UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

REQUESTOR'S REBUTTAL PREHEARING EXCHANGE

Requestor, August Mack Environmental, Inc. ("AME"), for its Rebuttal Prehearing Exchange, states the following:

Supplemental List of Witnesses

1. Employees and representatives of Tetra Tech, Inc., including, but not limited to:
    a. Scott Nesbit;
    b. Lynn Arabia;
    c. Robert Chozick;
    d. Rajendra Meruva; and
    e. David Richardson.

Supplemental List of Exhibits and Documents in Response to EPA's Prehearing Exchange

1. RX 323 River Removal Action Schedule.
2. RX 324 July 7, 2014 BJS Site River Removal Action Trust Claim Certificate.
3. RX 325 EPA's 2020 Community Involvement Plan.

4. RX 326 EPA's April 2015 Fact Sheet.
5. RX 327 Email from John Jones to Eric Newman with attached claim certification for river work in Fairmont, and Eric Newman's response.
6. RX 328 March 2018 Removal Design Work Plan.

Statement in Response to EPA's Prehearing Exchange

Having had its preauthorization application declared "legally obsolete" and invalidated by the Fourth Circuit, EPA now takes an untenable position. EPA admits that substantially complying with the preauthorization process would have been futile: "even if AME had formed the intent to apply for preauthorization and had substantially complied with the application process, EPA would nonetheless have been barred from approving the application . . . ." (EPA's Initial Prehr'g Exch., p. 6.); *see also id.* at pp. 12-13 (stating "it is not relevant whether AME is found to have substantially complied with its obligation to request reimbursement from the Superfund" because "[e]ven a favorable decision on substantial compliance will not entitle AME to relief").[1] Thankfully, the determination of whether AME substantially complied with what remains of the agency's obsolete "preauthorization" regulations is not up to EPA's attorneys. The Fourth Circuit Court of Appeals has placed that responsibility with this Tribunal.

[1] It bears noting that EPA's admission cuts directly against its claim that substantial compliance looks to the applicant's state of mind asking whether there was the expressed intention to apply for preauthorization before performing the EPA-approved response actions in order to have substantially complied with the preauthorization process.

Moreover, EPA's arguments are based on reversed and vacated decisions from this Tribunal and the district court whereas AME's arguments are based on the Fourth Circuit opinion, the statutory language of CERCLA, and what remains of the agency's regulatory framework. EPA's argument is so at odds with the Fourth Circuit's decision (a decision that the agency decided not to appeal) that it calls for this Court to commit reversible error a second time. Indeed, EPA cites more to this Tribunal's order, which was reversed, the district court's order, which was reversed, and the dissenting judge from the Fourth Circuit than the actual majority opinion. Specifically, EPA presents at least four arguments that cannot be reconciled with the plain language of the Fourth Circuit's Order.

1. *Whether AME substantially complied with the preauthorization process is not settled.*

First, while citing to the reversed decisions of this Tribunal and the District Court, EPA claims that it has already been settled that AME did not substantially comply with the preauthorization process. (EPA's Initial Prehr'g Exch., pp. 7-9.) However, when it reversed, vacated, and remanded the lower courts, the Fourth Circuit unambiguously stated that the substantial compliance issue had yet to be decided: "No discovery was conducted, and *whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings*." *August Mack*, 841 Fed.Appx. at 525 (4th Cir. 2021) (emphasis added). Thus, the Tribunal would err by accepting EPA's argument that the prior litigation had somehow settled the substantial compliance issue.

2. ***The Fourth Circuit completely reversed and vacated the prior decisions of this Tribunal and the District Court, leaving nothing "unreversed."***

Second, EPA contends the Fourth Circuit narrowly reversed and vacated the Tribunal and District Court's decisions, resulting in most issues remaining "unreversed" and settled. For example, EPA says that elements of AME's case that the Tribunal and District Court rejected were not reversed: "As to the other elements of AME's *prima facie* case – these issues also remain settled, affirmed by the District Court, and were neither reversed by the 4th Circuit nor remanded; and remain the law of the case."[2] (*Id.* at p. 7, n. 5.) Similarly, EPA says that most of this Tribunal's order granting EPA's motion to dismiss remains the law of the case: "All other aspects of this Court's decision, as affirmed by the District Court, remain the law of the case per *Arizona v. California* and its progeny." *Id.* at 9.[3]

However, the Fourth Circuit could not have been clearer in vacating and remanding the District Court's decision. Indeed, it used all capital and italicized letters

[2] EPA failed to specify what these "other elements" were, making it unclear to which elements EPA was referring.

[3] AME notes that *Arizona v. California*, 460 U.S. 605 (1983) is inapplicable to the present matter. In *Arizona*, litigation began in 1952 regarding the rights to the Colorado River's water. *Id.* at 607-608. A special master made recommendations, and the matter was twice argued in front of the Supreme Court in the 1960s. *Id.* at 609. In 1979, the Supreme Court entered a supplemental decree, and the special master issued another report in 1982. *Id.* at 611-613. When once again before the Supreme Court, there was a claim that certain irrigable acreage was omitted from relevant calculations. *Id.* at 617. A provision of the 1964 Decree specifically prevented the application of res judicata, yet the special master believed the "law of the case" doctrine should apply. *Id.* at 618. The Supreme Court disagreed and reversed. *Id.* at 618-619. Nothing about the "progeny" alters the inapplicability of the "law of the case" doctrine here.

in doing so: "*VACATED AND REMANDED*." *August Mack*, 841 Fed.Appx. at 525. The Court explicitly said it was vacating the District Court's decision on three separate occasions. *Id.* at 519, 525. Even the dissenting judge acknowledged the majority had vacated the District Court's dismissal. *Id.* at 525. Further, the majority opinion concluded that this Tribunal's decision was "an arbitrary and capricious abuse of discretion" and "legal error." So as not to be overlooked, the Fourth Circuit actually repeated its conclusion. *Id.*

When decisions are vacated and held to be arbitrary and capricious, an abuse of discretion and legal error, they cannot be controlling or persuasive. Indeed, EPA's chosen "law of the case" citations recognize the doctrine is inapplicable when there has been a reversal. (EPA's Initial Prehearing Exchange, p. 7.) Of course, that is not to say that reversed and vacated decisions have no value. Such decisions stand as a guide to prevent the lower court receiving remand from committing legal error twice.

3. ***EPA continues to place all its weight on the invalidated and legally obsolete preauthorization application.***

Third, EPA contends that substantial compliance with the preauthorization process required "providing EPA the information sought in Form 2075-3, as required under § 307.22(b) and (c)." (EPA's Initial Prehr'g Exch., p. 7.); *see also id.* at 8 ("AME could not possibly have complied with the essential or substantial requirement to seek preauthorization by filing the equivalent of an application, or otherwise" (emphasis omitted).)

But EPA's position ignores the Fourth Circuit's rejection of the preauthorization process outlined in EPA's regulations: "[B]ecause EPA Form 2075-3 is obsolete, *August Mack could not be required to seek preauthorization in the manner specified by the EPA* and thus a substantial compliance standard is wholly appropriate and necessary." *August Mack*, 841 Fed.Appx. at 524 (emphasis added). Simply put, EPA's contention is just a repackaged strict compliance argument, requiring that the information requested in a "legally obsolete" form be submitted for there to be substantial compliance. This position is at odds with the Fourth Circuit's holding and following such an interpretation would be reversible error.[4] *Id.* at 525.

Additionally, EPA's position is fundamentally unfair. EPA made it impossible to apply for preauthorization in the manner prescribed by the regulations and has unjustly used that impossibility to its benefit. EPA's preauthorization application was held to be legally obsolete because it "is the same today as it was in 1991"; expired on December 31, 1994; was implicitly declared obsolete by EPA; and contained outdated instructions, such as, requiring the form to be sent to a building that had been demolished and no longer existed and requiring the form to be sent to the attention of a director of an office that was eliminated in 2015. *Id.* at 524, 524 n.6. Despite these facts, EPA contends that AME should have prepared the functional equivalent of the application and then figured out where

[4] EPA has done nothing to cure its invalid regulation and it continues to publish the obsolete form in the C.F.R. *See* 40 C.F.R. § 307.22(a)(2).

and to whom to send the application. The doctrine of substantial compliance is an equitable doctrine, *August Mack*, 841 F. App'x at 522-523, and the actions of AME are appropriately viewed through that equitable lens.[5]

4. ***AME has standing to bring its claim.***

Next, EPA ridiculously argues that AME's case is moot, and there is no longer a justiciable controversy. (EPA's Initial Prehr'g Exch., pp. 11-14.) "A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States v. Ketter*, 908 F.3d 61, 65 (4th Cir. 2018) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). Here, AME has been injured by EPA's arbitrary and capricious refusal to reimburse AME for the necessary costs it incurred after performing response actions. After being approved as a contractor by EPA and having its work proposals approved by EPA, AME undertook response actions consistent with the NCP and incurred nearly $3 million in costs that were necessary to carry out the NCP. (RX 256-267; AX 7.) To this day, EPA continues to use the data obtained through AME's work at the BJS Site but nevertheless refuses to pay AME for that work. (RX 328.) This Tribunal can redress the wrong by awarding AME money from the Fund. Thus, EPA clearly has

[5] The fact that the balance of equities favors AME is further buttressed by EPA's failure to meaningfully participate in the Court-ordered settlement discussion, which AME discussed in its September 30, 2021 Preliminary Statement, and EPA's presentation of legal arguments that are at odds with the Fourth Circuit's order.

standing to bring its claim. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (stating the elements of standing).

With equal absurdity, EPA next claims that its decision to deny AME reimbursement from the Fund cannot be judicially reviewed: "AME cannot request this Court to order the EPA to make Fund financing available to AME, because the decision to commit and disburse these funds is a discretionary function of the Agency as the steward of the Fund." (EPA's Initial Prehr'g Exch., pp. 13-14.) In support, EPA cites to a district court case involving the Clean Water Act, a Fourth Circuit case involving the Clean Air Act, and a statutory provision that only applies to "Agreements with potentially responsible parties," 42 U.S.C. § 9622(b)(2), which AME is not. *Id.* Instead of looking at these cases and statutory provision, which are inapplicable on their face, the Tribunal should look to 42 U.S.C. § 9612, which controls claims against the Fund for response costs. In this section, Congress provided courts with jurisdiction to review EPA's refusal to reimburse from the Fund to determine if there was an arbitrary and capricious abuse of discretion. 42 U.S.C. § 9612(b)(5).

Finally, EPA's decision to deny AME reimbursement from the Fund should not receive deference. EPA did not appropriately use any discretion it might have when rejecting AME's claim. Rather, EPA based its decision on AME's failure to submit a legally obsolete form and it continues to do so. Because of this, and per the instructions of the Fourth Circuit, the Tribunal decides whether AME is entitled to reimbursement

under these facts: "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 525. Indeed, this language appears to establish a presumption that August Mack should be awarded its costs and that EPA must find some evidence to rebut that presumption.

5. ***AME substantially complied with the preauthorization process.***

With the Fourth Circuit's opinion in mind, it is clear that AME substantially complied with the preauthorization process because it satisfied the essential purposes preauthorization. *See generally Duvall v. Heart of CarDon, LLC*, 2020 WL 1274992 at *13 (S.D. Ind. March 17, 2020) (quoting *Delaware County v. Powell*, 393 N.E.2d 190, 192 (Ind. 1979) ("When the purposes of the statute are fully satisfied, it is clear that the result is substantial compliance with the statute.")); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994) ("In determining whether there has been substantial compliance, the purpose of [the federal statute] and its implementing regulations . . . serves as our guide . . . ."); *Joseph A. by Wolfe v. New Mexico Dept. of Human Services*, 69 F.3d 1081, 1085-1086 (10th Cir. 1995). Specifically, by performing work under the Consent Decree, receiving approval from EPA before completing NCP compliant response actions, and incurring costs necessary to carry out the NCP, AME fulfilled the essential purposes of preauthorization and therefore substantially complied with the preauthorization process.

See August Mack, 841 F. App'x at 523 (citing 54 Fed. Reg. 37892-01, at *37898 (Sept. 13, 1989) (discussing the purposes of the preauthorization process)).

Nevertheless, EPA incorrectly claims that substantial compliance with the preauthorization process required AME "to intend" to apply for preauthorization by submitting the information requested in the obsolete form before completing the EPA approved response actions. (EPA's Initial Prehearing Exchange, p. 7.) But there are three independent and overlapping reasons why AME's state of mind is irrelevant to the correct substantial compliance standard.

First, as discussed above, AME needed only to satisfy the essential purposes of preauthorization to establish substantial compliance. *See Duvall*, 2020 WL 1274992 at *13 (quoting *Delaware County*, 393 N.E.2d at 192; *Donato*, 19 F.3d at 382; *Joseph A. by Wolfe*, 69 F.3d at 1085-1086.

Second, the Fourth Circuit invalidated EPA's preauthorization application and held that AME could not be faulted for not seeking preauthorization in the manner prescribed by the regulations. *August Mack*, 841 F. App'x at 522-525. What is left of the regulatory framework regarding cost reimbursement—i.e. 40 C.F.R. § 307.21(b)(3)-(4)—contain no timing or preauthorization requirement.

Third, submitting the functional equivalent of the preauthorization application would have been futile—as EPA readily admits. (EPA's Initial Prehr'g Exch., pp. 6, 12-13.) In discrimination cases, courts reject the need to submit an application for a job, lease,

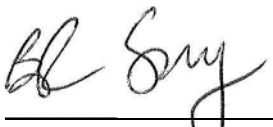
or the like to establish a claim if applying would be futile. *See generally International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 365-366 (1977); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990). Similarly, because the preauthorization application was legally obsolete, AME does not need to show that the obsolete form was the reason it did not apply before it performed the response actions. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 431 (4th Cir. 2004) (quoting *EEOC v. Metal Serv. Co., 892 F.2d 341, 349* (3d Cir. 1990) ("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")). EPA's preauthorization process was certainly "suspect." The Fourth Circuit declared the application legally obsolete and held that AME could not be required to follow it. *August Mack*, 841 F. App'x at 524. For any one of these reasons, this Tribunal would find firm ground to conclude that AME substantially complied with the preauthorization process.

6. *Reimbursing AME for its work that EPA continues to rely on is just and supported by the relevant statutory and regulatory language.*

Lastly, reimbursing AME from the Fund is supported by CERCLA's statutory language, what remains of EPA's regulations, and fairness. In this case, the Tribunal, without deference to EPA, decides whether to reimburse AME from the Fund. *August Mack*, 841 F. App'x at 525. Again, the costs at issue are eligible for reimbursement from the Fund and should be reimbursed because they were required to fulfill the NCP and were consistent with the NCP. 40 C.F.R. § 307.21(b)(3)-(4); 42 U.S.C. § 9611(a)(2). In

addition, failing to reimburse AME for the work that EPA continues to rely on is unfair, inequitable, and would unjustly enrich EPA. AME substantially complied with any preauthorization requirement, and the Tribunal should fully reimburse AME to avoid injustice.

Respectfully submitted,



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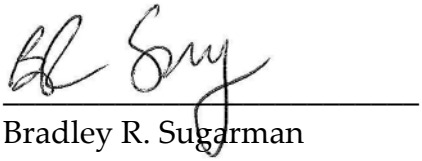
Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on November 29, 2021 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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