UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	
August Mack Environmental, Inc.,	**Docket No. CERCLA-HG-2017-0001**
Requestor.	

REQUESTOR'S REPLY IN SUPPORT OF MOTION TO COMPEL
AND RESPONSE TO EPA'S REQUEST FOR SANCTIONS

In its rambling and repetitive 38-page opposition to AME's Motion to Compel Discovery, the government offers an interpretation of 40 C.F.R. Part 305 that would all but prohibit meaningful discovery in this multi-million-dollar administrative proceeding. According to the government, discovery in this matter should be limited to the documents identified in the parties' initial prehearing exchanges. There are numerous flaws with the government's position.[1]

First, EPA conflates the Consolidated Rules of Practice found at 40 C.F.R. Part 22 ("Consolidated Rules"), and numerous administrative rulings interpreting that rule, with the Administrative Hearing Procedures for Claims Against the Superfund found at 40

[1] EPA also included what it called a motion in limine in its response brief. The government's request seeks to prevent the Tribunal from considering all but one of AME's exhibits identified in its prehearing exchange and all of the testimony to be offered by AME's testifying witnesses. While AME is filing a separate response substantively opposing EPA's request contemporaneously with this reply, EPA's motion bears noting here. EPA attempts to limit discovery to the parties' initial prehearing exchanges while at the same time asking the Tribunal to essentially delete all of the information in AME's exchange. This underscores the unreasonableness of the government's position regarding discovery.

C.F.R. Part 305 ("Superfund Procedures"). (*See* Mot. in Opp., pp. 2-3, 33-34.) The two sets of rules are distinct. For instance, the former requires parties to specifically move for "additional discovery" after a "prehearing information exchange," while the latter does not. The former makes no mention of the Federal Rules of Civil Procedure ("FRCP"), while the latter specifically invokes FRCP 26(a).[2] This is significant because the federal rules broadly permit parties to seek information that may lead to the discovery of admissible evidence, while the Consolidated Rules limit "other discovery" to "information that has significant probative value on a disputed issue of material fact relevant to liability or relief sought." Moreover, the invocation of the federal rules also means that discovery is to be self-implementing without unnecessary involvement of the trial court. This stands in direct contrast to the required participation of the Presiding Officer found in the Consolidated Rules. Based on these distinctions, EPA's plea to substitute the limited discovery found in the Consolidated Rules with the broad discovery called for by the Superfund Procedures should be rejected.

Second, EPA grossly misreads the Fourth Circuit's decision and bases its remand position on a flawed belief that vacated orders "remain[] controlling precedent[.]" (Mot.

[2] The Superfund Procedures mandate that "[d]iscovery shall include any of the methods described in rule 26(a) of the Federal Rules of Civil Procedure." 40 C.F.R. § 305.26(f)(1). The Superfund Procedures became effective on February 8, 1993 and have not since been updated. *See* 58 Fed. Reg. 7704-01. The version of FRCP 26(a) in effect at that time allowed for discovery via the methods AME used here. (Mot. Compel, p. 9, Exs. A, B, C.)

in Opp., p. 13.) The Fourth Circuit recognized the need for "discovery" when it concluded the orders granting EPA's motion to dismiss were erroneous, vacated those orders, and then was careful to highlight that "[n]o discovery" was conducted during the administrative proceeding. *August Mack Environmental, Inc. v. United States Environmental Protection Agency*, 841 F. App'x 517, 524-525 (4th Cir. 2021). EPA wrongly believes the "discovery" the Fourth Circuit contemplated was the "exchange of witness lists and documents" required by 40 C.F.R. § 305.26(b). (Mot. in Opp., p. 32.) But the Fourth Circuit never mentioned Part 305 or a prehearing exchange in its Order. Instead, the federal appellate court used the word "discovery," which has a "well-defined legal meaning" and refers to "'[c]ompulsory disclosure, at a party's request, of information that relates to the litigation.'" *State v. Bray*, 291 P.3d 727, 818 (Or. 2012) (quoting Black's Law Dictionary 533 (9th ed 2009)). Therefore, the "discovery" the Fourth Circuit envisioned includes the same discovery AME seeks through its interrogatories, request for production of documents, request for admissions, and depositions. *See also* 40 C.F.R. § 305.26(f)(1).

Third, EPA argues that a ban on discovery is warranted because the only issue that must be decided is whether AME presented a claim to EPA *before* it performed work and that claim was the functional *equivalent* of its obsolete form. (Mot. in Opp., pp. 17-19.) EPA's advocacy should be rejected as it is simply a strict compliance approach dressed up as substantial compliance. At best, EPA is merely parroting the *dissenting* opinion. But with all due respect to Judge Diaz, his views on substantial compliance were presented

to the panel and did not carry the day. As such, this Tribunal must do more than look at the date of AME's request for reimbursement to determine if AME substantially complied with EPA's preauthorization scheme. Thus, it matters whether the response actions AME performed were consistent with the NCP. It matters whether AME's response actions were accomplished with EPA's approval. It matters whether AME's actions were reasonable and necessary. And, it matters whether EPA has implemented its preauthorization scheme to effectively ban private parties from recovering necessary response costs that were incurred as a result of carrying out the NCP in direct contravention to CERCLA § 111(a)(2). AME's discovery was served to get at each one of these relevant issues.

Finally, to defeat AME's sanctions request, EPA contends that AME was itself in contempt because the agency "re-read[] this Tribunal's directive regarding further discovery" and determined that "it is evident that AME [sic] Counsel was openly misrepresenting and violating a valid court order." (Mot. in Opp. at 30.) EPA's arguments are baseless. As the EPA's and AME's extensive briefing demonstrate, the scope of discovery required by the Tribunal's prehearing order as well as 40 C.F.R. § 305.26(f) and the Fourth Circuit's decision are subject to wildly divergent legal interpretations. It is not bad faith for AME's lawyers (or, for that matter, the EPA's) to vigorously advocate for those legal interpretations. Nor is it sanctionable to serve discovery, to attempt to resolve discovery disputes by engaging in a meet and confer conference, or to send

correspondence advancing a legal argument to opposing counsel. On the other hand, EPA' actions and inactions in this proceeding since remand warrant appropriate sanction. EPA's sanctionable offenses include:

- Attending the court-ordered settlement conference without a client representative with authority to settle the matter;
- Arguing that vacated decisions of the Tribunal and the district court are unreversed, the law of the case, and, in the case of the district court order, controlling precedent;
- Failing to timely object or respond to any of AME's discovery requests; and,
- Stringing the discovery dispute on long enough to beat AME to the courthouse with a motion for accelerated decision that argues no discovery should take place.

Persuasive authority supports sanctioning a party who commits any one of these offenses, let alone four in approximately five months.

Argument

1. ***AME's discovery is proper in light of the Fourth Circuit's Order.***

The present dispute cannot be viewed in a vacuum. The parties are currently before the Tribunal because the Fourth Circuit vacated the decisions of the Tribunal and district court and remanded this proceeding back to the Tribunal. *August Mack Environmental*, 841 F. App'x at 524-525. In its Order, the Fourth Circuit stressed how "[n]o discovery" was conducted at the administrative level and EPA could litigate AME's substantial compliance and the amount of any Superfund reimbursement on remand. *Id.* at 525.

The Fourth Circuit did not mention Superfund Procedures of 40 C.F.R. Part 305 or the Consolidated Rules of 40 C.F.R. Part 22 in its Order. Nevertheless, EPA claims that the "discovery" the Fourth Circuit contemplated was simply the exchange of witness lists and documents (i.e. the prehearing exchange) required by 40 C.F.R. § 305.26(b). To support its argument, EPA points only to the Consolidated Rules, regulations that are inapplicable here, and court decisions interpreting those inapplicable regulations. (Mot. in Opp., pp. 32-34.)

EPA's argument is at odds with the plain meaning of "discovery" in the context of litigation. *Truesdell v. Link Snacks, Inc.*, 2016 WL 126873 at *4 (W.D. Ky. Jan. 11, 2016) ("In the litigation context, 'discovery' means 'compulsory disclosure, at a party's request, of information that relates to the litigation.'") (quoting *Black's Law Dictionary* (10th ed. 2014)); *Smith v. Manasquan Bank*, 2019 WL 1385085 at *1 (D.N.J. March 26, 2019) (same); *Colorado Medical Board v. Office of Administrative Courts*, 333 P.3d 70, 74 (Co. 2014) (same); *State v. Bray*, 291 P.3d 727, 818 (Or. 2012) (same).

In *State v. Schaefer*, the Wisconsin Supreme Court discussed the difference between the meaning of "discovery" when used in a legal context versus a lay context: "Discovery, in the legal sense, is distinguishable from less formal information-gathering techniques." 746 N.W.2d 457, 466 (Wisc. 2008). It "is designed to avoid unfairness and surprise in litigation, and may be enforced by judicial orders and sanctions." *Id.* At its core, "discovery," in its legal sense, involves the "[c]ompulsory disclosure, at a party's request,

of information that relates to the litigation." *Id.* at 466-467 (quoting Black's Law Dictionary 478 (7th ed. 1999)); *see also Arnett v. Dal Cielo*, 923 P.2d 1, 11 (Cal. 1996) (same).

With this in mind, our United States Supreme Court has long established that "[r]ather than using terms in their everyday sense, '(t)he law uses familiar legal expressions in their familiar legal sense.'" *Bradley v. U.S.*, 410 U.S. 605, 609 (1973) (quoting *Henry v. U.S.*, 251 U.S. 393, 395 (1920)). The Fourth Circuit itself uses this customary rule. *U.S. v. Dodson*, 291 F.3d 268, 271-272 (quoting *Bradley*, 410 U.S. at 609 (1973)). There is no reason to depart from this precedent and the long-understood meaning of "discovery" when used by lawyers and judges in litigation. Thus, AME's motion should be granted.

2. *EPA has waived any objection to AME's discovery.*

EPA does not dispute that AME served, and it received, written discovery in October and November 2021. Nor does EPA dispute that it failed to respond or object to AME's discovery within 30 days. (*See* Mot. Compel, pp. 5-7.) Indeed, EPA offers no justification in its 38-page response brief as to why it did not simply contact counsel for AME and explain its objections. Under these facts, EPA has waived any objection to AME's written discovery. *Essex Ins. Co. v. Neely*, 236 F.R.D. 287, 289 (N.D. W.Va. 2006) ("All objections must be stated with specificity and any objection not raised is waived."); Fed. R. Civ. P. 33(b)(4) ("The grounds for objecting to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the court, for good cause, excuses the failure."). Further, the requests for admission have been

deemed admitted as a matter of law. Fed. R. Civ. P. 33(a)(3) ("A matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.").

3. ***The relevant regulation embraces the discovery sought by AME.***

In addition to the controlling Fourth Circuit Order, the applicable Rules of Practice embrace the discovery methods used by AME, warranting a grant of the motion to compel. EPA contends the relevant Rules of Practice found at 40 C.F.R. § 305.26 are substantively identical to the inapplicable Consolidated Rules of Practice found at 40 C.F.R. § 22.19. (Mot. in Opp., pp. 2-4, 31-35.) EPA also goes so far as to state that its position is supported by administrative orders that date back to the early 1970s. (*Id.* at 34.) EPA seems to forget that CERCLA was only passed in 1980 and the relevant regulations found at Part 305 only became effective in 1993.

Nonetheless, despite what EPA says, the differences between 40 C.F.R. § 305.26 and C.F.R. § 22.19 are plain.[3] Under C.F.R. § 22.19(e)(1), a party must move for any "discovery." On the other hand, 40 C.F.R. § 305.26(f)(1) states that "[d]iscovery shall

[3] EPA cited the "supplementary information" preamble to the Interim Final Rule which established the Superfund Procedures to point out that those rules were "modeled after 40 C.F.R. part 22." (Mot. in Opp. At 33, n. 22.) However, being generally "modeled after" does not mean that EPA simply copied the discovery process of 40 C.F.R. § 22.19(e) when it promulgated 40 C.F.R. § 305.26(f). The plain language of the two regulations clearly shows they were drafted differently and must be applied differently.

include any of the methods described in rule 26(a) of the Federal Rules of Civil Procedure." At the time of this regulation, which has not been updated, Federal Rule 26(a) allowed for discovery via the methods AME used. This is initial "discovery" for which the consent of the party served and a Tribunal's order are unnecessary. In addition to initial discovery, the parties can agree to "voluntary discovery." 40 C.F.R. § 305.26(f)(2). Lastly, there is "further discovery" that the Presiding Officer can order, which includes additional written discovery and additional depositions. 40 C.F.R. § 305.26(f)(3)-(6). The use of the phrase "further discovery" implies the existence of the initial discovery AME utilized.

Likewise, AME's position is consistent with the Prehearing Order. The Order discussed voluntary discovery and "further discovery." (Prehr'g. Order, p. 4.) It did not mention, let alone bar, the initial "discovery" referenced by the Fourth Circuit, allowed by § 305.26(f)(1), and served by AME.

4. ***AME's discovery and deposition requests seek relevant and discoverable material.***

EPA improperly argues that AME lacks a valid claim, so the discovery is irrelevant. (Mot. in Opp., p. 17 ("No matter how much further discovery were to be allowed, AME Cannot Meet Its Burden of Proof . . . ."). This contention, like all of EPA's claims on remand, is premised on the vacated decisions still being good law. (*Id.* at 13 ("The fact that the further discovery sought by AME lacks significant probative value is made transparent [*sic*] by the District Court.")). However, by definition, the vacated

decisions cannot serve as proof or in support of EPA's claims. *Franklin Sav. Corp. v. U.S.*, 56 Fed.Cl. 720, 737 n.20 (Fed. Cl. 2003) ("This is plainly an endeavor by [plaintiff] to either mask or 'spin' the fact that the district court's opinion was not only reversed but was vacated—ergo, it has no legal value, no precedential value, and, in the eyes of law, does not exist. It is a nullity . . . This is not simply attempted legerdemain on the part of [plaintiff]. This is near deceit.'") (internal citation omitted). Accordingly, EPA's merits contentions cannot be used to prevent discovery.[4]

Further, EPA's argument is at odds with the purposes of discovery. A petitioner or "[p]laintiff may use discovery to try to develop the merits of his case." *Perez v. Indian Harbor Insurance Company*, 2021 WL 1164753 at *1 (N.D. Cal. March 26, 2021). Similarly, a petitioner/plaintiff may use discovery to develop a record to defeat defenses. *New York v. Micron Technology, Inc.*, 2009 WL 29883 at *6 (N.D. Cal. Jan. 5, 2009) ("Prohibiting plaintiff from conducting discovery on these defenses will clearly place plaintiff at an unfair disadvantage because plaintiff will be unable to explore the factual and legal bases of these defenses, which in turn will significantly impair plaintiff's ability to prepare to rebut or defend against these defenses in dispositive motions or at trial."). In this way, "modern instruments of discovery serve a useful purpose.... They together with pretrial procedures

[4] Moreover, as explained in its response to EPA's motion in limine and AME's other filings, AME will prove that it satisfied the objectives of the preauthorization process, thereby substantially complying with it, its response actions were consistent with the NCP, and its costs were necessary. Therefore, AME is entitled to 100% reimbursement of its costs from the Fund.

make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *Inferrera v. Wal-Mart Stores, Inc.*, 2011 WL 6372340 at *3 (D.N.J. Dec. 20, 2011) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)).

Moreover, given the Fourth Circuit's Order and language found at § 305.26(f)(1), EPA has the burden of proving that AME's discovery is not relevant or reasonably calculated to lead to the discovery of admissible evidence with specific arguments. *Lopez v. Don Herring Ltd.*, 327 F.R.D. 567, 585 (N.D. Tex. 2018) ("the burden [is] on the party resisting discovery to—in order to successfully resist a motion to compel—specifically object and show that the requested discovery does not fall within Rule 26(b)(1)'s scope of relevance (as now amended) or fails the required proportionality calculation or is otherwise objectionable."); *Financial Guaranty Insurance Company v. Putnam Advisory Company, LLC*, 314 F.R.D. 85, 87 (S.D.N.Y. 2016) ("If a party objects to discovery requests, that party bears the burden of showing why discovery should be denied."). EPA chose not to do that. Instead, it makes a broad unsupported claim that AME's discovery is irrelevant and lacks probative value. In doing so, EPA falls well short of its burden. Nevertheless, to leave no doubt, AME will further explain the relevance and importance of the requested discovery below.

a. *With its first set of written discovery, AME seeks information and documents relating to its claim, EPA's defenses, and is otherwise reasonably calculated to lead to the discovery of admissible evidence.*

AME's first set of interrogatories can be broken down into three categories with several independent and overlapping reasons for their appropriateness. First, AME seeks information regarding individuals who have discoverable information with interrogatories 1, 2, 4, 5, 11, 13, and 14, and it may seek to depose these individuals.[5] (Ex. A.) Depositions of these individuals may help AME develop its claim or defeat EPA's defenses, making the interrogatories proper. *See generally Inferrera*, 2011 WL 6372340 at *3 (quoting *Procter & Gamble*, 356 U.S. at 682); *Perez*, 2021 WL 1164753 at *1; *Micron Technology*, 2009 WL 29883 at *6.

For example, AME asks EPA to "[i]dentify those persons within the EPA with substantive knowledge of the administration of the agency's preauthorization program established in 40 C.F.R. § 307.22." (Ex. A, Interrog. 14.) After searching its records for PDDs to use in support of its defense, EPA only identified five. (AX 8, 10-11, 15, 18.) Notably, these PDDs each involve settlement involving the EPA and potentially responsible parties where mixed funding (i.e. remedies funded in part through PRP funds and in part through the Superfund) was an inducement to settle the government's claims. None involved an innocent party, like AME, seeking reimbursement under Sections 111(a)(2) and 112 of CERCLA or pursuant to the EPA's preauthorization scheme

[5] The information AME seeks regarding individuals with discoverable information is broader than EPA's prehearing exchange where it only identified witnesses that it intends to call. 40 C.F.R. § 305.26(b). Moreover, unlike with a prehearing exchange, a client representative (other than the attorney) must sign interrogatory answers. Fed. R. Civ. P. 33(b)(5)

under 40 C.F.R. § 307.22. AME believes it is possible that EPA has never preauthorized and reimbursed any innocent parties, such as AME, under these provisions. Indeed, EPA admitted that it believes it is barred from preauthorizing such parties in its Prehearing Exchange. (EPA Prehr'g Exch., p. 6.)

If true, the "inexorable zero" that exists will prove that the preauthorization scheme, as applied by EPA, is arbitrary and capricious, defeats the intent of Congress to reimburse innocent parties under 42 U.S.C. § 9611(a)(2), and is therefore invalid. Because this interrogatory is aimed at developing the merits of AME's case, it is proper. Sunlight is the best disinfectant and discovery into EPA's arbitrary and capricious preauthorization scheme is the only way for a meaningful review to occur. *See generally Master Printers of Am. v. Donovan*, 751 F.2d 700, 707 (4th Cir. 1984) (quoting *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting L. Brandeis, *Other People's Money* 72 (1933))). Denying such significant and relevant discovery would deprive AME of its right to due process and meaningful review on remand.

Second, AME properly seeks information regarding EPA's defenses with interrogatories 3, 10, 12, 15, 16, and 17. *New York v. Micron Tech., Inc.*, 2009 WL 29883 at *6 (N.D. Cal. Jan. 5, 2009). For example, interrogatory 15 asks EPA to "identify the status of the Site-specific funds, including a description of where and how such funds have been spent and the amount of Site-specific funds still held by the EPA." (Ex. A, Interrog. 15.) EPA uses its alleged status as protector of limited money in the Fund to support its

motion for accelerated decision. (Mot. Accelerated Dec., p. 5.) However, EPA accumulated $37 million in site-specific funding to specifically address the contamination at the BJS Site. (RX 001, pp. 1-8.) Moreover, the Biden Infrastructure Law provides $3.5 billion to help cleanup polluted Superfund Sites and EPA recently announced that it would use $1 billion to clear the backlog of 49 previously unfunded Superfund sites.[6] AME is entitled to test EPA's litigation position that it must safeguard scarce government resources and simply cannot pay AME's claim of approximately $3 million for work the agency continues to use at the BJS Site. Allowing EPA to skirt this discovery is inequitable given its pending arguments. (*See* Mot. Accelerated Dec., p. 5.) Thus, this interrogatory is proper because it will assist in the development of AME's claims and defeating EPA's defenses. *Perez*, 2021 WL 1164753 at *1; *Micron Technology*, 2009 WL 29883 at *6.

Third, AME seeks information that may be used to develop its claim with interrogatories 6-9. As discussed above, AME believes it is possible that EPA has never preauthorized and reimbursed an innocent private party, like AME, with money from the Fund under 42 U.S.C. § 9611(a)(2). If true, the preauthorization scheme is invalid as applied, making this discovery proper. *Perez*, 2021 WL 1164753 at *1.

Similarly, the request for production of documents seek material aimed at developing AME's claim that it met the purposes of preauthorization, its response actions

[6] This information comes from an EPA press release. *See* https://www.epa.gov/newsreleases/epa-announces-plans-use-first-1b-bipartisan-infrastructure-law-funds-clear-out-1.

were consistent with the NCP, and its costs were necessary and developing a record to defeat EPA's defenses. (Ex. A.) For example, documents that refer, relate to, or rely upon the work performed by AME at the Site may be used to establish these points. (*Id.*) Finally, the requests for admission relate to the issues on remand, developing AME's claims, and defeating EPA's defenses. (*Id.*) Thus, the discovery is appropriate and must be answered.

b. With its second set of written discovery, AME seeks information and documents relating to documents EPA uses to support its defense.

AME's second set of interrogatories and request for production of documents are limited to seeking information and documents that EPA uses in an attempt to defeat AME's claims.[7] (Ex. B; AX 8, 10-11, 15, 18.) In its response in opposition, EPA suggests that the PDDs it submitted in its Prehearing Exchange are irrelevant. (Mot. in Opp., p. 15.) However, EPA cited these documents to support its motion for accelerated decision. (Mot. for Accelerated Dec., p. 27.) Therefore, AME's second set of interrogatories and request for production of documents properly seek material relating to EPA's defenses. *Micron Technology*, 2009 WL 29883 at *6.

The second set of requests for admission seek to authenticate AME's exhibits. (Ex. B.) Because the requests for admission further AME's claim, they are appropriate. *Perez*, 2021 WL 1164753 at *1.

[7] AME inadvertently omitted an interrogatory and request for production relating to the Iron Horse PDD (AX 15). (Ex. B.) If this motion is granted, AME will serve an interrogatory and request for production regarding that PDD.

c. AME's deposition requests are designed to further develop its claims and defeat EPA's defenses.

AME seeks to depose the three witnesses that EPA listed in its Prehearing Exchange. (Ex. C.) Because EPA plans to call these witnesses in support of its defenses, allowing AME to depose them before a hearing is appropriate. *See generally Inferrera*, 2011 WL 6372340 at *3 (quoting *Procter & Gamble*, 356 U.S. at 682); *Micron Technology*, 2009 WL 29883 at *6. Further, because Mr. Newman constantly interacted with AME and approved AME's work, his testimony will advance AME's claim. *Perez*, 2021 WL 1164753 at *1.

In its response in opposition, EPA repeats the incorrect statement made in its motion in limine that EPA only listed Eric Newman as a rebuttal witness. (Mot. in Opp., p. 25.) As discussed in AME's response to the motion in limine, which AME incorporates hereto, EPA's statement is contradicted by its own Prehearing Exchange, and, regardless, Mr. Newman's anticipated testimony is relevant to AME's claims and defeating EPA's defenses. Likewise, EPA's passing statement that Mr. Newman and the other witnesses it listed on its witness list have no relevant personal knowledge is undeveloped, unsupported, contradicted by EPA's own prehearing exchange, and contradicted by AME's exhibits showing Mr. Newman's constant interaction with AME. (*Id.* at pp. 25-26.)

In addition, AME should be allowed to depose EPA Administrator Michael Regan. As previously discussed, AME believes it is possible that EPA has never preauthorized and reimbursed an innocent private party, such as AME, under 42 U.S.C. § 9611(a)(2). Such evidence would result in the preauthorization scheme being declared invalid. As

the Administrator, Mr. Regan has this relevant information, is the ultimate person responsible for the agency's preauthorization program, and EPA has not proposed an alternate deponent. Alternatively, however, instead of deposing Mr. Regan, AME would agree to take a deposition of EPA itself in accordance with Federal Rule of Civil Procedure 30(b)(6).

In sum, EPA seeks to deprive AME of its due process rights with its sweeping attempt to foreclose AME from using discovery to develop its claims and a record to defeat EPA's defenses. The relief requested by EPA, no "discovery," conflicts with the Constitution, the Fourth Circuit's Order, and Federal Rule 26, which the relevant Rules of Practice incorporated.

5. ***Sanctioning EPA for its post-remand conduct is supported by a wealth of persuasive authority.***

On multiple occasions since remand, EPA has acted in ways that are sanctionable. First, it attended the court-ordered settlement conference in bad faith without a representative with authority to settle the case. This conduct alone is sanctionable. *See Nick v. Morgan's Foods, Inc.*, 99 F.Supp.2d 1056, 1062 (E.D. Mo. 2000) ("Presence of the corporate representative is the cornerstone of good faith participation."); *aff'd*, 270 F.3d 590 (8th Cir. 2001); *see also Bartholomew v. Burger King Corp.*, 2014 WL 7419854 (D. Haw. Dec. 30, 2014).

Additionally, EPA insists that this Tribunal is bound by the vacated decisions of the district court and Tribunal despite AME repeatedly noting the impropriety of such

an argument. What's more, EPA takes this tactic even further in its response in opposition, calling the vacated district court order "controlling precedent." (Mot. in Opp., p. 13 (stating "the District Court's decision in this regard remains controlling precedent and a settled issue of law and fact as to any relevancy determinations on remand.")). However, as discussed in the response to EPA's motion in limine, vacated decisions are not good law and courts who face such inappropriate claims reject, reprimand, and even sanction the offending parties. For example, in *Kawitt v. U.S.*, 842 F.2d 951, 954 (7th Cir. 1988), the Seventh Circuit imposed sanctions when a vacated decision was cited. *See also Buckler v. Rader*, 56 F.Supp.3d 1371, 1376 (N.D. Ga. 2014) ("in what is clearly sanctionable behavior, *see Kawitt v. United States*, 842 F.2d 951, 954 (7th Cir.1988) (citation of vacated case warranted sanctions against attorney on appeal); *see also* Model Rule of Professional Conduct 3.3(a)(1)('A lawyer shall not knowingly make a false statement of ... law to a tribunal....'), counsel for Plaintiffs entirely failed to note that this specific holding was abrogated . . . ."). Sanctioning EPA for this behavior is appropriate and bringing an end to its baseless arguments regarding vacated decisions is "necessary for the maintenance of order and for the efficient and impartial adjudication of issues . . . ."[8] 40 C.F.R. 305.4(b).

[8] EPA claims that holding EPA's motion for accelerated decision in abeyance while discovery occurs "will prejudice EPA by causing unnecessary delay[.]" (Mot. in Opp., p. 36.) However, EPA is the one that has delayed this proceeding with its refusal to participate in discovery. AME requested the depositions to take place in December 2021, and if AME had timely responded to the written discovery, discovery could have been completed before the New Year, 2022. (Mot. Compel, Exs. A-K.)

Third, EPA wrongly chose to ignore AME's discovery. (Mot. Compel, Exs. A-K.) Yet, EPA admits to finding time to contact the Tribunal's clerk about the discovery and then misrepresents the clerk's response as "stating that your Honor had not issued a superseding order 'compelling' the additional discovery sought by AME[.]" (Mot in Opp., p. 30; Ex. 1.) The clerk's email states only that "Judge Biro has not issued any orders since the Order of Redesignation and Prehearing Order on September 8, 2021." The clerk's email says nothing about discovery or superseding orders and neither does EPA to the clerk. In any event, as explained in the motion to compel, sanctioning EPA for intentionally ignoring the discovery and refusing to respond to any of the discovery is appropriate and within the authority of the Tribunal. (Mot. Compel, pp. 16-18.)

Similarly, EPA should be sanctioned for its bait-and-switch tactics of appearing to cooperate in resolving this discovery dispute just long enough to beat AME to the courthouse with a motion for accelerated decision. This bad-faith gamesmanship is undisputed. AME worked diligently in trying to resolve the discovery dispute without Court involvement. (Mot. Compel, Exs. D-K.) After a meet and confer teleconference, EPA's counsel promised to take the discovery issues back to their client for further consideration, and AME requested a response by Monday, December 20, 2021 in order to have sufficient time to file the present motion. (*Id.* at Ex. J.) Then, on December 20, 2021, EPA emailed AME stating its refusal to participate in discovery and filed a 36-page brief in support of its motion for accelerated decision less than two hours later. (*Id.*) It is clear

that EPA was working on its brief well before its December 20, 2021 email, demonstrating improper gamesmanship by EPA. Sanctioning such conduct is appropriate. (Mot. Compel, pp. 16-18.)

6. ***Denying EPA's undeveloped and unsupported request for sanctions is proper.***

Lastly, to combat its numerous instances of sanctionable conduct, EPA goes on the offensive and claims that AME should be the one that is sanctioned. Instead of the growing list of improper conduct that AME cites in support of its sanction request, EPA only relies on the fact that AME served EPA with written discovery and demanded responses within 30 days. (Mot. in Opp., pp. 30-31.) EPA then makes an unsupported claim that AME is in contempt of court by serving the discovery and makes a passing reference to Federal Rule 11 in a footnote. (*Id.* at 31.) Such undeveloped arguments cannot support a claim for sanctions. 40 C.F.R. § 305.23(a); *International Painters & Allied Trades Industry Pension Fund v. Zak Architectural Metal & Glass, LLC*, 736 F.Supp.2d 35, 38 (D.D.C. 2010) ("A party moving for a finding of civil contempt must show, by clear and convincing evidence, that: (1) there was a court order in place; (2) the order required certain conduct by the defendant; and (3) the defendant failed to comply with that order.").

Additionally, as already established, AME's discovery requests are proper, and EPA waived any objection by failing to respond in a timely fashion. Further, requiring a response within 30 days is not AME's own rule, but rather, the Federal Rule for

responding to interrogatories, request for production of documents, and requests for admission. Fed. R. Civ. P. 33(b)(2) ("The responding party must serve its answers and any objections within 30 days after being served with the interrogatories."); Fed. R. Civ. P. 33(b)(2)(A) ("The party to whom the request is directed must respond in writing within 30 days after being served . . . ."); Fed. R. Civ. P. 36(a)(3).

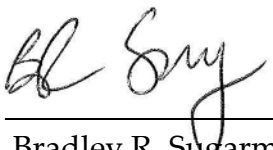
Finally, AME has not disobeyed the Prehearing Order as EPA suggests. Nowhere in the Order did the Tribunal bar the service of the discovery at issue. Even if EPA's position is accepted, AME had no reason to believe that EPA would refuse to agree to any "discovery." Relatedly, AME has not found, and EPA has not cited, any caselaw interpreting 40 C.F.R. § 305.26.[9] AME has a good faith argument that the discovery is proper, and it did not serve the discovery in bad faith or in contradiction of any caselaw interpreting the relevant Rules of Practice. Rather, AME seeks to exercise its right, which is grounded in the Due Process Clause, to develop its claim, develop a record to defeat EPA's defenses, and to locate otherwise discoverable material. (*See* Mot. Compel, p. 14.) Under these facts, sanctioning AME would be an abuse of discretion.

Conclusion

For the foregoing reasons, AME's motion to compel should be granted in its entirety.

[9] The lack of caselaw regarding the relevant regulation does not excuse EPA's failure to even dignify AME with a response to the discovery.

Respectfully submitted,



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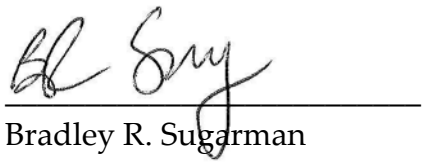
Certificate of Service

I certify that the foregoing was filed and served on the Chief Administrative Law Judge Biro on February 21, 2022 through the Office of Administrative Law Judge's e-filing system, and that a copy of this document was also served on opposing counsel at the following e-mail addresses: cohan.benjamin@epa.gov and Swenson.erik@epa.gov.



Bradley R. Sugarman

From: Barnwell, Matt <Barnwell.Matt@epa.gov>
Sent: Monday, November 01, 2021 10:36 AM
To: Cohan, Benjamin <Cohan.Benjamin@epa.gov>
Subject: RE: In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001

Judge Biro has not issued any orders since the Order of Redesignation and Prehearing Order on September 8, 2021. I've attached a copy of that Order.

Thanks,
Matt

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From: Cohan, Benjamin <Cohan.Benjamin@epa.gov>
Sent: Monday, November 1, 2021 10:20 AM
To: Barnwell, Matt <Barnwell.Matt@epa.gov>
Subject: RE: In re August Mack Environmental, Inc., EPA Docket No. CERCLA-HQ-2017-0001

Matt: Do you know whether Judge Biro's office has issued any orders that post-date her Prehearing Order of September 8, 2021. If so, can you please serve EPA again? Thank you.

EXHIBIT 1