UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

EPA'S REPLY TO REQUESTOR'S RESPONSE TO EPA'S MOTION IN LIMINE

Pursuant to 40 C.F.R. Part 305, the United States Environmental Protection Agency ("EPA") hereby files this Reply to Requestor AME's Response to EPA's Motion in Limine, and avers as follows:

1. AME ERRONEOUSLY SHIFTS THE SUBSTANTIAL COMPLIANCE INQUIRY TO THE QUESTION OF WHETHER AME SATISFIED THE ESSENTIAL PURPOSES OF PREAUTHORIZATION

The Fourth Circuit directs the trial court to apply the "substantial compliance" standard to AME's obligation *to apply for preauthorization.* The Court unambiguously did so because it determined that AME could not have "strictly complied" with the legal requirement to apply for preauthorization by filing Form 2075-3 pursuant to 40 CFR § 307.22(a)(2). "Put simply, the EPA should not arbitrarily fault August Mack for failing to strictly comply with the preauthorization process when the EPA itself has declared the required [application] form to be obsolete. Indeed, because EPA Form 2075-3 is obsolete, August Mack *could not be required to*

seek preauthorization in the manner specified by the EPA and thus a substantial compliance standard is wholly appropriate and necessary." *August Mack Environmental, Inc. v. United States Environmental Protection Agency*, 841 F. App'x 517, 524-25 (emphasis added). Therefore, the Court ruled that "it was legal error for EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim." *Id*. See also, ALJ Order of Redesignation and Prehearing Order at 1.

AME has, however, misinterpreted the Fourth Circuit ruling and this Tribunal's directive. AME does so by asserting that it can prove its claim by establishing that it "substantially complied" with the four policy objectives underlying the preauthorization requirement. Contrary to the Fourth Circuit decision, AME asserts that it "will have substantially complied with the preauthorization process if it satisfied the essential purposes of preauthorization" set forth in the 1989 preamble to what later became 40 C.F.R. Part 307. See AME Response to Motion in Limine at 16. AME's misapplication of the substantial compliance test to the essential purposes of preauthorization is far afield of the Fourth Circuit's directive to apply this legal standard to AME's duty to comply with the preauthorization process described in 40 C.F.R. Part 307. The relevant provision of the preauthorization process pertains to whether AME sought preauthorization by submitting to EPA the functional equivalent of an application for preauthorization pursuant to 40 C.F.R. § 307.22(a) and (b).

Presumably AME is relying on the argument that it met the policy objectives underlying the requirement to seek and receive preauthorization because it has already conceded that it never sought nor received preauthorization. According to AME, "EPA's 'preauthorization regulations' found at 40 C.F.R. § 307.22 do not apply to AME" and "AME had no reason to submit an application for preauthorization to conduct work." Response in Opposition

("Response") to Agency's Motion to Dismiss at 9; ALJ Order on Motion to Dismiss at 8. AME has therefore conceded that it could not have substantially complied with submitting the functional equivalent of an application for preauthorization, as it never intended to seek preauthorization when it began working on behalf of Vertellus. *Id*. Thus, under the substantial compliance standard, AME's exhibits and testimony are not relevant to the scope of the issue on remand, and EPA's Motion *in Limine* should be granted accordingly.

2. AME'S EXHIBITS AND WITNESS TESTIMONY ARE PROFERRED TO DEMONSTRATE THAT VERTELLUS'S WORK WAS NCP COMPLIANT PURSUANT TO A CONSENT DECREE WHICH BY LAW CANNOT CONSTITUTE PREAUTHORIZATION.

AME was directed by this Court to establish its claim by providing evidence that it substantially complied with relevant provision of the preauthorization process described in 40 C.F.R. pt. 307. Order at 3. To meet its burden, AME contends that it met the spirit of the preauthorization requirement by complying with the Consent Decree to which it was not even a party. Response to EPA's Motion *in Limine* at 3 and 17. To that end, AME states that its exhibits "demonstrate that EPA preapproved AME's work and that AME's work was performed pursuant to the Consent Decree". *Id*. Unfortunately for AME, it may not establish its cause of action pursuant to the terms and conditions of the Consent Decree, as previously briefed by EPA. The Consent Decree provides that "nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim…" CD at ¶ 77; see also 40 C.F.R. 307.22(j). The Consent Decree further states that "*nothing* in the Consent Decree shall be construed to create any rights in, *or grant any cause of action to*, *any* person not a party to this Consent Decree. CD at ¶ 79 (emphasis added). See also EPA's Motion for Accelerated Decision; EPA's Motion in

Opposition to AME's Motion to Compel; EPA's Prehearing Exchange Narrative Statement. Therefore, EPA's Motion in Limine should be granted with respect to all of AME's exhibits and testimony that demonstrate that AME performed work on behalf of Vertellus under the Consent Decree.

3. EPA HAS APPROPRIATELY CITED TO UNREVERSED SETTLED ISSUES OF FACT AND LAW FROM PRIOR DECISIONS IN THIS LITIGATION, AND THIS COURT MAY ACCEPT THE LAW OF THE CASE AT HER DISCRETION

EPA has made clear in prior briefs that it is not offering the ALJ or District Court decisions in effort to defraud this court in applying the erroneous "strict compliance" legal standard. This Tribunal is fully aware that on administrative reconsideration, the trial court must not commit legal error by continuing to apply a strict compliance standard to the question of whether AME requested preauthorization. However, since the other facts and issues at stake have been fully briefed, and AME has had a "full and fair" opportunity to develop its prima facie case since 2017, it stands to reason that EPA counsel can argue that the equitable common law principle known as "law of the case" doctrine is relevant and appropriate to apply to matters that do not pertain to the discrete "error of law" for which this case was remanded. Thus, if this Tribunal decides to apply the law of the case doctrine to the other settled issues of law or fact, it may do so accordingly, and at that point these settled issues will be controlling precedent hence forth, in accordance with general principle of *res judicata*. As such, it is abundantly clear that EPA counsel was not attempting to have this court apply an erroneous legal standard, or to otherwise argue that reversed case law should be controlling. Clearly, this Court is on notice as

to which legal standard to apply to the regulation at 40 C.F.R. 307.22(a)(2), and EPA's argument in the context of the law of the case discussion is not in bad faith.[1]

A. Law of the Case Doctrine: Legal facts and principles unaffected by 4th Circuit decision should not be relitigated, but decision is at judge's discretion

Law of the case doctrine posits that "'when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.'" *Equal Rights Ctr. v. Equity Residential*, 798 F. Supp. 2d 707, 721 (D. Md. 2011) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, (1988). The law of the case doctrine is not an inexorable command but discretionary. *Sejman v. Warner-Lambert Co.*, 845 F.2d 66, 68-69 (4th Cir. 1988). The Fourth Circuit has held that courts should follow the law of the case doctrine "unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *United States v. Aramony*, 166 F.3d 655, 661 (4th Cir. 1999) (quoting *Sejman v. Warner-Lambert Co.*, 845 F.2d

[1] The case law cited by AME in support of sanctions, *Kawitt v. United States* and *Buckler v. Rader,* are distinguishable from our case most generally in that both *Kawitt* and *Buckler* cited a vacated case for a legal argument, whereas here the cited vacated case is a previous proceeding of the same case. Furthermore, *Kawitt* cited a vacated case that was reversed and clearly no longer good law, and *Buckler* cited a case that was explicitly renounced in later caselaw as no longer good law; here, conversely, the judge can adopt law of the case doctrine (see section above) for the unreversed "foregone on appeal" propositions cited in the vacated cases. Moreover, there was an element of bad faith in these cases: Kawitt was expressly told about the case being bad law and still persisted in citing it in a "misleading" fashion, and also simply photocopied previous briefs; in *Buckler* the attorneys also did not note that the cited opinion was vacated in a misleading way to convince the court it was good law. Here, there is no such bad faith or misleading because the judge knows the discrete grounds upon which the case cited was vacated. Lastly, specifically in terms of sanctions, in *Kawitt* and *Buckler* the citing to a vacated decision was used only partly as grounds for sanction in connection with filing a frivolous appeal, and no such appeal circumstances are at issue in our case.

66, 69 (4th Cir. 1988)). Furthermore, the rule "forecloses litigation of issues decided by the district court but foregone on appeal." *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993).

Accordingly, the issues unrelated to the 4th Circuit opinion should be treated as law of the case and not relitigated. EPA's position is that these issues were "foregone on appeal", which is consistent with Fourth Circuit law of case doctrine, and none of the above stated exceptions are present in this case. However, the unaffected portions of the vacated judgments are not binding precedent unless the Court, at her discretion, determines that they are to be the established law of the case.

Conclusion

For the foregoing reasons, this Tribunal should grant EPA's motion in limine in its entirety.

Respectfully submitted,

3/2/22

BENJAMIN COHAN

Digitally signed by BENJAMIN COHAN
Date: 2022.03.02 09:52:06 -05'00'

Date

Benjamin M. Cohan Esq.
U.S. EPA Region 3
Office of Regional Counsel
1650 Arch Street
Philadelphia, PA 19103
cohan.benjamin@epa.gov
215.814.2618 (direct dial)
For the Agency

Erik Swenson, Esq.
United States Environmental Protection Agency
Office of General Counsel
1200 Pennsylvania Ave. NW
WJC Building North Room: 6204M
Washington, DC 20460
Email: Swenson.erik@epa.gov
For the Agency

CERTIFICATE OF SERVICE

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

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

3/2/2022

BENJAMIN COHAN

Digitally signed by BENJAMIN COHAN
Date: 2022.03.02 09:52:49 -05'00'

Benjamin M. Cohan
Sr. Assistant Regional Counsel
US EPA Region III (3RC43)
Philadelphia, PA 19103
(215) 814-2618
cohan.benjamin@epa.gov