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
REPLY IN SUPPORT OF MOTION FOR ACCELERATED DECISION

The parties have presented the Tribunal with competing views on what substantial compliance with the preauthorization scheme means. On one hand, AME argues that satisfying its objectives meets this standard. AME's position is sound and supported by caselaw from Federal Circuits, including the Fourth Circuit in this case. On the other, EPA presents a deeply flawed substantial compliance argument that, if accepted, would subject the Tribunal to reversal for a second time; indeed, the EPA's argument is the logical conclusion of the Fourth Circuit's dissenting opinion in this case, which by definition does not control the outcome here.

Specifically, EPA presents an intent-based argument: AME needed to "form[] the intent to seek preauthorization" to meet the substantial compliance standard. (EPA MFAD, p. 19; *see also* EPA MFAD Resp., p. 5.) But this argument is wrong because it faults AME for not submitting the legally obsolete application: "AME's failure to submit Form 2075-3 may fall within the category of a 'minor procedural infirmity[.]'" (EPA MFAD Resp., p. 12; *see also id.* at p. 5 (stating that AME needs to prove that its failure to file the

obsolete application did not violate the "essence" of the regulations).) The Fourth Circuit clearly held that AME could not be faulted for failing to submit the preauthorization application on remand. *August Mack Environmental, Inc. v. EPA*, 841 Fed.App'x. 517, 522-525 (4th Cir. 2021).

This is not the only flaw in EPA's argument. In addition to "form[ing] the intent to seek preauthorization," EPA states that AME needed to "fil[e] the equivalent of an application[.]" (EPA MFAD, pp. 19, 24.) However, "[b]y definition, substantial compliance is less than actual compliance." *Phoenix Mut. Life. Ins., Co. v. Adams*, 30 F.3d 554, 565 (4th Cir. 1994). The "equivalent" of filing the legally obsolete application is nothing more than the "equivalent" of actual compliance and therefore inconsistent with the equitable substantial compliance standard established by the Fourth Circuit.

EPA's substantial compliance argument also fails to account for the deposition testimony of its employees. Indeed, EPA avoids this sworn testimony in its response and instead relies on the facts alleged in the "pleadings." (EPA MFAD, p. 13 n.14.) However, not only is reliance on alleged "facts" inappropriate at this stage of the litigation, but such reliance ignores the Fourth Circuit's directive that facts obtained through "discovery" would determine whether AME substantially complied with the preauthorization process. EPA's position does not adhere to this ruling and should be rejected.

The deposition testimony of EPA's employees is critical because it (1) establishes that AME satisfied the objectives of the preauthorization process and (2) proves that EPA

administers its preauthorization scheme in an arbitrary and unlawful manner. Lacking any substantive rebuttal to this undisputed evidence, EPA turns to unavailing procedural arguments. EPA says that AME does not have standing because its claim is a generalized grievance—as if every person has a claim of approximately $3 million as a result of EPA's arbitrary and unlawful acts. The absurdity of this position is rivaled by EPA's waiver argument. There, EPA claims that AME needed to make its as-applied arguments in response to EPA's motion to dismiss. However, the facts which gave rise to this argument were only revealed through discovery—which occurred years after EPA's erroneous motion to dismiss. The EPA's argument is nonsensical and should be denied.

EPA next asserts that AME's facial challenges to its preauthorization scheme should have been filed in the D.C. Circuit in 1993. However, it is "settled law" that one can challenge a CERCLA regulation more than 90 days after its promulgation on the basis that the agency exceeded its authority, which is precisely what AME does here with its *ultra vires*, separation of powers, and major questions arguments. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 315-316 (D.C. Cir. 2018); *N.L.R.B. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987). Further, EPA incorrectly frames its venue argument (AME needed to file its case in the D.C. Circuit) as a jurisdictional issue. Decades of Supreme Court precedent holds that litigation-channeling provisions are venue provisions, and must be timely raised, which EPA failed to do.

In sum, AME's arguments are faithful to the Fourth Circuit's order whereas EPA's are not. AME's arguments adhere to controlling Supreme Court authority whereas EPA's do not. AME's position accounts for the deposition testimony secured after remand whereas EPA's does not. Thus, the Tribunal should grant AME's MFAD and award it the entirety of its claim.

Argument

1. EPA's intent-based argument conflicts with the Fourth Circuit's opinion.

In disregard for the Fourth Circuit's decision, EPA presents an intent-based substantial compliance argument that faults AME for failing to submit the legally obsolete application before starting response work. According to EPA, "substantial compliance [] requires (1) a showing of 'intent' by notifying EPA, before commencing a response action, that AME was seeking preauthorization; and (2) a demonstration that AME's failure to comply with the literal requirements (i.e., filing a timely Form 2075-3) did not violate the essence of the regulations." (EPA Resp. MFAD, p. 5; *see also id.* at p. 12 ("AME's failure to submit Form 2075-3 may fall within the category of a 'minor procedural infirmity[.]'"); *id.* at p. 8 n.4 ("The Fourth Circuit . . . did not dispense with the regulatory obligation to seek preauthorization in the first instance.") This argument cannot be squared with the Fourth Circuit's mandate that AME not be faulted for failing to submit the legally obsolete application on remand:

> 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 . . . 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.

August Mack Environmental, 841 Fed.App'x. at 524-525. Thus, accepting EPA's substantial compliance argument would subject the Tribunal to reversible error for a second time.

This conclusion is buttressed by examining the caselaw EPA cites to support its position. EPA says that *Phoenix Mutual Life. Ins., Co. v. Adams*, 30 F.3d 554, 565 (4th Cir. 1994), supports its intent-based argument. (EPA Resp. MFAD, p. 7.) But there, the Fourth Circuit started its substantial compliance discussion with a clear principle: "By definition, substantial compliance is less than actual compliance." *Phoenix Mut.*, 30 F.3d at 565 (emphasis added). Here, EPA fails to adhere to *Phoenix Mutual* because its substantial compliance argument is something more than actual compliance in that it adds an element of intent, requires submission of information that is the "equivalent" of the obsolete and invalid form, and then requires proof that failing to submit the legally obsolete form "did not violate the essence of the regulations." (EPA Resp. MFAD, p. 5; EPA MFAD, pp. 19, 24.) According to EPA's caselaw, the substantial compliance standard is a lower hurdle than actual compliance. Nevertheless, EPA would require AME to satisfy, and this Tribunal to apply, a heightened standard. To do so is clear error and EPA's argument should be rejected. *See also* AME Resp. MFAD, pp. 11-12, 14-17.

Moreover, EPA ignores that its legally obsolete form caused the Fourth Circuit to hold that a substantial compliance test is proper in this case: "An important fact, however, persuades us that applying a substantial compliance standard is compelled here. That is, the form that the EPA purports to require from an applicant for Superfund payment — EPA Form 2075-3 — is legally obsolete." *Id.* at 523. This key fact and holding makes all the Fourth Circuit caselaw cited by EPA distinguishable and inapplicable here.

For instance, the *Phoenix Mutual* decision involved an ERISA plan where the doctrine of substantial compliance applied automatically. 30 F.3d at 565. Importantly, *Phoenix Mutual* was not a lawsuit where one was "attempting to use an equitable theory to establish liability." *Id.* Rather, the insurer admitted it needed to pay out the benefits; the issue was whether the insured changed his beneficiary. *Id.* To change the beneficiary, the insured needed to complete a change of beneficiary form. *Id.* at 557. Evidence supporting that the insured intended to change his beneficiary status before he died was presented, and the Fourth Circuit affirmed the district court's opinion that the insured "substantially complied with the provisions of the plan governed by ERISA." *Id.* at 557-558, 567-568.

Thus, *Phoenix Mutual* is distinguishable and provides no support for EPA's position. The form at issue in that case was not "legally obsolete," the insurer admitted it needed to pay the proceeds, the substantial compliance doctrine automatically applied because of the ERISA plan, and an equitable theory was not being used to establish

insurer liability. *Id.* at 565. Here, on the other hand, the form is legally obsolete, EPA refuses to pay AME's claim, the substantial compliance doctrine applies because the form is legally obsolete, and the use of the substantial compliance has an equitable purpose here. *August Mack Envtl.*, 841 Fed.App'x. at 522-525; EPA Resp. MFAD, p. 4 ("EPA acknowledges that substantial compliance is an equitable doctrine[.]")

EPA also cites to *Atlantic Veneer Corp. v. C.I.R.*, 812 F.2d 158 (4th Cir. 1987). (EPA Resp. MFAD, pp. 5-9, 11, 13.) However, that case does not support EPA's position either. There, the Fourth Circuit affirmed the Tax Court's denial of depreciation deductions because taxpayer failed to file an election in accordance with 26 U.S.C. § 754, I.R.C. § 754 or a Form 1065. *Id.* at 158, 160. The taxpayer argued that the election requirement was procedural, not mandatory, so a substantial compliance standard should apply. *Id.* at 160. The court disagreed and held that the election requirement was not procedural, and that taxpayer "failed to make that election, either literally or 'substantially[.]'" *Id.* at 160-161. Thus, *Atlantic Veneer* does not support EPA's position. Neither the election nor Form 1065 were legally obsolete, and the court did not apply a substantial compliance standard.

Finally, EPA cites *Volvo Trucks of North America, Inc. v. U.S.*, 367 F.3d 204 (4th Cir. 2004). (EPA Resp. MFAD, pp. 5-6, 9, 11-12, 14.) Again, however, this case does not support EPA's EPA's position. In *Volvo Trucks*, the Fourth Circuit held that a substantial compliance standard did not apply: "we readily conclude that Volvo cannot have the benefit of substantial compliance in the circumstances presented." *Id.* at 210.

Nevertheless, in dicta, the court said that the taxpayer would not receive a tax refund under the substantial compliance doctrine either because the regulation was clear and taxpayer acknowledged that it could have complied with the regulation, which required it and its dealers to register with the IRS but, failed to do so. *Id.* at 210-211.

Fundamentally, none of EPA's cases illustrate application of a substantial compliance standard in the context of CERCLA. None of these cases assist with the issue at hand: whether AME substantially complied with what remains of the preauthorization scheme after the Fourth Circuit invalidated the pre-application requirement. As EPA recognizes, the substantial compliance doctrine is an equitable doctrine; it is not a one-size-fits-all test. Applying the substantial compliance discussed in these cases would be unfaithful to the Fourth Circuit's order and erroneous. Notably, in *August Mack*, the Fourth Circuit recognized this by not citing any of them. The Tribunal should follow the *August Mack* court's lead and avoid EPA's invitation to commit error a second time.

2. There is no genuine issue of material fact that AME substantially complied with the preauthorization process.

EPA response to AME's Statement of Undisputed Material Facts makes it clear that there is no genuine issue of material fact that AME substantially complied with EPA's preauthorization scheme. Claims may be asserted against the Fund for necessary response costs incurred by any person as a result of carrying out the National Contingency Plan, provided that the costs are approved under the NCP and ultimately "certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2). Under EPA's extra-

statutory preauthorization process, costs are considered eligible to be paid from the Fund if (1) the response action is preauthorized by EPA; (2) the costs are incurred for activities within the scope of EPA's preauthorization; (3) the response action is conducted in a manner consistent with the NCP; and (4) the costs incurred are necessary costs. 40 C.F.R. § 3017.21(b). The Fourth Circuit decision in this case accounts for the first two regulatory requirements, leaving the only question here whether AME substantially complied with the last two. It did.

EPA admits it selected a response action for the Site that is consistent with the NCP; the agency always acts in accordance with the NCP; the work called for in EPA's action memorandum is designed to protect human health and the environment; EPA understood the general location and nature of the contamination before AME's work; AME was qualified to perform the work; EPA and AME interacted constantly; EPA accepted AME's schedule of work; AME's work was a necessary part of the response and removal work; AME's work was consistent with the NCP; Tetra Tech used data AME generated to create a work plan; and EPA will seek funding the Superfund to pay Tetra Tech for its work at the BJS Site. (EPA Resp. AME SMF, ¶¶ 11-15, 16-21, 24, 26-29, 31, 34-36, 40, 44-49, 52-53, 55-60, 62, 64, 66, 78, 82, 87-89.) These admissions leave no doubt that AME satisfied the objectives of the preauthorization process, incurred necessary costs while performing work consistent with the NCP, and substantially complied with the preauthorization process because EPA possessed information required by the now

invalid application before AME performed work at the Site. (AME MFAD, pp. 34-42, 65-67; AME Resp. MFAD, pp. 17-19.)

Nevertheless, EPA argues that AME did not substantially comply with the preauthorization process because although it possessed all the information required by 40 C.F.R. § 307.22(b), AME did not provide EPA with all of the information required on its invalid form. (EPA MFAD, pp. 13-14.) EPA's form-over-substance argument is another example of EPA applying a strict/actual compliance standard and not the lesser standard substantial compliance standard. Discovery has demonstrated that AME provided or EPA possessed all of the information required by § 307.22(b) before AME started its NCP compliant response work. (AME MFAD, pp. 65-67; AME Resp. MFAD, pp. 17-19.) It would be wasteful, inefficient, and contrary to the equitable substantial compliance standard to hold that AME was also required to directly provide EPA with the information it already possessed or, as EPA arguments, "intend" to provide it.

Next, EPA says that AME did not satisfy the objectives of preauthorization because reimbursing AME does not adhere to the "polluter pays" principle. (EPA Resp. MFAD, pp. 19-20 (stating that AME ignores the polluter pays principle). But AME is not a PRP, which EPA admitted. (EPA Resp. AME SMF, ¶ 8.) Reimbursing an innocent private party like AME does not run afoul of the polluter pays principle. Rather, it is EPA arbitrary and unlawful policy of preauthorizing only liable parties (i.e. polluters) that agree to settle their liability with the government that violates this principle by placing polluters in a

better position than non-polluters and by reducing or eliminating the amount the polluter must pay. (AME MFAD, pp. 46-50, 58.)

Finally, EPA forfeits any remaining credibility when it claims that cleaning up the BJS Site is an inappropriate use of the Fund. (EPA Resp. MFAD, pp. 18-19.) There is no genuine issue of material fact that EPA will seek to use Superfund money to finish work at the Site. (EPA Resp. AME SMF, ¶ 88.) Thus, as EPA acknowledged before filing its response, cleaning up the BJS Site is an appropriate use of the Fund. In sum, AME satisfies all of the objectives of preauthorization, thereby substantially complying with EPA's preauthorization scheme as a matter of law.

3. EPA fails to dispute that section 9611(a)(2) is unambiguous, which makes EPA's manufacture of the preauthorization scheme *ultra vires* and unconstitutional.

Importantly, EPA fails to dispute that section 9611(a)(2) is unambiguous. Indeed, if a "statute is clear and unambiguous that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *K Mart Corp. V. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (internal quotation marks omitted). Because section 9611(a)(2) is unambiguous and contains no preauthorization requirement, EPA's creation of the preauthorization scheme is *ultra vires* and unenforceable. (AME MFAD, pp. 53-55.) By focusing on generalized Congressional intent and not the unambiguous language of section 9611(a)(2), EPA commits the same error that the D.C. Circuit did in *Ohio v. EPA*, 838 F.2d 1325 (1988). (AME MFAD, pp. 53-60.) EPA's failure to address this point means that EPA's interpretation of the statutory

provision is not entitled to deference. *Chevron, U.S.A., Inc. V. Nat. Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *see also Neustar, Inc. v. Federal Communications Commission*, 857 F.3d 886, 893-894 (D.C. Cir. 2017) ("The FCC's brief nominally references *Chevron*'s deferential standard in its standard of review but did not invoke this standard with respect to rulemaking. Consequently, it has forfeited any claims to *Chevron* deference."); *Commodity Futures Trading Com'n. V. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008) ("the CFTC waived any reliance on *Chevron* deference by failing to raise it to the district court.")

Incredibly, EPA urges the Tribunal to ignore the fact that section 9611(a)(2) is unambiguous for public policy reasons:

> If AME's "unambiguous" reading of the statute were to control, essentially any third party could take on a cleanup with no advance notice to EPA of anticipated costs, do so in a manner that adheres to certain portions of the preamble of the preauthorization rule, and expect EPA to pay its claim.

(EPA Resp. MFAD, pp. 32-33.) As an initial matter, EPA's argument ignores that the statute requires such costs to be "necessary response costs" incurred "as a result of carrying out the [NCP]." 42 U.S.C. § 9611(a)(2). Two facts that have been indisputably established here and would stem EPA's notion of a tidal wave of claims against the Superfund.[1] Indeed, it was, and is, Congress' intent to promote cleanups and incentivize

[1] EPA also fails to mention that Congress placed other limitations on the use of the Fund. *See* 42 U.S.C. 111(d) and (e).

private party responses, not to discourage them through unchecked administrative bureaucracy.

Moreover, this argument highlights how EPA's preauthorization scheme violates the separation of powers doctrine. Believing the preauthorization requirement is good public policy, EPA invades the power of Congress and acts as the legislature. (AME MFAD, pp. 60-62.) Misunderstanding the separation of powers doctrine, EPA asserts that its unconstitutional act is proper because Congress intended it. (EPA Resp. MFAD, p. 30.) Not only is the incorrect for the reasons stated in AME's MFAD, it does not allow EPA to escape its separation of powers violation because a separation of powers violation exists "*whether or not the encroached-upon branch approves the encroachment*." (AME MFAD, p. 61) (citations omitted).

Finally, EPA's response to AME's major questions argument misses the mark. EPA says "CERCLA's economic effects are beside the point." (EPA Resp. MFAD, pp. 34-35.) Yet that is the relevant question for when to apply the major questions doctrine. (AME MFAD, p. 63.) EPA's response disregards the Administrator and President's express acknowledgment that Superfund availability has extraordinary economic and political significance, especially when it comes to addressing environmental justice, one of the most important issues of our time. (*Id.* at 63-65.) The impact and importance of Superfund availability and environmental justice cannot be minimized in light of these admissions,

making it appropriate to apply the major questions doctrine and strike the preauthorization scheme. (*Id.*)

4. There is no genuine issue of material fact that EPA administers its preauthorization scheme in an arbitrary and unlawful matter.

In its MFAD, AME established that there is no genuine issue of material fact that EPA administers its preauthorization scheme in an arbitrary and unlawful manner. (AME MFAD, pp. 42-52.) In response, EPA says, "AME's argument that EPA *never* grants preauthorization to non-liable parties is simply factually incorrect, as already established in the record" and then specifically cites to a PDD issued in connection with the Mohawk Tannery Site. (EPA Resp. MFAD, p. 41.) If the Tribunal has not already lost faith in EPA and its arguments, this should be the final straw. EPA's statement is simply false and lacks candor. EPA was careful to include only the PDD for the Mohawk Tannery Site, which is a single appendix to the Mohawk Tannery Administrative Settlement Agreement, in the record. (AX 11.)

AME has now entered the entire Administrative Settlement Agreement as RX 341. EPA is a signed and bound party to the Administrative Settlement Agreement that relates to the Mohawk Tannery Site, which EPA misrepresents in this litigation. (RX 341; CERCLA Docket No. 01-2020-0063.) Therein, EPA and the prospective purchaser, Blaylock Holdings, LLC, acknowledged there was "risk of claims under CERCLA being asserted against the Purchaser . . . as a consequence of Purchaser's activities at the Site" so "one of the purposes of this Settlement is to resolve Purchaser's potential CERCLA

liability . . . ." (*Id.* at p. 1 ¶ 5.) The parties then note that the agreement is "[t]he resolution of this potential liability[.]" (*Id.* at ¶ 6.) Stated differently, EPA has admitted that the purchaser who received preauthorization in the Mohawk Tannery matter was a potentially liable party that was settling that liability with EPA. *See also Niagara Mohawk Power Corp. v. Chevron U.S.A.*, Inc., 596 F.3d 112, 120 (2d Cir. 2010) ("property owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there."); *Chubb Custom Ins. Co. v. Space Systems/Loral, Inc.*, 710 F.3d 946, 956-957, 956 n.5 (9th Cir. 2013) (describing how CERCLA "imposes strict liability on four categories of potentially responsible parties (PRPs)", which includes current and former owners.)

Thus, the only instance EPA can identify to dispute its arbitrary and capricious application of its preauthorization scheme actually confirms that practice. Again, there is no genuine issue of material that EPA has never preauthorized an innocent private party. Instead, pursuant to its unlawful and *unwritten* restrictions, EPA only preauthorizes PRPs who settle their CERCLA liability with EPA. Because of this, EPA's preauthorization regulations must be set aside for this specific case, and AME must be awarded the entirety of its claim. (AME MFAD, pp. 42-52.)

5. EPA's procedural arguments conflict with "settled law."

After presenting a substantive argument that conflicts with the Fourth Circuit's opinion, EPA proceeds to present procedural arguments that conflict with "settled law."

EPA says that AME does not have standing, it waived its arguments, and the Tribunal does not have subject matter jurisdiction. Each of these arguments is unavailing.

A. AME's claim is not a generalized grievance because not every person has suffered an injury in fact of $3 million as a result of EPA's arbitrary and unlawful conduct.

AME has already explained why it has standing to bring its claim. (AME Resp. MFAD, p. 22.) Nevertheless, EPA now says that AME does not have standing because its claim is nothing more than "a generalized grievance" that "affects every person equally." (EPA Resp. MFAD, pp. 36-37.) EPA's argument borders on the ridiculous.

First off, AME's claim is clearly not a "generalized grievance" that is shared equally among the populace because not every person has a claim against EPA of approximately $3 million due to its arbitrary, capricious, and unlawful acts. Stated differently, AME has suffered a concrete and particularized injury traceable to EPA's conduct. (AME Resp. MFAD, p. 22.) EPA's caselaw citations support AME's position.

In *Burke v. City of Charleston*, 139 F.3d 401 (1998), the Fourth Circuit held that an artist lacked standing to bring a claim against a city. *Id.* at 403. The artist painted a mural on an exterior wall of a restaurant and sold the mural to the restaurant owner. *Id.* Thereafter, the city invoked a historic preservation ordinance and denied the restaurant owner a permit to display the mural. *Id.* The artist then sued, bringing a First Amendment claim. *Id.* However, the artist lacked standing because he "relinquished his First Amendment rights when he sold his mural to the restaurant owner, who alone has the right to display the mural." *Id.* Because he sold his work, the artist's interest in seeing the

mural was no different than any other citizen: "Like the thousands upon thousands of Charlestonians and Charelston visitors who would likely take pleasure in Burke's creation were they only allowed to view it there on Klenk's wall, Burke himself, although the creator of the work, lacks such a direct stake, and as a consequence the district court lacked jurisdiction to adjudicate his claims." *Id.* at 407.

Here, unlike the artist in *Burke*, EPA's arbitrary and unlawful administration of its preauthorization has harmed AME in a unique and personal way. AME, a small business, worked at the BJS Site for over three years, completing response work that protected human health and the environment and was consistent with the NCP. As a result of its work, AME incurred reasonable and necessary costs of approximately $3 million. Despite this and EPA's contractors relying on AME's work to further the cleanup efforts after Vertellus' bankruptcy, EPA has arbitrarily and unlawfully refused to reimburse it from the Fund. This unlawful denial was based on AME not submitting the legally obsolete form and the fact that it was not a settling PRP. AME certainly has standing to bring this claim, including its arguments that EPA administers the preauthorization program in an arbitrary and capricious manner.[2]

[2] EPA cites *United States v. Richardson*, 418 U.S. 166, 171 (1974) to support a sentence about prudential standing, but there is no discussion of prudential standing on this page of the Supreme Court's decision. (EPA Resp. MFAD, p. 36.) EPA also cites *City of New York v. United States Dep't. of Defense*, but like *Burke*, this case does not support EPA's position. In that case, appellants sought "a judicial decree making the assistance of the federal government more useful to them than it is now." *Id.* at 435. The court held it was "not equipped to perform such tasks and have no legal basis for doing so" as "[t]he APA [] does not permit [] efforts to include judicial supervision of

B. AME's facial and as applied challenges to the preauthorization scheme are timely.

EPA presents two waiver arguments. First, EPA contends that AME's challenges to the preauthorization scheme are beyond the scope of remand. (EPA Resp. MFAD, pp. 26-27.) Second, EPA states that AME waived these challenges by not asserting them in response to EPA's motion to dismiss or the appeal of the Tribunal's order granting the motion to dismiss. (*Id.* at 27-28.) Both arguments should be rejected.

i. <u>The facial and as applied challenges are relevant to the issue on remand, how much money should be awarded to AME.</u>

EPA says the validity of the preauthorization process is not at issue and cites the Tribunal's order on AME's motion to compel for support. (*Id.* at 26-27.) But this is wrong and at odds with the Fourth Circuit's order. As an initial matter, the Fourth Circuit held that EPA's preauthorization application was legally obsolete and struck this requirement. This holding makes it clear that the validity of the preauthorization process is an appropriate issue in front of the Tribunal.

In addition, the Fourth Circuit said the issue on remand is whether to award AME money from the Superfund. *August Mack*, 841 Fed.App'x. at 525. Two independent reasons for making such an award are that (i) EPA's preauthorization scheme is invalid on its face and (ii) the scheme is arbitrary and capricious as applied. Both of these

---

the myriad programmatic workings of the federal government." *Id.* at 436. Here, AME does not seek judicial supervision of EPA's administration of the preauthorization scheme. Instead, AME has established that EPA's preauthorization scheme is arbitrary and capricious as applied and AME should be awarded the entirety of its claim. (AME MFAD, pp. 42-52.)

arguments are encompassed by the issue of whether to award AME money from the Superfund. The Fourth Circuit's opinion in *U.S. v. Henoud*, 81 F.3d 484 (4th Cir. 1996) illustrates this point. In *Henoud*, the Fourth Circuit "remanded 'for a determination of the restitution amount actually owed.'" *Id.* at 487 n.8. On remand, Henoud challenged the appropriateness of including smaller carriers as victims for which restitution should be awarded. *Id.* The government claimed that Henoud waived these issues by not raising them in the initial proceeding. *Id.* However, the Fourth Circuit rejected the government's argument, holding: "Because the scope of our remand order reasonably encompasses those matters as relevant to determining the appropriate amount of restitution, we find consideration of the issues not blocked by the mandate rule." *Id.*

As in *Henoud*, both AME's facial challenge and as applied challenge are relevant to the issue on remand (i.e. how much money should be awarded) and establish that awarding AME money from the Fund is warranted. Thus, these challenges are within the scope of remand. *Id.*; *see also Dish Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856, 866 (10th Cir. 2014) ("The important point is that nothing in the remand language in *DISH I* specifically limited or prevented the district court from allowing the Insurers to dispute the purported duty to defend on grounds other than those that were asserted in the Insurers' original motions for summary judgment. As a result, the district court did not violate the mandate rule by allowing the Insurers to file new motions for summary judgment raising additional defenses to the purported duty to defend."); *Aguinaga v.*

United Food & Commercial Workers Intern. Union, 854 F.Supp. 757, 773 (D. Kan. 1994) ("Lower courts are free to decide issues that were not resolved in a prior appeal, as long as the case remains open for further proceedings.")[3]

ii. AME did not waive its facial and as applied challenges by not asserting them before discovery was conducted.

EPA's cited authority does not support a holding that AME waived its facial and applied challenges. In fact, EPA's so-called "waiver" cases are actually "mandate rule" cases. (EPA Resp. MFAD, p. 27); *U.S. v. Hawkins*, 599 Fed.Appx. 485, 488 (4th Cir. 2015) ("we must determine whether the mandate rule precludes Defendant from raising his Fourth Amendment claim."); *Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) ("The mandate rule prohibits lower courts, with limited exceptions, from considering questions that the mandate of a higher court has laid to rest."); *Volvo Trademark Holding Aktiebolaget v. Clark Machinery Co.*, 510 F.3d 474, 481 (4th Cir. 2007) ("The mandate rule is a specific application of the law of the case doctrine."); *Brrow v. Falck*, 11 F.3d 729, 731 (7th Cir. 1993) ("An appellate mandate does not turn a district judge into a robot, mechanically carrying out

[3] Moreover, there are special circumstances that allow the Tribunal to consider the facial and as applied challenges. EPA filed a motion to dismiss with no discovery being conducted, the Supreme Court issued a new major questions decision that addressed EPA regulations, and EPA and the new President acknowledged that Superfund availability is integral to achieving environmental justice, a critical and major issue for the country. *U.S. v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001) ("Therefore, on remand and in the absence of special circumstances, a district court may address only (1) the issues remanded, (2) issues arising for the first time on remand, or (3) issues that were timely raised before the district and/or appellate courts but which remain undecided.") In addition, to these issues being encompassed by the Fourth Circuit's order and special circumstances being present, these issues arose for the first time on remand and after discovery, so they must be considered. *Id.*

orders that become inappropriate in light of subsequent factual discoveries or changes in the law.")

However, the facial and as applied challenges adhere to the mandate rule and must be considered because they are relevant to the issue on remand: whether AME is entitled to a Superfund reimbursement. *U.S. v. Henoud*, 81 F.3d 484, 487 n.8 (4th Cir. 1996); *Dish Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856, 866 (10th Cir. 2014); *U.S. v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001); *Aguinaga v. United Food and Commercial Workers Intern. Union*, 854 F.Supp. 757, 773 (D. Kan. 1994). Also, the mandate rule does not preclude consideration of "issues arising for the first time on remand" or if there are "special circumstances" warranting consideration of the issue. *U.S. v. Morris*, 259 F.3d 894, 898 (7th Cir. 2001). Again, the facial and as applied challenges were first raised on remand and the special circumstances of the appeal being on an order granting a motion to dismiss with no discovery, the Supreme Court's new major questions decision, and EPA's recent recognition that environmental justice is a major issue make considering these challenges proper.

Lastly, EPA's argument that AME needed to raise its as applied and facial challenges in response to EPA's motion to dismiss is frivolous. "An issue is not considered waived, ... if a party did not, at the time of the purported waiver, have *both* an *opportunity and* an *incentive* to raise it ... on appeal." *Oneida Indian Nation of New York v. County of Oneida*, 214 F.R.D. 83, 94 (N.D.N.Y. 2003) (quoting *U.S. v. Quintieri*, 306 F.3d

1217, 1229 (2d Cir. 2002)). Moreover, the number of alleged missed opportunities is irrelevant to the waiver inquiry: "[w]hether there is a waiver depends *not* ... on *counting* the *number* of *missed opportunities* ... to raise an issue, but on *whether* the party had *sufficient incentive* to raise the issue in prior proceedings." *Id.* (internal quotation marks omitted).

EPA's argument that a requestor must raise all conceivable arguments in a response to a pre-discovery motion to dismiss is unsupported. Moreover, as discussed above, AME's facial and as applied challenges are within the scope of remand and therefore must be considered by the Tribunal.

In addition, the bases of AME's as applied challenges are discovery and admissions taking place after remand. (AME MFAD, pp. 42-52.) Similarly, AME relies on a Supreme Court decision and admissions by EPA that occurred after the initial appellate proceedings to support its major questions argument. Thus, AME could not have raised these issues before remand. Finally, the application of waiver is discretionary. *Digan v. Euro-American Brands, LLC*, 2012 WL 668993 at *2 (N.D. Ill. Feb. 29, 2012). Given the strength of AME's arguments and the procedural history, the Tribunal should not conclude that AME waived any arguments.

C. AME's facial and as applied challenges comport with CERCLA.

In a last-ditch effort to save its arbitrary and unlawful preauthorization scheme, EPA says that the plain language of CERCLA required AME to bring its arguments before

the D.C. Circuit in 1993. (EPA MFAD Resp., pp. 24-26.) As with its other arguments, this claim is wrong and conflicts with well-settled law. CERCLA § 113(a) provides:

> Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations.

This language clearly does not apply to AME's as applied challenge because AME is challenging EPA's administration of the regulations as arbitrary and unlawful, not the regulations themselves. And regarding the facial challenges, the D.C. Circuit has already rejected EPA's argument. *Genuine Parts Co. v. EPA*, 890 F.3d 304, 315-316 (D.C. Cir. 2018). Frustrated with the same frivolous argument that EPA makes here, the D.C. Circuit held, "Our case law makes it clear that '[a]n agency's regulations may be attacked ... once the statutory limitations period has expired ... on the ground that the issuing agency acted in excess of its statutory authority in promulgating them.'" *Id.* at 316 (quoting *NLRB Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195 (D.C. Cir. 1987)). Likewise, the *NLRB* court criticized the agency because it "ignores the settled law of this circuit" that the validity of a regulation can be challenged if the agency continues to apply them. *NLRB Union*, 834 F.2d at 195-196. That is precisely the case here. Thus, AME's facial challenges are timely.

Moreover, although EPA frames its argument that AME needed to file this suit in the D.C. Circuit as a jurisdictional issue, (EPA Resp. MFAD, p. 25), it is actually a venue argument: "Provisions permitting suit to be brought only in certain district courts,

including those conferring special venue in the District of Columbia, are treated as venue, rather than jurisdictional, requirements." *Matter of 5300 Memorial Investors, Ltd.*, 973 F.2d 1160, 1163 (5th Cir. 1992). In fact, the Supreme Court has held that a statutory provision that required review in the D.C. Circuit "is a question of venue" that "may be lost unless seasonably asserted." *Panhandle E. Pipe Line Co. v. Fed. Power Comm.*, 324 U.S. 635, 639 (1945). The *Panhandle Eastern* case is not unique. The Sixth Circuit recognized that "the Supreme Court has uniformly treated [litigation-channeling provisions] as venue, not jurisdictional, limitations." *Brentwood at Hobart v. N.L.R.B.*, 675 F.3d 999, 1002-1003 (6th Cir. 2012) (providing string cite of Supreme Court cases). As such, EPA's "jurisdiction" argument must be rejected in accordance with this controlling Supreme Court precedent.

Having established that EPA's argument is one of improper venue, the conclusion that EPA's argument is untimely and must be rejected readily follows. EPA first raised the improper venue argument in its response to AME's MFAD, more than five years after this litigation began and well after its initial motion to dismiss. Moreover, EPA has not filed a motion to transfer venue or to dismiss the case for improper venue. Therefore, EPA's improper venue argument is untimely and has been waived. Fed. R. Civ. Pr. 12; *Panhandle Eastern*, 324 U.S. at 638-639; *Matter of 5300*, 973 F.2d at 1163; *Resolution Trust Corp. v. Sonny's Old Land Corp.*, 937 F.2d 128, 130 (5th Cir. 1991) ("Assuming that the RTC removed to a court of improper venue, Sonny's failed to assert a seasonable objection and thereby waived the defect."); *State of New York v. E.P.A.*, 133 F.3d 987, 990 (7th Cir. 1998);

Barnstead Broad. Corp. v. Offshore Broad. Corp., 869 F.Supp. 35, 38 (D.D.C. 1994) ("An objection to personal jurisdiction and venue may be waived 'by submission [in a cause] through conduct.'")[4]

6. AME is entitled to complete reimbursement, costs, pre-judgment interest, post-judgment interest, and attorneys' fees.

Strangely, and without support, EPA says that AME fails to explain why a favorable ruling on any of its challenges to the regulations would entitle it to monetary relief. (EPA Resp. MFAD, p. 25 n.20.) However, AME did explain why it is entitled to relief in its MFAD, but it will do so again. The basis of EPA's denial of AME's claim was that AME failed to submit a legally obsolete form.[5] Given that the form was legally obsolete, this denial was arbitrary, unlawful, and wrong. Thus, the Fourth Circuit tasked the Tribunal with deciding whether AME is entitled to Superfund reimbursement. By proving that it substantially complied with the preauthorization process, AME has "prove[n] its Superfund claim" and right to complete reimbursement. *August Mack*, 841 Fed.App'x. at 524-525. Moreover, with the preauthorization stricken or set aside due to AME's facial and as applied challenges, AME's claim should be paid because it consists

[4] Further, § 9612(2) and (5) required AME to file its appeal in this venue. Elevating "form over substance to require piecemeal challenges in various courts" should be avoided. *See generally Waterkeeper Alliance v. EPA*, 853 F.3d 527, 533 (D.C. Cir. 2017). This is another reason to reject EPA's argument.

[5] EPA says another reason is that AME did not receive a PDD, but PDDs are only issued if one submits the legally obsolete form. Thus, the legally obsolete form is the sole basis for EPA's denial of AME's claim.

of necessary response costs incurred as a result of carrying out the NCP. § 9611(a)(2). Here, there is no genuine issue of material fact that AME incurred necessary costs while performing work consistent with the NCP. (AME MFAD, pp. 40-41; *see also* EPA Resp. AME SMF, ¶ 66 (admitting that "AME's work was consistent with the NCP.") Under these facts, AME has proven its Superfund claim as a matter of law.

AME's Objection and Reply to
EPA's Response to AME's Statement of Undisputed Material Facts

EPA separately responded to AME's Statement of Undisputed Material Facts. As needed below, AME provides a reply and explanation as to how such disputes, when present, do not preclude granting AME's MFAD.

Statement of Undisputed Material Facts

The BJS Site and the Consent Decree

1. On July 27, 2000, EPA placed the Big John's Salvage – Hoult Road Superfund Site (the "BJS Site" or the "Site") on the National Priorities List ("NPL"). (RX 322, p. 5; 841 Fed.App'x. at 519; RX 325, p. 9; Dep. Newman[6], p. 26:10-12.)

EPA Response: not disputed.

2. There had been concerns that the BJS Site was contaminated since the 1930s when West Virginia first investigated the BJS Site. (*Id.*; 841 Fed.App'x. at 519; Dep. Newman, pp. 73:20-74:1.)

[6] Mr. Newman's deposition transcript has been submitted into the record as RX 330.

EPA Response: not disputed.

3. Eric Newman is the remedial project manager at the Site and first became involved there in 2005. (Dep. Newman, pp. 15:4-7, 16:1-3; *see also* RX 322, p. 19 ("EPA has designated Eric Newman of EPA Region III's Hazardous Site Cleanup Division as its Remedial Project Manager ('RPM') and Project Coordinator with regard to the Work.")

EPA Response: not disputed.

4. Mr. Newman started to work at EPA in 1988 and has held the position of RPM in EPA Region 3 throughout his entire time at EPA. (Dep. Newman, p. 14:9-24.)

EPA Response: not disputed.

5. The RPM at the Site "is pretty much a coordinator" who "[c]oordinates activities aimed towards . . . responding to environmental risks." (Dep. Newman, p. 15:8-13)

EPA Response: not disputed.

6. The contamination at the BJS Site includes hazardous substances in the land and river:

> The Big John's site was a tar refinery that was constructed on land adjacent a river. So during periods of operation, release of hazardous substances ended up contaminating both the land mass, and then it went into stormwater, which was conveyed to the river. And we had a tar patch of contaminated materials in the river.

(Dep. Newman, pp. 44:14-45:8.)

EPA Response: not disputed.

7. On October 10, 2012, the Northern District of West Virginia entered a Consent Decree ("Consent Decree") between the United States, West Virginia, Exxon Mobil Corporation ("Exxon"), Vertellus Specialties Inc. ("VSI"), and CBS Corporation ("CBS") as a final judgment under the Federal Rules of Civil Procedure. (RX 322, pp. 1, 89; 841 Fed.App'x. at 519.)

EPA Response: not disputed.

8. Exxon, VSI, and CBS are all potentially responsible parties ("PRPs"). (*Id.* at 82; 841 Fed.App'x. at 519.) AME is not, and was never, a PRP. (RX 322.)

EPA Response: not disputed.

9. Under the Consent Decree, VSI was the "Performing Defendant" and "was required to perform cleanup work on the Site, as specified and approved by the EPA." (*Id.* at 11, 16-18; 841 Fed.App'x. at 520.)

EPA Response: not disputed.

10. The Consent Decree serves as the guide for how EPA will implement the response actions. (Dep. Newman, p. 19:3-5.)

EPA Response: not disputed.

11. EPA selected a response action for the BJS Site that is consistent with the NCP. (Dep. Newman, pp. 17:22-18:8.)

EPA Response: not disputed.

12. This was unsurprising because EPA "do[es] everything consistent with NCP." (Dep. Newman, p. 18:9-14.)

EPA Response: not disputed.

13. The action memorandum is attached to and made a part of the Consent Decree and contains technical information and EPA's selected response action. (Dep. Newman, pp. 17:16-21, 21:4-19.)

EPA Response: not disputed.

14. The work called for in the action memorandum is designed to protect human health and the environment. (Dep. Newman, pp. 75:24-76:2.)

EPA Response: not disputed.

15. Before AME became involved at the Site, EPA already understood the general location and nature of the contamination at the Site. (Dep. Newman, p. 36:15-19.)

EPA Response: not disputed.

<u>EPA's acceptance of AME as the supervising contractor at the Site</u>

16. EPA ensures a supervising contractor is qualified to perform work at the site and will not create environmental hazards.

EPA Response: not disputed.

17. For instance, the RPM (Mr. Newman at the BJS Site) "make[s] sure that they've done some sort of [CERCLA] work and that . . . they have procedures to make sure that appropriate people are assigned to various tasks . . . We accept in accordance

with the consent decree . . . so Vertellus, in this case, the performing defendant, would propose to utilize a supervising contractor." (Dep. Newman, pp. 23:9-24:2.)

EPA Response: not disputed.

18. Further, prior to approving the selected supervising contractor, Mr. Newman considers whether the contractor can implement EPA's selected remedy consistent with the NCP. (Dep. Newman, pp. 24:25-25:9.)

EPA Response: Disputed that EPA "approved" AME; undisputed that EPA "accepted" Vertellus Specialty Inc.'s (a/k/a "VSI" or "Vertellus") selection of AME as its supervising contractor. (AX 5).

AME's Reply: *The distinction between "approve" and "accept" is immaterial. Jones v. Chandrasuwan, 820 F.3d 685, 691 (4th Cir. 2016) ("A fact is material if it might affect the outcome of the suit under the governing law.") It is undisputed that EPA did not reject Vertellus' choice of AME as the supervising contractor and EPA found that AME was qualified to do the work at the Site, could implement EPA's selected remedy consistent with the NCP, had the ability to do the work, and had procedures in place to ensure the appropriate people were assigned to certain tasks. See ¶¶ 18-21.*

19. EPA can reject the performing party's selected supervising contractor if EPA is not satisfied with its qualifications or experience. (Dep. Newman, p. 24:11-18; *see also* RX 322, p. 18 ("EPA retains the right to disapprove of any or all of the contractors and/or subcontractors retained by Performing Defendant.")

EPA Response: not disputed.

20. Thus, "if [EPA] were to see that a firm being proposed was clearly incapable in that they didn't demonstrate the ability to do that work, then we could disapprove of them." (Dep. Newman, p. 25:9-12.)

EPA Response: not disputed.

21. In accordance with the Consent Decree, VSI hired—and EPA approved on November 6, 2012—AME as the supervising contractor at the BJS Site, demonstrating that AME was qualified to do the work at the Site, could implement EPA's selected remedy consistent with the NCP, had the ability to do the work, and had procedures in place to ensure the appropriate people were assigned to certain tasks. (RX 257; 841 Fed.App'x. at 520; Dep. Newman, pp. 23:9-24:2, 24:11-18, 24:25-25:9, 25:9-12, 68:9-15.)

EPA Response: Immaterial but not disputed with the caveat that EPA did not "approve" of the decision to hire AME; rather EPA "accepted" Vertellus' decision to do so. (AX 5).

AME's Reply: *The distinction between "approve" and "accept" is immaterial. See AME Reply ¶ 18. Moreover, the fact that EPA found that AME was qualified to do the work at the Site, could implement EPA's selected remedy consistent with the NCP, had the ability to do the work, and had procedures in place to ensure the appropriate people were assigned to certain tasks is material. These facts help establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

EPA's approval of AME's work

22. "August Mack performed cleanup work at the BJS Site for more than three years, from about October 2012 to May 2016." (841 Fed.App'x. at 520; *see also* AX 7; RX 256-267, 270-274.)

EPA Response: Immaterial and disputed to the extent that AME implies (in statements enumerated 22-50) that EPA reviewed and approved its work pursuant to the BJS CD for purposes of preauthorization. As previously established as a matter of record, and consistent with the law of the case, it remains undisputed that EPA reviewed and approved Vertellus' work as required under the CD. (CD pp.31-32, § IX.

EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS). To the extent that AME states it was performing the work, it was only doing so in its capacity as a contractor/representative on behalf of its client, Vertellus. (Dep. Newman, p. 32:25; 33:10-11; 39:16-25; 40:1-2; Newman Affidavit ¶¶ 9¬17; AX 1,2,4,5,9,13;).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525; Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Further, there is no genuine dispute that AME performed cleanup work at the BJS Site for more than three years, from about October 2012 to May 2016." (841 Fed.App'x. at 520; see also AX 7; RX 256-267, 270-274.) EPA has failed to meet its rebuttal burden of offering evidence contradicting AME's fact. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005) ("The facts indicated in this section, unless otherwise noted, were admitted by Plaintiff because the affidavits offered by Plaintiff and referred to in her brief did not offer evidence contradicting the statements by Defendant.")

Moreover, EPA's statement about what AME might be implying in paragraph 22 is improper. A party must directly respond to numbered paragraph containing a material fact, which EPA fails to do. Fed. R. Civ. Pr. 56(e); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

23. AME's work at the BJS Site was in response to the contamination that had been identified by EPA. (Dep. Newman, p. 76:16-23.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

24. EPA's ultimate role at the BJS Site is overseeing the work being done to ensure that it is done in conformance with EPA's Action Memorandum under the Consent Decree and "moving towards the implementation of the work laid out in the action memorandum." (Dep. Newman, p. 39:2-10.)

EPA Response: not disputed.

25. While AME was performing this cleanup work, EPA was constantly interacting with AME; reviewing AME's proposed work; and approving AME's proposed work. (AX 7; RX 256-267, 270-274; Dep. Newman, pp. 17-23, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 111:1-6.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

26. Before any work was done at the Site, EPA would receive a submission of proposed work from VSI and AME. (Dep. Newman, p. 17-23.)

EPA Response: not disputed.

27. After VSI and AME presented the work to EPA, there would be a period of review and comments between EPA, VSI, and AME. (Dep. Newman, p. 34:1-6.)

EPA Response: not disputed.

28. Mr. Newman would receive documents from VSI or AME and would distribute them to his site team, West Virginia representatives, "and other agencies that may have interest in the work – and give them a certain period of time to complete their review." (Dep. Newman, p. 19:11-25.) After the review was completed, "They would submit their comments to EPA. We would discuss it. We – EPA, the RPM would collate the comments and generally submit another response to Vertellus or their representatives." (Dep. Newman, p. 20:1-4.) The work AME submitted on behalf of VSI was reviewed, commented upon, revised, and approved by Mr. Newman and his team throughout the time VSI was the performing party. (Dep. Newman, p. 111:1-6.)

EPA Response: Immaterial but not disputed; affirmed that "the work AME submitted on behalf of VSI was reviewed, commented upon, revised, and approved by Mr. Newman and his team throughout the time VSI was the performing party."

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

29. Mr. Newman used the Consent Decree and its attached documents, like the action memorandum, to guide his review of the work AME submitted. (Dep. Newman, pp. 20:19-21:19.)

EPA Response: not disputed.

30. In fact, Mr. Newman made sure to reiterate during his deposition that EPA was always comparing AME's work to the Consent Decree to ensure it was being done in conformance with it: "EPA is always comparing the work coming in to the consent decree and the decision document that was . . . being implemented. So we were always making sure that the work was being done in conformance with the consent decree. So it's like it's always touching back to that, yeah." (Dep. Newman, p. 34:14-25.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

31. It would be a regular occurrence for EPA to have comments or request more information or more work on a certain section. (Dep. Newman, p. 34:7-13.)

EPA Response: not disputed.

32. EPA's comments on AME's work and proposed work ensured consistency with the requirements of the Consent Decree and action memorandum. (Dep. Newman, p. 35:1-8.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

33. If EPA approved or accepted AME's work, sometimes with additional comments, that was reflective of EPA's determination that the work proposed is consistent, or at least not inconsistent, with the action memorandum in the Consent Decree. (Dep. Newman, p. 34:9-18.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

34. While doing work at the Site, AME provided Mr. Newman with a schedule for the work, including updates and revisions to the schedule as things progressed. (Dep. Newman, pp. 38:19-39:1.)

EPA Response: not disputed.

35. EPA accepted AME's proposal of a staggering schedule. (Dep. Newman, pp. 51:23-52:2.)

EPA Response: not disputed.

36. Mr. Newman "would always be referring to the consent decree as to next steps." (Dep. Newman, p. 19:6-9.)

EPA Response: not disputed.

37. EPA's review and approval AME and its work included:

- November 6, 2012: Acceptance of VSI's selection of AME "as the Supervising Contractor for removal actions undertaken in accordance with the Consent Decree for the Big John's Salvage Site" and acceptance of AME's Quality Management Plan. (RX 257.)

- June 25, 2013: Approval of AME's Uplands Area Removal Design Work Plan and Monongahela River Removal Design Work Plan conditioned upon incorporation of certain comments. (RX 261.)

- January 6, 2014: Approval with comment of AME's Sampling and Analysis Plan Proposed Amendment #1. (RX 263.)

- August 13, 2014: Approval with comment of AME's Sampling and Analysis Plan Proposed Amendment #4. (RX 266.)

- August 29, 2014: Approval with comment of AME's Quality Assurance Project Plan Proposed Amendment. (RX 262.)

- November 17, 2014: Approval of AME's Amendment #5 to the Sampling and Analysis Plan. (RX 259.)

- May 6, 2015: Approval of AME's Monongahela River Preliminary Design. (RX 267.)

- July 2, 2015: Approval of AME's revision to the Amendment #6 to the BJS Sampling and Analyses Plan. (RX 265.)

- September 14, 2015: Approval of Amendment #7 of AME's BJS Sampling and Analysis Plan. (RX 258.)

- October 8, 2015: Approval of AME's Sampling Plan Amendment #8 and Quality Assurance Project Plan Amendment #4. (RX 256.)

- February 1, 2016: Acceptance of AME's Request to Amend the Removal Design Work Plan for the BJS Site. (RX 264.)

- May 5, 2016: Approval of amendments to AME's Field Sampling Plan #9 and Quality Assurance Project Plan #5 that was condition upon incorporation of certain comments into the documents. (RX 260.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

38. In reviewing and ultimately approving AME's work, EPA was working to ensure that the work would protect people. (Dep. Newman, p. 104:20-24.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

39. When discussing amendments to the original work plan, Mr. Newman testified, "[E]ach one of those subsequent amendments would just be . . . a slight modification to the original document that was submitted under the terms of the consent decree. So when the parties agree that it's . . . reasonable to proceed, then we would approve that." (Dep. Newman, p. 67:4-10.)

EPA Response: not disputed.

40. EPA reviewing and accepting a request to amend the removal design work plan at the Site means "that there was a work plan that EPA had approved. For one reason or another, they have decided that they would like to change that work plan, so we would review and approve that modification under the consent decree." (Dep. Newman, pp. 70:17-71:1)

EPA Response: not disputed.

41. AME's proposed amendments to the work plan complied with the Consent Decree and action memorandum. (Dep. Newman, p. 71:10-14.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

42. AME's sampling analysis plan would include a field sampling plan and a quality assurance project plan, and these are driven by the action memorandum and consistent with the Consent Decree. (Dep. Newman, pp. 64:2-12, 66:18-20 ("[T]he original sampling analysis plan was submitted to EPA pursuant to the consent decree."))

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

43. AME's quality management plan was also submitted in accordance with the expectations of the Consent Decree. (Dep. Newman, p. 68:16-20.)

EPA Response: Immaterial and disputed on the grounds stated in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, AME notes that EPA does not dispute the material fact contained in this paragraph and instead incorporates its improper statement about what AME might be implying. See ¶ 22.

44. Another example of EPA's constant interaction and communication with AME is that there would be weekly or biweekly meetings between EPA, AME, and VSI. (Dep. Newman, p. 40:12-17; *see also* RX 275-277 279-321.)

EPA Response: not disputed.

45. After the weekly or biweekly meeting, meeting minutes would be submitted to EPA, and EPA would review the minutes. (Dep. Newman, p. 42:13-43:15.)

EPA Response: not disputed.

46. Mr. Newman testified that he personally would receive copies of the meeting minutes after meetings with AME, VSI, and EPA concluded. (Dep. Newman, p. 43:10-15; RX 275-277, 279-321.)

EPA Response: not disputed.

47. In addition, VSI submitted monthly progress reports in accordance with the Consent Decree. (Dep. Newman, p. 47:1-8.)

EPA Response: not disputed.

48. Part of the process of working with the contractor and implementing the remedy is that EPA gets a full understanding of the amount of the contamination at the Site. (Dep. Newman, p. 37:7-12.)

EPA Response: not disputed.

49. Ultimately, the Fourth Circuit recognized that "August Mack prepared and submitted a Removal Design Work Plan that specifically identified the cleanup work to be conducted, which the EPA then reviewed and approved. August Mack also engaged in other pre-design investigation activities, including evaluation of sediment, soil, and groundwater, in of the Work Plan."

EPA Response: Immaterial and disputed as an incomplete and/or out of context statement of the Court; undisputed that the Fourth Circuit stated that "pursuant to the consent decree, Vertellus was required to perform cleanup work on the site, as specified and approved by EPA." (841 Fed. App'x. at 520).

AME's Reply: *EPA's position that conclusions from the controlling Fourth Circuit order are immaterial is unfounded. Further, this is an accurate quotation from the order, and EPA's unsupported "dispute" cannot create a genuine issue of material fact.*

50. In sum, all of AME's work was performed pursuant to the Consent Decree and with EPA approval. (Dep. Newman, pp. 17-23, 19:3-5, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 39:2-10, 111:1-6; AX 7; RX 256-267, 270-274; Dep. Newman, pp. 17-23, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 64:2-12, 66:18-20, 67:4-10, 70:17-71:1, 71:10-14, 111:1-6.)

EPA Response: Immaterial and disputed on the grounds stated in #22, Infra.; also disputed on the grounds that EPA sometimes issued "disapproval letters" to Vertellus. (AX 1).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Finally, although EPA issued a single Notice of Disapproval/Notice of Deficiency letter dated March 31, 2015, there is no genuine issue of material fact that AME timely cured this deficiency and that at all other times EPA approved AME's work. (Dep. Newman, pp. 17-23, 19:3-5, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 39:2-10, 111:1-6; AX 7; RX 256-267, 270-274; Dep. Newman, pp. 17-23, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 64:2-12, 66:18-20, 67:4-10, 70:17-71:1, 71:10-14, 111:1-6.)

AME's work was necessary and protected humans and the environment

51. When discussing EPA's April 2015 Update on the Site (RX 326), Mr. Newman testified that when he communicated with the public through these updates, he intended to be accurate and truthful in the information he shared. (Dep. Newman, p. 103:3-21.)

EPA Response: not disputed.

52. Mr. Newman understood that AME's designs would protect the current and future workers and the ecological receptors from exposure to contaminated media. (Dep. Newman, p. 104:8-19; RX 326.)

EPA Response: not disputed.

53. Work to protect people and the environment is necessary response and removal work. (Dep. Newman, p. 105:2-13.)

EPA Response: not disputed.

54. Cleaning up the BJS Site protects human health and the environment. (Dep. Newman, p. 75:17-23.)

EPA Response: Immaterial but not disputed with the caveat that no clean-up "beyond basic conceptual planning..." was conducted because EPA triggered its work take over prior to Vertellus completing "performance of Removal Design Work Plans".

"At the time that Vertellus filed for bankruptcy and stopped performing Work required by the CD, it had not yet completed any substantive clean-up work". (Newman Affidavit at ¶ 11).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, EPA's dispute of this fact is groundless. Mr. Newman explicitly testified that cleaning up the BJS Site protects human health and the environment. (Dep. Newman, p. 75:17-23.) EPA's supposed quote that no work "beyond basic conceptual planning…" was conducted is not found in paragraph 11 of Mr. Newman's affidavit and is contradicted by his deposition testimony and AME's exhibits. AME has moved to strike Mr. Newman's improper affidavit.

55. As EPA was reviewing and approving the work AME submitted, another goal of EPA was to ensure that the designs would prevent erosion and reduce migration of soil contaminants. (Dep. Newman, p. 107:1-7; RX 326.)

EPA Response: not disputed.

56. Another goal of EPA in reviewing and approving the work that AME was submitting was to restore the stream sediment quality to acceptable human and ecological levels. (Dep. Newman, p. 107:8-14; RX 326.)

EPA Response: not disputed.

57. EPA expected that the designs AME developed, once constructed, would minimize rain and snow melt seeping into soil to prevent contaminants from being carried into the groundwater. (Dep. Newman, p. 105:14-19; RX 326.) AME's work was moving towards this goal, and that's a goal designed to protect the people and the

environment and public health. (Dep. Newman, pp. 105:20-106:2.) Work at the BJS Site to prevent contaminants from being carried into the groundwater is a necessary part of the response and removal work. (Dep. Newman, p. 106:3-7.)

EPA Response: not disputed.

58. EPA expected that the designs AME prepared, once constructed, would prevent the tar-derived materials and soils from rising to the surface. (Dep. Newman, p. 106:10-16; RX 326.) Moving towards that goal protected human health and the environment. (Dep. Newman, p. 106:17-20.) The work of preventing tar-derived material from rising to the surface is a necessary part of the response and removal work. (Dep. Newman, p. 106:21-25.)

EPA Response: not disputed.

59. All of the remedial action objectives at the BJS Site were designed to protect human health and the environment. (Dep. Newman, p. 107:15-18.)

EPA Response: not disputed.

60. EPA was pleased with AME's work and, at one point, said, "AME did a nice job [on the River Removal Design Work Plan]." (RX 261, p. 18.)

EPA Response: not disputed.

61. Moreover, Mr. Newman testified that none of the work AME performed at the Site that exacerbated or created environmental hazards. (Dep. Newman, p. 77:12-18.)

EPA Response: not disputed, with the caveat that this statement was based on Mr. Newman's personal knowledge at the time.

AME's Reply: *This is not a valid dispute. There is no genuine issue of material fact that Mr. Newman testified that none of the work AME performed at the Site exacerbated or created environmental hazards. (Dep. Newman, p. 77:12-18; Fed. R. Civ. Pr. 56(e); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).*

62. Likewise, Ms. Fonseca and Mr. Jeng have no information about whether AME's work at the BJS Site created environmental hazards. (Dep. Fonseca, p. 54:7-10; Dep. Jeng, p. 30:22-25.)

EPA Response: not disputed.

63. As of May 2015, Mr. Newman believed that the AME's work at the Site was progressing sufficiently and appropriately. (Dep. Newman, p. 55:4-9.)

EPA Response: Immaterial and disputed as an incomplete characterization of Mr. Newman's opinion. (See Dep. Newman, p.55:9-13)

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that Mr. Newman testified that he believes that AME's work at the Site was progressing sufficiently and appropriately. (Dep. Newman, p. 55:4-9; Fed. R. Civ. Pr. 56(e); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

64. As of April 2016, AME's work was continuing to progress forward at the Site in accordance with the action memorandum. (Dep. Newman, pp. 56:14-56:21.)

EPA Response: not disputed.

65. In sum, the work at the Site was progressing in the right direction under the action memorandum as part of the Consent Decree when AME was doing the cleanup work. (Dep. Newman, pp. 37:21-38:4, 39:11-16.)

EPA Response: Immaterial and disputed to the extent that "Vertellus had the responsibility of doing the work and August Mack was their Agent." (Dep. Newman, p. 39:16-17); ***See also*** **#22, Infra.**

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that the work at the Site was progressing in the right direction under the action memorandum as part of the Consent Decree when AME was doing the cleanup work. (Dep. Newman, pp. 37:21-38:4, 39:11-16; see also ¶ 22.

66. AME's work was consistent with the NCP. (RX 322, p. 16) ("The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP."); *see also* (RX 329, EPA resp. RFA 10; Dep. Newman, p. 18:9-14; RX 337, Aff. Glanders, ¶ 26.)

EPA Response: not disputed.

Vertellus' bankruptcy and EPA's takeover of the Site

67. VSI filed for bankruptcy on May 31, 2016. (AX 7; dkt. 46, p. 3.)

EPA Response: not disputed.

68. After VSI declared bankruptcy, EPA took over the site, and it is currently performing the response actions. (Dep. Newman, p. 8:18-22, 9:14-10:2, 59:1-60:16, 60:17-19.)

EPA Response: not disputed.

69. Specifically, EPA took over one part of the work (the water treatment plan work), and then assigned the other part of the work (the design work) to the United States Army Corps of Engineers under an interagency agreement with EPA. (Dep. Newman, pp. 8:25-9:7.)

EPA Response: not disputed.

70. Mr. Newman believes EPA took over the water treatment plan in April 2017. (Dep. Newman, p. 60:17-19.)

EPA Response: not disputed.

71. The Army Corps and Tetra Tech became involved at the Site after VSI's bankruptcy. (Dep. Newman, pp. 59:1-60:16.)

EPA Response: not disputed.

72. "It took a while for us to bring the Army Corps in, specifically for the river design, to take over that work. And Tetra Tech . . . probably came in in late 2017 as part of Army Corps's contractor." (Dep. Newman, p. 61:7-12.)

EPA Response: not disputed.

73. "Tetra Tech is the Army Corps of Engineers' selected firm doing – they took over the design once Vertellus went bankrupt. So we gave the project to the Army Corps of Engineers; the Army Corps of Engineers selected Tetra Tech. So that's the firm that's working on the design. Just as a matter of coincidence, Tetra Tech is also -- I think about a year ago, they became an EPA contractor . . . and so Tetra Tech . . . is working to assist confirming that we're in compliance at the water treatment plant. So Tetra Tech . . . [is] currently working . . . on the site in two capacities." (Dep. Newman, pp. 9:14-10:2.)

EPA Response: not disputed.

74. Tetra Tech is an environmental engineering firm that Mr. Newman has worked with "over the years." (Dep. Newman, p. 9:8-11.)

EPA Response: not disputed.

75. Tetra Tech is working at the Site in two different respects. The Army Corps engaged Tetra Tech to be the environmental engineer on the design side, and EPA engaged Tetra Tech on the compliance work at the water treatment plant. (Dep. Newman, p. 10:3-12.)

EPA Response: not disputed.

76. EPA did, however, retain a different contractor before Tetra Tech and that contractor was TechLaw. (Dep. Newman, p. 60:21-24.)

EPA Response: not disputed.

<u>Tetra Tech's reliance on AME's work product</u>

77. Tetra Tech could not do the work it is now doing without AME's delineation investigation work. (Dep. Newman, p. 83:10-84:12.)

EPA Response: Immaterial and disputed pursuant to the explanation provided in #22, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.") Moreover, this is not a valid dispute. See ¶ 22.*

78. Tetra Tech used the known information that AME generated in its evaluation of creating a work plan. (Dep. Newman, pp. 83:22-84:5.)

EPA Response: not disputed.

79. Tetra Tech used AME's data in its design efforts. (Dep. Newman, pp. 86:19-23, 89:12-20.)

EPA Response: Immaterial but not disputed, with the caveat that Tetra Tech also used other 3rd party data. (Dep. Newman, p.89:17-19)

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, there is no basis to qualify EPA's response. There is no genuine issue of material fact that Tetra Tech used AME's data in its design efforts. (Dep. Newman, pp. 86:19-23, 89:12-20; Fed. R. Civ. Pr. 56(e); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

80. Tetra Tech reported that DQOs for the predesign investigation were established by AME's field sampling plan from 2016. (Dep. Newman, pp. 92:14-18, 93:3-12.)

EPA Response: Immaterial and disputed on the basis that AME refers to the submitted work product as its own, whereas EPA considered it as Vertellus' work product under the CD. (Dep. Newman, p. 93:8-12)

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that Tetra Tech reported that DQOs for the predesign investigation were established by AME's field sampling plan from 2016. (Dep. Newman, pp. 92:14-18, 93:3-12; Fed. R. Civ. Pr. 56(e); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

81. Tetra Tech is using the DQOs established in AME's 2016 field sampling plan. (Dep. Newman, p. 93:3-7.)

EPA Response: Immaterial and disputed pursuant to #80, *Infra*.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that Tetra Tech is using the DQOs established in AME's 2016 field sampling plan. (Dep. Newman, p. 93:3-7; Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

82. In fact, Mr. Newman testified that "Vertellus had to develop a plan that would meet the action memorandum, so that plan, which was prepared by August Mack on behalf of Vertellus pursuant to the consent decree, would be the most up-to-date summation." (Dep. Newman, p. 93:8-12.)

EPA Response: not disputed.

83. AME's work was sound, allowing Tetra Tech to start work from where AME left off: "When Vertellus stopped performing under the consent decree, we had a body of information that we passed on to Tetra Tech. They were tasked with picking up from there." (Dep. Newman, p. 95:22-25.)

EPA Response: Immaterial and the editorial comment preceding the excerpted quote is disputed as inadmissible opinion of AME Counsel; however, the quote is accurate and speaks for itself.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. EPA has an obligation to directly respond to this statement of material fact, and its failure to do so results in a full admission. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007). EPA's argument that any non-quote statement of material fact is an "inadmissible opinion of AME Counsel" is groundless. There is no genuine issue of material fact that AME's work was sound.

84. Page 174 of Exhibit 328 details Tetra Tech's plan for picking up where "August Mack left off and then doing its own investigation to satisfy its own obligations as professional engineer[s]." (Dep. Newman, p. 95:10-22.)

EPA Response: Immaterial and disputed as substantively erroneous and misleading. The excerpted quote is not from Mr. Newman – it is taken out of context from a question posed by AME Counsel. However, Mr. Newman's answer to the question is admitted as an undisputed fact as follows: "When Vertellus stopped performing under the consent decree, we had a body of information that we passed on to Tetra Tech. They were tasked with picking up from there." (Dep. Newman, p.95: 22-25).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that Page 174 of Exhibit 328 details Tetra Tech's plan for picking up where "August Mack left off and then doing its own investigation to satisfy its own obligations as professional engineer[s]." (Dep. Newman, p. 95:10-22.):

Q So essentially, this is Tetra Tech's plan for picking up where August Mack left off and then doing its own investigation to satisfy its own obligations as professional engineer?

A Yeah.

(Dep. Newman, p. 95:18-22.)

85. Because of the quality of AME's work, EPA did not have to pay Tetra Tech to recreate it: "[T]he government didn't want to pay Tetra Tech to re – to collect data that's already been – if it's already known, so that's -- that is what this is saying. (Dep. Newman, pp. 94:17-95:1.)

EPA Response: Immaterial and Counsel's editorial comments are disputed, but the quotation speaks for itself and is not disputed.

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. EPA has an obligation to directly respond to this statement of material fact, and its failure to do so results in a full admission. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007). EPA's unsupported "dispute" of "Counsel's editorial comments" must be given no weight. There is no genuine issue of material fact that AME's work was high-quality.

86. In sum, Tetra Tech heavily relied on AME's work. (Dep. Newman, pp. 84:24-85:21.)

EPA Response: Immaterial and disputed as a mischaracterization of Mr. Newman's overarching and clarifying testimony. Mr. Newman made clear that Tetra Tech relied, in part, on Vertellus' work: "I knew that the Army Corps of Engineers used all the data, including the data that was collected in performance of the consent decree by Vertellus and any representative of Vertellus...[s]o this contractor says, in this paragraph, August Mack, but really it really should have said August Mack's submittal, in the accordance with Vertellus's requirements under the consent decree." (Dep. Newman, p.85:10-21). Counsel for AME conceded this point by withdrawing his question. (Dep. Newman, p.86:3-8).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that Tetra Tech relied on AME's work. (Dep. Newman, pp. 84:24-85:21.) EPA's argument that AME conceded any substantive point is belied by the plain language of the transcript. (Id. at pp. 84-86.)

EPA's payment of Tetra Tech for its work at the Site

87. EPA and the Army Corps are paying Tetra Tech for the work via the site-specific account. (Dep. Newman, pp. 10:13-11:1, 12:6-13:8.)

EPA Response: not disputed.

88. Mr. Newman testified that the payments to Tetra Tech will exhaust the special account and once that happens, EPA will seek funding from the Superfund to pay Tetra Tech. (Dep. Newman, pp. 12:17-13:17.)

EPA Response: not disputed.

89. Mr. Newman testified that approximately $20 million is left in the special account, and he estimates the outstanding cleanup work will cost approximately $60 million. (Dep. Newman, p. 110:2-11.)

EPA Response: not disputed.

AME's costs were reasonable and necessary EPA has no opinion as to whether AME's costs were reasonable or necessary

90. AME's costs were reasonable and necessary. (Aff. Glanders, ¶¶ 23-31.)

EPA Response: Immaterial and disputed. (Newman Affidavit; EPA's Resp. RFA 9, 10, 18)

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. There is no genuine issue of material fact that AME's costs were reasonable and necessary. (Aff. Glanders, ¶¶ 23-31.) EPA has no evidence refuting this fact. In fact, EPA and its employees have admitted that they do not know whether AME's costs

were reasonable and necessary. (RX 329, EPA's resp. RFA 9, 10, 18; Dep. Newman, pp. 7-16, 28:21-29:14; Dep. Fonseca, p. 16:10-15; Dep. Jeng, pp. 12:14-21, 22:11-15, 30:15-18, 30:19-21, 31:1-4, 31:9-12; see also ¶¶ 91-92.)

91. EPA does not know whether AME incurred necessary and reasonable responses costs as a result of its work at the BJS Site. (RX 329, EPA's resp. RFA 9, 10, 18.)

EPA Response: not disputed.

92. EPA has not reviewed AME's costs. (*Id.*)

EPA Response: not disputed.

93. Mr. Newman does not review claims for payment. (Dep. Newman, p. 26:17-22.) There is "an oversight contractor that works for EPA, and [Mr. Newman] work[s] under a contract officer for that. So they would be – that's the only context that we would be looking at costs, so I wouldn't be looking at costs for Vertellus per se." (Dep. Newman, pp. 26:21-27:2.)

EPA Response: Immaterial and disputed as stated. In fact, Mr. Newman stated that he did not review AME's claim but that he does sometimes review contractor invoices. (Dep. Newman, p. 27:21-29:12).

AME's Reply: *This fact is material because AME's work at the BJS Site forms the basis of its claim of approximately $3 million, and whether to reimburse AME from the Superfund is the issue on remand. August Mack, 841 Fed.App'x. at 525. Further, this fact helps establish that AME substantially complied with the preauthorization process and is entitled to a full reimbursement from the Fund. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. EPA has no evidence refuting this fact. In fact, EPA and its employees have admitted that they do not know whether AME's costs were reasonable and necessary. (RX 329, EPA's resp. RFA 9, 10, 18; Dep. Newman, pp. 7-16, 28:21-29:14; Dep. Fonseca, p. 16:10-15; Dep. Jeng, pp. 12:14-21, 22:11-15, 30:15-18, 30:19-21, 31:1-4, 31:9-12; see also ¶¶ 91-92.) Finally, EPA's dispute is unsupported by the record:

A So I don't get claims made on my sites. You know, I have invoices that are submitted in accordance with the contract if it's an EPA contractor. That's the only way that I would be looking at costs, like a monthly invoice-type of thing.

(Dep. Newman, p. 27:21-25 see also ¶ 94.)

94. Mr. Newman plays no role in reviewing claims for payment, "not even for EPA contractors." (Dep. Newman, p. 27:3-13.)

EPA Response: not disputed.

95. The only situation where Mr. Newman would even look at costs would be if an EPA contractor was involved: "I have invoices that are submitted in accordance with the contract if it's an EPA contractor. That's the only way that I would be looking at costs, like a monthly invoice-type of thing. (Dep. Newman, p. 27:21-25.)

EPA Response: not disputed.

96. When he receives an invoice on an EPA site, Mr. Newman confirms "the work was performed in accordance with the scope of work of the contract that they were working under, and then I recommend to the CO, based on what I see, if the costs were incurred within the technical scope and using professional levels that have been pre-agreed to under the contract." (Dep. Newman, p. 28:1-9.)

EPA Response: not disputed.

97. Mr. Newman did not review the claim to EPA for payment that AME submitted in January of 2017. (Dep. Newman, pp. 28:21-29:14.)

EPA Response: not disputed.

98. Mr. Newman is not familiar with all the work AME completed or whether it was necessary: "I'm not familiar with all of the work that they did. But the work that was done . . . I don't know if it was necessary because I wasn't reviewing them at that level because I was just making sure that the technical work got completed." (Dep. Newman, p. 7-16.)

EPA Response: not disputed.

99. Ms. Fonseca could not testify as to whether the costs supporting the claim were reasonable and necessary and consistent with the NCP. (Dep. Fonseca[7], p. 16:3-9.)

EPA Response: not disputed.

100. Ms. Fonseca did not review AME's claim and testified that she "could not review [AME's claim] since we didn't have a preauthorization decision document." (Dep. Fonseca, p. 16:10-15.)

EPA Response: not disputed.

101. When she received AME's claim, "The only thing I did was verify that we did not have a pre-decision – pre-authorize decision document, and I reached out to my counsel." (Dep. Fonseca, p. 16:16-22.)

EPA Response: not disputed.

102. Ms. Fonseca has not reviewed any of the work AME performed at the BJS Site, has no information about whether AME's work at the BJS Site was consistent with

[7] Ms. Fonseca's deposition transcript has been submitted into the record as RX 331.

the NCP, and has no information about whether AME's work at the BJS Site involved costs that were necessary and reasonable. (Dep. Fonseca, pp. 54:4-6, 54:14-18, 55:2-6.)

EPA Response: not disputed.

103. Mr. Jeng has no information regarding the work that AME performed at the Site, has not reviewed any of the work AME performed at the Site, has no information regarding whether AME's work at the Site was consistent with the NCP, and has no information regarding whether the costs AME incurred for the work it performed were reasonable and necessary. (Dep. Jeng[8], pp. 30:15-18, 30:19-21, 31:1-4, 31:9-12.)

EPA Response: not disputed.

104. Mr. Jeng does not know the criteria for determining whether a cost submitted as part of a claim is reasonable, necessary, or consistent with the NCP. (Dep. Jeng, p. 22:11-15.)

EPA Response: not disputed.

105. Mr. Jeng was not involved with the claim AME submitted and did not review it. (Dep. Jeng, p. 12:14-21.)

EPA Response: not disputed.

106. In sum, EPA does not know whether AME's costs were reasonable and necessary.

EPA Response: not disputed.

[8] Mr. Jeng's deposition transcript has been submitted into the record as RX 332.

EPA has distorted the purpose of preauthorization
and it is only rarely used as a settlement tool with PRPs

107. Preauthorization requests are "very rare." (Dep. Newman, pp. 22:9-23:8.)

EPA Response: not disputed.

108. This is consistent with EPA's policy that preauthorization requests will be granted only under extraordinary circumstances: "Most Superfund cleanup actions should be undertaken by the responsible party, by a State under a duly authorized Superfund contract or cooperative agreement, or by EPA contractors. Very few private party preauthorizations are anticipated, and those that are granted will occur under extraordinary circumstances." (RX 333.)

EPA Response: Immaterial and disputed to the extent that the excerpted quotation does not reflect the preauthorization program at all times relevant to AME's claim, but not disputed to the extent that the quotation reflects EPA policy for the polluter to pay, thereby conserving the resources of the Fund.

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and AME should therefore be awarded the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Further, there is no genuine issue of material fact that preauthorization requests will be granted only under extraordinary circumstances. (RX 333.) Despite the preauthorization scheme existing for decades, EPA has identified only five instances of preauthorization requests being granted. (AX 8, 10, 11, 15, 18.) Moreover, the deposition testimony of EPA's employees establish that EPA has created unwritten restrictions on preauthorization eligibility, using preauthorization as a settlement cudgel and never preauthorizing an innocent private party. Thus, EPA's arbitrary and unlawful administration of the preauthorization scheme places polluters (PRPs) in a better position than innocent non-PRPs, which is inconsistent with the polluter pay policy.

109. In fact, some regions did not plan to ever use preauthorization. (RX 334, p. 16) ("Our second concern was that some EPA regions did not plan to use preauthorization.")

EPA Response: Immaterial and disputed on the grounds that the excerpted quotation is taken out of context from a 1987 EPA Office of Inspector General report that does not address the current state or administration of the preauthorized mixed funding program at all times relevant to AME's claim; also disputed on the grounds that the statement mischaracterizes the 1987 report and represents legal argument.

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and the Tribunal should therefore award AME the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. EPA does not support its claimed "dispute" with evidence, so this fact should be deemed admitted. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007). Regardless, there is no genuine issue of material fact that some regions did not plan to ever use preauthorization. (RX 334, p. 16.)

110. EPA operates the preauthorization program as a settlement tool to incentivize PRPs to settlement with EPA. (Dep. Jeng, p. 9:4-12.)

EPA Response: Immaterial and disputed. Mr. Jeng was in fact describing a preauthorized mixed funding agreement and stated that "a preauthorized mixed funding agreement, to my knowledge, is an enforcement tool utilized by the agency in settlement with a responsible party under either a consent decree or administrative order of consent where we preauthorize a settling party to do work on behalf of a cleanup of a site, and later we provide that preauthorization which allows them to submit claims for reimbursement from the federal government." (Dep. Jeng, p.9:4-12).

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and the Tribunal should therefore award AME the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. Mr. Jeng testified that EPA uses the preauthorization process as a "settlement tool", "negotiation tool", and "enforcement tool" that is only available to PRPs. (Dep. Jeng, pp. 17:5-18:8; see also id. at 9:4-12.) Further, EPA's unwritten rule that preauthorization is available only to PRPs is so ingrained that EPA refers to the preauthorization process as "mixed funding" or "preauthorized mixed funding." (Dep. Fonseca, p. 10:11-11:19; Dep. Jeng, p. 9:4-12; 36:14-25; see also Dep. Fonseca, p. 13:4-20 ("if the team determines that mixed funding – sorry – preauthorization is something that should be considered in the context of a settlement . . . .")

111. Mr. Newman only knows of ***one*** case where EPA granted preauthorization and that occurred around 30 years ago. (Dep. Newman, p. 108:4-14.) In that case, there was a group of about 20 performing parties under that consent decree, and all of the performing parties were PRPs who had signed on to the consent decree. (Dep. Newman, pp. 108:19-109:2.)

EPA Response: not disputed.

112. Ms. Fonseca has been employed with EPA for 32 years, starting in approximately 1990. (Dep. Fonseca, p. 6:20-23.)

EPA Response: not disputed.

113. From approximately 2000-2017, she was the remedy decision team leader in the Office of Superfund Remediation and Technology Innovation. (Dep. Fonseca, pp. 7:22-8:3, 12:1-4, 34:9-17; EPA Initial Prehrg. Exch., p. 3.)

EPA Response: not disputed.

114. A remedy decision team lead is "the leader for all of the work that was done under the regional coordinators for remedy decision," and she "worked in the branch

that handles and takes care and is responsible for the pre-decision work[.]" (Dep. Fonseca, p. 8:4-19.)

EPA Response: not disputed.

115. She had responsibility for EPA's preauthorization process when she was the team leader for remedy decision where "some of my other duties as assigned was to handle the mixed funding or preauthorization accounts." (Dep. Fonseca, p. 10:6-10.)

EPA Response: not disputed.

116. In her role as the remedy decision team lead, she was responsible for reviewing requests for preauthorization. (Dep. Fonseca, p. 19:19-21.)

EPA Response: not disputed.

117. Ms. Fonseca was always involved when preauthorization requests came to headquarters. (Dep. Fonseca, p. 20:2-5.)

EPA Response: not disputed.

118. When a preauthorization request would come in, Ms. Fonseca would "work with the regional team that that application comes in as a result of the negotiations that have been going on with the settlement agreements, negotiation, the process that they're going through. We look through the information together. You know, I'll look through it. If there's something that's missing, information that's missing, I will typically reach out to the regional counsel, typically . . . But for the majority of them, they're pretty, you know, standard process information, and at that point the information is – you know, is

pretty straightforward. So, you know, the reviews are not significantly controversial, I would say." (Dep. Fonseca, pp. 20:11-21:2.)

EPA Response: not disputed.

119. EPA 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.)

EPA Response: Immaterial and disputed. Ms. Fonesca did not state that EPA has never preauthorized an innocent non-setting private party. In fact, Ms. Fonseca transitioned out of the preauthorization program prior to the issuance of the Mohawk Tannery PDD which provided preauthorization to a non-liable party in the context of a Prospective Purchaser Agreement. (AX 11)(Dep. Jeng, p.11;8-14; Dep.Fonseca, p.12:4). Mr. Jeng, who took over Ms. Fonseca's preauthorization team lead role in the 2018 time frame, stated that sometime following AME's January 2017 Application and Claim submittal, he was aware of EPA pre-authorizing a "non-liable" "non-settling" private party: "I believe the Mohawk Tannery may have been a nonliable party" but conceded that prior to Mohawk, he was not aware of any other cases by stating "but in the past, no." (Dep. Jeng, p.20:15-20)(AX 11).

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and the Tribunal should therefore award AME the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute. EPA's second sentence is unsupported and cannot create an issue of fact. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007). More fundamentally, Ms. Fonseca did testify that she is not aware of a non-PRP ever receiving preauthorization. (Dep. Fonseca, pp. 32:21-33:2.) To leave no doubt, she testified that she was never involved in a preauthorization request that did not involve a mixed funding settlement:

> *Q Have you ever been involved in a preauthorization request that did not involve the mixed funding settlement?*

A I have not been personally involved in any of those if there are any.

Q Are you aware of any?

A I'm not aware of any.

(Dep. Fonseca, p. 41:15-20.)

In addition, Mr. Jeng clearly testified that the preauthorization process applies only in the context of either negotiated consent decrees or negotiated administrative AOCs, that he was not aware of any preauthorization requests involving a private party who was not a PRP other than AME, and that he "was not aware of a nonsettling party ever being provided preauthorized mixed funding approval." (Dep. Jeng, pp. 19:6-14, 20:6-9, 32:25-33:22.)

Further, Mr. Jeng speculated, "I believe the party from Mohawk Tannery may have been a nonliable party[.]" (Dep. Jeng, p. 20: 15-18.) However, EPA is a signed (and bound) party to the Administrative Settlement Agreement that relates to the Mohawk Tannery Site, which EPA misrepresents in this litigation. (RX 341; CERCLA Docket No. 01-2020-0063.) Therein, EPA and the prospective purchaser, Blaylock Holdings, LLC, acknowledged there was "risk of claims under CERCLA being asserted against the Purchaser . . . as a consequence of Purchaser's activities at the Site" so "one of the purposes of this Settlement is to resolve Purchaser's potential CERCLA liability . . . ." (Id. at p. 1 ¶ 5.) The parties then note that the agreement is "[t]he resolution of this potential liability[.]" (Id. at ¶ 6.) Therefore, EPA has admitted that the purchaser who received preauthorization in the Mohawk Tannery matter was a settling PRP. See also Niagara Mohawk Power Corp. v. Chevron U.S.A., Inc., 596 F.3d 112, 120 (2d Cir. 2010) ("property owners are strictly liable for the hazardous materials on their property, regardless of whether or not they deposited them there."); Chubb Custom Ins. Co. v. Space Systems/Loral, Inc., 710 F.3d 946, 956-957, 956 n.5 (9th Cir. 2013) (describing how CERCLA "imposes strict liability on four categories of potentially responsible parties (PRPs)", which includes current and former owners.) There is no genuine issue of material fact on this point. Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).

Finally, although the Mohawk Tannery supports AME's position, not EPA's, EPA's attempt to use it to its benefit is yet another example of EPA's bad faith litigation tactics. EPA resisted written discovery into the Mohawk Tannery matter, and the Tribunal refused to compel this material. Now, EPA misrepresents the Mohawk Tannery matter and attempts to limit the Tribunal's attention to just the PDD, not the settlement agreement where the purchaser acknowledged it was a PRP and agreed to settle its CERCLA liability. (RX 341.)

120. Rather, EPA has only used preauthorization with parties who are liable under CERCLA. In fact, throughout the depositions of its testifying experts, EPA repeatedly referred to the preauthorization process as "mixed funding" or "preauthorized mixed funding." (Dep. Fonseca, p. 10:11-11:19; Dep. Jeng, p. 9:4-12; 36:14-25.)

EPA Response: Immaterial and substantively disputed that "EPA has only used preauthorization with parties who are liable under CERCLA". (See Dep. Jeng p.20:15-21; AX 11). AME counsel also mischaracterizes EPA's witnesses as "expert witnesses" when they were clearly identified by EPA as "fact witnesses. EPA Prehearing Exchange at 2-3.

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and the Tribunal should therefore award AME the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute for the reasons stated in AME's reply in support of paragraph 119. See ¶ 119. There is no genuine issue of material fact that EPA has imposed unwritten restrictions on preauthorization eligibility and only preauthorizes PRPs who settle their CERCLA liability with EPA. Id.

121. Ms. Fonseca is not aware of preauthorization when there was not a consent decree involved. (Dep. Fonseca, p. 11:2-6.)

EPA Response: not disputed.

122. Ms. Fonseca is not aware of any mixed funding settlements or preauthorization situations where the person performing and ultimately financially responsible for the work was also not a PRP. (Dep. Fonseca, pp. 32:21-33:2)

EPA Response: not disputed.

123. When she was the remedy decision team lead with responsibility for the preauthorization process, her "role was to provide support to the regions in situations where preauthorization was considered or being considered as part of negotiations with parties at specific sites, if that was what was being addressed or considered, and provide support when pre-decision documents were needed if the decision had been made that preauthorization was an appropriate thing to consider in the settlement. And then once – if there was a pre-decision document in place and a consent decree signed, when claims came in, I would review the claims, I would provide review of and provide the – and I would coordinate the other reviews that have to take place to make sure that the claim is complete, perfected, reviewed, and then I provided the – conducted the process to pay out the claims." (Dep. Fonseca, pp. 12:11-13:3.)

EPA Response: not disputed.

124. When asked what she meant by provide support, Ms. Fonseca testified, "if a regional team . . . meaning the individuals in the region that are working on a specific case related to settlement negotiations or settlement proceedings – if the region –- if the team determines that mixed funding – sorry – preauthorization is something that should be considered in the context of a settlement, they would often reach out to me and ask about the process and ask about what has to be done to be able to get approval and provide that preauthorization." (Dep. Fonseca, p. 13:9-20.)

EPA Response: not disputed.

125. It is "generally" true that the remedial response action has been selected and the record of decision has been developed by the time she receives the preauthorization request and starts to review it, and Ms. Fonseca is not aware of a time where she rejected a proposed response action as part of the preauthorization review. (Dep. Fonseca, p. 22:2-16.)

EPA Response: not disputed.

126. When she completed her review of the preauthorization submissions, she was not reviewing it as an environmental engineer reviewing the technical specifications of the response action. (Dep. Fonseca, p. 22:19-23.)

EPA Response: not disputed.

127. She is not aware of any changes to how the preauthorization process works since she left her prior role. (Dep. Fonseca, p. 27:19-24.)

EPA Response: not disputed.

128. Ms. Fonseca does not remember the information required by the preauthorization application. (Dep. Fonseca, p. 19:9-18.)

EPA Response: not disputed.

129. In her work on this case, Ms. Fonseca recommended that AME's claim should be denied only because there was no PDD in place. (Dep. Fonseca, p. 32:1-20.)

EPA Response: not disputed.

130. Ms. Fonseca is not aware of any preauthorization request that did not involve the mixed funding settlement. (Dep. Fonseca, p. 41:15-20.)

EPA Response: not disputed.

131. Ms. Fonseca was the team lead for 17 or 18 years and testified there were only "probably four or five" instances of a preauthorization application being approved in the form of a PDD. (Dep. Fonseca, pp. 34:9-35:2.) When discussing this later, she said there were only 4 or 5 preauthorization applications over her 18 years in that role. (Dep. Fonseca, p. 35:20-23.)

EPA Response: not disputed.

132. Mr. Jeng has been an EPA employee since August of 1991. (Dep. Jeng, p. 7:9-11.)

EPA Response: not disputed.

133. Mr. Jeng took over Ms. Fonseca's job of handling preauthorization requests and administering the claims process in approximately 2018 or 2019, held that position until at least January 2021, and is not aware of any changes to the preauthorization process since January 2021. (Dep. Jeng, pp. 11:15-17, 15:23-16:9.)

EPA Response: not disputed.

134. "A preauthorized mixed funding agreement, to my knowledge, is an enforcement tool utilized by the agency in settlement with a responsible party under either a consent decree or administrative order of consent where we preauthorize a

settling party to do work on behalf of a cleanup of a site, and later we provide that preauthorization which allows them to submit claims for reimbursement from the federal government." (Dep. Jeng, p. 9:4-12.)

EPA Response: not disputed.

135. When asked about his understanding of the requirements for a person to submit a claim, Mr. Jeng testified:

> [W]hen a regional counsel attorney is interested in possibly introducing preauthorized mixed funding as a settlement tool at the negotiation table, they do contact our Office of Site Remediation Enforcement to get a – we call it a prior written approval for moving forward with that as a potential negotiation tool. If there is a potential agreement on the table for including preauthorized mixed funding in a settlement agreement under an AOC, administrative order of consent or consent decree, then the settling potential responsible party will provide an application to the federal government and my office as well as the Office of Site Remediation Enforcement for preauthorization approval for potential future reimbursements. When that comes in, it is reviewed as far as the enforcement tool to be used and the scope of the work that they are proposing that will be done where they will be seeking future claim reimbursements as well as rough cost dollar estimates, and we signal approval of that application through a preauthorization decision document. And then once those are signed, all of that information is incorporated into the final administrative order of consent or consent decree. Once the consent decree is entered, then the work can proceed, the preauthorized work can proceed, and depending upon the stipulations of the decision document, claims can then be submitted to the agency for reimbursement.

(Dep. Jeng, pp. 17:5-18:8.)

EPA Response: not disputed.

136. "My understanding of what is in the application is what has been agreed upon as the work that would be allowed to seek reimbursement." (Dep. Jeng, p. 19:2-4.) The work agreed upon is the work agreed upon between EPA and the settling PRP as negotiated through the consent agreement talks. (Dep. Jeng, p. 19:6-9.)

EPA Response: not disputed.

137. In his experience, the preauthorization process applies only in the context of either negotiated consent decrees or negotiated administrative AOCs. (Dep. Jeng, p. 19:10-14.)

EPA Response: not disputed.

138. When asked: "In your experience are you aware of any preauthorization requests that involved a private party who was not a PRP?", Mr. Jeng responded: "Not until August Mack." (Dep. Jeng, p. 20:6-9.)

EPA Response: Immaterial and disputed. (See Dep. Jeng, p.20:15-21; AX 11).

AME's Reply: *This fact is material because it helps establish that EPA's preauthorization scheme is arbitrary, capricious, and unlawful as applied, and the Tribunal should therefore award AME the entirety of its claim. Jones, 820 F.3d at 691 ("A fact is material if it might affect the outcome of the suit under the governing law.")*

Moreover, this is not a valid dispute for the reasons stated in AME's reply in support of paragraph 119. See ¶ 119. There is no genuine issue of material fact that EPA has imposed unwritten restrictions on preauthorization eligibility and only preauthorizes PRPs who settle their CERCLA liability with EPA. Id. Lastly, this is an accurate quotation from Mr. Jeng's deposition, and EPA's attempt to dispute it is groundless.

139. Mr. Jeng also testified that, even with a PDD in place, once the actual claim is submitted, the costs associated with that claim still have to go through the approval process even though the work being done is subject to the PDD. (Dep. Jeng, p. 27:13-18.)

EPA Response: not disputed.

140. When describing his conversation with Ms. Fonseca regarding AME's claim, Mr. Jeng testified, "My first question is always how much money are we talking about . . . ." He also "asked if they were PRP and she they were not. I remember that." He asked if AME was a PRP "[b]ecause I was not aware of a nonsettling party ever being provided preauthorized mixed funding approval." (Dep. Jeng, pp. 32:25-33:22.)

EPA Response: not disputed.

EPA reviews response actions to ensure consistency with the NCP and costs to ensure they are reasonable and necessary after the work is completed

141. Ms. Fonseca never reviewed the costs associated with the claim for whether they were necessary costs based on the site-specific circumstances. (Dep. Fonseca, p. 27:10-15.)

EPA Response: not disputed.

142. She did not review the claims for whether the costs were reasonable in nature and amount. (Dep. Fonseca, p. 27:16-18.)

EPA Response: not disputed.

143. Ms. Fonseca plays no role in considering whether the activities proposed or the claims submitted are consistent with the NCP. (Dep. Fonseca, p. 45:13-19.)

EPA Response: not disputed.

144. Mr. Newman did not look at VSI's costs and did not play a role in reviewing claims for payment. (Dep. Newman, pp. 26-29.) He does not know if the costs incurred by AME were necessary costs. (Dep. Newman, p. 32.)

EPA Response: not disputed.

145. Mr. Jeng did not review AME's costs to determine if they were reasonable and necessary and does not know whether they were reasonable and necessary. (Dep. Jeng, pp. 14, 22, 31.)

EPA Response: not disputed.

Procedural History

The Tribunal's order granting EPA's motion to dismiss

146. On December 18, 2017, the Tribunal granted EPA's motion to dismiss with prejudice. (Order, pp. 14-15.)

EPA Response: not disputed.

147. The basis of the Tribunal's grant was that AME "did not ask for or receive preauthorization" prior to starting work at the BJS Site. (Order, pp. 7-8.)

EPA Response: not disputed.

148. Specifically, the Tribunal held:

> No claim may be submitted to the fund without preauthorization. This is a bright line rule. Preauthorization is not just a regulatory nicety but the mechanism by which the Agency assesses the value of work to be performed and determines whether it justifies depleting scarce monetary resources of the Fund. If this evaluation has not occurred prior to payment of a claim . . . then payment cannot be justified.

(Order, p. 13.)

EPA Response: not disputed.

149. The Tribunal then concluded: "there is no question that the preauthorization process was not engaged" and granted EPA's motion to dismiss. (Order, pp. 13-14.)

EPA Response: not disputed.

The district court's order granting EPA's motion to dismiss

150. On July 11, 2019, the Northern District of West Virginia granted EPA's motion to dismiss. (Dkt. 46, Order, p. 1.)

EPA Response: not disputed.

151. Like the Tribunal, the basis of the district court's grant was that "it is undisputed that AME did not obtain preauthorization[.]" (Order, p. 8; *see also id.* at 10 ("AME failed to seek preauthorization as required by the governing statute regulations[.]")

EPA Response: not disputed.

152. When addressing AME's substantial compliance argument, the district court held, "AME's substantial compliance argument has no merit because this is not a mere technical oversight on AME's behalf; it is an outright failure to attempt to comply with clear federal regulations." (Order, p. 10.)

EPA Response: not disputed.

The Fourth Circuit's order vacating the erroneous decisions of the Tribunal and district court

153. On January 7, 2021, the Fourth Circuit vacated the erroneous decisions of the district court and Tribunal. *August Mack*, 841 Fed.App'x at 524-525.

EPA Response: Disputed on the grounds that the Fourth Circuit only vacated the District Court Judgment. *August Mack*, 841 Fed.App'x at 524-525.

AME's Reply: *EPA's argument that the Fourth Circuit vacated on the District Court Judgment is baseless. The Tribunal's order granting EPA's motion to dismiss was erroneous and is not good law. If the Tribunal's order was still in effect and binding, this proceeding would not be ongoing.*

154. Therein, the Fourth Circuit concluded that EPA's preauthorization application is "legally obsolete," and because of this, AME only needed to substantially comply with the preauthorization process. *Id.*

EPA Response: Disputed on grounds that the statement represents legal argument and conclusions of law to which no response is required.

AME's Reply: *EPA's response is improper and is deemed an admission. See generally Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).*

155. However, the Tribunal faulted AME for failing to seek preauthorization in the manner specified by EPA, which made its order dismissing AME's claim arbitrary and capricious. *Id.* at 522-525.

EPA Response: Disputed on grounds that the statement purports to be paraphrasing the holding of the Court. Also disputed on grounds stated in #154, *Infra*.

AME's Reply: *EPA's response is improper and is deemed an admission. See generally Fed. R. Civ. Pr. 56(e); DePaoli v. Vacation Sales Associates, LLC, 425 F.Supp.2d 709, 712 n.1 (E.D. Va. 2005); JDS Uniphase Corp. v. Jennings, 473 F.Supp.2d 705, 707 (E.D. Va. 2007).*

Conclusion

For the foregoing reasons, the Tribunal should grant AME's motion for accelerated decision and award AME the entirety of its claim, including costs, pre-judgment interest, post-judgment interest, and attorneys' fees.

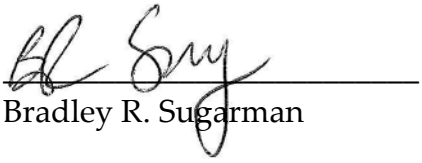
Respectfully submitted,

Bradley R. Sugarman
Philip R. Zimmerly
Jackson L. Schroeder
BOSE MCKINNEY & EVANS LLP
111 Monument Circle, Suite 2700
Indianapolis, Indiana 46204
Telephone: (317) 684-5000
Facsimile: (317) 684-5173
BSugarman@boselaw.com
PZimmerly@boselaw.com
JSchroeder@boselaw.com

Attorneys for August Mack Environmental, Inc.

Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on November 11, 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.ElizabethG@epa.gov.



Bradley R. Sugarman