

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR**

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In the Matter of:	)	
	)	
ISP Freetown Fine Chemicals, Inc.	)	Docket No. RCRA-01-2018-0062
238 South Main Street	)	
Assonet, MA 02702-1699	)	
	)	
MAR000009605	)	<b>COMPLAINANT’S RESPONSE</b>
	)	<b>TO RESPONDENT’S MOTION</b>
	)	<b>FOR ACCELERATED DECISION</b>
Proceeding under Section 3008(a)	)	
of the Resource Conservation and	)	
Recovery Act, 42 U.S.C. § 6928(a)	)	
_____	)	

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.20, Complainant United States Environmental Protection Agency, Region 1, files this Response to the motion for accelerated decision in this matter filed on June 23, 2021, by Respondent ISP Freetown Fine Chemicals, Inc.

Respectfully submitted,

Date: July 8, 2021

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## **I. INTRODUCTION**

The United States Environmental Protection Agency (“EPA”), Region 1 (“Complainant”), and ISP Freetown Fine Chemicals, Inc. (“Respondent”) have each filed a Motion for Accelerated Decision (“Motion”) in this case. In its Motion, Complainant set out its prima facie case demonstrating that Respondent violated certain federal and federally authorized state hazardous waste regulations promulgated under Subtitle C of the Resource Conservation and Recovery Act (“RCRA”). Complainant also rebutted Respondent’s claimed affirmative defense that a manufacturing process unit exemption (“MPU Exemption” or “Exemption”) set out in RCRA regulations applied to the four receiver tanks (“Receiver Tanks” or “Tanks”) remaining at issue in the case. The plain meaning of the MPU Exemption, as confirmed by its regulatory history, case law, and EPA guidance, demonstrates that the Exemption applies to individual pieces of equipment in which product manufacturing occurs and in which hazardous waste is generated. Complainant’s Motion (“C-Motion”) showed that Respondent’s Receiver Tanks do not satisfy these criteria, and thus that the MPU Exemption cannot apply to the Tanks.

Respondent’s Motion (“R-Motion”) acknowledges that the Receiver Tanks were not operated in compliance with Complainant’s cited RCRA hazardous waste regulations and focuses exclusively on its claimed MPU Exemption defense – but Respondent’s myriad arguments do not avail to make the Receiver Tanks subject to the Exemption. Complainant files this Response to Respondent’s Motion (“Response”) to address matters raised in Respondent’s Motion. Respondent’s claims and Complainant’s responsive arguments are summarized in this Introduction and discussed in detail in the body of this Response.

One lengthy set of Respondent’s arguments appears rooted in the notion that the MPU Exemption can be properly interpreted by importing and employing terms used in other RCRA regulations (or in these regulations’ preambles) and in Clean Air Act (“CAA”) regulations. But the primary term – “distillation unit” – that Respondent wishes to import does not appear in the regulatory text of the MPU Exemption. Further, the other RCRA and CAA regulations cited by Respondent have entirely different purposes than the MPU Exemption and the other exemptions listed with it in 40 C.F.R. § 261.4(c) (“Section 261.4(c”). The Supreme Court and other federal courts have held that when the same term is used in two different statutes or regulations, the term should be interpreted differently where the statutes or regulations have different purposes. Accordingly, Respondent’s appeals to other RCRA and CAA regulations, whose objectives are fundamentally different than those of the MPU Exemption, are unavailing.

Respondent also argues that EPA administrative case law establishes a test for MPU Exemption coverage that would include the Receiver Tanks. But the two cases that Respondent cites actually support Complainant’s arguments that no product manufacturing within the meaning of the MPU Exemption occurs in the Receiver Tanks, and that the Tanks could not be covered by the MPU Exemption even if they were arguably necessary to the functioning of Respondent’s production processes.

Respondent next argues that the term “manufacturing process unit” can include a collection of equipment, not just a single tank or other single piece of equipment. Here again, Respondent’s arguments fail on the text, purposes, and preamble of the MPU Exemption, and Respondent’s citations to other CAA and RCRA regulations with purposes inherently different from the Exemption are inapposite.

Finally, Respondent makes various claims regarding the alleged functions and features of the Receiver Tanks to argue that the Tanks are an integral part of the Respondent's production processes and thus exempt from RCRA regulation. Complainant's responses to these claims are in Section V below. But even if the Receiver Tanks were "integral" to Respondent's chemical production in the sense that production could be impacted or even halted if the Tanks were not functioning, being "integral" to production is not the test of whether the Tanks are covered by the MPU Exemption. Instead, the relevant criteria for exemption are whether product manufacturing and hazardous waste generation occur in the Receiver Tanks.

Because Respondent is asserting an affirmative defense, Respondent has the burden to prove that the MPU Exemption applies to the Receiver Tanks. *See* C-Motion pp. 24-25. But Respondent has come nowhere near meeting its burden. Respondent has not shown that the Receiver Tanks – the only pieces of equipment at issue in this case – satisfy the plain terms of the MPU Exemption. Instead, Respondent has focused on claims that the terms of the Exemption are met by aggregating separate pieces of equipment. Further, Respondent has failed to prove that "manufacturing" is occurring in the Receiver Tanks as defined and applied in two cases decided by the Tribunal. Finally, Respondent has failed to demonstrate that hazardous waste is generated in the Receiver Tanks. Since Respondent has failed to prove that the Receiver Tanks have satisfied the terms of the MPU Exemption, the Tanks are not exempt and are in violation of RCRA regulations.

**II. RCRA AND CAA REGULATORY AND PREAMBLE LANGUAGE THAT DOES NOT APPEAR IN THE MPU EXEMPTION, AND THAT HAS DIFFERENT REGULATORY PURPOSES THAN THE EXEMPTION'S, CANNOT BE USED TO INTERPRET IT**

In Section I.A.1. of its Motion, Respondent's arguments that the Receiver Tanks are MPUs because of regulatory preambles or text may be summarized as follows:

1. Because EPA used the term "distillation unit" a single time in the preamble of the Section 261.4(c) rulemaking, EPA was requiring that any and all "distillation units" be treated under the MPU Exemption as an excluded unit;
2. The Receiver Tanks are necessarily included within the term "distillation unit";
3. Thus, the Receiver Tanks are necessarily exempt from RCRA regulation under the MPU Exemption.

As Complainant demonstrates below, Respondent's argument is fundamentally flawed. Further, by focusing on a term ("distillation unit") that is nowhere used in the regulatory text of Section 261.4(c) and the MPU Exemption itself, Respondent's argument obscures the pivotal question before this Tribunal regarding whether the Receiver Tanks satisfy the regulatory criteria set out in the text of the MPU Exemption, which is whether both manufacturing and hazardous waste generation occur within the Tanks. Since the Receiver Tanks do not satisfy these criteria, the MPU Exemption does not apply to them.<sup>1</sup>

**"Distillation Unit" in Section 261.4(c) Preamble.** Respondent insists that EPA's use of the words "distillation unit" in the preamble to the Section 261.4(c) final rulemaking ("Section 261.4(c) Preamble") forces the conclusion that all "distillation units" – however configured, however used, and however defined (or undefined) – must be treated as exempt units under

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<sup>1</sup> Even if Respondent could make a colorable claim that either of these activities occur in some marginal way within the Receiver Tanks, the Tanks' primary function remains the collection of used liquid solvents, including hazardous waste solvents, and the Tanks are thus still subject to RCRA regulation.

Section 261.4(c) and the MPU Exemption. *See* R-Motion pp. 12-14; CX-14. EPA did refer to a “distillation unit” as an example in the Section 261.4(c) Preamble – but it was given as an example of a tank or tank-like unit that could qualify for a Section 261.4(c) exemption. The term “distillation unit” is not used in the regulatory text of Section 261.4(c), and it is not defined in any other RCRA regulations. Respondent cites EPA RCRA Online (“RO”) guidance memoranda to bolster the supposed importance of the Preamble’s single use of the term “distillation unit,” but these guidances merely recite the Preamble’s language wholesale. *See* R-Motion p. 13 (quoting two RO guidances).

Although Respondent places great weight on this single mention of “distillation unit,” it appears that EPA used this phrase in the Preamble merely as a synonym for “distillation column.” As discussed below in Section IV, the Preamble specifically listed a “distillation column” as one of three examples of a potentially exempt manufacturing process unit. In the Preamble’s next paragraph, EPA stated that it “did not intend to regulate product and raw material storage tanks, transport vehicles and vessels, and manufacturing process units in which hazard wastes were generated.” In the very next sentence, EPA stated that “[a]s represented by the above examples, most of these units are tank or tank-like units (e.g., distillation units) . . . .” EPA apparently used the phrase “distillation **unit**” rather than “distillation column” here because the sentence was referring to all the “tank or tank-like **units**” that were to be covered by Section 261.4(c).

The term “distillation unit” was also used to mean a “distillation column” in a specific discussion of Section 261.4(c) exemptions that appears in a technical document supporting the Subpart AA/BB rulemaking. “[U]nits such as product (not hazardous waste) distillation columns

generating organic hazardous waste still bottoms are not subject to the RCRA process vent and equipment leak standards while the wastes are in the product distillation column or unit.

However, distillation columns that treat such hazardous wastes (*i.e.*, hazardous waste management units) are subject to these standards if located at a RCRA-permitted facility.” *See Hazardous Waste TSD/Technical Guidance Document for RCRA Air Emission Standards for Process Vents and Equipment Leaks*, EPA-450/3-89-021, July 1990 (p. 3-3) (Response Att. 2).

**Subpart AA/BB Preamble.** Respondent next turns to the preamble to Subpart AA and BB’s final rule, promulgated almost ten years after Section 261.4(c), to support its claim that the Receiver Tanks are part of a “distillation unit” (which according to Respondent must be exempted from RCRA regulation by the MPU Exemption).<sup>2</sup> In like manner to its Section 261.4(c) Preamble argument, Respondent extracts a single word (“unit”) from the preamble’s discussion of Subpart AA to claim that that distillate receivers must be part of a distillation unit. But the term “distillation unit” is not defined in the text of Subpart AA. Further, Subpart AA has regulatory subject matter and purposes that are very different than those of Section 261.4(c) and the MPU Exemption. As a result, the Subpart AA preamble cannot offer the aid that Respondent seeks.

Unlike Section 261.4(c), which contains exemptions from RCRA regulation, both Subpart AA and Subpart BB were promulgated to regulate and reduce hazardous air emissions

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<sup>2</sup> *See* 55 Fed. Reg. 25454 (June 21, 1990). Subparts AA and BB refer to two RCRA air emissions regulations promulgated in 40 C.F.R. Parts 264 and 265. (Subpart CC, also promulgated in both Parts, is the third RCRA air emission regulation in this series.) The Subpart AA, BB, CC regulations are substantively the same in both Parts. The Part 265 versions of Subparts BB and CC were violated by Respondent.

from certain process vents and equipment. Subpart AA regulates air emissions from certain hazardous waste management processes with high potential emissions that involve solvent or other organic chemical separation and/or reclamation. *See* 55 Fed. Reg. at 25,461-62. These high-emitting hazardous waste processes are “typically associated with . . . distillation or other separation operations.” *Id.* EPA chose six high-emitting hazardous waste management processes for regulation, including hazardous waste distillation operations.<sup>3</sup> These hazardous waste distillation operations, which distill liquid wastes as part of hazardous waste treatment processes, are far removed from the product manufacturing operations at issue in this case.

To reduce emissions from these hazardous waste management processes, Subpart AA controls emissions from “process vents.” The preamble describes a process vent as a “pipe, stack, or other opening through which emissions from a hazardous waste management unit are released to the atmosphere . . . .” 55 Fed. Reg. at 25,461. The preamble explains:

A process vent is determined to be affected by the standard if the vent is part of a hazardous waste distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping unit that manages wastes with 10 ppmw or more total organics; this includes vents on tanks (e.g., distillate receivers or hot wells) if emissions from the process operation are vented through the tank.

55 Fed. Reg. at 25,471. Respondent seizes on the single word “unit” in the above-quoted sentence to claim that EPA intended to define a “distillation unit” (a term that is not defined in Subpart AA) as including the above-referenced “distillation receiver.” *See* R-Motion p. 15. But, if anything, the preamble’s above-quoted discussion shows that EPA did not consider “distillate receivers” to be part of a covered “hazardous waste distillation process,” and therefore,

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<sup>3</sup> The other five regulated processes are fractionation, thin-film evaporation, solvent extraction, or air or steam stripping operations. *See* 55 Fed. Reg. at 25,461-62, 25,471.

specifically added any “process vents” on receiver tanks to ensure that such emissions would be controlled under Subpart AA.

However, even if the Subpart AA regulations contained a definition of “distillation unit” (which they do not), that definition would not control an inquiry into what “distillation unit” might mean as used in the preamble to the Section 261.4(c) exemptions, including the MPU Exemption. Subpart AA aims to regulate hazardous waste emissions vented into the atmosphere from certain hazardous waste management operations and sources with the greatest emission potential. Accordingly, a broad variety of equipment associated with these hazardous waste management operations is regulated. In contrast, Section 261.4(c) provides exemptions from otherwise applicable general RCRA regulations and RCRA’s “cradle-to-grave” management of hazardous wastes, so the types of equipment covered by Section 261.4(c) are limited. Given the different purposes of these different regulations, Subpart AA definitions of covered equipment or processes would scarcely be relevant in construing potentially covered equipment under the MPU Exemption.

**Subpart AA Definition of “Distillation Operation.”** Respondent additionally points to the definition of “distillation operation” in the Subpart AA regulations as further support that receiver tanks are required for distillation and are part of a “distillation unit” as a matter of law. *See* R-Motion pp. 16-17; 40 C.F.R. § 264.1031. The Subpart AA definition describes how distillation takes place and is consistent with recognized chemical engineering authority. *See* Supplemental Affidavit of Kevin Schanilec (“Schanilec Supp. Aff.”) ¶ 5 (Response Att. 1). The definition provides that one or more feed streams are **separated out** into two or more exit

streams and that this separation occurs through the redistribution (meaning, dividing up) of the feed stream(s) into vapor and liquid phases as equilibrium is reached.

Respondent takes this straightforward description of distillation and misconstrues it. The definition is clear that separation is accomplished **through** redistribution; it is not “separation **and** redistribution,” as if they were two separate steps. The only unit in which the separation/redistribution of the feed streams occurs is the reactor. *See* Declaration of Joel LeBlanc (“LeBlanc Decl.”) ¶ 13 (indicating that only the vapor exits the reactor, demonstrating that the separation between phases has already occurred). This meaning of distillation is further supported by the reference to “equilibrium” in the definition, because the only point in distillation where equilibrium is a factor is in the reactor vessel as solvent vapor and remaining liquid material achieve this physical balance. *See* Schanilec Supp. Aff. ¶ 5. Because the condenser receives only the vapor phase of the solvent, no further redistribution between phases can occur in the condenser (and by necessity, downstream of the condensers, in the Receiver Tanks). Therefore, the entirety of this definition is describing the process that happens exclusively in the reactor tanks.

**CAA NESHAP Definition of “Distillation Unit.”** Respondent next turns to Clean Air Act (“CAA”) regulations for support, citing a definition of “distillation unit” that includes distillate receivers in the general provisions of the CAA’s National Air Emission Standards for Hazardous Air Pollutants for Source Categories (“NESHAP”) regulations, set out at 40 C.F.R. Part 63. *See* R-Motion p. 17. Armed with this definition, Respondent asserts that this Tribunal “must” look to this CAA definition under the *in pari materia* canon of statutory construction. But this Tribunal needs to do no such thing.

First, canons of statutory construction are guidelines, not hard-and-fast rules. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 93-95 (2001) (explaining that canons are guides rather than “mandatory rules,” the Supreme Court held that statutory canons could not force an interpretive result in favor of a tribal nation); *In re Deseret Power Electric Cooperative*, 14 E.A.D. 212, 245 (EAB 2008) (statutory canons should not be “woodenly” applied (quoting *Ali v. Fed. Bureau of Prisons*, 128 S. Ct. 831, 841 (2008)).

Second, as explained supra, the *in pari materia* canon does not apply to statutes and regulations that have different purposes or objectives – and here, the CAA and RCRA (and their respective implementing regulations) have radically different purposes. The CAA regulates air emissions, while RCRA regulates hazardous wastes and hazardous waste management. It is true that Subparts AA, BB, and CC also regulate air emissions – but these are not the RCRA regulations at issue in this motion. Respondent has already admitted that the Subpart BB and CC regulations would apply but for the MPU Exemption. *See* Respondent’s Prehearing Exchange (“RPHE”) p. 1. The only remaining regulation/issue in this litigation is whether Respondent can prove its affirmative defense, that Section 261.4(c) and the MPU Exemption contained within it apply to the Receiver Tanks. Section 261.4(c) does not deal with air emissions at all – instead, it deals squarely with RCRA-regulated hazardous wastes and certain temporary exemptions from such regulation. In contrast to the CAA NESHAP regulations, which cover broad categories of air emission sources, and which seek to control air emissions from various emission points within these sources, Section 261.4(c) and the MPU Exemption define a limited exemption from full RCRA regulation as long as – and only as long as – certain defined conditions are met.

Accordingly, even if the term “distillation unit” were used in Section 261.4(c) – which it is not –

the widely differing purposes of the CAA NESHAP regulations and Section 261.4(c) would render the *in pari materia* canon inapplicable.

***In Pari Materia Canon.*** The *in pari materia* canon generally provides that statutes and regulations on the same subject matter and with same purposes should be read in conjunction with each other. See *Gonzales v. Marriott Internat’l, Inc.*, 142 F. Supp. 3d 961, 973 (C.D. Cal. 2015) (explaining that the *in pari materia* canon requires statutes to be construed together when they both “concern the same subject matter” and “concern the same object” (citing Sutherland Statutes and Statutory Construction § 51.3 (7th ed.) (“Sutherland”))). The *in pari materia* canon does not apply to distinct statutes (and distinct regulations) that have different purposes and objectives. See, e.g., *United States v. Mills*, 850 F.3d 693, 699 (4th Cir. 2017) (“The doctrine of *in pari materia* is inapplicable when statutes have different purposes.”); *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1248 (D.C. Cir. 2008) (declining to apply *in pari materia* canon because “[c]haracterization of the object or purpose is more important than characterization of subject matter to determine whether different statutes are closely enough related to justify interpreting one in light of the other” (citing Sutherland § 51.3. (6th ed. 2008))). Indeed, the Supreme Court has held that identical terms within the same environmental statute can be defined differently for different regulatory purposes, even where the two terms cross-referenced each other in the statute. See *Environmental Defense v. Duke Energy Corp.*, 549 U.S. 561 (2007) (“*Duke Energy*”).

In *Duke Energy*, the Supreme Court considered two different definitions for the term “modification,” which occur in two separate parts of the Clean Air Act. In CAA Section 111, which established the New Source Performance Standards (“NSPS”) program, the term

“modification” was specifically defined at CAA Section 111(a)(4), 42 USC § 7411(a)(4). In CAA Section 169, which contains statutory definitions for the CAA’s Prevention of Significant Deterioration (“PSD”) program, the term “construction” is defined as including “the modification (**as defined in section 7411(a) of this title**) of any source or facility.” CAA Section 169(2)(C) (emphasis added). EPA promulgated a regulatory definition of “modification” for the PSD program that was substantially different than the statutory definition of “modification” enacted for the NSPS program.

In its defense of a CAA enforcement action, Duke Energy (“Duke”) argued that EPA was required to define “modification” identically in the NSPS and PSD programs. The Supreme Court rejected Duke’s argument. In so doing, the Court opined that words can have “different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same regulation.” *Duke Energy* at 574 (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)). As a result, a single statutory term can have different meanings based on different statutory objectives and implementation strategies. *Id.* The Court held that “modification” could be defined and interpreted differently in the PSD and NSPS programs, even though the term was cross-referenced from the PSD to the NSPS statutory provisions. *Id.* at 576.

Similarly, in *United States v. O’Connell*, No. 17-CR-50, 2017 WL 4675775, (E.D. Wis. Oct. 17, 2017) (“*O’Connell*”), a CAA criminal enforcement case, the defendants argued that a count in their indictment should be dismissed because the term “ambient air” as defined under the CAA’s National Primary and Secondary Ambient Air Quality Standards (“NAAQS”) regulations should control when interpreting the Asbestos NESHAP. The NAAQS regulations

defined “ambient air” as air “external to buildings,” while the Asbestos NESHAP did not define “ambient air” at all. *See O’Connell* at \*2-3. The District Court observed that the NAAQS were intended to apply to air outside of buildings, but that the asbestos removals governed by the Asbestos NESHAP “generally take place indoors.” *Id.* at \*3. Accordingly, the court declined to apply the NAAQS definition of “ambient air” to the Asbestos NESHAP. *Id.*

***In Pari Materia* Cases Cited by Respondent.** Respondent cites a multitude of cases to support its *in pari materia* arguments, but most are distinguishable on the grounds that the cases considered statutes or regulations with the same purposes and subject matter. *See Alabama Educ. Ass’n v. State Super. of Educ.*, 746 F.3d 1135, 1158 (11th Cir. 2014) (two sections of Alabama Election Code “had [a] common purpose . . . and should be construed together”); *United States v. Fillman*, 162 F.3d 1055, 1057 (10th Cir. 1998) (two statutory provisions that both “specifically prohibit persons under indictment from shipping, transporting or receiving explosives in interstate commerce” were considered *in pari materia*); *Estate of Leder v. C.I.R.*, 893 F.2d 237 (10th Cir. 1989) (two sections of federal tax code pertaining to life insurance should be read *in pari materia*); *United States v. Stauffer Chemical Co.*, 684 F.2d 1174, 1187-1188 (6th Cir. 1982) (CAA and Clean Water Act compliance inspection provisions that were virtually identically were read *in pari materia*); *Matter of Robison*, 665 F.2d 166, 171 (7th Cir. 1981) (where two separate state provisions had the same purpose to protect potential purchasers, court applied *in pari materia* canon); *Hallenbeck v. Penn Mut. Life Ins. Co.*, 323 F.2d 566 (4th Cir. 1963) (court found several chapters of a bankruptcy statute to be *in pari materia* where the chapters had “common principle purpose”); *In re City of Phoenix, Ariz.*, 9 E.A.D. 515, 529 (EAB 2000) (EAB found two provisions within a single regulatory part regarding permitting

procedures to be *in pari materia* where both provisions pertained directly to the timing of public comments and had a “common purpose”).

The remaining cases cited by Respondent affirm that the *in pari materia* canon is inapplicable to distinct statutes and regulations that have different purposes. *See Erlenbaugh v. United States*, 409 U.S. 239, 243-247 (1972) (where two criminal statutory provisions had the same broad goal to inhibit organized criminal activity but were not intended to serve the same function, the Supreme Court declined to read the provisions *in pari materia*); *In re Guardianship of Penn*, 15 F.3d 292, 294-295 (3d Cir. 1994) (where two statutes had two different purposes, the court held that conflicting statutory provisions were not opposed and could each be given effect).<sup>4</sup>

As demonstrated above by *Duke Energy*, *Erlenbaugh*, *Guardianship of Penn*, and *O’Connell*, the critical *in pari materia* inquiry is not whether the same term is used in two different statutes or regulations, but rather whether the two statutes or regulations have the same purpose or object. In the present case, the purpose of the CAA NESHAP regulations is to control emissions, so their reach is broad; in contrast, the purpose of Section 261.4(c) is to provide exemptions from otherwise applicable general RCRA regulations and establish the

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<sup>4</sup> In addition, Respondent cited *Marlowe v. Bottarelli*, 938 F.2d 807, 813 (7th Cir. 1991), where the *in pari materia* canon was mentioned but not applied, and *Creque v. Luis*, 803 F.2d 92, 95-96 (3d Cir. 1986), where the court considered general and specific legislation regarding the tenure of water authority board members whose terms had expired and found that the specific legislation controlled and the board members should stay. In so doing, the court emphasized that a contrary result “would create significant health hazards,” and that “public policy considerations such as these ‘exert a significant influence in the process of statutory interpretation by the courts.’” *Id.* at 96 (quoting 2A *Sutherland Statutory Construction* § 56.01 (4<sup>th</sup> ed. 1984)).

regulatory boundary, so its reach is narrow. Since the purpose and subject matter of these CAA and RCRA regulations are widely different, their terms should not be read *in pari materia* with each other. Thus, even if the term “distillation unit” appeared in Section 261.4(c) – and it most assuredly does not – it would not be *in pari materia*, and could not be viewed identically, with this term as set out in the CAA NESHAP regulations.<sup>5</sup>

### **III. EPA ADMINISTRATIVE CASE LAW DEMONSTRATES THAT NO PRODUCT MANUFACTURING WITHIN THE MEANING OF THE MPU EXEMPTIONS OCCURS IN THE RECEIVER TANKS**

EPA administrative case law has established that the MPU Exemption applies to equipment in which a product is created and therefore, in which manufacturing occurs. *See In re General Motors Automotive - North America*, Docket No. RCRA 05-2004-0001, 2006 WL 3406333 (ALJ, Mar. 30, 2006) (“*General Motors*”), *remanded on other grounds*, 4 E.A.D. 1 (EAB 2008); *In re Chem-Solv, Inc.*, Docket No. RCRA-03-2011-0068, 2014 WL 2593697 (ALJ, June 5, 2014) (“*Chem-Solv*”), *affirmed*, 16 E.A.D. 594 (EAB 2015). In both *General Motors* and *Chem-Solv*, the Tribunal held that the MPU Exemption was inapplicable where the claimed exempt equipment in question did not produce a product, but rather was part of the waste management system.

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<sup>5</sup> Respondent’s appeal to the CAA NESHAP regulations’ definition of “chemical manufacturing process unit” (R-Motion pp. 35-36) fails on the same grounds. First, this term does not appear in Section 261.4(c). Second, the broad purposes of the CAA NESHAP regulations to control air pollution emissions – which are evidenced by the broad language of this definition – are very different than those of excluding RCRA regulation from units that would otherwise be drawn into the RCRA hazardous waste management program. Accordingly, there is no basis to force this CAA NESHAP definition into service to interpret the MPU Exemption. The flaws in this NESHAP-based argument are further discussed in Section IV below.

In its Motion, Respondent puts forward a test for the MPU Exemption that Respondent asserts is derived from these two cases. However, Respondent's test – that the MPU Exemption “applies where the ‘integral parts’ of a ‘production system’ are used to ‘create a product’” (R-Motion p. 27) – finds no support in *General Motors* and *Chem-Solv*.

In *General Motors*, the Tribunal considered whether certain equipment conveying purge mixture solvents and GM's purge mixture storage tanks located downstream of automobile spray paint applicators fell within the MPU Exemption. The test for such analysis set forth in *General Motors* was whether such equipment and tanks were “part of the production system” used to “create a product.” *General Motors* at 41-44. The test did not include the term “integral parts” (of a “production system”) as Respondent suggests. In *General Motors*, the Tribunal found:

It is undisputed that painting automobiles is an integral part of the manufacturing process. Complainant's Post-Hrg. Br. at 37. Unrebutted testimony by GM's witnesses establishes that a clogging of the downstream purge mixture piping or equipment can totally disrupt the manufacturing process. Specifically, when the paint operation is stopped, the preceding assembly process is halted shortly thereafter. Nonetheless, this is true of many waste delivery systems associated with manufacturing. Such interplay does not convert the facility's production system, including the painting operation and waste delivery system, into a “manufacturing process unit” within the purview of 40 C.F.R. § 261.4. . . .

GM's need to manage its spent material does not make such management part of the manufacturing process. GM is managing waste . . . . In the instant case, usage of the purge mixture downstream of the manifolds and associated applicators does not create a product. Instead, the production occurs at the point of the manifolds and associated applicators, which is where the painting of the vehicles occurs. Accordingly, the manufacturing process unit exemption does not apply to the instant case.

*General Motors* at 41-42. The Tribunal described “painting automobiles” as an “integral part” of the manufacturing process. But in *General Motors*, the Tribunal did not use the term “integral

part” in analyzing whether or not the MPU Exemption applied. Instead, the Tribunal looked to the purpose of GM’s business – “to produce automobiles” – stating that GM is “not in the business of manufacturing purge solvent.” *General Motors* at 42. In the present case, Respondent is in the business of manufacturing chemicals that are used in personal care and beauty products. R-Motion p. 2. Respondent is not in the business of manufacturing solvent or managing used liquid solvent that has been separated from Respondent’s products and then collected and stored in the Receiver Tanks.

In *Chem-Solv*, as discussed at length on pages 29 through 33 of Complainant’s Motion, the Tribunal considered whether or not manufacturing was occurring in “the Pit,” and whether the Pit water was a “waste” rather than a “product” or “raw material,” and again rejected the respondent’s MPU Exemption claim. There was no discussion of whether the Pit was “an integral part of the production process.” Respondent has thus incorrectly inserted the term “integral part” into the analysis of whether the MPU Exemption applies because it serves Respondent’s argument to claim that the Receiver Tanks are an “integral part” of its process.

Just as the downstream equipment, purge pots and purge storage tanks in the *General Motors* case, and the Pit in the *Chem-Solv* case were not part of the manufacturing process, so too Respondent’s Receiver Tanks are not part of the manufacturing process because they are not operated to produce a product. Thus, the Receiver Tanks do not fall within the MPU exemption.

Respondent also attempts to distinguish *General Motors* and *Chem-Solv* by arguing that in both cases, the respondents’ MPU Exemption claims were unsuccessful because “neither respondent could show that the process at issue was integral to a production system creating a product, as distinct from cleanup.” R-Motion p. 27. To describe GM’s complicated use and

disposal of the purge mixture downstream of the paint applicators through “a series of pipes, lines, valves, purge pots, recirculation loops, and pumps to the purge mixture tanks” (*General Motors* at 16) as “cleanup” is an exaggeration and oversimplification of the facts.<sup>6</sup> The manner in which Respondent disposes of, recycles or reclaims used liquid solvent at its facility appears to be much simpler than at GM’s facilities. The common factor in both cases is that neither General Motors nor Respondent is in the business of manufacturing solvents. In Respondent’s Receiver Tanks, used liquid solvents are stored [REDACTED]

[REDACTED] No product is produced in the Receiver Tanks. Like the equipment downstream of the paint spray applicators in *General Motors*, the Receiver Tanks are part of Respondent’s waste management system.<sup>7</sup>

Despite Respondent’s urgings to the contrary, “integral” or “necessary” to the production process cannot be the “test” for the MPU Exemption. In *General Motors*, no one could credibly doubt that the waste management equipment downstream of the paint applicators (waste lines, purge pots, *etc.*) was necessary to the proper functioning of the automobile painting process, yet

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<sup>6</sup> Respondent also incorrectly implies that GM’s spray gun applicators were “exempt as part of a manufacturing process unit.” R-Motion p. 29, fn. 24. But there was no assertion in the *General Motors* case that the paint spray gun applicators held solid or hazardous waste that might be “exempt” from RCRA regulation.

<sup>7</sup> Respondent refers to RO 14152 (CX-20) for the proposition that an MPU can be a “collection of equipment.” See R-Motion p. 31. This is not an accurate reading of this guidance. RO 14152, also cited and discussed in *General Motors*, examines “whether EPA considers flow equalization tanks and associated indoor piping to be part of a manufacturing process unit.” In the guidance, EPA states that “used solvent is a waste once it leaves the spray painting unit, and that the equalization tank and associated piping are subject to hazardous waste regulatory requirements. . . . The exemption at 261.4(c) applies where waste is generated . . . such as the sludge that accumulates on the bottom of raw material product tanks. However, the system you have described is not part of the production system, but serves solely to manage wastes.”

the Tribunal found that the “interplay” between the painting operations and the waste management system did not convert both of those systems into an exempted “manufacturing process unit.” Similarly in this case, Respondent's claim that the Receiver Tanks are necessary to the proper function of Respondent’s chemical production processes does not make the Tanks exempt MPUs.<sup>8</sup> Respondent has not, and cannot, show that any manufacturing or production of Respondent’s chemical products occurs in the Receiver Tanks. Thus, in accordance with *General Motors* and *Chem-Solv*, the Receiver Tanks are (1) managing used liquid solvent that is, at times, hazardous waste, (2) downstream of the manufacturing process, and (3) not exempt from RCRA regulation.

**IV. FOR PURPOSES OF APPLYING THE MPU EXEMPTION, A “MANUFACTURING PROCESS UNIT” DETERMINATION IS PROPERLY BASED ON INDIVIDUAL PIECES OF EQUIPMENT, NOT ON MULTI-EQUIPMENT SYSTEMS**

The text, preamble, and purposes of Section 261.4(c) itself, as well as Agency guidance and the Tribunal’s decisions regarding it, are consistent and confirm EPA’s position that a manufacturing process unit determination for the purposes of applying the MPU Exemption cannot be made on the broad, multi-equipment basis urged by Respondent (R-Motion p.30). In Section I.B.3. of its Motion, Respondent argues that a “manufacturing process unit” is generally considered to be a “collection of equipment” or “system,” as opposed to a single tank or piece of equipment. However, this argument is incorrect.

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<sup>8</sup> Likewise, the drum of solvent was necessary and integral to the operation of Safety-Kleen’s parts washer equipment in RO 12790. CX-29. But EPA concluded that because the drum which collected the used solvent sometimes contained spent solvent that was regulated hazardous waste, the MPU exemption did not apply.

**Section 261.4(c).** The purpose of Section 261.4(c) confirms that the MPU Exemption must be applied only to individual pieces of equipment. Section 261.4(c) aims to reduce RCRA’s regulatory burden on industry for specific, hazardous waste-generating pieces of equipment that have the primary purpose of product or raw material storage or transport, or product manufacturing. EPA recognized the intended effect of its hazardous waste regulations, particularly the provisions of 40 C.F.R. § 261.3(b), which “was to make hazardous wastes subject to regulation at the point where they are generated.” 45 Fed. Reg. 72,024 (October 30, 1980). EPA further noted that the “[t]he point of generation, however, may be a product or raw material storage tank, transport vehicle, or vessel, or a manufacturing process unit,” and that a literal application of [40 C.F.R.] Part 261 regulations would mean that “such units are hazardous waste storage facilities.” *Id.* at 72,804. This would have the unintended effect that pieces of equipment, the primary function of which is manufacturing product or storing and transporting product or raw materials but which also generate hazardous waste within them, would be subject to full RCRA regulation. For this reason, EPA promulgated Section 261.4(c) and tailored it to these single pieces of equipment (not “systems” of equipment) in order to balance the burden on industry against human health and environmental protection considerations. Respondent’s attempt to apply the MPU Exemption to the Receiver Tanks that have a primary purpose of collecting and storing used liquid solvents that have already been generated in another piece of equipment is a misapplication of the regulation.

As explained in Complainant’s Motion (p. 27), the exemptions listed in Section 261.4(c) are all singular. The term “manufacturing process unit” itself is singular, as are the specific examples of such a unit given in the Section 261.4(c) Preamble: distillation column, flotation

unit, and discharge trays of screens.<sup>9</sup> In addition, the term occurs in a larger list of terms in Section 261.4(c), each one of which is singular: a tank,<sup>10</sup> a vehicle, a vessel,<sup>11</sup> a pipeline.

Further, the examples provided in the Section 261.4(c) Preamble that illustrate these other terms are likewise singular: the tank of a tank truck, the tank or hold of a ship or a barge. *See* 45 Fed. Reg. at 72,025. That all of the exemptions in Section 261.4(c) refer to individual pieces of equipment is unsurprising, since the exemptions are designed to be limited exemptions from RCRA regulation for hazardous waste that is generated within a product or raw material storage or transport unit, or within a product manufacturing unit, while ensuring that full RCRA

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<sup>9</sup> *See* Schanilec Supp. Aff. ¶ 13.

<sup>10</sup> Respondent argues that an EPA RCRA guidance memorandum (RO 13126) demonstrates that a “product or raw material storage tank” is a system because the memorandum affirmed that certain hazardous waste tank standards would not apply to “ancillary equipment” associated with non-regulated units such as surface impoundments or exempted tanks. *See* R-Motion p. 32. The standards at issue were new “Subpart J - Tank Systems” regulations promulgated in 40 C.F.R. Parts 264 and 265. *See* 51 Fed Reg. 25,422 (July 14, 1986). These regulations expressly pertain to “tank systems” (*see* 40 C.F.R. §§ 264.190 and 265.190), and a “tank system” is specifically defined as including “ancillary equipment.” *See* 40 C.F.R. § 260.10 (“tank system” defined as “a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system”). Given this context, it is hardly surprising that EPA affirmed that the ancillary equipment of a Subpart J tank would be exempt from regulation if the tank itself was exempt – and EPA’s affirmation does not show that a hazardous waste storage tank is a “system” as argued by Respondent.

<sup>11</sup> Respondent points to a subsequent RCRA Online guidance (RO 12727) regarding “vessels” to support its argument. *See* R-Motion p. 33. The guidance states that the language of the exemption applies to a product or raw material transport vessel, “rather than the product-containing unit itself.” The guidance explains that EPA had not originally contemplated such a vessel-wide exemption, and that EPA was concerned that it “exempts from regulation some hazardous wastes that were not intended to be exempt when EPA promulgated the regulatory amendment (*i.e.*, waste generated aboard vessels in other than product or raw material cargo tanks).” EPA nevertheless agreed to the broader exemption because the definition of “vessel” in 40 C.F.R. § 260.10 included “every description of watercraft...,” and because the regulated community had placed “substantial reliance for some time on a legitimate, though unintended, reading” of the exemption based on it.

regulation will attach as soon as the waste exits the unit. The Section 261.4(c) Preamble lists three specific examples of MPUs: distillation columns, flotation units, and discharge trays of screens. These are clearly singular pieces of equipment within which product manufacturing occurs and hazardous waste is generated. *See Schanilec Supp. Aff.* ¶ 13.

**Other EPA Guidance.** Respondent also points to EPA guidance and other RCRA exemptions to argue that “units” can include multi-equipment systems. *See R-Motion p. 35.* Specifically, Respondent advances an EPA RCRA guidance document (RO 11173; RX-35) that discusses RCRA’s wastewater treatment unit (“WWTU”) and elementary treatment unit (“ENU”) exemptions as potentially consisting of multiple tanks. However, for a tank or series of tanks to be exempt under the WWTU or ENU exemptions at 40 C.F.R. § 265.1(c)(10), the tank(s) must be “dedicated solely for on-site wastewater treatment at all times and for no other purpose” (*see* RO 14262, for WWTUs) (Response Att. 3), or “used exclusively for the purpose of handling the hazardous wastewater in conjunction with the exempted unit” (*see* RO 13126, for ENUs). Both of these EPA guidance documents alert the regulated community that if the series of tanks is not exclusively dedicated to that particular exempted use, the exemption will not apply and all tanks will be subject to RCRA regulation. Thus, even if a series of tanks were claimed to be subject to the MPU Exemption, each of these tanks would have to individually meet the requirements of the Exemption.<sup>12</sup>

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<sup>12</sup> In further support of its “systems” argument, Respondent references (R-Motion p. 35) an EPA memorandum dated October 3, 2016 (RO 14884) on the applicability of the MPU Exemption to hazardous wastes generated in filter canisters when they are disconnected from an associated manufacturing process. Examining previous guidance (RO 13374) (Response Att. 4) on the issue, EPA explains why the MPU Exemption does not apply to units that are disassembled for

**The Term “Unit.”** Respondent also asserts (R-Motion p. 37) that the word “unit” is defined in Perry’s Chemical Handbook (CX-26, p. 58) (“Perry”) as a “multi-element system.” However, for calculational purposes, a “unit” is defined as “a combination of elements and may or may not constitute the entire process.” In this section, Perry is concerned with “Degrees of Freedom and Design Variables,” strictly for purposes of design calculations, where a “unit” or “element” could be a particular portion of an actual physical unit. For example, at Figure 13-62 in Perry, the depicted distillation column (which is a “unit” in physical and functional terms) has three “units” for purposes of performing design calculations. Therefore, how a “unit” is defined and used in this section of Perry is much different than how the term “unit” is otherwise used. *See CX-26, pp. 13-62.*

**CAA NESHAP Regulations.** In addition, Respondent argues that the term “manufacturing process unit” in the MPU Exemption should be given the same definition as “chemical manufacturing unit” (“CMPU”) in the CAA NESHAP regulations. As noted above, the purposes and scope of these two sets of regulations are fundamentally different. The NESHAP’s CMPU definition is broad in scope to protect human health and the environment from hazardous air emissions; RCRA’s MPU Exemption is designed as a limited exemption

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cleaning off-site. In its reasoning, the Agency focuses exclusively on the fact that these canisters, singular pieces of equipment, operating “[a]s part of the maintenance cycle ... are disconnected and replaced periodically” from the process. Disconnection “immediately subjects any hazardous waste within the canister to regulation...” Respondent argues that while attached to an associated manufacturing process, the canisters are part of a system, and the entire system is an MPU. However, EPA never addresses the issue of whether the canisters, when connected, meet the specific requirements of Section 261.4(c) and the MPU Exemption.

from RCRA hazardous waste regulation for individual pieces of equipment. To broaden a narrow exemption originally designed to reduce the burden on industry, where EPA in its limiting language sought to maintain the protection for human health, would leave facility employees and surrounding communities at risk due to the absence of RCRA regulation on large potentially extensive systems of hazardous waste-containing equipment.

**Subpart AA Process Vents.** In Section I.B.3 of its Motion, Respondent returns to Subpart AA to argue that the Subpart AA's definition of "process vent" applies to equipment systems, and therefore that Section 261.4(c) exemptions should apply to systems as well. *See* R-Motion pp. 37-38. Complainant has described Subpart AA's purposes and scope (and rebutted similar Subpart AA-based arguments) in Section II of this Response. Subpart AA defines a process vent as "any open-ended pipe or stack that is vented to the atmosphere either directly, through a vacuum-producing system, or through a tank (e.g., a distillate receiver, condenser, bottoms receiver, surge control tank, separator tank, or hot well) associated with hazardous waste distillation, fractionation, thin-film evaporation, solvent extraction, or air or stream stripping operations." 40 C.F.R. § 264.1031. In the context of Subpart AA's purposes and text, it is clear why a "distillate receiver" is included in Subpart AA's definition of a "process vent" – the inclusion ensures that hazardous air emissions from a receiver are captured along with other process vent emissions. The text and broad purposes of Subpart AA render its "process vent" definition inapposite to the interpretation of the MPU Exemption.

**V. RESPONDENT’S CLAIMS THAT THE RECEIVER TANKS SERVE FUNCTIONS IN PRODUCTION PROCESSES ARE UNAVAILING FOR THE MPU EXEMPTION**

In the latter part of its brief, Respondent offers numerous alleged examples of the differing purposes the Receiver Tanks serve in an effort to show that the Tanks are engaged in manufacturing, despite the fact that their clear main function is to collect and manage used liquid solvent. As explained below, Respondent is relying on mischaracterized engineering principles or erroneous technical assertions in its attempt to inflate the role of the Receiver Tanks. More importantly, even if the Receiver Tanks serve additional purposes related to product production, these additional roles cannot transform the Receiver Tanks into manufacturing process units for the purposes of the MPE Exemption.

**Primary Function of Receiver Tanks.** As an initial matter, it is important to point out that there is no dispute between the parties that the primary function of Receiver Tanks is to collect and store used liquid solvent, ██████████ of which is RCRA-regulated hazardous waste. Until page 40 of its Motion, Respondent focuses on the function of the Receiver Tanks to collect and store the used solvent, describing them as a “collection point” and as “reservoir[s]” (R-Motion pp. 39-40). As Respondent transitions to describe other purported functions of the Receiver Tanks, Respondent states: “[t]he receivers also perform a variety of . . . functions . . . beyond the **core . . . function described *supra*.**” R-Motion p. 40 (emphasis added). This statement is telling because the only function described in Respondent’s Motion up to that point is the used solvent collection function. The Receiver Tanks’ core function of used liquid solvent collection is confirmed by Respondent’s technical witness, who describes the Receiver Tanks as the collection point and distillate reservoir. *See* LeBlanc Decl. ¶¶ 13, 15, 17.

**Use of Receiver Tanks in Distillation.** Respondent seems to claim that because receiver tanks are commonly used to collect materials exiting a distillation operation, receiver tanks are required in all distillation operations. EPA acknowledges that receiver tanks are commonly used at facilities with distillation operations. Further, EPA recognizes that distillate must flow out of the condenser to another location in order to keep the flow of material moving out of the reactor/distillation column and into the condenser (and then out of the condenser to make room for the material flowing in). *See* Schanilec Supp. Aff. ¶ 7. But a common sense recognition that liquid distillate must be routed out of the condenser and into another piece of equipment to properly (and safely) contain the liquid distillate does not, and cannot, mean that equipment in which the liquid distillate is collected, stored and managed has an engineering role in the separation of materials and condensing of vapor to liquid that occurs in distillation. The separation aspect of distillation is concluded for the solvent vapor molecules coming out of the reactor/distillation column once the vapors are condensed, as these comprise the “distilled” portion of the feed streams. *See* Schanilec Aff. ¶¶ 24, 25; Schanilec Supp. Aff. ¶ 5.

Third, Respondent is simply wrong as a matter of chemical engineering and design that receiver tanks are the only way to manage the material exiting the condenser in a system under vacuum pressure. Another common option for managing the liquid distillate in such a system is the use of a barometric leg and hot well. This design allows the desired pressure to remain in the condenser while providing a means for the distillate to flow out of the condensers and be managed elsewhere. Schanilec Supp. Aff. ¶ 8. To be clear, Complainant is not necessarily claiming this engineering design could take the place of the Receiver Tanks at Respondent’s facility. Rather, Complainant is offering this example to show that the broad-sweeping technical

generalizations that Respondent has proffered are not accurate. *See* R-Motion p. 24 (“because distillation physically requires receivers, a process ‘unit’ that does not include receivers – whatever else it might be – is not a ‘distillation unit’ *because it is not capable of distillation*”). Distillation and, more specifically, management of resulting distillate can and does occur at facilities (e.g., at wet-process phosphoric acid manufacturers) that do not utilize receiver tanks. Schanilec Supp. Aff. ¶ 8.

But there is a more fundamental flaw with Respondent’s basic assertion here. When it claims that “distillation physically cannot be done without a receiver” and that a distillation operation that does not include Receiver Tanks “is not capable of distillation” (R-Motion p. 24) Respondent cannot be asserting that the act of distillation and condensation, that is, the separation of materials and the condensing of vapors back to liquid, cannot occur in the absence of a receiver. Respondent must mean simply that there must *physically* be a location (a piece of equipment) that is dedicated to collecting and storing the liquid distillate. That the act of distillation does not require nor depend upon the presence of a collection vessel such as a receiver tank is a well-understood and indisputable chemical engineering principle. Affidavit of Kevin Schanilec, C-Motion Att. 2 (“Schanilec Aff.”) ¶ 24.

Respondent’s own description of its operations clearly indicates that distillation occurs without any open connection to the Receiver Tanks. Respondent states, “[d]uring the production of some products, the condensed vapors [the solvent distillates] are initially routed through pipes back to the reactor in a ‘reflux’ loop, **before routing to the receiver**” R-Motion p. 3, fn. 2 (emphasis added); Declaration of Eric Morin (“Morin Decl.”) ¶ 6. “[L]iquids are sometimes returned or ‘refluxed’ to the reactor.” R-Motion p. 39, fn. 28. The liquids being referred to here

are the condensed distilled solvents that started in the reactor. “[T]he distillates formed in the narrow tubes [of the condenser] immediately flow by gravity out of the condensers as the distillates are formed.” R-Motion p. 39, fn. 29. Since the ““reflux line”” is connected ‘upstream’ of the Receiver Tanks and these liquid distillates have not yet been sent to the Tanks, it is incontrovertible that collection of the distillates in the Tanks is not necessary for distillation to occur. And because during reflux the relevant valves to Receiver Tanks are closed (*see* Schanilec Aff. ¶ 27; RX-23, Step 6; RX-26, Step 16 and Step 32; RX-28 Step 42 and Step 45), the Receiver Tanks are incapable of providing any of the purported functions Respondent claims the Tanks provide, including collection of the used liquid solvent (discussed generally at R-Motion pp.40-50). Thus, Respondent’s claim that distillation cannot take place without the Receiver Tanks must simply be a statement that properly used solvent management must occur somewhere so that the used solvent does not leak out uncontained or backup into the condensers and reactors. At Respondent’s facility, this management sometimes, but not always, happens in the Receiver Tanks.

**Pressure Control.** Respondent claims that the Receiver Tanks serve a pressure control role in its efforts to maintain desired conditions within the closed system. R-Motion p. 41. Complainant does not disagree that this is how the Facility operates, but notes that the Receiver Tanks themselves do not provide Respondent with the ability to control pressure conditions, rather it is equipment that Respondent has installed and attached to the Tanks that allows this. Collection and storage tanks themselves, of course, do not have the capacity to effect pressure differentials unless they are specially outfitted with the add-on equipment to do so. [REDACTED]

[REDACTED]



**Potential for Bumping.** Respondent additionally suggests that because the Tanks **could** collect material that prematurely exits the reactor during a process upset (known as “bumping”), the Tanks “play an important role” and are “vital to the manufacturing process.” *See* R-Motion pp. 44-45. Although Respondent asserts “bumping can happen in [the] eight processes” at issue in this case (R-Motion p. 45, fn. 32), Respondent has provided no evidence that bumping has in fact occurred in any of these eight processes. In any event, any such infrequent, if any, process upset materials collection, even if it temporarily halted a production process, could not serve to show that the Receiver Tanks’ function in a manufacturing capacity outweighs or supersedes their core function of collecting and holding used liquid solvents, including solvent hazardous wastes. *See General Motors* at 32.

**Potential for Condensation.** Respondent claims the potential for minute and insignificant trace fugitive vapors, which may find their way to the Receiver Tanks and then condense, allows the Receiver Tanks to be viewed as condenser units. Respondent’s logic appears to be that if the actual condensers can be viewed as being part of “manufacturing,” then any piece of equipment in which the condensation of vapors is theoretically possible serves as a condenser.<sup>13</sup> Respondent does not point to any chemical engineering authority that describes receiver tanks being designed and intentionally serving as condensers. Incidental, minute condensation that may occur in the Receiver Tanks is in no way analogous to the purposeful,

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<sup>13</sup> This claim is particularly curious given that all tanks, including waste storage tanks, can theoretically hold material that is susceptible to condensation or evaporation, or both, such as when material is added to a tank that is significantly different in temperature to material already in the tank. *Schanilec Supp. Aff.* ¶ 11.

designed function of the condenser units and does not alter the primary function of the Receiver Tanks.<sup>14</sup>

**Physical/Chemical Changes.** In another example of Respondent misconstruing Complainant's position, Complainant has never claimed that mere "physical or chemical changes" of any type amount to "manufacturing." R-Motion p. 46. The Tribunal in *Chem-Solv* stated that manufacturing "entails an element of creation or transformation as raw materials or components are turned into substantively different products." *Chem-Solv* at 78. Complainant's position has always been consistent with the *Chem-Solv* decision; Respondent is simply wrong that Complainant's position is that "manufacturing" occurs anywhere there are physical or chemical changes to material. Respondent has left out the key part of the definition that requires transformation of raw materials into substantively different products. [REDACTED] of the volume of used solvent managed in the Receiver Tanks is hazardous waste and no amount of physical or chemical change, such as condensation or evaporation, of that waste transforms into valuable product.

**Residual Pressure.** Respondent points to yet another purported, ancillary role of the Tanks to provide pressure differentials because of the Tanks' residual pressure within the series of equipment as evidence of a qualifying manufacturing function. R-Motion p. 47. Just as the potential use of the Receiver Tanks in the event of a process upset (bumping) cannot obscure the

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<sup>14</sup> Modern automobiles have many features that are ancillary to the core function of the automobile. The driver and passengers can listen to music or talk on the phone thru these ancillary features. But no one can credibly claim that an automobile is in effect a radio or telephone because the fact remains that the core function of the automobile is to provide transportation of the occupants.

fact that the Receiver Tanks primarily serve to collect and manage the used solvent, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

**Design and Cleaning of Receiver Tanks.** Lastly, Respondent claims that because the Receiver Tanks are able to withstand pressurized conditions and are regularly cleaned, the Receiver Tanks are manufacturing process units.<sup>15</sup> R-Motion pp. 47-50. Respondent spends a substantial portion of its Motion trying to convince this Tribunal that it uses vacuum in its

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<sup>15</sup> In several places in its Motion, Respondent contends that at times the connected pieces of equipment all share the same atmosphere. R-Motion p. 4, fn. 4, p. 39, fn. 27. Anticipating Complainant’s suspicion of this description, Respondent provides an example that the Earth has a single atmosphere that differs in local conditions. As an initial matter, this example is not helpful because the Earth has one gigantic uncontrolled atmosphere while the equipment at Respondent’s facility has controlled “atmospheres,” meaning that the conditions of temperature, pressure and chemical composition are carefully manipulated and monitored. Comparing the Earth’s atmosphere to the controlled conditions in the equipment does not accurately describe the connectedness of the equipment at the facility. In a controlled system, it is those specific attributes (pressure, temperature and chemical makeup) that dictate the conditions in each piece of equipment and at the facility, those conditions are intentionally kept different between the equipment. And Respondent’s reference to the internal conditions of the controlled system as an “atmosphere” is not chemical engineering convention in any event. *See* Perry pp. 13-99 (the only usage of the term is to describe the pressure that surrounds the outside of the unit, not the conditions within it.) *See* Schanilec Supp. Aff. ¶ 6.

operations and that the Receiver Tanks were built to handle pressurized conditions.<sup>16</sup>

Complainant does not contest these claims. Of course, the use of a pressurized distillation and used solvent collection system requires the use of tanks that can safely withstand the pressure. But again, connecting equipment that creates desired vacuum to a tank that manages used liquid solvent does not convert that used solvent management into manufacturing. Connecting vacuum equipment to a tank that at no time creates products cannot change the indisputable fact that manufacturing, as defined by the Tribunal in *Chem-Solv*, is not occurring in the Receiver Tanks.

Respondent also claims that regular cleaning of the Receiver Tanks demonstrates that the Receiver Tanks are not utilized for waste management but instead are engaged in manufacturing 100% of the time. Respondent offers the broad-sweeping generalization that waste management tanks (and presumably related waste management equipment) are not regularly cleaned because there is no reason to do so. Once again, Respondent is arguing an issue that has nothing to do with the analysis of the MPU Exemption application.

First, Complainant agrees that at times the Receiver Tanks collect and hold used solvent that can be reused as-is or reclaimed for future use. Accordingly, hazardous waste solvent from a prior batch should be fully removed before re-useable solvent is collected in a subsequent batch. But use of the same equipment to manage regulated waste part of the time and re-useable materials at other times is not a novel concept in RCRA. Equipment that is used to hold or

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<sup>16</sup> [REDACTED]

convey solid waste at least part of the time is regulated under RCRA. *See Chem-Solv* at 79; *see also* CX-19 and CX-21.

Second, similar to the fact that vacuum pressure and equipment capable of maintaining the pressure is utilized in the Facility operations, maintenance schedules and diligent maintenance of equipment has no bearing on whether manufacturing is occurring in the Receiver Tanks. Frequent cleanings cannot change the fact that no products are being created within the Receiver Tanks.

Third, to find an example where waste management equipment that is clearly not within the MPU Exemption must be regularly cleaned, this Tribunal need not look any further than the *General Motors* case. There, not only did the solvent in question act to clean the paint applicators, but GM claimed the solvents were necessary to keep the lines and equipment downstream of the applicators clean. The Tribunal was not persuaded that this cleaning of the waste lines and equipment was enough to transform the used solvent management system into a manufacturing unit.

## **VI. CONCLUSION**

Respondent has asserted an affirmative defense that the MPU Exemption applies to its Receiver Tanks. The MPU Exemption would apply to the Receiver Tanks if both product manufacturing and hazardous waste generation occurred within the Tanks. Respondent cannot satisfy these requirements, so its MPU Exemption defense must fail. Respondent focuses much of its Motion on the claimed roles of the Receiver Tanks in Respondent's chemical manufacturing processes. But these claimed roles do not make the Receiver Tanks subject to the MPU Exemption, because none involve the manufacturing of products within the Tanks.

Respondent attempts to import preamble language and regulatory text from other RCRA regulations and CAA regulations to expand the scope of the MPU Exemption to cover a manufacturing system that would include the Receiver Tanks. But this expansive, multi-equipment approach is unsupported by the Exemption's text, case law, and guidance. Further, such an expansion would allow hazardous waste storage tanks that were in some arguable way connected to a facility's manufacturing processes to be exempted from RCRA regulations that were designed to reduce hazardous air emission and otherwise safely manage hazardous wastes from these sources. This would undercut the core purpose of RCRA, which is to provide cradle-to-grave management of hazardous wastes to protect human health and the environment.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Response to Respondent's Motion for Accelerated Decision ("Complainant's Response"), with attachments, was served on this 8th day of July, 2021, on the addressees listed below. Because Complainant's Response and attachments contain claimed Confidential Business Information, a redacted version of Complainant's Response and attachments was served electronically via the Office of Administrative Law Judges ("OALJ") E-Filing System, and an unredacted version was transmitted in accordance with instructions provided by the Headquarters Hearing Clerk. Both the redacted and unredacted versions of Complainant's Response and attachments were served on Respondent's counsel.

By OALJ E-Filing System:

Mary Angeles, Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
Office of the Administrative Law Judges  
Ronald Reagan Building, Room M1200  
1200 Pennsylvania Avenue, NW  
Washington, D.C. 20460

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July 8, 2021

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