UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

Pursuant to Sections 22.16(a) and 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), codified at 40 C.F.R. Part 22, Complainant United States Environmental Protection Agency, Region 1, hereby moves for an accelerated decision regarding the liability of Respondent ISP Freetown Fine Chemicals, Inc., for this case's remaining unresolved violations, which are alleged in Counts 1, 2, 3, 4, and 6 of the Amended Complaint.

In support of this Motion, Complainant relies on the Consolidated Rules, the pleadings and documents in the record, and the facts and law set forth in the attached Memorandum in Support of this Motion, which includes two attached affidavits. Prior to this filing, the

undersigned counsel for Complainant contacted counsel for Respondent to determine whether Respondent would object to the granting the relief sought in this Motion. Respondent's counsel has stated that Respondent will oppose the Motion.

Respectfully submitted,

STEVEN VIGGIANI Digitally signed by STEVEN VIGGIANI Date: 2021.06.23 18:23:33 -04'00'

Date: June 23, 2021

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In the Matter of: ISP Freetown Fine Chemicals, Inc. 238 South Main Street Assonet, MA 02702-1699 MAR000009605 Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)	Docket No. RCRA-01-2018-0062 **COMPLAINANT'S MEMORANDUM IN SUPPORT OF ITS MOTION FOR ACCELERATED DECISION**

Pursuant to Sections 22.16(a) and 22.20 of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Consolidated Rules"), codified at 40 C.F.R. Part 22, Complainant United States Environmental Protection Agency ("EPA"), Region 1, today moves for an accelerated decision regarding the liability of ISP Freetown Fine Chemicals, Inc. ("Respondent") for this case's remaining unresolved violations, alleged in the Amended Complaint in Counts 1, 2, 3, 4, and 6. All of these counts pertain to four receiver tanks (and equipment associated with these tanks) that Respondent regularly uses to collect distilled liquid solvents that are regulated hazardous wastes. Respondent's only claimed defense to liability – a regulatory exemption – fails on the plain language of the exemption and the undisputed facts of the case. Because there are no genuine issues of material fact, Complainant is entitled to a determination of Respondent's liability as a matter of law, and respectfully requests an order granting this motion.

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I. INTRODUCTION

Complainant and Respondent have narrowed this case to the single substantive issue of whether a regulatory exemption applies to hazardous wastes and the four tanks and associated equipment in which the wastes are managed at Respondent's chemical production facility. Respondent's Prehearing Exchange ("RPHE"), p. 1 and Complainant's Rebuttal Prehearing Exchange Rebuttal ("Rebuttal CPHE"), p. 1. Complainant and Respondent agree that "[a]ll other issues previously contested in this case have been resolved." RPHE, p. 1. Accordingly, if Respondent's exemption defense fails, Respondent's four tanks and equipment are subject to federal and state regulatory requirements under RCRA, and Respondent is liable for the violations alleged in the five counts remaining in the case.[1]

The four tanks at issue are receiver tanks (hereinafter, the "Receiver Tanks") that Respondent uses to collect and store used liquid solvents after they have been distilled in Respondent's reactors and condensers. [redacted] are hazardous wastes that are transferred from the Receiver Tanks to another hazardous waste storage tank and disposed of off-site as hazardous waste. Complainant's prima facie case establishes that the Receiver Tanks store hazardous wastes, and that the Receiver

[1] On September 26, 2018, Complainant filed a Complaint, Compliance Order, and Notice of Opportunity for Hearing ("Complaint") in this case. On June 7, 2019, Complainant filed an Amended Complaint, containing nine counts of alleged RCRA violations. On June 25, 2019, Respondent filed its Answer and Reaffirmation of Request for Hearing ("Answer"). On October 19, 2020, a Partial Consent Agreement and Final Order ("Partial CAFO") was filed that memorialized a partial settlement agreement between Complainant and Respondent. The Partial CAFO resolved Counts 5, 7, 8, and 9 of the Amended Complaint and partially resolved Counts 1, 2, 3, 4, and 6.

Tanks are subject to federal and federally-authorized state requirements for hazardous waste storage tanks and associated equipment.

Respondent argues that the hazardous wastes stored in the Receiver Tanks are subject to the manufacturing process unit exemption ("MPU Exemption") embedded within 40 C.F.R. § 261.4(c), and thus the Receiver Tanks are not hazardous waste tanks subject to RCRA regulation. In this Memorandum, Complainant demonstrates that the MPU Exemption does not apply to the hazardous waste or the Receiver Tanks. The MPU Exemption applies only to hazardous waste in individual pieces of equipment in which manufacturing occurs and in which hazardous waste is generated. The limited scope of the MPU Exemption is confirmed by its regulatory history, administrative case law, and EPA guidance. Respondent cannot show that the Receiver Tanks meet the straightforward terms of the exemption. No manufacturing of Respondent's chemical products occurs within any of the Receiver Tanks. In addition, hazardous waste is not generated within the Receiver Tanks. Accordingly, the MPU Exemption does not apply to the Receiver Tanks, and Respondent is liable for the remaining violations alleged in this case.

II. STATUTORY AND REGULATORY FRAMEWORK

A. RCRA Statutory Framework

In 1976, Congress enacted the Resource Conservation and Recovery Act ("RCRA"), which amended the Solid Waste Disposal Act, in order to regulate the management of hazardous waste. Since then, Congress has enacted various amendments to RCRA, including the Hazardous and Solid Waste Amendments of 1984 ("HSWA"). RCRA "is a comprehensive environmental statute that empowers EPA to regulate hazardous waste from cradle to grave, in

accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934." *City of Chicago v. Envtl. Defense Fund*, 511 U.S. 328, 331 (1994). When amending RCRA in 1984, Congress declared "it to be the national policy of the United States that, whenever feasible, the generation of hazardous waste is to be reduced or eliminated," and that any hazardous waste generated "should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." HSWA, Pub. L. No. 98-616, Title I, § l0l(b), 98 Stat. 3221, 3224 (codified at 42 U.S.C. § 6902(b) (1984)).

Pursuant to Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, EPA has promulgated regulations that set forth standards and requirements applicable to generators of hazardous waste. These regulations are codified at 40 C.F.R. Parts 260-271. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, EPA has authorized Massachusetts to administer its own hazardous waste program. The federally-authorized Massachusetts hazardous waste regulations ("MAHW Regulations") are codified in Title 310, Chapter 30 of the Code of Massachusetts Regulations ("C.M.R."), 310 C.M.R. §§ 30.001, *et seq.* Many of the MAHW Regulations incorporate federal hazardous waste regulations by reference.

B. RCRA Air Emissions Regulations

When HSWA was enacted in 1984, Congress was acutely aware of and concerned by the human health and environmental harms caused by air emissions associated with hazardous wastes.[2] Accordingly, Congress amended Section 3004 of RCRA, 42 U.S.C. § 6924, to add a new Section 3004(n) that required EPA to promulgate air emission control regulations for

[2] *See* S. Rep. No. 98-284, 98th Cong., 1st Sess., at 63 (1983) ("There is a considerable body of information indicating that emissions into the air from hazardous waste facilities pose a significant threat to health and the environment.")

facilities that treat, store, and dispose of hazardous wastes. Pursuant to RCRA Section 3004(n), EPA promulgated the Subparts AA, BB, and CC air emission standards at 40 C.F.R. Part 264 and 40 C.F.R. Part 265. Since the Subpart AA, BB, and CC regulations in Parts 264 and 265 are substantively the same, and since only the Part 265 version of these regulations apply to large quantity generators that store hazardous waste, solely the Part 265 Subpart AA, BB, and CC regulations (hereinafter, "Subpart AA," "Subpart BB," and "Subpart CC") are discussed below.[3]

Broadly speaking, Subpart CC is designed to control hazardous air emissions from hazardous waste tanks; Subpart BB requires leak detection and repair to control hazardous air emissions from specific pieces of equipment such as valves, pumps, connectors, and lines associated with hazardous waste tanks; and Subpart AA applies to process vents associated with certain hazardous air emission-emitting processes. Massachusetts has not sought authorization from EPA to administer Subparts AA, BB, and CC.

Of particular relevance to this case are the Subparts BB and CC regulations. Subpart CC establishes air emission control standards and requires emission control equipment for various types of hazardous waste storage tanks, requires regular inspections of the tanks, and requires regular inspections of the control equipment and repairs if control equipment defects are found. *See* 40 C.F.R. §§ 265.1085 and 265.1089. Subpart CC also requires that detailed records of Subpart CC compliance be kept for a minimum of three years. *See* 40 C.F.R. § 265.1090. Subpart BB regulates various types of equipment that contain or contact hazardous waste – often equipment that is associated with hazardous waste storage tanks and that is conveying hazardous

[3] The Subpart AA regulations are set out at 40 C.F.R. §§ 265.1030-265.1035; Subpart BB, at 40 C.F.R. §§ 265.1050-265.1064; and Subpart CC, at 40 C.F.R. §§ 265.1080-265.1090.

waste to or from such tanks. Subpart BB requires that this equipment be clearly marked and regularly monitored to detect any leaks of hazardous air emissions, with any detected leaks repaired on specified schedules. *See* 40 C.F.R. § 265.1050(c) (marking) and 40 C.F.R. §§ 265.1052, 265.1057, and 265.1058 (monitoring and leak repair schedules for certain types of pumps and valves). As with Subpart CC, Subpart BB also requires detailed compliance-related recordkeeping. *See* 40 C.F.R. § 265.1064. Failing to comply with Subpart BB and CC requirements can cause leaks of hazardous waste air emissions and serious risks to human health and the environment.

The preamble to EPA's final rule promulgating Subparts AA and BB explained the human health and environmental purpose of these regulations:

> Air emissions from hazardous wastes include photochemically reactive and nonphotochemically reactive organics, some of which are toxic or carcinogenic, and also may include toxic or carcinogenic inorganic compounds. Depending on the source, particulates ... also may be released or generated. These emissions which are released to the atmosphere from a wide variety of sources … present diverse health and environmental risks…. Organic emissions from TSDF[s] managing hazardous wastes contribute to ambient ozone formation and increase cancer and other health risks…. [This] regulatory approach will significantly reduce emissions of ozone precursors and air toxics and carcinogens from TSDF[s] by controlling emissions of organics as a class rather than controlling emissions of individual waste constituents.

55 Fed. Reg. 25,454, 25,456 (June 21, 1990).[4] The preamble to EPA's final rule promulgating Subpart CC similarly observed:

[4] For reference, the main Federal Register notices pertaining to the promulgation of Subparts AA, BB, and CC are as follows: 52 Fed. Reg. 3,748 (Feb. 5, 1987) (proposed Subpart AA and BB rules); 55 Fed. Reg. 25,454 (June 21, 1990) (final Subpart AA and BB rules); 56 Fed. Reg. 33,490 (July 22, 1991) (proposed Subpart CC rules); 59 Fed. Reg. 62,896 (Dec. 6, 1994) (final Subpart CC rules); and 61 Fed. Reg. 59,932 (Nov. 25, 1996) (final Subpart CC rule, amending previous final rule).

> Control of organic air emissions addresses many air quality problems including ambient ozone formation, adverse human health effects from inhalation of air toxics, and, to a lesser extent, depletion of stratospheric ozone.… Today's action will also significantly reduce the risk to the public of contracting cancer posed by exposure to toxic constituents contained in the organic emissions from hazardous waste management activities.

59 Fed. Reg. 62,896, 62,900 (Dec. 6, 1994).

Section 3006 of RCRA, 42 U.S.C. § 6926, provides that authorized state hazardous waste programs operate in lieu of the federal regulatory program. Thus, a violation of a requirement of an authorized state hazardous waste program is a violation of Subtitle C of RCRA. Pursuant to Sections 3008(a) and 3006(g) of RCRA, 42 U.S.C. §§ 6928(a) and 6926(g), EPA may enforce violations of any requirement of Subtitle C of RCRA, including the authorized requirements of the MAHW Regulations and of Subparts AA, BB, and CC.

III. STANDARD OF REVIEW FOR ACCELERATED DECISION MOTIONS

Section 22.20(a) of the Consolidated Rules provides that the Presiding Officer may:

> at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as [they] may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). Although the Federal Rules of Civil Procedure ("FRCP") do not apply, EPA's Environmental Appeals Board ("EAB") has looked to the summary judgment standard in FRCP Rule 56 to provide guidance for deciding accelerated decisions.[5] *See, e.g., In re Consumers Scrap Recycling, Inc*., 11 E.A.D. 269, 285 (EAB 2004); *In re BWX Technologies, Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000). Federal courts have also approved of applying the FRCP

[5] The FRCP Rule 56 standard is the same as that of the Consolidated Rules: "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FRCP Rule 56(a).

Rule 56(c) standard to administrative summary judgment proceedings. *See Puerto Rico Aqueduct and Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert denied*, 513 U.S. 1148 (1995). EPA Administrative Law Judges ("ALJs") have described and employed this FRCP-informed approach to decide accelerated decision motions. *See, e.g., In re Dave Erlanson, Sr.*, EPA Docket No. CWA-10-2016-0109, 2018 WL 4859961, pp. 2-5 (ALJ, September 27, 2018) (Order on Complainant's Motion for Accelerated Decision). Under FRCP Rule 56(c), the moving party bears the initial responsibility for identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *See Celotex Corp. v. Caltrett*, 477 U.S. 317, 323 (1986). The movant may also choose to submit supporting affidavits or other similar materials. *Id*.

IV. FACTUAL BACKGROUND

Respondent is a Delaware corporation doing business in Massachusetts.[6] Answer ¶ 13. Since 1998, Respondent has owned and operated a facility located at 238 South Main Street in Assonet, Massachusetts (the "Facility"). Answer ¶ 14. Assonet is a village within the city limits of Freetown, Massachusetts. At the Facility, Respondent manufactures polymers and other chemical intermediates used in a variety of health and beauty products such as toothpaste, hair gels, hair sprays, skin creams, and sunscreens, producing approximately 14 million pounds of products annually. Answer ¶ 15. On or about January 29, 1998, Respondent submitted a Notice of Hazardous Waste Activity to Massachusetts, identifying itself as a large quantity generator ("LQG") of hazardous waste. Answer ¶ 16.

[6] Since 2011, Respondent has been owned by Ashland, Inc.

The Facility is situated on three contiguous parcels totaling approximately 170 acres, about 5 miles north of Interstate 195. *See* CX-1, p. 2. The Facility is bounded by the Taunton River to the west, South Main Street and residential homes to the east and southeast, an apartment complex to the south, and the Freetown-Fall River State Forest to the northeast. Affidavit of Richard Piligian (hereinafter, "Piligian Aff.")[7] ¶ 9.

The Facility consists of several buildings including a manufacturing area (Building F-5), several 90-day hazardous waste storage areas, and a wastewater treatment plant. *See* Piligian Aff. ¶ 10. In the 90-day hazardous waste storage areas, Respondent stores hazardous wastes which are mostly mixed solvents designated with the RCRA hazardous waste codes D001, D018, F003, and F005. *See* Piligian Aff. ¶ 10. The Facility generates approximately two million pounds of hazardous waste per year including the following waste solvents: isopropanol (isopropyl alcohol), 1-hexanol, ethanol, toluene, and acetone. *See* Piligian Aff. ¶¶ 10, 11 and CX-33. These waste solvents are all ignitable hazardous wastes and are designated with the RCRA hazardous waste codes D001, F003, and F005. *See* Piligian Aff. ¶ 10. [redacted] All three of these solvents have average volatile organic concentrations that are greater than 500 parts per million by volume and have organic concentrations of at least 10% by weight. *See* Piligian Aff. ¶ 30.

On August 1, 2017, EPA Region 1 personnel, including Richard Piligian, conducted a RCRA compliance inspection ("Inspection") at the Facility. *See* Piligian Aff. ¶ 8. At the time of

[7] Mr. Piligian's Affidavit is Attachment 1 to this Memorandum.

the Inspection, Respondent operated, among other equipment, the Receiver Tanks described below:

a. Tank S-502A, [redacted]

b. Tank S-503A, [redacted]

c. Tank S-526, [redacted] and

d. Tank S-545, [redacted].

See Piligian Aff. ¶ 17.

Respondent manufactures its chemical products using batch production processes. [redacted]

[8] Mr. Schanilec's Affidavit is Attachment 2 to this Memorandum.

[9] [redacted]

[redacted]

To remove unwanted solvents from the products, distillation is used. In distillation, solvents are separated from the product in the reactors as vapor and routed to the condensers, where the solvent vapor is condensed. *See* Schanilec Aff. ¶ 24. [redacted]

After transformation from vapor to liquid occurs in the condensers, the used liquid solvents are conveyed through piping and other equipment to the Receiver Tanks.[10] The used liquid solvents are collected and stored in the Receiver Tanks, and then either: (1) sent to hazardous waste tank S-535 for disposal as hazardous waste; [redacted] the used liquid solvent collected in the Receiver Tanks is disposed of as hazardous waste.[11] *See* CX-34. No intended chemical reactions or mixing of ingredients in connection with production of Respondent's final chemical products occurs in the Receiver Tanks. *See* Schanilec Aff. ¶ 29.

[10] [redacted]

[11] On April 19, 2021, Respondent provided a written table to Complainant containing information regarding [redacted] the used solvent liquid collected in the Receiver Tanks. In a Supplemental Prehearing Exchange filed on the same day as this Motion, Complainant has included this table as Complainant's Exhibit CX-34. [redacted]

V. ARGUMENT

The first part of this section (Section V.A.) sets out Complainant's prima facie case. The second part (Section V.B.) addresses Respondent's expected affirmative defense regarding the MPU Exemption and sets forth Complainant's arguments that the MPU Exemption does not apply.

A. Complainant's Prima Facie Case

The five unresolved counts in this case – Counts 1, 2, 3, 4, and 6 – allege that Respondent's four Receiver Tanks and associated equipment have violated the MAHW Regulations and Subparts BB and CC. The heart of Complainant's prima facie case is the Receiver Tanks' status as hazardous waste tanks that are subject to MAHW Regulations and Subpart CC tank standards. Separately, the Receiver Tanks' associated equipment is subject to Subpart BB's air emission leak prevention requirements. As discussed at the end of Section V.A., Respondent has effectively admitted Complainant's prima facie case because Respondent's affirmative defense necessarily includes an acknowledgement that the Receiver Tanks hold hazardous waste that would be RCRA-regulated but for the asserted defense.

1. General Allegations

Respondent is a corporation and a "person" within the meaning of Section 1004(15) of RCRA, 42 U.S.C. § 6903(15), 40 C.F.R. § 260.10, and 310 C.M.R. § 30.010. Since 1998, Respondent has been the "owner" and "operator" of the Facility, as defined in 40 C.F.R. § 260.10 and 310 C.M.R. § 30.010. At all times relevant to the allegations set forth in the Amended Complaint, the Facility has generated "hazardous wastes," as defined in Section 1004(5) of RCRA, 42 U.S.C. § 6903(5), 40 C.F.R. § 261.3, and 310 C.M.R. § 30.010. At all

times relevant to the allegations set forth in the Amended Complaint, Respondent has been a "generator" of hazardous wastes at the Facility, as defined in 40 C.F.R. § 260.10 and 310 C.M.R. § 30.010. Moreover, at all times relevant to the allegations set forth in the Amended Complaint, Respondent has been a "large quantity generator" of hazardous wastes at the Facility, as defined in 40 C.F.R. § 260.10 and 310 C.M.R. § 30.040. Accordingly, Respondent must comply with the MAHW Regulations at 310 C.M.R §§ 30.340-30.343 (*see* 310 C.M.R. §§ 30.340(1) and (2)), and must also comply with 310 C.M.R. §§ 30.394-30.396, as referenced by 310 § C.M.R. 30.343(1).

In addition, Respondent accumulates hazardous wastes in tanks at the Facility, without a permit, for 90 days or less. Pursuant to 40 C.F.R. § 262.34(a)(1)(ii) (renumbered as 40 C.F.R. § 262.17(a)(2)), a generator may accumulate hazardous waste on-site in tanks for 90 days or less, without a permit, provided that the generator complies with, among other things, Subparts BB and CC of 40 C.F.R. Part 265. Accordingly, to remain eligible to store hazardous waste without a permit, Respondent must comply with Subparts BB and CC at the Facility.

2. Count 1: Respondent's Violations of Federally-Authorized State Hazardous Waste Storage Tank Requirements

Pursuant to 310 C.M.R. § 30.340(2), Respondent must comply with the requirements set forth or referenced in 310 C.M.R. §§ 30.340-30.343 for hazardous waste storage tanks. Such tanks must, among other things, be labeled with the words "Hazardous Waste," the name of the hazardous waste(s) stored in the tank, the type of hazard(s) associated with the waste(s), and the date when each period of waste accumulation began. *See* 310 C.M.R. §§ 30.341(2) and 30.695, as referenced in 310 C.M.R. § 30.343(d)(1). The tanks must be provided with secondary containment "[i]n order to prevent the release of hazardous waste or hazardous constituents into the environment." *See* 310 C.M.R § 30.694, as referenced in 310 C.M.R. § 30.343(d)(1), and

310 C.M.R. § 30.694(1). The tanks must be regularly inspected, and the inspections must be documented. *See* 310 C.M.R. § 30.696, as referenced in 310 C.M.R. § 30.343(d)(1).

The Receiver Tanks regularly hold used solvent liquid that is hazardous waste. Specifically, [redacted] These used liquid solvents collected in the Receiver Tanks are hazardous due to the characteristic of ignitibility (EPA waste code D001). Because the Receiver Tanks hold hazardous solvent wastes, the Receiver Tanks are hazardous waste tanks that must comply with the MAHW requirements, including the labelling, secondary containment, inspection, and documentation requirements cited above.

Respondent has admitted that at the time of the Inspection the Receiver Tanks were not labeled with the words "Hazardous Waste," the type of waste being stored, the hazards associated with the waste, and the dates of waste accumulation. *See* Answer ¶ 32. Further, Respondent was not performing daily inspections of the Receiver Tanks and was not documenting inspections. *Id.* To Complainant's knowledge, Respondent still has not taken any of these actions. Accordingly, Respondent has violated the MAHW Regulations at 310 C.M.R. § 30.341(2) and 310 C.M.R. §§ 30.694, 30.695, and 30.696, as referenced by 310 C.M.R. § 343(d)(1).

3. Count 2: Respondent's Violations of Subpart CC Hazardous Air Emission Standards for Tanks

Pursuant to 40 C.F.R. § 265.1083 of Subpart CC, air emissions from hazardous waste management tanks must be controlled in accordance with the requirements set out at 40 C.F.R. § 265.1085 (Standards: Tanks). Subpart CC's tank standards require, among other things, that

air emission control equipment, including fixed roofs and closure devices, be inspected for defects that could result in air pollution emissions. *See* 40 C.F.R. § 265.1085(c)(4). Pursuant to 40 C.F.R. § 265.1089 of Subpart CC (Inspection and Monitoring Requirements), air emission control equipment used to comply with Subpart CC must be inspected and monitored in accordance with the applicable requirements of 40 C.F.R. §§ 265.1085-265.1088, and a written inspection/monitoring plan must be developed and implemented. Pursuant to 40 C.F.R § 265.1090 of Subpart CC (Recordkeeping Requirements), specified records relating to Subpart CC compliance, including records of tank inspections, must be kept and maintained for a minimum of three years.

The Receiver Tanks collect and hold solvent hazardous wastes with average volatile organic concentrations equal to or greater than 500 parts per million by volume. Accordingly, pursuant to 40 C.F.R. §§ 265.1083(a)-(c), the Receiver Tanks are subject to and must comply with the requirements of Subpart CC, including the tank inspection, monitoring, recordkeeping, and record retention requirements cited above.

At the time of the Inspection, Respondent had not developed or implemented a Subpart CC inspection/monitoring program for the Receiver Tanks and their air emission controls, was not inspecting the Receivers Tanks and their controls in accordance with Subpart CC, and was not keeping Subpart CC records. *See* Piligian Aff. ¶ 22. To Complainant's knowledge, Respondent still has not taken any of these actions. Accordingly, Respondent has violated Subpart CC, including 40 C.F.R. §§ 265.1083(b), 265.1085(c)(4), 40 C.F.R. §§ 265.1089(a)-(b), and 265.1090(a)-(b).

4. Counts 3, 4 and 6: Respondent's Violations of Subpart BB Requirements for Labeling, Monitoring, and Maintaining Records for Subpart BB Equipment

Subpart BB applies to equipment that contains or contacts hazardous wastes with organic concentrations of at least 10% by weight. *See* 40 C.F.R. § 265.1050(b). The hazardous waste solvents that are routed to and collected in the Receiver Tanks have organic concentrations of at least 10% by weight. Therefore, certain equipment (e.g., valves, pumps, connectors) that conveys the hazardous solvent waste from the condensers to the Receiver Tanks is subject to the requirements of Subpart BB.

As alleged in Count 3, Subpart BB at 40 C.F.R. § 265.1050(c) requires that each piece of equipment to which Subpart BB applies must be marked in such a manner that it can be readily distinguished from other pieces of equipment. *See* Amended Complaint ¶ 47. At the time of the Inspection, certain equipment that conveys hazardous solvent waste from the condensers to the Receiver Tanks was not marked in accordance with this requirement. As alleged in Count 4, Subpart BB at 40 C.F.R. §§ 265.1052(a)(1)-(a)(2), 265.1057(a), and 265.1058(a) requires periodic monitoring of certain Subpart BB equipment in light liquid and gas/vapor service. *See* Amended Complaint ¶¶ 52-56. At the time of the Inspection, certain equipment in light liquid and gas/vapor service that conveys hazardous solvent waste from the condensers to the Receiver Tanks was not being monitored in accordance with the above-cited Subpart BB requirements. *See* Piligian Aff. ¶ 23.

Finally, as alleged in Count 6, Subpart BB at 40 C.F.R. §§ 265.1064(a), (b) and (g) requires that various information regarding Subpart BB equipment be kept by the facility. *See* Amended Complaint ¶¶ 66-68. At the time of the Inspection, Respondent was not keeping Subpart BB-related information at the Facility for the equipment described above. *See* Piligian

Aff. ¶ 23. To Complainant's knowledge, Respondent has still not taken any of Subpart BB labeling, monitoring, or recordkeeping actions for the above-described equipment. Accordingly, Respondent has violated the Subpart BB labeling, monitoring, and recordkeeping requirements, cited above, for certain equipment that routes hazardous waste solvent to the Receiver Tanks.

5. Respondent's Admission of Complainant's Prima Facie Case

In Sections V.A.1.-V.A.4. above, Complainant has established its prima facie case regarding Respondent's liability for federal and federally-authorized state hazardous waste regulatory violations regarding the Receiver Tanks and associated equipment. These factual and legal allegations are apparently not disputed by Respondent, nor could they credibly be disputed. Respondent has effectively admitted to Complainant's prima facie case because Respondent's MPU Exemption claim necessarily includes the admission that the Receiver Tanks hold hazardous solvent waste that would be regulated under RCRA but for the application of the MPU Exemption. Respondent has stated in its PHE that "[t]his case has been narrowed down to a single substantive issue" of whether the Receiver Tanks and associated equipment are exempt from RCRA regulation because of the MPU Exemption, and that "[a]ll other issues previously contested in this case have been resolved." *See* RPHE, p. 1. Complainant agrees that the case has narrowed to Respondent's affirmative defense of MPU Exemption applicability. But in order for the MPU Exemption to apply to the Receiver Tanks at all, there must be RCRA-regulated hazardous waste in the Receiver Tanks.

As described in detail in Section VI below, the MPU Exemption appears in 40 C.F.R. § 261.4(c), a regulatory section that is captioned "Hazardous wastes which are exempted from certain regulations." The section provides in part that "[a] hazardous waste which is generated in

... a manufacturing process unit ... is not subject to regulation under parts 262 through 265 ... until it exits the unit in which it was generated." Necessarily, there must be "hazardous waste" subject to RCRA regulation within the claimed exempted unit; however, this waste is temporarily exempted from regulation until it exits the unit. In the present case, Respondent is claiming that the Receiver Tanks are covered by the MPU Exemption. In so doing, Respondent must be acknowledging that there is RCRA-regulated hazardous waste in the Receiver Tanks, while claiming that the hazardous waste (and the Receiver Tanks storing the waste) are exempt from RCRA regulation until the waste exits the Receiver Tanks. Accordingly, but for the MPU Exemption, the Receiver Tanks are necessarily hazardous waste storage tanks subject to the MAHW regulations and Subpart CC, and the equipment associated with the Receiver Tanks (which contains and contacts the same hazardous waste) is subject to Subpart BB. If Respondent's MPU Exemption defense fails, the Receiver Tanks and their associated equipment are subject to RCRA regulation as hazardous waste storage tanks and hazardous waste-contacting equipment, and Respondent has admittedly not complied with the MAHW and federal RCRA regulations set forth in the remaining counts of this case.

B. Respondent's Affirmative Defense Based on the MPU Exemption

1. Respondent Has the Burden to Prove an Affirmative Defense

Under the Consolidated Rules, Respondent has the burdens of presentation and persuasion for affirmative defenses. *See* 40 C.F.R. § 22.24(a). The EAB has confirmed these burdens of proof in numerous cases. *See, e.g., In re General Motors Automotive – North America*, 14 E.A.D. 1, 54-55 (EAB 2008) (citing 40 C.F.R. § 261.2(f) and case law); *In re J. Phillip Adams*, 13 E.A.D. 310, 321 (EAB 2007); *In re City of Marshall*, 10 E.A.D. 173, 180

(EAB 2001). Because Respondent has the burden of proof regarding its affirmative defense, Respondent must meet its burden by a preponderance of the evidence. *See* 40 C.F.R. § 22.24(b); *see also In re BWX Technologies, Inc.*, 9 E.A.D. at 73 (for affirmative defenses outside the parameters of EPA's prima facie case, a respondent must present the defense and demonstrate it by a preponderance of the evidence). Where EPA as the movant seeks an accelerated decision with regard to an affirmative defense, EPA must show that there is an "absence of support in the record for the defense." *In re BWX Technologies, Inc.*, 9 E.A.D. at 78. If EPA meets this burden, then the respondent, as the party "bearing the ultimate burden of persuasion on its affirmative defense, must meet its countervailing burden of production by identifying 'specific facts' from which a reasonable factfinder could find in its favor by a preponderance of evidence." *Id.*

2. The MPU Exemption and Other Product and Raw Material Exemptions

Respondent asserts as its sole affirmative defense the MPU Exemption, one of a series of RCRA exemptions promulgated at 40 C.F.R. § 261.4(c) (hereinafter, "Section 261.4(c)").[12] The full text of Section 261.4(c) is as follows:

> Hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA

[12] Because both Complainant and Respondent are submitting their dispositive motions by the same deadline, Complainant has assumed for purposes of its Motion that Respondent will assert its affirmative MPU Exemption defense in accordance with the arguments set out in Respondent's PHE. If Respondent makes additional arguments, or provides new evidence (e.g., affidavits) in support of its arguments, Complainant may, in subsequent response or reply briefs, supplement the arguments and affidavits contained in this Motion, and may also provide additional supporting exhibits.

> until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

The MPU Exemption, set forth among other exemptions contained within Section 261.4(c), provides that "[a] hazardous waste which is generated in ... a manufacturing process unit ... is not subject to regulation under [40 C.F.R.] parts 262 through 265, 268, 270, 271 and 124 ... until it exits the unit in which it was generated." Respondent claims that the Receiver Tanks, which would otherwise be regulated by RCRA as hazardous waste storage tanks, fall within the MPU Exemption.

The Section 261.4(c) exemptions exclude hazardous waste from RCRA regulation when the waste is first generated in a product or raw material storage tank, transport vehicle, vessel, or pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit. The exemptions apply to the hazardous waste so long as it remains in the unit where it was first generated. RCRA then regulates the hazardous waste upon exit from the exempted unit.

In the preamble to the final rule promulgating Section 261.4(c), EPA stated that the intended effect of its initial RCRA hazardous waste regulations was "to make hazardous wastes subject to regulation at the point where they are generated." *See* 40 Fed. Reg. 72,024 (Oct. 30, 1980). However, EPA recognized that:

> [t]he point of generation ... may be a product or raw material storage tank, transport vehicle or vessel, or a manufacturing process unit. A literal application of the Part 261 regulations would mean that such units are hazardous waste storage facilities, and that their owners and operators must comply with the notification requirements of Section 3010 of RCRA, submit applications for and obtain permits under Part 122 and comply with the Interim Status Standards of Part 265 until a permit is issued or denied.

Id.

EPA in the Section 261.4(c) rulemaking both recognized that hazardous waste generated in a product or raw material tank, transport vehicle or vessel, pipeline, or a manufacturing unit would normally be subject to RCRA regulation, and understood that this would have the unintended consequence of sweeping into the RCRA waste management program individual units whose primary function is the manufacturing, storage, or transport of product or raw material. Thus, the practical and limited effect of Section 261.4(c) is to allow incidental hazardous waste management within these units without RCRA regulation.

3. The MPU Exemption Must Be Applied to Individual Pieces of Equipment

In its assertion of the MPU Exemption, Respondent appears to construe the relevant manufacturing "unit" to be comprised of several distinct pieces of equipment (a reactor, condenser, and receiver) and the connections between them. *See* RHPE, pp. 6-7. But the plain language of the MPU Exemption dictates that it applies to individual pieces of equipment. The term itself – a "manufacturing process unit" – is singular. In addition, the term occurs in a larger list of terms in Section 261.4(c), each one of which is singular: a tank, a vehicle, a vessel, a pipeline.[13] 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 a limited exclusion from RCRA regulation for hazardous waste that is generated within a product or raw material storage or transport unit, or within or a product manufacturing unit, while ensuring that full RCRA regulation will attach as soon as the wastes exits the unit.

[13] The examples given in the preamble to the final rule promulgating Section 261.4(c) that describe these various terms confirm their singularity: the tank of a tank truck, the tank or hold of a ship or a barge, a distillation column, a flotation unit, a cooling tower. *See* 40 Fed. Reg. at 72,025.

The term "unit" is not defined in the RCRA regulations and, therefore, the ordinary, everyday meaning of that term should be employed.[14] The appropriate definition to employ can be informed by examining both a general, contemporary dictionary and a technical dictionary: a unit is "a single thing or a separate part of something larger" or "a small machine or part of a machine that has a particular purpose" (*The Cambridge Dictionary*, Cambridge University Press 2021(https://dictionary.cambridge.org/us/dictionary/english/unit); and, a unit is "an item of process equipment or plant designed to carry out a specific task" (*Oxford Dictionary of Chemical Engineering* 392 (Carl Chaschke ed. First Edition 2014)). As these definitions demonstrate, the ordinary use of the term "unit" as used in the context of the MPU Exemption is a singular component, with a discrete function, that is part of a larger system. Viewed in this light, Respondent's attempt to characterize the "unit" for purposes of analyzing the exemption's applicability as including the reactor vessels and the condensers along with the Receiver Tanks is erroneous.[15]

If, as Respondent suggests, the MPU Exemption were expanded to include multiple connected, distinct pieces of equipment performing different functions, a regulated entity could

[14] The EAB has stated that "[w]hen construing an administrative regulation, the normal tenets of statutory construction are generally applied," and "[t]he plain meaning of words is ordinarily the guide to the definition of a regulatory term." *See In re Bil-Dry Corp*., 9 E.A.D. 575, 595 (EAB 2001) (citing *Black & Decker Corp. v. Comm'r*, 986 F.2d 60, 65 (4th Cir. 1993) and *T.S. v. Bd. of Educ*., 10 F.3d 87, 89 (2d Cir. 1993)). *See also Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020) ("This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment.").

[15] Respondent's error in looking to aggregate these distinct pieces of equipment (reactors, condensers, and Receiver Tanks) within the singular term "unit" is highlighted here given that Complainant is not claiming that the reactors or condensers are subject to RCRA regulation. It makes no sense to include equipment within the MPU Exemption analysis where there is no claim that the equipment is covered by RCRA in the first place.

claim that a waste storage tank that was connected at the end of a manufacturing process and that received hazardous waste generated within the manufacturing process was exempt from RCRA regulation. The *Chem-Solv* decision, discussed below in Section V.B.4, specifically rejected this approach: "Section 261.4(c) identifies specific categories of units that may qualify for the § 261.4(c) Exemption.... Respondents' logic would allow every tank, hose, or pipeline associated with industry or manufacturing to be an MPU, and its contents exempt from hazardous waste regulation, without regard to the unit's specific function." *In re Chem-Solv, Inc.*, Docket No. RCRA-03-2011-0068, 2014 WL 2593697, at 78 (ALJ June 5, 2014) *("Chem-Solv")*, *affirmed*, 16 E.A.D. 594 (EAB 2015).

The only way to properly determine if the terms of the MPU Exemption are met is to examine each individual tank, vessel, or other piece of equipment that is potentially exempt to determine if manufacturing and hazardous waste generation occurs therein. Aggregating multiple tanks and other pieces of equipment for MPU Exemption applicability would allow the exemption to be asserted where product manufacturing occurred in one tank, hazardous waste generation occurred in another tank, and hazardous waste storage occurred in a third tank. The plain language of the MPU Exemption, which requires that the potentially exempted unit be the locus of manufacturing and hazardous waste generation, runs counter to such an aggregation of equipment.[16] If such equipment aggregation were allowed under the MPU Exemption, a hazardous waste storage tank in which neither product manufacturing nor waste generation was

[16] *See In re Consumers Scrap Recycling, Inc.*, 11 E.A.D. at 294 (exceptions and exclusions should be narrowly construed to preserve the purpose of the general rule, citing *City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 731-32 (1995) and *Comm'r v. Clark*, 489 U.S. 726, 739 (1989)).

occuring could be exempt from RCRA regulation, in direct contradiction to the purposes of the MPU Exemption and RCRA as described in Section V.B.2. above.[17] Thus, for the purpose of determining whether any of the Receiver Tanks should be subject to the MPU Exemption, each of the Receiver Tanks must be considered individually.

4. The MPU Exemption Applies Only to a Unit in Which Manufacturing Occurs, But No Manufacturing Occurs in the Receiver Tanks

By its terms, the MPU Exemption applies only to a unit where "manufacturing" occurs. Although the terms "manufacturing" and "manufacturing process" are not defined in RCRA or RCRA regulations, both the EAB and ALJs have looked to the ordinary meaning of the term "manufacturing" when construing the MPU Exemption. In *Chem-Solv*, the ALJ considered the meaning of the term "manufacturing" in the MPU Exemption, with reference to an earlier EAB decision construing the exemption, as follows:

> The Environmental Appeals Board has noted that while the terms "manufacturing" and "manufacturing process unit" are not defined by statute or regulation, "[t]he ordinary, every day meaning of 'manufacturing' is 'to make (as raw material) into a product suitable for use....'[;] to make from raw materials by hand or by machine...[;] to produce according to an organized plan and with division of labor....'" *General Motors Auto. - N. Am.*, [14 E.A.D. 1, 79 n.54 (EAB 2008)] (quoting Webster's Third New International Dictionary 1378 (Philip Babcock Gove ed., 1993)). Read in its entirety, this definition implies that "manufacturing" entails an element of creation or transformation as raw materials or components are turned into substantively different products. This creative element is emphasized in the definition of "manufacturer" found in Black's Law Dictionary, i.e. "A person or entity engaged in producing or assembling *new products*." Black's Law Dictionary 1050-51 (9th ed. 2009) (emphasis added).

Chem-Solv at 78-79. Mindful of the EAB's guidance, the ALJ reasoned that the definition of "manufacturing" in the MPU Exemption depends on the transformation of raw

[17] *See In re Bil-Dry Corp.*, 9 E.A.D. at 595 (a regulation "must, of course, be 'interpreted so as to harmonize with and further not to conflict with the objective of the statute it implements,'" quoting *Secretary of Labor v. Western Fuels-Utah, Inc*., 900 F.2d 318, 320 (D.C. Cir. 1990)).

materials or components into products. This focus on "manufacturing" as a process that turns raw materials into products is consistent with the other exemptions in Section 261.4(c), which exempt product and raw material storage tanks and transport vessels containing hazardous waste from RCRA regulation. For all the exemptions, the emphasis is on whether raw materials or products are within the potentially exempted tank or vessel. For the MPU Exemption in particular, the emphasis is on whether raw materials are being transformed into products within the exempted unit.

In *Chem-Solv*, the ALJ was faced with a respondent's claim that a hazardous waste storage pit was part of the respondent's manufacturing process because liquid wastes in the pit were allegedly used to wash the outside of drums. *Chem-Solv* at 75, 79. In determining that no "manufacturing" occurred in the pit or with its liquid wastes, the ALJ reasoned that "[n]o intentional physical or chemical change [occurred] in the Pit as part of the alleged manufacturing process, distinguishing the Pit from the examples of MPUs in the preamble." *Chem-Solv* at 79 (referencing the preamble to the final rule promulgating Section 261.4(c)). Far from serving a manufacturing function, the pit's "function was to collect the rinsate for potential disposal or resuse." *Chem-Solv* at 78.

The ALJ further observed that the Chem-Solv pit was similar to equipment that EPA had determined in prior RCRA guidance documents to be waste storage units, not manufacturing units covered by the MPU Exemption. *Id.* Specifically, the ALJ cited to an EPA document from December 1986 ("December 1986 Hotline Summary") that determined that a parts washer (consisting of a cleaning apparatus attached to a drum containing solvents, with the solvents used

as the cleaning agent) could not be part of an MPU, and likened the pit to the drum of the parts washer in that both were "catch basins for used, and sometimes spent, material."[18] *Id.*

The ALJ also cited to a May 2000 memorandum from the Director of EPA's Office of Solid Waste (the "Cotsworth Memorandum"), in which EPA determined that piping and pumps that transport liquids "exiting a reactor unit after a particular chemical reaction" to a manifold were not subject to the MPU Exemption although the liquids were sometimes reused, sometimes recycled, and sometimes sent for off-site disposal as a hazardous waste.[19] The manufacturer decided prior to the production process what the final disposition of the liquid would be. *See* Cotsworth Memorandum, p. 1. The ALJ likened the manifold in the Cotsworth Memorandum to respondent's pit in Chem-Solv because "both are ancillary to the alleged manufacturing process, and both hold or convey solid waste [i.e., waste liquids] at least part of the time." *Chem-Solv* at 79.

In her MPU analysis, the ALJ also rejected the claim that the pit could have been exempted under Section 261.4(c) as a product or raw material storage tank. *See Chem-Sol*v at 79-80. In so doing, the ALJ observed that the "overwhelming majority of the Pit water was

[18] CX-29, RCRA Online 12790, RCRA/Superfund Hotline Monthly Summary, Dec. 1986. As stated in the December 1986 Hotline Summary and as described by the ALJ, this guidance superseded an earlier RCRA Online document (No. 12634) from May 1986. *See Chem-Solv* at 74. In her initial explication of Section 261.4(c) and the MPU Exemption, the ALJ also discussed a separate December 1986 EPA letter rejecting a claimed Section 261.4(c) exemption for process transfer equipment that was used for production purposes but that sometimes transferred hazardous waste to a hazardous waste storage/treatment tank. See *Chem-Solv* at 74-75 (discussing an EPA Letter from Joseph Carra, Acting Waste Management Division Director, to the Diamond Shamrock Chemicals Co., RCRA Online 13790 (Dec. 19, 1986). This letter ("Diamond Shamrock Letter") is Complainant's Exhibit CX-19.

[19] CX-21, RCRA Online 14469, EPA Memorandum from Elizabeth Cotsworth, Director of EPA's Office of Solid Waste, regarding Kodak's Claim for MPU Exemption (May 26, 2000), and *Chem-Solv* at 75, 79.

always destined to be disposed of as solid waste," and that "the Pit's primary purpose was storing that solid waste." *See Chem-Sol*v at 80. In sum, the ALJ concluded in *Chem-Solv* that the respondent's pit could not be subject to the MPU Exemption because: (1) no intentional physical or chemical changes relevant to the manufacturing process occurred there; (2) its function was to collect liquid rinsate for potential disposal or reuse; and (3) it held and conveyed solid wastes at least part of the time. *See Chem-Solv* at 79-80.

Although Respondent claims that the Receiver Tanks are subject to the MPU Exemption, no "manufacturing" occurs in the Receiver Tanks [redacted] No raw materials or products are present in the Receiver Tanks, and no creation of products occurs in them. Instead, raw materials and solvents are introduced into the reactors for chemical processing, and unwanted solvents are separated as vapor in the reactor and routed to the condenser. In the condenser, the distillate solvent vapor is condensed and the used liquid solvents are conveyed to the Receiver Tanks. The used liquid solvents are then disposed of as hazardous waste, [redacted] All of the used liquid solvents that are collected in the Receiver Tanks – no matter the solvents' final disposition – are intentionally separated from the raw materials and products in the reactors. Indeed, the purpose of the Receiver Tanks is to collect used liquid solvents that have been separated through distillation from Respondent's manufactured products in the reactors. *See* Schanilec Aff. ¶ 20; RPHE, p. 6. In this sense, the Receiver Tanks are like the pit in *Chem-Solv*, whose function was to collect liquids for disposal or reuse. Further, no chemical or physical reactions relevant to the manufacturing of

Respondent's batch chemicals occur in the Receiver Tanks. Accordingly, following *Chem-Solv*, there is no "manufacturing" occuring in the Receiver Tanks. Since no "manufacturing" within the meaning of the MPU Exemption occurs in the Receiver Tanks, the exemption cannot apply to them.[20]

In an apparent attempt to give the Receiver Tanks some role in product manufacturing, Respondent in its Prehearing Exchange asserts that in all of its distillation processes, distillate [i.e., used liquid solvent] is held in the receivers for "evaluation for potential return to reactors for further use in the process" and that this occurs "before any distillate exits" the receiver. RPHE p. 7. [redacted]

[20] In the only other EPA administrative decision regarding the MPU Exemption, the ALJ rejected a claim by General Motors ("GM") that the exemption applied to equipment and tanks downstream of GM's automobile painting operations that were used to transport and store "purge solvents" that cleaned GM's spray-painting lines. *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,* 14 E.A.D. 1 (EAB 2008). To determine where GM's automobile spray painting process ended and the waste management of purge solvents began, the ALJ reasoned: "GM does not paint automobiles downstream of the [paint spray] gun boxes.... GM's business is to produce automobiles and is not in the business of manufacturing purge solvent, purge mixture, or reclaiming purge mixture. Moreover, GM has the purge mixture burned or reclaimed (which requires further processing)." *General Motors* at 23. The ALJ also emphasized that GM's undisputed need to manage the purge waste "did not make such management part of the manufacturing process. *Id.* In the present case, Respondent is in the business of manufacturing chemicals that are used in health and beauty products. It is not in the business of manufacturing solvents. Further, although it is true that used solvents must be removed from Respondent's products and are managed in the Receiver Tanks, the fact of such management does not transform the Receiver Tanks into an MPU.

[redacted]

[21] [redacted]

[22] [redacted]

[23] [redacted]

[redacted][24]

5. The MPU Exemption Applies Only to a Unit in Which Hazardous Waste is Generated, But Hazardous Waste is Not Generated in the Receiver Tanks

The plain language of the MPU Exemption, as with all of the exemptions contained in Section 261.4(c), requires that hazardous waste must be generated within the exempted unit: "[a] hazardous waste *which is generated in* ... a manufacturing product unit ... is not subject to [RCRA regulation or statutory notice provisions] *until it exits the unit in which it was generated*." (Emphasis added.) This waste generation element is fundamental to the MPU Exemption and the other Section 261.4(c) exemptions, and the main reason that Section 261.4(c) was promulgated. As discussed above, the MPU Exemption is aimed at excluding units that have primarily a raw material or product storage, transport, or manufacturing function with incidental generation of hazardous waste. Where hazardous waste is generated outside of the

[24] In the Cotsworth Memorandum, the manufacturer decided prior to the production process whether the liquids entering the manifold were to be managed as hazardous wastes. *See* Cotsworth Memorandum, p. 1. As described in the main text, [redacted]

unit in question and then transferred to and collected in it, the management of the waste is unlikely to be incidental, but rather intentional and purposeful and the type of waste management that should be regulated safely under RCRA.

At Respondent's Facility, hazardous waste is not generated in the Receiver Tanks. Instead, the hazardous waste solvents are generated in the condensers (when solvent vapors from the reactors are condensed into liquid solvents). The condensed liquid solvents then flow into the Receiver Tanks for collection.[25] In its Prehearing Exchange, Respondent acknowledges that "[a]s a general matter, solvent vapors from the reactor are "condensed" into liquid distillate in the condenser and the resulting distillate is "received" in the receiver." RPHE, p. 8. Respondent further acknowledges that "[t]he receivers serve to initially and immediately collect condensed vapors...." (RPHE, p. 6). This condensed vapor is used solvent liquid – and some of this used solvent liquid is the hazardous waste at issue in this case. Since the hazardous waste has been generated in the condensers prior to its collection in the Receiver Tanks, the MPU Exemption cannot apply to the Receiver Tanks.

VI. CONCLUSION

Complainant has established – and Respondent has effectively admitted – a prima facie case for Respondent's liability for the violations alleged in Counts 1, 2, 3, 4, and 6 of the

[25] As noted in Complainant's Rebuttal Prehearing Exchange, Respondent has claimed that a de minimis volume of used solvent vapor makes its way from the condensers into the Receiver Tanks. *See* Rebuttal CPHE, pp. 7-8 and RPHE, p. 8. The vast majority of solvent vapor, however, is condensed into used liquid solvents in the condensers. A very small amount of evaporation or condensation could potentially occur in the Receiver Tanks, but these physical phase changes (from liquid to vapor and vice versa) can be expected to occur naturally in waste storage tanks. *See* Schanilec Aff. ¶ 32. These minute, predictable phase changes do not impact the Receiver Tanks' function, which is to collect condensed liquid solvents, including hazardous waste, that flow from the condensers. *See* Schanilec Aff. ¶¶ 20, 32.

Amended Complaint. The only issue remaining in the case is Respondent's affirmative defense claim that the MPU Exemption applies to the Receiver Tanks. Respondent has failed to meet its burden of proof regarding this defense. The plain language of the MPU Exemption, as well as the exemption's regulatory history, case law, and EPA guidance, demonstrate that the exemption can apply only if both manufacturing and hazardous waste generation occurs within the unit in question. Even if considered in a light most favorable to Respondent, the undisputed facts of this case demonstrate that neither manufacturing nor the generation of hazardous wastes occurs within the Receiver Tanks. Thus, Respondent cannot meet its burden of proof regarding the MPU Exemption defense, and Complainant is entitled to an accelerated decision as a matter of law regarding Respondent's violations alleged in Counts 1, 2, 3, 4, and 6 of the Amended Complaint.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Motion for Accelerated Decision and a Memorandum in support of this motion (with separate attachments) was served this 23rd day of June, 2021, on the addressees listed below. Because the supporting Memorandum and attachments contain claimed Confidential Business Information, a redacted version of the Motion and Memorandum 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 the Motion and Memorandum 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
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June 23, 2021

STEVEN VIGGIANI Digitally signed by STEVEN VIGGIANI Date: 2021.06.23 18:26:26 -04'00'

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