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 MOTION IN OPPOSITION TO REQUESTOR AUGUST MACK ENVIRONMENTAL'S MOTION TO COMPEL DISCOVERY, FOR SANCTIONS, AND MOTION TO EXTEND CASE MANAGEMENT DEADLINES ("MOTION TO COMPEL"); AND EPA'S MOTION *IN LIMINE* TO EXCLUDE EVIDENCE AND TESTIMONY

I. Issue presented

The issue before this Court is whether the discovery August Mack Environmental, Inc. ("AME") demands has significant probative value on a disputed issue of material fact relevant to the question on remand. The matter remanded by the Fourth Circuit is whether AME "substantially complied" with the preauthorization process described in 40 C.F.R. Part 307. To determine whether AME substantially complied with the preauthorization process, this Tribunal must determine whether AME submitted the equivalent of an application for preauthorization pursuant to 40 C.F.R. § 307.22(a)(2) and .22(b). 40 C.F.R. § 307.22(a)(2) requires that AME submit an application for preauthorization and provides EPA Form 2075-3 to do so. The Fourth Circuit determined that Form 2075-3 is obsolete, but that AME needed to have substantially complied with the requirement to apply for preauthorization. 40 C.F.R. § 307.22(b) lists all of the *essential* information that applicants for preauthorization must include in their application.

Submittal of this *essential* information thus satisfies the *purpose or objective* of the formal submittal of EPA Form 2075-3.[1] The remaining elements of the "preauthorization process" pertain to EPA's conduct in granting or denying an application, and as such, do not relate to the question of whether AME substantially complied with the requirement to submit an application for preauthorization prior to commencing work in 2012.

II. Legal standard applicable to "other discovery"

Rule 305.26(f)(4) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Administrative Hearing Procedures for Claims Against the Superfund ("Part 305" or "Rules of Procedure"), 40 C.F.R. § 305.26(f)(4), provides for "other discovery," that is, *discovery other than that provided for in the prehearing exchange*, "only upon a showing of good cause and upon a determination" by the Presiding Officer that it:

> (i) Will not in any way unreasonably delay the proceeding;
> (ii) Seeks information that is not otherwise obtainable from the non-moving party;
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to the issue on remand.

Id. The term "significant probative value" denotes the "tendency of a piece of information to prove a fact that is of consequence in the case." *Chautauqua Hardware Corp.,* EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Oder on Interlocutory Review, June 24, 1991). This Tribunal has traditionally not granted further discovery absent a *convincing* demonstration by the moving party that the information sought has *significant* probative value. *In re Palm Harbor Homes, Inc*., Docket No. EPCRA-4-99-54 (A.L.J., Dec 22, 2000) (Order

[1] This is why the Tribunal reasoned that "[w]ith or without a standardized form, there is clear notice of the information that must be submitted." ALJ Order on Motion to Dismiss (Dec.18, 2017) at 10.

Denying Respondent's Motion for Additional Discovery); *In re Wyeth Pharmamaceuticals*, Docket No. CWA-02-2009-3460, *3 (Nov.18, 2009)(Order Denying Motion for Additional Discovery); *In re Mercury Vapor Processing Technologies Inc., a/k/a River Shannon Recycling and Laurence Kelly,* Docket No. RCRA-05-2010-0015 (June 9, 2011)(Respondent's Amended Motion to Compel denied).[2] The decision whether to grant a Motion for other discovery is within the discretion of the Presiding Officer. *In re Chempace Corp*., 9 E.A.D. 119, 134 (EAB 2000). Establishing the need for further discovery in an administrative proceeding is a high bar. By not favoring unnecessary extensive discovery, "EPA foregoes in its administrative proceedings the opportunities afforded by extensive discovery in exchange for the benefits of more expeditious case resolution." 64 Fed. Reg. 40138, 40160 (July 23, 1999).

III. AME Fails to Demonstrate Good Cause for Other Discovery

AME's Motion to Compel Discovery, for Sanctions, and Motion to Extend Case Management Deadlines filed December 23, 2021 ("Motion to Compel" or "Motion") makes only passing, cursory reference to the criteria it must establish, pursuant to Section 305.26(f)(4)(i-iii), in showing good cause for each enumerated item and category of other discovery it seeks. Motion to Compel at 13-14. Nowhere in AME's brief does it provide a reasoned basis for its contorted legal argument, and nor does AME specify what information is allegedly in EPA's possession that is not already produced *via* prehearing exchange, what probative value it has, and why it is directly relevant to the narrow scope of the issue on remand. AME has not, therefore, met its burden of proof to demonstrate good cause for other discovery. Having not met its

[2] 40 C.F.R. 305.26(f)(4)(i-iii) parallels Rule 22.19(e)(i-iii) of the Consolidated Rules of Practice, 40 C.F.R. 22.19(e)(i-iii). As such, the Part 22 case law cited herein is equally relevant to Part 305, as Part 305 "is modeled after 40 CFR part 22." 58 Fed. Reg.7704, 7705 (Feb. 8, 1993)(interim final rule).

burden of demonstration and "showing of good cause", AME's Motion to Compel should be denied, consistent with long-standing administrative precedent. *In re Palm Harbor Homes*; *In re Wyeth Pharmamaceuticals*; *In re Mercury Vapor Processing Technologies Inc., a/k/a River Shannon Recycling and Laurence Kelly. Id.*

As in discovery under Part 22 of the Consolidated Rules of Practice ("Part 22"), discovery under Part 305 is designed to be relatively limited. *See In re Advanced Elec. Inc*. 10 E.A.D. 385, 393 n. 19 (EAB 2002)(court explained that there is no basic right to discovery in federal administrative proceedings, rather the agency's procedural rules govern the amount of discovery available). Under the Agency's procedural rules at Part 305, The Prehearing Information Exchange is the primary "mechanism for discovery" in administrative proceedings under Parts 22 and 305 alike. *In re H. Kramer & Company*, No. RCRA-5-2000-014, Slip. Op. at 2 (ALJ Feb. 27, 2001). Therefore, AME's argument that it will be denied due process if further discovery is not allowed is false because AME wrongly asserts that it has been denied any discovery. *See e.g.* Motion to Compel at 10 ("No discovery has taken place to date"); *Id*. at 1 (EPA "has refused to engage in even basic discovery"). To the contrary, the Prehearing Exchange process required that all potentially relevant information that would be relied upon at hearing (e.g. testimony and exhibits) be provided to the parties. Hence, it is demonstrably baseless and nonsensical when AME predicates its motion on the argument that "AME's written discovery is designed to lead to the discovery of EPA's admissible evidence that the agency may seek to introduce at hearing." Motion to Compel at 11. Clearly, EPA has done so *via* prehearing exchange. Nor has EPA any reason to believe that supplementation of its prehearing exchange is warranted prospectively.

It is equally illogical when AME argues that "allowing this case to go forth without discovery would result in a trial by ambush." Motion at 15. Again, the notion that EPA has held back or failed to present relevant information is demonstrably false. EPA affirms that it is not involved in "a game of blind man's bluff" (Motion at 14) as AME would have this court believe. Finally, the judicial cases that AME relies upon to argue that its due process rights will be denied are based upon a determination that the information sought is relevant and material in the first place, and that there remain material and relevant facts in dispute that have not already been disclosed. Contrary to the distinguishable facts in those judicial cases, AME has not demonstrated that the information it seeks has significant probative value, or otherwise meets the criteria set forth in 40 C.F.R. § 305.26(f)(4).

A. The demanded discovery does not seek information that has significant probative value on a disputed issue of material fact relevant to the issue on remand. 40 C.F.R. § 305.26(f)(4)(iii).

In order to assess whether the discovery AME seeks is of "significant probative value", it is critical to identify the issue that requires further administrative consideration by this Tribunal. In ruling that "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", the Fourth Circuit was referring specifically to the fact that "the ALJ applied a strict compliance standard and faulted August Mack for failing to fill out and submit the EPA's preauthorization form, i.e., EPA Form 2075-3." *August Mack Envtl., Inc. v. EPA,* 841 Fed. App'x 517, 524-25 (4th Cir. 2021) ("Fourth Circuit Opinion"). In explaining the narrow scope of its remand, the Court stated that:

> …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 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. The EPA failed to consider August Mack's allegations under the applicable substantial compliance standard, and thus the EPA's dismissal of August Mack's claim was an arbitrary and capricious abuse of discretion.

Id. at 524. Thus, the only issue that the Fourth Circuit remanded for further administrative consideration is whether AME sought preauthorization by substantially complying with the requirement to "submit an application for preauthorization" pursuant to 40 C.F.R. § 307.22(a)(2). *Id*. As the Fourth Circuit reasoned, this inquiry is necessarily a fact specific inquiry *focused exclusively on AME's conduct*, and whether such "conduct should, in reality, be considered *the equivalent of compliance*." Fourth Circuit Opinion at 522 (emphasis added)(citations omitted).[3]

The legal definition of *substantial compliance* is: "compliance with the *substantial or essential* requirements of something (as a statute or contract) that satisfies its *purpose or objective* even though its formal requirements are not complied with".[4] Consistent with the Fourth Circuit opinion, the doctrine of substantial compliance is a tool designed to "assist the court in determining whether conduct should, in reality, be considered the *equivalent of compliance*." *See Peckman v. Gem State Mut.*, 964 F.2d 1043, 1052 (10th Cir. 1994) (emphasis added). It remains "an equitable doctrine designed to avoid hardship in cases *where the party does all that can reasonably be expected of him*." See *Sawyer v. Sonoma Cnty*., 719 F.2d 1001, 1008 (9th Cir.-1983) (emphasis added).

[3] While it should be obvious that the legal standard of substantial compliance does not, logically speaking, apply to EPA's review and analysis of an application, nor EPA's grant or denial of same (i.e. the second and third elements that establish the "process of preauthorization" as defined in 40 C.F.R. § 307.14), AME's confusion on this point needs to be highlighted to clarify how and why AME seeks information that is not relevant to this proceeding.
[4] "Substantial compliance." Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/substantial%20compliance. Accessed 18 Oct. 2021.

Therefore, the issue before this Tribunal focuses exclusively on AME's conduct, specifically whether AME did all that can reasonably be expected of it in applying for preauthorization. Accordingly, any discovery of "significant probative value" would pertain to AME's action, i.e., the actions AME took to substantially comply with the preauthorization process by seeking preauthorization *prior to* conducting design work in 2012. If there is evidence that AME took actions to apply for preauthorization, that evidence is in the possession of AME. This Tribunal provided AME with the opportunity to provide evidence pertaining to its conduct and actions *via* the discovery required by the Prehearing Exchange process. AME's Prehearing Exchanges included 328 exhibits. None of those exhibits are "*relevant to whether August Mack 'substantially complied' with the preauthorization process described in 40 C.F.R. pt. 307"*. Rather, all but two of the documents[5] pertain to work performed by AME on behalf of Vertellus pursuant to the BJS Consent Decree ("CD"). As discussed in more detail directly below, the Tribunal and the District Court found that this work was "irrelevant" to the Part 307 preauthorization process.

1. AME's work on behalf of Vertellus under the BJS CD cannot constitute substantial compliance with seeking preauthorization.

Underlying AME's Motion to Compel is the false premise that the submittal and approval of Vertellus' work under the CD constitutes the entire process of preauthorization – both the seeking of preauthorization (to which the standard of substantial compliance applies) and the obtaining or granting of preauthorization by EPA in the form of the requisite Preauthorization Decision Document (PDD). As a matter of settled fact and law, the work under the BJS CD is

[5] RX-1 pertains to Counsel communications from 2017, and RX-325 relates to community involvement communications.

not relevant to whether AME substantially complied with the requirement to seek preauthorization because the submittal and approval of Vertellus' work under the BJS CD is not relevant to the "preauthorization process" itself. *See* 40 C.F.R. 40 C.F.R. § 307.14.

Having already admitted that it neither sought nor received preauthorization pursuant to 40 C.F.R. Part 307, AME would now have this Court believe that the EPA oversight and approval process under the BJS CD substitutes for, or is somehow the equivalent of, preauthorization of AME's claim at bar.[6] According to AME, "the procedures set in place by the Consent Decree provided the structure for the communications between AME and EPA. Those communications whereby EPA officials reviewed, commented on, and imposed changes to AME's planned work constitute the approval and preauthorization necessary for payment from the Fund…these communications establish the terms and conditions of the preauthorization… [by] directing, reviewing, approving, and overseeing each and every remedial activity AME undertook at the Site, EPA provided preauthorization."[7] AME's Response in Opposition to Respondent's Motion to Dismiss at 12; *see also* Hearing Request at 23. This Court previously rejected AME's argument and settled the issue as follows:

> …August Mack is incorrect. As the Agency observes, applicable regulations directly refute the notion that mere compliance with the Consent Decree constitutes preauthorization: "Unless otherwise specified and agreed to by EPA, the terms, provisions, or requirements of a . . . Consent Decree . . . requiring a response action do not constitute preauthorization to present a

[6] AME has also stated that "AME's costs also satisfy the intent of the preauthorization process." It is unclear what AME is referring to with this statement. AME did not submit the subject costs to EPA for review and approval of its claim against the fund. AME admits as much when it says "AME stands ready to provide the cost data to EPA regarding the work that it completed. *But AME was never given the opportunity to do so*…" Reply Brief for the Appellant, U.S. Dist. Crt. at 4.

[7] 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 a gross misreading of the Consent Decree. *See* Consent Decree at 31 (IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS) (clearly identifying Vertellus as the entity to whom approvals or other directives were communicated and clearly identifying Vertellus as the sole party who must comply with implementation of any approved work). AME's continued substitution of itself for Vertellus is a glaring example of obfuscation and misdirection.

> claim to the Fund." 40 C.F.R. § 307.22(j); *see also* Motion at 7. Whatever approval the Agency gave to work that Vertellus provided under the terms of the Consent Decree would have been to ensure Vertellus was upholding its end of the agreement. Preauthorization serves different purposes. *See* 54 Fed. Reg. at 37898. Although it may be true that "*a* procedure existed under the terms of the Consent Decree for EPA to approve and certify all work conducted at the Big John Site," it is not *the* preauthorization procedure for which the regulations provide. *See* Hearing Request at 23 (emphasis added). Thus, August Mack could not meet preauthorization requirements by adhering to whatever preapproval process Vertellus was required to complete under the Consent Decree. Indeed, even if Vertellus itself fully satisfied the review and approval process the Consent Decree mandated, it could not claim to have simultaneously obtained preauthorization under the regulations in Part 307.

ALJ Order on Motion to Dismiss at 12.

The District Court agreed with this Tribunal, stating that "nothing under the Consent Decree constitutes preauthorization, and nothing in the Consent Decree creates rights in non-parties. ***It is irrelevant that EPA authorized and supervised AME's work***." District Court Order Granting Motion to Dismiss Amended Complaint (Civ. Action No. 1:18-CV-12)(July 11, 2019) at 10 (emphasis added). This settled issue constitutes the law of the case, and remains "unreversed" by the Fourth Circuit decision on remand. *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964). Indeed, the Fourth Circuit in effect dismissed AME's reliance on the BJS CD to establish preauthorization when it concluded as a matter of fact that "[i]n this situation, August Mack did not seek or obtain an express preauthorization from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 *or otherwise*." *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 522 (4th Cir. 2021) (emphasis added). To the extent that there remain any lingering doubts as to the courts' resolution of this issue, the Consent Decree itself states: "Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim …." CD at 76, ¶77.

This provision affirms, again, that the BJS CD is *expressly **not** a CERCLA §122(b) "mixed funding agreement*". 42 U.S.C. § 9622(b)[8]. *See also* 40 C.F.R. § 307.22(j).

EPA's oversight and approval of Vertellus' work under the BJS CD does not show that AME substantially complied with the preauthorization process. The preauthorization process allows EPA to evaluate, certify, and approve cost claims in a transparent and predictable manner by not just establishing a general plan of work, but also by establishing financial oversight procedures and permissible project costs – information that EPA did not receive from AME. *See* nt.5, *Infra*. (AME admission that it never submitted the relevant cost data to EPA). *See also* AX-8, 10, 11, 15, 18 (examples of recent PDDs setting forth procedures for evaluating, certifying, and approving cost claims by establishing financial oversight procedures, auditing and accounting principles, eligible project costs for potential reimbursement, maximum allowable reimbursement amounts, etc.).

EPA's oversight of the BJS CD (i.e. an agreement not involving mixed funding), on the other hand, focuses on determining whether a PRP is complying with its legal requirements under the CD to clean up that site. Among other things, that oversight involves reviewing submitted work plans and design documents; overseeing construction activities; confirming compliance with health and safety requirements; ensuring that appropriate land use restrictions and environmental covenants are in place; and monitoring remedy performance. *See, generally*, BJS Consent Decree at 15 (General Provisions). At the BJS Site, EPA's oversight focused on the

[8] CERCLA §122(b) establishes that "the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance." These "mixed funding agreements" or Consent Decrees reference the 40 C.F.R. Part 307 claims procedures, and incorporate the relevant PDDs as appendices thereto. Often times these "mixed funding agreements" take the form of RD/RA Consent Decrees, examples of which are listed in EPA's Prehearing Exchange. *See e.g.* AX-3, 8, 17. The BJS Consent Decree was explicitly not a mixed funding agreement, and it explicitly excluded any form of preauthorization for Vertellus to file a claim for reimbursement against the Fund. *See* 40 C.F.R. 307.22(j).

implementation of the cleanup by Vertellus – not on the specific cost and accounting procedures used by AME, which would be an integral part of the preauthorization process. As CERCLA Section 111(a)(2) provides, "such *costs* must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. §9611(a)(2) (emphasis added).

EPA's oversight of response action work at the BJS Site simply does not equate to the substantive review conducted when a party applies for preauthorization to submit monetary claims against the Fund. The Court acknowledged this distinction in her Order on Motion to Dismiss, stating that "the Agency's Answer indicates a sufficient reason for not, after the fact, allowing August Mack's claim: the Agency 'lacks knowledge of all the activities AME [August Mack] may have performed on behalf of Vertellus at the Site', and the Agency 'never certified AME's costs or work' because '[t]he Consent Decree does not provide for any mechanism for EPA to have done so." ALJ Order on Motion to Dismiss at 12-13 (citations omitted).

2. AME cannot justify further discovery by, in effect, disputing the terms of the Consent Decree.

At its core, AME's claim is based on the meaning and purpose of a federal Consent Decree; as such, AME's claim is not a case in controversy and cannot be adjudicated by this Court on remand because the dispute resolution provision of the Consent Decree remains the "*exclusive* mechanism to resolve disputes arising under or with respect to the CD." CD at 57, ¶ 53. The District Court retains exclusive jurisdiction as to, *inter alia*, any and all disputes arising out of the Consent Decree. *Id.* at 7, ¶ 1 (parties "shall not challenge the terms of this Consent Decree"); 85,¶ 92 (Court retains exclusive jurisdiction for the purposes of, *inter alia*, construction or modification of the CD, enforcement of its terms, or to resolve disputes). District Court Order Granting Motion to Dismiss Amended Complaint at 11. The District Court stated

that AME is not a party or "third party beneficiary" of the Consent Decree and therefore "no rights for AME are created under the CD." *Id*.. *Aff'rmd* Fourth Circuit Opinion at 527, nt.5. Therefore, AME has no rights to dispute the Consent Decree's stated purpose with EPA, or to otherwise reconstruct it, modify it, or misappropriate it for purposes of its claim against the Fund. In addition, AME has no rights or cause of action to avail itself of any other provisions of the Consent Decree – period. The District Court definitively rejected AME's bootstrapping of the Consent Decree, in its charge that "Settling Defendants shall not challenge the terms of this Consent Decree or the Court's jurisdiction to enter and enforce" it. CD at 7. If the parties to the Consent Decree cannot challenge or reconstruct the Consent Decree's terms, there is no question that AME is barred from doing so. Likewise, AME does not have standing under the Consent Decree to intervene, or assert an eligible claim arising out of any provisions or procedures in the Consent Decree.[9] Ergo, AME's further discovery demands cannot proceed, as everything AME seeks pertains to work conducted pursuant to the Consent Decree.

[9] AME's claim arises out of a contract it is not privy to; however, to sue the government "on a contract claim, a plaintiff must be in privity of contract with the United States." *Pacific Gas and Electric Company v. United States*, 838 F.3d 1341, 1350 (Fed. Cir. 2016) (quoting *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). "[T]he 'government consents to be sued only by those with whom it has privity of contract." *Id*. An exception "to the privity requirement… [is] when a 'party standing outside of privity by contractual obligation stands in the shoes of a party within privity,' such as when a party can demonstrate that it was an intended third-party beneficiary under the contract." *Id.* at 1350-51. "In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Authentic Apparel Group, LLC v. United States*, 989 F.3d 1008, 1012 (Fed. Cir. 2021) (quoting *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001). "[A]t a minimum there must be a particular, identifiable benefit that was clearly intended to flow to the third party." *Id.* (quoting *PG&E*, 838 F.3d at 1361). Additionally, "indirect benefit [to a plaintiff] is not sufficient to establish third-party beneficiary status." *Id. Id* at 1013. A third-party beneficiary relationship can be found where "one party promises another to pay a debt to a third party." *PG&E*, 838 F.3d at 1362. Under the facts of the case at bar, and pursuant to the Consent Decree which is expressly not a mixed funding agreement, AME cannot establish an exception to the privity requirement. There is nothing in the Decree which reflects an intention to benefit AME directly, let alone provide preauthorization to Vertellus. Moreover, the District Court affirmed that AME was not an intended third-party beneficiary, settling the issue by stating that "AME is neither a party to the Consent Decree nor a third-party beneficiary to it." District Court Order Granting Motion to Dismiss Amended Complaint [ECF No. 30] at 11.

The fact that the further discovery sought by AME lacks significant probative value is made transparent by the District Court. Indeed, the District Court held that "it is irrelevant that EPA authorized and supervised AME's work" under the Consent Decree. District Court Order Granting Motion to Dismiss Amended Complaint at 10. The Fourth Circuit did not substitute its judgment on this settled issue nor otherwise reverse it; thus the District Court's decision in this regard remains controlling precedent and a settled issue of law and fact as to any relevancy determinations on remand. Therefore, given that the court with exclusive jurisdiction finds oversight and the approval process under the Consent Decree to be "irrelevant" to Part 307 preauthorization, it stands to reason that the information sought pertaining to the Consent Decree would also be irrelevant and, therefore, lack any "significant probative value". On this basis alone, AME's demand for further discovery should be denied, as its entire argument and the information it seeks is predicated upon activities, submissions and approval of work pursuant to the Consent Decree.

3. Information Demanded Pertaining to EPA's Preauthorization Scheme at Large is outside the Scope of the Remand and Has No Probative Value on the question of whether AME sought or obtained preauthorization in accordance with Part 307.

With its Motion to Compel, AME would like to broaden the scope of the Fourth Circuit's remand to include an adjudication of EPA's preauthorization scheme at large. Motion to Compel at 8 (seeking discovery on the impetus or "…purposes of EPA's preauthorization process"). Specifically, AME seeks to discover information pertaining to CERCLA § 122(b) mixed funding agreements at other sites; "EPA's administration of the preauthorization program at large"; "the process of recovery from the Superfund, how awarding AME money from the Fund is appropriate, and the exhibits EPA uses to try to defeat AME's claims and secure an accelerated

decision." *Id.* at 13-14. In short, AME would have this Tribunal relitigate *State of Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988)(upholding congressionally authorized *purposes* of EPA's preauthorization program and finding no merit in a challenge to the regulatory preauthorization requirement).[10] *See also*, ALJ Order on Motion to Dismiss at 8-10 (discussing EPA's stated purposes or objectives of preauthorization in the context of *State of Ohio v. EPA*). AME is therefore wrong when it misconstrues the scope and purpose of the remand as necessitating further discovery "to assess whether August Mack's activities at the BJS site substantially complied with the *purposes* of EPA's preauthorization *process*" at large. Motion to Compel at 8 (emphasis added). Pursuant to the specific scope of the remand, AME may not demand further discovery for these other stated purposes, and therefore its attempts to compel this data are overbroad, irrelevant, and prejudicial.[11]

EPA's "preauthorization process" at large is not on trial and not at issue on remand because the only element of that process that applies to AME's conduct or "activities", and to which a substantial compliance standard must now be applied, is the requirement for AME to submit the *equivalent* of an application that includes the *substantial or essential* information enumerated in 40 C.F.R. § 307.22(b)-(c). The preauthorization process involves three elements: 1) the applicant's submittal of an application; 2) EPA's review and analysis of that application; and 3) EPA's discretionary decision to grant or deny the request for preauthorization. 40 C.F.R. § 307.14.

[10] In upholding EPA's preauthorization regulations against Petitioner's attacks that they are "impediments" not contemplated by the intent of Congress, the Court held that "[i]n light of the the well-settled principles of administrative law set forth above and the absence of anything showing EPA's accommodation of policies to be unreasonable or inconsistent *with the intent of Congress*, we must deny the petition an let the regulations stand." *State of Ohio* at 1331. AME cannot now re-litigate the merits and applicability of the preauthorization regulations, n*or the policy considerations informing EPA's administration of the program*.

[11] *See* EPA Motion to Dismiss (Aug.16, 2017) at 3-4.

The issue on remand involves whether AME's conduct or "activities" were in substantial compliance with the first element. Whether AME satisfied that element of the preauthorization process, i.e., the requirement to submit an application for preauthorization, is a factual inquiry involving the actions taken by AME. It does not involve EPA's review of that application and EPA's discretionary decision to grant or deny the request for preauthorization. Those actions are separate elements of the preauthorization process that have nothing to do with whether AME substantially complied with the duty to request preauthorization.[12]

Accordingly, given the specific scope of the remand, the information sought in AME's Motion to Compel has no probative value. It is overbroad, irrelevant, and prejudicial, as AME misconstrued the Fourth Circuit's holding and purpose for remand, as further articulated by this Tribunal's Order of Redesignation and Prehearing Order dated September 8, 2021 ("Prehearing Order"). *Id*. at 1-2. *See also*, *Joint Motion for Remand to U.S. Environmental Protection Agency*, Civ. Action No. 1:18-CV-12 (filed July 22, 2021) (jointly stating that "the Fourth Circuit held that the ALJ erred by not applying a "substantial compliance" standard when adjudicating whether August Mack satisfied the statutory and regulatory *requirement for seeking Superfund reimbursement*.") *Id.* at 2, ¶ 3. It is also undisputed that the relevant "requirement for *seeking* Superfund reimbursement" is set forth in 40 C.F.R. 307.22(a)(2) (requiring submission of EPA Form 2075-3).

[12] While it is not anticipated that this Court will determine that AME substantially complied with its duty to submit a preauthorization application, EPA identified potential rebuttal evidence (which AME refers to in its motion) in order to defend against any claim that EPA somehow granted AME preauthorization – in lieu of the requisite PDD. It thereby provided examples of mixed funding agreements and PDDs in order to defeat a claim by AME that conflates the BJS Consent Decree with a mixed funding Consent Decree, or otherwise conflates the approval process under the Consent Decree with the requisite preauthorization process under Part 307. However, none of these EPA exhibits have any bearing on whether AME's conduct establishes that it substantially complied with seeking preauthorization in the first place. Given AME's admissions on this point, and the law of the case, it is absurd to infer that EPA intends to re-prove that AME did not attempt to seek preauthorization in the first place. That fact was asked and answered by AME itself, and EPA does not have the burden of proof to re-establish this negative event.

4. AME Erroneously Shifts the Burden of Proof to EPA Because AME Cannot Establish Its Prima Facie Case as Required by Law.

When litigating claims against the Fund for response costs under Section 112(b) of CERCLA, 42 U.S.C. § 9612(b), Congress made clear that "the claimant shall bear the burden of proving his claim." *Id*. at § 112(b)(3). Likewise, EPA's Part 305 hearing procedures state:

> The Requestor has the burden of going forward with his case and of proving that the amount demanded in the Request for 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 Hearing. Each matter of controversy shall be determined by the Presiding Officer upon a preponderance of the evidence.

40 C.F.R. § 305.33 (emphasis added). *See, also* ALJ Order on Motion to Dismiss at 5 (affirming that "the claimant bears the burden of proving its claim, both as to presentation and persuasion, by a preponderance of the evidence") (citations omitted). Nothing in the Fourth Circuit's Decision can reasonably be understood to upend these basic principles of due process which form the heart of American jurisprudence.

AME nonetheless misrepresents the Fourth Circuit Decision by arguing that "there is good cause to order the discovery" due to the fact that "*the Fourth Circuit has placed the burden of proof on EPA to show why AME should not be reimbursed from the Fund*" and therefore "AME must be allowed to recover its response costs from the Superfund *unless EPA can demonstrate AME was not in substantial compliance* with the preauthorization process." Motion to Compel at 11 (emphasis added). *Id*. at 12-13 (claiming that ignoring AME's burden of proof and flipping the burden of proof to EPA demonstrates that all of AME's "written discovery is immanently reasonable"). AME justifies its flipping the burden of proof by referencing and

taking out of context court *dicta* to the effect that EPA has the right to defend against AME's claim "by disput[ing] and litigat[ing]" AME's alleged "compliance" with the preauthorization requirement. Motion to Compel at 8 (citing to *August Mack*, 841 Fed. App'x. at 524-525). This *dicta*, reciting fundamental principles of due process as memorialized in 40 C.F.R. § 305.33, in no way indicates that AME does not first have to prove its claim by demonstrating substantial compliance with the issue on remand – and the Fourth Circuit affirmed as much when it stated 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*. (emphasis added).

5. **No matter how much further discovery were to be allowed, AME Cannot Meet Its Burden of Proof in Establishing it Substantially Complied with the Preauthorization Process because AME admits it did not intend to seek, nor attempt to seek, preauthorization.**

At the initial stage of litigation before this Court, AME repeatedly acknowledged that it did not intend to seek, nor attempt to seek, preauthorized funding for its work, as required by 40 C.F.R. §§ 307.21 and 307.22, because it expected to be paid by Vertellus. Specifically, AME's Response to EPA's Motion to Dismiss states that AME "did not intend to submit a claim to the fund *at the time*" because "AME *never* formed an 'intent' to submit a claim when it began work at the BJS Site" and that "**AME had no reason to submit an application for preauthorization** to conduct work" ***before*** commencing the response action. AME Response in Opposition to EPA's Motion to Dismiss at 9 (Response) (emphasis added). In its Response, AME claims instead that EPA's preauthorization regulations simply "do not apply to AME," and therefore "AME had no reason to submit an application for preauthorization to conduct work." *Id.* *See also* AME Request for Hearing at 6 ("…preauthorization was never warranted when AME began work at the BJS Site because, at that time, the work was being performed for a viable PRP with

financial assurances guaranteed by a federally enforceable Consent Decree."). Therefore, without having formed the intent to seek preauthorization, and with its erroneous conclusion that the entire preauthorization process "simply does not apply" to AME[13], AME in no way could have attempted to comply with the preauthorization regulations, let alone substantially complied with them.[14] Moreover, AME clearly acknowledges that it did not attempt to comply with preauthorization (i.e. *prior* to commencing the response action as required by 307.22(a)) when it admits that it was EPA's "denial letter" dated February 8, 2017 (which AME refers to as an "arbitrary" and "inequitable" action) "that required AME to seek reimbursement from the Fund." Request for Hearing at 6. It is critical to note that AME's first attempt to seek after-the-fact reimbursement from the Fund admittedly occurred 4 to 5 years after Vertellus commenced the response action under the Consent Decree. Therefore, AME admits it did not seek preauthorized funding *prior to commencing work in 2012.* Request for Hearing at 5 ("Beginning in October 2012 and continuing to May 2016, AME diligently performed removal actions…").

After AME appealed the Court's Order to the U.S. District Court for the Northern District of West Virginia, AME continued to provide the aforementioned justifications for not seeking preauthorized funding. Again, AME asserted that preauthorization was not warranted in its situation.[15] Specifically, AME admits that, "from October 2012…to May 2016," it did

[13] AME Request for Hearing at 6.

[14] The dissenting opinion by 4th Circuit Judge Diaz puts these facts into context, stating "[b]ut the problem in this case is that August Mack didn't allege *any* facts that suggest it even attempted to comply, much less substantially complied, with the [application] requirement. As the ALJ and the district court recognized, August Mack concedes that it didn't seek preauthorization for the reimbursement from the Superfund because it expected to receive payment for its work from Vertellus (who was contractually obligated to pay August Mack), or the site-specific fund. Indeed, the district court didn't fault August Mack for failing to strictly comply with the EPA's process; rather, it reasoned that August Mack's "substantial compliance argument has no merit because this is not a mere technical oversight on [August Mack's] behalf; **it is an outright failure to attempt to comply with the clear federal regulations**." [citation to joint appendices omitted]. Dissent at 18-19 (emphasis added).

[15] Amended Complaint ¶ 25(B) ("EPA wrongly concluded that AME was required to submit an application for preauthorization prior to performing work at the BJS Site."). *See also*, ALJ Order on Motion to Dismiss at 11

work at the BJS Site as a contractor to Vertellus, which was required to perform cleanup activities under the CD. Amended Complaint ¶¶ 10-11. AME admits that it expected to be paid for that work by Vertellus. *Id*. ¶ 11.[16] AME alleges that, after Vertellus "went broke," AME made claims against Vertellus in bankruptcy for non-payment during this 43-month period. *Id*. ¶ 12, 15; AME also states that it "requested payment from CBS, and Exxon." *Id*. ¶ 16. When those attempts to obtain payment failed, AME then "requested reimbursement from EPA" (*Id*. ¶ 17) by submitting the subject Application Form[17] on January 12, 2017 (Appendix 1, AME Request for Hearing), over four years after the response work was undertaken by Vertellus per the Consent Decree, and over four years after the allowable time period under the regulations for seeking preauthorization from the Fund.

Because it is undisputed that AME never sought and never even attempted to seek preauthorization to submit its claim against the Fund, EPA should not have to re-establish or relitigate these settled admissions in its defense, and nor do they warrant a bid for further open-ended discovery.

i. The law of the case doctrine forecloses discovery of the information AME seeks, as it remains an undisputed and settled fact that AME did not attempt to comply, much less substantially comply, with the requirement to request preauthorization.

(addressing AME's claim that it would have been "futile" for AME to seek preauthorization while Vertellus was still viable).

[16] Indeed, it is a fact that under their contract, Vertellus was required to pay AME for services rendered in accordance with the terms of that contract – and Vertellus was required to make those payments within 30-60 days of receipt of AME's submission of invoices. AME had a right to enforce these payment terms on a 30-60 day clock, but declined to do so, thus allowing Vertellus to default. Why AME did not seek contractual recourse, and why it allowed Vertellus to default for over 4 years is unknown. See AX 16, Proof of Claim, Exh. AA ("SERVICES RELATING TO BIG JOHN'S SALVAGE-HOULT ROAD SUPERFUND SITE, FAIRMOUNT WEST VIRGINIA").

[17] Both the Application Form and the Claim Form (filed Jan.12, 2017 as part of the Request for Hearing) contain false material statements and do not provide the requisite data sought. They were clearly filed after the fact for litigation purposes and do not comport with EPA's preauthorization process, nor its filing procedures set for in 40 C.F.R. § 307.31.

The law of the case doctrine forecloses re-litigation and further discovery on the finding of fact that AME never sought EPA's prior approval (prior to performing work at the Site), either by submitting EPA's preauthorization application Form 2075-3 *before* commencing the response action pursuant to 40 C.F.R. § 307.22, *or otherwise* substantially complying with the substance of that requirement by providing EPA the information sought in Form 2075-3, as required under 40 C.F.R. §§ 307.22(b) and (c). "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); see *Graves v. Lioli*, 930 F. 3d 307, 318 (4th Cir. 2019); *Williams v. Patrick*, No. 2:2:18-cv-9593, 2020 WL 776886, at *3 n.1 (D. N.J. Dec.30, 2020); *United States v. Batista*, No. 5:09CR00037, 2017 WL 2651717 at *2 n.4 (W.D. Va.Jun 19, 2017); *FMC Corp. v. US EPA*, 557 F.Supp. 2d 105, 109 (D.D.C. 2008). This well-established doctrine promotes the finality and efficiency of the judicial process by "protecting against the agitation of *settled issues*." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p.118 (1984). "Generally speaking, the 'law of the case' doctrine applies to the principle that where there is an *unreversed decision* of a question of ***law or fact*** made during the course of litigation, such decision settles the question for all subsequent stages of the suit." *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964) (emphasis added). Moreover, "[t]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). This Tribunal has recognized the law of the case doctrine in past decisions. *In re Palm Harbor, Inc*., Docket No. EPCRA-4-99-

54, *5 (Order Denying Respondent's Motion for Additional Discovery) (stating that her previous Order on Motion for Accelerated Decision "is now the law of the case").

The fact that AME did not intend or attempt to request preauthorization before incurring costs in October 2012 has been settled by the findings of fact established by this Tribunal, as affirmed by the District Court, and these settled issues remain "unreversed" by the Fourth Circuit decision. *Wilson v. Ohio River Co.,* 236 F. Supp. 96; *Id*. 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.[18]

This Tribunal has previously adopted AME's aforementioned allegations and admissions, and has settled the subject matter as follows:

> ***The Company states that it never had the intent to submit a claim when it started work at the Site because it expected to be paid by Vertellus…Undoubtedly this is true***. But August Mack reads a limitation into "intending" that does not exist. If a person intends to submit a claim to the Fund, it must first take certain steps to obtain preauthorization. At some point in time, presumably after learning of Vertellus's bankruptcy, August Mack formed an intent to submit a claim to the Fund. At that point, and prior to submitting a claim, August Mack was obligated to obtain preauthorization. ***The unfortunate consequence of August Mack's business relationship with Vertellus is that by the time it formed an intent to obtain preauthorization, it was impossible for August Mack to do so***. But the timing of August Mack's intent to submit a claim does not render the preauthorization requirement inapplicable. If it did, then any person could submit a claim to the Fund after the fact for work it had already performed, *rendering the preauthorization requirement meaningless*. *Given that preauthorization is at the heart of the regulatory*

[18] As to the other elements of preauthorization that do not apply to AME's conduct and to which the standard of substantial compliance is irrelevant (i.e. EPA's non-issuance of the requisite Preauthorization Decision Document)– these issues also remain settled matters of fact and law, affirmed by the District Court, and were neither reversed by the 4th Circuit nor remanded, and remain the law of the case.

> *procedure for filing a claim, this result is absurd*. In this instance, August Mack may not have intended to submit a claim to the Fund prior to commencing the work, but that does not excuse the company from obtaining preauthorization. **Rather, it highlights the reality that it is too late for the company to submit a claim against the fund for work that was not preauthorized**.

EPA Order on Motion to Dismiss (Order) at 10-11 (emphasis added). *See also* Order at 8 ("In this case, August Mack admittedly did not seek preauthorization prior to performing work at the Site, and the Agency did not issue a Preauthorization Decision Document…"). In addressing AME's argument that seeking preauthorization while Vertellus was still viable would have been "futile", this Court opines that "when August Mack entered into a subcontracting agreement with Vertellus, it voluntarily placed itself in a position to receive payment from Vertellus ***and did not seek preauthorization for payment from the Fund***. August Mack cannot, after the fact, raise a futility excuse because its own business calculation did not pan out." Order at 11-12 (emphasis added). *Hence, it 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 the application form, or otherwise*. Without a time machine and alternative facts, it is simply impossible that AME could have done so.

The District Court affirmed the ALJ's decision in this regard, stating "it is undisputed that AME did not obtain preauthorization and, thus, did not fulfill the statutory and regulatory requirements. In fact, AME admits that it expected to be paid by Vertellus or the site-specific fund, *rather than by the Superfund*." *August Mack Envtl., Inc.. v. EPA*, No.1:18-CV-12 (Order Granting Motion to Dismiss Amended Complaint) at 8. As to the Fourth Circuit's directive to apply the concept of substantial compliance to the issue on

remand, the District Court acknowledges that "AME argues that it *substantially complied* with the requirements and policy of the preauthorization scheme…" *Id*. at 9 (emphasis added). However, after consideration of AME's substantial compliance argument on preauthorization, the District Court concludes that "*AME failed to seek preauthorization* as required by the governing statute [sic] regulations…[and] AME's substantial compliance argument has no merit because this [failure to seek preauthorization] is not a mere technical oversight on AME's behalf; *it is an outright failure to attempt to comply with clear federal regulations*" *Id*. at 10 (emphasis added).

Echoing the District Court, The Fourth Circuit similarly concludes that: "In this situation, August Mack did not seek or obtain an express preauthorization [PDD] from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 *or otherwise*." *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 522 (4th Cir. 2021) (emphasis added). Thus, the fact that the Fourth Circuit determined AME did not seek or obtain preauthorization by using the application form *or otherwise*, is an "unreversed decision" of a question of fact made during the course of litigation. *Wilson v. Ohio River Co*; *Id.* Therefore, in applying a substantial compliance standard to this issue in light of the 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.

Finally, although the law of the case doctrine may, *arguendo*, not apply where there are "changed circumstances or unforeseen issues not previously litigated" *(Arizona, Id*. at 619), AME has failed to provide new evidence, in the form of an equivalent application, to prove it substantially complied with seeking preauthorization in accordance with Part 307; and the

Courts in this on-going litigation have already decided that AME did not seek or obtain preauthorization, therefore the law of the case doctrine remains central to further adjudication of this matter. *See e.g. Eagle v. WGAY/WWRC*, No. CCB 94-3202, 1996 WL 1061102, at *4 (D. Md. Sept. 5, 1996) (where defendants tried to argue that plaintiff's charge of discrimination was not timely the court applied the law of the case doctrine because the district court had already decided that the charge was timely and *defendants failed to provide new evidence to show otherwise*) (emphasis added). Here, the Fourth Circuit remand and vacatur is narrowed only to the issue of whether AME substantially complied with the preauthorization process.[19] All other aspects of this Court's decision, as affirmed by the District Court, remain the law of the case per the *Arizona v. California* line of cases. *See also, Graves v. Lioi*, 930 F.3rd 307, 318 (4th Cir. 2019).

6. The EPA fact witnesses AME wishes to depose do not have first-hand knowledge of AME's failure to seek preauthorization, and any information they may possess would not be relevant nor "appear reasonably calculated to lead to the discovery of admissible evidence"[20]as to the issue on remand; nor does AME comply with the supplemental requirements for depositions.

AME alleges that the requested deponents Eric Newman, Richard Jeng, Silvina Fonseca and Administrator Michael Regan "contain [sic] information regarding substantial compliance with the preauthorization process, AME's substantial compliance with the preauthorization process, the process of recovery from the Superfund, how awarding AME money from the Fund is appropriate, and the exhibits EPA uses to try to defeat AME's claims and secure an accelerated decision." Motion to Compel at 13-14. As discussed in the introduction to this Motion, AME is seeking information on issues that are not relevant to the defined scope of the

[19] 23 *See e.g.* nt.4, *Infra.*

[20] *Jenkins v. White Castle Mgmt Co*., 12 C 7273, 2014 WL 3809763, at *1 n.2 (N.D. III. Aug.4, 2014).

Fourth Circuit's issue on remand. Per the Fourth Circuit Opinion, the only issue that could be subject to further discovery is whether AME sought preauthorization by substantially complying with the requirement to "submit an application for preauthorization" pursuant to 40 C.F.R. § 307.22(a)(2). As the Fourth Circuit reasoned, this inquiry is necessarily a fact specific inquiry *focused exclusively on AME's conduct in this case*, and whether such "conduct should, in reality, be considered *the equivalent of compliance*." Fourth Circuit Opinion at 522 (emphasis added). Thus, the Court's stated purpose for remand has nothing to do with EPA's generic review and analysis of applications for preauthorization, nor EPA's decision to grant or deny preauthorization to AME or others; nor any of the other irrelevant reasons AME mentions in its Motion to Compel. *Id*. at 13-14. As such, AME's proposed fishing expedition should be denied.

Nor were EPA's listed witnesses proffered for the explicit purpose of establishing that AME did not substantially comply with its duty to submit an application for preauthorization. See EPA's Prehearing Exchange at 2-3. While the Prehearing Exchange speaks for itself, Mr. Jeng and Ms. Fonseca were offered in the unlikely event that EPA must relitigate the issue of whether EPA granted AME preauthorization *via* a PDD pursuant 40 C.F.R. § 307.23. In that event, these witnesses can speak to whether the BJS Consent Decree is a mixed funding Consent Decree, and whether the Consent Decree constitutes preauthorization, what a PDD is and how it functions, and related issues. Mr. Newman's potential rebuttal testimony was offered with respect to what he did or did not do in accordance with the terms of the Consent Decree, how the Consent Decree functions, and what documents he reviewed, inclusive of any correspondence with the parties and their representatives. Administrator Regan was never listed as a witness.

None of the proposed deponents have personal knowledge as to the facts underlying AME's lack of substantial compliance with its duty to submit an application for preauthorization.

Thus, if this Court agrees that it is appropriate to look to the Federal Rules of Evidence as guidance in this matter, the proposed deponents' testimony should be considered irrelevant and inadmissible because a fact witness may testify to a matter only if there is evidence to support a finding that he "has personal knowledge of the matter." Fed. R. Evid. 602. Finally, under Part 305, a Presiding Officer may only order depositions upon oral questions if, in addition to satisfying the requirements of 40 C.F.R. § 305.26(f)(4)(i)-(iii), the party moving for the depositions establishes that: the information being sought by the depositions cannot reasonably be obtained by alternative methods of discovery; or there is 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)(i)-(ii). AME has failed to establish either condition.

i. AME may not depose Administrator Regan absent extraordinary circumstances

AME Counsel named Administrator Regan as a deponent despite the fact that it should be obvious he has no personal knowledge of the facts at issue. AME appears to be seeking non-factual information which would go toward legal or policy arguments with no probative factual value as to the question of whether AME sought preauthorization from EPA. Aside from being irrelevant *per se*, such testimony would also implicate attorney-client privilege, and deliberative information concerning the policy decisions, decision-making process, and mental impressions that Administrator Regan holds as the highest level EPA official. Finally, to the extent Administrator Regan would be called in his capacity as the highest level EPA official, AME has not shown "extraordinary circumstances that would overcome a presumption against having…a high level EPA official[] testify at hearing." *In re 1836 Reality Corp*., 1999 EPA ALJ LEXIS

113, at **4-5 (ALJ, April 8, 1999). EPA requests that Mr. Regan therefore be excluded as a deponent and as a witness.

B. The demanded discovery will unreasonably delay the proceedings. 40 C.F.R. § 305.26(f)(4)(i).

The majority of the discovery demanded by AME pertains to activities and voluminous documents relating to the BJS CD (or other consent decrees), based on the argument that EPA's oversight and approval of the work under the BJS CD constitutes preauthorization. Specifically, AME seeks 1) all documents and communications referring to the work performed by AME at the Site; 2) all documents and communications which relate to, or rely upon, the work performed by AME at the Site; 3) all communications between EPA personnel regarding AME's request for reimbursement from *the Special Account*." Id. at 11 (emphasis added). This information is irrelevant given Court orders that disposed of AME's claims against the special account (see Fourth Circuit Decision, footnote 5), and the District Court Decision affirming that "nothing under the Consent Decree constitutes preauthorization, and nothing under the Consent Decree creates rights in non-parties. It is irrelevant that EPA authorized and supervised AME's work" under the BJS CD. District Court Order Granting Motion to Dismiss Amended Complaint at 10. Nonetheless, AME seeks thousands upon thousands of pieces of paper regarding a mix of privileged and non-privileged communications regarding these irrelevant issues. Many of AME's discovery demands would have EPA supplement its Prehearing Exchange with irrelevant information. See Motion to Compel, Exhibit A at 8, ¶4 ("Please identify any fact witness you intend to call at the hearing in this matter and provide a description of the testimony that such witness is expected to provide."). Other demands seek voluminous and irrelevant information

from multiple sources including AME itself: "Identify all response actions that have been conducted at the Site since January 1, 2011." *Id.* at 9.

C. AME Seeks information that is otherwise obtainable from itself, thus undercutting any showing of good cause to support its motion. 40 C.F.R. § 305.26(f)(4)(ii).

The only discovery that could be potentially relevant on remand is information pertaining to whether AME substantially complied with the requirement to submit an application for preauthorization. That information is in the possession of AME. Ironically it is AME, and not EPA, that has first-hand knowledge and information as to AME's failure to substantially comply with the requirement to submit an application for preauthorization in 2012. Given that AME has not established its claim, i.e., it has not proffered any facts during initial discovery that even suggest it attempted to comply, much less substantially complied, with the requirement to seek preauthorization, it's Motion to Compel further discovery is nothing other than a fishing expedition.

It is transparent that AME does not possess documentary evidence to support an argument that it substantially complied with the requirement to submit an application for preauthorization. If it did, AME would have provided those documents via Prehearing Exchange.

As discussed in more detail above, in its Motion to Compel, AME seeks to avoid the burden of proving its claim by shifting its burden of proof to EPA such that "AME must be allowed to recover its response costs from the Superfund *unless EPA can demonstrate AME was not in substantial compliance* with the preauthorization process". Motion to Compel at 11 (emphasis added). In attempting to shift the burden of proof to EPA, AME erroneously states that "the Fourth Circuit has placed the burden of proof on EPA to show why AME should not be

reimbursed from the Fund." To that end, AME has demanded EPA "Provide a description by category and location of all documents, electronically stored information, and tangible things that you have in your possession, custody or control and may use to support *an argument* that AME did not substantially comply with the preauthorization process." Motion to Compel, Exhibit A at 8, ¶ 3. EPA has no such documents or tangible things to support the fact that AME did not substantially comply with the requirement to seek preauthorization prior to commencing work in 2012. The very lack of such documents evinces that AME did not substantially comply with the preauthorization process, and this is where the further discovery process should begin and end. As stated and sustained by AME at all stages of litigation through the fourth circuit, AME did not intend to seek, nor attempt to seek, preauthorized funding for its work as required by 40 C.F.R. §§ 307.21 and 307.22. AME has proffered no facts or documentation to evince otherwise. Rather, AME's Response to EPA's Motion to Dismiss states that AME "did not intend to submit a claim to the fund at the time" because "AME never formed an 'intent' to submit a claim when it began work at the BJS Site" and that "AME had no reason to submit an application for preauthorization to conduct work" before commencing the response action. Again, if documents do exist that demonstrate AME's substantial compliance with the preauthorization process, those documents are obtainable from AME itself, as are any documents demonstrating that it did not substantially comply. It is absurd to posit that EPA must re-establish the law of the case and AME's explicit admissions affirming that it did not substantially comply with seeking preauthorization. EPA simply cannot produce a negative, nor prove a negative.

IV. Sanctions for EPA's advocacy in declining further discovery are not warranted

Sanctions for EPA's compliance with this Court's Prehearing Order are not appropriate. AME's first and second set of written discovery demands (Motion to Compel, Exs. A and B) state that the ALJ order "compelled" additional discovery and required that EPA answer the discovery demands within 30 days. Having re-read the Prehearing Order to say quite the opposite, the undersigned EPA Counsel quickly emailed the Court's law clerk and asked him if the Tribunal had issued a subsequent prehearing order that Counsel for EPA was not aware of. The Court's law clerk responded *via* email, stating that your Honor had not issued a superseding order "compelling" the additional discovery sought by AME, thus contradicting AME's written representations made to EPA Counsel (and now this Court). *Id.* After re-reading this Tribunal's directive regarding further discovery, it is evident that AME Counsel was openly misrepresenting and violating a valid court order. At that point, and having determined that the information sought by AME was not relevant to the issue on remand, EPA determined that it would not comply with AME's demands.

Ironically, every case cited by AME regarding sanctionable behavior applies exclusively to AME Counsels' conduct. AME Counsel "clearly should have understood [its] duty to the Court" but nonetheless 'deliberately disregarded' it" by ignoring and misrepresenting this Tribunal's discovery order in an effort to unilaterally coerce further discovery. *See Sines v. Kessler*, 339 F.R.D. 96, 109 (W.D. Va. 2021) (citations omitted.); *Silverman & Silverman, LLP v. Pacifica Foundation*, 2014 WL 3724801 (July 25, 2014)(E.D. NY)(sanctions levied for failure to comply with Court's discovery orders); *Worldcom Network Services, Inc, f/k/s Wiltel, Inc. v. Metro Access, Inc.*, 205 F.R.D. 136 (S.D.N.Y)(Jan.3, 2002)(sanctioning attorney for failure to comply with discovery order on the principle that discovery sanctions serve three fundamental

purposes: 1) preventing a party from profiting from its failure to comply with a discovery order; 2) securing the party's compliance with the order and deterring future misconduct by it; and 3) deterring future litigants from non-compliance with discovery rules and orders). Moreover, sanctions for failure to comply with a Pre-Hearing Exchange have, from time to time, been issued by this Tribunal and the Environmental Appeals Board. *See, e.g., In re Jiffy Builders, Inc.*, 8 E.A.D. 315, 319 (EAB 1999)(Presiding officer has right to issue a default order for failure to comply with a prehearing order); *In re B&L Plating, Inc*. 2003 EPA App. LEXIS 8, at 21 n.18 (EAB Oct.20, 2003). In sum, AME's attempts to compel discovery by repeatedly and deliberating disregarding and misrepresenting a valid court order are *per se* in contempt of court, and do not accord with professional codes of conduct.[21] EPA requests that this Court exercise its authority to issue sanctions commensurate with AME Counsels' misconduct.

Contrary to allegations made against EPA Counsel, AME Counsel has never explained - to EPA or this Court - why the subject discovery is "unquestionably relevant". Motion to Compel at 18. Indeed, AME Counsel has not met its burden to establish the criteria in 40 C.F.R. § 305.26(f)(4)(i-iii), as discussed above. AME's allegations of bad faith "that EPA strung AME along for weeks…" is also false or misleading, as are the remaining laundry list of complaints made against EPA Counsel.

i. EPA's position that further discovery should be denied is entirely consistent with the plain language of the Fourth Circuit's Order, EPA's administrative rules of practice, and the Prehearing Order.

AME's Motion to Compel is founded on demonstrably false claims that: 1) EPA is in "direct contradiction to [sic] the Fourth Circuit Order"…"*command[ing]* that there be discovery

[21] See Rule 11, Federal Rules of Civil Procedure.

as to substantial compliance" (Motion to Compel at 1, 9)(emphasis added); 2) EPA has "refused to engage in even basic discovery" (*Id*. at 1); 3) that EPA is seeking a Motion for Accelerated Decision in its favor "without ***any*** discovery" (*Id.* at 3); 4) that EPA attempts to "thwart discovery and deny AME due process" (*Id*. at 4); and 5) Chief Administrative Law Judge Susan Biro's Order of Redesignation and Prehearing Order dated September 8, 2021 ("Prehearing Order") is "silent as to initial discovery" (Motion to Compel at 5). Each of these claims is false.

First, AME asserts that EPA has willfully and deliberately disregarded the Fourth Circuit's Order which AME characterizes a "command" for discovery. Motion to Compel at 4 and 18. As AME alleges, the Fourth Circuit noted that "no discovery was conducted". Motion to Compel at 4 (citing Fourth Circuit Opinion at 525). However, the Fourth Circuit does not command discovery, let alone the manner of unilateral judicial discovery AME now demands under the Federal Rules of Civil Procedure. The discovery permissible under Part 305 and this Court's Prehearing Order in no way "conflicts with the plain language of the Fourth Circuit's Order" (Motion to Compel at 7). AME's charge that EPA is proceeding in contempt of the Fourth Circuit Order on remand is therefore demonstrably false and misleading. It is a shameful coercive tactic unbecoming a member of the bar. *See* Motion to Compel, Ex. I (Sugarman December 15, 2021 letter at 2) (charging EPA Counsel in contempt of the Fourth Circuit decision and the "ALJ's pre-hearing order").

Nor can AME possibly establish its next three spurious claims that EPA has "refused to engage in even basic discovery" (Motion to Compel at 1); that EPA is seeking a Motion for Accelerated Decision in its favor "without ***any*** discovery" (*Id.* at 3); or that EPA has attempted to "thwart discovery and deny AME due process" (*Id*. at 4). EPA complied with this court's Prehearing Order which provided for a prehearing exchange of information constituting

administrative discovery The prehearing exchange of information remains the primary mechanism for discovery. 40 C.F.R. § 305.26; Prehearing Order at 3; *In re H. Kramer & Company*, *Id*.

AME Counsel appears to substantiate its claims on the false statement that the Prehearing Order is "*silent* as to initial discovery" (Motion to Compel at 5) (emphasis added). The Prehearing Order is anything but silent as to administrative discovery, as is evidenced by the Prehearing Exchange provisions in Judge Biro's Order. Prehearing Order at 3 *et.seq*.

Moreover, it is understood that Part 305 is modeled after 40 C.F.R. Part 22: "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits" ("Part 22" or "Consolidated Rules of Practice"),[22] and that in "an administrative proceeding governed by the Rules of Practice, *discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a* ***prehearing exchange of information*** in accordance with Section 22.19(a), 40 C.F.R. § 22.19(a)."[23]*In the Matter of Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling, and Laurence C. Kelly,* Docket No. RCRA-05-2010-0015 *2 (June 9, 2011)(emphasis added); *In re Wyeth Pharmaceuticals*, Docket No. CWA-02-2009-3460, *3 (Nov. 18, 2009)(Order Denying Motion for Additional Discovery and reiterating that "discovery occurs through a prehearing exchange of information") . AME Counsel knows that an equivalent "prehearing exchange of information", constituting administrative discovery, was properly order by ALJ Biro under the parallel provision of 40 C.F.R. § 305.26. Prehearing Order at 3 (directing the detailed exchange of witness lists and documents -- consistent with Part 22 Rules). AME knows that EPA fully

[22] When the interim final rule for Part 305 was published, EPA stated that it was "modeled after 40 CFR part 22…". 58 Fed. Reg. 7704, 7705 (Feb. 8, 1993).
[23] See 40 C.F.R. § 305.26(b), which is the parallel provision to 40 C.F.R. § 22.19(a).

complied with the directives set forth in the Prehearing Exchange component of the Order. And AME Counsel knows that EPA, in response to Section 1(C)(3) of the Order, filed an extensive brief (forming almost *ver batim* its brief for accelerated decision), demonstrating why there is no genuine issue of material fact, and why the Agency is entitled to judgment as a matter of law.[24] It is bad faith, therefore, for AME to pretend as if administrative discovery did not occur or that EPA tried to thwart it; it is perhaps more galling to claim that this Tribunal failed to issue the standard discovery directives that have consistently been ordered in hundreds of other administrative matters dating back to the early 1970's.

ii. **EPA's position regarding discovery is entirely consistent with Part 305, the Prehearing Order, and the Fourth Circuit's Decision.**

AME asserts that the reference in 40 C.F.R. § 305.26(f)(1)[25] to 26(a) of the Federal Rules of Civil Procedure ("FRCP") means that AME "does not need EPA's consent or this Tribunal's order to proceed" with its "initial discovery" commands. In doing so, AME thereby nullifies a direct court order mandating that:

> The parties may conduct any mutually agreed upon discovery without the participation of this Tribunal as long as such discovery concludes by **December 24, 2021**. *Any* further discovery shall be permitted *only* pursuant to an order of this Tribunal. 40 C.F.R. § 305.26(f)(2), (f)(3).

Prehearing Order at 4 (emphasis added). AME's isolation of FRCP 26(a), by taking it out of context and then misreading it to suggest that AME may unilaterally obtain further discovery *in violation of court order*, is a gross misreading of the plain language of subsection 26(f), and a

[24] AME, on the other hand, filed a partial narrative statement that failed to proffer any evidence whatsoever in support of its argument that it substantially complied with submitting an application for preauthorization. Rather than providing the court ordered legal and factual bases, in detail, supporting its claim to have substantially complied with requirement to seek preauthorization, AME promised to provide evidence at hearing – in contempt of this Tribunal's Order. To cloud the record further, AME provided hundreds exhibits pertaining to the Consent Decree, many of which appear to be cut off or duplicative, or otherwise irrelevant.

[25] "Discovery shall include any of the methods described in Rule 26(a) of the Federal Rules of Civil Procedure." *Id.*

violation of this Court's order stating otherwise. AME used its misreading as an excuse to stand in the shoes of the Court in an attempt to compel EPA to produce further discovery within 30 days of AME's directive.

40 C.F.R. § 305.26(f)(3) provides that these "methods of discovery sought" may only proceed pursuant to order of the court, and that "any party to the proceeding desiring an order of discovery shall make a motion therefore" and that "[s]uch motion shall set forth: (iii) "the method of discovery sought" – an unambiguous reference to the discovery "methods described" in 40 C.F.R. § 305.26(f)(1)(which sites to the discovery methods in FRCP 26(a)). It is nonsensical to disconnect 26(f)(1) from its related subsections in order to nullify the inter-related provisions of 26(f)(3) and (f)(4).

40 C.F.R. § 305.26(f) is essentially identical to 40 C.F.R. § 22.19(e) in terms of the requirement to file a motion for additional discovery. Under Part 22, EPA has long held that "[s]ubsequent to the prehearing exchange, a party may move for 'additional discovery' pursuant to Section 22.19(e)(1) of the Rules of Practice, 40 C.F.R. § 22.19(e)(1). Such a motion shall specify the method of discovery sought…" *In the Matter of Mercury Vapor Processing Technologies, Inc., a/k/a River Shannon Recycling, and Laurence C. Kelly,* Docket No. RCRA-05-2010-0015 *2 (ALJ June 9, 2011). AME's re-writing of 40 C.F.R. § 26(f) is thus plainly erroneous or inconsistent with the regulation – but even if it were reasonable, it still does not provide justification for contradicting a court order, or coercing further discovery.

Lastly, AME's purported thirty-day deadline for EPA's answering discovery, and its reliance on judicial case law citing to the FRCP, are of no relevance to this proceeding. The FRCP do not substitute for the authorized administrative hearing procedures set forth in Part 305. 40 C.F.R. § 305.1. It is controlling case law that there is no basic right to judicial discovery in

federal administrative proceedings, rather the agency's procedural rules govern the amount of discovery available. *In re Advanced Elec., Inc*., 10 E.A.D. 385, 393 n.19 (EAB 2002).

V. EPA's motion for accelerated decision should not be held in abeyance

EPA's motion for accelerated decision should not be held in abeyance to provide AME time to complete what amounts to nothing more than a fishing expedition. Motion to Compel at 4. Attempting to hold EPA's dispositive motion hostage to AME's unjustified Motion to Compel will prejudice EPA by causing unnecessary delay and needless confusion in a matter that is ripe for resolution at this juncture, without the taking of additional discovery. *See*, *generally*, EPA Motion for Accelerated Decision (evidencing that there remain no genuine issues of material fact in dispute).

Conclusion

No amount of further discovery can possibly alter the relevant facts and law in this matter. The settled fact is that AME neither applied for preauthorization nor received a PDD evincing the terms and conditions of EPA's prior approval to present an eligible claim to the Fund. And the law, as settled by *State of Ohio v. EPA*, requires that AME must seek preauthorization and obtain preauthorization pursuant to EPA regulation. For all of the aforementioned reasons, AME's motion fails to demonstrate: 1) that the information sought has "*significant probative value*" on the issue of whether AME substantially complied with the requirement to submit an application for preauthorization; 2) that the information sought is not otherwise available to AME; and 3) that the discovery process will not in any way delay the proceedings.

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CERTIFICATE OF SERVICE

I certify that the foregoing motions *In the of Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001, were 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 EPA's Motion in Opposition to AME's Motion to Compel 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.

1/28/22

Date

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