UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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VIA E-FILING November 14, 2022

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. EPA, Office of Administrative Law Judges
Ronald Reagan Building, Room Ml 200
1300 Pennsylvania Avenue, NW
Washington, DC 20004

Re: August Mack Environmental, Inc. (AME)
Docket No. CERCLA-HQ-2017-0001

Dear Judge Biro,

On behalf of the United States Environmental Protection Agency (EPA), I enclose for your consideration the "EPA's Reply in Opposition to AME's Response to EPA's Motion for Accelerated Decision." According to past practice before this Tribunal, my understanding is that a Proposed Order is not necessary.

Respectfully submitted,

BENJAMIN COHAN
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

EPA'S REPLY IN OPPOSITION TO AME'S RESPONSE TO EPA'S MOTION FOR ACCELERATED DECISION

Introduction

AME's Response to EPA's Renewed Motion for Accelerated Decision (Response) does not set forth any arguments or disputed material facts that would prevent this Court from granting EPA's Renewed Motion for Accelerated Decision (RMFAD). As established in EPA's RMFAD, the Agency has demonstrated that no genuine issue of material fact exists as to the issue before this Tribunal -- whether AME substantially complied with its duty to seek preauthorization. Hence, EPA is entitled to judgement as a matter of law, and nothing presented in AME's Response upsets the basis for granting EPA's RMFAD. 40 C.F.R. § 305.27.[1]

AME's mishmash of arguments are absurd and would require this Tribunal to completely ignore AME's lack of any intent or notification to EPA to seek preauthorization through any form of application or request. At a minimum, AME must notify EPA and request preauthorization prior to commencing response actions. The dictionary definition of

[1] EPA hereby incorporates by reference its RMFAD, its Response to AME's Motion for Accelerated Order, and related briefs in this matter as if fully set forth herein.

"application" is illuminative. The plain meaning of "application" is "an official request for something, usually in writing".[2] This underscores the fundamental flaw of AME's argument -- it must at least have requested preauthorization, prior to commencing response actions, through a formal or informal notice to EPA. This never occurred. Hence, it cannot be said that AME's conduct should "in reality be considered the equivalence of compliance." *See Peckman v. Gem State Mut.*, 964 F.2d 1043, 1052 (10th Cir. 1994)("*Peckman*"). At a minimum, AME would have to at least signal to the Agency that it planned to seek preauthorization to claim that it did "all that can be reasonably expected of [it]." *See Sawyer v. Sonoma Cnty*., 719 F.2d 1001, 1008 ((9th Cir. 1993)("*Sawyer*"). *See also August Mack Environmental v. U.S. EPA*, 841 Fed. Appx. 517, 522-523 (4th Cir. 2021)(citing to *Sawye*r and *Peckman* for the legal principles stated herein). But AME proffers no facts that it attempted to and in fact did seek preauthorization prior to commencing response actions, which is the foundation upon which EPA's preauthorization regulations are premised. Without such a showing, AME cannot demonstrate that it substantially complied with EPA's preauthorization process. As such, EPA's RMFAD should be granted as a matter of law.

EPA's MFAD explicitly sets forth the material undisputed facts

AME's allegation that EPA makes "no attempt to designate facts that are material or undisputed" lacks foundation. See Response at 2.[3] With respect to whether AME substantially complied with seeking preauthorization, there is only one material fact which has been conceded *ad nauseum*: 1) that AME did not intend to seek, let alone attempt to seek, preauthorization prior

[2] dictionary.cambridge.org/us/dictionary/English/application.

[3] The relevant administrative rules of practice (40 C.F.R. Part 305) do not require or otherwise contemplate that the parties proffer uncontested facts in a separate subheading of their respective briefs. Regardless, AME cannot demonstrate that it substantially complied with its duty to seek preauthorization as a matter of law; and therefore, EPA's MFAD should be granted.

to commencing response actions in 2012[4]. EPA by no means failed to explicitly specify the undisputable material facts upon which it relied when establishing that it was entitled to judgement as a matter of law. In fact, AME recited these undisputed material facts again in its Response (*Id*. at 9-11) (affirming that AME did not intend to seek, nor attempt to seek, preauthorized funding of the response action) (citations omitted). EPA also clearly identified and stated the undisputed fact that AME did not intend to seek *reimbursement* of its costs until four or five years after it commenced work. EPA RMFAD at 19.[5] Finally, EPA clearly and explicitly stated the undisputed fact that EPA never issued the requisite preauthorization decision document ("PDD") granting preauthorization. EPA RMFAD at 36-37. *See also*, Aff. Newman at ¶¶14-17; Dep. Newman at p.22.

Hence, the notion that AME "does not know the facts that EPA claims are undisputed and material and therefore cannot challenge those facts" (Response at 4) is pure theater. Not only does AME repeatedly recite these very same undisputed material facts in its Response (*Id*. at 9-11) (citing to EPA's RMFAD), but even a cursory reading of EPA's MFAD makes it crystal clear that the undisputed facts identified by EPA establish that AME neither sought preauthorization nor received it. Thus, one need not be "like pigs, hunting for truffles buried in

[4] Its belated attempt to seek reimbursement was set forth in the misappropriate Claim form (Appendix B to Part 307) filed with the Agency on January 12 (via letter) and on March 9, 2017 (via request for hearing). See Request for Hearing (March 9, 2017) at 6 (acknowledging that it was seeking "reimbursement" as opposed to "preauthorization").

[5] "Moreover, AME clearly acknowledges that it did not attempt to comply with preauthorization (i.e., prior to commencing the response action as required by 40 C.F.R. § 307.22(a)) when it admits that it was EPA's "denial letter" dated February 8, 2017, "that required AME to seek *reimbursement* from the Fund." Request for Hearing at 6. It is critical to note that AME's first attempt to seek after-the-fact reimbursement from the Fund admittedly occurred 4 to 5 years after the response action commenced. Therefore, AME admits it did not seek preauthorized funding prior to commencing work in 2012. Request for Hearing at 5 ("Beginning in October 2012 and continuing to May 2016, AME diligently performed removal actions….")." EPA MFAD at 19.

briefs"[6] to figure this out. *See also*, RMFAD at 21-25 (discussing law of the case doctrine and the undisputed material facts as stated.).

The Fourth Circuit vacatur was on narrow grounds – only vacating the legal standard applicable to the requirement to seek preauthorization

AME consistently mischaracterizes the Fourth Circuit ruling[7] by, *inter alia*, referring to the court's "directive that discovery be conducted to determine whether AME substantially complied with the preauthorization process." Response at 5. But the Fourth Circuit did not order further discovery. In *dicta* only, the Court simply observed that "[n]o discovery was conducted, and whether August Mack substantially complied with the preauthorization process was not assessed in the administrative proceedings." *August Mack*, 841 Fed. App'x at 525. Since much of AME's arguments flow from a chronic mischaracterization of the Fourth Circuit's ruling, it is important to highlight the narrow scope of its vacatur and remand.[8]

Contrary to AME's misreading, the Fourth Circuit remand and vacatur is narrowed only to the issue or question of whether AME substantially complied with the preauthorization process – specifically its duty to *seek* preauthorization pursuant to 40 C.F.R. 307.22(a). *August Mack*, 841 Fed. App'x at 524, Note 7 ("August Mack needed only to substantially comply with the preauthorization requirement"). Having concluded that "the specific regulation relied on by

[6] Response at 4 (case citation omitted).

[7] There are multiple examples of AME's mischaracterization of the Fourth Circuit ruling throughout its brief. Among other things, AME proclaims that the "Fourth Circuit struck the application *and coinciding PDD requirements*" that comprise the preauthorization scheme. Response at 16 (citation omitted). This is a blatant distortion of the opinion. Nowhere does the Court strike down the preauthorization requirements themselves. *August Mack*, 841 Fed. App'x at 522-525.

[8] AME also misrepresents EPA's arguments throughout its Response; but EPA's pleadings speak for themselves. For example, AME claims that EPA's RMFAD is limited to "reliance on the pleadings." Response at 5. This is not relevant or true. Although AME's admissions of material fact derive largely from the pleadings in this matter, EPA's RMFAD also relies upon exhibits, deposition testimony, and Mr. Newman's Affidavit. See, e.g. EPA RMFAD at pp. 36-39 (citing heavily to Mr. Newman's affidavit and deposition testimony). And far from ignoring the deposition testimony of its witnesses, both EPA's RMFAD and EPA's Response to AME's Motion for Accelerated Order cite heavily to these sources. Unfortunately for AME, the deposition testimony of EPA's witnesses did not bear fruit for AME—as there are no facts suggesting that AME in fact did intend to seek preauthorization, and notified EPA of its intent, prior to commencing response actions.

EPA in this case, 40 C.F.R.307.22(a)" would not be undermined, the Fourth Circuit directed EPA to apply the substantial

compliance standard to the regulation (841 Fed. Appx. at 523), requiring EPA to evaluate whether AME substantially complied with its regulatory obligation to apply for preauthorization pursuant to § 307.22(a)(2). The court determined that AME need not have "strictly complied" with the legal requirement to apply for preauthorization by filing Form 2075-3 pursuant to 40 C.F.R. § 307.22(a)(2). *Id*. at 523-34. "Put simply, the EPA should not arbitrarily fault August Mack for failing to strictly comply with the preauthorization process when the EPA itself has declared the required [application] form to be obsolete. Indeed, . . . August Mack could not be required to *seek* preauthorization in the manner specified by the EPA and thus a substantial compliance standard is wholly appropriate and necessary." *Id*. at 525. Therefore, the court clearly stated that "it was legal error for EPA to require strict compliance with its preauthorization process in order for August Mack to prove its Superfund claim." *Id.*; *see also* ALJ Order of Redesignation and Prehearing Order (Sept. 8, 2021) at 1; Joint Motion for Remand to the U.S. Environmental Protection Agency at 1 (Civil Action No. 1:18-CV-12) (Dist. Crt. N.D. West Virginia) (stating that "the Fourth Circuit held that the ALJ erred by not applying a 'substantial compliance' standard when adjudicating whether August Mack satisfied the statutory and *regulatory requirements for seeking" preauthorization*) (emphasis added) (internal citations omitted). All other aspects of the ALJ's decision, as expressly affirmed by the U.S. District Court, remain intact based upon legal and equitable doctrines. *See* EPA's RMFAD, p.21-25 (re: law of the case doctrine).

There is an intent and notice aspect to the substantial compliance standard under controlling Fourth Circuit case law

As a matter of law, AME incorrectly asserts that EPA "grafts elements of criminal law" concepts (*mens rea*, or intent) onto the substantial compliance standard, in violation of the Fourth Circuit's decision. Response at 9.[9] This argument is in fact divorced from Fourth Circuit jurisprudence. At the outset, AME fails to apply the correct, controlling Fourth Circuit test for substantial compliance, which requires (1) a showing of "intent" by notifying EPA, before commencing a response action, that AME was seeking preauthorization; and (2) a demonstration that AME's failure to comply with the literal requirements (i.e., filing a timely Form 2075-3) did not violate the essence of the regulations. *See, e.g., Atlantic Veneer Corp. v. Comm'r of Internal Revenue*., 812 F.2d 158, 161 (4th Cir. 1987) ("Atlantic Veneer"); *Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 210 (4th Cir. 2004) ("Volvo Trucks"). AME cannot show that it met either element. First, it cannot demonstrate that it notified EPA of its intent to seek preauthorization before commencing a response action. *See Atlantic Veneer*, 812 F.2d at 161 (stating that "at a minimum" notice of intent is required); 40 C.F.R. § 307.22(a)(2). And second, apart from intent, AME[10] did not provide EPA with a comprehensive package of information, before commencing a response action, that substantially complied with EPA's preauthorization application requirements. *See, e.g.,* § 307.22(a) and (b). Finally, even applying AME's erroneous interpretation of a substantial compliance test, AME cannot demonstrate that it satisfies all four

[9] AME does not cite to the Fourth Circuit opinion itself. This is because nowhere, even in *dicta*, did the Fourth Circuit opine that the principles of intent and notice conflict with the doctrine of substantial compliance. *August Mack*, 841 Fed. Appx. at 523-524.

[10] AME served as Vertellus' "supervising contractor" for the BJS Site. Any work plans that AME submitted to EPA were done so on behalf of Vertellus, and in accordance with the terms of the BJS Consent Decree. None of AME's submissions were on behalf of AME. *See also*, EPA's Response to AME's Statement of Undisputed Material Facts at ¶ 22 et.al.

"objectives of preauthorization."[11] *See* EPA's Response to AME's Motion for Accelerated Order at pp. 6-24 (providing detailed legal analysis for the above stated arguments).

AME neither sought preauthorization nor provided EPA with a timely, comprehensive package of information relevant to preauthorization.

AME grossly misstates EPA's RMFAD, alleging that "EPA says it needed six things for AME to have substantially complied with the preauthorization process…" Response at 18.[12] AME misquotes EPA's brief -- EPA did not say that AME would have substantially complied had it provided the six things listed by EPA.[13] To the contrary, EPA cited to a partial list of application data to point out that the process of preauthorization is distinct and separate from the approval process under the CD.[14] In other words, EPA cited to a partial list of the requisite application data to highlight how and why the CD did not provide for the process of preauthorization – and how "EPA's alleged oversight and approval of Vertellus' work at the BJS Site does not show that AME substantially complied with the preauthorization process." RMFAD at p.31; *Id*. at 29-33.

Moreover, EPA's position is that AME, in its capacity as supervising contractor to Vertellus, did not notify EPA of its intent to seek preauthorization prior to commencing response work, in addition to all the other dispositive reasons stated in EPA's Response in opposition to AME's Motion for Accelerated Order. *See* EPA's Response at pp.13-15. Nor did EPA have any

[11] Substantial compliance does not apply solely to regulatory objectives. The Tribunal must evaluate whether AME substantially complied with the requirements of the regulation at issue. *Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 210 (discussing when substantial compliance applies to "the regulatory requirement at issue").
[12] AME made essentially the same argument in its cross-motion, stating that it "substantially complied with the preauthorization process because EPA possessed all the information required by the application prior to AME beginning work at the Site." AME Motion for Accelerated Order at 65-66.
[13] In any event, EPA was citing to fourteen items (using only six as an example). Clearly this would not have been the comprehensive suite of information required by 40 C.F.R. 307.22(b). Nor did AME or Vertellus ever provide "a proposed schedule for submitting eligible claims against the Superfund" (Response at 18). Only Claim Certificates for draw downs on Site specific funding were submitted – as AME concedes. *Id.*
[14] Citing to 40 C.F.R. 307.22(j), the Tribunal affirmed this distinction, noting that the two processes are substantially different and serve different functions. ALJ Order on Motion to Dismiss at 12.

reason whatsoever to review or accept Vertellus' submission of the requisite "plans and other submissions" for the purpose of evaluating a request for preauthorization. Aff. Newman, ¶ ¶12-17. Not even a clairvoyant could have intuited in 2012 that five years later, in 2017, AME would (belatedly) attempt to seek "preauthorization", let alone file an ineligible claim against the Fund. EPA never had any reason to know, or even suspect that AME might submit a future claim against the Fund for costs associated with the work that was already required to be implemented and funded by Vertellus and other PRPs.

To find in AME's favor could set a dangerous precedent. Such a finding could effectively earmark Superfund resources for projects that EPA had no way of knowing it was approving. A claimant could seek reimbursement years after commencing response actions—a direct contradiction to the regulations themselves.[15] The Superfund would become available to almost anyone on a whim, and EPA would be in no position to serve as a manager of those Funds. Such an outcome is inconsistent with the CERCLA, its implementing regulations, and EPA's fiscal duty to responsibly manage the limited resources of the Fund.

For these reasons, and the reasons that follow, this Tribunal should grant EPA's RMFAD.

EPA Administers the Preauthorization Process in Accordance with the Statute and Regulations

In its response, AME weaves in arguments from its own Motion for Accelerated Order that the entire preauthorization program is arbitrary and capricious because it violates the intent of Congress and is covertly only used by EPA to preauthorize PRPs. Response at 7, 15-16, 19, 27. EPA has disposed of these accusations in detail in its Response to AME's Motion for

[15] To be clear, EPA never "authorized" a future claim against the Fund, either.

Accelerated Order and, for the sake of brevity, will not repeat those arguments here as our response remains the same. *See* EPA Response to AME Motion for Accelerated Order at 28-41.

EPA will, however, address two specific nuances raised by AME in this response. First, AME claims that seeking preauthorization would have been futile[16] because "EPA only preauthorizes PRPs who settle their CERCLA liability with EPA." Response at 24. As explained in our Response to AME's Motion for Accelerated Order, this is a non-justiciable generalized grievance that does not provide standing to challenge the preauthorization process, as it effects all persons equally. *See* EPA Response to AME Motion for Accelerated Order at 36-38. Further, it simply is not relevant here, where the actual controversy presented to the Tribunal is whether AME substantially complied with EPA's preauthorization process, not the validity of the preauthorization process itself. As previously recognized by this Tribunal, AME cannot lean on a futility excuse to "bypass CERCLA's clear regulatory requirement . . . because its own business calculation [to contract with Vertellus] did not pan out." ALJ Order on Motion to Dismiss (Dec. 18, 2017) at 11-12.

The preauthorization regulations themselves make it clear that preauthorization is available to "any person" who intended to make a future claim against the Fund, with limited exceptions. *See, e.g.,* 40 C.F.R. §307.20(a) ("Subject to the provisions of this subpart, claims for the costs of response actions may be asserted against the Fund by *any person* other than the United States Government, States, and political subdivisions thereof, except to the extent the claimant is otherwise compensated for the loss." (emphasis added)). Similarly, the preamble to the final rule explains that preauthorization is intended for "use by any individual, private entity,

[16] AME argues that because EPA is now contracting with, and paying from the Superfund, a different contractor for cleanup work at the Site, it is entitled to payment. Response at 25. This statement, and other actions that EPA has taken at the site since the bankruptcy of the PRPs financially responsible for the Site's cleanup, is entirely irrelevant to the question of whether AME substantially complied with the preauthorization regulations.

potentially responsible party (PRP), or foreign entity eligible to submit a claim pursuant to sections 111(a)(2) or 122(b)(1) of CERCLA." 58 Fed. Reg. 5,460, 5,460 (Jan. 21, 1993). And, as EPA has already pointed out in its response to AME's Motion for Accelerated Order, the accusation that EPA only provides preauthorization to PRPs is factually untrue. *See* EPA Response to AME Motion for Accelerated Order at 41; *see also* Deposition of Richard Jeng at p.21:15-21; EPA's PHE AX 11 (Mohawk PDD).[17]

Second, AME claims in this response that not only should the Tribunal find substantial compliance based on AME's submissions to EPA made when it was acting as a contractor of Vertellus (the party who is actually responsible for paying AME's claim), but that it in fact has a "statutory right" to its claim against the Fund. Response at 22. This is simply false. While the statute authorizes such claims as one of several uses of the Fund, the statute did not create an affirmative "right" for any and all claims to be paid by the Fund. *See* 42 U.S.C. § 9611(a)(2). The Fourth Circuit itself recognized as such in its decision. *August Mack Environmental, Inc. v. EPA*, 841 Fed. Appx. 517, 524-25 ("Our decision today, however, does not mean that August Mack is necessarily entitled to recover on its claim for response costs"). Moreover, the statute explicitly *does* provide EPA with the authority to create "forms and procedures" related to the process of filing a claim. 42 U.S.C. § 9612(b)(1); 40 C.F.R. § 307.10 and § 307.11. It also sets forth another condition precedent for payment of claims: "*[p]rovided, however*, that such costs

[17] AME's Motion to Submit Additional Documents into the Record (filed Nov.11, 2022) purports to set forth the Prospective Purchaser Agreement (PPA) for the Mohawk Tannery Site, for which EPA listed the accompanying PDD as AX 11. Contrary to AME's Motion, the PPA and attached PDD demonstrate that at the time preauthorization was granted, the prospective purchase was neither a liable party nor a potentially liable party under CERCLA – because it had not yet purchased the Site property. Moreover, to be clear, the validity of the preauthorization program is not on trial in these proceedings. See ALJ Order on Requestor's Motion to Compel Discovery and for Sanctions (May 12, 2022) at 9.

must be approved under said plan and certified by the responsible Federal official. 42 U.S.C. 9611(a)(2).[18]

There is no genuine issue of material fact as to whether AME substantially complied with those procedures here; it did not, and its arguments to the contrary are unavailing. For the reasons explained herein, EPA's Motion for Accelerated Decision should be granted.

Respectfully submitted on behalf of EPA's Claims Official,

11/14/22
Date

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[18] This Tribunal has already addressed and dismissed AME's statutory right argument. ALJ Order on Motion to Dismiss (Dec. 18, 2017) at 9 ("Preauthorization is a requirement that is clearly provided for by the statute, which empowers the Agency to 'prescribe forms and procedures' for filing claims"). *Id.* The ALJ also stated that the requirement for approval and certification by the responsible federal official in section 111(a)(2) "is the direct authority for the Agency's preauthorization requirement." *Id.*

CERTIFICATE OF SERVICE

I certify that the foregoing "EPA's Reply in Opposition to AME's Response to EPA's Motion for Accelerated Decision" *in the Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001 ("EPA's Reply"), was filed and served on the Chief Administrative Law Judge Susan L. Biro this day through the Office of Administrative Law Judge's E-Filing System.

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

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