**UNITED STATES**
**ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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

**AUGUST MACK ENVIRONMENTAL, INC.'S**
**MOTION FOR ACCELERATED ORDER**

Requestor, August Mack Environmental, Inc. ("AME"), by counsel files this Motion for Accelerated Order, seeking an order requiring the U.S. Environmental Protection Agency ("EPA") to pay all of AME's past response costs, post-judgment interest, and attorneys' fees. AME's Motion for Accelerated Order should be granted because AME substantially complied with the purpose and intent of the preauthorization process, which according to the Fourth Circuit is sufficient. This request is not new; approximately five years ago, the Tribunal granted EPA's motion to dismiss "because [AME] did not ask for or receive preauthorization[.]" 2017 WL 6551773 at *6. After appealing the Tribunal's dismissal order, AME received a similar adverse ruling in 2019 when the district court held that "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." (Dkt. 46, p. 10.)

The Fourth Circuit, however, had a different view, and that view controls. *August Mack Environmental v. U.S. EPA*, 841 Fed.Appx. 517, 525 (4th Cir. 2021). In remanding the

matter, the Fourth Circuit handed down three clear instructions. First, to succeed in advancing its claim for reimbursement from the Superfund, AME had to show only that it substantially complied with the preauthorization process. *Id.* at 524-525. Second, when evaluating AME's claim, the Fourth Circuit said that AME cannot be faulted for failing to "seek or obtain an express preauthorization from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 ***or otherwise***" because EPA's application is "legally obsolete." *Id.* at 522-525 (emphasis added). Third, and building off the second instruction, AME cannot "be required to seek preauthorization in the manner specified by the EPA[.]" *Id.* at 524.

The Fourth Circuit's directives must be followed on remand and stand in direct contradiction to the Tribunal's erroneous holding that AME's was not entitled to recover the investigative, response, and removal costs ("response costs") from the Superfund, costs that were incurred through the EPA-approved work AME performed at the BJS Site. The evidence that AME substantially complied with the preauthorization process is undisputed because it comes from the deposition testimony of EPA employees and the affidavit of AME's owner and president (who EPA chose not to depose). Similarly, the evidence is undisputed that AME incurred necessary costs as a result of carrying out the National Contingency Plan ("NCP") with its work at the BJS Site. The Tribunal should grant AME's Motion for Accelerated Order and award AME all of its claim. Indeed, to deny AME's Motion would be reversible error.

## 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[1], p. 26:10-12.)

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.)

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.")

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.)

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)

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

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

> 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.)

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.)

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.)

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.)

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

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

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

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.)

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.)

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's acceptance of AME as the supervising contractor at the Site

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

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.)

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.)

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.")

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.)

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'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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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

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

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.)

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.)

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.)

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)

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

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."))

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

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.)

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.)

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.)

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

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.)

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."

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.)

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.)

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.)

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

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

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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.)

Vertellus' bankruptcy and EPA's takeover of the Site

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

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.)

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.)

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

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

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.)

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.)

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

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.)

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

Tetra Tech's reliance on AME's work product

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.)

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.)

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

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.)

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

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.)

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.)

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.)

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.)

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

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.)

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.)

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.)

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.)

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.)

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

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.)

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

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.)

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.)

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.)

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.)

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[2], p. 16:3-9.)

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.)

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.)

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

[2] 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.)

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[3], pp. 30:15-18, 30:19-21, 31:1-4, 31:9-12.)

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.)

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

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

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.)

108. This is consistent with EPA's policy that preauthorization requests will be granted only under extraordinary circumstances: "Most Superfund cleanup actions

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

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.)

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.")

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

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.)

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

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.)

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.)

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.)

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

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

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.)

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.)

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.)

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

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)

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.)

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.)

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.)

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.)

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.)

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

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.)

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

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.)

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

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.)

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.)

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.)

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.)

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.)

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.)

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.)

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 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.)

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

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.)

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.)

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.)

## 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.)

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.)

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.)

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.)

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.)

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[.]")

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.)

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.

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.*

155. The Fourth Circuit then held that the Tribunal's dismissal of AME's claim was arbitrary and capricious because it was based solely on AME's purported failure to seek preauthorization in the manner specified by EPA. *Id.* at 522-525.

**Legal Standard**

Granting a motion for accelerated order is proper "if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law, as to all or any part of the proceeding." 40 C.F.R. § 305.27(a). AME has not located any caselaw substantively applying this specific regulation. However, when applying the Consolidated Rules of Practice, the Environmental Appeals Board "has construed an accelerated decision to be in the nature of summary judgment" and adopted Supreme Court caselaw interpreting Federal Rule of Civil Procedure 56. *Rogers Corp. v. E.P.A.*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). Under this rule, an accelerated order is inappropriate if the evidence presents

"contradictory inferences." *Id.* However, if the "evidence [] is so strong and persuasive that no reasonable factfinder is free to disregard it," granting a motion for accelerated order is proper. *Id.* "Evidence not too lacking in probative value must be viewed in the light most favorable to the party opposing the motion" and inferences from evidence "must be 'reasonably probable'" and cannot be based on speculation. *Id.*

**Argument**

There are five independent reasons why AME's pending motion should be granted. *First*, AME substantially complied with the preauthorization process by satisfying the purposes of preauthorization. *Second*, AME incurred necessary costs while performing work consistent with the NCP making the costs AME seeks eligible for reimbursement from the Fund. *Third*, EPA's preauthorization scheme is arbitrary and capricious ***as applied*** because it does not fulfill the objectives of preauthorization and EPA unlawfully bars innocent parties like AME from being preauthorized. *Fourth*, the preauthorization scheme is invalid ***on its face*** because the preauthorization requirement is ultra vires, violates the separation of powers doctrine, and violates the major questions doctrine. And, *finally*, there is no disputed issue of fact that AME substantially complied with the preauthorization process because EPA possessed the information required by the obsolete application before AME started its work. Importantly, all of these issues must be reviewed consistent with the Fourth Circuit's decision. Indeed, any ruling that faults

AME from failing to seek preauthorization through the agency's "obsolete" process – or the functional equivalent of that process – is erroneous and will be reversed on appeal.

## I. AME cannot be faulted for failing to seek preauthorization by using EPA Form 2075-3 or otherwise.

Congress authorized the President to use the Superfund for the payment "of any claim for necessary response costs incurred by" any person other than the federal government "as a result of carrying out the national contingency plan" provided that "such costs must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2). The only statutory prerequisite for asserting a claim against the Superfund is that the claimant first present the claim "to the owner, operator, or guarantor of the vessel or facility from which a hazardous substance has been released, if known to the claimant, and to any other person known to the claimant who may be liable under section 9607 of this title." 42 U.S.C. § 9612(a). If such a "claim has not been satisfied within 60 days of presentation in accordance with this subsection, the claimant may present the claim to the Fund for payment." *Id.*

In its order vacating the decisions of the district court and Tribunal, the Fourth Circuit limited the issues on remand and delivered clear directives. Most notably, the Fourth Circuit held that "it was legal error for the EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim." *August Mack*, 841 Fed.App'x. at 524. Instead, because EPA's preauthorization application is legally obsolete, AME must only substantially comply with the preauthorization

process to succeed in its claim. *Id.* at 524-525. The court then remanded the case so that discovery could be conducted and to allow EPA to "dispute and litigate August Mack's compliance and any Superfund reimbursement that might be awarded." *Id.* at 525. However, the Fourth Circuit was careful to craft instructions as to how the substantial compliance standard was to be applied on remand given the district court and Tribunal's prior errors in deciding the case.

Specifically, on remand, AME cannot be faulted for "not seek[ing] or obtain[ing] an express preauthorization from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 ***or otherwise***" because EPA's preauthorization application is legally obsolete *Id.* at 522-525 (emphasis added).[4] Stated differently, any ruling by this Tribunal that AME needed "to seek preauthorization in the manner specified by the EPA" will be erroneous. *Id.* at 524. With the Fourth Circuit's controlling precedent in mind, AME turns to the critical issue of what constitutes substantial compliance with a regulation.

## II. AME satisfied the objectives of the preauthorization process, thereby substantially complying with it.

Under well-established law, a party substantially complies with a statute or regulation if it satisfies its purposes. *Duvall v. Heart of CarDon, LLC*, 2020 WL 1274992 at *13 (S.D. Ind. March 17, 2020 (quoting *Delaware County v. Powell*, 393 N.E.2d 190, 192 (Ind.

[4] It is important to note that if AME needed to secure an express preauthorization from EPA before starting its work by using EPA's preauthorization application or its functional equivalent, then the Fourth Circuit would have affirmed, not vacated, the Tribunal's original order.

1979) ("When the purposes of the statute are fully satisfied, it is clear that the result is substantial compliance with the statute."); *Gilbertson v. Allied Signal, Inc.*, 328 F.3d 625, 635 (10th Cir. 2003) ("[T]o determine . . . 'substantial compliance' with the regulatory requirements, we must consider the[eir] purpose . . . ."); *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 382 (7th Cir. 1994) ("In determining whether there has been substantial compliance, the purpose of [the federal statute] and its implementing regulations . . . serve as our guide . . . ."). Thus, AME will have substantially complied with the preauthorization process if it satisfied the objectives of preauthorization. *Id.* Those objectives are "(1) ensuring appropriate use of the Superfund, (2) ensuring that response actions do not create environmental hazards; (3) ensuring that response actions are consistent with the NCP; and (4) ensuring that response actions are accomplished with the EPA's approval and are reasonable and necessary." *August Mack*, 841 Fed.App'x. at 523. Here, the undisputed evidence shows that AME satisfied every one of these objectives and therefore substantially complied with the preauthorization process as a matter of law.

**A. Paying for NCP compliant work that furthered the cleanup efforts of the BJS Site is an appropriate use of the Fund.**

The first objective of preauthorization is to ensure the Superfund is being used appropriately. *Id.* at 523. The primary purposes of Superfund money are "to finance 'governmental response,' and to pay 'claims.'" *Exxon Corp. v. Hunt*, 475 U.S. 355, 360 (1986). One type of these "claims" is a demand from a nongovernment entity "for costs

incurred pursuant to the federal plan for cleanup of hazardous substances, known as the 'national contingency plan.'" *Id.* at 360, 360 n.4. That is precisely the claim AME makes against the Superfund here. Thus, paying AME for its work is an appropriate use of the Fund. *Hunt*, 475 U.S. at 360, 360 n.4.

Moreover, the fact that the Site was on the NPL means using the Fund to advance its cleanup is an appropriate use of the Fund:

> The NPL is EPA's list of the most serious hazardous waste sites identified for possible long-term remedial response. Thus, the NPL is used to identify priorities among releases and potential releases and serves as a basis to guide the allocation of Fund resources among releases. The purpose of the NPL restriction is to ensure that the limited monies in the Fund are used only at sites that have been identified as posing the greatest potential threats to human health and the environment.

58 FR 5460-01 at 5464, 1993 WL 9288.

In addition, EPA has admitted that it will seek funding from the Superfund to complete the cleanup of the BJS Site. Tetra Tech, an EPA and USACE contractor, is currently performing the cleanup work at the BJS Site. (Dep. Newman, pp. 8-10.) Unlike with AME, EPA is paying Tetra Tech from the Big John's Salvage account for the work being done. (Dep. Newman, pp. 10:13-11:1, 13:9-17.) Once the account is exhausted, EPA will seek funding from the Superfund in order to pay Tetra Tech for its work at the Site.[5]

[5] The PRPs provided EPA with approximately $37 million as site-specific funds. *August Mack*, 841 Fed.App'x at 520. However, according to Mr. Newman, only about $20 million remains in the special account, and he estimates the cost of the remaining cleanup work to be around $60 million. (Dep. Newman, p. 110:2-11.)

(Dep. Newman, pp. 10:13-11:1, 13:9-17.) Therefore, EPA has determined that using the Fund to pay for work at the BJS Site is appropriate, and this fact independently establishes that paying AME for its work is an appropriate use of the Fund.

**B. EPA found AME qualified to do the work and knows of no environmental hazards created by AME.**

The second objective of preauthorization is to make sure the response actions do not create environmental hazards. *August Mack*, 841 Fed.App'x. at 523. AME satisfied this objective because it passed EPA's review process and did not create any environmental hazards with its work. Prior to approving a performing party's selected contractor, Mr. Newman considers whether the contractor can implement EPA's selected remedy consistent with the NCP. (Dep. Newman, pp. 24:25-25:9.) Specifically, Mr. Newman testified that his "job would be to just make 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 can reject the performing party's selected 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.")) 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.)

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.) In addition, EPA reviewed AME's proposed work and made comments and revisions when necessary to ensure the work was appropriate and consistent with the NCP. (AX 7; RX 256-267, 270-274; Dep. Newman, pp. 17-23, 18:9-14, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 111:1-6; RX 329, EPA resp. RFA 10.[6]) Further, Mr. Newman testified that he is not aware of any environmental hazards exacerbated or created by AME's work. (Dep. Newman, p. 77:12-18; Dep. Fonseca, p. 54:7-10; Dep. Jeng, p. 30:22-25.) These facts demonstrate the second objective of preauthorization was satisfied.

**C. It is undisputed that AME's response actions were consistent with the NCP.**

The third purpose of preauthorization is to ensure response actions are consistent with the NCP. *August Mack*, 841 Fed.App'x. at 523. Here, EPA admitted that AME's response actions were consistent with the NCP. (AX 7; RX 256-267, 270-274; Dep. Newman, pp. 17-23, 18:9-14, 19:11-25, 20:1-4, 20:19-21:19, 34:1-25, 35:1-8, 111:1-6; RX 329,

[6] EPA failed to properly respond to many of AME's requests for admission. (RX 329; FRCP 36.) The requests that EPA did not fully respond to or objected to without responding to are deemed admitted as a matter of law. FRCP 36.

EPA resp. RFA 10.) In addition, EPA acknowledged that AME's response actions were performed pursuant to the Consent Decree and that EPA reviewed and approved AME's work before it was started. (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.) By operation of the Consent Decree, to which EPA is a bound signatory, AME's work was therefore consistent with the NCP. (RX 322, p. 16; Dep. Newman, p. 99:6-11.) Thus, the undisputed facts show that AME satisfied the third objective of preauthorization. *See also* Aff. Glanders, ¶ 26; *see generally U.S. v. Kramer*, 644 F.Supp.2d 479, 490 (D.N.J. 2008) (holding that "response costs incurred, and response actions taken, by the Settling Work Defendants pursuant to the consent decrees are consistent with the NCP."); *NutraSweet Co. v. X-L Engineering Co.*, 227 F.3d 776, 791 (7th Cir. 2000) ("the district court did not clearly err in concluding that NutraSweet had satisfied the NCP" when the Illinois EPA approved the party's clean-up plan and monitored the progress of the work); *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1138 (10th Cir. 2002) (concluding that "Morrison was entitled to a rebuttable presumption of compliance with the NCP based on the fact that its actions were undertaken pursuant to a consent order[.]"); *U.S. v. Atlas Minerals and Chemicals, Inc*, 1995 WL 510304 (E.D. Penn. Aug. 22, 1995) ("any actions taken by the Third-Party Plaintiffs pursuant to the terms of . . . the Consent Decree will be deemed consistent with the NCP.")

**D. It is undisputed that EPA approved AME's response actions and that AME incurred reasonable and necessary costs as a result.**

Finally, the last objective of preauthorization is to make sure response actions are done with EPA's approval and are reasonable and necessary. *August Mack*, 841 Fed.App'x. at 523. As discussed above, it is undisputed that EPA approved AME's work. Additionally, as discussed at greater length below, AME's costs were reasonable and necessary, thereby satisfying the fourth objective of preauthorization.

In sum, there is no genuine issue of material fact that AME satisfied every one of the objectives of preauthorization. The result is that AME substantially complied with the preauthorization process as a matter of law. *Duvall*, 2020 WL 1274992 at *13; *Gilbertson*, 328 F.3d at 635; *Donato*, 19 F.3d at 382.

## III. AME incurred necessary costs while performing work consistent with the NCP.

Another basis for granting AME's pending motion and awarding AME the entirety of its claim is that it incurred necessary costs while performing work consistent with the NCP. Under 40 C.F.R. 307.21, costs are eligible for reimbursement from the Fund if (1) the response action was preauthorized; (2) the costs result from activities within the scope of the preauthorization; (3) the response action was consistent with the NCP; and (4) the costs are necessary costs under 40 C.F.R. § 307.11. However, the Fourth Circuit struck requirements 1 and 2—for this specific case—when it held that EPA's preauthorization application was legally obsolete and that "August Mack could not be

required to seek preauthorization in the manner specified by the EPA[.]" *Id.* at 524 Therefore, AME's costs will be fully reimbursed from the Superfund if they were incurred from response actions consistent with the NCP and "necessary."

As discussed above, there is no question that AME's work was consistent with the NCP because it was conducted pursuant to the Consent Decree and approved by EPA. (RX 322, p. 16.) Similarly, it is clear that AME's costs are "necessary costs incurred in carrying out the National Contingency Plan[.]" 40 C.F.R. 307.11(a). "Costs are 'necessary' if they are incurred in response to a threat to human health or the environment and they are necessary to address that threat." *Valbruna Slater Steel Corp. V. Joslyn Manufacturing Co.*, 260 F.Supp.3d 988, 993 (N.D. Ind. 2017). Stated differently, "Necessary costs are costs that are necessary to the containment of and cleanup of hazardous releases. *City of Spokane v. Monsanto Co.*, 237 F.Supp.3d 1086, 1094 (E.D. Wash. 2017) (internal quotation marks omitted) (quoting *United States v. Iron Mountain Mines, Inc.*, 987 F.Supp. 1263, 1271 (E.D. Cal. 1997) (quoting *United States v. Hardage*, 982 F.2d 1436, 1448 (10th Cir. 1992)).

Here, AME incurred $2,661,150.98 in costs for its work at the BJS Site, and its these costs are reasonable and necessary. (Aff. Glanders, ¶¶ 26-31.) AME's work furthered the cleanup of the BJS Site, a contaminated site on the NPL, and protected human health and the environment. (Dep. Newman, pp. 75:17-76:2, 104:8-19, 104:20-24, 105:20-106:7, 106:10-25, 107:15-18; RX 326; Aff. Glanders, ¶ 27.) Moreover, the costs AME incurred were reasonable because they were incurred consistent with the purpose of the NCP and after

EPA approved the work. *See generally A.S.I., Inc. v. Sanders*, 1996 WL 91626 at *6 (D. Kan. Feb. 9, 1996) ("costs should be viewed as consistent with the NCP when they are incurred consistent with the purpose of the NCP, meaning that the costs were 'reasonable, cost-effective, and likely to lead to a CERCLA-quality clean-up.'"); *Durham Mfg. Co. v. Merriam Mfg. Co.*, 294 F.Supp.2d 251, 266 (D. Conn. 2003) ("The response costs already incurred were reasonable and necessary because [the plaintiff] was required to conduct investigations and to prepare a work plan for the remediation of contamination at the . . . site.")[7]

## IV. EPA's administration of the preauthorization scheme is arbitrary, capricious, and defeats the objectives of preauthorization.

The third independent basis for granting AME's motion is the preauthorization scheme is arbitrary and capricious as applied. Arbitrary and capricious agency actions must be set aside. *Data Mktg. Partnership, LP v. United States Dept. of Labor*, 2022 WL 3440652 at *5 (5th Cir. Aug. 17, 2022) (quoting 5 U.S.C.A. § 706(2)(A)). If agency action is not reasonable or reasonably explained, then it is arbitrary and capricious. *See generally Federal Communications Commission v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021).

[7] When the government has chosen a response action, courts have held, "As long as the government's choice of response action is not inconsistent with the NCP, its costs are presumed to be reasonable and therefore recoverable." *U.S. v. Hardage*, 982 F.2d 1436, 1443 (10th Cir. 1992); *U.S. v. Dico, Inc.*, 266 F.3d 864, 879 (8th Cir. 2001) (same). Thus, because AME's costs were incurred in advancing a response action selected by the government, its costs are reasonable, necessary, and fully recoverable.

Here, the preauthorization regulations are arbitrary and capricious as applied in two different respects. *First*, EPA does not fulfill the stated goals of preauthorization with its operation of EPA's obsolete preauthorization scheme. Although the goals of preauthorization are eventually met, that is done only *after* a party is preauthorized. *Second*, EPA has imposed restrictions on preauthorization eligibility that are (a) not found in the relevant statute or regulations, (b) unreasonable, and (c) not adequately explained. These arbitrary and unlawful unwritten restrictions rendered AME ineligible for preauthorization. Because EPA's application of the preauthorization scheme is arbitrary and capricious as applied, it must be held unlawful and set aside.[8] 5 U.S.C.A. § 706(2)(A).

**A. EPA operates its preauthorization scheme in an arbitrary manner that does not fulfill its stated goals.**

EPA's review of preauthorization requests "are not significantly controversial" because all the meaningful review of costs and work takes place *after* EPA grants preauthorization. (Dep. Fonseca, pp. 20:11-21:2.) Accordingly, the preauthorization process does not fulfill the stated objectives of preauthorization. Rather, EPA ensures those objectives are met *after* it grants preauthorization. Because of this, EPA's preauthorization scheme is superfluous and arbitrary and capricious as applied.

*First*, preauthorization does not ensure appropriate use of the Fund. *August Mack*, 841 Fed.App'x at 523. EPA does not evaluate whether a party's costs are reasonable and

[8] To be clear, an arbitrary and capricious as applied holding will only result in the preauthorization regulations being set aside in this case.

necessary under the NCP during the preauthorization process. (Dep. Fonseca, p. 25:2-9.) In fact, Ms. Fonseca testified that she does not consider whether the response action was consistent with the NCP when she reviews preauthorization requests. (Dep. Fonseca, pp. 23:9-24:11.) Instead, that is done *after* EPA grants preauthorization, *after* the preauthorized party completes work and incurs costs, and *after* that preauthorized party submits a claim for payment from the Fund. (Dep. Fonseca, pp. 25:2-9, 29:4-7.) After that party submits a claim for payment, the region then evaluates whether the costs supporting the claim are reasonable and necessary and consistent with the NCP. (Dep. Fonseca, pp. 15:5-16:9, 51:4-10.) In addition to the region's review, a claims adjuster "review[s] the claim for the purposes of ensuring that the costs are actually incurred, like they have invoices, the invoices are legit invoices, and that the costs have the backup information required, and . . . that the costs were actually incurred and paid by the claimant." (Dep. Fonseca, pp. 39:1-14, 50:23-51:10.) In short, it is the review of the work and costs that takes place *after* a party is preauthorized that ensures money from the Fund is being used appropriately, not the preauthorization process, itself. (Dep. Fonseca, p. 19:2-8) (testifying that the costs still have to go through the review process even though there was a PDD).

*Second*, the preauthorization scheme does not reduce the likelihood that responses will create environmental hazards. EPA's evaluation of the performing party's selected contractor is what ensures this objective is met. That happens regardless of whether the

performing party has received preauthorization. (RX 257, 322, p. 18; 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.)

*Third*, preauthorization itself does not ensure that a claimant will complete work in accordance with the NCP. *August Mack*, 841 Fed.App'x at 523. Rather, it is EPA's review of the proposed work from the performing party's selected contractor that ensures this objective has been met. Again, that happens regardless of whether the performing party has received preauthorization. (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.)

*Fourth*, preauthorization does not ensure that "response actions are accomplished with the EPA's approval and are reasonable and necessary." *August Mack*, 841 Fed.App'x at 523. EPA's review of the preauthorization applications are not "significantly controversial" as EPA simply reviews the legally obsolete preauthorization application and makes sure nothing is missing. (Dep. Fonseca, pp. 20:11-21:2.) In fact, the person in charge of the preauthorization scheme and reviewing applications for 17 or 18 years cannot even remember the information required by the preauthorization application. (Dep. Fonseca, pp. 19:9-18, 7:22-8:3, 12:1-4, 34:9-17; EPA Initial Prehrg. Exch., p. 3.)

In sum, EPA takes steps to ensure the objectives of preauthorization are met. However, those steps are taken *after* preauthorization has been granted. Accordingly, EPA's preauthorization scheme does not fulfill its stated purposes, making it arbitrary and capricious as applied. Because of this, the Tribunal should set aside the

preauthorization regulations for this specific case and award AME the entirety of its claim.

**B. EPA created arbitrary and unlawful unwritten restrictions on preauthorization eligibility.**

*Second*, EPA has covertly imposed arbitrary and unlawful unwritten restrictions on preauthorization eligibility, rendering innocent parties like AME ineligible for reimbursement from the Fund. These restrictions conflict with the controlling statute that plainly makes innocent parties like AME eligible for reimbursement from the Fund. 42 U.S.C. § 9611(a)(2). In fact, paying a private party for NCP compliant costs incurred while advancing the cleanup of hazardous substances is one of the primary purposes of the Superfund. *Exxon Corp. V. Hunt*, 475 U.S. 355, 360 (1986). Yet EPA has made that outcome impossible, usurped the role of Congress, and barred any innocent non-settling party from reimbursement from the Fund. These unlawful requirements were revealed during the depositions of EPA's designated experts, namely, Ms. Fonseca, Mr. Jeng, and Mr. Newman.

Throughout their depositions, EPA employees called the preauthorization scheme "preauthorized mixed fund" or "mixed funding" because EPA will grant preauthorization only if a party is both a PRP that settles its CERCLA liability with EPA. For example, when asked what she meant by "mixed funding," Ms. Fonseca testified, "It's our shorthand designation word for preauthorization. Preauthorization, how do I want to say it? Preauthorization decisions, we call them mixed funding." (Dep. Fonseca,

p. 11:7-11.) The term "mixed funding" relates to the source of the funding, which is private parties and the Superfund. (Dep. Fonseca, p. 11:12-19.)

Earlier in her deposition, Ms. Fonseca described how she handled "the mixed funding or preauthorization accounts" when she was the team leader for remedy decisions. (Dep. Fonseca, p. 10:6-10.) She said that a preauthorization or mixed funding account is "what I call them. But, you know, we have pre-decision mixed funding documents that are part of consent decrees, settlement agreements, and those [are] what I call accounts quote/unquote." (Dep. Fonseca, p. 10:11-15.) Next, she confirmed that the preauthorization scheme operates as a settlement tool:

> So my 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.) Providing "support" in this context means helping the region use preauthorization (or "mixed funding" as Ms. Fonseca calls it) to force PRPs to settle:

> So 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.)

Notably, Ms. Fonseca has been employed by EPA for around 30 years and is unaware of preauthorization absent a consent decree. (Dep. Fonseca, p. 11:2-6.) Similarly, she is not aware of any preauthorization request that did not involve the mixed funding settlement. (Dep. Fonseca, p. 41:15-20.) Further, she is not aware of any mixed funding settlements or preauthorization uses where the person performing and ultimately financially responsible for the work was not a PRP. (Dep. Fonseca, pp. 32:21-33:2)

Turning to Mr. Jeng, he, like Ms. Fonseca, testified that EPA limits the use of preauthorization (or "preauthorized mixed funding" as he calls it) to forcing PRPs to settle with the EPA:

> 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.) Later, Mr. Jeng explicitly referred to preauthorization as a "settlement tool," "negotiation tool," and "enforcement tool" that is available to a "settling potential responsible party:"

> [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.)

Like Ms. Fonseca, in Mr. Jeng's experience, the preauthorization process applies only in the context of either negotiated consent decrees or negotiated administrative orders. (Dep. Jeng, p. 19:10-14.) In fact, Mr. Jeng was not aware of any preauthorization requests that involved a private party who was not a PRP until AME's request. (Dep.

Jeng, p. 20:6-9.) He did, however, discuss AME's claim with Ms. Fonseca, and the questions he asked her are telling. Mr. Jeng's "first question is always how much money are we talking about . . . [.]" He also "asked if they were PRP and she said 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.)

Finally, despite working for EPA as the RPM for Region 3 for over 30 years, Mr. Newman has only been involved in ***one*** case where there was preauthorization, and that was about 30 years ago. (Dep. Newman, p. 108:4-14.) In that case, there was a group of about 20 performing parties and they were all PRPs who had signed the consent decree. (Dep. Newman, pp. 108:19-109:2.)

Based on the unrefuted testimony of its own witnesses, there is simply no dispute that EPA has altered its own preauthorization program into a settlement tool and, as such, has limited access to the Fund to PRPs that are willing to settle claims with EPA. These unwritten prerequisites are unlawful and invalid as they are found nowhere in the statute or regulations. Moreover, the reasons for the requirements have not been reasonably explained, making them arbitrary and capricious. *Federal Communications Commission v. Prometheus Radio Project*, 141 S.Ct. 1150, 1158 (2021).

In addition, these requirements are unreasonable as they thwart the purpose of CERCLA. CERCLA "was designed to promote the timely cleanup of hazardous waste

sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009) (internal quotation marks omitted). Also, the Superfund is intended to pay nongovernment entities for NCP compliant work that advances cleanups. *Hunt*, 475 U.S. at 360. CERCLA is to be construed liberally to accomplish these goals. *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d. Cir. 1999). However, EPA's unwritten and secret restrictions on preauthorization—and therefore access to the Superfund—force innocent parties to bear the costs of cleanups while PRPs get paid. This puts PRPs in a better position than innocent parties and creates a perverse incentive to pollute. This is an absurd result that directly contradicts the purpose of CERCLA. Thus, setting aside EPA's arbitrary and unlawful restrictions that made AME ineligible for preauthorization and ordering full reimbursement of AME's claim from the Fund is warranted.

**C. Seeking preauthorization was futile.**

Finally, AME notes that it was futile for it to seek preauthorization, because the EPA never would have allowed it: "even if AME had formed the intent to apply for preauthorization and had substantially complied with the application process, EPA would nonetheless have been barred from approving the application . . . ." (EPA's Initial Prehr'g Exch., p. 6.); *see also id.* at pp. 12-13 (stating "it is not relevant whether AME is found to have substantially complied with its obligation to request reimbursement from the Superfund" because "[e]ven a favorable decision on substantial compliance will not

entitle AME to relief"). Because seeking preauthorization was futile, AME did not need to submit the functional equivalent of the legally obsolete application (as EPA argues) to establish substantial compliance with the preauthorization process.[9] *See generally International Broth. of Teamsters v. U.S.*, 431 U.S. 324, 365-366 (1977); *Pinchback v. Armistead Homes Corp.*, 907 F.2d 1447, 1452 (4th Cir. 1990).

Similarly, because the preauthorization application was legally obsolete, AME does not need to show that the obsolete form was the reason it did not apply before it performed the response actions. *See Williams v. Giant Food Inc.*, 370 F.3d 423, 431 (4th Cir. 2004) (quoting *EEOC v. Metal Serv. Co., 892 F.2d 341, 349* (3d Cir. 1990) ("relaxation of the application element of the prima facie case is especially appropriate when the hiring process itself, rather than just the decision making behind the process, is implicated in the discrimination claim or is otherwise suspect")). EPA's preauthorization process was certainly "suspect." The Fourth Circuit declared the application legally obsolete and held that AME could not be required to follow it. *August Mack*, 841 F. App'x at 524. The futility of AME seeking preauthorization establishes that EPA's unfounded request for a mens rea requirement to the substantial compliance test (forming an intent to submit the functional equivalent of the application) should be rejected.

[9] Moreover, as discussed previously, satisfying the objectives of preauthorization is what establishes substantial compliance with the preauthorization process.

## V. EPA improperly gave itself authority Congress did not intend when it created a preauthorization requirement.

In addition, AME is entitled to an accelerated order because the preauthorization requirement is invalid on its face in three independent ways. *First*, CERCLA is unambiguous and does not require EPA to preauthorize a private party's work before that party has access to the Superfund, making the preauthorization requirement ultra vires. *Second*, by requiring preauthorization before a party has access to the Superfund, EPA has usurped the role of legislature and substituted its judgment for that of Congress, thereby violating the separation of powers doctrine. *Third*, the gravity of the trillions of dollars of liability that flows from the many sites on the NPL, billions of dollars earmarked for the cleanup of these sites, and harm to the People and environment caused by untimely cleanup of these sites implicates the major questions doctrine. For any one of these reasons, the preauthorization scheme should be invalidated, and AME should be awarded the entirety of its claim.

### A. EPA's preauthorization requirement is ultra vires and must be stricken.

Under well-established law, "[a]n agency may not confer power upon itself." *La. Pub. Serv. Com'n v. F.C.C.*, 476 U.S. 355, 374 (1986). In fact, "an agency literally has no power to act . . . unless and until Congress confers power upon it." *Id.* Accordingly, "[a]ny action that an agency takes outside the bounds of its statutory authority is ultra vires, *see City of Arlington*, 569 U.S. at 297, 133 S.Ct. 1863, and violates the Administrative Procedure Act, see 5 U.S.C. § 706(2)(C)." *City of Providence v. Barr*, 954 F.3d 23, 31 (1st Cir. 2020).

Thus, when addressing whether a regulation is valid, "a reviewing court must first determine if the regulation is consistent with the language of the statute. If the 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). The reason for this is simple. If a statute is unambiguous, then that is "a clear sign that Congress did *not* delegate gap-filling authority to an agency[.]" *U.S. v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012). Whether an agency's action is ultra vires is a question of law. *D&G Holdings, L.L.C. v. Becerra*, 22 F.4th 470, 477 (5th Cir. 2022).

Here, the relevant statutory language is plain and does not require EPA to preauthorize a private party's work before it has access to the Fund. Nonetheless, EPA has imposed such a requirement and in doing so has stepped outside the bounds of its statutory authority and conferred power onto itself. The preauthorization requirement is therefore ultra vires and must be stricken.

**1. Section 111(a)(2) of CERCLA is plain and unambiguous and cannot be modified by EPA.**

Here, the statutory language at issue is plain and ambiguous:

> The President shall use the money in the Fund for the following purposes: . . . (2) Payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 1321(c) of Title 33 and amended by section 9605 of this title: Provided, however, That such costs must be approved

> under said plan and certified by the responsible Federal official.

42 U.S.C. § 9611(a)(2). The statute is clear and allows payment of *any* claim by *any* non-government person. *See generally Exxon Corp. v. Hunt*, 475 U.S. 355, 360 n.4 (1986) ("[T]he phrase 'any other person' in paragraph (2) of that subsection must denote any nongovernmental entity.") The provision only requires costs to be approved under the NCP and certified by a certain federal official. This language is unambiguous and does not impose any preauthorization or timing requirement. Because this language is clear, EPA had no authority to expand its language and create a preauthorization requirement. The preauthorization requirement is therefore ultra vires, violates the APA, and must be stricken. *See generally City of Providence*, 954 F.3d at 31 (citing *City of Arlington*, 569 U.S. at 297); *K Mart*, 486 U.S. at 291; *Home Concrete*, 566 U.S. at 488.

**2. Congress rejected a preapproval requirement.**

The fact that Congress has spoken clearly on this issue ends the inquiry. *K Mart*, 486 U.S. at 291. However, AME notes that the illegitimacy of the preauthorization scheme is further supported by legislative history. EPA supported a proposed amendment to CERCLA that would have inserted a preapproval clause:

> payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan established under section 311(c) of the Clean Water Act and amended by section 105 of this title; provided however, that such costs must be approved under said plan and certified by the responsible Federal official prior to taking of any action for which costs may be sought[.]

S. 494 § 114(a), 99th Cong., 1st Sess. (1985); Superfund Improvement Act of 1985: Hearing before the Committee on Environment and Public Works United States Senate on S.51 and S. 494, 99th Cong., 1st Sess. 319 (Feb. 25, 1985) (emphasis added on "prior to;" remaining emphasis in original); Ex. A, pp. 323-324; Ex. B, pp. 134-135.) Notably, EPA explained how this proposed language would "clarify" its authority to require preauthorization:

> This amendment would make the following changes:
> - Clarify authority to preauthorize response claims;
>
> * * *
>
> The availability of response claims can expedite private party cleanup. Following preauthorization for all or portions of the cleanup, private parties can promptly conduct cleanup action, and bring claims to the Fund when the response action is completed.

"Section by Section Analysis of EPA's Proposed Amendments to CERCLA," at 11, reprinted in Superfund Improvement Act of 1985: Hearing on S. 51 and S. 494 before the Committee on Environment and Public Works United States Senate, 99th Cong., 1st Sess. 100 (Feb. 25, 1985); *see also* Ex. A, p. 105; Ex. B, pp. 134-135.

EPA advanced its position that CERCLA should be amended to add a preapproval requirement in both the Senate and the House of Representatives, but EPA's advances were rejected by both chambers of the legislative body. *See* 42 U.S.C. § 9611(a)(2); H.R. Rep. No. 99-253, Part 1, 99th Cong., 1st Sess. 133 (Aug. 1, 1985); S. 51, H.R. 2005, H.R. 2817,

99th Cong., 1st Sess. (1985); Ex. B, pp. 134-135. Thus, Congress specifically rejected requiring preauthorization before a private party could recover from the Fund.

**3. Preauthorization conflicts with Section 112 of CERCLA.**

Further, EPA's preauthorization scheme conflicts with the claims procedure set forth in Section 112 of CERLCA. This section contains the procedures for asserting claims for reimbursement against the Fund. 42 U.S.C. 9612. It requires a claimant to *first* present a claim to PRPs before making a claim against the Fund. 42 U.S.C. 9612(a). If the PRPs do not pay the claim within 60 days, the claimant may *then* make a claim against the Fund for payment "pursuant to section 9611(a)[.]" *Id.*

Yet preauthorization is "EPA's prior approval to submit a claim against the Fund[.]" 40 C.F.R. 307.14. In other words, "the agency authorizes funding to be set aside to fund a claim that under the preauthorization decision document can be submitted for specific work." (Dep. Fonseca, p. 18:13-18.) In doing so, preauthorization represents EPA's commitment to reimburse a claim from the Superfund if the response action is conducted in accordance with the NCP and the costs are reasonable and necessary. (Dep. Fonseca, p. 27:3-9.)

Thus, EPA's preauthorization scheme eliminates Section 112's unambiguous requirement to *first* present the claim to PRPs *before* making a claim against the Fund. In fact, EPA has so replaced its judgment for that of Congress that the person who led the team "responsible for the pre-decision work" and "assigned [] to hand the mixed funding

or preauthorization accounts" for approximately 18 years was not aware of Section 112's requirement. (Dep. Fonseca, pp. 8:4-19, 10:6-10, 29:25-30:5, 34:9-35:2.) Ultimately, the fact that EPA's preauthorization scheme is incompatible with the plain language of Section 112 further supports striking EPA's ultra vires and unlawful requirement.[10]

**4. Preauthorization frustrates the purpose of CERCLA and the Superfund.**

Because the text of section 111(a)(2) is clear, "there is no need . . . to consult the purpose of CERCLA at all." *Cooper Indus., Inc. V. Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004). Nevertheless, AME notes that preauthorization frustrates the purpose of CERCLA and the Superfund. CERCLA "was designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination." *Burlington Northern and Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009) (internal quotation marks omitted). Further, "[t]here are two primary purposes for which the Superfund money may be spent—to finance 'governmental response,' and to pay 'claims.'" *Hunt*, 475 U.S. at 360. Congress intended CERCLA to be construed liberally to accomplish its goals. *Freeman v. Glaxo Wellcome, Inc.*, 189 F.3d 160, 163 (2d. Cir. 1999). However, the preauthorization process inhibits the timely cleanup of hazardous waste sites and benefits those responsible for the contamination, the PRPs, at the cost of innocent non-settling parties.

[10] AME followed CERCLA's mandate as it sought payment from all PRPs before making a claim against the Fund, but those requests were denied. (RX 001, p. 14.)

**5. *Ohio v. EPA* is distinguishable and was wrongly decided.**

Lastly, the D.C. Circuit's decision in *Ohio v. EPA*, 838 F.2d 1325 (1988) cannot be relied on to uphold EPA's preauthorization scheme because it is distinguishable and wrong. It is distinguishable because petitioner challenged rules promulgated by EPA before the Superfund Amendments and Reauthorization Act of 1986 ("SARA"). *Id.* at 1327. The purpose of SARA was to hasten the "cleanup of hazardous waste sites and to shift the cost of environmental response from the taxpayers to the parties who benefitted from the wastes that caused the harm." *Morrison Enterprises v. McShares, Inc.*, 302 F.3d 1127, 1132 (8th Cir. 2002) (internal quotation marks omitted). AME's challenge to the preauthorization scheme should be considered in light of SARA and its emphasis on the importance of quick cleanups, which preauthorization frustrates. Further, the petitioner attacked EPA's revision to the NCP. *Id.* at 1327-1328. It was not until 1993, five years of the D.C. Circuit's decision that EPA promulgated that preauthorization scheme that is the subject of AME's challenge. Finally, the decision was based on assumptions that 30 years of history have proved wrong. For example, the court said that it is "plausible" that the preauthorization requirement "encourages private involvement" in cleanups and therefore preauthorization is not an impediment "to the intended operation of the statute[.]" *Id.* at 1331. However, the fact that EPA rarely receives preauthorization applications, hardly uses preauthorization, and has never preauthorized an innocent non-settling party shows just how wrong the court's reasoning was. The D.C. Circuit's

decision should be reconsidered in light of these undisputed facts resulting from 30 years of arbitrary administration of the preauthorization scheme.

In addition, the D.C. Circuit's decision was simply wrong. The court's decision is founded on the use of *Chevron* deference. *Id.* at 1331. However, the court did not analyze whether the relevant statutory language was unambiguous, which is step one of the *Chevron* test. In recent years, the Supreme Court has placed greater emphasis on step one of *Chevron*, and the court's jump to step two of *Chevron* was erroneous. As discussed above, the relevant statute is unambiguous, so EPA is entitled to no *Chevron* deference. For these reasons, *U.S. v. Ohio* does not support EPA's position.

**B. EPA's creation of the preauthorization scheme violates the separation of powers doctrine.**

EPA's invention of the preauthorization scheme violates the separation of powers doctrine and must therefore be stricken. "Our Constitution divided the 'powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial.'" *Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 483 (2010). This tri-part structure "is designed to preserve the liberty of all the people." *Collins v. Yellen*, 141 S.Ct. 1761, 1780 (2021). Stated differently, "'[T]he doctrine of separation of powers is a *structural safeguard'* which has as one of 'its major feature[s]' the 'establish[ment] [of] high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.'" *N.L.R.B. v. New Vista Nursing and Rehabilitation*, 719 F.3d 203, 242 (3d. Cir. 2013) (quoting *Plaut v.*

*Spendthrift Farm, Inc.*, 514 U.S. 211, 239 (1995)); *see also Plyler v. Moore*, 100 F.3d 365, 371 (4th Cir. 1996). The separation of powers doctrine "is not merely a matter of convenience.... Its object is basic and vital, namely, to preclude a commingling of these essentially different powers of government in the same hands." *Plyler,* 100 F.3d at 370 (quoting *O'Donoghue v. United States*, 289 U.S. 516, 530 (1933)).

Importantly, "The Constitution's division of power among the three branches is violated where one branch invades the territory of another, *whether or not the encroached-upon branch approves the encroachment*." *New York v. U.S.*, 505 U.S. 144, 182 (1992) (emphasis added); *see also Free Enterprise Fund v. Public Co. Accounting Oversight Bd.*, 561 U.S. 477, 497 (2010) (same). Accordingly, executive action that amounts to lawmaking violates the separation of powers. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588 (1952) (invalidating executive action when "President's order does not direct that a congressional policy be executed in a manner prescribed by Congress—it directs that a presidential policy be executed in a manner prescribed by the President.")[11] An appropriate remedy for separation of powers violation is severing the constitutionally repugnant part. *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S.Ct. 2183, 2208-2210 (2020).

[11] "[H]istorical events, the fears of power and the hopes for freedom" drove the Founders' choice of entrusting only Congress with the power to make laws. *Id.* at 589.

Here, EPA invaded the power of Congress when it created the preauthorization scheme, thereby acting as the legislature.[12] EPA then administers the preauthorization scheme it invented and decides when to grant preauthorization, acting as the executive. Finally, EPA, through its administrative law judges, resolves challenges to the manner in which it administers it preauthorization scheme. This is precisely the consolidation of legislative, executive, and judicial power that our Constitutional system of checks and balances was designed to prevent: "This system prevents '[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands[.]" *Patchak z. Zinke*, 138 S.Ct. 897, 905 (2018) (quoting The Federalist No. 47, p. 301 (C. Rossiter ed. 1961) (J. Madison)). Because the preauthorization scheme violates the separation of powers doctrine, it must be severed from the regulations.

**C. The appropriation of money to address harm caused to human health and the environment is a major question that only Congress can answer.**

Controlling access to billions of dollars of Superfund money for sites that have trillions of dollars of liabilities flowing from grave harm caused to humans and the environment is a major question that only Congress can answer. "Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be 'shaped, at least in some measure, by the nature of the question presented'—whether

[12] Any argument that preauthorization is "efficient, convenient, and useful" must be given no weight in the separation of powers analysis. *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983).

Congress in fact meant to confer the power the agency has asserted." *W. Va. V. EPA,* 142 S.Ct. 2587, 2607-2608 (2022). In some cases, "the history and the breadth of the authority that the agency has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority. *Id.* at 2608 (internal quotation marks omitted).

In such cases, "both separation of powers principles and a practical understanding of legislative intent make [courts] 'reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there.'" *Id.* at 2609. Indeed, "Extraordinary grants of regulatory authority are rarely accomplished through 'modest words,' 'vague terms,' or 'subtle device[s].'" *Id.* Because of this, there is an overarching presumption that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* In these cases, an agency's regulation will be upheld only if there is "'clear congressional authorization' for the power it claims," not just "a merely plausible textual basis for the agency action[.]" *Id.* These legal principles make up the "major questions doctrine," a doctrine that has been repeatedly applied to invalidate EPA rulemaking. *Id.* at 2610; *Utility Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324 (2014).

Access to the Superfund falls under the major questions doctrine. CERCLA "reaches far more than hazardous waste sites; in fact, it has been said that through CERCLA, 'Congress sought to deal with every conceivable area where hazardous substances come to be located....'" *First United Methodist Church of Hyattsville v. U.S.*

*Gypsum Co.*, 882 F.2d 862, 867 (4th Cir. 1989). In the 1980s, it was estimated that there would be billions of dollars of CERCLA litigation costs. *U.S. v. Rohm & Haas Co.*, 721 F.Supp. 666, 696 n.35 (D.N.J. 1989) (citing Note, Developments—Toxic Waste Litigation, 99 Harv.L.R. 1458, 1479 n. 73 (1986)).

According to EPA, 25% of Americans (approximately 73 million people) live within 3 miles of a site on the Superfund's NPL. (RX 335, *available at* https://semspub.epa.gov/work/HQ/100003048.pdf at 4, 5.) And "Superfund cleanups provide significant human health and economic benefits: 20-25% reduction in birth defects among children living near sites[;] 13-26% reduction in blood-lead levels among children living near sites[;] 19-24% increase in residential property value within 3 miles after cleanup." (*Id.* at 4.) Further, by the end of 2021, federal and non-federal Superfund sites supported more than 10,200 businesses, hosted more than 246,000 employees, and generated more than $18.6 billion in annual employment income. *Id.*

The current administration is committed to confronting environmental injustices and has integrated environmental justice components into its decision-making. https://www.whitehouse.gov/ceq/news-updates/2022/05/23/biden-harris-administration-outlines-historic-progress-on-environmental-justice-in-report-submitted-to-congress-2/; 2 Executive Order 14008 (Jan. 27, 2021). EPA has recognized that CERCLA plays an important role in achieving these necessary environmental goals.

(RX 336; *available at* https://www.epa.gov/system/files/documents/2021-07/strengtheningenvirjustice-cleanupenfaction070121.pdf

As EPA recognizes, the Fund has the ability to transform communities, address environmental injustices, and stop the grave harm to the environment and people caused by hazardous waste. Nevertheless, EPA has restricted the Fund's access to only settling PRPs whose work has been pre-approved by EPA. The effects of limiting the Fund in this manner are profound. Preauthorization has so discouraged private parties from cleaning up sites that the preauthorization process is hardly used. (Dep. Newman, p. 108:4-14; Dep. Fonseca, pp. 34:9-35:2, 35:20-23.) Further, because private parties must obtain preauthorization for any expenditure, there are significant delays in cleanups. Additionally, there is no incentive for an innocent party to even consider cleaning up a Superfund site as they know they will not be preauthorized and therefore will not receive money from the Fund. In effect, preauthorization hinders the ability to fulfill the most important policy objectives of our day. There must be "clear congressional authorization" for EPA to wield such power. *W. V.A.*, 142 S.Ct. at 2615-2616. Because there is none, EPA did not have authority to create the preauthorization scheme, and it must be stricken. *Id.*

## VI. AME substantially complied with the preauthorization process because EPA possessed information required by the application prior to AME beginning work at the Site.

In the alternative, if satisfying the objectives of the preauthorization process does not establish that AME substantially complied with it, then AME still substantially

complied with the preauthorization process because EPA possessed information required by the application prior to AME beginning work at the Site. To be considered for preauthorization under EPA's regulations, a party needs to submit a legally obsolete application that includes certain information to an unknown person and location. 40 C.F.R. § 307.22(b); *August Mack*, 841 Fed.App'x. at 523-524.

In this case, either AME provided EPA with, or EPA possessed the information required by the regulations, before AME started its NCP compliant work. This independently establishes that AME substantially complied with the preauthorization process. Specifically, EPA knew the location and nature of the hazardous material. § 307.22(b)(1); (Dep. Newman, p. 36:15-19.) Mr. Newman testified that EPA gains an understanding of the nature and quantity of hazardous material as the cleanup processes, and it was gaining this understanding as AME's work continued. § 307.22(b)(2); (Dep. Newman, pp. 36:20-37:12.) EPA knew the PRPs for the Site before AME began work. § 307.22(b)(3); RX 322.

Prior to AME doing any work, EPA ensured that AME's work was necessary and consistent with the NCP. § 307.22(b)(5); (Dep. Newman, pp. 17-23, 18:9-14, 19:3-5, 19:11-25, 20:1-4, 20:19-21:19, 23:9-24:2, 24:11-18, 24:25-25:9, 25:9-12, 34:1-25, 35:1-8, 39:2-10, 111:1-6; 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, 68:9-15, 70:17-71:1, 71:10-14, 111:1-6.) EPA determined that AME could implement the proposed response action in November 2012. §

307.22(b)(6); (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.) AME provided EPA with a schedule of activities. § 307.22(b)(7); (Dep. Newman, pp. 38:19-39:1, 51:23-52:2.) EPA had projected costs of the response action prior to AME's work being started. § 307.22(b)(8); *see generally* RX 322. EPA had contracting procedures in place, and there were procedures in place for project management, EPA oversight, and reporting of progress of AME's work, including, but not limited to, weekly or biweekly updates and meetings. § 307.22(b)(9)-(10); RX 322, pp. 30-32; RX 275-277, 279-321; (Dep. Newman, pp. 40:12-17, 42:13-43:15, 47:1-8.) EPA had assurances that AME's work would be timely. § 307.22(b)(12); (Dep. Newman, pp. 23:9-24:2, 24:11-18, 24:25-25:9, 25:9-12, 38:19-39:1, 51:23-52:2, 68:9-15.) EPA possessed a copy of the preliminary assessment and a description of the proposed removal action, relevant environmental requirements, and understood how the removal would comply with such requirements before AME's work began.[13] § 307.22(c)(1)-(2); *see generally* AX 7, pp. 4-6; RX 322; Dep. Newman, pp. 17-19; Aff. Glanders.

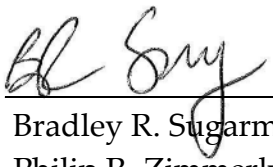
In sum, because EPA possessed the information required by the legally obsolete preauthorization application before AME began its work, AME substantially complied with the preauthorization process and is entitled to Superfund reimbursement.

**Conclusion**

[13] The cleanup of the BJS Site was done as a removal action. (Dep. Newman, p. 48:20-22.)

For the foregoing reasons, AME substantially complied with the preauthorization process and must be awarded the entirety of its claim from the Superfund. The Tribunal should award AME $2,661,150.98 in costs for its work at the BJS Site; attorneys' fees; costs of this action; post-judgment interest; and all other just and proper relief available by law.

Respectfully submitted,



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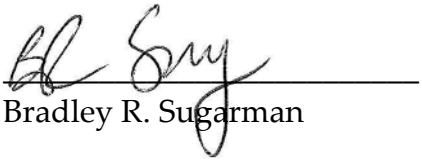
## Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on September 16, 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: Berg.ElizabethG@epa.gov and Swenson.erik@epa.gov.



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