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 REQUESTOR'S MOTION TO COMPEL DISCOVERY AND FOR SANCTIONS

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

On September 8, 2021, I issued an Order of Redesignation and Prehearing Order ("Prehearing Order") that set forth various deadlines for the prehearing exchange process, discovery, and the filing of dispositive motions. In accordance with the Prehearing Order, August Mack submitted its initial prehearing exchange on October 22, 2021.

Presently pending before me is AME's Motion to Compel Discovery, for Sanctions, and to Extend Case Management Deadlines filed on December 23, 2021 ("Mot. to Compel"). This Motion relates to 17 interrogatories, 22 requests for production of documents, and 18 requests for admission which August Mack served upon the U.S. Environmental Protection Agency Region III ("Agency" or EPA") on October 29, 2021. Mot. to Compel at 5, Ex. A. The Agency did not specifically respond to this discovery request, but it timely submitted its prehearing exchange documents on November 10, 2021.

On November 22, 2021, August Mack served the Agency with a second written discovery request containing four interrogatories, four requests for production of documents, and one request for admissions. Mot. to Compel at 5, Ex. B. August Mack also requested to depose four individuals, including EPA Administrator Michael Regan. Mot. to Compel at 5, Exs. C, D. August Mack filed a rebuttal prehearing exchange on November 29, 2021.

When it received no response to its discovery requests, August Mack asked in a December 6, 2021 letter to Agency counsel to meet and confer "to discuss these discovery

issues." Mot. to Compel at 5, Ex. E. On December 8, 2021, Agency counsel responded that EPA had not been required by this Tribunal or the rules governing this proceeding to participate in additional discovery and would not agree to it. Mot. to Compel at 6, Ex. F. The parties exchanged further correspondence and held a teleconference to discuss additional discovery, but they reached no agreement. Mot. to Compel at 6, Exs. G-K.

On December 20, 2021, after declining to participate in further discovery, the Agency filed a Motion for Accelerated Decision ("AD Motion") contending that no material facts are in genuine dispute and that the Agency is entitled to judgment as a matter of law.

Three days later, August Mack filed its Motion to Compel, which alleges that during this time the Agency "refused to engage in even basic discovery." Mot. at 1, 4. The Motion seeks to compel EPA's response to certain discovery requests, sanction it for conduct in this proceeding, and argues that the AD Motion should be held in abeyance until August Mack is able to complete discovery. Mot. at 1, 4.

The Agency filed a response brief ("Response") on January 28, 2022.[1] The Agency asserts that August Mack has not met the legal standard for "other discovery" required by the procedural rules that govern this proceeding. Specifically, the Agency contends that August Mack has failed to demonstrate good cause for other discovery, has demanded discovery that will unreasonably delay the proceedings, and seeks information already in its possession. Response at 3-29. As such, it adds, no sanctions are warranted and the AD Motion should not be held in abeyance. Response at 30-36.

August Mack filed a reply brief ("Reply") in support of its Motion to Compel on February 21, 2022.

A. The Agency had no obligation to respond to August Mack's discovery requests

This proceeding is regulated by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund, 40 C.F.R. Part 305 ("Rules"). With respect to discovery, the Rules provide for the prehearing exchange of witness lists and testimony summaries as well as all documents and exhibits that each party intends to introduce into evidence. Parties are limited in their ability to rely on any witnesses, documents, or exhibits that they do not exchange prior to a hearing. *See* 40 C.F.R. § 305.26(b).

Beyond the prehearing exchange, the Rules address two categories of "other discovery." *See* 40 C.F.R. § 305.26(f). The first is "any mutually agreed upon discovery" that does not involve the participation of this Tribunal in which the parties may voluntarily agree to engage. 40 C.F.R. § 305.26(f)(2). The second category of discovery is "further discovery" that is not included in either the prehearing exchange or any mutually agreed upon discovery. 40 C.F.R. § 305.26(f)(3). This type of discovery "shall be permitted only pursuant to order of the Presiding

[1] The Agency's response is contained within its "Motion in Opposition" to August Mack's Motion to Compel.

Officer" and requires a motion by the party seeking discovery. 40 C.F.R. § 305.26(f)(3). Further, an order for such discovery will be granted "only upon a showing of good cause and upon a determination (i) [t]hat such discovery will not in any way unreasonably delay the proceeding; (ii) [t]hat the information to be obtained is not otherwise obtainable; and (iii) [t]hat such information has significant probative value." 40 C.F.R. § 305.26(f)(4). With respect to depositions, they may be ordered "only upon a finding that: (i) [t]he information sought cannot be obtained by alternative methods of discovery; or (ii) [t]here is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." 40 C.F.R. § 305.26(f)(5).

August Mack argues that the Agency's refusal to engage in other discovery conflicts with the Fourth Circuit opinion remanding this case. Mot. to Compel at 7-8; Reply at 2-3, 5-7. August Mack cites the following passage from that opinion:

> At bottom, it was legal error for the EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim. 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 Environmental, Inc. v. U.S. EPA, 841 Fed. App'x 517, 524-25 (4th Cir. 2021). According to August Mack, this means "that discovery must be conducted that is sufficient for this Tribunal to assess whether August Mack's activities . . . substantially complied with the purposes of EPA's preauthorization process." Mot. to Compel at 8. However, I do not see in this passage any mandate or directive for the type of broader discovery that August Mack proposes. Rather, the Court cites the error of declining to consider whether August Mack substantially complied with the preauthorization process and goes on to clarify that this error does not necessarily entitle August Mack to recover response costs. The Court's reference to discovery merely describes the procedural history of this case. That is, "[n]o discovery was conducted" because the case was dismissed before the prehearing exchange process could be initiated. This implies that *any* discovery, including a prehearing exchange, would be useful in determining whether August Mack should be reimbursed by the Superfund. It does not impose a requirement for any particular form of discovery. August Mack argues the Court uses the term "discovery" as it is understood in the context of federal judicial litigation. Reply at 6-7. I disagree, given that the Court decided to remand this matter to an administrative forum that has its own set of discovery rules. In short, the Fourth Circuit opinion does not require the Agency to participate in "other" discovery beyond the prehearing exchange called for under the Rules.

August Mack next argues that the Rules "embrace the discovery methods used by AME" because they divide "other discovery" into three categories rather than the two outlined above. Mot. to Compel at 8; Reply at 1-2, 8-9. Specifically, August Mack cites 40 C.F.R. § 305.26(f)(1), which states that "[d]iscovery shall include any of the methods described in rule

26(a) of the Federal Rules of Civil Procedure." Mot. to Compel at 8. August Mack notes that at the time § 305.26(f)(1) was written, Rule 26(a) stated:

> **(a) Discovery Methods.** Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

Mot. to Compel at 9 (quoting Fed. R. Civ. P. 26(a) (1993)). The result, according to August Mack, is that "the discovery methods set forth in Federal Rules of Civil Procedure are directly applicable to this dispute pursuant to the Federal Regulations," and "AME's initial discovery does not need EPA's unilateral consent or this Tribunal's order to proceed." Mot. to Compel at 9. I disagree with this conclusion. Section 305.26(f)(1) states what *methods* of discovery—those listed in Federal Rule 26(a)—shall be available to a party seeking mutually agreed upon discovery or an order for discovery. The text of § 305.26(f)(1) contains no independent authorization to obtain discovery unilaterally. In contrast, former Federal Rule 26(a) stated that "[p]arties *may obtain* discovery" by one of the aforementioned methods, arguably setting forth a right to discovery in federal court by giving parties permission to "obtain" it.[2] Additionally, § 305.26(f)(3) specifies that only two types of discovery do not need permission of the Presiding Officer: the prehearing exchange of witness lists and documents under § 305.26(b) and mutually agreed upon discovery under § 305.26(f)(2). If § 305.26(f)(1) created some separate category of automatic "initial discovery," then § 305.26(f)(3) would cite it as an exception as well.

Further, just because § 305.26(f)(1) references "methods" listed in Federal Rule 26(a) does not mean that the full range of federal judicial discovery applies to this administrative proceeding, as August Mack seems to suggest. When they were drafted, the Rules were intentionally "modeled after" the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules"), so that they would "incorporate[ ] well-established principles of *administrative procedure* familiar to the regulated community and the Government." CERCLA Administrative Hearing Procedures for Claims Asserted Against the Superfund, 58 Fed. Reg. 7704, 7705 (Feb. 8, 1993) (Interim Final Rule) (emphasis added). At that time, the Environmental Appeals Board ("EAB") had already established that neither the constitution nor the Administrative Procedure Act conferred a right to discovery in federal administrative proceedings, and the extent of discovery available was determined by the agency's procedural rules. *ICC Industries, Inc.*, 1991 WL 280349, *4 n.9 (EAB 1991) (Order on Interlocutory Review). At EPA, the Consolidated Rules "allow[ed] discovery initially through the prehearing exchange," and "[d]iscovery beyond that provided by the prehearing exchange 'shall be permitted only upon determination by the Presiding Officer[.]'" *Id.* (quoting 40 C.F.R. §

[2] However, when this version of Federal Rule 26(a) is viewed in context, it appears equally likely that it served as an overview of available discovery methods while other subsections of Federal Rule 26 actually authorized discovery.

22.19(f) (1991)).[3] *See also Chautauqua Hardware Corp.*, 3 E.A.D. 616, 620, 1991 WL 310028, *3 (EAB 1991) (Order on Interlocutory Review) (noting that under the Consolidated Rules "there are two ways for a party to obtain discovery of relevant information from another party"—through the prehearing exchange or by permission of the Presiding Officer). This continued to be the prevailing principle, and when the Agency later amended the Consolidated Rules to prescribe in greater detail the requirements that must be met to obtain a discovery order, it observed that in EPA administrative proceedings "other discovery has *always* been limited in comparison to the extensive and time-consuming discovery typical in the Federal courts, and designed to discourage dilatory tactics and unnecessary and time-consuming motion practice." Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, 64 Fed. Reg. 40138, 40160 (July 23, 1999) (Final Rule) (emphasis added).[4] Likewise, the EAB has continued to point out that "federal administrative litigation developed as a truncated alternative to Article III courts . . . and does not allow for the kind of discovery available, for example, under the Federal Rules of Civil Procedure[.]" *JHNY, Inc.*, 12 E.A.D. 372, 382, 2005 WL 2902519, *7 (EAB 2005). August Mack contends that discovery under the Rules in this proceeding should be treated differently than discovery under the Consolidated Rules, primarily because the reference to Federal Rule 26(a) in § 305.26(f)(1) does not appear in the Consolidated Rules. Reply at 8-9. But as stated above, this reference to Federal Rule 26(a) does not create some new type of "initial discovery" that is free to go forward without an opposing party's consent or this Tribunal's permission. The Rules governing this proceeding do not express or imply any right to discovery that is equal to what the Federal Rules of Civil Procedure provide, and the limited discovery principles that exist in administrative enforcement proceedings apply equally here.

Finally, August Mack argues the Prehearing Order "clearly accounted for the Fourth Circuit's command that there be discovery as to substantial compliance" and that it "contemplates having original discovery or discovery as a matter of right (i.e., discovery pursuant to Federal Rule 26(a))" because the Order includes a provision on "Additional Discovery." Mot. to Compel at 9, 10; Reply at 9; Order of Redesignation and Prehearing Order at 4. August Mack is correct that the Prehearing Order intends there to be discovery as to substantial compliance. That is the purpose of ordering the parties to engage in a prehearing exchange of information relevant to that topic. *See* Prehearing Order at 3-4. However, as indicated above, the prehearing exchange materials are the "original discovery or discovery as a matter of right" in this proceeding. Any discovery beyond that is "additional" and would require the consent of the opposing party or this Tribunal's permission, as set forth in the Prehearing Order. *See* Prehearing Order at 4 ("The parties may conduct any mutually agreed upon discovery . . . . Any further discovery shall be permitted only pursuant to an order of this

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[3] At that time, the Consolidated Rules also specified that other than the prehearing exchange of witness lists and documents, "further discovery . . . shall be permitted only upon determination by the Presiding Officer[.]" *See* 40 C.F.R. § 22.19(b), (f) (1993).

[4] August Mack's comparison of § 305.26(f)(1) to the Consolidated Rules' present language at § 22.19(e)(1) following this amendment is inapposite given that § 305.26(f)(1) does not confer any right to "initial discovery." *See* Mot. to Compel at 10 n.2; Reply at 2.

Tribunal.").

Accordingly, August Mack's request to compel discovery must be denied.

B. August Mack's request for permission to conduct other discovery

Anticipating that its request to compel discovery may be denied, August Mack alternatively asks this Tribunal for permission to conduct additional discovery. Mot. to Compel at 11-15. I construe this request as a motion for further discovery under 40 C.F.R. § 305.26(f)(3). As previously established, a motion for further discovery will be granted "only upon a showing of good cause and upon a determination: (i) [t]hat such discovery will not in any way unreasonably delay the proceeding; (ii) [t]hat the information to be obtained is not otherwise obtainable; and (iii) [t]hat such information has significant probative value." 40 C.F.R. § 305.26(f)(4).

a. The parties may issue requests for admissions but August Mack has not presented good cause for its request for further documentary discovery

In its Motion to Compel, the only good cause that August Mack raises in support of further discovery is that "the Fourth Circuit has placed the burden on EPA to show why [August Mack] should not be reimbursed from the fund." Mot. to Compel at 11. August Mack cites one sentence from the Fourth Circuit's opinion to justify this claim: "On remand, the EPA is entitled to dispute and litigate August Mack's compliance and any Superfund reimbursement that might be awarded." Mot. to Compel at 11; *August Mack*, 841 Fed. App'x at 525. According to August Mack, its "written discovery is designed to lead to the discovery of EPA's admissible evidence that the agency may seek to introduce at hearing or through motion to meet its burden." Mot. to Compel at 11.

However, the Agency does not have the burden that August Mack alleges. CERCLA unambiguously declares that in this proceeding, "the claimant shall bear the burden of proving his claim." 42 U.S.C. § 9612(b)(3). The Rules further state that

> [t]he Requestor has the burden of going forward with his case and of proving that the amount demanded in the Request for a Hearing is justified. Accordingly, the Requestor bears the burdens of presentation and persuasion. Following the establishment of a prima facie case, the Claims Official shall have the burden of presenting and of going forward with any defense to the allegations set forth in the Request for a Hearing.

40 C.F.R. § 305.33. The Fourth Circuit says nothing about overturning statutory and regulatory requirements that place the burden of proof on August Mack. Rather, a more natural reading in the broader context of the opinion is that the Court on remand has given August Mack an opportunity to prove that it substantially complied with the preauthorization requirement and the Agency an opportunity "to dispute and litigate" any showing that August Mack makes. *See August Mack*, 841 Fed. App'x at 524-25. Consequently, August Mack cannot assert any good

cause for further discovery based on the notion that the Fourth Circuit has shifted the burden in this proceeding.

August Mack seeks to buttress a showing of good cause in its Reply, where it provides somewhat more specific grounds for its discovery requests. With respect to its first interrogatories 1, 2, 4, 5, 11, 13, and 14, August Mack states that it "seeks information regarding individuals who have discoverable information . . . and it may seek to depose these individuals." Reply at 12; Mot. to Compel Ex. A. August Mack particularly hopes to "identify those persons within the EPA with substantive knowledge of the administration of the agency's preauthorization program[,]" because it "believes it is possible that EPA has never preauthorized and reimbursed any innocent parties, such as [August Mack], under these provisions." Reply at 12-13. If true, August Mack contends this "will prove that the preauthorization scheme, as applied by EPA, is arbitrary and capricious, defeats the intent of Congress to reimburse innocent parties . . . and is therefore invalid." Reply at 13. But this is not good cause for further discovery. The narrow issue before this Tribunal is whether August Mack substantially complied with the preauthorization requirements. This question focuses on August Mack's actions related to its work at the Site. The validity of the preauthorization scheme as a whole is not within the purview of this proceeding. Accordingly, August Mack has not shown good cause for further discovery through these interrogatories.

With respect to its first interrogatories 3, 10, 12, 15, 16, and 17, August Mack states that it "seeks information regarding EPA's defenses . . . ." Reply at 13; Mot. to Compel Ex. A. August Mack specifically articulates support for interrogatory 15, which "asks EPA to 'identify the status of the Site-specific funds, including a description of where and how such funds have been spent and the amount of Site-specific funds still held by the EPA.'" Reply at 13 (quoting first interrogatory 15); Mot. to Compel Ex. A. This also is insufficient cause for further discovery. Whether August Mack substantially complied with the preauthorization process is unrelated to the status of Site-specific funds. Further, the Fourth Circuit has ruled that August Mack does not have a right to be reimbursed from the Site-specific funds. *August Mack*, 841 Fed. App'x at 522 n.5. I will not order further discovery through these interrogatories.

Regarding its first interrogatories 6 through 9, August Mack states that it seeks information about the possibility "that EPA has never preauthorized and reimbursed an innocent private party" such as August Mack with money from the Superfund under 42 U.S.C. § 9611(a)(2). Reply at 14; Mot. to Compel Ex. A. Again, this does not address issues specific to August Mack's conduct, so it cannot provide good cause for further discovery. I will not order further discovery through these interrogatories.

As for August Mack's first request for production of documents, numbers 1 through 5 relate to August Mack's work at the Site or request for reimbursement and "seek material aimed at developing AME's claim that it met the purposes of preauthorization, its response actions were consistent with the [National Contingency Plan], and its costs were necessary . . . ." Reply at 14-15; Mot. to Compel Ex. A. Some of these requests are relevant to the extent that they address August Mack's work and reimbursement requests specifically. However, numbers 2 and 3 are overly broad, and numbers 4 and 5 likely include privileged material. Mot. to Compel Ex. A. While perhaps more narrowly tailored requests would require an Agency response, as

currently written, Respondent's requests 1 through 5 require no response.[5] Request numbers 6 and 7 address the Special Account and are not relevant because August Mack does not have a right to recover from the Special Account. Mot. to Compel Ex. A.; *See August Mack*, 841 Fed. App'x at 522 n.5. Request numbers 8 through 13 address preauthorization more generally and do not relate to August Mack. Mot. to Compel Ex. A. Request numbers 14 through 19 appear to include documents that would have originally been generated by August Mack, and it is unclear why they are not obtainable from August Mack's own records. Mot. to Compel Ex. A. Request numbers 20 through 22 are also overly broad and not tailored to August Mack's work at the Site. Mot. to Compel Ex. A. Accordingly, I will order no further discovery through these document requests.

August Mack states that its first requests for admissions "were designed to establish facts that should not be in dispute in this matter." Mot. to Compel at 12, Ex. A. In the interest of narrowing the issues and facts in dispute, I find that there is good cause for August Mack to issue its first requests for admissions to the Agency. Likewise, even though the Agency has not requested further discovery, the same good cause exists for EPA to propound requests for admissions on August Mack that seek to narrow the issues in dispute, if it so wishes. I will permit further discovery through August Mack's first request for admissions, and the Agency may serve August Mack with requests for admissions if the Agency so desires.

For its second set of interrogatories and request for production of documents, August Mack seeks "all documents relating to" the preauthorization decision documents that the Agency created when granting claims related to other CERCLA cleanup sites. Reply at 15; Mot. to Compel Ex. B. The Agency included these preauthorization decision documents with its prehearing exchange and cites them in its AD Motion. *See* AD Mot. at 27, 29-30; AX 8, 10, 11, 15, 18. August Mack asserts that its requests "properly seek material relating to EPA's defenses." Reply at 15. But August Mack has not asserted good cause for the breadth of further discovery that it seeks. First, these documents concern preauthorization decisions at other CERCLA cleanup sites and do not address August Mack's actions in this case. Second, the Agency has already provided in its prehearing exchange the documents that it will use "in an attempt to defeat [August Mack's] claims." *See* Reply at 15. The Agency has not cited in its AD Motion any "related" documents not provided in its prehearing exchange, and August Mack has not explained what related documents it seeks or how they are relevant. I will not order further discovery through August Mack's second set of interrogatories or request for production of documents.

In the second set of requests for admissions, August Mack seeks to authenticate its exhibits. Because these requests for admissions also seek to narrow disputes prior to hearing, good cause exists for August Mack to issue these requests to the Agency. If it chooses to do so, the Agency may likewise submit requests for admissions to August Mack that ask it to admit to the authenticity and admissibility of Agency exhibits.

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[5] Document request number 1 is for documents "referred to or identified" in answers to the interrogatories. Because I am not authorizing discovery through August Mack's interrogatories, this request for documents is also denied.

b. August Mack may depose the Agency's three proposed witnesses but not the Agency Administrator

August Mack also asks to depose the Agency's three proposed witnesses—Eric Newman, Richard Jeng, and Silvina Fonesca—in addition to EPA Administrator Michael Regan. Mot. to Compel at 13, Ex. C. According to August Mack, these individuals "contain information regarding substantial compliance with the preauthorization process, [August Mack's] substantial compliance with the preauthorization process, the process of recovery from the Superfund, how awarding [August Mack] money from the Fund is appropriate, and the exhibits EPA uses to try to defeat [August Mack's] claims and secure an accelerated decision." Mot. to Compel at 13-14.

As set forth above, in addition to the requirements for further discovery, the Rules state that this Tribunal "shall order depositions upon oral questions only upon a finding that: (i) [t]he information sought cannot be obtained by alternative methods of discovery; or (ii) [t]here is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing." 40 C.F.R. § 305.26(f)(5).

Given that the Agency has offered three fact witnesses who will testify with respect to August Mack's work at the Site and the Agency's preauthorization process, I find that there exists good cause to allow August Mack to depose Mr. Newman, Mr. Jeng, and Ms. Fonesca. As outlined above, I have denied the alternative methods of discovery that August Mack has requested, preventing August Mack from obtaining the information these individuals possess through other means. The scope of questioning shall be limited to the topics of the witnesses' proposed testimony as described on pages 2 and 3 of the Agency's Initial Prehearing Exchange.

I will not permit August Mack to depose Administrator Regan. The Agency has not proposed to call him as a witness in this proceeding, and there is no evidence that he has any personal knowledge of information relevant to whether August Mack substantially complied with the preauthorization requirements. As previously established, the validity of the preauthorization process is not at issue in this proceeding, so any information Administrator Regan might have about the program at large is irrelevant.

C. August Mack's request for sanctions is denied

August Mack asks this Tribunal to sanction EPA, arguing that the Agency has "willfully and deliberately disregarded the Fourth Circuit's Order, the relevant regulations, and the Prehearing Order" by not responding to its requests for discovery. Mot. to Compel at 18. In its Reply, August Mack further alleges the Agency engaged in sanctionable conduct more broadly following the remand of this case. Reply at 17-20. Specifically, August Mack contends the Agency "attended the court-ordered settlement conference in bad faith without a representative with authority to settle the case;" "insists that this Tribunal is bound by the vacated decisions of the district court and Tribunal despite AME repeatedly noting the impropriety of such an argument;" and engaged in "bait-and-switch tactics of appearing to cooperate in resolving this discovery dispute just long enough to beat AME to the courthouse with a motion for accelerated decision." Reply at 17-20.

The Rules provide this Tribunal with the authority to "[d]o all other acts and take all measures necessary for the maintenance of order and for the efficient and impartial adjudication of issues" arising in this proceeding. 40 C.F.R. § 305.4(b)(12). The EAB has interpreted nearly identical language in the Consolidated Rules as authority for me to issue a broad array of sanctions as appropriate for case management. *See John A. Biewer Co. of Toledo, Inc.*, 15 E.A.D. 772, 783, 2013 WL 686378, *10 (EAB, 2013). Accordingly, I may sanction parties when needed to maintain order or to ensure the efficient and impartial adjudication of issues.

In this case, I will not issue any sanctions against the Agency. As set forth above, August Mack was not entitled to any discovery beyond the prehearing exchange. The Agency was not obligated to answer or "cooperate" with August's Mack's unilateral discovery requests. Accordingly, none of the Agency's actions or inactions related to these requests are grounds for sanctions. Likewise, there is insufficient evidence that the Agency acted in bad faith at the parties' September 20, 2021 settlement conference. August Mack has previously asserted that "the government appeared without a client representative with authority to settle this matter, without a substantive response to [August Mack's] written settlement demands made on February 19, 2021, and again on September 16, 2021, and without any settlement authority." Preliminary Statement of Requestor (Sept. 30, 2021). According to the Agency, its counsel "attended the subject settlement conference on behalf of EPA with authority to respond" to August Mack's September 16, 2021 settlement offer "and to engage in settlement discussions with [August Mack]." EPA's Response to AME's Preliminary Statement (Oct. 5, 2021) ("PS Response"). The Agency states that the September settlement offer was "not materially different from" the settlement offer made in February. PS Response at 2. The Agency had considered that offer then and rejected it. Going into the September 20, 2021 settlement conference, EPA's counsel was authorized to reject August Mack's revived offer and bring back to the Agency for further consideration any new offer the company made. PS Response at 2. This does not demonstrate bad faith, particularly given that the Agency had already considered and rejected August Mack's February settlement offer and August Mack did not materially change its position in September. Finally, I see no sanctionable conduct in the Agency's discussion of "the law of the case" and the effect of the Fourth Circuit opinion, prior orders of the district court, or prior orders of this Tribunal. The Agency is making a legal argument, and it is unsurprising that it has a different view than August Mack of what issues should be considered on remand and what issues have already been ruled upon.[6]

D. Conclusion

As set forth above, August Mack's Motion to Compel Discovery, for Sanctions, and to Extend Case Management Deadlines is **DENIED in part** and **GRANTED in part** as follows:

August Mack's requests to compel discovery and for sanctions is **DENIED**.

[6] In its Response, the Agency "requests that this Court exercise its authority to issue sanctions commensurate with AME Counsels' misconduct" in seeking to obtain discovery unilaterally. Response at 30-31. The Agency has not fleshed out its argument in a separate motion for sanctions, and I decline to consider this request further at this time.

August Mack's request for further discovery is **GRANTED in part** with respect to its requests for admissions and depositions of the Agency's three proposed witnesses. The motion is **DENIED in part** with respect to the rest of its documentary discovery requests and proposed deposition of Administrator Regan.

The Agency shall respond to August Mack's first and second requests for admissions as presented in Exhibits A and B to August Mack's Motion to Compel no later than **June 13, 2022**. If the Agency desires to serve requests for admissions on August Mack, it shall do so no later than **June 13, 2022**. The deadline for August Mack to respond to any such requests for admissions shall be no later than **30 days** after it is served with those requests.

The Agency shall make available for depositions Mr. Newman, Mr. Jeng, and Ms. Fonesca. The parties shall work together in good faith to determine mutually agreeable times, dates, and locations for the depositions. The depositions may be conducted virtually if a deponent or party so desires. The scope of questioning shall be limited to the topics of the witnesses' proposed testimony as described on pages 2 and 3 of the Agency's Initial Prehearing Exchange. Depositions shall be concluded no later than **July 15, 2022**.

In light of the additional discovery that is taking place, the dispositive motion deadline is extended through **September 16, 2022.** The Agency has already filed a dispositive motion but may file a renewed motion. Notwithstanding the time set forth in 40 C.F.R. § 305.23(b), responses to dispositive motions shall be due **September 30, 2022**. The parties may submit replies to responses no later than **October 7, 2022**.[7]

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge

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

[7] *See* Order on Motions for Extension of Time (Dec. 29, 2021) (extending August Mack's response deadline to a date to be set after resolution of the discovery dispute); Order on Requestor's Unopposed Motion to Extend Dispositive Motion Deadline (Jan. 20, 2022) (granting August Mack's request to extend the dispositive motion deadline 60 days after the discovery deadline).

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order on Requestor's Motion to Compel Discovery and for Sanctions**, dated May 12, 2022, and issued by Chief Administrative Law Judge Susan L. Biro, was sent this day to the following parties in the manner indicated below.

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