UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

REQUESTOR'S RESPONSE TO EPA'S MOTION IN LIMINE

Introductory Statement

In its motion in limine, EPA seeks to bar August Mack Environmental, Inc. ("AME") from presenting any evidence or calling any witnesses in support of its claim for reimbursement. Indeed, EPA seeks to exclude all but one of AME's 328 exhibits and all of AME's witnesses. (Mot. in Limine, pp. 3-8.) However, EPA's efforts to silence AME contradict the decision from the United States Court of Appeals for the Fourth Circuit remanding this case, *August Mack Environmental, Inc. v. United States Environmental Protection Agency*, 841 F. App'x 517, 524-525 (4th Cir. 2021), and otherwise fail to satisfy the requirements necessary for an appropriate motion in limine.

First, EPA's motion ignores the Fourth Circuit's Order. EPA argues that vacated decisions from the district court and Tribunal are controlling law. (Mot. in Limine, p. 4) ("The District Court ruling cited above remains the standing law of the case[.]"); *see also* (Mot. in Opp., p. 22) ("*[I]t is well settled by this Court that AME could not possibly have complied with the substantial or essential requirement to seek preauthorization by filing the*

equivalent of the application form, or otherwise." (emphasis in original)). But EPA is plainly mistaken. By vacating the orders of the district court and this Tribunal, the Fourth Circuit rendered those past orders ineffective. Anything but a full denial of EPA's motion would be at odds with the Fourth Circuit's remand to allow discovery and an administrative hearing as to whether AME substantially complied with the preauthorization process and is entitled to reimbursement and would constitute reversible error. *August Mack Environmental, Inc.*, 841 F. App'x at 524-525.

Seeking to avoid such an evidentiary inquiry, EPA contends that AME needed to submit the functional equivalent of the agency's obsolete preauthorization application, that AME's failure to do so means that AME did not substantially comply with the agency's preauthorization scheme, and AME's exhibits and anticipated witness testimony are therefore irrelevant. (Mot. in Limine, pp. 2-3.) These arguments are misplaced both procedurally and substantively.

From a procedural perspective, a motion in limine is an improper vehicle for EPA's substantive merits arguments. *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561-563 (6th Cir. 2013) (noting numerous cases coming to this conclusion). EPA's own cited caselaw recognizes that "[m]otions *in limine* are generally disfavored." *In the Matter of Martex Farms, Inc.*, 2005 EPA ALJ LEXIS 51 at *2 (Sept. 27, 2005). By seeking to exclude all of AME's witnesses and all but one of AME's exhibits, EPA's motion in limine is, in essence, a dispositive motion. Yet, EPA has already filed a dispositive motion, in the form of a

motion for accelerated decision, and its filing of what is effectively a second dispositive motion under the guise of a motion in limine is improper.

Substantively, AME's exhibits and anticipated witness testimony are relevant and admissible. AME's evidence will establish that its response actions were consistent with the NCP, its costs were reasonable and necessary, and therefore AME should receive a complete reimbursement of its costs from the Fund. 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a). AME will make this showing because AME's exhibits demonstrate that EPA pre-approved AME's work and that AME's work was performed pursuant to the Consent Decree ("CD"), which thereby makes the response actions consistent with the NCP. (RX 002-328; *see also* AX 7, pp. 1-94.) In fact, the CD, signed by EPA, unambiguously provides that "activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." (RX 322, p. 16) Thus, EPA's request to exclude exhibits and witness testimony that will conclusively establish that EPA approved AME's activities and that those activities were conducted pursuant to the CD should be denied. To do otherwise would ignore the Fourth Circuit's directive to the lower courts on remand. *August Mack*, 841 Fed.App'x at 525.

Moreover, throughout its motion, EPA presents undeveloped and unsupported arguments that fail to meet its high burden. This includes EPA's passing conclusion that AME's president and principal hydrogeologist, Geoffrey Glanders, is not a qualified expert. (Mot. in Limine, p. 5.) Mr. Glanders' CV and the heavy reliance of EPA's new

contractor for the BJS Site, Tetra Tech, on AME's prior work show that Mr. Glanders has the requisite expertise to testify as an expert in this matter. (AME Initial Prehr'g. Exch., p. 25; RX 328.) Similarly, EPA's self-serving and conclusory statement that TechLaw, an oversight consultant EPA used to review AME's work, and Tetra Tech lack sufficient personal knowledge to testify is refuted by the very evidence EPA seeks to exclude. (Mot. in Limine, p. 8; RX 328.)

Finally, EPA's assertions regarding the irrelevance of all of AME's exhibits and anticipated witness testimony are directly at odds with its prior filings. For instance, in its present motion, EPA tells the Tribunal that EPA's own fact witness, Eric Newman the agency's project manager for the Site, was only listed on its prehearing exchange as a rebuttal witness. (*Id.*) But EPA's statement is false as it plainly listed him as a direct witness. (EPA Initial Prehr'g. Exch., pp. 1-2.) Perhaps more telling, EPA told the Tribunal in its prehearing exchange that Mr. Newman may be called to testify regarding the very exhibits that EPA now contends are irrelevant, including Mr. Newman's correspondence and interactions with AME and his review and approval of AME's work. (*Id.* at 2.) The inherent contradiction between EPA's two filings cannot be reconciled and further supports denying the motion in limine.

At bottom, EPA's motion in limine is yet another attempt to deprive AME of the opportunity for meaningful review the Fourth Circuit commanded this body to perform. Accordingly, AME respectfully requests that the motion in limine be denied.

Legal Standard

"A motion in limine to exclude evidence ... should be granted only when the evidence is clearly inadmissible on all potential grounds." *Emami v. Bolden*, 241 F.Supp.3d 673, 681 (E.D. Va. 2017) (citations omitted). Relevant evidence is typically admissible. *Id.* (citing Fed. R. Evid. 402). Evidence is relevant if it has any tendency to make a fact of consequence more or less probable. *Id.* (citing Fed. R. Evid. 401). Relevant evidence may be excluded if "'if its probative value is substantially outweighed' by the risk of unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or unnecessarily presenting cumulative evidence." *Id.* (quoting Fed. R. Evid. 403).

Argument

1. ***EPA's contentions conflict with the Fourth Circuit's Order.***

EPA has made apparent in its filings, including the motion in limine, that the foundation of its arguments on remand is that the vacated decisions of this Tribunal and the district court "remain[] the standing law of the case[.]"(Mot. in Limine, p. 4.); *see also id.* ("Applying AME's substantial compliance argument, the District Court correctly ruled . . . ."). By relying upon these vacated decisions, EPA once again asks the Tribunal to commit reversible error. "A vacated decision has no effect whatever." *Musnick v. King Motor Co. of Fort Lauderdale*, 325 F.3d 1255, 1257 n.1 (11th Cir. 2003); *Cash In Advance of*

Florida, Inc. v. Jolley, 612 S.E.2d 101, 103 (Ga. Ct. App. 2005) (noting vacated opinion "has no precedential value"). EPA's invitation to follow those vacated decisions is improper.[1]

Moreover, at least three of the arguments EPA presents in its motion in limine conflict with the Fourth Circuit's Order. First, EPA contends that substantial compliance means "submitting *the equivalent of* an application for preauthorization" by providing EPA with all of the information listed at 40 C.F.R. § 307.22(b). (Mot. in Limine, p. 2.) This contradicts the Fourth Circuit's clear instruction that "August Mack could not be required to seek preauthorization in the manner specified by the EPA[.]" *August Mack*, 841 Fed. App'x at 524. The Fourth Circuit noted further that AME did not seek preauthorization "by using EPA Form 2075-3 ***or otherwise***." *Id.* at 522 (emphasis added). If AME needed to seek preauthorization by submitting the functional equivalent of EPA's obsolete form (i.e., "otherwise" seeking preauthorization), the Fourth Circuit would have affirmed the decisions of the Tribunal and district court, but it did not do so. Instead, those decisions were vacated, are not good law, and cannot be relied on here to deny AME meaningful administrative review. Logically, then, substantial compliance with the preauthorization process cannot mean submitting the functional equivalent of a legally obsolete

[1] Examples of instances where courts have disapproved of, sanctioned, or admonished parties for citing vacated decisions include the following: *U.S. v. Sigma Intern., Inc.*, 300 F.3d 1278, 1280 (11th Cir. 2002); *Northwest Resource Information Center, Inc. v. Northwest Power Planning Council*, 35 F.3d 1371, 1385-1386 (9th Cir. 1994); *Kawitt v. U.S.*, 842 F.2d 951, 954 (7th Cir. 1988); *Buckler v. Rader*, 56 F.Supp.3d 1371, 1376 (N.D. Ga. 2014); *Franklin Sav. Corp. v. U.S.*, 56 Fed.Cl. 720, 734 n.18 (Fed. Cl. 2003); *Indiana Family & Social Servs. Admin. v. Ace Foster Care and Pediatric Home Nursing Agency Corp.*, 823 N.E.2d 1199, 1204 n.5 (Ind. Ct. App. 2005).

application. Rather, a party substantially complies with the preauthorization process when it satisfies the stated purposes of that process, and AME's evidence establishes that it did satisfy those purposes here. (AME Rebuttal Brief, pp. 9-11.)

Second, EPA mischaracterizes the Fourth Circuit's Order, stating, "The Fourth Circuit determined that Form 2075-3 is obsolete, but that AME nonetheless needed to have substantially complied with the requirement to apply for preauthorization." (Mot. in Limine, p. 2.) EPA provides no citation to support its incorrect and illogical statement. As discussed above, AME only had to substantially comply with the purposes of the "preauthorization process" and "could not be required to seek preauthorization in the manner specified by the EPA[.]" *August Mack*, 841 F. App'x at 524.

Finally, EPA claims that issues of compliance with the NCP and necessary response costs are irrelevant to this action and outside the scope of remand. Specifically, EPA cites to this Tribunal's vacated order and argues that "even if, *arguendo*, AME can prove it complied with the NCP and that the costs incurred are 'necessary costs', these elements are irrelevant to the issue on remand." (Mot. in Limine, p. 5); *see also id.* at p. 6 ("[A]djudication of the final two prerequisites (pertaining to NCP compliance) are not relevant or ripe for review.") Rather than returning to this Tribunal's vacated order, the Court must look to the actual language of the Fourth Circuit Order:

> Our decision today, however, *does not mean that August Mack is necessarily entitled to recover on its claim for response costs*. No discovery was conducted, and whether 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 and any Superfund reimbursement that might be awarded*.

August Mack, 841 F. App'x at 524-525 (emphasis added).

The Fourth Circuit plainly put the amount of AME's Superfund reimbursement at issue on remand. And to be reimbursed from the Fund, a response action must be consistent with the NCP and the costs must be necessary. 40 C.F.R. § 307.21(b)(3)-(4). Thus, evidence relating to response costs and compliance with the NCP are relevant and within the scope of the remand.[2]

2. *The motion in limine is premature and lacks required specificity.*

In addition to conflicting with the Fourth Circuit's Order, EPA's motion in limine is procedurally and substantively defective as it is premature and lacks the necessary specificity. Motions in limine must address specific evidence to be ripe for resolution. *Hart v. RCI Hospitality Holdings, Inc.*, 90 F.Supp.3d 250, 266 (S.D.N.Y. 2015) ("Plaintiffs' motion is framed at a conceptual level and does not appear to be addressed to specific evidence. This motion does not present a crystallized dispute ripe for resolution.");

[2] EPA has not presented any evidence to disprove these two elements. In fact, these elements are plainly established in the documents previously exchanged and are commanded by the very language of the CD, EPA's own regulations, and controlling caselaw. *See* (RX 322, p. 16); 40 C.F.R. § 300.700(c)(3)(ii); *United States v. Kramer*, 644 F.Supp.2d 479, 490 (D.N.J. 2008) (noting that there is an "irrebuttable presumption of consistency with the NCP" when a response action is carried out in compliance with the terms of a consent decree and providing multiple cases in support). Thus, EPA's relevance and ripeness arguments are little more than a plea for this Tribunal to ignore the weakness in its continued opposition to reimbursement.

Bygum v. City of Montgomery, 2021 WL 4487610 at *6 (S.D. W. Va. Sept. 30, 2021) (denying motion in limine as premature when the movant did not identify a specific item of evidence that was allegedly inadmissible). None of the witnesses that EPA seeks to exclude have been deposed. Because there is no actual testimony that EPA seeks to exclude, the motion in limine is premature and should be denied. Indeed, "it 'is almost always better'" to wait until "the actual trial to assess the value and utility of evidence[.]" *Bygum*, 2021 WL 4487610 at *6.[3]

3. *EPA's motion in limine improperly relies on substantive merits arguments.*

A motion in limine that relies on substantive merits arguments is appropriately denied. In fact, "[w]here . . . the motion in limine is no more than a rephrased summary-judgment motion, the motion should not be considered." *Louzon v. Ford Motor Co.*, 718 F.3d 556, 561-563 (6th Cir. 2013) (collecting authority that infusing substantive merits arguments with evidentiary contentions is improper).

Here, EPA's motion in limine regurgitates arguments from its dispositive motions. (Mot. in Limine, pp. 3-4 ("As explained at length in EPA's dispositive briefs . . . .")). EPA bases its contention that evidence relating to NCP compliance and response costs are irrelevant on its merits argument that AME did not substantially comply with the

[3] Additionally, the testimony of the individuals who are not representatives of AME is reasonably calculated to lead to the discovery of admissible evidence. Concluding that these individuals' testimony is irrelevant before they are deposed would improperly deprive AME of the ability to discover other relevant evidence not currently in its possession.

preauthorization process. According to EPA, "because AME did not meet the first two prerequisites set forth in 40 C.F.R. § 307.21(b) pertaining to preauthorization, adjudication of the final two prerequisites (pertaining to NCP compliance) are not relevant or ripe for review." (Mot. in Limine, p. 6) (citing ALJ Order on Mot. Dismiss, p. 7.)

EPA's relevance claims can only be accepted if the Tribunal accepts EPA's substantive merits argument. This is a merits question, not an evidentiary issue. AME disputes EPA's characterization of the substantial compliance standard. Accordingly, no further consideration needs to be given to the EPA's motion before denying it. Nevertheless, AME will specifically address EPA's other arguments below.

4. ***Compliance with the Consent Decree and EPA directives are relevant.***

As discussed previously, the Fourth Circuit explicitly made the amount of Superfund reimbursement to AME an issue on remand, and EPA does not meet its burden to show that AME's exhibits and anticipated testimony are "clearly inadmissible" on this issue. *Emami v. Bolden*, 241 F.Supp.3d 673, 681 (E.D. Va. 2017) (citations omitted).

Moreover, AME's compliance with the CD, EPA's pre-approval of AME's work, AME's compliance with EPA directives, and AME's work and communications with EPA regarding the BJS Site are unquestionably relevant to this issue. For AME to receive a reimbursement from the Fund, the response action must be consistent with the NCP and the costs incurred must be necessary costs. 40 C.F.R. § 307.21(b)(2)-(3). And the CD, which EPA signed, unambiguously provides that EPA-approved activities that are performed

pursuant to the CD are consistent with the NCP: "The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." (RX 322, p. 16.) *See also* 40 C.F.R. § 300.700(c)(3)(ii).

Here, exhibits RX 002-328, which EPA contends are unduly repetitious, irrelevant, immaterial and not probative, establish that AME's response actions were (1) approved by EPA, (2) performed pursuant to the CD, and therefore (3) "shall be considered to be consistent with the NCP." (*Id.*) Moreover, when read in conjunction with AME's invoices (AX 7, pp. 1-94), these exhibits demonstrate that AME's costs are necessary costs. 40 C.F.R. § 307.21(b)(4); 40 C.F.R. § 307.11. Thus, AME's exhibits prove that (a) AME's response actions were consistent with the NCP, (b) AME's incurred costs are necessary costs, and therefore (c) AME is entitled to 100% reimbursement of its costs from the Fund. 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a) ("The President shall use the money in the Fund for the following purposes: . . . Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan . . . ."). Accordingly, AME's evidence is much more than evidence that has "any tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence." Fed. R. Evid. 401. It actually proves AME's case in chief.

EPA recognizes the importance of response actions being consistent with the NCP and costs being necessary as it calls them "elements" and "prerequisites" in its motion. (Mot. in Limine, pp. 5-6.) Nonetheless, to combat what EPA implicitly recognizes as true

(AME's evidence is relevant to these "elements" and "prerequisites" of a Superfund reimbursement), EPA makes the unsupported claim that compliance with the NCP and necessity of costs "are not relevant or ripe for review" since "AME did not meet the first two prerequisites set forth in 40 C.F.R. § 307.21(b) pertaining to preauthorization[.]" (*Id.* at 6) (citing ALJ Order on Mot. to Dismiss, p. 7.) EPA provides no support for its lack of ripeness claim. Ultimately, this is an improper merits argument and a direct attack on the Fourth Circuit's Order regarding the issues on remand. EPA could have appealed the Fourth Circuit's Order, but it did not. EPA's attacks on the Order, which are based on its fundamentally flawed position that vacated orders are controlling, should be summarily rejected.

5. ***EPA fails to provide supported or developed arguments.***

EPA's motion in limine is also appropriately denied because it relies on unsupported and undeveloped arguments. *Campania Mgmt. Co., Inc. v. Rooks, Pitts & Poust*, 290 F.3d 843, 852 n.6 (7th Cir. 2002) ("Perfunctory and undeveloped arguments are waived . . . .'") (citation omitted); *Burnell v. State*, 110 N.E.3d 1167, 1171 (Ind. Ct. App. 2018) (quoting *Keller v. State*, 549 N.E.2d 372, 373 (Ind. 1990) (warning that "a court which must search the record and make up its own arguments because a party has presented them in perfunctory form runs the risk of being an advocate rather than an adjudicator.").

In particular, EPA provides no support for its claim that Geoffrey Glanders is not a qualified expert. (Mot. in Limine, p. 5.) Contrary to EPA's bald conclusion, Mr. Glanders

is highly qualified and should be allowed to testify as an expert in this matter. AME filed Mr. Glanders' CV, listing his significant experience and qualifications, with its Initial Prehearing Exchange. (AME Initial Prehr'g Exch., p. 25.) First, he is the president and principal hydrogeologist of AME and has held those positions for more than 30 years since 1988. (*Id.*) EPA thought highly enough of AME to approve it as the Supervising Contractor for removal actions undertaken pursuant to the CD. (RX 257.) It then recognized the exceptional nature of AME's work by authorizing and approving AME's investigation and design work. (RX 256, RX 258-267.) In fact, EPA's new contractor for the BJS Site, Tetra Tech, has relied extensively on the work AME performed. The quotations below are taken from Tetra Tech's reports:

- "The existing data from the Site includes the results from a series of studies conducted by . . . August Mack . . . Data from these efforts, when applicable, will be used to support the [removal design] process for the Site." (RX 328, p. 23.)

- "It should be noted that the most current understanding of the extent of contamination in the river (based on the result present in the 2016 August Mack Trip Report) . . . ." (*Id.* at p. 35.); *see also* pp. 355, 515 (same).

- "This evaluation included the review of . . . previous available reports prepared by August Mack . . . The data and information gathered were used for the planning of the field assessment and will be used for engineering analyses and designs, as required." (*Id.* at p. 51.)

- "Tetra Tech will utilize existing draft Intermediate Design (August Mack, 2016b) . . . ." (*Id.* at p. 56.)

- "Information and data . . . presented in August Mack's 2016 Intermediate Design will serve as the bases for Tetra Tech's efforts." (*Id.* at p. 94.); *see also* pp. 104, 176 (same).

- "The POTW has accurate sewer location information on the west bank of the river, which was surveyed by August Mack." (*Id.* at p. 177.)

- Data gathered by August Mack "will be used to support the conceptual site model (CSM) and remedial design." (*Id.* at p. 535.)

- "The Contractor shall utilize the following documents . . . to aid in the preparation of pre-design investigation work plans . . . August Mack Environmental, Inc. 2016 *Field Sampling Plan* . . . August Mack Environmental, Inc. 2016. *Quality Assurance Project Plan* . . . ." (*Id.* at 615.)

- "The Contractor shall utilize the following document . . . to aid in the preparation of the Final Design Report . . . August Mack Environmental, Inc., 2016. *Draft Intermediate (60%) Design Report* . . . ." (*Id.* at 626-627.)

- "The Contractor shall utilize . . . the Draft Intermediate (60%) Design Report (August Mack Environmental, Inc. 2016) . . . as a starting point to generate the Draft Intermediate (60%) Design Report tasked under this SOW." (*Id.* at 627).

Under these facts, EPA's unsupported attack on the qualifications of AME's president is absolutely unfounded.[4]

In addition, Mr. Glanders "specializes in the evaluation, regulatory negotiation, and implementation of practical, alternative strategies to address environmental remediation and compliance issues" and "has more than 30 years of experience regarding subsurface investigation and remediation . . . ." (AME Initial Prehr'g. Exch., p. 25.) He has

[4] EPA and Tetra Tech's use and reliance on AME's work, which saved the government time and money, further demonstrates the unjust and inequitable nature of EPA's refusal to reimburse AME from the Fund. Despite amassing over $37 million in site specific funding to address the contamination at the BJS Site that could be used to pay AME's claim of approximately $3 million in response costs, EPA has simply denied reimbursement in contradiction of the intent and purpose of Superfund. (RX 001, pp. 1-8.) The Tribunal can (and should) cure this injustice by awarding AME reimbursement from the Fund.

also assessed more than 1,000 contaminated sites, investigated hundreds of sites to determine the scope of contamination, and designed and implemented remedial measures for contaminated property. (*Id.*) Thus, Mr. Glanders is qualified to testify as an expert witness regarding AME's compliance with the NCP. EPA's groundless attack on the qualifications of AME and its president should be disregarded.

As with Mr. Glanders, EPA presents an undeveloped and unsupported claim that unknown testimony of TechLaw, Inc. employees, including those listed in AME's Rebuttal Prehearing Exchange, is privileged and excludable under Federal Rule of Evidence 602. (Mot. in Limine, pp. 7-8.) Specifically, EPA concludes that the anticipated testimony regarding "their relationship with EPA" is subject to the deliberative process privilege. (Mot. in Limine, p. 7.) EPA provides no citation or support for this claim of privilege, so it must be rejected. *See generally RLI Ins. Co. v. Conseco, Inc.*, 477 F.Supp.2d 741, 748 (E.D. Va. 2007) ("in order to meet this burden, the proponent of the privilege must 'come forward with a specific demonstration of facts supporting the requested protection,' preferably though affidavits from knowledgeable persons.") (citation omitted). EPA similarly presents a bald conclusion that the unknown testimony "would be inadmissible under Fed. R. Evid. 602 because these individuals lack 'personal knowledge of the matter' before this Court." (Mot. in Limine, p. 8.) However, TechLaw is an oversight consultant that EPA used at the BJS Site. (AME Prehr'g. Exch., p. 3; RX 328, p. 36 ("In November 2015, USEPA contracted TechLaw . . . .")) It is AME's current

understanding that TechLaw's representatives, including, but not limited to, Joe Carter, reviewed AME's work and made recommendations regarding the work at the BJS Site. EPA has not met its burden of demonstrating that TechLaw representatives lack personal knowledge of AME's work or the work performed at the BJS Site.

Also, although EPA lumps TechLaw and Tetra Tech, Inc., distinct entities, into one, the representatives of Tetra Tech, including, but not limited to, those listed on AME's supplemental witness list, have personal knowledge of relevant matters. (AME's Rebuttal Prehr'g. Exch, p. 1.) Tetra Tech names these individuals as the independent technical reviewers and the program/task order manager in the Removal Design Work Plan. (RX. 328, pp. 140, 1748, 1764, 1767-1824.) Given Tetra Tech's aforementioned reliance on AME's work, representatives of Tetra Tech clearly have personal knowledge of AME's NCP-compliant and necessary work. EPA's conclusory statements contained throughout its motion in limine come nowhere close to satisfying its hefty burden.

6. ***AME's witnesses and exhibits are relevant to AME complying with the purposes of EPA's preauthorization scheme, which establishes substantial compliance.***

As discussed previously, AME will have substantially complied with the preauthorization process if it satisfied the essential purposes of preauthorization. (AME Rebuttal Brief, pp. 9-11.) The purposes of preauthorization are "(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 Fed.App'x. at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)).

Geoffrey Glanders, Joel Ruselink, Andrew Tennyson, and Bryan Petriko will testify as fact witnesses regarding the agency-approved remedial work AME performed at the Site. (AME Initial Prehr'g Exch., pp. 5-6.) Their anticipated testimony and AME's exhibits will establish that AME satisfied the purposes of preauthorization and therefore substantially complied with EPA's preauthorization scheme. They will further show that AME's response actions were NCP compliant and the costs incurred were necessary costs. 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16. This evidence is relevant and admissible. As a result, EPA has not satisfied its burden of showing that AME's evidence is "clearly inadmissible on all potential grounds." *Emami v. Bolden*, 241 F.Supp.3d 673, 681 (E.D. Va. 2017) (citations omitted).

After moving to exclude the anticipated testimony of AME's representatives, EPA takes the highly unusual tactic of moving to exclude its own witness, Eric Newman. (Mot. in Limine, pp. 6-7.) Mr. Newman was, and is, EPA's Remedial Project Manager for the BJS Site. In support, EPA says Mr. Newman was only "listed by EPA as a rebuttal witness, as may be necessary" and because of this, "requests that his testimony *on behalf of AME* be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above." (*Id.* at 7.) EPA's statements are misleading on many levels. First, EPA's claim

that Mr. Newman was only listed as a rebuttal witness is inconsistent with its Initial Prehearing Exchange. There, EPA clearly designated him as more than just a rebuttal witness:

> 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 Prehr'g. Exch., p. 2 (emphasis supplied).)[5]

Second, the above shows that EPA seeks to prevent AME from introducing evidence as to matters in which it intends to have Mr. Newman testify. Specifically, EPA posits that the evidence AME seeks to introduce regarding EPA's approval of AME's

[5] In addition to EPA explicitly listing Mr. Newman as a direct witness on page 2 of its Initial Prehearing Exchange, it reserved the right to call Mr. Newman as a direct witness on page 1 of its Initial Prehearing Exchange: "EPA reserves the right to present the testimony of any witness identified herein as part of EPA's direct case or in rebuttal. Finally, EPA reserves the right to call as witnesses in EPA's direct case or in rebuttal any witness identified in Requestor's Prehearing Exchange as filed or supplemented." (EPA Initial Prehr'g. Exch., p. 1.)

work, the work being performed pursuant to the NCP, the consistency of the work with the NCP, and the necessity of the costs is irrelevant but EPA's evidence on these same issues is relevant. *Compare* Mot. in Limine, pp. 3-8 *with* EPA Initial Prehr'g. Exch., p. 2. In fact, EPA believes that Mr. Newman's "receipt, review, and approval/disapproval of pre-design field investigations and preliminary design documents . . . submitted by the contractor AME" is relevant and admissible when offered by EPA, but if AME offers that very same evidence, it somehow becomes "not relevant, material, or probative[.]" *Compare* Mot. in Limine, p. 3 *with* EPA Initial Prehr'g. Exch., p. 2. Likewise, EPA believes a so-called "Disapproval Letter" from EPA to AME is relevant to this matter but now claims that the numerous approval letters from EPA to AME are irrelevant. *Compare* Mot. in Limine, pp. 3-8 *with* EPA Initial Prehr'g. Exch., p. 3.

Simply put, EPA's motion in limine arguments cannot be reconciled with its Initial Prehearing Exchange. The Tribunal need only look so far as EPA's own Initial Prehearing Exchange for why EPA's motion in limine should be denied. More fundamentally, the anticipated testimony of Mr. Newman is relevant and admissible because it will further demonstrate that AME's work met the purposes of the agency's preauthorization scheme, was pre-approved by EPA, was consistent with the NCP, and resulted in AME incurring necessary costs. *August Mack*, 841 Fed.App'x at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)); 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16.

Next, EPA concludes that the testimony of Thomas Bass is "irrelevant and of no probative value for the reasons cited above." (Mot. in Limine, p. 7.) Mr. Bass is or was an employee of the West Virginia Department of Environmental Protection and was the Project Coordinator for work AME performed at the BJS Site. (AME Initial Prehr'g. Exch., p. 3.) He will testify as to his express approval and oversight of the work AME performed and therefore will have relevant testimony as to the issues of AME's work meeting the purposes of preauthorization, being consistent with the NCP, and resulting in AME incurring necessary costs. *August Mack*, 841 Fed.App'x at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)); 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16.

EPA then seeks to exclude the potential testimony of Jason McDougal on the same grounds. (Mot. in Limine, p. 7.) However, Mr. McDougal is the Program Manager for the Division of Land Restoration at the West Virginia Department of Environmental Protection and will be examined as a fact witness on the work AME performed at the BJS Site. (AME Initial Prehr'g Exch., p. 3.) Accordingly, his testimony is relevant to AME satisfying the purposes of preauthorization and its work being consistent with the NCP and necessary. *August Mack*, 841 Fed.App'x at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)); 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16.

Finally, EPA seeks to bar testimony from TechLaw, Inc. (Mot. in Limine, pp. 7-8.) For the reasons discussed previously, EPA's undeveloped and unsupported claim of privilege and contention that these individuals lack sufficient personal knowledge must

fail. In addition, AME listed employees and representatives of Tetra Tech, Inc. on its supplemental list of witnesses, not additional employees of TechLaw, Inc. It is AME's current understanding that TechLaw, Inc. and Tetra Tech, Inc. are distinct entities. Nevertheless, because representatives of Tetra Tech and TechLaw reviewed AME's work, and Tetra Tech relied on AME's unpaid work, anticipated testimony of representatives from these entities is relevant to AME satisfying the purposes of preauthorization and its work being consistent with the NCP and necessary. *August Mack*, 841 Fed.App'x at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)); 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16; RX 328.[6]

Conclusion

For the foregoing reasons, the Tribunal should deny EPA's motion in limine in its entirety.

Respectfully submitted,

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[6] For the reasons discussed in this response, rejecting EPA's "standing objection" to witnesses numbers 9-14 "to the extent those witnesses are being listed to illicit testimony pertaining to work or correspondence submitted pursuant to any terms, provisions or requirements of the Consent Decree" is proper. (Mot. in Limine, p. 8.) As discussed at length, such testimony is relevant to AME satisfying the purposes of preauthorization and its work being necessary and consistent with the NCP. *August Mack*, 841 Fed.App'x at 523 (citing 54 Fed. Reg 37892-01, at *37898 (Sept. 13, 1989)); 40 C.F.R. § 307.21(b); 42 U.S.C. § 9611(a); RX 322, p. 16.

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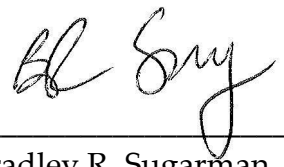
Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on February 21, 2022 through the Office of Administrative Law Judge's e-filing system, and that a copy of this document was also served on opposing counsel at the following e-mail addresses: cohan.benjamin@epa.gov and Swenson.erik@epa.gov.



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