UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

AUGUST MACK ENVIRONMENTAL, INC.'S
RESPONSE TO EPA'S MOTION FOR ACCELERATED DECISION

EPA's motion for an accelerated decision is a mess of scattershot arguments made without legal or factual support. EPA's motion hopes to hide what the discovery in this case – discovery EPA vehemently opposed – has made abundantly clear. First, AME has substantially complied with the purpose of and the procedure in EPA's preauthorization scheme. And, second, EPA has so warped its legally questionable preauthorization scheme that, as applied, the agency only grants preauthorization to CERCLA-liable parties that have settled their liability with the government. Thus, EPA does not adhere to its own preauthorization scheme that it now says bars AME's recovery, and it never has. Given the insurmountable case against it, EPA has elected to throw rhetorical spaghetti at the wall to see what sticks.

As discussed in detail below, EPA's motion should be denied because it: (1) fails to state what facts are material and undisputed; (2) misapplies the substantial compliance standard, effectively requiring strict compliance with the preauthorization scheme; and (3) ignores evidence establishing that AME incurred necessary costs while performing

work consistent with the NCP. Moreover, the agency's arguments as to mootness, standing, and law of the case should also be rejected as frivolous.

ARGUMENT

I. EPA fails to state what facts are undisputed and material.

In its opening brief, EPA acknowledges that motions for accelerated decisions are analogous to motions for summary judgment. (EPA MFAD, pp. 15-17.) Moreover, courts have repeatedly stated that motions for accelerated decisions are akin to motions for summary judgment and will only be granted where the movant can establish undisputed material facts. (*Id.*) Thus, the substantive and procedural requirements of Federal Rule of Civil Procedure 56 must be met for an order granting a motion for accelerated decision to be proper:

> Rule 56 is the prototype for administrative summary judgment procedures, and the jurisprudence that has grown up around Rule 56 is, therefore, the most fertile source of information about administrative summary judgment. Thus, "[w]ith minor individual modifications, the summary judgment procedures should be similar in most agencies [to those under Rule 56]."

Puerto Ricoc Aqueduct & Sewer Auth. v. U.S. E.P.A., 35 F.3d 600, 607 (1st Cir. 1994); *see also John D. Copanos & Sons, Inc. v. Food & Drug Admin.*, 854 F.2d 510, 523 (D.C. Cir. 1988) ("These [Rule 56] principles apply with equal force in the context of administrative judgment.") Despite its lip service to the applicable standard and its self-proffered expertise in administrative law, EPA makes no attempt to designate facts that are material

or undisputed.[1] For this reason, the agency has not met its burden and its motion should be denied.

EPA's deficient briefing is not merely a failure to fill out an obsolete form. Rather, it substantially prejudices AME and this Tribunal. As to AME, a movant's obligation to provide a list of undisputed facts gives the non-movant a fair opportunity to respond and dispute a movant's claimed undisputed facts. *Gardels v. Central Intelligence Agency*, 637 F.2d 770, 773-774 (D.C. Cir. 1980) (holding non-movant does not have a fair opportunity to respond "when one party, particularly the moving party, fails in his statement to specify the material facts upon which he relies"); *Discover Bank v. Stanley*, 757 N.W.2d 756, 764 (S.D. 2008) ("The lack of such a statement [of undisputed material facts] denied Stanley the opportunity to submit his mandatory statement controverting those undisputed facts offered by Discover.")

Here, AME and the Tribunal have been left to guess what facts EPA believes are material and undisputed. As to the Tribunal, EPA's failure to provide a statement of undisputed material fact asks the adjudicator to become the advocate. *Cray Commc'ns, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 396 (4th Cir. 1994) ("Even assuming

[1] Under Federal Rule 56, a summary judgment movant must identify the undisputed and material facts, and this is typically done by listing the undisputed material facts in separately numbered paragraphs with supporting citations. *Mensie v. City of Little Rock*, 917 F.3d 685, 688 (8th Cir. 2019) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)); *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349-350 (5th Cir. 2005); *Curtis v. Costco Wholesale Corp.*, 807 F.3d 215, 2019 (7th Cir. 2015); *Blanch v. Hexagon US Fed., Inc.*, 2018 WL 4997644 at *1 (E.D. Va. Oct. 15, 2018); *Kawczynski v. F.E. Moran, Inc.*, 238 F.Supp.3d 1076, 1080 (N.D. Ill. 2017).

arguendo that the district court had some duty to consider the affidavit and exhibits, it would have remained well within its discretion in refusing to ferret out the facts that counsel had not bothered to excavate."); *Bd. of Trustees, Sheet Metal Workers' Nat. Pension Fund v. Four-C-Aire, Inc.*, 42 F.4th 300, 315 (4th Cir. 2002) ("Judges are not like pigs, hunting for truffles buried in briefs.") (quoting *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991)); *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997) ("A court which must search the record and make up its own arguments because a party has not adequately presented them runs the risk of becoming an advocate rather than an adjudicator.") (citing *Keller*, 549 N.E.2d at 373); *Green v. Colvin*, 2015 WL 3505528 at *4 (D.S.C. June 3, 2015) (discussing how the due process clause "entitles claimants to a neutral fact finder" and that the proper role of an administrative law judge is an impartial advocate, not an adjudicator).

Because EPA failed to state what facts are undisputed and material, the Tribunal should deny EPA's MFAD. Any other result would violate AME's due process rights because AME does not know the facts that EPA claims are undisputed and material and therefore cannot challenge those facts.[2] Moreover, for EPA to receive a favorable ruling, the Tribunal would have to analyze and identify the undisputed and material facts for

[2] In contrast, AME properly identified undisputed material facts in separately numbered paragraphs, with supporting citations, in its MFAD. (AME MFAD, pp. 3-31.)

EPA, thereby improperly turning itself into an advocate. Thus, denying EPA's MFAD is warranted.[3]

II. EPA misstates the procedural history, omits undisputed evidence obtained through discovery, and misrepresents AME's arguments.

The lack of a statement of undisputed material facts is not EPA's only critical omission. Throughout its MFAD, EPA omits evidence that AME developed by conducting EPA-opposed discovery, misstates the procedural history, and misrepresents AME's arguments. To start, EPA's MFAD is essentially another motion to dismiss as it "derive[s]" the facts "from the pleadings in this matter[.]" (EPA MFAD, p. 13) EPA's limited reliance on the "pleadings" ignores the Fourth Circuit's directive that "discovery" be conducted to determine whether AME substantially complied with the preauthorization process. *August Mack*, 841 Fed.App'x at 525. EPA's argument that the Tribunal should limit its review to "the pleadings" thus conflicts with the Fourth Circuit's decision and should be rejected. *See also* May 12, 2022 Order, p. 3 (stating the Fourth Circuit's decision "implies that *any* discovery, including a prehearing exchange, would be useful in determining whether August Mack should be reimbursed by the Superfund.")

[3] AME incorporates its Statement of Undisputed Material Facts from its Motion for Accelerated Decision hereto and disputes all "facts" stated by EPA that are inconsistent with same. (AME MFAD, pp. 3-31.)

Next, EPA acknowledges that discovery took place when describing the procedural history of the case, but it misstates how the discovery occurred. According to EPA the parties "agreed to additional discovery to develop the record as to whether August Mack 'substantially complied.'" (EPA MFAD, p. 8.) However, EPA never "agreed" to additional discovery, as described at length in AME's motion to compel and reply in support, and was ordered to respond to AME's requests for admission and make three EPA employees available to be deposed.[4] (AME Mot. Compel, pp. 2-6; AME Reply; May 12, 2022 Order.)

Although lacking in candor, it is not surprising that EPA wants to reduce the Tribunal's attention to the facts it alleged in pleadings, and to ignore EPA's discovery responses and deposition testimony. The undisputed deposition testimony of EPA's designated witnesses clearly demonstrates that the agency's preauthorization scheme is arbitrary, capricious, and unlawful as applied. For instance, EPA's witnesses testified that it has never preauthorized an innocent non-settling private party. (Dep. Fonseca, pp. 11:2-6, 13:9-20, 32:21-33:2, 41:15-20; Dep. Jeng, pp. 17:5-18:8, 19:10-14, 20:6-9, 32:25-33:22.)

[4] The Tribunal did not order EPA to respond to AME's interrogatories or request for production though, despite recognizing that "[s]ome of these requests are relevant[.]" (May 12, 2022 Order, p. 7.) Likewise, the Tribunal did not require EPA to submit to a Federal Rule 30(b)(6) deposition or allow the EPA administrator to be deposed. (*Id.* at 11.) AME maintains that the Tribunal's refusal to grant AME's motion to compel in full constitutes reversible error because it has impaired AME's ability to develop its case (including responses to EPA's arguments) and conflicts with the Fourth Circuit's order.

Instead, EPA operates the preauthorization program as a settlement cudgel to encourage PRPs to settle CERCLA liability with EPA. (Dep. Fonseca, p. 10:11-11:19, 12:11-13:20, 32:21-33:2, 41:15-20; Dep. Jeng, p. 9:4-12, 17:5-18:8, 19:6-14, 32:25-33:22, 36:14-25.)[5] Under these facts, EPA administration of the preauthorization scheme is arbitrary, capricious, and unlawful as a matter of law. (AME MFAD, pp. 42-52.)

In addition, the deposition testimony of EPA's employees demonstrate that AME satisfied the objectives of the preauthorization process. Specifically, EPA's project manager for the Site testified that financing the remediation of the Site with money from the Fund is appropriate and that EPA will use Fund monies once the BJS account is exhausted; EPA found AME qualified to conduct remedial work at the Site and knows of no environmental hazards AME created; AME's response actions were consistent with the NCP; and, EPA approved AME's response actions. (Dep. Newman, pp. 8-11:1, 13:9-17, 17-23, 18:9-14, 19:3-5, 19:11-25, 20:1-4, 20:19-21:19, 23:9-24:2, 24:11-18, 24:25-25:12, 34:1-35:8, 39:2-10, 64:2-12, 66:18-20, 67:4-10, 68:9-15, 70:17-71:1, 71:10-14, 77:12-18, 99:6-11, 111:1-6; Dep. Fonseca, p. 54:7-10; Dep. Jeng, p. 30:22-25 *see also* RX 329, EPA resp. RFA 10.) This undisputed material evidence—drawn from the testimony of EPA's own

[5] In its motion, EPA pays no attention to how it administers its preauthorization scheme, but rather discusses how it is supposed to work under the regulations. (EPA MFAD, pp. 10-12.) A comparison of how the preauthorization process is supposed to work under the regulations versus how it works in practice, as established by the deposition testimony, shows how arbitrary and capricious EPA's administration of the preauthorization scheme has been. (*See* AME MFAD, pp. 42-52.) The regulations do not limit preauthorization availability to settling PRPs, and EPA's unwritten restrictions on the Fund are by definition arbitrary, capricious, and unlawful. (*Id.*)

employees and designated witnesses—establishes that AME substantially complied with the preauthorization process as a matter of law. (AME MFAD, pp. 34-40.)

Finally, EPA attempts to misguide the Tribunal when it states, AME "argue[s] that it was EPA's obsolete application form which blocked AME from seeking reimbursement from the Fund." (EPA MFAD, p. 27.) No citation is provided for this mischaracterization of AME's position.[6] Rather, the issue before the Tribunal is whether AME substantially complied with the preauthorization process. *August Mack*, 841 Fed.App'x. at 525. AME's position is that it substantially complied with the preauthorization process because it satisfied the stated purpose of EPA's preauthorization scheme. (AME MFAD, pp. 34-40.) Additionally, EPA possessed all the information required by the obsolete form before AME started response work, which further supports a finding that AME substantially complied with the preauthorization process as a matter of law. (*Id.* at 65-67.) EPA's omission of material facts revealed during discovery and its misrepresentation of AME's arguments is an admission that EPA cannot rebut the evidence or AME's arguments.

[6] This misrepresentation and red herring forms the basis of EPA's estoppel argument, which should be rejected. (EPA MFAD, pp. 25-27.) Moreover, as discussed in the briefs on AME's motion to compel and for sanctions, EPA's law of the case argument is groundless because the Fourth Circuit vacated the Tribunal and district court's opinions. The Tribunal did not sanction EPA for this misconduct, stating, "The Agency is making a legal argument," Order, p. 10, but a party has a duty of candor and to make good faith arguments. Claiming that vacated decisions bind the Tribunal and parties is neither. (AME Mot. Compel Reply, pp. 17-18.)

III. EPA's invites reversible error with its substantial compliance arguments.

EPA's substantial compliance arguments are erratic, inconsistent, unavailing, and often directly violate the Fourth Circuit's order. First, without support, EPA grafts elements of criminal law onto the substantial compliance standard, claiming there is a mens rea component and an actus reus component. Then, without explanation, EPA completely changes its arguments in the middle of its brief and says a party substantially complies with the preauthorization process when it submits the information required by the legally obsolete form. As explained below, EPA's attempt to use criminal law elements in this case is erroneous and conflicts with the Fourth Circuit's order. In addition, EPA possessed the information required by 40 C.F.R. § 307.22(b) and (c) before AME performed work at the Site. EPA's possession of this information demonstrates substantial compliance with the preauthorization process, and that AME, not EPA, is entitled to judgment as a matter of law.

A. EPA improperly grafts elements of criminal law onto the substantial compliance standard.

For the majority of EPA's brief, it argues that substantial compliance with the preauthorization process means "form[ing] the intent to seek preauthorization" and "filing the equivalent of an application[.]" (EPA MFAD, pp. 19, 24.) EPA makes this argument at least eight times:

> AME did not substantially comply with the essence of EPA's procedures for claims against the Fund, as AME admits it did

not seek, or attempt to seek, preauthorization before initiating response actions. (EPA MFAD, p. 18.)

* * *

[I[t did not intend to seek, nor attempt to seek, preauthorized funding of the response action, as required by 40 C.F.R. §§ 307.21 and 307.22. (EPA MFAD, p. 18.)

* * *

Without having formed the intent to seek preauthorization . . . AME in no way could have attempted to comply with the preauthorization process, let alone substantially complied with it. (MFAD, p. 19) (footnote omitted).

* * *

AME never sought and never even attempted to seek preauthorization. That undisputed fact alone disposes of AME's claim for payment from the Superfund pursuant to this Court's *sua sponte* authority[.] (AME MFAD, p. 21.)

* * *

Having never intended to request preauthorization, AME could not have attempted to comply with the preauthorization process, let alone substantially comply with it. Therefore, under either a strict compliance standard or a substantial compliance standard, AME's claim that it 'satisf[ied] the intent of the preauthorization process' has no merit because AME utterly failed to attempt to comply with the preauthorization process in the first place. (EPA MFAD, p. 22.)

* * *

[I]t is well settled by this Court that AME could not possibly have complied with the substantial or essential requirement to seek preauthorization by filing the equivalent of an application, or otherwise. (EPA MFAD, p. 24.)

* * *

[I]n applying a substantial compliance standard to this issue in light of that unreversed finding of fact – that AME did not seek preauthorization expressly *or otherwise*, AME's claim must fail because it never attempted to comply with the preauthorization regulations, let alone substantially comply with them. (EPA MFAD, p. 25.)

* * *

> [E]very document that AME proffers in its Prehearing Exchange evinces that AME was simply fulfilling its duty as 'Supervising Contractor' on behalf of Vertellus, *and not otherwise independently seeking preauthorization on its own behalf*. (EPA MFAD, p. 35.)

EPA provides no citation to support its position that elements of criminal law, mens rea (form the intent to seek preauthorization) and actus reus (file the equivalent of the application), make up the substantial compliance standard applicable in this civil proceeding. Nor could it as EPA's position has no basis in law. Instead, Federal courts repeatedly hold that a party substantially complies with a regulation when it satisfies its objectives. (AME MFAD, pp. 34-35.)

The flaws with EPA's substantial compliance argument continue. Importantly, EPA is silent as to what constitutes the "equivalent" of the obsolete form and with whom and where AME was supposed to file it. This highlights one of the many errors in EPA's argument. The Fourth Circuit held that EPA's preauthorization application is legally obsolete because it "expired more than twenty-five years ago," EPA itself declared the application obsolete, and "the directions on the face of [the form] are outdated" as an applicant needed to mail the completed form to a department of EPA that "was eliminated in 2015" located in a building that "has been demolished and no longer exists." *August Mack*, 841 Fed.App'x. at 524, 524 n.6. By claiming AME needed to file the "equivalent" of the obsolete form (without saying what constitutes "equivalent" and where and with whom it was supposed to be filed), EPA seeks to impose the same

arbitrary, capricious, and legally erroneous strict compliance standard that the Fourth Circuit struck down.

i. EPA struggles to apply its substantial compliance argument to the facts, highlighting the error in its position.

Next, EPA ties itself into knots trying to apply its substantial compliance argument to the facts. At one point, EPA says that AME should have called Mr. Newman, the RPM for the BJS Site, and asked him about preauthorization: "As an agent of Vertellus under the Consent Decree, AME had direct communications with EPA's RPM and could have asked about preauthorization, but AME never did so[.]"[7] (EPA MFAD, p. 28.) Notably, EPA does not say what asking Mr. Newman would have accomplished. In fact, later in its motion, EPA recognizes that this would have accomplished nothing as Mr. Newman has no involvement in the preauthorization process. (EPA MFAD, pp. 37-39; *see also* RX 330, Dep. Newman, p. 22:6-15 (testifying that he has "no authority related to [preauthorization]."))

Nonetheless, EPA doubles down and says "numerous other applicants who have substantially complied with the preauthorization process by successfully contacting the Agency and initiating the preauthorization process." (EPA MFAD, p. 29.) EPA's position that AME needed to contact "the Agency" at random and ask it about preauthorization

[7] EPA provides no citation for its statement that AME never asked Mr. Newman about preauthorization, and this unsupported claim should be given no weight or struck outright.

to substantially comply with the preauthorization scheme is unfounded and nonsensical.[8] Again, EPA has only itself to blame for the application being legally obsolete and for the arbitrary nature of its preauthorization scheme. *August Mack*, 841 Fed.App'x. at 522-525. EPA's attempt to use its own wrongdoing to its benefit by imposing additional burdens on an innocent private party seeking Superfund reimbursement has no basis in the regulations should be rejected.

Moreover, EPA does not support its statement that "numerous other applicants . . . substantially complied with the preauthorization process," and, as such, the Tribunal should give it no weight or strike the statement. Despite the preauthorization scheme existing for decades, EPA only identified a sum total of 5 instances of preauthorization being granted. (AX-8, 10, 11, 15, 18.) This is consistent with the deposition testimony of EPA's employees and its designated witnesses regarding the preauthorization process. Ms. Fonseca was in charge of the preauthorization scheme for nearly 20 years and only reviewed "four or five" preauthorization applications during that time period. (RX 331, Dep. Fonseca, pp. 34:9-35:2.) Mr. Jeng was in charge of the preauthorization scheme for approximately two years and testified there was only one preauthorization application submitted during that time. (RX 332, Dep. Jeng, p. 32:11-16.) Mr. Newman has been the RPM for Region 3 for approximately 30 years and only knows of one instance of

[8] "The Agency" has a total workforce of 18,742 employees. https://www.eeoc.gov/federal-sector/environmental-protection-agency-epa-0 (last accessed October 28, 2022).

preauthorization. (RX 330, Dep. Newman, pp. 23:1-8, 108:4-14.) In short, preauthorization grants were anything but "numerous." There were hardly any, and in accordance with EPA's arbitrary and unlawful *unwritten* restrictions, those grants were limited to PRPs settling their CERCLA liability with EPA. (AME MFAD, pp. 42-52.)

In addition, there is no evidence in the record that EPA has ever issued a preauthorization under 40 C.F.R. § 307.22 using a substantial compliance test. In fact, the opposite is true. EPA admitted that it only grants preauthorization if the regulations are strictly complied with: "If EPA receives a timely and complete application for preauthorization . . . EPA then [decides] to either grant or deny the application." (EPA MFAD, p. 11; RX 331, Dep. Fonseca, pp. 36:24-37:17 (testifying that she reviewed applications to make sure they are complete and required resubmission if an application was incomplete); Dep. Jeng, p. 37:5-8 ("Once the application is submitted it is memorialized upon the signature of the preauthorization decision document[.]"))

ii. EPA presents a strict compliance argument masquerading as substantial compliance.

By claiming that AME needed to "fil[e] the equivalent of an application," it is clear that EPA presents a strict compliance argument masquerading as substantial compliance. This conclusion is cemented by EPA's emphasis on the lack of a PDD in this case. (EPA MFAD, p. 25, 25 n.29 ("AME has failed to provide new evidence to prove it was preauthorized under Part 307 . . . Any new evidence would have to be in the form of a Preauthorization Decision Document ('PDD) – which of course does not exist."), pp. 36-

37 (arguing that AME's claim is ineligible for reimbursement *even if* "AME substantially complied with EPA's preauthorization process" because "EPA never issued a PDD with respect to AME and the BJS Site.") However, the lack of a PDD is immaterial because EPA will only issue one if a PRP (that is a liable party) settles its liability with EPA and then submits the legally obsolete application form. (EPA MFAD, p. 11; Dep. Jeng, p. 17:2-25 ("If there is a potential agreement on the table for including preauthorized mixed funding in a settlement agreement . . . then the settling potentially responsible party will provide an application . . . When that comes in, it is reviewed . . . and we signal approval of that application through a preauthorization decision document."), p. 37:5-7 ("Once the application is submitted it is memorialized upon the signature of the preauthorization decision document[.]")) Thus, EPA's argument that AME should be faulted for not receiving a PDD, which is conditioned on submittal of the legally obsolete application, runs afoul of the Fourth Circuit's instruction that AME should not be faulted "for failing to strictly comply with the preauthorization process[.]" *August Mack*, 841 Fed.App'x. at 524.

EPA goes so far as to state it "would be acting *ultra vires* were it to process a claim against the Fund without a PDD." (EPA MFAD, p. 37.) With this unsupported statement, EPA demonstrates a misunderstanding of the meaning of ultra vires. EPA has acted in an ultra vires manner, but that occurred when it created the preauthorization scheme. (AME MFAD, pp. 53-60.) As discussed in AME's Motion for Accelerated Decision, the

preauthorization requirement is invalid on its face because (1) CERCLA is unambiguous and does not require preauthorization, resulting in the preauthorization requirement being ultra vires[9]; (2) EPA has usurped the role of Congress by requiring preauthorization, which violates the separation of powers doctrine; and (3) access to the Fund is an issue of vast economic and political significance that affects environmental justice, trillions of dollars of liability, and human health and the environment, meaning only Congress can address this issue under the major questions doctrine. (*Id.* at pp. 53-64; *see also* https://www.epa.gov/newsreleases/epa-announces-plans-use-funding-bipartisan-infrastructure-law-clear-out-superfund (last accessed October 19, 2022); https://www.whitehouse.gov/environmentaljustice/ (last accessed October 19, 2022).[10]

What is more, EPA calls a PDD "an essential component of the preauthorization process[.]" (EPA MFAD, p. 37.) This tracks its statement that submitting the legally obsolete application is the "[c]hief" preauthorization requirement. (*Id.* at 6.) However, the Fourth Circuit struck the application and coinciding PDD requirements. *August Mack*, 841 Fed.App'x. at 522-525. The facts establishing that AME satisfies the remaining

[9] EPA's statement that § 9611(a)(2) contains "direct authority" for preauthorization is baseless. (EPA MFAD, p. 10.) In reality, Congress rejected EPA's attempt to insert direct authority for preauthorization into CERCLA, further supporting AME's arguments. (AME MFAD, pp. 55-57.)

[10] EPA says that processing AME's claim without a PDD "would effectively upend the CERCLA claims procedures, rendering them essentially meaningless." (EPA MFAD, p. 37.) To the extent the CERCLA claims procedures have been rendered "essentially meaningless," it is EPA's own doing. EPA has only itself to blame for its legally obsolete regulations. Notably, despite the Fourth Circuit's order, EPA has refused to update its obsolete regulations.

requirements of eligibility for Superfund reimbursement (i.e. the cleanup work is consistent with the NCP and the costs are necessary) are undisputed and AME is entitled to judgment as a matter of law. 40 C.F.R. § 307.21; AME MFAD, pp. 40-42.

B. EPA does an about face in the middle of its motion and says a party substantially complies with the preauthorization process only when it provides EPA with the information sought in Form 2075-3.

Without explanation and in the middle of its motion, EPA completely changes course and says a party substantially complies with the preauthorization process only if it provides the information sought by the legally obsolete application: "AME never sought preauthorization, either by filing EPA's preauthorization application form (Form 2075-3) before commencing the response action . . . *or otherwise* substantially complying with the substance of that requirement by providing EPA the information sought in Form 2075-3, as required by 40 C.F.R. §§ 307.22(b) and (c)." (MFAD, p. 21.) Importantly, EPA remains silent as to where and to whom this information needed to be sent. Because of this and federal law holding that a party substantially complies with a regulation when it satisfies its objectives, EPA's substantial compliance argument should be rejected. Nonetheless, in the alternative, and as discussed in its own MFAD, if a party substantially complies with the preauthorization scheme by providing EPA with the information required by § 307.22(b) and (c), then AME met this standard as a matter of law. (AME MFAD, pp. 65-67.)

Specifically, EPA says it needed six things for AME to have substantially complied with the preauthorization process: "an explanation of why the proposed response action is necessary and how it adheres to the NCP; a proposed schedule for the work; projected costs of response activities; a proposed schedule for submitting eligible claims against the Superfund; proposed project management and oversight procedures; and assurances of timely initiation and completion of work." (EPA MFAD, p. 32.) The evidence in the record establishes that EPA possessed all of this information as a matter of law. First, prior to AME doing any work, EPA and AME ensured that AME's work was necessary and consistent with the NCP. (AME MFAD, pp. 66-67.) Second, AME provided EPA with a schedule of work. (*Id.*) Third, EPA had projected costs of the response action before AME's work began. (AME MFAD, pp. 66-67; RX 322, pp. 5-6, 34-42, 47-48; *see also* AX 12, pp. 3-4 (stating the estimated cost of completing the work); RX 330, Dep. Newman, p. 110:2-11 (providing estimate of cost of outstanding cleanup work)). Fourth, EPA possessed a schedule for the submission of claims from Vertellus, which clearly applies to AME as the EPA-approved performing contractor[11](RX 322, pp. 44-46; RX 324 (submitting Claim Certificate to the BJS Site River Removal Action Trust for payment under the BJS Site River Removal Action Trust Agreement); RX 327 (discussing payment

[11] Even if the Tribunal does not find that EPA possessed a proposed schedule for the submission of claims, there is no genuine issue of material fact that AME satisfied what EPA calls the other five requirements to substantially comply with the preauthorization process. Accordingly, AME should be award its claim in full because requiring all six would be strict compliance.

triggers for the completion of project milestones); AX 14 (listing project milestones and payment triggers and describing the amount of the claim payable to AME).) Fifth, there was project management and oversight procedures in place, including EPA oversight, West Virginia oversight, reporting of progress of AME's work, and weekly or biweekly updates and meetings. (AME MFAD, pp. 66-67.) Sixth, EPA was assured that AME's work would be timely started and completed. (*Id.*) Thus, even under EPA's substantial compliance argument, AME is entitled to 100% reimbursement from the Fund as a matter of law.

IV. EPA only has authority to ensure the appropriate use of the Fund, not to safeguard it from legitimate claims made by innocent private parties.

A theme of EPA's MFAD is that it is the protector of the Fund and must preserve it from being depleted. (EPA MFAD, pp. 5-6.) In addition to this claim being irrelevant to the substantial compliance issue presented here, it is simply wrong. It is the clear purpose and the intent of Congress to use the money in the Fund in an appropriate manner. CERCLA "was designed to promote the timely cleanup of hazardous waste sites," *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009) (internal quotation marks omitted), and the Superfund Amendments and Reauthorization Act of 1986 reiterated the intent to hasten the "cleanup of hazardous waste sites[.]" *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1132 (8th Cir. 2002) (internal quotation marks omitted); *see also U.S. v. Chem-Dyne Corp.*, 572 F.Supp. 802, 805 (S.D. Ohio 1983) ("CERCLA was enacted both to provide rapid responses to the nationwide threats posed

by the 30–50,000 improperly managed hazardous waste sites in this country as well as to induce voluntary responses to those sites."). If necessary, Congress can replenish the Superfund as it did last year when it reinstated chemical excise taxes and invested an additional $3.5 billion into the Fund.[12]

Thus, EPA's position that it must preserve the Fund is wrong. Instead, it must use the Fund to finance remediation of contaminated sites and seek additional funding from Congress when needed. Using Superfund to reimburse AME would fulfill these goals and be an appropriate use of the Fund. (AME MFAD, pp. 35-37, 40-42, 58.)

Moreover, as implemented, EPA's preauthorization scheme does nothing to fulfill its statutory mandate to "approve" necessary response costs. EPA's "approval" occurs outside of its preauthorization scheme. EPA evaluates the nature and extent of contamination and assesses the cost of cleanup prior to preauthorization. For example, here, EPA sent letters to certain PRPs on June 4, 2002 in an attempt to initiate a Remedial Investigation and Feasibility Study ("RI/FS"). (RX 322, p. 5.) According to EPA, a RI/FS is a "stage [that] involves an evaluation of nature and extent of contamination as a site and assessing potential threats to human health and the environment" and "also includes evaluation of the potential performance and cost of the treatment options identified for a

[12]https://www.epa.gov/newsreleases/epa-secures-funding-under-bipartisan-infrastructure-law-ensure-clean-raymark-superfund#:~:text=The%20Bipartisan%20Infrastructure%20Law%20reinstates,the%20environment%20of%20communities%20and (last accessed October 24, 2022).

site."[13] For the BJS Site, "EPA initiated a fund-lead RI in 2005," and it was completed in April 2009. (RX 322, p. 5.) Then, after deciding that a non-time critical removal action was appropriate, EPA "conduct[ed] an Engineering Evaluation/Cost Analysis ('EE/CA') as required by the NCP." As EPA acknowledges, "the EE/CA identifies the . . . cost of various alternatives . . . Thus, an EE/CA serves an analogous function to . . . the remedial investigation/feasibility study (RI/FS) conducted for remedial actions."[14] The estimated cleanup costs are an important function of the EE/CA. *Id.* at 3. In accordance with EPA's estimate of the cleanup costs, EPA secured "nearly $37 million in cash and financial assurances" to clean up the BJS Site. *August Mack*, 841 Fed. App'x. at 520. Thus, EPA had already in this case, determined and approved the necessary response actions and the cost of those actions.

Moreover, EPA's witnesses testified that it is EPA's review of costs that occurs *after* a party performs response actions that ensures money from the Fund is being used appropriately and not the agency's review through its preauthorization scheme. (AME MFAD, pp. 43-44.) Therefore, not only is EPA incorrect in its belief that it must preserve Superfund money, but it is wrong in its belief that preauthorization helps ensure the appropriate use of the Fund or its "preservation."

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[13] https://www.epa.gov/superfund/superfund-cleanup-process (last accessed October 24, 2022).

[14] https://semspub.epa.gov/work/11/175656.pdf at 3.

V. EPA's standing and mootness arguments are frivolous.

With its standing and mootness arguments, EPA leaves no doubt that it wants this Tribunal to disregard the Fourth Circuit's order. First, in sub-header IV.F.1., EPA says that AME lacks standing. (EPA MFAD, p. 33.) Then, without mentioning standing or its elements once, it spends three pages arguing that AME does not have a contract claim against the government under a privity or third-party beneficiary theory. (*Id.* at 33-35.) However, AME is making a claim against the Superfund, to which it has a statutory right, and it is clear that AME has standing to bring this claim. *See generally August Mack*, 841 Fed.App'x. at 522-525; *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (identifying the elements of standing, an injury in fact that is fairly traceable to defendant's conduct and likely to be redressed by a favorable decision). AME has suffered an injury, in the amount of approximately $3 million, that is traceable to EPA's unlawful creation and administration of the preauthorization scheme, and this injury may be redressed by this Tribunal. Rejecting EPA's standing argument is both warranted and required.

Next, EPA takes direct aim at the Fourth Circuit's holding and says it is irrelevant whether AME substantially complied with the preauthorization process. (EPA MFAD, pp. 36-39.) This is not an exaggeration. Despite the Fourth Circuit's order to the contrary, on at least five occasions, EPA says the substantial compliance issue is irrelevant and

AME should be awarded nothing even if it substantially complied with the preauthorization process:

> "Even if, *arguendo*, AME could prove it substantially complied with the prerequisite to seek preauthorization, it's claim remains moot given the fact that EPA never granted preauthorization." (EPA MFAD, p. 36.)
>
> * * *
>
> "Even if this Court should find that AME substantially complied with EPA's preauthorization process pursuant to Part 307, AME's claim is nonetheless ineligible for reimbursement from the Superfund[.]" (EPA MFAD, p. 36.)
>
> * * *
>
> "EPA would be acting *ultra vires* were it to process a claim against the Fund without a PDD. For this reason alone, AME's claim should fail and be dismissed with prejudice." (EPA MFAD, p. 37.)
>
> * * *
>
> "[E]ven assuming that AME submitted information to EPA that this Court could conclude 'substantially complies' with EPA's preauthorization process, no 'responsible Federal official' has approved and certified costs as required by CERCLA § 111(a)(2)." (EPA MFAD, p. 37.)
>
> * * *
>
> "[I]t is not relevant whether AME is found to have substantially complied with its obligation to request preauthorization in the first place. Therefore, AME's claim is moot, with the substantial compliance inquiry before this Court is merely an academic exercise." (EPA MFAD, p. 39.)
>
> * * *
>
> "Even a favorable decision on substantial compliance will not entitle AME to payment of its claim." (MFAD, p. 39.)

Given these statements and prior statements by EPA, it is undisputed that it was futile for AME to seek preauthorization. This is yet another reason for rejecting EPA's arguments. (AME MFAD, pp. 51-52.)

Strangely, one of the reasons EPA states it would have been futile for AME to seek preauthorization is because AME had a contract with Vertellus and Vertellus was a party to the CD. (EPA MFAD, pp. 20-21.) EPA cites 307.23(g) and says that it cannot grant preauthorization when the work is done pursuant to a contract with a United States and then claims a CD is a contract under this provision. (*Id.*) This is unpersuasive for many reasons.

First, as EPA acknowledges, AME did not have a contract with the United States. Indeed, EPA's substitution of AME for Vertellus is precisely the erroneous conflation that EPA accuses AME of making: "This passage exemplifies how AME erroneously conflates itself with Vertellus – as if AME is the performing settling defendant party and it is AME who must conduct the work and receive EPA approval or other communications. This is a false equivalency and gross misreading of the Consent Decree . . . AME's continued substitution of itself for Vertellus is an example of obfuscation and misdirection." (EPA MFAD, p. 30 n.35.) Of course, AME has never "conflated" itself with Vertellus or engaged in obfuscation or misdirection. Those are tactics better left to the government.

Second, EPA's position that it cannot issue preauthorization to a party subject to a CD is at odds with the statute, regulations, and EPA's own actions. EPA admitted that it only issues preauthorization when a CD is present (because EPA only preauthorizes PRPs who settle their CERCLA liability with EPA):

> Q: Have you had experience . . . in your role as the remedy decision team lead in the preauthorization process where there was not a consent decree involved?
>
> A: Not that I am aware of.

(RX 331, Dep. Fonseca, p. 11:2-6; *see also id.* at 12-13.)

> A: A preauthorized mixed funding agreement . . . is an enforcement tool utilized by the agency in settlement with a responsible party under either a consent decree or administrative order of consent . . . .

(RX 332, Dep. Jeng, p. 9:4-12.)

> Q: Is it your experience at EPA that the preauthorization process applies only in the context of either [] negotiated consent decrees or negotiated administrative AOCs?
>
> A: Yes.

(*Id.* at 19:10-14; *see also* AX 8, p. 52 ("This Preauthorization Decision Document (PDD) approves the Settling Defendant's request for preauthorization, subject to the terms of this PDD, and performance of the Work, as defined in the CD and the ROD."); AX 10, p. 3 ("This preauthorization is subject to Performing Settling Defendants' compliance with the Consent Decree and the provisions of this PDD."); AX 11, 15, 18.) Third, EPA will be paying Tetra Tech, an entity that has contracts with the EPA and Army Corps of Engineers for cleanup work at the Site, from the Superfund. (RX 330, Dep. Newman, pp. 9-13.) In sum, EPA's position is at odds with the record and must be rejected.

Conclusion

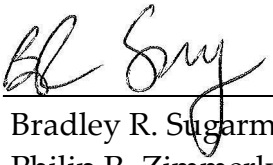
EPA believes that litigation before this Tribunal is "merely an academic exercise." (EPA MFAD, p. 39.) As such, EPA fully expects the Tribunal to accept its meritless arguments and rubber stamp the agency's arbitrary decision to deny AME's reasonable request for reimbursement of necessary response costs it incurred at the BJS Superfund Site. But EPA's cavalier and cocksure attitude simply underscores the legal insufficiencies in its case. For instance, EPA asserts it is irrelevant whether AME substantially complied with the preauthorization process in direct contradiction to Fourth Circuit's decision requiring this Tribunal to evaluate AME's substantial compliance. (EPA MFAD, pp. 36-39); *August Mack Env., Inc. v. United States E.P.A.*, 841 Fed.App'x. 517, 525 (4th Cir. 2021). Next, EPA argues AME lacks standing even though AME has suffered a direct injury in fact (i.e., economic damages of approximately $3 million) that is traceable to EPA's arbitrary, capricious, and unlawful acts and that this Tribunal may redress this injury by issuing a decision favorable to AME. (EPA MFAD, pp. 33-35.) EPA even asserts that the prior decisions of the district court and Tribunal are controlling law that bind the parties and this Tribunal even though the Fourth Circuit has vacated these decision and declared them erroneous. (EPA MFAD, pp. 21-33); *August Mack*, 841 Fex.App'x. at 522-525. EPA even suggests that elements of criminal law (i.e. a party's prior intent) should guide the substantial compliance standard despite this being a civil proceeding and EPA's position being at odds with the Federal Circuits. Indeed, according to EPA, AME needed to "form[] the intent to seek preauthorization" and then "fil[e] the equivalent of an

application" in order to substantially comply with the preauthorization process. (EPA MFAD, pp. 19, 24.) Accepting any of EPA's arguments invites reversible error.

EPA's unwavering reliance on arguments that conflict with the Fourth Circuit's majority opinion and CERCLA's unambiguous statutory language is not surprising. The agency wants this Tribunal to ignore the discovery AME conducted in this matter (discovery the Fourth Circuit ordered and that EPA vigorously opposed). During that discovery, EPA employees most familiar with the agency's preauthorization process (and specifically identified on EPA's witness list) testified that the agency has used the process to effectively bar an innocent party's access to the Fund. Indeed, the agency has limited the Fund Congress unambiguously established to pay "any claim for necessary response costs" as a means to incentivize liable parties to settle claims through mixed funding settlement agreements. This sworn testimony is anything but "academic", and it establishes that, for decades, EPA has been absorbed in an effort to bar innocent private parties from accessing the Fund. Those efforts started when the agency created a preauthorization regulations out of whole cloth despite an unambiguous statute to the contrary. Those efforts continued when EPA all but abandoned those regulations and created arbitrary, unlawful and *unwritten* restrictions on preauthorization eligibility allowing only PRPs who settle their CERCLA liability with EPA to be "preauthorized".

It is time to put a stop to EPA's arbitrary and unlawful acts. For the foregoing reasons and the reasons stated in AME's Motion for Accelerated Decision, EPA's MFAD should be denied.

Respectfully submitted,



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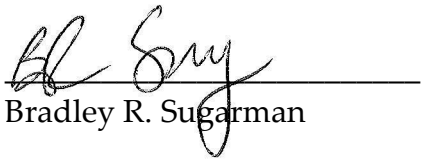
Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on October 28, 2022 through the Office of Administrative Law Judge's e-filing system, and that a copy of this document was also served on opposing counsel at the following e-mail addresses: cohan.benjamin@epa.gov and Berg.Elizabeth@epa.gov.



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