UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
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VIA E-FILING

October 28, 2022

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

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

Dear Judge Biro,

On behalf of the United States Environmental Protection Agency (EPA), I enclose for your consideration the following: 1) EPA's Response in Opposition to AME's Motion for Accelerated Order, and 2) EPA's Response to AME's "Statement of Undisputed Material Facts" as set forth in its Motion for Accelerated Order. According to past practice before this Tribunal, my understanding is that a Proposed Order is not necessary.

Respectfully submitted,

BENJAMIN COHAN
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Enclosures

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

EPA'S RESPONSE TO AME'S "STATEMENT OF UNDISPUTED MATERIAL FACTS" AS SET FORTH IN ITS MOTION FOR ACCELERATED ORDER

This Tribunal has affirmed that, on remand from the U.S. Court of Appeals for the Fourth Circuit, "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 of Redesignation and Prehearing Order at 2, n.2. EPA contends that most of the facts offered by AME in support of its September 16, 2022 Motion for Accelerated Order are immaterial to the legal questions before this Tribunal on remand. That is, regardless of their veracity, they have no bearing on the legal issues as properly framed. For example, few if any of AME's asserted facts pertain to whether AME "substantially complied" with the preauthorization process, but instead concern issues not properly before the Tribunal, such as the validity of the preauthorization process itself. EPA has not identified every irrelevant and immaterial fact individually, but responses by EPA below that a fact is not disputed should not be taken as an indication or admission that EPA concedes it is relevant to these proceedings. EPA also notes that some of

AME's asserted facts contain opinions, legal argument, or conclusions of law. Without waiving those objections or any of its rights at hearing (*e.g.*, objections to inadmissible evidence), EPA responds to AME's "Statement of Undisputed Facts" as follows, with the numbers corresponding to the numbered paragraphs in AME's Motion (Motion at pp.3-31):[1]

1. not disputed.
2. not disputed.
3. not disputed.
4. not disputed.
5. not disputed.
6. not disputed.
7. not disputed.
8. not disputed.
9. not disputed.
10. not disputed.
11. not disputed.
12. not disputed.
13. not disputed.
14. not disputed.
15. not disputed.
16. not disputed.

[1] EPA's response to the legal arguments presented in AME's Motion for Accelerated Order (pp.32-68) is hereby provided concurrently in a related brief captioned: "EPA's Response in Opposition to August Mack Environmental, Inc.'s Motion for Accelerated Order" (filed *via* consolidated PDF on October 28, 2022).

17. not disputed.

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

19. not disputed.

20. not disputed.

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

22. Immaterial and disputed to the extent that AME implies (in statements enumerated 22-50) that EPA reviewed and approved its work pursuant to the BJS CD for purposes of preauthorization. As previously established as a matter of record, and consistent with the law of the case, it remains undisputed that EPA reviewed and approved Vertellus' work as required under the CD. (CD pp.31-32, § IX. EPA APPROVAL OF PLANS AND OTHER SUBMISSIONS). To the extent that AME states it was performing the work, it was only doing so in its capacity as a contractor/representative on behalf of its client, Vertellus. (Dep. Newman, p. 32:25; 33:10-11; 39:16-25; 40:1-2; Newman Affidavit ¶¶ 9-17; AX 1,2,4,5,9,13;).

23. Immaterial and disputed on the grounds stated in #22, *Infra*.;

24. not disputed.

25. Immaterial and disputed on the grounds stated in #22, *Infra*.

26. not disputed.

27. not disputed.

28. Immaterial but not disputed; affirmed that "the work AME submitted on behalf of VSI was reviewed, commented upon, revised, and approved by Mr. Newman and his team throughout the time VSI was the performing party."
29. not disputed.
30. Immaterial and disputed on the grounds stated in # 22, *Infra.*
31. not disputed.
32. Immaterial and disputed on the grounds stated in #22, *Infra.*
33. Immaterial and disputed on the grounds stated in #22, *Infra*.
34. not disputed.
35. not disputed.
36. not disputed.
37. Immaterial and disputed on the grounds stated in #22, *Infra.*
38. Immaterial and disputed on the grounds stated in #22, *Infra*.
39. not disputed.
40. not disputed.
41. Immaterial and disputed on the grounds stated in #22, *Infra*.
42. Immaterial and disputed on the grounds stated in #22, *Infra*.
43. Immaterial disputed on the grounds stated in #22, *Infra.*
44. not disputed.
45. not disputed.
46. not disputed.
47. not disputed.
48. not disputed.

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

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

51. not disputed.

52. not disputed.

53. not disputed.

54. Immaterial but not disputed with the caveat that no clean-up "beyond basic conceptual planning…" was conducted because EPA triggered its work take over prior to Vertellus completing "performance of Removal Design Work Plans". "At the time that Vertellus filed for bankruptcy and stopped performing Work required by the CD, it had not yet completed any substantive clean-up work". (Newman Affidavit at ¶ 11).

55. not disputed.

56. not disputed.

57. not disputed.

58. not disputed.

59. not disputed.

60. not disputed.

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

62. not disputed.

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

64. not disputed.

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

66. not disputed.

67. not disputed.

68. not disputed.

69. not disputed.

70. not disputed.

71. not disputed.

72. not disputed.

73. not disputed.

74. not disputed.

75. not disputed.

76. not disputed.

77. Immaterial and disputed pursuant to the explanation provided in #22, *Infra*.

78. Not disputed.

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

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

81. Immaterial and disputed pursuant to #80, *Infra*.

82. not disputed.

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

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

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

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

Counsel for AME conceded this point by withdrawing his question. (Dep. Newman, p.86:3-8).

87. not disputed.

88. not disputed.

89. not disputed.

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

91. not disputed.

92. not disputed.

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

94. not disputed.

95. not disputed.

96. not disputed.

97. not disputed.

98. not disputed.

99. not disputed.

100. not disputed.

101. not disputed.

102. not disputed.

103. not disputed.

104. not disputed.

105. not disputed.

106. not disputed.

107. not disputed.

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

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

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

111. not disputed.

112. not disputed.

113. not disputed.

114. not disputed.

115. not disputed.

116. not disputed.

117. not disputed.

118. not disputed.

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

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

121. not disputed.

122. not disputed.

123. not disputed.

124. not disputed.

125. not disputed.

126. not disputed.

127. not disputed.

128. not disputed.

129. not disputed.

130. not disputed.

131. not disputed.

132. not disputed.

133. not disputed.

134. not disputed.

135. not disputed.

136. not disputed.

137. not disputed.

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

139. not disputed.

140. not disputed.

141. not disputed.

142. not disputed.

143. not disputed.

144. not disputed.

145. not disputed.

146. not disputed.

147. not disputed.

148. not disputed.

149. not disputed.

150. not disputed.

151. not disputed.

152. not disputed.

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

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

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

Respectfully submitted on behalf of EPA's Claims Official,

10/28/22
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing "EPA's Response to AME's Statement of Undisputed Material Facts as Set Forth in Its Motion for Accelerated Order" *in the Matter of August Mack Environmental, Inc.*, Docket No. CERCLA-HQ-2017-0001 ("EPA's Response"), 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 Response 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.

10/28/22
Date

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	Docket No.: CERCLA-HQ-2017-0001
	)	
August Mack Environmental Inc.	)	EPA'S RESPONSE IN OPPOSITION TO REQUESTOR'S MOTION FOR ACCELERATED ORDER
	)	
	)	
	)	
[Requestor]	)	

EPA'S RESPONSE IN OPPOSITION TO AUGUST MACK ENVIRONMENTAL, INC.'S MOTION FOR ACCELERATED ORDER

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INTRODUCTION

This Tribunal should deny AME's[1] Motion for Accelerated Order filed on September 16, 2022, ("Motion" or "AME Motion") because AME has not established that it substantially complied with EPA's preauthorization regulations, and as such AME is not entitled to judgment as a matter of law. 40 C.F.R. § 305.27(a). AME's arguments fail to address fundamental considerations relevant to substantial compliance and raise new, unpreserved arguments that this Tribunal is jurisdictionally or procedurally barred from adjudicating.

AME's erroneous substantial compliance test misconstrues the Fourth Circuit's opinion in *August Mack Environmental, Inc. v. U.S. EPA*, 841 Fed. Appx. 517 (4th Cir. 2021) ("*August Mack*"), by looking solely at whether its claim satisfies the "objectives of preauthorization." This "test" is completely divorced from the relevant statutory and regulatory requirements for preauthorization and claims against the Fund. It is legally incorrect and untenable. EPA acknowledges that substantial compliance is an equitable doctrine, but that does not give AME license to wholly dispense with regulatory requirements applicable to its duty to seek preauthorization. Such an outcome would vitiate EPA's long-standing requirement that a future claimant seek and obtain preauthorization to make a claim against the Fund *before commencing response actions*. 40 C.F.R. § 307.22(a). AME essentially asks this court to grant retroactive preauthorization and would excuse AME's complete noncompliance with EPA's preauthorization procedures.

[1] This response generally assumes familiarity with acronyms and other short-hand used in AME's Motion and EPA's renewed motion for accelerated decision (Sept. 16, 2022).

In light of the weakness of its substantial compliance arguments, AME further attempts to argue that EPA's preauthorization regulations as a whole should be invalidated. But collectively these arguments are procedurally or jurisdictionally barred. AME failed to preserve its arguments over the last five years of this litigation, and moreover, these challenges to the regulations are being brought in the wrong place and at the wrong time. *See* 40 U.S.C. § 9613(a). For these reasons, EPA respectively requests that this Tribunal deny AME's motion.

ARGUMENT

AME cannot demonstrate as a matter of law that it substantially complied with EPA's preauthorization requirements under either the controlling Fourth Circuit test or AME's erroneous "objectives" test. Thus, its motion should not be granted.

At the outset, AME fails to apply the correct, controlling Fourth Circuit test for substantial compliance, which requires (1) a showing of "intent" by notifying EPA, before commencing a response action, that AME was seeking preauthorization; and (2) a demonstration that AME's failure to comply with the literal requirements (i.e., filing a timely Form 2075-3) did not violate the essence of the regulations. *See, e.g., Atantic Veneer Corp. v. Comm'r of Internal Revenue.*, 812 F.2d 158, 161 (4th Cir. 1987) ("*Atlantic Veneer*"); *Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 210 (4th Cir. 2004) ("*Volvo Trucks*"). AME cannot show that it met either element. First, it cannot demonstrate that it notified EPA of its intent to seek preauthorization before commencing a response action. See *Atlantic* Veneer, 812 F.2d at 161 (stating that "at a minimum" notice of intent is required); 40 C.F.R. § 307.22(a)(2). And second, apart from intent, AME[2] did not provide EPA with a comprehensive package of information,

[2] AME served as Vertellus' "supervising contractor" for the BJS Site. Any work plans that AME submitted to EPA were done so on behalf of Vertellus and in accordance with the terms of the Big John Salvage Consent Decree. None of AME's submissions were on behalf of AME. For the sake of brevity,

before commencing a response action, that substantially complied with EPA's preauthorization application requirements. *See, e.g.*, § 307.22(a)-(b). Finally, even applying AME's erroneous substantial compliance test, AME cannot demonstrate that it satisfies all four "objectives of preauthorization."[3]

Likewise, this Tribunal should reject AME's arguments challenging the validity of EPA's regulations. Pursuant to CERCLA sections 112(b) and 113(a), this Tribunal does not have jurisdiction to adjudicate challenges to the preauthorization regulations, attacks which AME in any event waived by not raising them earlier in these proceedings. AME's challenges to the regulations fail nevertheless because the preauthorization regulations and CERCLA claims procedures were promulgated under EPA's congressionally-granted authority to prescribe necessary procedures for managing a limited resource, the Superfund.

For all of these reasons, AME's motion must be denied.

I. AME did not substantially comply with EPA's preauthorization regulations

AME asserts that it "will have substantially complied with the preauthorization process if it satisfied the objectives of preauthorization." AME Motion at 25. This is the wrong test for substantial compliance in the Fourth Circuit and runs afoul of the court's ruling in *August Mack.* While the Fourth Circuit discussed preauthorization policy objectives, it did so in a specific context: determining whether a substantial compliance standard was appropriate to apply to AME's legal duty to request preauthorization at all. *August Mack*, 841 Fed. Appx at 523. The Fourth Circuit considered whether allowing application of the substantial compliance test would

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EPA will not repeat this caveat throughout its brief. *See also*, EPA's Response to AME's Statement of Undisputed Material Facts (filed concurrently herewith).

[3] Substantial compliance does not apply solely to regulatory objectives. The Tribunal must evaluate whether AME substantially complied with the requirements of the regulation at issue. *Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 210 (discussing when substantial compliance applies to "the regulatory requirement at issue"). See infra I.B.

"defeat the policies of the underlying regulatory provisions" and concluded that it "was satisfied that applying the substantial compliance doctrine [to the specific regulation] would not undermine any of those [four] objectives." August Mack, 841 Fed. Appx. at 523. AME erroneously applies the court's decision in *August Mack*. *Infra* I.D. As a result, *AME* asserts that it need only substantially comply with preauthorization "objectives," an analysis that is legally incorrect and avoids any consideration of the regulatory requirements for preauthorization. AME is wrong. But regardless of whether the court applies AME's erroneous "objectives" test or the controlling Fourth Circuit standard described herein, AME fails to show that there is no genuine dispute as to any material fact that would demonstrate it meets either substantial compliance test.

In order to demonstrate substantial compliance, the Fourth Circuit has stated that a party must "at a minimum" demonstrate that it has provided to the agency "sufficient notice of [its] intent" to seek the benefit requested. *Atl. Corp. v. Veneer Comm'r of Internal Revenue.*, 812 F.2d 158, 161 (4th Cir 1987) *see also Phoenix Mutual Life. Ins., Co. v. Adams*, 30 F.3d 554, 565 (4th Cir.1994) (requiring that "intent" must be shown to demonstrate substantial compliance with provisions of an ERISA life insurance policy); *see also Metropolitan Life Ins., Comp. v. Gorman-Hubka*, 159 F. Supp. 3d 668, 673 (E.D. Va. 2016) ("Substantial compliance is an equitable principle that gives effect to the demonstrated *intent* of an insured in designating a beneficiary.") ("Substantial compliance is an equitable principle that gives effect to the demonstrated *intent* of an insured in designating a beneficiary.") (emphasis added). Only after the requisite intent has been established, the court will then consider "whether the 'essence' of the statutory framework has been violated by the [party's] failure to satisfy the literal

requirements."[4] *Atl. Veneer Corp.*, 812 F.2d at 161 This standard is measured by considering whether the actions taken by the party that were not in strict compliance with the regulations represented a "relatively ancillary, minor procedural infirmity." *Id.*

As discussed below, AME has failed to establish that—under any formulation of a substantial compliance test—there is no genuine issue of material fact as to whether it intended to comply, *let alone substantially* complied, with EPA's preauthorization regulations prior to commencing a response action.

A. AME fails to demonstrate that it notified EPA of its intent to seek preauthorization.

In order to satisfy the Fourth Circuit test and the summary judgment standard here, AME must demonstrate that it provided EPA with "sufficient notice of [its] *intent*" to seek preauthorization before commencing any response work in 2012. *See Atl. Veneer Corp,* 812 F.2d at 161 But August Mack can identify *no* facts showing it timely notified EPA of its intent to seek preauthorization. Motion at 3-12. *August Mack*, 841 Fed. Appx. at 526 (Judge Diaz, dissenting) ("[E]ven assuming the doctrine of substantial compliance applies to the preauthorization requirement, August Mack's amended complaint falls far short of alleging substantial compliance here. And August Mack's concession that it didn't even attempt to comply with the preauthorization requirement makes it inevitable that August Mack will fare no better on remand.")

In *Atlantic Veneer*, the court found that a party must first demonstrate that it had notified the Agency of its "intent" to seek the benefit of a regulation, prior to reaching the question of whether the person substantially complied with the regulations at issue. 812 F.2d at 161. The

[4] The Fourth Circuit stated, "that August Mack could not be required to seek preauthorization in the manner specified by the EPA," 841 Fed. Appx at 524, but did not dispense with the regulatory obligation to seek preauthorization in the first instance.

court determined that the bare minimum for complying with the regulations at issue was "the requirement that the taxpayer provide the [Agency] with notice of its intent" to seek a tax benefit and that "failure to provide the [Agency] with proper notice [of intent] should stand as a failure to" substantially comply. *Id.* As a result, the court held that the taxpayer had neither "literally or substantially" complied due to the lack of notice to the Agency expressing intent to seek a tax benefit. *Id*

AME finds itself similarly situated to the taxpayer in *Atlantic Veneer*. Like that individual, AME never gave EPA timely notice of its intent to seek preauthorization or make a future claim against the Superfund. And this is not in dispute—AME has expressly conceded its lack of intent. As affirmed by this Tribunal, "[t]he 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. Response at 9; Hearing Request at 19. *Undoubtedly this is true*." ALJ Order on Motion to Dismiss at 10) (emphasis added). Consistent with this prong of the substantial compliance standard, EPA's preauthorization regulations clearly specify that EPA must be put "on notice" of an applicant's "intent" to file a future claim against the Fund. *See* 40 C.F.R. § 307.22(a) (stating that "No person may submit a claim to the Fund for a response action unless that person *notifies* the Administrator of EPA . . . prior to taking such response action . . . . In order to obtain preauthorization, any person *intending* to submit a claim to the Fund must fulfill the [preauthorization] requirements before commencing a response action . . . .") (emphasis added).

And notification to the Agency of a party's intent to request preauthorization of a CERCLA response action is an essential part of the preauthorization process. It is a timely request for preauthorization that triggers EPA's duty to review the request pursuant to the evaluative criteria set forth at 40 C.F.R. § 307.23(b)(1-17). Many of these criteria directly reflect

and embody EPA's stated policy objectives, thus ensuring that EPA's decision to grant or deny the request aligns with the objectives of preauthorization. 40 C.F.R. § 307.23(b). EPA can only fulfill its policy objectives at the outset—before a potential claimant commences a response action.[5]

AME goes to great lengths to describe "EPA's approval of AME's work" in paragraphs 22 through 50 of its "undisputed material facts." However, none of those facts establish that AME timely notified EPA of its intent to seek preauthorization or future reimbursement from the Superfund.[6] AME Motion at 6-12. Rather, AME acknowledges that all of its work was conducted pursuant to the Consent Decree, AME Motion at 12, and Vertellus was responsible for implementing all work under the Consent Decree as the performing Settling Defendant. *See* Consent Decree at 15. EPA never had any reason to know, or even suspect that AME might submit a future claim against the Fund for costs associated with the work that was already required to be implemented by Vertellus.[7] Affidavit Eric Newman at ¶ 14.

[5] For example, § 307.23(b)(1) through (5) correspond to EPA's first policy objective (appropriate use of the Fund); (b)(13) corresponds to the second objective (reducing likelihood that the response will create environmental hazards); (b)(7) and (8) correspond to the third objective (compliance with the NCP); (b)(6), (11) and (12) correspond to the fourth objective (assurance to the applicant that it will get reimbursed if the costs are reasonable and necessary…)

[6] *See* EPA's Response to AME's Statement of Undisputed Material Facts, submitted concurrently herewith.

[7] To be clear, had AME notified EPA of its intention to seek preauthorization prior to conducting any response work, EPA would not have had the authority to approve such an application. The regulations provide that preauthorization should not be granted where the work proposed is already covered by a consent decree. *See, e.g.,* § 307.23(g) ("EPA will not grant preauthorization for any response actions where the action is to be performed by a . . . person operating pursuant to a contract with the United States"). Here, these actions were covered by the Big John Salvage Consent Decree. Moreover, response actions contemplated under the Consent Decree were to be conducted solely by Vertellus. The financing or funding of the response actions, inclusive of performance guarantees, were to be allocated among Vertellus and the "Non-Performing Defendants" (CBS Corp. and Exxon Mobil Corp.) pursuant to the terms of the Consent Decree. CD at 46 (Sect. XIII. "Payments"). .

AME's failure to express to EPA its intent to seek preauthorization underscores that AME could not have and did not "substantially comply" with EPA's preauthorization regulations.

B. Using the correct Fourth Circuit standard, AME Violated the Essence of EPA's Preauthorization Regulations by Failing to Comply with Any Aspect of a Preauthorization Application.

After determining whether a party had the requisite intent, evinced by some form of timely notice to the regulatory agency, the Fourth Circuit then considers whether the "essence" of the requirements at issue were "violated by the [person's] failure to satisfy the literal requirements." *Atlantic Veneer*, 812 F.2d at 161. The court considers whether a party's failure to strictly comply with the literal requirements of the regulation was a "minor" or "ancillary" omission. *Id.* A court may "forgive noncompliance for either unimportant and tangential requirements or requirements that are so confusingly written that a good faith effort at compliance should be accepted."[8] *Volvo Trucks of North Am., Inc. v. United States*, 367 F.3d 204, 210 (4th Cir. 2004) ("*Volvo Trucks*"). However, the "doctrine of substantial compliance cannot be applied [where] it would excuse noncompliance with essential regulatory requirements." *Id.* at 211.

Even assuming that AME's complete failure to notify EPA of its intent to seek preauthorization or submit a future claim against the Fund could be excused, AME still cannot demonstrate that it substantially complied with EPA's preauthorization regulations, which detail the specific information a preauthorization application should include. *See* § 307.22(b) To satisfy

[8] AME cannot claim that EPA's regulations are "so confusingly written" that it couldn't be expected to comply. Rather, once AME formed the intent to seek reimbursement—after incurring the costs and conducting the response actions—it filed a preauthorization application and claim form *at the same time* and for the purposes of litigation. AME Request for Hearing (appendices) (filed March 9, 2017).

the Fourth Circuit's controlling standard, AME must demonstrate that its deviations from the preauthorization process articulated in section 307.22 were "unimportant," "tangential," or "ancillary" to the requirements of the regulations themselves. *Id.* at 210; *see also August Mack*, 841 Fed. Appx. at 523 (noting that substantial compliance ensures that a person does not evade liability for an "immaterial or insubstantial" deviation from the NCP).

But AME's failures to comply with EPA's preauthorization requirements were not unimportant, tangential, or ancillary. Rather, these failures make clear that AME violated the "essence" of the regulations at issue. The requirement to seek preauthorization *prior* to commencing response actions is the "essence" of the preauthorization regulations. That timing aspect is paramount. "Preauthorization is not just a regulatory nicety but the mechanism by which the Agency assesses the value of the work to be performed and determines whether it justifies depleting scarce monetary resources of the Fund . . . ." ALJ Order on Motion to Dismiss at 13 (Dec. 18, 2017). This mechanism is only useful for its intended purpose if EPA's approval for reimbursement is sought *and received* prior to work being undertaken.

AME's failure to submit Form 2075-3 may fall within the category of a "minor procedural infirmity," *see August Mack*, 841 Fed. Appx. at 524, but its utter failure to otherwise provide EPA with the information necessary for EPA to evaluate an application—including notifying EPA that AME was seeking or planned to seek preauthorization prior to commencing response actions—cannot be excused. To do so would "excuse noncompliance with essential regulatory requirements." *See Volvo Trucks*, 367 F.3d at 211; ALJ Order on Motion to Dismiss at 11 (acknowledging that "preauthorization is at the heart of the regulatory procedure for filing a claim").

C. AME did not provide EPA with a timely package of information sufficient for a preauthorization application.

AME asserts that it "substantially complied with the preauthorization process because EPA possessed all the information required by the application prior to AME beginning work at the Site." AME Motion at 65-66. That is incorrect. As an initial matter, it is critical to reorient the inquiry here—the question is whether AME, *on its own behalf*, provided EPA with a timely, comprehensive package of information sufficient for a preauthorization application.[9]

As stated *infra* AME was the "supervising contractor" to Vertellus, and only submitted information to EPA its capacity as a representative for Vertellus, rather than on its own behalf. Over the course of four years, from 2012 to 2016, all of AME's work-related submissions to EPA (submitted on behalf of Vertellus) were made solely to satisfy Vertellus' obligations under the BJS Site Consent Decree. *See*, e.g. AX 4,5; Newman Affidavit at ¶¶ 9-17. That process cannot substitute for or otherwise constitute EPA's preauthorization process, as each process involves distinct considerations and distinct purposes. The Consent Decree explicitly provided that its terms and conditions did not constitute preauthorization (Consent Decree at ¶ 77), and it further provided that AME was nothing other than Vertellus' agent for purposes of ensuring that Vertellus comply with the terms of the Consent Decree. AX 2. AME cannot establish that its conduct (i.e. the submittal of work product per the Consent Decree) was tantamount to a request for preauthorization, or that it demonstrated "sufficient notice of intent" to seek preauthorization prior to commencing response work. See *Atl. Veneer Corp*, 812 F.2d at 161 *See also* 40 C.F.R. §

[9] AME concedes that some of the information was already in the possession of the Agency and that AME did not therefore provide it to EPA. AME Motion at 66. EPA agrees that it already possessed some of the subject information and that AME therefore could not have submitted to EPA.

307.22(j) () (unless otherwise specified and agreed to by EPA, CDs "do not constitute preauthorization to present a claim to the Fund.").

Notwithstanding those issues, AME cannot claim that "EPA possessed information … *prior to AME beginning work at the Site.*" Motion at 66. AME never provided EPA with a comprehensive package of information *"before commencing a response action.*" 40 C.F.R. § 307.22(a) (emphasis added).) The parties involved, including AME, commenced the response action in 2012.[10] AME would have had to submit to EPA no later than 2012 a package that described all of its anticipated work for which it now seeks reimbursement (*i.e.*, the work that now forms the basis of its $2.6 million claim), which AME failed to do. Rather, AME was doing work at the Site as it was developing and submitting work plans for EPA's consideration. AME Request for Hearing at 14.

Volvo Trucks is also illustrative of the fundamental flaw of AME's assertion that it substantially complied with preauthorization. In *Volvo Trucks,* the Fourth Circuit found that a requirement that was a "condition precedent" to eligibility for a tax exemption was "not ancillary or unimportant." 367 F.3d at 210. Failure to satisfy the "condition precedent" was a failure to substantially comply with the regulations at issue. *Id.* at 211 (finding that the condition precedent was not an "unimportant procedural matter"). Here, August Mack was required to submit to EPA a timely and complete package of information akin to what a preauthorization application must include *before commencing response actions*. 40 C.F.R. § 307.22(a)-(b). That is the "condition precedent" required for EPA to be able to evaluate a request for preauthorization.

[10] August Mack has acknowledged that it began work in 2012: "From October 2012 and continuing to May 2016, AME performed cleanup actions at the Site." Amended Complaint for Judicial Review of Final Administrative Decision and Request for Jury Trial (US Dist. Crt.)(Filed 06/01/18) at 3,¶ 11.

Even setting aside the issue of timeliness, AME cannot demonstrate that it provided EPA with a comprehensive package of information sufficient to satisfy a preauthorization application. *See* § 307.22(b). An application must include information on the proposed response action from soup to nuts—from early investigations to operations and maintenance, including the total anticipated costs. *E.g.,* § 307.22(b)(8), (b)(12), (f)(2), (f)(4). Here, accounting for all of AME's submissions to EPA, AME Motion at 9, multiple pieces of information "essential" to preauthorization were never submitted to EPA, including information about AME's financial capabilities, § 307.22(b)(6), (f)(4); proposed contracting procedures, § 307.22(b)(10); projected costs for response activities, with the basis for those projections, § 307.22(b)(8); assurances of timely initiation and completion of the actions proposed, § 307.22(b)(12); or documentation of reasonable effort to obtain cooperation from a state or Tribe, § 307.22(f)(3).

The specific substantive information that a preauthorization application must include is "essential," and not merely "unimportant and tangential." See § 307.22(b). The timely application requirements are essential to EPA's ability to fully consider a future claim against the Fund and determine whether it should take priority over other competing demands on the limited resources of the Fund. *See* § 307.23(b) (identifying a "non-exclusive list of criteria" that EPA will consider when reviewing preauthorization applications); 54 Fed. Reg. at 37892 ("Only after the Agency has determined that the preauthorization application is complete will EPA review and analyze the application according to the criteria proposed in today's rule."). For all of the reasons set out above, AME cannot demonstrate that it substantially complied with the regulatory requirement to timely submit a complete package of information required of a preauthorization application.

D. AME misconstrues the Fourth Circuit's *August Mack* opinion and articulates the wrong substantial compliance test.

AME does not address the Fourth Circuit's controlling test for substantial compliance, but instead asks this Tribunal to adopt a test of AME's own invention: whether in hindsight the work it conducted on behalf of Vertellus satisfied the "objectives" of preauthorization. AME Motion at 35. In doing so, AME misreads the Fourth Circuit's opinion, focusing solely on the four policy objectives that it argues underly EPA's preauthorization process and circumventing the proper substantial compliance analysis as it applies to the statute and its implementing regulations. AME recites those objectives as follows: "(1) ensuring appropriate use of the Superfund; (2) ensuring that response actions do not create environmental hazards; (3) ensuring that response actions are consistent with the NCP; and (4) ensuring that response actions are accomplished with the EPA's approval and are reasonable and necessary." *Id.* (citing *August Mack*, 841 Fed. Appx. at 523) (internal quotations omitted).

While the Fourth Circuit discussed those policy objectives, it did so in a specific context: determining whether a substantial compliance standard was appropriate to apply to AME's legal duty to request preauthorization *at all*. The Fourth Circuit considered whether allowing application of the substantial compliance test would "defeat the policies of the underlying regulatory provisions" and concluded that it "was satisfied that applying the substantial compliance doctrine [to the specific regulation] would not undermine any of those [four] objectives." *August Mack*, 841 Fed. Appx. at 523.

Having concluded that "the specific regulation relied on by EPA in this case, 40 C.F.R. 307.22(a)" would not be undermined, the Fourth Circuit directed EPA to apply the substantial compliance standard to the regulation, 841 Fed. Appx. at 523, requiring EPA to evaluate whether

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

To make its argument, AME outright mischaracterizes the Fourth Circuit ruling by removing the context in which the court cited the four policy objectives of preauthorization. AME also goes so far as to suggest that the Fourth Circuit found that "AME cannot be faulted for 'not seek[ing] or obtain[ing] an express preauthorization from the EPA before its cleanup of the BSJ Site, by using EPA Form 2075-3 or otherwise." *See* AME Motion at 34 (emphasis added). That is incorrect. Rather, the court stated as a factual matter that, "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." *August Mack* at 522. Contrary to

August Mack's assertion, the court directed the parties to evaluate whether August Mack substantially complied with the preauthorization process, which by definition includes "EPA's receipt of an application for preauthorization." § 307.14

But even under this erroneous analysis, AME fails to establish that it substantially complied with its duty to seek preauthorization by doing "all that can reasonably be expected of it." *See Sawyer v. Sonoma Cnty*, 719 F.2d 1001, 1008 (9th Cir. 1983).

E. Even applying AME's incorrect "objectives" substantial compliance test, AME's argument still fails because the objectives of preauthorization have not been satisfied.

AME misconstrues the Fourth Circuit opinion in an effort to avoid the obvious failing of whether it substantially complied with the regulations at issue. However, even applying AME's own "objectives of preauthorization" test, AME has not established that it is entitled to judgment as a matter of law. AME fails to demonstrate that the information it provided to EPA was sufficient to satisfy the four objectives of preauthorization. AME Motion at 35. Most significantly, AME cannot demonstrate that paying AME for work that was already mandated by the BJS Consent Decree would be an "appropriate use of the Fund" or would ensure that AME's costs are "reasonable and necessary."[11]

AME argues that "paying AME for its work is an appropriate use of the Fund, because it is seeking reimbursement of 'costs incurred pursuant to [the NCP],'" the site is on the NPL, and

[11] August Mack also asserts that "AME passed EPA's review process" and that AME's response actions were consistent with the NCP. AME Motion at 25, 38. EPA's review process for a future claimant is distinct and more involved than the process for accepting a supervising contractor under the Consent Decree. *Compare* § 307.22(b)(4), (6), (10)-(12) and BJS Site Consent Decree at 16 (Section VI). EPA acknowledges that the Consent Decree states that "[t]he activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP." BJS Site Consent Decree at 15 (Section V). However, EPA does not concede that AME's work, as implemented, was in fact consistent with the NCP.

future work at the Site may be funded by the Superfund. AME Motion at 35-36. These reasons are insufficient to demonstrate that AME's work is an "appropriate use of the Fund." EPA's preamble to the regulation is instructive as to what is "an appropriate use of the Fund:"

> Preauthorization . . . 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 that may be undertaken *relative to other response needs*.

Response Claims Procedures for the Hazardous Substance Superfund (Proposed Rule), 54 Fed. Reg. 37892, 37898 (Sept. 13, 1989) (emphasis added); *see also* 40 C.F.R. § 207.23(b)(2) (in evaluating an application for preauthorization EPA will consider the "seriousness of the problem or importance of the response activity when compared with the competing demands of the fund"). The preamble also provides that "[t]he Agency will consider all applications for preauthorization against the alternatives of an enforcement action or conducting the remedial action through a cooperative agreement or a contract. EPA will approve a response action by a private party when it determines that such a response is the best available means to address a release from the site at issue." 54 Fed. Reg. at 37899. Fundamentally, EPA aims to finance cleanups by holding the polluting party responsible for cleanup costs(e.g., by seeking performance or payment by a PRP, as it did here) before turning to the Fund as a potential source of funding. This "enforcement first" policy "promotes the 'polluter pays' principle and helps to conserve the resources of the [Superfund] for the cleanup of those sites where viable responsible

parties do not exist." *See, e.g.,* Enforcement First for Remedial Action at Superfund Sites at 1 (Sept. 20, 2002).[12]

But AME ignores EPA's actual stated policy considerations in evaluating use of the Fund. Instead, AME asserts that its claim represents an appropriate use of the Fund because "the costs [were] incurred pursuant to . . . the national contingency plan" and because "the Site [is] on the NPL." AME Motion at 36. Those facts are insufficient to demonstrate that the payment of AME's claim is an "appropriate use of the fund." If that standard were the only measure for substantial compliance with the "appropriate use of the Fund" then *any and every* person could claim retroactive preauthorization and potentially obtain reimbursement from the Fund, regardless of other sources of funding or the relative importance of the work. Such an outcome is at direct odds with the regulations and EPA's fiscal responsibility to the Fund.

Moreover, whether preauthorization of the work proposed is an appropriate use of the Fund is a wholly discretionary determination by the agency. See § 307.23 (describing the factors that inform EPA's discretionary decision to grant or deny a preauthorization application); § 300.700(d) ("EPA, in its discretion, may grant preauthorization of a claim."). Here, EPA could not have found that preauthorization of AME's proposed work was an appropriate use of the Fund. Even assuming that EPA reviewed AME's alleged "application" prior to AME beginning performance of work in 2012, at that time the work contemplated was covered by the BJS Site Consent Decree, and Vertellus was on the hook to perform the response action. Consent Decree at 15. EPA's regulations forbid preauthorization in these circumstances -- "EPA will not grant preauthorization for any response actions where . . . [t]he action is to be performed by a . . .

[12] Judicial notice of this publicly available guidance document is appropriate. *See, e.g., Papasan v. Allain*, 478 U.S. 265, 269 n.1, 298 (1986) (noting that the Court is not precluded from "taking notice of items in the public record"); *U.S. v. White*, 620 F.3d 401, 416 (4th Cir. 2010) (same). The document is available at https://www.epa.gov/sites/default/files/documents/enffirst-mem.pdf.

person operating pursuant to a contract with the United States." § 307.23(g)(4). AME's submissions (on behalf of Vertellus) did not allow EPA to determine whether its work would be (or was) an "appropriate use of the Fund."

AME goes on to assert that "EPA approved AME's work[,]" and therefore, "AME's costs were reasonable and necessary," satisfying another preauthorization objective. AME Motion at 40. AME misrepresents both this objective and the relevant standard for evaluating whether costs are reasonable and necessary. EPA has stated that this objective "gives the claimant an assurance that if the response is conducted in accordance with EPA's approval *and* the costs are reasonable and necessary, monies *may* be had from the Fund." 54 Fed. Reg. at 37898 (emphasis added). The point of this objective is to provide certainty between both the agency and the claimant. Here, AME's expectation of retroactive preauthorization is the antithesis of this objective. It cannot be said that AME was given "an assurance," when it failed to express to EPA any intent or interest in potentially filing a claim against the Fund at the time that it was engaging with EPA at the BJS Site. Affidavit of Eric Newman at ¶¶ 10-17. AME's after-the-fact assertions that its costs are "reasonable and necessary" cannot satisfy this objective.[14]

And regardless, AME cannot unilaterally determine that its costs were "reasonable and necessary." AME has conceded that it never provided the relevant cost data to EPA, let alone provided it prior to commencing response actions. "AME stands ready to provide the cost data to

[14] EPA will only consider costs to be necessary and eligible if "the response action is preauthorized by EPA pursuant to § 307.22" and "the costs are incurred for activities within the scope of EPA's preauthorization." § 307.21(b)(1) and (2). Whether costs are reasonable and necessary is first and foremost a function of the terms and conditions of the PDD. As stated clearly in the NCP itself, "[p]reauthorization represents EPA's commitment that if funds are appropriated for response actions, the response action is conducted in accordance with the preauthorization decision document, and costs are reasonable and necessary, reimbursement will be made from the Superfund, up to the maximum amount provided in the preauthorization decision document." 40 C.F.R. § 300.700(d)(8). See also § 300.800(d)(8) (EPA must certify the costs were necessary and consistent with the PDD); *see also Infra* at pg 22 FN 16.

EPA regarding the work that it completed, [b]ut AME was never given the opportunity to do so . . . ." Reply Brief for the Appellant (USCA4 Appeal: 19-1962; Doc: 19) (filed 12/12/2019). Furthermore, AME concedes that EPA witnesses testified that the Agency has not reviewed AME's costs. *E.g.,* AME Motion at 29; *see also* Affidavit of Eric Newman at ¶ 14.

Moreover, EPA, not AME, makes decisions about whether costs are "reasonable and "necessary." CERCLA requires that the "responsible Federal official" approve and certify such costs. 42 U.S.C. § 9611(a)(2); *see also* 40 C.F.R. § 300.700(d)(8) ("For a claim to be awarded under section 111 of CERCLA, EPA must certify that the costs were necessary and consistent with the preauthorization decision document.").[15] Eric Newman is not the Federal official responsible for approving and certifying costs, nor did Mr. Newman review (let alone approve and certify) any response cost documentation from AME. Newman Affidavit at ¶¶ 14-17. Approval and certification of costs by the "responsible Federal official" remains an unequivocal Congressional mandate that cannot be upended by alleged substantial compliance with seeking preauthorization. *See* 42 U.S.C. § 9611(a)(2).

In sum, AME's attempt at retroactive preauthorization actually frustrates, rather than satisfies, the "objectives of preauthorization" that it identifies. And regardless of whichever substantial compliance test is applied here—the Fourth Circuit's controlling standards requiring "intent" and non-violation of regulatory "essence" or AME's incorrect "objectives" test—AME

[15] EPA's regulations define "'necessary response costs' as required by section 111(a)(2) of CERCLA for Fund reimbursement of a *preauthorized* response action." 40 C.F.R. § 307.14 (emphasis added). The definition goes on to provide that necessary response costs are "costs determined to be: (1) Required based on the site-specific circumstances; (2) Reasonable (nature and amount do not exceed that estimated or which would be incurred by a prudent person); (3) Allocable (incurred specifically for the site at issue); and (4) Otherwise allowable (consistent with the limitations and exclusions under the appropriate Federal cost principles." *Id.* EPA has not had an opportunity evaluate AME's costs using this rubric.

has failed to demonstrate that it substantially complied with the preauthorization regulations.[16] As such, AME is not entitled to judgment as a matter of law. 40 C.F.R. § 305.27(a)

F. A finding that AME substantially complied with EPA's preauthorization regulations would vitiate the purpose of preauthorization and jeopardize the Superfund.

If this Tribunal were to find that August Mack substantially complied with EPA's preauthorization regulations, it would render them meaningless. A finding of retroactive compliance would essentially strike the "pre" in preauthorization, as a claimant could seek reimbursement years after commencing response actions—a direct contradiction to the regulations themselves.[17] Such a finding could set a dangerous precedent of effectively earmarking Superfund resources for projects that EPA had no way of knowing it was approving. The Superfund would become available to almost anyone on a whim, and EPA would be in no position to serve as a manager of those Funds. Potential claimants could subscribe to the adage "it's better to beg for forgiveness than to ask for permission." Such an outcome is inconsistent with the CERCLA, its implementing regulations, and EPA's fiscal duty to responsibly manage the limited resources of the Fund.

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[16] AME also fails to explain why, even in the event of a ruling that AME substantially complied with seeking preauthorization, it is entitled to the relief it seeks – payment of its approximately $2.667 million claim in full. EPA did not grant preauthorization, and EPA's decision to grant or deny preauthorization is discretionary and not subject to judicial review under CERCLA section 112(b)(2). *See* 40 C.F.R. § 300.700(d)(3) ("EPA, *in its discretion*, may grant preauthorization of a claim.") (emphasis added). In addition, because EPA did not grant preauthorization and issue a preauthorization decision document (PDD), there are no standards by which this Tribunal could evaluate a claim for reimbursement from the Fund. *See* 40 C.F.R. § 307.31(a)(1)-(2); Interim final rule for CERCLA Administrative Hearing Procedures for Claims Asserted Against the Superfund, 58 Fed. Reg. 7704, 7705 (Feb. 8, 1993) (providing that for CERCLA response claims, the ALJ shall consider, *inter alia*, the terms and conditions of the PDD).

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

In 2016, AME represented to the Bankruptcy Court that Vertellus was in breach of contract for allegedly failing to pay AME's invoices totaling approximately 1.7 million dollars. AX 16 at p.6, ¶ 5.[18] EPA is not responsible for Vertellus' alleged default, just as EPA is not responsible for paying AME's invoices. AME represented in the bankruptcy proceedings that Vertellus was required to approve and then pay invoices on a 30 or 45-day clock, depending on the nature of the services rendered. AX 16 at p.25 (§ 3.2 payment terms and timing). Vertellus apparently did not approve, certify, and then pay AME's invoices. Yet over a period of several years, AME did not actually seek payment from Vertellus. Rather than timely enforce the terms of its own contract, AME would now like taxpayers to reimburse it, for its failure to require timely payment from Vertellus. But AME may not do so by misappropriating EPA's preauthorization regulations and upending sections 111(a)(2) and 112(b)(1) of CERCLA. Put bluntly, AME should not be permitted to use the Superfund as an insurance policy.[19] Its recourse, like that of all businesses, was against Vertellus in bankruptcy court.

A finding that AME substantially complied with EPA's preauthorization requirements would vitiate the program. If AME's arguments prevail, then in theory any person could work with EPA for years or even decades without any mention to EPA of a future claim against the Fund, incur millions of dollars in costs along the way, and then turn around after-the-fact to claim "retroactive preauthorization."

II. Challenges to EPA's Preauthorization Regulations are Barred under CERCLA Section 113.

[18] EPA cannot confirm the underlying allegations, but notes that Vertellus only scheduled AME's claim for approximately $244,000, a fraction of its Proof of Claim. *Id*. AX 7 at 8.

[19] To allow otherwise, would fly in the face of Congress' concern that the "Fund could become a potentially open-ended entitlements program." H.R. Rep 99-253(II) 2986, 3003 (Oct. 28, 1985)

In its Motion for Accelerated Order, AME raises what it characterizes as both facial and "as applied" challenges to the preauthorization regulations themselves. AME asserts that "the preauthorization scheme is invalid ***on its face*** because the preauthorization requirement is *ultra vires*, violates the separation of powers doctrine, and violates the major questions doctrine," and that "EPA's preauthorization scheme is arbitrary and capricious ***as applied*** because it does not fulfill the objectives of preauthorization and EPA unlawfully bars innocent parties like AME from being preauthorized." AME Motion at 32. On those grounds, AME requests that EPA's preauthorization regulations either be "set aside in this case," AME Motion at 43 n.8, or entirely "invalidated," AME Motion at 53. AME further demands that, as a consequence of the regulations being either invalidated or set aside, it should be awarded "the entirety of its [approximately $2.66 million] claim."[20]

As an initial matter, neither this Tribunal nor any other reviewing court has subject matter jurisdiction under CERCLA section 112 to invalidate or set aside any EPA regulations in this case, as the scope of review in this proceeding concerns only the agency's "administrative decision" regarding the claim on the Fund. *See* 42 U.S.C. § 9612(b)(5) (specifying that EPA's decision "shall not be overturned except for arbitrary or capricious abuse of discretion").

Additionally, these arguments are barred under the governing terms of CERCLA. *See U.S. Magnesium LLC v. EPA*, 630 F.3d 188 (D.C. Cir. 2011) ("CERCLA imposes exceptional limits on efforts to attack the EPA's regulations in this field . . . ."). Pursuant to 42 U.S.C. § 9613(a), "[r]eview of any regulation promulgated under [CERCLA] . . . may be had . . . only in the Circuit Court of Appeals of the United States for the District of Columbia." That is, the D.C.

[20] Similar to its "substantial compliance" arguments, nothing in AME's advocacy connects the dots as to why a favorable ruling on any of its challenges to the regulations themselves would entitle it to reimbursement from the Fund or any other monetary relief.

Circuit Court of Appeals has "direct (and exclusive) jurisdiction" to hear challenges to the preauthorization regulations. *Waterkeeper Alliance, et al. v. EPA*, 853 F.3d 527, 532 (D.C. Cir. 2017).

Further, review of any CERCLA regulation "shall be made within ninety days from the date of promulgation of such regulations." 42 U.S.C. § 9613(a). In the first revision to the NCP in 1982, the regulations provided that a person who intended "to seek reimbursement from the Fund" for response actions "notif[y] the Administrator of EPA or his/her designee prior to taking such action and receive[] prior approval to take such action." 40 C.F.R. § 300.25(d) (1985). These regulations were subsequently challenged and upheld by the D.C. Circuit Court of Appeals because both the language and purpose of CERCLA support the legality of EPA's preauthorization scheme. *Ohio v. EPA,* 838 F.2d 1325 (D.C. Cir., 1988).[21] And the current version of the preauthorization regulations was finalized in 1993. 58 Fed. Reg. 5475 (Jan. 21, 1993). The time to challenge preauthorization is therefore long past. And while AME characterizes some of its arguments as "as applied" challenges to which the CERCLA section 9613(a) time limitations may not apply, those challenges are in reality further collateral facial attacks on the regulations themselves, and therefore also barred. *See* Section V.A*, infra*.

III. AME Has Waived Any Arguments Challenging EPA's Preauthorization Regulations, the Validity of Which Are Not at Issue on Remand.

As discussed above, the Fourth Circuit remanded this matter for further proceedings regarding whether AME "substantially complied" with the CERCLA preauthorization process. *August Mack*, 841 Fed. Appx. at 524. This Tribunal has appropriately recognized that "the validity of the preauthorization process [itself] is not at issue in this proceeding." ALJ Order on

[21] The similarities between this challenge and the challenges made in *Ohio v. EPA* are discussed in Section IV.A, *infra*.

Requestor's Motion to Compel Discovery and for Sanctions (May 12, 2022) at 9. Disregarding those limitations, AME's Motion for Accelerated Order raises several new legal arguments challenging the validity of EPA's preauthorization regulations. The Tribunal should reject all of these arguments as either waived or beyond the scope of the proceedings that the Fourth Circuit contemplated on remand.

For the reasons discussed above, the Tribunal lacks jurisdiction to hear any challenges to EPA's preauthorization regulations. Even if that were not so, AME unequivocally waived such arguments by failing to assert them at any point during the previous five years of litigation—not in its initial appeal to this Tribunal, not in federal district court, and not before the Fourth Circuit. *See Doe v. Chao*, 511 F.3d 461, 465 (4th Cir. 2007) ("[A]ny issue that could have been but was not raised on appeal is waived and thus not remanded.") (internal quotations omitted). Given that the regulations that AME seeks to have invalidated as facially unlawful have not changed during the course of this litigation, there is no reason why AME could not have raised these exact same issues from the outset of its appeal of EPA's denial of its claim against the Fund.[22] AME is barred from litigating "issues that could have been, but were not, raised before remand." *United States v. Hawkins*, 599 Fed. Appx. 485, 488 (4th Cir. 2015); s*ee Barrow v. Falck*, 11 F.3d 729, 730 (7th Cir. 1993 ("An argument bypassed by the litigants, and therefore not presented in the court of appeals, may not be resurrected on remand . . . ."). As the Fourth Circuit has succinctly stated, "a remand proceeding is not the occasion for raising new arguments or legal theories." *Volvo Trademark Holding Aktiebolaget v. Clark Mach. Co.*, 510 F.3d 474, 481 (4th

[22] As discussed above, however, any challenges to EPA's regulations implementing CERCLA, which includes EPA's preauthorization regulations, must be made within ninety days of promulgation and in the D.C. Circuit. *See* 42 U.S.C. § 9613(a).

Cir. 2007). The Tribunal should decline to entertain AME's newly-raised arguments challenging EPA's CERCLA regulations.

The attacks on EPA's preauthorization regulations that AME characterizes as "as-applied" challenges are just as procedurally improper as its facial challenges, and are likewise barred. Those arguments, similar to AME's facial challenges, broadly critique "EPA's preauthorization scheme" as, among other alleged flaws, "not fulfill[ing] its stated purposes." AME Motion at 45-46. AME's choice to include select citations to deposition testimony as part of these "as applied" arguments does not render them procedurally valid. The fact that some record evidence allegedly supports a litigant's legal arguments does not establish that those arguments could not have been raised previously. But even assuming for the sake of argument that AME's as applied arguments were founded on newly-discovered information *and* could not have been raised earlier, the Tribunal should still treat them as procedurally improper because they are beyond the scope of remand. The Fourth Circuit's holding that this Tribunal erred initially in applying a "strict compliance" standard to the question of whether AME sought preauthorization, and mandating further proceedings to determine whether AME substantially complied, provides no grounds for AME to instead challenge the regulations themselves. While AME may be entitled in these remand proceedings to assert new arguments regarding whether they substantially complied, it is precluded from raising new arguments that the underlying EPA regulations are unlawful.[23]

IV. AME's Facial Attacks to the Regulations Are Baseless and Must Be Rejected.

[23] As relief for its as applied challenges, AME asks the Tribunal to "set aside the preauthorization regulations for this specific case and award AME the entirety of its claim." AME Motion at 45-46. That requested relief is fundamentally no different from the plea for invalidation of the regulations that AME seeks through its facial challenges. Either way, a ruling that sidelines the regulations would be inconsistent with the Fourth Circuit's intent that on remand this Tribunal should apply a "substantial compliance" standard under those regulations.

AME raises a variety of facial attacks to the preauthorization regulations and process, arguing that "the preauthorization scheme is invalid ***on its face*** because the preauthorization requirement is *ultra vires*, violates the separation of power doctrine, and violates the major questions doctrine." AME Motion at 32. Section 112(a)(2) of CERCLA, AME continues, is unambiguous in allowing "payment of any claim by any non-government person," and because of this clear language, EPA's expansion of the requirements to make a claim against the Fund to include preauthorization are outside of the Agency's authority. AME Motion at 55. To require preauthorization, according to AME, "frustrates the purpose of CERCLA and the Superfund" by inhibiting timely cleanup of hazardous waste sites.[24] AME Motion at 58. And although arguments startlingly similar to AME's have already been heard and decided by the D.C. Circuit in a case from nearly thirty years ago, *see Ohio,* 838 F.2d 1325, AME argues its largely unsupported misinterpretations of CERCLA should govern instead. AME Motion at 59-60. Finally, to fill out its grab bag of facial attacks, AME claims that these regulations violate the major questions doctrine. AME Motion at 63.

As explained above, all of AME's facial attacks on the preauthorization regulations are jurisdictionally barred from consideration by this Tribunal because such claims must be made before the D.C. Circuit Court of Appeals and are out of time. *See* Section II, *supra*. As further explained, AME has waived these challenges, which exceed the scope of the remand, by failing to raise them earlier in these proceedings. *See* Section III, *supra*. In the alternative, however, we address AME's facial attacks below.

A. EPA's Preauthorization Regulations are Within the Scope of Its Broad Statutory Authority.

[24] AME provides no support whatsoever for its allegation that cleanups are somehow delayed by preauthorization.

Even if 113(a) did not bar review of AME's statutory authority claims at this time[25] and in this Tribunal, and if it had not waived these claims, these attacks fail on other grounds. In order to succeed on a facial challenge, AME must show that "no set of circumstances exists under which the [regulation] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987).

Both AME's *ultra vires* and separation of powers claims rest on essentially the same false premise—that EPA's preauthorization process runs counter to CERCLA section 111(a)(1)'s allegedly "unambiguous" allowance for "payment of *any* claim by *any* non-government person" against the Fund. AME Motion at 55. By limiting who can make a claim, AME alleges that the preauthorization process both is *ultra vires*, exceeding clear limits on EPA's statutory authority, and usurps the role of Congress, violating separation of powers. But AME's gross misinterpretation of the statute fails because the text and purpose of CERCLA make clear that EPA has wide authority and discretion to manage claims against the Fund, the Fund itself, and the prioritization of hazardous waste site cleanup.

CERCLA section 111(a)(2) does provide that the Fund, among other things, can be used for "payment of any claim for necessary response costs incurred by any other person as a result of carrying out the national contingency plan." 42 U.S.C. § 9611(a)(2). But that is not, as AME seems to suggest, the end of the CERCLA's words on the subject. As previously recognized by this Tribunal,[26] section 112(b), which AME continues to ignore, goes on to provide the Agency with specific and direct authority to "prescribe appropriate forms *and procedures* for claims," 42

[25] *See, e.g., Genuine Parts Company v. EPA*, 890 F.3d 304, 315 (D.C. Cir. 2018).
[26] Order on Motion to Dismiss at 9 ("Preauthorization is a requirement that is clearly provided for by the statute, which empowers the agency to 'prescribe appropriate forms and procedures' for filing claims. 42 U.S.C. § 9612(b)(1). For this reason, August Mack's related argument that it complied with all statutory requirements for submitting its Claim also fails.")

U.S.C. § 9612(b)(1) (emphasis added), and makes it clear that the Agency has discretion whether to pay claims. *Id.* § 9612(b)(2) ("The President *may* . . . make and pay an award of the claim . . . .") (emphasis added). AME cannot therefore establish that EPA's actions are plainly in excess of the Agency's CERCLA authority.

AME's arguments are not novel. The D.C. Circuit previously upheld a preauthorization requirement in the face of challenges nearly identical to those raised here. *Ohio,* 838 F.2d 1325. In *Ohio*, petitioners challenged the 1985 final rule setting out the requirement of preauthorization for reimbursable claims against the Fund "as being 'impediments' not contemplated by and inconsistent with the intent of Congress as expressed in the statutory scheme, both as originally enacted and as amended by the Superfund Amendments and Reauthorization Act of 1986 [(SARA)]." *Id.* at 1328; *compare with* AME Motion at 53-55. Petitioners argued that "the intent of Congress was to make the Fund available to private parties initiating cleanup activities to encourage the cleanup of hazardous waste facilities." *Ohio*, 838 F.2d at 1329; *compare with* AME Motion at 46, 50, 58. The court disagreed, recognizing that while "involving private parties in cleanup efforts" is one purpose of CERCLA, *Ohio*, 838 F.2d at 1330, "a reading of the full text of § 111 of CERCLA in the context of CERCLA and SARA makes it abundantly plain that EPA is required to serve as the protector and distributor of scarce government resources devoted to this program of national priority." *Id.* at 1331. The court recognized EPA's "broad rulemaking authority to craft the NCP," which serves "expressly [as] the foundation for allowance of private claims under sections 111 and 112 of CERCLA," and determined that "the requirement[] that a private claim for response costs be preauthorized by EPA" was not an "'impediment[]' to the intended operation of the statute" but instead "reflect[s] priorities for management of the Fund set out in CERCLA itself." *Id.* at 1331. Finally, the court noted that

"[s]o far as [Petitioner]'s argument that CERCLA as amended by SARA places claims against the Fund on the same basis as actions against responsible parties, not only is there no indication of any clear congressional intent to do so, but such an intent is inherently unlikely." *Id.*; *compare with* AME Motion at 59. As such, the court upheld the preauthorization regulations. *Ohio*, 838 F.2d at 1331-32.

AME offers a slew of arguments as to why the findings of *Ohio* are distinguishable or, alternatively, wrongly decided. It must, because it is rehashing the same, already settled arguments as petitioners in that case—that preauthorization violates the plain language and frustrates the purpose of CERCLA. But each of AME's efforts to distinguish *Ohio* fails in turn. AME asserts that the preauthorization rule challenged by *Ohio* petitioners was promulgated pre-SARA and therefore *Ohio* does not apply. AME Motion at 59. But both petitioners and the court in *Ohio* addressed SARA's purpose in the pleadings and ruling. *See, e.g., Ohio*, 838 F.3d at 1330-31. AME states that this version of the regulations was not promulgated until 1993.[27] AME Motion at 59. However, the fundamental intent and purpose of CERCLA that provides EPA with authority to make preauthorization regulations, as recognized in *Ohio*, did not change after SARA. Finally, AME argues that the *Ohio* decision "was based on assumptions that 30 years of history have proven wrong." AME Motion at 59. But the *Ohio* court did not rest its holding on assumptions; it did so on the plain language of CERCLA and clear intent of Congress. For these reasons, *Ohio* remains good law, and AME's remarkably similar arguments against preauthorization fail.

If AME's "unambiguous" reading of the statute were to control, essentially any third party could take on a cleanup with no advance notice to EPA of anticipated costs, do so in a

[27] Pursuant to CERCLA Section 113(a), the appropriate time to challenge regulations promulgated in 1993 would have been 90 days after their promulgation, not in 2022. 42 U.S.C. § 9613(a).

manner that adheres to certain portions of the preamble of the preauthorization rule, and expect EPA to pay its claim. Operating the Fund in this manner would wholly remove EPA's clearly prescribed authority to "serve as the protector and distributor of scarce government resources," *Ohio,* 838 F.2d at 1331, and additionally risk rapid and uncontrollable depletion of the Fund's resources. While, as AME suggests, *one* of the purposes of CERCLA is to get hazardous waste sites cleaned up, *see, e.g.,* AME Motion at 58, Congress also understood that there is vastly more work in this arena than funding to accomplish it. That is precisely why the statute provides EPA authority to manage the Fund, and the authority to make regulations to ensure that claims against the Fund are included in the Agency's analysis of cleanup priorities. *Ohio,* 838 F.2d at 1331.

For the above reasons, EPA's preauthorization regulations are neither *ultra vires* nor in violation of the separation of powers doctrine.

B. Preauthorization Does Not Present a Major Question.

As addressed above, the validity of EPA's preauthorization regulations is not properly before this Tribunal. Even if it were, AME is incorrect that the "preauthorization scheme" presents a major question as described in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022). AME Motion at 65. The preauthorization regulations do not "assert[] highly consequential power beyond what Congress could reasonably be understood to have granted." *West Virginia,* 142 S. Ct. at 2609. To the contrary, Congress *specifically directed* that "the President shall prescribe appropriate forms and procedures for claims" against the Fund. 42 U.S.C. § 9612(b)(1).[28] Fully in accordance with that mandate, EPA promulgated the ministerial regulations at 40 C.F.R. Part 307 to address the process and timing for seeking reimbursement from the Fund. Those forty-year-old regulations are not based on "newfound authority," nor did the regulations exert

[28] The President delegated this authority to EPA. Exec. Order. 12580 § 9, 52 Fed. Reg. 2923 (Jan. 29, 1987).

"extravagant statutory power over the national economy." *Id.* at 2609-10. They were upheld by the D.C. Circuit in *Ohio v. EPA*, 838 F.2d 1325 (D.C. Cir. 1988) and have remained unchanged by Congress despite other major amendments to CERCLA.

In *West Virginia*, the U.S. Supreme Court distinguished between an "ordinary case," where traditional canons of statutory construction apply, and an "extraordinary case," where an agency must identify "clear congressional authorization for its asserted regulatory authority." *Id.* at 2608. The Court explained that there are circumstances "in which the history and breadth of the authority that [the agency] has asserted, and the economic and political significance of that assertion, provide a reason to hesitate before concluding that Congress meant to confer such authority." *Id.* Those circumstances include an action that reflects an "extravagant statutory power over the national economy" and represents a "radical or fundamental change to the statutory scheme." *Id.* at 2609.

None of the factors described in *West Virginia* as constituting an extraordinary case apply to EPA's preauthorization regulations. CERCLA expressly directs EPA to "prescribe appropriate forms and procedures" as necessary to facilitate both the filing of claims against the Fund *and* the Agency's ability to evaluate such claims based on "information developed during the processing of the claim." 42 U.S.C. § 9612(b)(1), (2). In 1982, shortly after CERCLA's enactment in 1980, and pursuant to this direct specific grant of authority, EPA issued the preauthorization regulations.[29]

EPA's preauthorization regulations do not exert "extravagant statutory power over the national economy." AME's broad assertions generalizing CERCLA's economic effects are

[29] EPA initially promulgated regulations requiring preauthorization in 1982, and later amended these regulations in 1985; however, the preauthorization requirement was unchanged. *See Ohio*, 838 F.2d at 1328 (acknowledging that the 1985 revision retained the preauthorization requirement).

beside the point. AME Motion at 63-64. EPA acknowledges that CERCLA is a consequential program for addressing impacts to human health and the environment, but the broad effects that AME points to are baked in to CERCLA's larger statutory scheme and do not flow from the preauthorization and claims procedures. In keeping with CERCLA's larger statutory scheme that "those actually responsible" for the contamination pay for the costs of cleanup, *see, e.g.*, *Bestfoods v. U.S.*, 524 U.S. 51, 52 (2009), EPA stated when promulgating the preauthorization regulations that "[f]or most sites listed on the NPL, EPA expects to pursue enforcement actions against the responsible party or enter into contracts or cooperative agreements . . . for the response actions . . . ." 54 Fed. Reg. at 37895. The preauthorization regulations merely establish procedures to address a "third mechanism (i.e., claims for reimbursement of response costs under section 111 of CERCLA) [that] may be useful to expedite remedial and removal actions." 54 Fed. Reg. at 37895. Such procedures do not come close to an exertion of "extravagant statutory power over the national economy." *West Virginia*, 142 S. Ct. at 2609.

EPA's preauthorization requirements were subsequently upheld by the D.C. Circuit. *Ohio*, 838 F.2d at 1332. In *Ohio*, the court correctly concluded that the regulations "reflect priorities for management of the Fund set out in CERCLA itself" and there was nothing in "the statute or its legislative history" to indicate "that Congress would [not] have sanctioned" the requirements. *Id.* at 1331. Moreover, in the forty years since EPA's promulgation of the preauthorization regulations, Congress has revised CERCLA several times and left EPA's claims' forms and procedures untouched—strong evidence that Congress does not believe that those regulations usurped a power Congress intended to reserve for itself. *See, e.g.,* Superfund Amendments and Reauthorization Act (SARA), Public Law 99-499 law (Oct. 17, 1986); Small

Business Liability Relief and Brownfields Revitalization Act, Public Law 107-118 (Jan. 11, 2002); BUILD Act, Public Law 115-141 (Mar. 23, 2008).

Thus, this case is anything but "extraordinary." EPA's long-standing preauthorization regulations, which address the timing and process for payment, represent the quintessential ministerial process decisions that Congress routinely delegates to administrative agencies. Even if this Tribunal has jurisdiction to address the regulations' validity—which it does not for the multiple independent reasons identified above—it should affirm EPA's preauthorization requirements consistent with the D.C. Circuit's opinion in *Ohio*.

V. AME's "As Applied" Challenges to the Preauthorization Regulations Fail.

While AME improperly attacks the preauthorization rule on its face, it also attacks the application of the regulations on what it characterizes as several "as applied" bases. *See* AME Motion Section IV. AME argues that EPA's administration of the preauthorization process is "arbitrary and capricious" because the goals stated in the preamble to the preauthorization proposed rule are fulfilled only *after* preauthorization is granted. AME Motion at 43. Further, AME argues that EPA administers preauthorization "covertly" with a set of "unlawful unwritten restrictions" that prevent *any* "innocent part[y]" from getting reimbursement from the Fund. AME Motion at 46.

A. This Tribunal Does Not Have Jurisdiction to Hear AME's "As Applied" Arguments

As a threshold issue, AME does not have standing to assert that EPA administers the program in a way that is arbitrary and capricious, because such a claim is a generalized grievance. Prudential standing is a fundamental element of a court's jurisdiction to hear any particular claim. *See United States v. Richardson*, 418 U.S. 166, 171 (1974). "[E]ven when a plaintiff satisfies the constitutional requirements for standing, federal courts will not adjudicate a

'generalized grievance shared in substantially equal measure by all or a large class of citizens.'" *Burke v. City of Charleston*, 139 F.3d 401, 405 (4th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 499 (1975)). Where an agency action is challenged, courts avoid generalized grievances by focusing on "specific and discrete governmental conduct," rather than "programmatic challenges, which are not [reviewable]." *City of New York v. United States Dep't of Def.*, 913 F.3d 423, 431 (4th Cir. 2019). This distinction "is vital to the [Administrative Procedure Act]'s conception of the separation of powers. Courts are well-suited to reviewing specific agency decisions, such as rulemakings, orders, or denials. We are woefully ill-suited, however, to adjudicate generalized grievances asking us to improve an agency's performance or operations." *Id.*[30]

AME's allegation that EPA's administration of the *entire* preauthorization process is arbitrary and capricious is a broad, programmatic attack on agency action and a generalized grievance that does not convey standing. Even if AME's position on EPA's administration of the preauthorization process were true, which it is not, then it theoretically affects every person equally, even if AME is the only party that has tried to apply. This is exactly the kind of "programmatic attack" representing an injury "shared in substantially equal measure by all" that inappropriately demands the Tribunal "improve an agency's performance or operations," and this Tribunal should reject it. AME's second argument, that EPA has imposed "arbitrary and unlawful unwritten restrictions" on the preauthorization program, which if true would similarly affect all persons, must be rejected for the same reasons.

[30] *See also Norton v. Southern Utah Wilderness Alliance*, 542 U.S.55, 66-67 (2004) ("If courts were empowered to enter general orders compelling compliance with broad statutory mandates, they would necessarily be empowered, as well, to determine whether compliance was achieved-which would mean that it would ultimately become the task of the supervising court, rather than the agency, to work out compliance with the broad statutory mandate, injecting the judge into day-to-day agency management.").

Additionally, these challenges are not, as AME characterizes, "as applied" to its own situation; they are a collateral facial attack on the regulations as a whole. An argument that there can be no lawful application of a set of regulations is, in essence, a facial challenge. *See, e.g., Gold Dollar Warehouse v. Glickman*, 211 F.3d 93, 98-99, 100 (4th Cir. 2000).[31] AME fails to make any allegations that EPA is administering its preauthorization program in a way inconsistent with the regulations themselves, nor does it suggest a way EPA could be administering the regulations as written that would not have the same "arbitrary and capricious" problem. AME's argument, then, is fundamentally that the preauthorization process itself is "arbitrary and capricious" because it does not meet the objectives of the rule and contains "unwritten" prerequisites. That is, AME is arguing in essence that there is no way the preauthorization process can meet its own objectives, which is a facial challenge.

As described by the Supreme Court, the distinction between an as applied and facial challenge "is both instructive and necessary, for it goes to the breadth of the remedy employed by the Court." *Citizens United v. Fed. Election Commission*, 558 U.S. 310, 331 (2010). The only reasonable remedy to AME's supposed "as applied" arguments, which attack the administration of the preauthorization process in a way that applies to *every* potential claim equally, would be to throw out the entire preauthorization process, which AME in fact requests (AME Motion at 45-46).

Facial attacks on the preauthorization regulations are time-barred and must be brought in the D.C. Circuit Court of Appeals pursuant to CERCLA Section 113(a). *See* Section II*, supra*.

[31] *See also Doe v. Va. Dept. of State Police*, 713 F.3d 745 (4th Cir. 2013) ("An as-applied challenge attacks the constitutionality of a statute 'based on a developed factual record and the application of a statute to a specific person.' *Richmond Med. Ctr. for Women v. Herring*, 570 F.3d 165, 172 (4th Cir.2009) (en banc). By contrast, a litigant asserting a facial challenge contends that a statute always operates in an unconstitutional manner. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008).").

As such, these supposed "as applied" claims are barred as well because they present collateral facial attacks on the regulations.

While AME lacks standing to raise its "as applied" arguments, which also have been procedurally waived, *see* Section III *supra*, for the sake of argument, we address them briefly below.

B. EPA's Administration of the Preauthorization Process Achieves the Objectives of that Process.

AME argues that EPA's administration of the preauthorization process is arbitrary and capricious because it fails to achieve the objectives of that process until *after* preauthorization has been granted. AME Motion at 43-45.

AME provides no support for its assertions that a regulatory process must meet all the objectives stated in its rule preamble or otherwise be found arbitrary and capricious. Regardless, EPA's process is built around those same objectives AME claims the Agency does not address. EPA evaluates applications for preauthorization based on a non-exclusive list of seventeen criteria. *See* 40 C.F.R. § 307.23(b). At least eleven of these criteria invoke and reflect EPA's stated policy objectives. *Id.*[32] Additionally, the terms and conditions of EPA's Preauthorization Decision Documents (PDDs) reflect and integrate the stated objectives of preauthorization. *See* AX 8, AX 10, AX 11, and AX 18. EPA will approve a claim only to the extent that the cleanup was performed in compliance with the terms of the PDD. *See* 40 C.F.R. §§ 307.32(f), 300.700(d)(7) and (8) (citing to NCP Section 111(a)(2) claims procedures).

Ultimately, the preauthorization process ensures that EPA can fulfill its obligation to "serve as the protector and distributor of scarce government resources" so that the Superfund is

[32] *See* note 6, *supra*.

available for the most urgent cleanup priorities. *Ohio*, 838 F.2d at 1331. The process ensures that EPA has the crucial opportunity to evaluate any proposed activity against the requirements of the NCP *before* the action is undertaken and *before* the limited monies of the Superfund have been committed. Parties benefit from the certainty created by this process because "without the preauthorization procedure, private persons would proceed at the peril of their claim ultimately being disapproved or being invalid by reason of the exhaustion of available funds." *Id.*

C. EPA Administers the Preauthorization Process in Compliance with the Preauthorization Regulations.

AME alleges that because EPA regularly utilizes preauthorization as a tool in the process of settling with potentially responsible parties (PRPs) under CERCLA, the Agency has "covertly imposed arbitrary and unlawful unwritten restrictions on preauthorization eligibility" that prevent "innocent parties like AME" from being reimbursed from the Fund. AME Motion at 46.

Contrary to AME's position, it is not subject to "unlawful unwritten restrictions" on making a claim. AME, like any other member of the public, has access to EPA's regulations and the opportunity to avail itself of the preauthorization process prior to taking a response action. The regulations themselves are not AME's problem; rather, the problem AME faces is simple: AME was acting on behalf of Vertellus under contract, and it did not obtain payment from Vertellus, who was legally obligated to pay AME. AME cannot turn around now and treat the Superfund as its insurance policy. Although the circumstances AME finds itself in are unfortunate, AME is not suffering from covert restrictions on preauthorization eligibility.

AME would not have received preauthorization for reasons that, far from being unwritten, flow directly from CERCLA. EPA has congressionally-granted discretion to manage "appropriate uses of the Fund" such that "Fund money available for claims is expended in

accordance with environmental and public health priorities." *See* Proposed Rule, 54 Fed. Reg. at 37898. To manage those resources, EPA will not grant preauthorization for response actions that are to be performed by another person pursuant to a federal agreement. 40 C.F.R. § 307.23(g)(4). In the case of the BJS Site, Vertellus agreed to finance and implement the proposed response action pursuant to a federal contract with the United States. *See* note 7, *infra*. EPA therefore did not have the authority to preauthorize a claim from AME, a contractor for a PRP at the time, even if one had been made. Additionally, for reasons discussed in EPA's Renewed Motion for Accelerated Decision, EPA had further reason to deny AME's attempt to seek retroactive reimbursement from the fund. *See* Memorandum of Law in Support of Agency's Motion for Accelerated Decision (Sept. 16, 2022) at 17-39.

The requirement to comply with the preauthorization process, which AME failed to do, is the only "prerequisite" that applies to its claims against the Fund, and it flows directly from the regulations. *See* 40 C.F.R. §§ 307.11(a), 307.22(a). EPA's use of preauthorization as part of the settlement process, which is specifically contemplated by CERCLA section 122(b)(1) and regulations not subject to review here (*see, e.g.,* 40 C.F.R. § 307.22(a), (h)), is unrelated to the fact that AME failed to comply or even substantially comply with the preauthorization process and therefore is ineligible to receive a PDD and present a claim. And, as a final point, AME's argument that EPA *never* grants preauthorization to non-liable parties is simply factually incorrect, as already established in the record. *See* AX 11 (Mohawk PDD) (providing preauthorized funding to a prospective purchaser under the terms of a PPA).

For these reasons and the jurisdictional arguments discussed above, AME's supposed "as applied" challenges to the preauthorization process must be rejected.

Respectfully submitted on behalf of EPA's Claims Official,

10/28/22
Date

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CERTIFICATE OF SERVICE

I certify that the foregoing "EPA'S Response In Opposition to August Mack Environmental, Inc.'s Motion for Accelerated Order" in the Matter of August Mack Environmental, Inc., Docket No. CERCLA-HQ-2017-0001 ("EPA's Response"), 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 Response 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.

10/28/22
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