UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CERCLA-HQ-2017-0001
	)	
August Mack Environmental Inc.	)	EPA'S MOTION FOR
	)	ACCELERATED
	)	DECISION
	)	
Requestor	)	

MEMORANDUM OF LAW IN SUPPORT OF AGENCY'S MOTION FOR ACCELERATED DECISION ON THE ISSUE OF WHETHER AME SUBSTANTIALLY COMPLIED WITH THE PREAUTHORIZATION PROCESS

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I. INTRODUCTION

The United States Environmental Protection Agency ("Agency" or "EPA") hereby submits this Memorandum of Law in support of its Motion for Accelerated Decision in this matter, and hereby affirms that the foregoing submittal is consistent with this Tribunal's Order of Redesignation and Prehearing Order dated September 8, 2021 ("ALJ Prehearing Order"), and the CERCLA Administrative Hearing Procedures for Claims against the Superfund set forth at 40 C.F.R. Part 305 ("Rules of Practice" or "Rules"). This matter pertains to a proceeding under Sections 111(a)(2) and 112(b)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9611(a)(2) and 9612(b)(2), and the Agency's implementing regulations set forth at 40 C.F.R. Part 307, which contain the relevant CERCLA claims procedures.

By way of introduction, the preauthorization requirement set forth in 40 C.F.R. Part 307 is important so that EPA can manage the limited amount of moneys in the Fund, and assure that those moneys are spent in the most appropriate way.[1] EPA explained when promulgating the reimbursement regulations that "[t]the preauthorization requirement is necessary for proper Fund management, to ensure that Fund monies be available for the most urgent priorities." 50 Fed. Reg. 5862, 5873 (Feb.12, 1985). *See also*, nt.1. EPA must weigh the "importance of the [proposed] response activity when compared with the competing demands of the Fund." 40 C.F.R. § 307.23(b)(2). The D.C. Circuit confirmed that important EPA Role when it upheld EPA's preauthorization)requirements, noting: "EPA is required to serve as the protector and distributor of scarce government resources." *State of Ohio v. EPA*, 838 F.2d 1325, 1331 (D.C. Cir. 1988). To that end, EPA's regulations require a prospective claimant to fulfill certain requirements "before commencing a response action." 40 C.F.R. § 307.22(a). Chief among these is the submission of an "application for preauthorization." *Id.* & 40 C.F.R. § 307.14. Based on the pleadings and related documents set forth in both the administrative and judicial dockets, the facts and law set forth herein, the Agency seeks an Order on Accelerated Decision affirming that: 1) August Mack Environmental; Inc. ("AME" or "August Mack") did not substantially comply with the preauthorization process in 40 C.F.R. Part 307 required for reimbursement from the Superfund; and 2) AME's request for payment from the Superfund is therefore denied, and AME's Request for Hearing is dismissed with prejudice.

[1] Among other things, "[p]reauthorization…enables the Agency to…fulfill its role as Fund manager by ensuring appropriate uses of the Fund. In this way, Fund money available for claims is expended in accordance with environmental and public health priorities. Because the number of incidents that may give rise to claims is large, and because remediating a single incident can involve considerable expense, it is essential that the Agency screen possible claims to determine the importance of the response action that may be undertaken relative to other response needs." 54 FR 37892, 37898 (Sept.13, 1989)

II. PROCEDURAL HISTORY

As notated in the ALJ Prehearing Order, the matter at bar was previously before this Court in 2017, after EPA denied AME's claim for payment from CERCLA's Superfund ("the Fund") for CERCLA related work the company performed on behalf of Vertellus, pursuant to the Big John Salvage Consent Decree ("Decree" or "Consent Decree"). On December 18, 2017, following AME's request for a hearing on the denial of its claim, this Court granted EPA's Motion to Dismiss AME's claim for payment. *See* EPA Order on Motion to Dismiss ("Order").[2] The Order served as the final administrative decision of the Agency, and AME thereafter appealed the decision by filing a complaint in federal district court. *August Mack Envtl., Inc.. v. EPA*, No.1:18-CV-12 (N.D. W.Va. filed January 17, 2018; as amended June 1, 2018). The District Court upheld the Tribunal's Order. *See Id.* (Order Granting Motion to Dismiss Amended Complaint (July 11, 2019).[3] August Mack then appealed the District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit. *August Mack Envtl., Inc. v. EPA*, No. 19-1962 (4th Cir. Filed Sept. 5, 2019). On January 7, 2021, the Court of Appeals issued an Opinion vacating the District Court's order. The Court ruled that "it was legal error for the EPA to require *strict* compliance with its preauthorization process in order for [AME] to prove its Superfund claim" and remanded the case "for further administrative proceedings" to assess whether AME "*substantially* complied with the preauthorization process". *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 524-25 (4th Cir. 2021 (emphasis added).[4] Thereafter, the District Court ordered the case be remanded to this Tribunal for further proceedings consistent with the Fourth

[2] The administrative procedural history, which does not bear further repeating, is set forth in the Court's Order. *Id*. at 1-2.
[3] All subsequent references to the U.S. District Court Order are citations to the Order downloaded from the Pacer system, and identified as document 46 in the Court's docking system.
[4] If EPA grants a request for preauthorization, the preauthorization process results in an approval document ("Preauthorization Decision Document" or "PDD") from EPA that sets forth the terms and conditions for potential reimbursement of any preapproved costs, as outlined in 40 C.F.R. Part 307.

Circuit Opinion. *See August Mack*, No. 1:18-CV-12 (N.D. W.Va. Aug.3, 2021) (Order on Joint Motion for Remand to the U.S. Environmental Protection Agency).

The Tribunal received the District Court's remand order on August 16, 2021. On August 27, 2021, counsel for AME filed a notice of Appearance and a Request for Prehearing Conference pursuant to 40 C.F.R. § 305.26. Finding that no formal prehearing conference was necessary, the Court denied AME's request, and issued a detailed prehearing schedule in lieu thereof. ALJ Prehearing Order at 2. At the same time, the Court framed the scope of the subject administrative adjudication as follows: "[h]aving reviewed the [Fourth Circuit] Opinion, it is this Tribunal's position that the only issues that require further administrative consideration are whether August Mack "substantially complied" with the preauthorization process described in 40 C.F.R. pt. 307 and, if so, whether its request for payment from the Superfund should be granted." Order at 2 (nt.2).[5]

III. APPLICABLE LAW AND REGULATIONS

A. Substantive Law

Congress enacted CERCLA, 42 U.S.C. §§ 9601-75 (as amended), in 1980 in response to the serious environmental and public health problems posed by the disposal of hazardous substances, exemplified by sites such as Love Canal. *See Dedham Water Co. v. Cumberland Farms Dairy, Inc*., 805 F.2d 1074, 1081 (1st Cir. 1986). It's overriding purpose is "to protect and preserve public health and the environment by facilitating the expeditious and efficient cleanup

[5] The parties have already stipulated to the Court's understanding of the Fourth Circuit Opinion, stating jointly 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* Superfund reimbursement." Joint Motion for Remand to U.S. Environmental Protection Agency (July 22, 2021) at 2, ¶3 (emphasis added). Per this Court's directive, this remains the only unresolved issue for remand and further consideration.

of hazardous waste sites," *Pritikin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001), while at the same time "placing the ultimate financial responsibility for cleanup on those responsible for the hazardous waste." *Wash. State Dep't of Transp. V Wash. Natural Gas Co*., 59 F. 3d 793, 799 (9th Cir. 1995). To enable EPA to carry out these goals, Congress created the Fund, known as "the Superfund"[6], to finance federal cleanup actions.

The statute grants the Agency "'broad power to command . . . private parties to clean up hazardous waste sites by or at the expense of the parties responsible for the contamination.'" *In re Idaho Conservation League*, 811 F.3d 502, 506 (D.C. Cir. 2016) (quoting *Gen. Elec. Co. v. Envtl. Prot. Agency*, 360 F.3d 188, 189 (D.C. Cir. 2004)). "CERCLA also authorizes EPA to undertake 'response actions' — using funds from the Hazardous Substance Superfund[7] — when there is a release or substantial threat of release of a hazardous substance, pollutant, or contaminant." *Id.* The Agency may then "replenish the expended funds through a cost recovery action against the parties responsible for the release." *Id.* (citing 42 U.S.C. § 9607(a)).

Section 111 of CERCLA, as amended, describes the purposes for which the Fund and its limited appropriations may be expended. 42 U.S.C. § 9611. Specifically, it authorizes payments from the Fund for certain enumerated purposes, including – in certain circumstances - reimbursement of private parties for clean-up costs. In particular, Section 111 directs that money in the Fund shall be used for "[p]ayment of any claim for necessary response costs incurred by any other person[8] as a result of carrying out the national contingency plan[9] . . . : *Provided,*

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[6] The Superfund was originally established under 221 of CERCLA, but in 1986 Congress repealed that provision and amended the IRS Code to the same end. See 26 U.S.C. § 9507 (part of the Superfund Amendments and Reauthorization Act).

[7] The Fund is held in the Treasury of the United States pursuant to 26 U.S.C. § 9507.]

[8] Under CERCLA, the term "person" includes corporations. 42 U.S.C. § 9601(21).

[9] The "national contingency plan" is the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"), which "provides the organizational structure and procedures for preparing for and responding to discharges of oil and

however, That such costs must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. § 9611(a)(2). Section 112 of CERCLA outlines the procedures for a person to assert a claim against the Fund for response costs incurred. 42 U.S.C. § 9612. Specifically, it defines the broad requirements with which a person must comply before making a claim and further authorizes the Agency to "prescribe appropriate forms and procedures" for filing such claims. 42 U.S.C. § 9612(b)(1).[10]

Consequently, the Agency has promulgated regulations at 40 C.F.R. Part 307 that "prescribe the appropriate forms and procedures" for making a claim against the Fund. *See* 40 C.F.R. § 307.10. These regulations set baseline requirements that must be met before a claim is eligible for reimbursement:

> (1) The response action is preauthorized by EPA pursuant to § 307.22;
> (2) The costs are incurred for activities within the scope of EPA's preauthorization;
> (3) The response action is conducted in a manner consistent with the NCP; and
> (4) The costs incurred are necessary costs pursuant to § 307.11 of this part.

40 C.F.R. § 307.21(b). "Preauthorized" and "preauthorization" are terms that carry defined regulatory meanings and that demand a claimant take certain specified actions before receiving payment from the Fund:

> *Preauthorization* means EPA's prior approval to submit a claim against the Fund for necessary response costs incurred as a result of

releases of hazardous substances, pollutants, and contaminants." *See* 40 C.F.R. § 300.1. The NCP is required by Section 105 of CERCLA, 42 U.S.C. § 9605, and by Section 311(d) of the Clean Water Act ("CWA"), 33 U.S.C. § 1321(d), as amended by the Oil Pollution Act of 1990, Pub. L. 101-380. *See* 40 C.F.R. § 300.2. Among other roles, the NCP provides procedures for undertaking response and removal actions under CERCLA and the CWA. *See* 40 C.F.R. § 300.3(b)(3)-(4).

[10] Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA. Authority for the payment of claims for response costs is provided by section 111(a)(2) of CERCLA. Authority for the reimbursement of certain costs incurred by the parties to a settlement agreement entered pursuant to section 122 of CERCLA is provided by section 122(b) of CERCLA. 40 C.F.R. § 307.11.

> carrying out the NCP. The process of preauthorization consists of three steps:
>
> (1) EPA's receipt of the application for preauthorization;
> (2) EPA's review and analysis of the application; and, if granted,
> (3) EPA's issuance of the Preauthorization Decision Document, which sets forth the terms and conditions for reimbursement.

40 C.F.R. § 307.14. "*Preauthorized* response actions are response actions approved through the preauthorization process." *Id.* If EPA receives a timely application for preauthorization *prior to the commencement of any proposed response action*, EPA then exercises its discretionary function to either grant or deny the application. 40 C.F.R. §307.22(a). Specifically, "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 [Preauthorization Decision Document] PDD. 40 C.F.R. § 307.23(a). "If EPA grants preauthorization, the applicant may begin the approved response action subject to the terms and conditions contained in the PDD." 40 C.F.R. § 307.23(e).

Completing the preauthorization process requires the claimant to fulfill essential requirements "*before commencing a response action*." 40 C.F.R. § 307.22(a) (emphasis added). In fact, "[n]o person may submit a claim to the Fund for a response action unless that person notifies the Administrator of EPA or his designee *prior to taking such response action and receives preauthorization by EPA*." 40 C.F.R. § 307.22(a)-(emphasis added); *see also* 40 C.F.R. § 307.11 ("Only response actions that EPA has preauthorized are eligible for reimbursement through the claims process of section 112 of CERCLA."). Because the claimant must "[o]btain the approval of the Administrator…before initiating the response action", the entire "preauthorization" process must be completed and effectuated prior to undertaking any proposed response action. 40 C.F.R. § 307.22(a)(3).

B. Procedural Law

After a claim is filed against the Fund, and the Agency "declines to pay all or part of the claim, the claimant may, within 30 days after receiving notice of the . . . decision, request an administrative hearing." 42 U.S.C. § 9612(b)(2) All administrative proceedings for the total or partial denial of claims asserted under Section 111(a)(2) of CERCLA, 42 U.S.C. § 9611(a)(2), are governed by 40 C.F.R. Part 305 ("Rules"). 40 C.F.R. § 305.1. The claimant bears the burden of proving its claim, both as to presentation and persuasion, by a preponderance of the evidence. 42 U.S.C. § 9612(b)(3); 40 C.F.R. § 305.33.

The Rules additionally provide that upon motion of any party or *sua sponte*, this Tribunal "may at any time render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [s]he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law." 40 C.F.R. § 305.27(a). An order of dismissal "constitutes the final order of the Presiding Officer." 40 C.F.R. § 305.27(b).

IV. FACTUAL BACKGROUND[11]

The Big John's Salvage-Hoult Road Superfund Site ("BJS Site" or "Site") is a 38-acre former industrial property used for coal tar refining, salvage operations, and waste disposal. It is located in Marion County, West Virginia near the east bank of the Monongahela River. Parties that have been identified as potentially responsible for contaminating the Site include

[11] The facts are derived from the pleadings in this matter, principally the Court's Findings of Fact set forth in the Order (Order at 2-3), the subject BJS RD/RA Consent Decree at 2-6 (RX # XXX; *See also* Amended Complaint filed June 1, 2018, Ex.A)("Consent Decree").

ExxonMobil Corp., CBS Corp., and Vertellus Specialties, Inc. Hearing Request, ¶¶ 1-3; Ans., ¶¶ 1-3.

On June 10, 2008, the Agency sued ExxonMobil under Section 107 of CERCLA, 42 U.S.C. § 9607, seeking to recover response costs the Government had incurred at the Site since the early 1980s as well as costs it expected to incur in the future. Hearing Request, ¶ 14; Ans. ¶ 14; *see also United States v. ExxonMobil Corp*., No. 1:08-cv-00124-IMK (N.D. W.Va. June 10, 2008) (Doc.1-3). More than four years later, on October 10, 2012, the Agency entered into a Consent Decree with ExxonMobil – as well as CBS and Vertellus, who intervened after the complaint was filed – that resolved the litigation. Hearing Request, ¶¶ 14-18; Ans. 14-18. Under the Consent Decree, Vertellus was tasked with cleaning up the Site, while ExxonMobil and CBS provided clean-up funding. Hearing Request, ¶¶ 19-20; Ans., ¶¶ 19-20. More specifically, Vertellus obtained a $10.5 million irrevocable letter of credit, and a trust fund was created to guarantee performance of Site-specific work. Ex.A to Claim at 33-35. Also under the Consent Decree, CBS paid $5 million and ExxonMobil paid $6 million into the trust fund. Ex.A to Claim at 48. Further, a second Site-specific trust fund was created under the Consent Decree into which Vertellus paid $5.056 million and ExxonMobil paid $5 million to cover the site-specific work. Ex.A to Claim at 35, 49.

The Consent Decree additionally required Vertellus to hire a supervising contractor whose selection was subject to Agency approval. Hearing Request, ¶¶ 38-39; Ans., ¶¶ 38-39. Vertellus chose August Mack as its supervising contractor for work at the Site, and the Agency accepted August Mack's selection on November 6, 2012. Hearing Request, ¶¶ 41-42; Ans., ¶¶ 41-42.

As supervising contractor, August Mack — on behalf of Vertellus — prepared and submitted to the Agency a Removal Design Work Plan to guide overall completion of

Vertellus's clean-up work. Hearing Request, ¶¶ 23, 43; Ans., ¶¶ 23, 43. The Agency reviewed and approved the Plan. Hearing Request, ¶ 44; Ans., ¶ 44. August Mack also initiated PreDesign Investigation activities on behalf of Vertellus, including evaluation of sediment, soil, and groundwater, to support the Plan, and performed additional tasks for Vertellus at the Site between October 2013 and February 2016. August Mack's work for Vertellus was approved by the Agency in accordance with the Consent Decree. Hearing Request, ¶¶ 45-49; Ans., ¶¶ 45-49. In total, August Mack represents that it completed more than $2.5 million of work for Vertellus.

On May 31, 2016, Vertellus and ten of its affiliates filed voluntary petitions for relief under Chapter 11 of the U.S. Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. Hearing Request, ¶ 50; Ans., ¶ 50. In court filings, Vertellus listed August Mack as holding a nonpriority unsecured claim for $214,551.56. On October 20, 2016, August Mack filed a proof of claim in the bankruptcy cases for more than $2,627,891.46. Hearing Request, ¶¶ 51-52; Ans., ¶¶ 51-52. Additionally, August Mack requested payment from both CBS and ExxonMobil on August 30 and September 22, 2016, respectively, but both companies rejected the request. Hearing Request, ¶ 56; Ans., ¶ 56. August Mack then sought reimbursement from the Fund.

V. STANDARD OF REVIEW FOR ACCELERATED DECISION

Under Section 305.27(a) of the Rules, the Presiding Officer may at any time:

> render an accelerated order in favor of the Requestor or the Claims Official as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [s]he may require, if no genuine issue of material fact exists and the party is entitled to judgment as a matter of law. 40 C.F.R. § 305.27(a) The Rules further provides:
>
> If an accelerated order . . . is rendered on less than all issues or claims in the proceeding, the Presiding Officer shall determine what material facts exist without *substantial*

> *controversy* and what material facts remain controverted *in good faith*. [S]he shall thereupon issue an interlocutory order specifying the facts which appear *substantially uncontroverted*, and the issues upon which the hearing will proceed. 40 C.F.R. § 305.27(b)(2) (emphasis added).

The Rules do not specifically provide a standard for adjudicating motions for accelerated decision.[12] However, the standard for motions for accelerated decision under 40 C.F.R. § 305.27 is similar to the standard for motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure ("FRCP"), which states that "the court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[13] FED. R. CIV. P. 56(A); *See, e.g., In re Clarksburg Casket,* 8 E.A.D. 496, 501–502 (EAB 1999), *citing In re Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997). Thus, FRCP Rule 56 jurisprudence provides useful guidance for adjudicating motions for accelerated decision. *Mayaguez Regional Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993).

The burden of showing that no genuine issue of material fact exists rests on the party moving for summary judgment. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). The Environmental Appeals Board ("EAB") has defined the words "material" and "genuine" as used in this context as follows:

> A factual dispute is *material* where, under the governing law, it might affect the outcome of the proceeding. . . . A factual dispute is *genuine* if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor. . . . If so, summary judgement is inappropriate and the issue must be resolved by the finder of fact. If, on the other hand, the evidence, viewed in a light most favorable to the non-moving party, is such that no

[12] EPA is not aware of any administrative or judicial decisions interpreting the Section 305.27(a) standard for accelerated decision. In the absence of any Part 305 case law regarding a Motion for Accelerated Decision, EPA looks to the language set forth in 40 C.F.R. Part 22, because the language of 40 C.F.R. § 305.27 mirrors that set forth in 40 C.F.R. §22.20 of the Consolidated Rules of Practice.

[13] As in administrative enforcement proceedings under 40 C.F.R. Part 22, the Court has latitude to find that the Federal Rules of Civil Procedure and associated jurisprudence offer guidance to this Tribunal in addressing motions for accelerated decision in Part 305 proceedings. See 40 C.F.R. §305.1(b)("Procedural questions arising at any stage of the proceeding which are not addressed in this part shall be resolved at the discretion of the…Presiding Officer."). Order at 6; nt.10.

> reasonable decision maker could find for the nonmoving party, summary judgment is appropriate.

Mayaguez, 4 E.A.D. at 781 (citations omitted).

The evidentiary standard of proof in cases for the administrative assessment of civil penalties governed by the Rules is a "preponderance of the evidence." 40 C.F.R. § 305.33. Accordingly, a party moving for accelerated decision must establish through the pleadings, depositions, answers to interrogatories, and admissions on file, together with any affidavits, the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law by the preponderance of the evidence. *In the Matter of Harpoon P'ship,* Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52, at *19-20 (ALJ, August 4, 2003). On the other hand, a party opposing a properly supported motion for accelerated decision must demonstrate the existence of a genuine issue of material fact by proffering significant probative evidence from which a reasonable presiding officer could find in that party's favor by a preponderance of the evidence. *Id*.

In considering a motion for summary judgment, the court must construe the evidentiary material and reasonable inferences drawn therefrom in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Adickes,* 398 U.S. at 158-159. Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1103 (D.C. Cir. 2002). However, the nonmoving party cannot defeat the motion without offering "any significant probative evidence tending to support" its pleadings. *Anderson,* 477 U.S. at 256. A party responding to a motion for accelerated decision must produce some evidence that places the moving party's evidence in question and raises a question of material fact for an adjudicatory hearing. *Harpoon*, 2003 EPA ALJ LEXIS at *18, citing *In the Matter of Strong Steel Products*, Docket Nos. RCRA-05-2001-

0016, CAA-05-2001-0020, and MM-05-2001-0006, 2002 EPA ALJ LEXIS 57, at *22-23 (September 9, 2002).

VI. ACCELERATED DECISION IN FAVOR OF EPA IS WARRANTED BECAUSE AME CANNOT ESTABLISH THAT A "GENUINE ISSUE OF MATERIAL FACT" EXISTS AS TO WHETHER IT SUBSTANTIALLY COMPLIED WITH THE REQUIREMENT TO SEEK PREAUTHORIZATION PURSUANT TO 40 C.F.R. § 307.22.

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".[14] 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).[15]

B. AME admits it did not substantially comply with the requirement to seek preauthorization to submit an eligible claim against the Fund, and nothing proffered in AME's Prehearing Exchange indicates otherwise.

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

[15] This legal standard is applicable to the requisite evidence and data that EPA must be able to assess when a person is requesting or seeking preauthorization. See 40 C.F.R. § 307.22(b) and (c)(enumerating the data that must be provided to EPA in order to fulfill the purpose or objective of the application process such that EPA is afforded the ability to review and analyze it). 40 C.F.R. § 307.14; § 307.22(a).

At the initial stage of litigation before this Court, AME repeatedly acknowledged that it did not intend to seek, nor attempt to seek, preauthorized funding 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 AME "did not intend to submit a claim to the fund *at the time*" because "AME *never* formed an 'intent' to submit a claim when it began work at the BJS Site" and that "AME had no reason to submit an application for preauthorization to conduct work" ***before*** commencing the response action. AME Response in Opposition to EPA's Motion to Dismiss at 9 (Response) (emphasis added). In its Response, AME claims instead that EPA's preauthorization regulations simply "do not apply to AME," and therefore "AME had no reason to submit an application for preauthorization to conduct work." *Id.* *See also* AME Request for Hearing at 6 ("…preauthorization was never warranted when AME began work at the BJS Site because, at that time, the work was being performed for a viable PRP with financial assurances guaranteed by a federally enforceable Consent Decree.").[16] Therefore, without having formed the intent to seek preauthorization, and with its erroneous conclusion that the entire preauthorization process "simply does not apply" to AME[17], AME in no way could have attempted to comply with the preauthorization regulations, let alone substantially complied with them.[18] Moreover, AME clearly acknowledges that it did not attempt to comply with

[16] Note that AME's justification for not requesting preauthorization mirrors the prohibition against granting preauthorization where the response action is to be conducted by a PRP pursuant to a contract with the United States. 40 C.F.R. § 307.23(g)(4).

[17] AME Request for Hearing at 6.

[18] 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).

preauthorization (i.e. *prior* to commencing the response action as required by 307.22(a)) when it admits that it was EPA's "denial letter" dated February 8, 2017 (which AME refers to as an "arbitrary" and "inequitable" action) "that required AME to seek reimbursement from the Fund." Request for Hearing at 6. It is critical to note that AME's first attempt to seek after-the-fact reimbursement from the Fund admittedly occurred 4 to 5 years after 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…"). .

After AME appealed the Court's Order to the U.S. District Court for the Northern District of West Virginia, AME continued to provide the aforementioned excuses for not seeking preauthorized funding. Again, AME asserted that preauthorization was not warranted in its situation.[19] 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 admits that it expected to be paid for that work by Vertellus. *Id*. ¶ 11.[20] AME alleges that, after Vertellus "went broke," AME made claims against Vertellus in bankruptcy for non-payment during this 43-month period. *Id*. ¶ 12, 15; AME also states that it "requested payment from CBS, and Exxon." *Id*. ¶ 16. When those attempts to obtain payment failed, AME then "requested reimbursement from EPA" (*Id*. ¶ 17) by submitting

[19] 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).

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

the subject Application Form[21] on January 12, 2017 (Appendix 1, AME Request for Hearing), over four years after the response work was undertaken by Vertellus per the Consent Decree and over four years after the allowable time period under the regulations for seeking preauthorization from the Fund.

As a practical matter, EPA agrees with AME that the preauthorization process "simply does not apply" to it. 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 intended 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.". In other words, Vertellus was under obligation to perform the work pursuant to its Consent Decree with the United States, and because Vertellus was already obligated to do the work, EPA would have been barred from paying Fund money to AME even if it had made such a request.

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 undisputed 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 cannot establish othewise.

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**.

[21] Both the Application Form and the Claim Form contain false material statements and do not provide the requisite data sought. They were clearly filed for litigation purposes and do not comport with EPA's preauthorization process.

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

The fact that AME did not intend or attempt 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.[22]

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 sought 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 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**.

[22] As to the other elements of preauthorization (i.e. that EPA did not grant preauthorization)– 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.

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

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

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

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*." *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 522 (4th Cir. 2021) (emphasis added). Thus, the fact that the Fourth Circuit determined AME did not seek or obtain preauthorization by using the application form *or otherwise*, is an "unreversed decision" of a question of fact made during the course of litigation. *Wilson v. Ohio River Co*; *Id.* Therefore, in applying a substantial compliance standard to this issue in light of 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 preauthorization regulations, let alone substantially comply with them.

Finally, although the law of the case doctrine may, *arguendo*, not apply where there are "changed circumstances or unforeseen issues not previously litigated" *(Arizona, Id*. at 619), AME has failed to provide new evidence (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 Fourth Circuit remand and vacature is narrowed only to the issue of whether AME substantially complied with the preauthorization process.[23] 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. AME is barred from asserting it substantially complied with preauthorization by principals of judicial and equitable estoppel.

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 (AME 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

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

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* rationalization for never seeking preauthorization.[24] 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. *See e.g.*, AME Request for Hearing at 6, ¶1. AME acknowledges that it 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. Therefore, it is appropriate to bar AME from continuing to argue 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

[24] Note that AME was in fact able to use the form when it attempted to file its time-barred claim in January 2017. Request for Hearing, Appendix 2.

seeking preauthorization, it raises an argument that is irrelevant and distracting and misleading in light of the prior admissions that AME did not seek preauthorization. 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.[25] 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 intended or attempted to seek preauthorization.

E. AME did not substantially comply with the preauthorization process because it failed to do "all that can reasonably be expected of [it]." [26]

Even if AME were able to present evidence that EPA's preauthorization process itself is obsolete, AME is not able to show that it did all that can reasonably be expected of it – or that it took any steps whatsoever – to comply with the preauthorization process. If AME had intended

[25] 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).
[26] *Sawyer vs. Somona Cnty*. 719 F 2d. 1001, 1008 (9th Cir. 1983)

to seek preauthorization, it had ample opportunity to do so. As an agent of Vertellus under the Consent Decree, AME had direct communications with EPA's RPM and could have asked about preauthorization, but AME never did so as it admits that it did not intend to submit a claim to the fund at the time. Often this is done in the context of negotiations for cleanup of the site, as required by Part 307. Other entities have been able to initiate the preauthorization process with EPA. In fact, EPA has approved numerous applications in this manner since 1995 and has provided PDDs and mixed funding consent decrees accordingly. *See* United States Fourth Circuit "Brief for the Appellee" at 21, footnote 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 preauthorization process by successfully contacting the Agency and initiating the preauthorization process. Indeed, the only thing barring AME from seeking preauthorization was AME itself, and its admission that it never intended or attempted to seek preauthorization in the first place.

F. AME cannot claim that its work for Vertellus constituted AME's substantial compliance with the preauthorization process.

Having admitted that it neither sought nor received preauthorization pursuant to 40 C.F.R. Part 307, AME would have this Court believe that the EPA oversight and approval process under the Consent Decree substitutes for, or is somehow the equivalent of, preauthorization of AME's claim at bar.[27] According to AME, "the procedures set in place by

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

the Consent Decree provided the structure for the communications between AME and EPA. Those communications whereby EPA officials reviewed, commented on, and imposed changes to AME's planned work constitute the approval and preauthorization necessary for payment from the Fund…these communications establish the terms and conditions of the preauthorization…[by] directing, reviewing, approving, and overseeing each and every remedial activity AME undertook at the Site, EPA provided preauthorization."[28] AME's Response in Opposition to Respondent's Motion to Dismiss at 12; *see also* Hearing Request at 23. This Court previously rejected AME's argument and settled the issue as follows:

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

[28] This passage exemplifies how AME erroneously conflates itself with Vertellus – as if AME is the performing settling defendant party and it is AME who must conduct the work and receive EPA approval or other communications. This is a false equivalency and a gross misreading of the Consent Decree. *See* Consent Decree at 31 (IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS) (clearly identifying Vertellus as the entity to whom approvals or other directives were communicated and clearly identifying Vertellus as the party who must comply). AME's continued substitution of itself for Vertellus is a glaring example of obfuscation and misdirection.

Order at 12. The District Court emphatically agreed with the Tribunal, stating that "nothing under the Consent Decree constitutes preauthorization, and nothing in the Consent Decree creates rights in non-parties. *It is irrelevant that EPA authorized and supervised AME's work.*" District Court Order Granting Motion to Dismiss Amended Complaint [ECF NO. 30] at 10 (emphasis added). This settled issue constitutes the law of the case, and remains "unreversed" by the 4th Circuit decision. *Wilson v. Ohio River Co.,* 236 F. Supp. 96, 98 (1964) To the extent that there remain any lingering doubts as to the courts' resolution of this issue, the Consent Decree itself explicitly affirms the law of the case as follows: "Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim…" Decree at 76, ¶77. This provision affirms that the BJS Consent Decree is *expressly **not** a CERCLA §122(b) "mixed funding agreement*". 42 U.S.C. § 9622(b)[29].

By way of further explanation (which buttresses the courts' aforementioned settlement of this issue), EPA's alleged oversight and approval of Vertellus' work at the BJS Site does not show that AME substantially complied with the preauthorization process. The preauthorization process allows EPA to evaluate, certify, and approve cost claims in a transparent and predictable manner by not just establishing a general plan of work, but also by establishing financial oversight procedures and project costs – information that EPA does not receive from a party – and most importantly here, did not receive from AME - as part of its oversight of a cleanup. *See* nt.27, *Infra*. (AME admission that it never submitted the relevant cost data to EPA). *See also* AX-8, 10, 11, 15, 18 (examples of recent PDDs setting forth procedures for evaluating,

[29] CERCLA §122(b) establishes that "the President will reimburse the parties to the agreement from the Fund, with interest, for certain costs of actions under the agreement that the parties have agreed to perform but which the President has agreed to finance." These "mixed funding agreements" or Consent Decrees reference the 40 C.F.R. Part 307 claims procedures, and incorporate the relevant PDDs as appendices thereto. Often times these "mixed funding agreements" take the form of RD/RA Consent Decrees, examples of which are listed in EPA's Prehearing Exchange. *See e.g.* AX-3, 8, 17.

certifying, and approving cost claims by establishing financial oversight procedures, auditing and accounting principles, eligible project costs for potential reimbursement, etc.)

Specifically, when an application for preauthorization is submitted to EPA, it must include, *inter alia*, an explanation of why the proposed response action is necessary and how it adheres to the NCP; a proposed schedule for the work; *projected costs of response activities*; a proposed schedule for submitting eligible claims against the Superfund; proposed project management and oversight procedures; and assurances of timely initiation and completion. 40 C.F.R. §307.22(b). If preauthorization is granted, the terms of that approval are set out explicitly in a Preauthorization Decision Document that memorializes the specific "terms and conditions for reimbursement." *Id*. §307.14; *see also* 307.23(e) (conditions include explicit maximum reimbursement amount, financial auditing procedures, and claim substantiation guidelines). *See also* AX-8, 10, 11, 15, 18 (examples of recent PDDs inclusive of these conditions). AME did not initiate a process to request – nor did EPA otherwise issue – a Preauthorization Decision Document. As previously discussed, these established facts remain the law of the case. *Id*. Order at 12.

In contrast, EPA's oversight of a site specific consent decree focuses on determining whether a PRP is complying with its legal requirements under the CD to clean up that site. Among other things, that oversight involves reviewing submitted work plans and design documents; overseeing construction activities; confirming compliance with health and safety requirements; ensuring that appropriate land use restrictions and environmental covenants are in place; and monitoring remedy performance. *See, generally*, Consent Decree. At the BJS Site, EPA's oversight focused on the implementation of the cleanup by Vertellus – not on the specific cost and accounting procedures used by AME, which would be an integral part of the

preauthorization process. As CERCLA Section 111(a)(2) provides, "such *costs* must be approved under said plan and certified by the responsible Federal official." 42 U.S.C. §9611(a)(2) (emphasis added). EPA's oversight of response action work at the BJS Site simply does not equate to the substantive review conducted when a party applies for preauthorization to submit monetary claims.[30]

1. Notwithstanding the law of the case doctrine, AME lacks standing to assert an eligible claim (or any other cause of action) arising out of any provisions or procedures set forth in the Consent Decree.

AME's claim arises out of a contract it is not privy to; however, to sue the government "on a contract claim, a plaintiff must be in privity of contract with the United States." *Pacific Gas and Electric Company v. United States*, 838 F.3d 1341, 1350 (Fed. Cir. 2016) (quoting *Anderson v. United States*, 344 F.3d 1343, 1351 (Fed. Cir. 2003)). "[T]he 'government consents to be sued only by those with whom it has privity of contract." *Id*.

An exception "to the privity requirement… [is] when a 'party standing outside of privity by contractual obligation stands in the shoes of a party within privity,' such as when a party can demonstrate that it was an intended third-party beneficiary under the contract." *Id.* at 1350-51. "In order to prove third party beneficiary status, a party must demonstrate that the contract not only reflects the express or implied intention to benefit the party, but that it reflects an intention to benefit the party directly." *Authentic Apparel Group, LLC v. United States*, 989 F.3d 1008, 1012 (Fed. Cir. 2021) (quoting *Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001). "[A]t a minimum there must be a particular, identifiable benefit that was clearly intended to flow to the third party." *Id.* (quoting *PG&E*, 838 F.3d at 1361). Additionally, "indirect benefit [to a

[30] See nt. 25, Infra. (relevant cost data admittedly never provided to EPA).

plaintiff] is not sufficient to establish third-party beneficiary status." *Id.* *Id* at 1013. A third-party beneficiary relationship can be found where "one party promises another to pay a debt to a third party." *PG&E*, 838 F.3d at 1362. Under the facts of the case at bar, and pursuant to the Consent Decree which is expressly not a mixed funding agreement, AME cannot establish an exception to the privity requirement. There is nothing in the Decree which reflects an intention to benefit AME directly, let alone provide preauthorization to Vertellus. Moreover, the District Court affirmed that AME was not an intended third-party beneficiary, settling the issue by stating that "AME is neither a party to the Consent Decree nor a third-party beneficiary to it." District Court Order Granting Motion to Dismiss Amended Complaint [ECF No. 30] at 11.

In *Authentic Apparel Group*, the court held that plaintiff could not show it was a third-party beneficiary because the benefit of the government's contract flowed directly to the contracting party, not plaintiff. *Authentic Apparel Group*, 989 F.3d at 1012. In *Southern California Federal Sav. & Loan Ass'n. v. U.S.*, the court ultimately held that plaintiff lacked third-party beneficiary status, in part because one of the agreements between the government and the contracting party disclaimed third parties from asserting rights under the agreement. *Southern California Federal Sav. & Loan Ass'n. v. U.S.*, 422 F.3d 1319, 1329 (Fed. Cir. 2005) ("Nothing expressed or referred to in this Agreement is intended or shall be construed to give any person other than the parties hereto any legal or equitable right, remedy, or claim under, or in respect to, this Agreement or any of its provisions.").

As in *Southern California*, the subject Consent Decree also disclaims or bars third parties from establishing *any* causes of action or rights under the agreement, stating that *"[n]othing* 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." Decree at 77, ¶ 79 (emphasis added). Thus, AME cannot establish third party beneficiary status.

Consistent with the above stated case law, and in disposing of AME's claim against the Site-specific funds in the Special Account established under the Consent Decree, The 4th Circuit quoted paragraph 79 of the Decree ("nothing in this Consent Decree shall be construed to create any rights in, or grant a cause of action to, any person not a party to this Consent Decree."), and affirmed that "[t]he Decree lists the parties bound by it: Vertellus, CBS, and Exxon. Thus, nothing in the Decree provides August Mack with the right to recover from the Special Account." *August Mack Envtl., Inc. v. EPA*, 841 Fed. App'x 517, 527; nt.5 (4th Cir. 2021). By the same token, nothing in the Consent Decree provides AME with *any* cause of action or right to assert a claim against the Fund for payment of its alleged costs.

G. AME's Prehearing Exchange does not provide new evidence establishing that it substantially complied with the requirement to submit an application requesting preauthorization.

Contrary to AME's "narrative statement", every document that AME proffers in its prehearing exchange evinces that AME was simply fulfilling its duty as a "Supervising Contractor" on behalf of Vertellus, *and not otherwise independently seeking preauthorization on its own behalf*. AME submitted the subject work to EPA on behalf of Vertellus as required by the contract between Vertellus and AME. AX 16 (Exhibit AA). The work at issue reflects AME's contractual obligation to Vertellus for which AME was to be paid by Vertellus, not EPA. *Id.* 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. *Id.* Accordingly, the pre-design and design-related workplans submitted on behalf of Vertellus to EPA under the Consent Decree prior to 2017 cannot equate to substantial compliance with a request for preauthorization. *See also* ALJ Order on Motion to Dismiss at 12 (finding that, pursuant to 40 C.F.R. § 307.22(j),

compliance with a consent decree does not constitute preauthorization and affirming that "[w]hatever approval the Agency gave to work that Vertellus provided under the terms of the Consent Decree would have been to ensure Vertellus was upholding its end of the agreement…"). See *Infra*. at VI.F (distinguishing EPA approval and oversight of Vertellus's work under the Consent Decree from the preauthorization process at issue).

VII. CONCLUSION

For the preceding reasons, the Agency has demonstrated by the preponderance of the evidence that no genuine issue of material fact exists as to the issue before this Court, and that EPA is entitled to judgment as a matter of law on the basis that AME's request for payment from the Superfund cannot be granted. *See In the Matter of Harpoon P'ship,* Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 52, at *19-20 (ALJ, August 4, 2003).

Respectfully submitted on behalf of EPA's Claims Official,

12.20.2021
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing Agency's Motion for Accelerated Decision and Memorandum in Support thereof in the *Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001, 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.

12/20/21

Date

BENJAMIN COHAN

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