UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

EPA'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE AND TESTIMONY

The United States Environmental Protection Agency ("EPA") hereby files this Motion *in Limine* to Exclude Evidence and Testimony. Requestor August Mack Environmental, Inc. ("AME") has identified an open-ended list of potential exhibits and testimony that is irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value. EPA requests that the Tribunal exclude this material from the evidentiary hearing in this matter. It is understood that AME will oppose this motion.

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") Administrative Hearing Procedures for Claims Against the Superfund set forth at 40 C.F.R. Part 305 ("Rules of Practice" or "Rules") provide that "[t]he Presiding Officer 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).[1] Motions *in Limine* are appropriate where

[1] This provision is identical to 40 C.F.R. § 22.22(a)(1) of the Consolidated Rules of Practice. Cases citing to 40 C.F.R. § 22.22(a)(1) are therefore relevant to the Court's disposition of this matter.

"evidence sought to be excluded is clearly inadmissible for any purpose." *In re Martex Farms, Inc*., 2005 EPA ALJ LEXIS 51 at *2 (ALJ, Sept. 27, 2005) (quoting *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. III. 2000)).

"The admissibility of exhibits is dependent on the context in which they are offered." *Id*. The context of this matter pertains to the question of whether AME "substantially complied" with seeking preauthorization by submitting *the equivalent of* an application for preauthorization pursuant to 40 C.F.R. § 307.22(a)(2) and .22(b). 40 C.F.R. § 307.22(a)(2) requires that an applicant submit an application for preauthorization and provides EPA form 2075-3 to do so. The Fourth Circuit determined that Form 2075-3 is obsolete, but that AME nonetheless needed to have substantially complied with the requirement to apply for preauthorization. The regulations at 40 C.F.R. § 307.22(b) list all of the *substantial or essential* information that applications for preauthorization must include. Submittal of this *essential* information would thus satisfy the *purpose or objective* of the formal submittal of EPA Form 2075-3. As noted in EPA's attached Motion in Opposition to AME's Motion to Compel, the remaining elements of the "preauthorization process" pertain only to EPA's conduct in granting or denying the request, and as such do not relate to the question of whether AME substantially complied with seeking preauthorization.

In this matter, the parties were ordered to exchange information *"in so far that information is relevant to whether [AME] 'substantially complied' with the preauthorization process described in 40 C.F.R. pt. 307 and, if so, whether its request for payment from the Superfund should be granted."* Order of Redesignation and Prehearing Order at 3. Thus, via the discovery required by the Prehearing Exchange, this Tribunal provided AME with the opportunity to provide evidence pertaining to its conduct and actions in substantially complying

with the preauthorization process. As explained at length in EPA's dispositive briefs, in order for AME to prove that it substantially complied with the preauthorization process, it must prove that it sought EPA's prior approval to submit a claim by doing all that can reasonably be expected of it to fulfill the purpose and objective of the requirement directing applicants to submit an application. 40 C.F.R. § 307.22(a)(2). AME, in both its Initial Prehearing Exchange and its Rebuttal Prehearing Exchange ("Prehearing Exchanges"), has identified testimony and documents that are unreliable, repetitious, immaterial and not relevant to the defined matter on remand. These items should therefore be excluded at the evidentiary hearing on AME's claim.

1. AME's Exhibits identified as "RX 2-328"

These exhibits contain incomplete pages, truncated images and multiple copies of the same document; in total, thousands of pages of "unduly repetitious" material. Moreover, said exhibits are not relevant, material, or probative of the narrow issue before this court because all of the exhibits pertain to work or correspondence pursuant to the BJS Consent Decree ("CD" or "Consent Decree"). These documents represent AME's continued effort to create a false equivalency between the work submitted and approved pursuant to the CD, and the wholly unrelated process of preauthorization set forth at 40 C.F.R. Part 307. In other words, none of these proposed exhibits are relevant as to whether AME substantially complied with the requirement to *seek* preauthorization prior to commencing design-related work on behalf of Vertellus in 2012. Nor do any of these documents have any probative value or relevancy as to whether EPA actually issued a PDD *granting* preauthorization prior to the initiation of work in 2012 – which is determinative of whether payment from the Fund should be granted. 40 C.F.R. §§ 307.23(a) and 307.23(e); 307.21(b)(2); 307.22(a)(3); 307.14. Per EPA's Motion in Opposition to AME's Motion to Compel (filed concurrently herewith), and as further elucidated

in its Motion for Accelerated Decision, it remains the law of the case that these CD related documents are *per se* not relevant. In response to AME's argument "that it *substantially complied* with the requirements and policy of the *preauthorization scheme*" because it worked "hand-in-glove" with EPA as EPA "authorized and approved" AME's work, the District Court ruled:

> AME has failed to *seek* preauthorization as required by the governing statute [sic] regulations, and it has not demonstrated that it is exempt from doing so…*nothing under the Consent Decree constitutes preauthorization*, and nothing in the Consent Decree creates rights in non-parties. *It is irrelevant that EPA authorized and supervised AME's work. AME's substantial compliance argument has no merit* because this is not a mere technical oversight on AME's behalf; it is an outright failure to attempt to comply with clear federal regulations.

August Mack Envtl., Inc. v. EPA, No. 1:18-CV-12 (N.D. W. Va.)(Order Granting Motion to Dismiss Amended Complaint at 9-10)(July 11, 2019)(emphasis added). The District Court ruling cited above remains the standing law of the case, as the Fourth Circuit's decision and issue on remand is unrelated to the question of whether the work approved under the Consent Decree constitutes compliance with the preauthorization process of seeking and obtaining preauthorization. Applying AME's substantial compliance argument, the District Court correctly ruled that AME failed to seek and receive preauthorization – *not* because it was strictly required to fill out and submit EPA's obsolete application for preauthorization Form 2075-3, but rather because "nothing under the Consent Decree constitutes preauthorization and nothing in the Consent creates rights in non-parties." *Id.* The District Court is indeed correct that there is nothing in the Consent Decree that provides for *anyone* to seek preauthorization by providing the essential information contained in Form 2075-3, or otherwise; and the Court is also correct that there is nothing in the Consent Decree that could be construed as a term or provision for EPA's

preauthorization; to the contrary, ¶77 of the Decree absolutely forbids it. "Thus August Mack could not meet preauthorization requirements by adhering to whatever preapproval process Vertellus was required to complete under the Consent Decree." ALJ Order on Motion to Dismiss at 12. Since the Fourth Circuit did *not* find that the ALJ or the District Court committed legal error on the crucial issue of whether compliance with the Consent Decree constitutes or substitutes for preauthorization, it remains the unreversed law of the case, and therefore it has been judicially determined that the Consent Decree related documents listed by AME are not relevant or probative of the issue on remand. EPA therefore requests that these documents be excluded on the basis that they are irrelevant and of "little probative value" on the issue of preauthorization. *See also* 40 C.F.R. § 307.22(j).

2. Testimony of *Mr. Geoffrey Glanders:*

To the extent that Mr. Glander's proposed testimony pertains to any work or correspondence submitted pursuant to any terms, provisions or requirements of the Consent Decree, EPA requests that his testimony be excluded on the basis that it is irrelevant and of no or "little probative value" for the reasons cited above. To the extent that Glanders is being offered as an expert witnesses, EPA objects to his testimony regarding "compliance with the NCP" on the basis that he is not qualified to opine as an expert under Rule 702 of the Federal Rules of Evidence, and on the basis that it is the law of the case that "it is undisputed that AME did not obtain preauthorization and, thus, did not fulfill the statutory and regulatory requirements" (District Court Order Granting Motion to Dismiss Amended Complaint at 8). In addition, 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. Information pertaining to compliance with the NCP has no probative value as to whether AME substantially complied with the preauthorization

process or whether EPA granted Preauthorization by issuing the requisite PDD. AME must still seek *and* obtain preauthorization first, and it did not do so. Thus, 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. ALJ Order on Motion to Dismiss at 7.

3. Testimony of *Mr. Joel Ruselink*:

Mr. Ruselink's proposed testimony pertains to work or correspondence submitted and conducted pursuant to the terms, provisions or requirements of the Consent Decree. EPA requests that his testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above.

4. Testimony of *Mr. Andrew Tennyson:*

Mr. Tennyson's proposed testimony pertains to work or correspondence submitted and conducted pursuant to the terms, provisions or requirements of the Consent Decree. EPA requests that his testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above.

5. Testimony of *Mr. Bryan Petriko*

Mr. Petriko's proposed testimony pertains to work or correspondence submitted and conducted pursuant to the terms, provisions or requirements of the Consent Decree. EPA requests that his testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above.

6. Testimony of *Mr. Eric Newman*

Mr. Newman's proposed testimony pertains exclusively to his review, approval and oversight of the work Vertellus performed at the Site pursuant to the Consent Decree. As such, Mr. Newman's testimony would have no probative value regarding AME's case-in-chief. Therefore, EPA 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. Additionally, Mr. Newman can only establish that he never received the equivalent of an application for preauthorization and did not indeed grant AME preauthorization; Mr. Newman was therefore listed by EPA as a rebuttal witness, as may be necessary.

7. Testimony of *Mr. Thomas Bass*

Mr. Bass's proposed testimony pertains to his approval and oversight of the work AME performed at the Site pursuant to the Consent Decree. EPA requests that his testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above.

8. Testimony of *Mr. Jason (Jake) McDougal:*

Mr. McDougal's proposed testimony pertains to his approval and oversight of the work AME performed at the Site pursuant to the Consent Decree. EPA requests that his testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above.

9. Testimony of *TechLaw, Inc. employees, including those listed in AME's Rebuttal Prehearing Exchange:*

Unnamed and named Techlaw, Inc. employees' proposed testimony pertain to the work or correspondence submitted pursuant to terms, provisions or requirements of the Consent Decree. EPA requests that these named and unnamed employees' testimony be excluded on the basis that it is irrelevant and of no probative value for the reasons cited above. To the extent AME is seeking testimony regarding "their relationship with EPA", this information is also irrelevant and subject to the deliberative process privilege. Nor would any of Techlaw employees' testimony be reliable

or material as to whether AME sought or received preauthorization from EPA, or otherwise complied with the elements to make out a prima facie case for a claim against the Fund. Moreover, any fact testimony would be inadmissible under Fed. R. Evid. 602 because these individuals lack "personal knowledge of the matter" before this Court. *Id*.

10. Testimony of potential future witnesses (listed as witnesses nos. 9-14 in AME's Initial Prehearing Exchange):

For the aforementioned reasons, EPA makes a standing objection to AME's attempts to list future witnesses 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.

Conclusion

For the reasons stated above, EPA requests that this Tribunal issue an order excluding the foregoing documents and witnesses from AME's Prehearing Exchanges.

1/28/22
Date

Respectfully submitted,
BENJAMIN COHAN
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CERTIFICATE OF SERVICE

I certify that the foregoing motions *In the of Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001, was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

I also certify that an electronic copy of EPA's Motion *In Limine* to Exclude Evidence and Testimony was sent this day by e-mail to the following e-mail addresses for service on Requestor's counsel: Bradley Sugarman @ bsugarman@boselaw.com; Philip Zimmerly @ pzimmerly@boselaw.com; and Jackson Schroeder @ jschroeder@boselaw.com.

1/28/22

Date

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