mack submitted a response brief (“Response”) on February 21, 2022 objecting to the Motion, and the Agency filed a reply brief on March 2, 2022.

In its Motion, the Agency argues that August Mack’s “list of potential exhibits and testimony . . . is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value.” Mot. at 1. In particular, the Agency contends that August Mack’s exhibits RX 2 through RX 328 are irrelevant to whether August Mack substantially complied with the preauthorization

process because they all relate to the Consent Decree that governs cleanup at the Site, August Mack is not a party to that document, and the Fourth Circuit did not specifically overturn the district court's ruling that work under the Consent Decree cannot constitute preauthorization. Mot. at 3-4. Similarly, the Agency alleges that August Mack's witnesses will all testify regarding work that August Mack performed pursuant to the Consent Decree, so their testimony is not relevant to whether August Mack substantially complied with the preauthorization process. Mot. at 5-7.

In response, August Mack argues that the Fourth Circuit ruled that "a party substantially complies with the preauthorization process when it satisfies the stated purposes of that process." Response at 6-7, 16-21. According to August Mack, its proposed evidence "establishes that it did satisfy those purposes here," and its compliance with the Consent Decree is necessary to show that it met certain regulatory requirements to receive reimbursement from the Superfund. Response at 10-12. August Mack also asserts that the Motion is premature, lacks specificity and sufficiently developed arguments, and improperly includes substantive merit arguments. Response at 8-10, 12-16.

Under the rules governing this proceeding, at a hearing I "shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, or otherwise unreliable or of little probative value[.]" 40 C.F.R. § 305.31(a). Motions in limine to exclude evidence are generally disfavored and "should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose. . . . If evidence is not clearly inadmissible, evidentiary rulings may be deferred until trial so questions of foundation, relevancy, and prejudice may be resolved in context." *Taotao USA, Inc.*, EPA Docket No. CAA-HQ-2015-8065, 2017 WL 6373571, *1 (ALJ, Sept. 19, 2017) (Order on Agency's Motion in Limine) (quoting *Zaclon, Inc.*, EPA Docket No. RCRA-05-2004-0019, 2006 WL 3406357, *4 (ALJ, April 24, 2006) (Order on Respondent's Motion in Limine)).¹

I agree with August Mack that the Agency's Motion is premature. Limited additional discovery has been authorized,² the time for filing and briefing dispositive motions has not yet expired, and no hearing has been scheduled. See *Nicor Gas*, EPA Docket No. TSCA-HQ-2015-5017, 2016 WL 7035583, *2 (ALJ, Nov. 22, 2016) (Order on Complainant's Motion in Limine) (denying motion because it was premature). I cannot currently determine whether August Mack's evidence is "clearly inadmissible for any purpose." It is possible the issues in this matter may be narrowed or refocused by further prehearing litigation. It is better to defer these evidentiary rulings, particularly given the breadth of the Agency's request, until closer to or during the hearing when there will be greater context within which to consider questions of relevancy and prejudice.

Accordingly, the Agency's Motion is **DENIED without prejudice**.

¹ It is appropriate to rely on this Tribunal's caselaw addressing motions in limine in the context of administrative enforcement proceedings under 40 C.F.R. Part 22, because the applicable rule in those proceedings, § 22.22(a)(1), is nearly identical to the language of § 305.31(a).

² See Order on Requestor's Motion to Compel Discovery and for Sanctions (May 12, 2022).

SO ORDERED.

A handwritten signature in black ink, appearing to read 'S. Biro', positioned above a horizontal line.

Susan L. Biro
Chief Administrative Law Judge

Dated: May 12, 2022
Washington, D.C.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on EPA's Motion in Limine to Exclude Evidence and Testimony**, dated May 12, 2022, 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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Dated: May 12, 2022
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