UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CERCLA-HQ-2017-0001
	)	
August Mack Environmental, Inc.	)	EPA'S INITIAL
	)	PREHEARING EXCHANGE
Requestor	)	

EPA'S INITIAL PREHEARING EXCHANGE

Pursuant to 40 C.F.R. § 305.26 of the CERCLA Administrative Hearing Procedures for Claims Against the Superfund ("Part 305 Consolidated Rules of Practice") and in response to Chief Administrative Law Judge Susan L. Biro's September 8, 2021 Order of Redesignation and Prehearing Order ("Prehearing Order"), the United States Environmental Protection Agency ("EPA" or "Agency") and its designated Claims Official, by and through its undersigned attorneys, hereby sets forth its Initial Prehearing Exchange. EPA respectfully reserves its right to supplement this Initial Prehearing Exchange in accordance with 40 C.F.R. § 305.26 and by permission of this Tribunal.

I. WITNESSES

At this time, EPA expects to call as witnesses some or all of the following individuals, whose testimony is expected to include, but may not be limited to, the matters described generally below. EPA reserves the right to revise and supplement the matters to which each witness identified below may testify. EPA anticipates that it may be appropriate to present the testimony of certain witnesses in written or affidavit form. Consequently, EPA reserves the right to seek leave of the Court to present in written or affidavit form, all or part of the testimony of some of the witnesses described below. In addition, EPA anticipates that the parties will be able to stipulate that many of the exhibits are what they purport to be. In the event that parties are unable to so stipulate, EPA reserves the right to present the testimony of the appropriate records custodians or other witnesses, live or in written form, for the sole purposes of establishing that certain documents are what they purport to be. EPA reserves the right to present the testimony of any witness identified herein in as part of EPA's direct case or in rebuttal. Finally, EPA reserves the right to call as witnesses in EPA's direct case or in rebuttal any witness identified in Resquestor's Prehearing Exchange as filed or supplemented.

To the extent that the parties can agree on stipulations and narrow the issues, or the issues are narrowed by accelerated decision, the number of witnesses, and/or length of their testimonies, may be reduced.

1. Eric Newman, RPM
   Environmental Engineer
   US Environmental Protection Agency
   1650 Arch Street (3SD23)
   Phila. PA 19130
   25-814-3237
   Newman.eric@epa.gov

Mr. Newman is employed as a Remedial Project Manager (RPM) in EPA's Superfund Emergency Management Division, Region 3. Since March 13, 2006, his duties as an RPM have included overseeing response activities at the Big John Salvage-Hoult Road Superfund Site (BJS Site), located along the east bank of the Monongahela River in Fairmount, Marion County, West Virginia.

In connection with his role/responsibility as RPM for the BJS Site, Mr. Newman may be called to testify as a FACT WITNESS, either via direct testimony or in rebuttal, with respect to: a) the Removal Administrative Record compiled for the BJS Site (available at www.epa.gov/arweb), including decision documents and related enforcement documents; including a Consent Decree (Civil Action No. 1:08CV124) entered on October 10, 2012 in the U.S. District Court for the Northern District of West Virginia (BJS CD); b.) his oversight function in monitoring, overseeing, and enforcing the terms and conditions of the BJS CD; 3) his receipt, review, and approval/disapproval of pre-design field investigations and preliminary design documents submitted by Settling Defendant (Vertellus), or submitted by the contractor AME, on behalf of Vertellus; 4) any and all action that Mr. Newman undertook to assure compliance with the CD, including correspondence and interactions with Vertellus and/or its contractors.

2. Richard Jeng,
   Environmental Engineer, Construction and Post Construction Management Branch
   Office of Superfund Remediation and Technology Innovation
   1200 Pennsylvania Avenue, Southwest
   Washington, DC 20460

Mr. Jeng is employed as a senior staff member of the Office of Superfund Remediation and Technology Innovation in EPA Headquarters in Washington D.C. where he is currently the chair of the National Risk-Based Priority Panel and is responsible for the national management

of remedial action construction resources for the Superfund remedial program which includes preauthorized mixed funding settlements.

Mr. Jeng may be called to testify as a FACT WITNESS with respect to: a) the scope of his experience in the area of preauthorization and mixed funding; 2) instances since 2017 where EPA has reviewed claims for preauthorized mixed funding, and subsequently recommended approval for reimbursement of claims based on site Preauthorization Decision Documents (PDDs).

3. Silvina Fonseca

Ms. Fonseca is employed as the Senior Technical and Policy Advisor to the OLEM AA in EPA's Headquarters in Washinton, D.C. where she supports and advises the OLEM AA on diverse technical and policy issues related to the implementation of the Comprehensive Environmental Response, Compensation, and Liability Act. From 2000 through 2017, as part of her duties as an Envioronmental Engineer and Team Leader within the Office of Superfund Remeditation and Technology Innovation, Ms. Fonseca managed the national mixed funding program.

Ms. Fonseca may be called to testify as a FACT WITNESS with respect to: a) the scope of her experience in the area of preauthorization and mixed funding; 2) instances since 2000 where EPA has reviewed applications for mixed funding, and subsequently granted approval in the form of a Preauthorization Decision Document (PDD); 3) providing support to the Regions in negotiating Mixed Funding Consent Decrees that incorporate PDDs, including those for the White house, Hows Corner, Iron Horse and Big River Sites.

Upon adequate notice to Requestor, EPA reserves the right to call: a) witnesses listed by Requestor in its Prehearing Exchange and to question the witness as an adverse witness, b) additional witnesses to rebut the testimony of Requestor's witnesses, and c) such other witnesses as otherwise may become necessary.

II. <u>EXHIBITS</u>

EPA intends to introduce the following exhibits at hearing, copies of which are attached hereto in accordance with the OALJ E-Filing System:

Exhibit Number	Description of Exhibit	No. of Pages
AX 1	BJS - River Revised PD - Disapproval Letter 3-31-15	11

AX 2	Vertellus Informs EPA that AME will be its Supervising Contractor	1
AX 3	Hows Corner CD	65
AX 4	River RDWP Submittal 2012	2
AX 5	Acceptance of AugMack Sup Con BJS 11-6-12	1
AX 6	(Reserved)	
AX 7	AME CERCLA Claim Ltr Exxon CBS DEMAND - (8-2016)	94
AX 8	Doe Run CD and PDD	58
AX 9	Work Approval letter to Vertellus 1-6-14	3
AX 10	Hows Corner PDD	7
AX 11	Mohawk PDD	6
AX 12	Newman declaration BJS bankruptcy 9-1-16	4
AX 13	River Preliminary Design Approval - BJS 5-6-15	2
AX 14	River Removal Trust Claim Certificate to EPA 3.21.12	5
AX 15	Iron Horse PDD 9-18-07	13
AX 16	Vertellus POC Claim 397 August Mack	36
AX 17	Whitehouse Consent Decree	322
AX 18	Whitehouse PDD	8

Note: At hearing, EPA may present enlargements of one or more of these exhibits in the nature of demonstrative aids.

Upon adequate notice to Requestor, EPA reserves the right to introduce: a) exhibits included by Requestor in its Initial and Rebuttal Prehearing Exchanges , b) additional exhibits to rebut evidence presented by Requestor, and c) such other exhibits as otherwise may become necessary.

In addition to various reservations set forth above, EPA reserves the right to cite to or incorporate by reference all or part of the judicial dockets and joint appendices that have been established of record by the U.S. District Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit. EPA further reserves the right to amend this Prehearing Exchange upon review of Requestor's Prehearing Exchanges and upon notice to Requestor.

III. <u>TIME NEEDED FOR HEARING AND TRANSLATION SERVICE NEEDS</u>

At this time, Counsel for EPA estimates that the time needed to present its direct case will require not more than one full business day. Complainant does not anticipate that translation services will be necessary in regard to the testimony of any of its witnesses.

IV. NARRATIVE STATEMENT

EPA is hereby providing a narrative statement "explaining in detail the factual and/or legal bases supporting its denial of Requestor's claim to have ***substantially complied*** with the preauthorization process". Order at 4. In the context of this prehearing exchange of information, and the request for "documents in support" thereof, EPA notes that the parties are both in possession of the prior briefs and submittals which have been docketed as part of the Judicial Record before the U.S. District Court for the Northern District of West Virginia and the 4th Circuit Court of Appeals. It is believed that Joint Appendices of these full dockets remain available for download through PACER and other applications. As such, because reproduction of that record is voluminous and accessible to all, EPA is requesting that this Tribunal take some form of judicial notice of the judicial docket at issue, thus allowing the parties to freely refer back to relevant portions of it without having to reproduce the judicial docket anew. To the extent relevant, EPA hereby provides excerpts from the pleadings in the judicial dockets.

A. The "substantial compliance" legal standard applicable to the case at bar

The legal definition of *substantial compliance* is: "compliance with the substantial or essential requirements of something (as a statute or contract) that satisfies its purpose or objective even though its formal requirements are not complied with".[1] Consistent with the 4th Circuit opinion, the doctrine of substantial compliance is a tool designed to "assist the court in determining whether conduct should, in reality, be considered the *equivalent of compliance*." *See Peckman v. Gem State Mut.*, 964 F.2d 1043, 1052 (10th Cir. 1994) (emphasis added). It remains "an equitable doctrine designed to avoid hardship in cases *where the party does all that can reasonably be expected of him*." See *Sawyer v. Sonoma Cnty.*, 719 F.2d 1001, 1008 (9th Cir. 1983) (emphasis added).

B. AME did not substantially comply with the requirement to seek preauthorization.

At the initial stage of litigation before this Court, AME repeatedly acknowledged that it did not intend to seek preauthorized funding of the response action, as required by §§ 307.21 and 307.22, because it expected to be paid by Vertellus. Specifically, AME's Response to EPA's Motion to Dismiss states that, in fact, AME "did not intend to submit a claim to the fund *at the time*" because "AME *never* formed an 'intent' to submit a claim when it began work at the BJS Site" and that "AME had no reason to submit an application for preauthorization to conduct work" ***before*** commencing the response action. AME Response in Opposition to EPA's Motion to Dismiss at 9 (Response)(emphasis added). In its Response, AME claims instead that EPA's preauthorization regulations simply "do not apply to AME," and therefore "AME had no reason to submit an application for preauthorization to conduct work." *Id.* Therefore, without having

[1] "Substantial compliance." Merriam-Webster.com Legal Dictionary, Merriam-Webster, https://www.merriam-webster.com/legal/substantial%20compliance. Accessed 18 Oct. 2021.

formed the intent to seek preauthorization, AME in no way could have attempted to comply with the pre-authorization regulations, let alone substantially complied with them.[2] See discussion, *Infra*.

AME has asserted that preauthorization was not warranted in its situation.[3] As a practical matter, EPA agrees with AME on this point. Given that AME was to be paid by Vertellus for the work it performed at the Big John's Salvage (BJS) Site, 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 at that time because, *inter alia*, §307.23(g) precludes EPA from granting pre-authorization where "…the action is to be performed by a…person operating pursuant to a contract with the United States.". Specifically, AME admits that, "from October 2012…to May 2016," it did work at the BJS Site as a contractor to Vertellus, which was required to perform cleanup activities under the CD. Amended Complaint ¶¶ 10-11. AME also admits that it expected to be paid for that work by Vertellus. *Id*. ¶ 11.[4] AME alleges that, after Vertellus "went broke," AME made claims against Vertelllus in bankruptcy for non-payment during this 43 month period. *Id*. ¶ 12, 15; AME also states that it "requested payment from CBS, and Exxon." *Id*. ¶ 16. When those attempts to obtain payment failed, AME then "requested reimbursement from EPA" (*Id*. ¶ 17) by submitting the subject Application Form on January 12, 2017.

Even through the lens of substantial compliance, it is undisputed that AME never sought and never even attempted to seek preauthorization for the claimed costs. That fact alone disposes of AME's claim for payment from the Superfund pursuant to this Court's *sua sponte* authority established in § 305.27, as no genuine issue of material fact(s) "remain controverted in good faith", and AME has failed to establish its *prima facie* case.

---

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

[3] Amended Complaint ¶ 25(B) ("EPA wrongly concluded that AME was required to submit an application for preauthorization prior to performing work at the BJS Site."). *See also*, ALJ Order on Motion to Dismiss at 11 (addressing AME's claim that it would have been "futile" for AME to seek preauthorization while Vertellus was still viable).

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

C. **It is appropriate that this Tribunal exercise its discretion to apply the "law of the case doctrine" so that AME is not afforded another opportunity to re-litigate this settled issue or its underlying claim**.

The law of the case doctrine forecloses re-litigation of the finding of fact that AME never intended to request preauthorization, either by properly filing EPA's preauthorization application form (Form 2075-3) **before** commencing the response action pursuant to § 307.22, *or otherwise* substantially complying with that requirement by providing EPA the information sought in Form 2075-3, as required under § 307.22(b) and (c). "As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). This Rule of practice promotes the finality and efficiency of the judicial process by "protecting against the agitation of *settled issues*." 1B J. Moore, J. Lucas, & T. Currier, Moore's Federal Practice ¶ 0.404[1], p.118 (1984). "Generally speaking, the 'law of the case' doctrine applies to the principle that where there is an *unreversed decision* of a question of ***law or fact*** made during the course of litigation, such decision settles the question for all subsequent stages of the suit." *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964) (emphasis added). Moreover, "[t]he doctrine applies as much to the decisions of a coordinate court in the same case as to a court's own decisions." *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 816 (1988). The fact that AME did not intend to request preauthorization before October 2012 has been settled by the findings of fact established by this Tribunal, as affirmed by the District Court and these settled issues remain "unreversed" by the 4th Circuit decision. " *Wilson v. Ohio River Co.,* 236 F. Supp. 96; *Id*. Having never intended to request preauthorization, AME could not have attempted to comply with the preauthorization process, let alone substantially comply with it. Therefore, under either a strict compliance standard or a substantial compliance standard, AME's claim that it "satisf[ied] the intent of the preauthorization process" has no merit because AME utterly failed to attempt to comply with the preauthorization process.[5]

1. **The Courts are unified as to the relevant facts and regardless of whether the strict compliance or substantial compliance standard is applied, the result is the same: AME never requested preauthorization.**

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

> ***The Company states that it never had the intent to submit a claim when it started work at the Site because it expected to be paid by Vertellus…Undoubtedly this is true***. But August Mack reads a limitation into "intending" that does not exist. If a person intends to submit a claim to the Fund, it must first take certain steps to obtain preauthorization. At some

[5] As to the other elements of AME's *prima facie* case – these issues also remain settled, affirmed by the District Court, and were neither reversed by the 4th Circuit nor remanded; and remain the law of the case.

> point in time, presumably after learning of Vertellus's bankruptcy, August Mack formed an intent to submit a claim to the Fund. At that point, and prior to submitting a claim, August Mack was obligated to obtain preauthorization. ***The unfortunate consequence of August Mack's business relationship with Vertellus is that by the time it formed an intent to obtain preauthorization, it was impossible for August Mack to do so***. But the timing of August Mack's intent to submit a claim does not render the preauthorization requirement inapplicable. If it did, then any person could submit a claim to the Fund after the fact for work it had already performed, *rendering the preauthorization requirement meaningless. Given that preauthorization is at the heart of the regulatory procedure for filing a claim, this result is absurd*. In this instance, August Mack may not have intended to submit a claim to the Fund prior to commencing the work, but that does not excuse the company from obtaining preauthorization. Rather, it highlights the reality that it is too late for the company to submit a claim against the fund for work that was not preauthorized.

EPA Order on Motion to Dismiss (Order) at 10-11 (emphasis added). In addressing AME's argument that seeking preauthorization while Vertellus was still viable would have been "futile", this Court opines that "when August Mack entered into a subcontracting agreement with Vertellus, it voluntarily placed itself in a position to receive payment from Vertellus ***and did not seek preauthorization for payment from the Fund***. August Mack cannot, after the fact, raise a futility excuse because its own business calculation did not pan out." Order at 11-12 (emphasis added). *Hence, it is well settled by this Court that AME could not possibly have complied with the essential or substantial requirement to seek preauthorization by filing the equivalent of an application, or otherwise*. Without a time machine, it is simply impossible that AME could have done so.

The District Court affirmed the ALJ's decision in this regard, stating "it is undisputed that AME did not obtain preauthorization and, thus, did not fulfill the statutory and regulatory requirements. In fact AME admits that it expected to be paid by Vertellus or the site-specific fund, rather than by the Superfund." Dist. Crt. Order Granting Motion to Dismiss Amended Complaint at 8. As to the 4th Circuit's directive to apply the concept of substantial compliance to the issue on remand, the District Court acknowledges that "**AME argues that it *substantially complied* with the requirements and policy of the preauthorization scheme**…" Id. at 9. However, after consideration of AME's substantial compliance argument on preauthorization, the District Court concludes that "*AME failed to seek preauthorization* as required by the governing statute [sic] regulations…[and] AME's substantial compliance argument has no merit because this [failure to seek preauthorization] is not a mere technical oversight on AME's behalf; it is an outright failure to attempt to comply with clear federal regulations" *Id*. at 10.

The 4th Circuit similarly concludes that: "In this situation, August Mack did not seek or obtain an express preauthorization [PDD] from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 *or otherwise*." Id. at 10 (emphasis added). Thus, the fact that AME did

not seek or obtain preauthorization expressly or otherwise, is an "unreversed decision" of a question of fact made during the course of litigation. *Wilson v. Ohio River Co.*; *Id.* Therefore, in applying a substantial compliance standard to this matter in light of that unreversed finding of fact – that AME did not seek preauthorization expressly or otherwise, AME's claim must fail because it never attempted to comply with the pre-authorization regulations, let alone substantially comply with them.

Finally, although the law of the case doctrine may, *arguendo*, not apply where there are "changed circumstances or unforeseen issues not previously litigated" *(Arizona, Id*. at 619), AME has failed to provide new evidence (in the form of a PDD) to prove it was preauthorized under Part 307; and the Courts in this on-going litigation have already decided that AME did not obtain preauthorization, therefore the law of the case doctrine remains central to further adjudication of this matter. *See e.g. Eagle v. WGAY/WWRC*, No. CCB 94-3202, 1996 WL 1061102, at *4 (D. Md. Sept. 5, 1996)(where defendants tried to argue that plaintiff's charge of discrimination was not timely the court applied the law of the case doctrine because the district court had already decided that the charge was timely and *defendants failed to provide new evidence to show otherwise*)(emphasis added). Here, the 4th remand and vacature is narrowed only to the issue of whether AME substantially complied with the preauthorization process. All other aspects of this Court's decision, as affirmed by the District Court, remain the law of the case per *Arizona v. California* and its progeny. *Graves v. Lioi*, 930 F.3rd 307, 318 (4th Cir. 2019).

D. Principals of judicial estoppel and equitable estoppel should be applied by this tribunal to assure that AME does not continue to change its position from its prior position on the remanded issue at bar.

At the initial stage of litigation before this Court, AME acknowledged that it did not request preauthorized funding of the response action because it expected to be paid by Vertellus. Response at 9; Hearing Request at 20 (affirming that "AME had no reason to seek preauthorization"). This Court responded by stating "[u]ndoubtedly this is true." ALJ Order on Motion to Dismiss at 10. *See also*, EPA AX 16 (contract with Vertellus). After gaining the Court's reliance on this settled issue, but having lost its case at the administrative stage, AME subsequently relied on a different argument in its Response in Opposition to the EPA's Motion to Dismiss before the U.S. District Court for the Northern District of West Virginia. In its subsequent Response before Judge Thomas Kleeh of the Northern District of West Virginia, AME shifted tack by arguing that "EPA's current preauthorization process is obsolete and invalid *and may not be used to block AME's access to the Fund*". Response at 5 (emphasis added). AME goes on to say "…and there is currently no clear process AME can discern for meeting EPA's 'preauthorization' requirements…[c]learly, if EPA intended the parties seeking preauthorization to apply using Form 2075-3, it should have revised the Form to identify not only the appropriate office, but at very least the correct address. That the agency could not be bothered to alter the Form demonstrates just how obsolete and irrelevant the EPA's preauthorization process has become." Response at 2-3, 11.

After losing on this issue before this Tribunal, AME hoped for a better result by using the outdated application form as a *post-hoc* excuse for never seeking preauthorization.[6] That argument, however, is contrary to AME's original position – that AME never attempted to seek preauthorization in the first place because, indeed, Vertellus was contractually obligated to pay AME for the work at issue. AME could not have logically or lawfully sought preauthorization for the recovery of the same costs from the Superfund at that time, as it would have been asking to be paid twice for the same work. It is appropriate here to bar AME from later arguing that it was EPA's obsolete application form which blocked AME from seeking reimbursement from the Fund.

Judicial estoppel "generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Zedner v. United States*, 547 U.S. 489, 504 (2006)(quoting *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). It is an equitable doctrine so there is no precise test for when it applies, but courts often weigh several factors: 1) "a party's later position must be clearly inconsistent with its early position", 2) "whether the party has succeeded in persuading a court to accept that party's earlier position," and 3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Id.* (quoting New Hampshire, 532 U.S. at 750-751). Factors 1 and 2 have been met, and factor 3 is also satisfied because if AME prevails in presenting inconsistent or contrary reasons for not seeking preauthorization, it will impose an unfair detriment on EPA by focusing on work AME performed under a contract with Vertellus rather than on AME's decision to forego the preauthorization process because it was to be reimbursed by Vertellus, per contract. The 4th Circuit has embraced the doctrines of judicial and equitable estoppel. For example, in *Allen v. Zurich Ins. Co*., the Court held that a plaintiff who successfully argued that he was the employee of an insured party and obtained a judgement in his favor based on that argument could not later argue he was a joint-venturer with the insured party to achieve a new judgement in his favor. *Allen v. Zurich Ins*. Co. 667 F.2d 1162, 1163, 1167 (4th Cir. 1982).

This tribunal has in effect already rejected AME's alternative position without invoking judicial or equitable estoppel, stating that "[w]ith or without a standardized form, there is clear notice of the information that must be submitted.[7] And, in this case, the fact that the form is 'expired' lends no support to August Mack's argument because it never sought to use the form for preauthorization prior to commencing work at the Site." ALJ Order on Motion to Dismiss at 10 (footnote omitted). Nonetheless, application of judicial or equitable estoppel is still important given that this issue may be revived on appeal, and AME may continue to assert contrary or conflicting positions with respect to why it never sought preauthorization.

---

[6] AME did figure out how to use this form, albeit incorrectly, when it attempted to file its claim in January 2017.

[7] It is believed that the Court is referring to § 307.22(b) and (c)(setting forth the requisite information that AME must otherwise provide when requesting reimbursement from the Fund prior to commencing work)

E. **AME did not substantially comply with the preauthorization process because it failed to do "all that can reasonably be expected of [it]."** [8]

Notwithstanding the strict regulatory directive under 307.22 to submit an application for pre-authorization for EPA's approval or disapproval, as a practical matter, and in reality, EPA's program office (OSRTI) does not require that an applicant "strictly comply" with the outdated mailing instructions on the form. To the contrary, appropriate EPA personnel assure that the applicant re-directs the application to the correct mailing address, EPA office, and point of contact within OLEM/OSRTI. Often this is done in the context of negotiations for cleanup of the Site, as required by Part 307.[9] So, ironically, it is EPA that encourages "substantial compliance" by re-directing the application to assure proper receipt and consideration. Therefore, the outdated mailing instructions on the form have never barred or precluded *anyone* from otherwise submitting proper notification and application to EPA; to wit, EPA has approved numerous applications in this manner since 1995, and has provided PDDs and mixed funding consent decrees accordingly. See US 4th Circuit "Brief for the Appellee" at 21, foot note 3. *See also* AX 3, 8, 10, 11, 15, 17, 18. AME's claim that it could not have applied for preauthorization is false, as it flies in the face of numerous other applicants who have substantially complied with the process by using a telephone or search engine to find the relevant EPA office and contact information, or by properly entering into negotiations with EPA pursuant to § 307.23(h). Indeed, the only thing barring AME from seeking preauthorization was AME itself, and its contractual obligation to submit monthly invoices for approval and payment by Vertellus pursuant to its contract. *See* AX-16 (Exhibit AA to Proof of Claim; ¶ 3.0 (Compensation; Reimbursement of Expenses).

F. The issue at bar is moot, as is AME's cause of action.

The preauthorization process requires, *inter alia*, that the following three elements be satisfied:

1) Submission of an "application for preauthorization (EPA Form 2075-3, found at appendix A of this part) to the Administrator or his designee; 40 C.F.R. § 307.22(a);
2) EPA's "review and analysis of the application," *Id*. § 307.14; and,
3) Issuance of EPA's approval in the form of a "Preauthorization Decision Document" that sets forth the "terms and conditions for reimbursement," *Id*. § 307.14.[10]

---

[8] *Sawyer vs. Somona Cnty*. 719 F 2d. 1001, 1008 (9th Cir. 1983)

[9] See 307.23(h)(EPA will deny preauthorization to a person whom the Agency believes is a liable party under Section 107 of CERCLA unless negotiations are underway aimed at reaching a judicial or administrative settlement).

[10] EPA is not bound to approve every request for Fund money. It's decision to obligate Fund monies is a discretionary action by the Agency taken on the basis of certain determinations. *See* § 307.23(b)(setting forth a non-exclusive list of criteria that EPA may consider in its decision); *See* § 307.23(a) ("EPA shall review each

Only if all three conditions precedent are completed "before commencing a response action" is a claim preauthorized pursuant to Part 307. *Id*. § 307.22(a); § 307.14 (defining process of *preauthorization*). Only preauthorized response actions are eligible for reimbursement through the claims process of section 112 of CERCLA. *Id*. § 307.11; § 307.22. If an applicant's request for reimbursement from the Fund is preauthorized, costs are only eligible for potential reimbursement when, *inter alia*, "the costs are incurred for activities within the scope of EPA's preauthorization." *Id.* § 307.21(b(1) and (2). All of EPA's decisions to grant preauthorization *must be* memorialized in a Preauthorization Decision Document (PDD), which sets forth the terms and conditions (scope) for reimbursement. *Id*. § 307.14 (*Preauthorization* definition); § 307.23(a)(decisions to grant preauthorization will be memorialized in a PDD). If EPA decides to grant preauthorization, the applicant may only begin the approved response action subject to the terms and conditions contained in the PDD (i.e. those terms include, *inter alia*, the amount of money that EPA decides to potential make available to the applicant if it conducts the defined work in compliance with the NCP; audit procedures for assuring that the costs are necessary costs pursuant to 307.11, etc.). *See* § 307.23(e); § 307.21(b). Despite AME's belated challenge to this preauthorization process, the United States Court of Appeals for the District of Colombia found no merit in a challenge to the regulatory preauthorization process nearly 30 years ago. *See Ohio v. EPA*, 838 F. 2d 1325 (D.C. Cir. 1988).[11] See also ALJ Order on Motion to Dismiss at 9-10 (affirming holding in *Ohio, Id.*).

The narrow issue on remand pertains to the first element listed above: whether AME *substantially complied* with the requirement to submit an application for preauthorization. If it is found that AME did not substantially comply with the requirement to apply for *or otherwise request* preauthorization, then this ends the preauthorization inquiry mandated by the 4th Circuit, and AME's claim is *per se* ineligible for adjudication under Part 305, and the enabling statutory provisions of 111(a)(2) and 112 of CERCLA. If, on the other hand, it is found that AME did substantially comply with the requirement to submit an application for preauthorization, AME's claim is still ineligible for adjudication under Part 305, and the enabling statutory provisions of 111(a)(2) and 112 of CERCLA, because it has been unanimously decided that EPA did not grant AME preauthorization (and the absence of a PDD being dispositive of this fact)[12]; thus it is not relevant whether AME is found to have substantially complied with its obligation to request reimbursement from the Superfund. Hence, without approval by EPA in the form of a PDD, AME is not preauthorized to assert its claim against the Fund, and therefore AME's claim is moot, and the issue before this Court is academic. *See Sigma Chi Fraternity v. Regents of University of Colo*., 258 F. Supp. 515, 523 (D. Colo. 1966)(holding that when a an action "no longer presents a justiciable controversy because the issue involved has become academic or

---

preauthorization application and will notify the applicant of the decision to grant or deny preauthorization. Decisions to grant preauthorization will be memorialized in a PDD").

[11] The Court in *Ohio v. EPA* upheld the language of 40 C.F.R. § 307.22.

[12] See ALJ Order on Motion to Dismiss at 8; US District Court Order Granting Motion to Dismiss Amended Complaint at 8 (holding "[I]t is undisputed that AME did not obtain preauthorization and, thus did not fulfill the statutory and regulatory requirements"); 4th Circuit Unpublished Opinion at 10 ("In this situation, August Mack did not seek or obtain an express preauthorization from the EPA before its cleanup of the BJS Site, by using EPA Form 2075-3 or otherwise").

dead," or "a judgement, if rendered, will have no practical legal effect upon the existing controversy," it is moot). Even a favorable decision on substantial compliance will not entitle AME to relief. *See also Murphy v. Hunt,* 455 U.S. 478, 481-82 (1982)(holding that plaintiff's claim for pre-trail bail became moot after he was convicted because "even a favorable decision on [his bail claim] would not have entitled [plaintiff] to bail").

1. **EPA's decision to make funds available for payment to a party is a discretionary function, not a mandatory duty.**

however, EPA's decision to make funds available for payment to a party is a discretionary function not subject to judicial review under CERCLA § 122(b)(3); as such, AME's claim is moot and its Request for Hearing must be dismissed. CERCLA provides that payment of any claims must be approved and certified by the Agency, and the statute empowers the Agency to establish the forms and procedures for such approval. *See* CERCLA Sections 111(a)(2) and 112(b)(1), 42 U.S.C. §§ 9611(a)(2), 9612(b)(1). As such, EPA is not bound to approve every request for Fund money. Its decision to obligate Fund monies is a discretionary function by the Agency taken on the basis of certain considerations, some of which are referenced herein, and some of which are referenced in this Tribunal's Order on Motion to Dismiss. *See e.g.* ALJ Order on Motion to Dismiss at 8. *See also* § 307.23(b)(setting forth a non-exclusive list of criteria that EPA *may* consider in its decision to grant or deny a request for preauthorization); *See* § 307.23(a) ("EPA shall review each preauthorization application and will notify the applicant of the *decision to grant or deny preauthorization*. Decisions to grant preauthorization will be memorialized in a PDD") (emphasis added); § 307.23(c) ("the Administrator may grant preauthorization for all or part of proposed response action); § 307.23(c)(1)-(4) (the Administrator may set a limit on the amount that may be claimed as reimbursement from the Fund; the Administrator may condition its decision to grant preauthorization on a host of other factors set forth in this subsection, at the discretion of EPA).[13]

In this instance, had AME substantially complied with the requirement to submit an application for preauthorization, given the established facts of the case, EPA would have been barred from granting preauthorization pursuant to § 307.23(g)(precluding preauthorization where the action is otherwise to be performed by a person (i.e. Vertellus) "operating pursuant to a contract with the United States". Thus, Unless claimants allege abuse of discretion, courts will not typically order the EPA to perform discretionary functions, only non-discretionary functions. *American Canoe Ass'n Inc. v. U.S. E.P.A.*, 30 F. Supp.2nd 908, 918 (E.D. Va. 1998)("The decision whether to approve or disapprove an agency's 303)d) submission appears to be a discretionary one, and so not reviewable under

[13] In the initial adjudication before this Tribunal, AME concedes that preauthorization is a discretionary act: "AME asks why won't Region III allow AME access to the Fund to reimburse these costs. § 307.22(j) certainly suggests EPA has the discretion to do so." AME Request for Hearing at 24.

the citizen suit provision of the Clean Water Act, which only permits challenge of "any act or duty under this chapter which is not discretionary with EPA."); *Murphy Energy Corporation v. Administrator of Environmental Protection Agency*, 861 F.3r 529, 536 n.3 (4th Cir. 2017)("[T]he evaluation duty…includes investing threatened plant closures or reductions in employment allegedly resulting from [Clean Air Act] administration or enforcement.. [h]owever, Section 321(a) explicitly notes that these investigations need only be conducted 'where appropriate,'…and thereby renders them a matter of agency discretion unreviewable under Section 304(a)(2)").

Courts cannot step into the role of EPA and make discretionary decisions. In *Gulf Restoration Network v. McCarthy*, the Court held that the district Court's order for the "EPA to conduct a necessity determination in response to Plaintfiffs' rulemaking petition" was in error "[b]ecause the agency had the option of declining to make a necessity determination." *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015). Here, AME cannot request this Court to order the EPA to make Fund financing available to AME, because the decision to commit and disburse these funds is a discretionary function of the Agency as the steward of the Fund. Congress also reinforced this common law principle, forbidding judicial review, stating "[t]he President's decisions regarding the availability of Fund financing under this subsection shall not be subject to judicial review under subsection (d) of this section." CERCLA Section 122(b)(3), 42 U.S.C. § 9622(b)(2).

G. AME's narrative statement does not provide new evidence or legal argument as to how it substantially complied with the requirement to submit an application requesting preauthorization.

AME's narrative statement seems to imply that Vertellus's required submittal of workplans for EPA review and approval constitutes AME's substantial compliance with the preauthorization process. [14] They do not. Every document that AME proffers in its prehearing exchange evidence that rather than seeking or requesting any form of implied or express preauthorization, AME was simply fulfilling its duty as a supervising contractor on behalf of Vertellus, *and not otherwise independently seeking preauthorization on its own behalf*. [15] AME submitted the subject work to EPA on behalf of Vertellus as required by the contract between

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

[15] Indeed paragraph 79 of the BJS CD, coupled with § 307.22(j), bar AME from re-purposing the CD as a mechanism for establishing any element of preauthorization: "Nothing in this consent decree shall be construed to create any rights in, ***or grant any cause of action to***, any person not a Party to this Consent Decree." *Id*. at 77 (emphasis added). See also 4th Circuit Opinion at 11, footnote 5 (affirming same, and holding that "nothing in the Decree provides August Mack with the right to recover from the Special Account"). It stands to reason that the same logic holds true for AME's cause of action against the Fund.

Vertellus and AME. The work at issue evidence AME's contractual obligation to Vertellus for which AME was to be paid by Vertellus, not EPA. AME admittedly never intended to seek reimbursement from the Fund until approximately January 2017 -- because during the relevant time period of its claim (October 2012 to May 2016), AME was to be paid by Vertellus for the work AME performed. Accordingly, the pre-design and design-related workplans submitted to EPA on behalf of Vertellus prior to 2017 cannot equate to substantial compliance with a request for preauthorization since AME never formed the intent to seek reimbursement from the Fund until after January 2017 -- after AME failed to receive reimbursement from Vertellus and the other non-Performing Settling Defendants. *See* AME's Request for Hearing at 16; *Id*. at 20 (stating "AME had no reason to seek preauthorization …Indeed it was EPA's unexpected—and arbitrary – [2/8/2017] refusal to reimburse AME from the site-specific funds which forced AME to submit its claim against the Fund"). *See also* ALJ Order on Motion to Dismiss at 10 (inclusive of footnote). It has been unanimously settled by the Courts that AME had no right to seek or obtain reimbursement from the site-specific funds, and nor would that excuse AME from seeking and obtaining preauthorization in any event. "Rather, it highlights the reality that it is too late for the company to submit a claim against the Fund for work that was not first preauthorized." *Id*. at 11.

Respectfully submitted,

____________ ______________________

Date

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

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

CERTIFICATE OF SERVICE

I certify that the foregoing Agency's Prehearing Exchange in the *Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-00001, 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 Prehearing Exchange 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.

____________ _________________________________

Date

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