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 MOTION TO DISMISS

This proceeding was initiated 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"),[1] 42 U.S.C. §§ 9611 and 9612, and CERCLA's implementing regulations.

The Agency has moved to dismiss August Mack's claim. *See* Respondent's Motion to Dismiss (Aug. 16, 2017) ("Motion"). For the following reasons, the Motion is **GRANTED**.

I. Procedural History

In a letter dated January 12, 2017, August Mack submitted to the Agency's Region III Office of Regional Counsel a $2,661,150.98 claim against the Fund. The company seeks reimbursement for serving as the supervising contractor of removal work at the Big John's Salvage-Hoult Road Superfund Site ("Site"). *See* Response Claim for Payment from the Hazardous Substance Superfund (January 12, 2017) ("Claim").

The Agency denied the Claim on February 8, 2017. *See* Letter to Bradley R. Sugarman, Esq. from Region III Senior Assistant Regional Counsel Susan T. Hodges ("Denial"). As grounds for denying the Claim, the Agency cited August Mack's failure to obtain "preauthorization" for the work it performed, as federal law requires. Denial at 1-2. In response to the Denial, August Mack submitted a Request for Hearing ("Hearing Request") to various Agency offices on March 9, 2017.[2] The Hearing Request was officially referred to this Tribunal

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[1] CERCLA was significantly amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), Pub. L. 99-499. References to CERCLA in this Order are to the statute as amended.

[2] This Tribunal received a copy of the Hearing Request on March 10, 2017.

by the Agency on August 16, 2017. On that same date, the Agency filed its Answer to the hearing request as well as a Motion to Dismiss the company's claim against the Fund. August Mack submitted a Response in Opposition ("Response") to the Agency's Motion to Dismiss on September 29, 2017.[3] The Agency filed a reply brief on October 6, 2017.[4]

II. Findings of Fact

The Big John's Salvage-Hoult Road Superfund Site is a 38-acre former industrial property used for coal tar refining, salvage operations, and waste disposal. It is located in Marion County, West Virginia near the east bank of the Monongahela River. Parties that have been identified as potentially responsible for contaminating the site include ExxonMobil Corp., CBS Corp., and Vertellus Specialties, Inc. Hearing Request, ¶¶ 1-3; Ans., ¶¶ 1-3.

On June 10, 2008, the Agency sued ExxonMobil under Section 107 of CERCLA, 42 U.S.C. § 9607,[5] seeking to recover response costs the Government had incurred at the Site since the early 1980s as well as costs it expected to incur in the future. Hearing Request, ¶ 14; Ans. ¶ 14; *see also United States v. ExxonMobil Corp.*, No. 1:08-cv-00124-IMK (N.D. W. Va. June 10, 2008) (Doc. 1-3). More than four years later, on October 10, 2012, the Agency entered into a Consent Decree with ExxonMobil — as well as with CBS and Vertellus, who intervened after the complaint was filed — that resolved the litigation. Hearing Request, ¶¶ 14-18; Ans., ¶¶ 14-18. Under the Consent Decree, Vertellus was tasked with cleaning up the Site while ExxonMobil and CBS provided clean-up funding. Hearing Request, ¶¶ 19-20; Ans., ¶¶ 19-20. More specifically, Vertellus obtained a $10.5 million irrevocable letter of credit, and a trust fund was created to guarantee performance of Site-specific work. Ex. A to Claim at 33-35. Also under the Consent Decree, CBS paid $5 million and ExxonMobil paid $6 million into the trust fund. Ex. A to Claim at 48. Further, a second Site-specific trust fund was created under the Consent Decree into which Vertellus paid $5.056 million and ExxonMobil paid $5 million. Ex. A to Claim at 35, 49.

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[3] I was designated to preside over this proceeding on August 17, 2017, and granted August Mack a 45-day extension to file its Response. *See* Order Granting Requestor's Motion for an Extension of Time to Respond to Respondent's Motion to Dismiss (Aug. 21, 2017).

[4] More specifically, the Agency filed a "Motion to File Sur-Reply to Requestor's Response in Opposition to Respondent's Motion to Dismiss and Memorandum in Support of Respondent's Motion to Dismiss." However, the document the Agency asked permission to file is more analogous to a "reply" than a "sur-reply." Although not specifically provided for in 40 C.F.R. Part 305, a reply is a routinely-filed litigation document, and Part 305 vests me with the authority to resolve unaddressed procedural questions at my discretion and to "make such other orders concerning the disposition of motions as [I] deem[ ] appropriate." 40 C.F.R. §§ 305.1(b), 305.23. Consequently, the Agency's "Motion to File Sur-Reply" is **GRANTED**.

[5] This section of CERCLA provides that "(1) the owner and operator of a vessel or a facility, [and] (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for – (A) all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan." 42 U.S.C. § 9607(a).

The Consent Decree additionally required Vertellus to hire a supervising contractor whose selection was subject to Agency approval. Hearing Request, ¶¶ 38-39; Ans., ¶¶ 38-39. Vertellus chose August Mack as its supervising contractor for work at the Site, and the Agency accepted August Mack's selection on November 6, 2012. Hearing Request, ¶¶ 41-42; Ans., ¶¶ 41-42.

As supervising contractor, August Mack — on behalf of Vertellus — prepared and submitted to the Agency a Removal Design Work Plan to guide overall completion of Vertellus's clean-up work. Hearing Request, ¶¶ 23, 43; Ans., ¶¶ 23, 43. The Agency reviewed and approved the Plan. Hearing Request, ¶ 44; Ans., ¶ 44. August Mack also initiated Pre-Design Investigation activities on behalf of Vertellus, including evaluation of sediment, soil, and groundwater, to support the Plan, and performed additional tasks for Vertellus at the Site between October 2013 and February 2016. August Mack's work for Vertellus was approved by the Agency in accordance with the Consent Decree. Hearing Request, ¶¶ 45-49; Ans., ¶¶ 45-49. In total, August Mack represents that it completed more than $2.5 million of work for Vertellus.

On May 31, 2016, Vertellus and ten of its affiliates filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Hearing Request, ¶ 50; Ans., ¶ 50. In court filings, Vertellus listed August Mack as holding a nonpriority unsecured claim for $214,551.56. On October 20, 2016, August Mack filed a proof of claim in the bankruptcy cases for more than $2,627,891.46. Hearing Request, ¶¶ 51-52; Ans., ¶¶ 51-52. Additionally, August Mack requested payment from both CBS and ExxonMobil on August 30 and September 22, 2016, respectively, but both companies rejected the request. Hearing Request, ¶ 56; Ans., ¶ 56. August Mack then sought reimbursement from the Fund.

III. Applicable Law and Regulations

a. Substantive Law

"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*, 134 S. Ct. 2175, 2180 (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. Envtl. Prot. Agency*, 360 F.3d 188, 189 (D.C. Cir. 2004)). "CERCLA also authorizes EPA to undertake 'response actions' — using funds from the Hazardous Substance Superfund[6] — 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)).

[6] The Fund is held in the Treasury of the United States pursuant to 26 U.S.C. § 9507. In addition to Congressional appropriations, it receives money from certain environmental taxes and amounts collected under CERCLA and Section 311(b)(6)(B) of the Clean Water Act. *See* 26 U.S.C. § 9507.

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. In particular, 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[7] as a result of carrying out the national contingency plan[8] . . . : *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). 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. Specifically, it defines the broad requirements with which a person must comply before making a claim and further authorizes the Agency to "prescribe appropriate forms and procedures" for filing such claims. 42 U.S.C. § 9612(b)(1).

Consequently, 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. *See* 40 C.F.R. § 307.10. These regulations set baseline 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). "Preauthorized" and "preauthorization" are terms that carry defined regulatory meanings and that demand a claimant take certain specified actions before receiving payment from the Fund:

> *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:

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[7] Under CERCLA, the term "person" includes corporations. 42 U.S.C. § 9601(21).

[8] The "national contingency plan" is the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), which "provides the organizational structure and procedures for preparing for and responding to discharges of oil and releases of hazardous substances, pollutants, and contaminants." *See* 40 C.F.R. § 300.1. The NCP is required by Section 105 of CERCLA, 42 U.S.C. § 9605, and by Section 311(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(d), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380. *See* 40 C.F.R. § 300.2. Among other roles, the NCP provides procedures for undertaking response and removal actions under CERCLA and the CWA. *See* 40 C.F.R. § 300.3(b)(3)-(4).

(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.*

Completing the preauthorization process requires the claimant to fulfill myriad requirements "*before commencing a response action*." 40 C.F.R. § 307.22(a) (emphasis added). In fact, "[n]o 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); *see also* 40 C.F.R. § 307.11 ("Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA.").

Additionally, and apart from the preauthorization requirement, "[n]o claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim." 42 U.S.C. § 9612(a).

b. Procedural Law

After 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 ("Rules"). 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.

The Rules additionally provide that upon the Agency's motion, this Tribunal "may at any time dismiss a Request for a Hearing without further hearing or upon such limited additional evidence as [it] requires, on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the Requestor." 40 C.F.R. § 305.27(a). An order of dismissal "constitutes the final order of the Presiding Officer."[9] 40 C.F.R. § 305.27(b).

[9] The Rules further require that a final order be rendered within 90 days after this Tribunal rules on any objections to jurisdiction and "affirmatively accepts such jurisdiction." 40 C.F.R. § 305.4(c). The Agency objected to this Tribunal's jurisdiction in its Motion. Specifically, the Agency alleged that August Mack is barred from submitting a claim to the Superfund in the first place because the company did not obtain preauthorization under 40 C.F.R. 307.22(a). On these grounds, the Agency contended that this Tribunal "cannot adjudicate this matter." Mot. at 8-9. In light of this objection to jurisdiction, the 90-day clock never started in this proceeding.

c. Motion to Dismiss Standard

The Rules do not specifically provide a standard for adjudicating motions to dismiss. However, a motion to dismiss in this case is "analogous to motions for dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure."[10] *In re Mercury Vapor Processing Technologies, Inc.*, EPA Docket No. RCRA-05-2010-0015, 2011 EPA ALJ LEXIS 15, at *6 (ALJ, July 14, 2011) (citing *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993)). Rule 12(b)(6) provides that a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). Such motions to dismiss "test the legal sufficiency of a claim." *Id.* (quoting *Cook v. Brewer*, 637 F.3d 1002, 1004 (9th Cir. 2011)). As the U.S. Supreme Court has stated:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Id. (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "Thus, in considering a motion for dismissal, [this Tribunal] should assume the veracity of all 'well-pleaded factual allegations' in the complaint and 'then determine whether they plausibly give rise to an entitlement to relief.'" *Id.* at *7. To that end, for the purpose of ruling on the Agency's Motion, it is assumed that August Mack's factual allegations are true. The question is whether these facts entitle August Mack to legal relief within the narrow confines of CERCLA Sections 111 and 112, 42 U.S.C. §§ 9611, 9612.

IV. Discussion and Conclusions of Law

The Agency moves to dismiss August Mack's claim based on the company's failure to comply with the plain language of CERCLA Section 112 and implementing regulations at 40 C.F.R. Part 307. Specifically, the Agency asserts it does not have the authority to approve August Mack's claim for payment from the Fund because the company did not seek or obtain "preauthorization" for its work at the Site, as that term is defined in 40 C.F.R. § 307.14. In its Hearing Request and Response, August Mack contends for various reasons that its work was either preauthorized in spirit if not by letter of the law, or that it was not required to seek preauthorization pursuant to the regulations prior to performing work. For the reasons discussed below, the Agency's argument prevails: CERCLA requires "preauthorization" for a company to submit a claim for payment from the Fund, August Mack did not satisfy that requirement, and August Mack is not excused from complying with that requirement.

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[10] As in administrative enforcement proceedings under 40 C.F.R. Part 22, I find that the Federal Rules of Civil Procedure and associated jurisprudence offer guidance to this Tribunal in addressing motions to dismiss in Part 305 proceedings. *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.").

a. August Mack may not submit a claim to the Fund because it did not ask for or receive preauthorization to do so

The Agency first points to the four prerequisites of 40 C.F.R. § 307.21(b) that must be met before claims for costs of removal actions are eligible for payment. The most applicable of these prerequisites are that "(1) The response action is preauthorized by EPA pursuant to § 307.22" and that "(2) The costs are incurred for activities within the scope of EPA's preauthorization." Mot. at 6-7 (quoting 40 C.F.R. § 307.21(b)). By August Mack's own admission, the Agency observes, the work it performed at the Site was not preauthorized pursuant to § 307.22. Mot. at 7. Furthermore, costs August Mack incurred were not for activities within the scope of the Agency's preauthorization.

The Agency next asserts that August Mack cannot "circumvent the preauthorization requirement by contracting with Vertellus." Mot. at 7. Recognizing that August Mack performed work at the Site on behalf of Vertellus, and that Vertellus was required to perform this work under the terms of the Consent Decree, the Agency points to 40 C.F.R. § 307.22(j), which expressly states that the terms, provisions, or requirements of a consent decree "do not constitute preauthorization to present a claim to the Fund." Mot. at 7 (quoting 40 C.F.R. § 307.22(j)). Even Vertellus would be forbidden from obtaining preauthorization by relying on preapproval of plans and work under the Consent Decree, the Agency notes. Mot. at 7. Consequently, August Mack cannot claim its work for Vertellus was preauthorized simply because portions of it received prior approval by the Agency under the terms of the Consent Decree.

Nor can August Mack excuse its failure to obtain preauthorization just "because it substantially complied with the National Contingency Plan," the Agency adds. Mot. at 8. Even if August Mack complied with the NCP, it must still obtain "preauthorization," and it did not do so, the Agency notes. Mot. at 8.

Finally, regardless of the preauthorization requirement, the Agency declares that it is precluded from awarding August Mack's claim because the company has a pending claim against Vertellus in Bankruptcy Court. Mot. at 9. To pay August Mack from the Superfund would violate the prohibition in CERCLA Section 112 that "[n]o claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim," the Agency concludes. Mot. at 9 (quoting 42 U.S.C. § 9612(a)). As further discussed below, August Mack's bankruptcy claim bars it from simultaneously asserting a claim against the Fund.

In all, the Agency's arguments hold true because the requirements of CERCLA and its implementing regulations are clear: "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); *see also* 40 C.F.R. § 307.11(a) ("Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA."). By definition, "[*p*]*reauthorization* 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," a process that "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 (emphasis added). In this case, August Mack admittedly did not seek preauthorization prior to performing work at the Site, and the Agency did not issue a Preauthorization Decision Document setting forth the terms and conditions under which it would reimburse August Mack. *See* Response at 9. This is fatal to August Mack's claim against the Fund. Indeed, as the Agency argues, August Mack is prohibited from even submitting a claim, because the company did not first obtain preauthorization to do so. The statute and regulations are clear and unambiguous on this point. Thus, August Mack had no basis for submitting its claim to the Fund, and this Tribunal does not have authority to award any money from the Fund to August Mack.

b. August Mack is not excused from complying with the regulations' preauthorization requirement

August Mack asserts that neither the text of 42 U.S.C. §§ 9611(a)(2) nor 9612(b) specifically limit claims against the Fund to preauthorized actions, and preauthorization is merely an administrative function. Hearing Request at 18-19. Be that as it may, the plain language of the statute *and the regulations authorized by the statute*, do not allow payment of claims that have not been preauthorized. CERCLA provides that payment of any claims must be approved and certified by the Agency, and the statute empowers the Agency to establish the forms and procedure for such approval. *See* 42 U.S.C. §§ 9611(a)(2), 9612(b)(1). In establishing the procedure for obtaining payment from the Fund, the Agency has mandated that no person may submit a claim without first receiving "preauthorization" for work. *See* 40 C.F.R. § 307.22(a). Indeed, the Agency has concluded that requiring preauthorization serves four important objectives:

> First, it 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.
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> Second, preauthorization of response actions reduces the likelihood that responses themselves will create environmental hazards. The Federal Government has considerable experience in performing and overseeing cleanup activities. This experience has shown that poorly-handled cleanup efforts can cause other environmental damage or can present risks to workers and the surrounding population. Moreover, nongovernmental persons may not be fully aware of statutory and regulatory requirements that apply to proposed activities. Through the preauthorization process, EPA can review a proposed response plan and either obtain necessary modifications to a plan or, if it appears desirable, replace the plan for nongovernmental response with one in which the Government would become involved directly in the response.

> Additionally, the NCP requires that persons who wish to undertake a response action demonstrate the necessary technical expertise before the request is approved.
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> Third, preauthorization ensures that a claimant is aware of, and will carry out a response action in a manner consistent with the NCP.
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> Fourth, preauthorization gives the claimant an assurance that if the response is conducted in accordance with EPA's approval and the costs are reasonable and necessary, monies may be had from the Fund.

Response Claims Procedures for the Hazardous Substance Superfund, 54 Fed. Reg. 37892, 37898 (Sept. 13, 1989) (Proposed Rule); *see also* Response Claims Procedures for the Hazardous Substance Superfund, 58 Fed. Reg. 5460, 5461 (Jan. 21, 1993) (Final Rule).

The fact that preauthorization is addressed in detail by the regulations and is not a term expressly used by §§ 9611 or 9612 does not diminish its role in the claims process. Preauthorization is a requirement that is clearly provided for by the statute, which empowers the Agency to "prescribe appropriate forms and procedures" for filing claims. 42 U.S.C. § 9612(b)(1). For this reason, August Mack's related argument that it complied with all statutory requirements for submitting its Claim also fails. Hearing Request at 27-30. The company contends its costs were "necessary response costs," that it was "any other person," and that its work was completed "as a result of carrying out the NCP" — all express statutory conditions for making a claim against the Fund. Hearing Request at 28-29 (quoting 42 U.S.C. § 9611(a)(2)). But even if August Mack meets these definitions, it did not comply with the statute because it did not comply with the regulations implementing the statute. August Mack overlooks a key portion of the code that it has cited: "*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). This is the direct authority for the Agency's preauthorization requirement. In other scenarios, perhaps August Mack would be permitted to assert a claim against the Fund under Section 111(a)(2), 42 U.S.C. § 9611(a)(2). But in this case, where preauthorization was not sought or granted, the statute does not allow reimbursement.

Moreover, as the Agency makes haste to point out, the United States Court of Appeals for the District of Columbia found no merit in a challenge to the regulatory preauthorization requirement nearly 30 years ago. *See Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988).[11] In that case, the Court considered an argument that regulatory preauthorization requirements were "'impediments' not contemplated by and inconsistent with the intent of Congress as expressed in the statutory scheme." *Id.* at 1328. In rejecting the petitioner's argument in that case, the Court found significance in the express language of 42 U.S.C. § 9611(a)(2), which, again, states, "*Provided, however*, That such costs must be approved under said plan and certified by the

[11] The Court in *Ohio v. EPA* upheld the language of 40 C.F.R. § 300.25(d), which was later restated in 40 C.F.R. § 307.22(a). *See* Response Claims Procedures for the Hazardous Substance Superfund, 54 Fed. Reg. at 37898.

responsible Federal official." *Id.* at 1330. The Court further noted that a full reading of the statute "makes it abundantly plain that EPA is required to serve as the protector and distributor of scarce government resources devoted to this program of national priority." *Id.* at 1331. To ignore the requirement of preauthorization or cast it as mere formalism would inhibit the Agency's ability to preserve scarce government resources under its charge.

August Mack also contends the official preauthorization application form was expired and therefore the company need not submit it prior to performing work at the Site. Response at 7; Hearing Request at 21. It is true that in discussing the application for preauthorization, regulations refer to appended EPA Form 2075-3, which carries an expiration date of December 31, 1994. 40 C.F.R. § 307.22(a)(2) & Appx. A. It is unclear why the Agency has not updated this form. However, an outdated form does not excuse the broader requirement that potential claimants seek preauthorization prior to performing work. In addition to offering the form, the regulations list all the information that applications for preauthorization must include. *See* 40 C.F.R. § 307.22(b). With or without a standardized form, there is clear notice of the information that must be submitted. And in this case, the fact that the form is "expired" lends no support to August Mack's argument because it never sought to use the form for preauthorization prior to commencing work at the Site.[12] Likewise, August Mack complains that the directions for EPA Form 2075-3 instruct claimants to submit their application to an Agency office that now carries a different name. But again, August Mack never actually sought to submit the form for preauthorization, so it cannot claim to be damaged by instructions it alleges are misleading. *See* Response at 8; Hearing Request at 21. And had the company looked to file an application for preauthorization, there is no reason to believe it could not have determined with minimal effort where to direct its submission.

August Mack next argues it was not required to obtain preauthorization "because it did not intend to submit a claim to the Fund" at the time it began work at the Site. Response at 9; *see also* Hearing Request at 19. The regulations state in part that "[i]n order to obtain preauthorization, any person intending to submit a claim to the Fund must fulfill" three listed requirements "before commencing a response action." 40 C.F.R. § 307.22(a); *see also* Hearing Request at 19. August Mack asserts that "under the plain language of the regulation, a person must first *intend to submit a claim* before being required to submit an application for preauthorization." Response at 9; Hearing Request at 19. The company states that it never had an intent to submit a claim when it started work at the Site because it expected to be paid by Vertellus. Response at 9; Hearing Request at 19. Undoubtedly this is true. But August Mack reads a limitation into "intending" that does not exist. If a person intends to submit a claim to the Fund, it must first take certain steps to obtain preauthorization. At some point in time, presumably after learning of Vertellus's bankruptcy, August Mack formed an intent to submit a claim to the Fund. At that point, and prior to submitting its claim, August Mack was obligated to obtain preauthorization. The unfortunate consequence of August Mack's business relationship with Vertellus is that by the time it formed an intent to obtain preauthorization, it was impossible for August Mack to do so. But the timing of August Mack's intent to submit a claim does not render the preauthorization requirement inapplicable. If it did, then any person could submit a claim to the Fund after the fact for work it had already performed, rendering the preauthorization

[12] According to the record, August Mack did not submit EPA Form 2075-3 until filing its Claim in January 2017. *See* Claim, Ex. D.

requirement meaningless. Given that preauthorization is at the heart of the regulatory procedure for filing a claim, this result is absurd. In this instance, August Mack may not have intended to submit a claim to the Fund prior to commencing work, but that does not excuse the company from obtaining preauthorization. Rather, it highlights the reality that it is too late for the company to submit a claim against the Fund for work that was not first preauthorized.

August Mack further states it had no reason to seek preauthorization because the Consent Decree provided ample funding to ensure the work at the Site was completed. Response at 10; Hearing Request at 20. Under the Consent Decree, Vertellus obtained a $10.5 million irrevocable letter of credit and a trust fund was created as a performance guarantee for Site-specific work. Ex. A to Claim at 33-35. Also under the Consent Decree, CBS paid $5 million and ExxonMobil paid $6 million into the trust fund. Ex. A to Claim at 48. Further, under the Consent Decree, a second Site-specific trust fund was created. Vertellus paid $5.056 million and ExxonMobil paid $5 million into the second trust fund. Ex. A to Claim at 35, 49. "With EPA controlled site-specific funding totaling $37,556,000, over one-third which came directly from Vertellus, [August Mack] expected that its costs would be paid regardless of what happened to Vertellus," the company now observes. Response at 10; *see also* Hearing Request at 20. However, the Agency notes that these funds were retained in a "special account" under CERCLA. Answer at 10. Section 122(b)(3) of the statute authorizes the Agency to "retain and use such amounts for purposes of carrying out the [Consent Decree]." 42 U.S.C. § 9622(b)(3); *see also* Answer at 10 ("Special accounts are funded with money paid to the United States pursuant to site-specific settlement agreements. Use of special account monies is ultimately determined by the agreement under which the funds were received."). To the extent this could be considered money outside of the Fund, it is governed by the terms of the Consent Decree, an agreement to which August Mack is not a party and that is under the jurisdiction of the U.S. District Court for the Northern District of West Virginia. Ex. A to Claim at 9, 87. It would not be appropriate for this Tribunal to referee a dispute under the terms of the Consent Decree in this Superfund claim proceeding, nor is it clear that August Mack has standing to seek relief under the agreement in the first place. Moreover, given that August Mack is not a party to the Consent Decree, there is no basis for the company to "expect[ ] that its costs would be paid regardless of what happened to Vertellus." Likewise, to the extent the payments made by Vertellus, CBS, and ExxonMobil are a portion of the Hazardous Substance Superfund, August Mack's ability to obtain payment is limited to the claim procedure set forth under 42 U.S.C. §§ 9611 and 9612 and its implementing regulations. This proceeding does not provide any alternative grounds for reimbursement or payment from the Fund outside of CERCLA.

August Mack additionally complains that seeking preauthorization while Vertellus was still viable would have been futile, because the Agency would have directed August Mack to Vertellus for payment. Response at 10-11. "[T]he law does not require a party to undertake a futile act," August Mack asserts, without citing any authority. Response at 11; Hearing Request at 22. True, futility may excuse a party from performing a condition precedent to enforcement of a contract in certain instances, or in others it might permit a party to proceed to court before exhausting specific administrative remedies. *See, e.g.*, *Alvarez v. Rendon*, 953 So. 2d 702, 708-09 (Fla. Dist. Ct. App. 2007); *Harris v. Pepsi Bottling Group, Inc.*, 438 F. Supp. 2d 728, 731 (E.D. Ky. 2006). But August Mack has not shown any such futility exception exists in this context. Nor can the company claim "futility" allows it to bypass CERCLA's clear regulatory requirement. August Mack may be correct that the Agency would have directed it to Vertellus for payment. But when August Mack entered into a subcontracting agreement with Vertellus, it

voluntarily placed itself in a position to receive payment from Vertellus and did not seek preauthorization for payment from the Fund. August Mack cannot, after-the-fact, raise a futility excuse because its own business calculation did not pan out.

August Mack further contends that the Agency substantively preauthorized its work at the Site even if it did not do so procedurally. Response at 11; Hearing Request at 23. The Consent Decree describes the "Work to be Performed" by Vertellus at the Site and specifies the procedure Vertellus must follow when performing that work, including submitting work plans to the Agency for approval. Ex. A to Claim at 21-27, 31-35. According to August Mack, "the procedures set in place by the Consent Decree provided the structure for the communications between [August Mack] and EPA. Those communications whereby EPA officials reviewed, commented on, and imposed changes to [August Mack's] planned work constitute the approval and preauthorization necessary for payment from the Fund." Response at 12; *see also* Hearing Request at 23. However, August Mack is incorrect. As the Agency observes, applicable regulations directly refute the notion that mere compliance with the Consent Decree constitutes preauthorization: "Unless 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); *see also* Motion at 7. Whatever approval the Agency gave to work that Vertellus provided under the terms of the Consent Decree would have been to ensure Vertellus was upholding its end of the agreement. Preauthorization serves different purposes. *See* 54 Fed. Reg. at 37898. Although it may be true that "*a* procedure existed under the terms of the Consent Decree for EPA to approve and certify all work conducted at the Big John Site," it is not *the* preauthorization procedure for which the regulations provide. *See* Hearing Request at 23 (emphasis added). Thus, August Mack could not meet preauthorization requirements by adhering to whatever preapproval process Vertellus was required to complete under the Consent Decree. Indeed, even if Vertellus itself fully satisfied the review and approval process the Consent Decree mandated, it could not claim to have simultaneously obtained preauthorization under the regulations in Part 307.

August Mack protests further that apart from the legal arguments the Agency cites to justify denying the company's claim against the Fund, the Agency has offered "no justification for refusing to exercise its discretion under 40 C.F.R. § 307.22(j)." Hearing Request at 24. This regulation "certainly suggests EPA has the discretion" to allow the company to access the Fund, August Mack asserts, yet the Agency has refused to exercise that discretion in its favor. Hearing Request at 24. In making its argument for the exercise of the Agency's discretionary authority, August Mack appears to refer to the first part of the regulation, which reads, "[u]nless otherwise specified and agreed to by EPA . . . ." 40 C.F.R. § 307.22(j). But this regulation does not mandate the Agency provide justification when it chooses to not "otherwise specif[y] and agree[ ]" to allow a Consent Decree to constitute preauthorization. This language merely allows the Agency the option of substituting Consent Decree terms for regulatory preauthorization *if* it otherwise specifies and agrees to do so. Further, the context in which this language appears indicates any such specification or agreement would appear in "a court judgment, Consent Decree, administrative order" or similar document that would be negotiated *prior* to the performance of response work, i.e., in a timeframe similar to when preauthorization would otherwise be sought, not after a claim is filed. In any event, the Agency's Answer indicates a sufficient reason for not, after the fact, allowing August Mack's claim: the Agency "lacks knowledge of all of the activities AME [August Mack] may have performed on behalf of

Vertellus at the Site," and the Agency "never certified AME's costs or work" because "[t]he Consent Decree does not provide any mechanism for EPA to have done so." Answer at 13.

August Mack claims the Agency ignored the fact that it "substantially complied" with preauthorization requirements in the NCP. Hearing Request at 25-26. However, in making this argument the company appears to have appropriated the idea of "substantial compliance" from an inapplicable portion of the regulations. CERCLA permits "substantial compliance" with the NCP with respect to clean up efforts under Section 107, 42 U.S.C. § 9607, cost recovery actions. 40 C.F.R. § 300.700(c). That is, a private party response action for which another potentially responsible party is liable is "consistent with the NCP" as required by Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), when the work is in "substantial compliance" with CERCLA. 40 C.F.R. § 300.700(c)(3)(i). But "substantial compliance" is, notably, not a term that the regulations use when discussing claims made against the Fund under Section 111(a)(2), 42 U.S.C. § 9611(a)(2). 40 C.F.R. § 300.700(d). Substantial compliance may be sufficient for claims between private parties, but clearly the regulations demand something greater when a claim is made against the Fund. Thus, August Mack is wrong to assert that "substantial compliance" is a maxim that applies to this case.

August Mack also argues the Agency "never squarely addresses the beneficial work AME actually conducted at the . . . Site," and that the Agency has never claimed the work to be unnecessary, without value, or beyond the scope of approval of work that needed to be done. Response at 13. This argument, however, is beside the point. August Mack's work may be all of these things – necessary, valuable, and within the scope of work that had to be done – but it was not preauthorized. No claim may be submitted to the fund without preauthorization. *See* 40 C.F.R. § 307.22(a). This is a bright line rule. Preauthorization is not just a regulatory nicety but the mechanism by which the Agency assesses the value of work to be performed and determines whether it justifies depleting scarce monetary resources of the Fund. If this evaluation has not occurred prior to payment of a claim, and there is no record of the Agency engaging in such evaluation, then payment cannot be justified. In this case, there is no question that the preauthorization process was not engaged. Nor at this point can Consent Decree-approvals of Vertellus's proposed work be piecemealed together to paint the same picture that preauthorization of work performed by August Mack would have provided. And to the extent that August Mack contends the Agency was unjustly enriched by its work, it is seeking a remedy from the wrong party. Vertellus is the entity that received services for which it apparently did not pay, and it is from Vertellus that August Mack must seek restitution.

August Mack disputes the Agency's contention that its claim for compensation against the Superfund is barred by the company's claim against Vertellus in Bankruptcy Court. Response at 13-15; Mot. at 9. Under 42 U.S.C. § 9612(a), "[n]o claim against the Fund may be approved or certified during the pendency of an action by the claimant in court to recover costs which are the subject of the claim." August Mack argues its proof of claim in Vertellus's bankruptcy proceeding is not a pending action under § 9612(a) because the "claim is deemed allowed as a matter of law." Response at 14; *see also* 11 U.S.C. § 502(a) (describing a proof of claim as allowed "unless a party in interest . . . objects"). However, "[i]t is well settled that a creditor's filing of a proof of claim is tantamount to filing a complaint in a civil action." *In re Kittrell*, 2012 Bankr. LEXIS 633 at *7 (Bankr. M.D.N.C. Feb. 3, 2012) (citing *O'Neill v. Continental Airlines, Inc. (In re Continental Airlines)*, 928 F.2d 127, 129 & n.1 (5th Cir. 1991) (per curiam); *Simmons v. Savell (In re Simmons)*, 765 F.2d 547, 552 (5th Cir. 1985); *Nortex*

Trading Corp. v. Newfield, 311 F.2d 163, 164 (2d Cir. 1962)). *See also, Hill v. Day (In re Today's Destiny, Inc.)*, 388 B.R. 737, 757-58 (Bankr. S.D. Tex. April 11, 2008) (outlining the material similarities in filing a proof of claim and filing a civil action). Moreover, the concern that a party could be paid twice — once following an action in court to recover costs, and once by payment from the Superfund — is the same whether the party's claim is satisfied as a bankruptcy creditor or as a plaintiff awarded damages in a civil suit. In this particular instance, if § 9612(a) were read to exclude proof of claims filed in bankruptcy proceedings, August Mack could receive payment from the Fund through this proceeding and subsequently receive payment from Vertellus. *See* Response at 14 ("This provision shields the Fund from claimants seeking double recovery."). Consequently, August Mack may not be paid from the Fund while its claim against Vertellus in Bankruptcy Court is pending.

Finally, August Mack alleges that the Agency's refusal to pay its claim against the Fund is "directly opposed to the established purposes of CERCLA." Response at 15; Hearing Request at 31. As August Mack articulates them, the statute's primary purposes "are to: (1) obtain quick cleanup of contaminated sites and (2) require responsible parties to pay for cleaning up contamination they cause." Response at 15-16; Hearing Request at 32 (citing *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) ("The Act was designed 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.")). August Mack contends that by denying its claim, the Agency will delay response actions at the Site and require an innocent party to bear the cost of cleaning a site it did not contaminate. Response at 16; Hearing Request at 32. However, CERCLA's purpose was carried out when the Agency reached a settlement with the potentially responsible parties, required *those* parties to pay for cleaning up the Site, and then provided oversight as clean up began. Beyond its conclusory statement, August Mack does not explain how denying its claim against the Fund will delay response actions at the Site. Nor does it explain how CERCLA's purpose is fulfilled if money from the Fund may be tapped by third parties to heal personal damages from business relationships gone awry. This Tribunal does not discount that August Mack has suffered real and significant monetary damages. It simply recognizes that CERCLA does not contemplate — or allow — that the limited resources of the Fund may be used to remedy those damages through a claim under Sections 111 and 112.

V. Conclusion and Final Order

For the reasons stated above, August Mack has failed to establish a prima facie case or other grounds that show it has a right to relief. *See* 40 C.F.R. § 305.27(a). Consequently, the Agency's Motion to Dismiss is **GRANTED**, and August Mack's Hearing Request is **DISMISSED with prejudice**. 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: December 18, 2017
Washington, D.C.

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

CERTIFICATE OF SERVICE

I certify the foregoing **Order on Motion to Dismiss**, dated December 18, 2017, 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: December 18, 2017
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