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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN RE:

General Motors Automotive - North America
Docket No. RCRA-05-2004-0001

)
) RCRA Appeal No. (3008) 06-02
)
)
)

COMPLAINANT'S RESPONSE BRIEF

CONFIDENTIAL BUSINESS INFORMATION REDACTED

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General Motors Automotive - North America)
Docket No. RCRA-05-2004-0001)
_____)

COMPLAINANT'S RESPONSE BRIEF

I. AUTHORITY

Pursuant to 40 C.F.R. § 22.30(a)(2) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits, ("*Consolidated Rules*" or "*CROP*"), Complainant, through its undersigned attorneys, files the instant Complainant's Brief in Response to Respondent General Motors Corporation's Notice of Appeal and Brief in Support of Notice of Appeal (hereinafter, "Complainant's Brief")

II. STATEMENT OF THE ISSUES ON APPEAL

1. Did Judge Gunning correctly determine that the Purge Mixture¹ is a solid waste when

¹Throughout its Brief, GM uses the term "Purge Solvent" to identify the used solvent contaminated with paint that is the waste at issue in this case. This is both incorrect and misleading. GM and EPA long ago agreed to use the phrase "Purge Mixture" to identify the downstream waste at issue in this case – the purge solvent that has been used to clean the paint manifolds and their associated applicators - that has become contaminated with paint as a result of such cleaning. The term "purge solvent" refers to the virgin or reconstituted solvent (i.e., the solvent reconstituted following its reclamation) that is used to remove paint from the paint manifolds and associated applicators; after this solvent has been so used, and consequently has become contaminated with paint, it becomes "Purge Mixture." The term "Purge Mixture" was used throughout the prehearing briefs, the hearing itself and in the posthearing briefs. GM's use of the phrase "Purge Solvent" now to describe both the upstream solvent and the downstream

it exits the manifolds and associated applicators at GM's Pontiac and Moraine facilities, or the mini purge pots at the Orion facility?

2. Did Judge Gunning correctly determine that Purge Mixture is a "spent" material under RCRA?

3. Did Judge Gunning correctly determine that EPA may enforce its interpretation of its regulations?

4. Did Judge Gunning correctly determine that neither the "manufacturing process unit" nor the "totally enclosed treatment facility" exemptions apply to the instant case?

5. Did Judge Gunning correctly determine that EPA has the authority to enforce compliance with RCRA in Michigan?

6. Did Judge Gunning correctly determine that GM's Purge Mixture is "spent" and "discarded" and therefore, a waste, when it is sent off site to a treatment, storage or disposal facility?

III. SYNOPSIS OF COMPLAINANTS RESPONSE

The Respondent has appealed the Presiding Administrative Law Judge's *Initial Decision* and *Order* in *In the Matter of General Motors Automotive-North America*, Docket No. RCRA-05-2004-0001, (ALJ, March 30, 2006) (hereinafter referred to as *Initial Decision*) insofar as she concluded that the material at issue, Purge Mixture, is in fact, a RCRA regulated solid waste. Respondent does not appeal the Presiding Administrative Law Judge's findings that it violated RCRA, assuming the Purge Mixture is a solid waste. Further, Respondent does not appeal the

solvent contaminated with paint only serves to generate confusion.

Presiding Administrative Law Judge's penalty award.²

At each of the three automobile assembly plants at issue in this case, Respondent General Motors Corporation ("GM") uses purge solvent to purge (i.e., clean) paint from paint manifolds and their associated applicators. The purge solvent becomes contaminated with the paint during this cleaning process, and the resulting mixture has been referred to by the parties throughout these proceedings as "Purge Mixture." It is EPA's contention that the Purge Mixture is a RCRA "solid waste" and a "hazardous waste"³ from the time it exits the paint manifolds and associated applicators, and it remains a "solid waste" and a "hazardous waste" as it flows through the gun box or when it flows from the valve into the internal dump lines, which both lead to purge pots located immediately outside of the paint booths; the Purge Mixture remains a RCRA "hazardous waste" during the entire time it is conveyed through a series of pipes, lines, valves, pumps, purge pots, and recirculation loops that convey the Purge Mixture to storage tanks, and this Purge

²Because Respondent has not appealed the Presiding Administrative Law Judge's determination that, assuming the Purge Mixture is a solid waste, it violated RCRA's regulations, and it has not appealed her penalty award, Complainant will not present any arguments proving the violations or justifying the penalty. These issues are covered in Complainant's Post Hearing Brief and Post-Hearing Reply Brief, copies of which are included in the record of this case. Complainant hereby incorporates by reference its arguments on these issues in the previous briefs.

³GM has stipulated that the Purge Mixture is "ignitable" pursuant to 40 C.F.R § 261.21 and that it would be a Subtitle C "hazardous waste," subject to "hazardous waste" requirements, if it is a "solid waste" as defined in the regulations. (CX 1 at ¶ 38). Mich. Admin. Code r. 299.9212(1)(2004) and Ohio Admin. Code § 3745-51-21 (2004) define "ignitable" in the same way, in all material respects, as does 40 C.F.R. § 261.21. Additionally, GM's Waste Characterizations for its Purge Mixture demonstrate that the Purge Mixture has a flash point below 140 degrees Fahrenheit, which demonstrates that it is "ignitable" within the meaning of Michigan and Ohio regulations. (CX 33; CX 44; CX 45; CX 53; CX 54; RX 60 at PT5021; RX 75 at GM140140, GM140143; RX 76 at GM140149, GM140153; RX 92 at GM150183; RX 93, at GM150186).

Mixture remains a RCRA “hazardous waste” while it is stored in the Purge Mixture storage tanks. EPA further contends that the Purge Mixture is a RCRA “hazardous waste” when it is taken off-site to a treatment, storage or disposal facility, and it remains RCRA regulated “hazardous waste” during the entire time prior to reclamation, being burned for energy recovery or disposal. Judge Gunning agreed with EPA. Judge Gunning understood that the piping which conveyed the Purge Mixture away from the paint booths to hazardous waste storage tanks was nothing more than a waste conveyance system.

Judge Gunning found that once the purge solvent was used a single time to clean the paint manifolds and associated applicators, the purge solvent was too contaminated to be used for that purpose a second time. *Initial Decision* at 30. Judge Gunning concluded that since the Purge Mixture (which inevitably results from that cleaning) is not used to clean anything downstream of the paint booths, and is not used to perform any other task, and since there is no manufacturing downstream of the paint booths, the downstream piping system does nothing other than convey waste. *Initial Decision* at 37, 39. Judge Gunning held that the purpose of the Purge Mixture conveyance system is to move Purge Mixture from the paint booths to the outdoor storage tanks. *Initial Decision* at 31-34. The purge solvent was not designed to clean the waste conveyance system; rather, the conveyance system was designed to handle and manage the particular solvent waste being generated at the GM plants – i.e., the Purge Mixture. Judge Gunning was able to “step back and look at this process and operation overall, seeing the forest through the trees [and find that] [t]he contaminated purge mixture is not a product, it is a waste.” *Initial Decision* at 39.

The position of the Complainant in this matter is reasonable, consistent and in

conformance with the requirements of RCRA Subtitle C. The Purge Mixture is a “solid waste” since, due to contamination (i.e., the residual paint contaminates the purge solvent), the purge solvent can no longer serve the purpose for which it was produced – to clean the manifolds and associated applicators. Once the contaminated purge solvent (i.e., the Purge Mixture) exits the manifolds and associated applicators, it is not being used; rather, it simply exists as a contaminated solvent holding in solution dissolved paint polymers/resins and suspended pigment particles. While inside the equipment downstream of the paint applicators, the Purge Mixture is no longer being used by GM; rather it is simply captured and conveyed away from the manufacturing process via a waste handling system (i.e., a series of pipes, lines, valves, purge pots, recirculation loops, and pumps that convey the Purge Mixture to the Purge Mixture storage tanks). The waste system merely stores and conveys the already discarded Purge Mixture until such time as it is moved to the hazardous waste storage tanks (Purge Mixture storage tanks) located on-site and ultimately removed from the facility for further processing (e.g., reclamation, disposal, or burning for energy recovery).⁴ Judge Gunning shared Complainant’s concern that GM’s argument would open up a loophole large enough to exempt the waste in waste management systems throughout the country, stating that “I foresee that to classify the purge mixture as a non-waste would open a large loophole, in which used and contaminated materials escape regulation as ‘waste’ materials merely because they retain some limited beneficial properties...This cannot be what Congress intended.” *Initial Decision* at 31.

The holding in the Presiding Officer’s *Initial Decision* should be sustained. It is based on a careful review of an extensive record. That record included the examination of fourteen

⁴(See CX 5 at ¶ 10; CX 11 at ¶ 8).

witnesses (nine called by Respondent) over nine days and hundreds of exhibits. In its Brief, GM has not provided any compelling reason for the Board to reverse the Presiding Officer's findings in her *Initial Decision*. Consequently, the Board should affirm Judge Gunning's decision.

IV. BACKGROUND

A. Statutes and Regulations

Congress enacted the Resource Conservation and Recovery Act of 1976, as amended (RCRA), 42 U.S.C. § 6928(a),⁵ to address the serious environmental and health dangers arising from waste generation, management, and disposal. Congress was particularly concerned with the management and disposal of "hazardous wastes," for which it mandated comprehensive "cradle-to-grave" regulation in RCRA Subtitle C, 42 U.S.C. §§ 6921-6939e (hereinafter "Subtitle C").

See, e.g., City of Chicago v. Environmental Def. Fund, 511 U.S. 328, 331 (1994); *American Chem. Council v. EPA*, 337 F.3d 1060, 1062 (D.C. Cir. 2003). Congress broadly defined "hazardous waste" as a "solid waste" which "may . . . pose a substantial present or potential hazard to human health or the environment when improperly . . . managed."

42 U.S.C. § 6903(5). "Solid waste" includes all "discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial [or] commercial . . . operations." 42 U.S.C. § 6903(27). *See also* 40 C.F.R. § 261.2 (regulatory definition of "solid waste").

Congress delegated to EPA the task of developing criteria for identifying the characteristics of "hazardous waste" and the listing of "hazardous wastes." 42 U.S.C. § 6921(a).

⁵RCRA was amended in 1984 by the Hazardous and Solid Waste Amendments of 1984 (HSWA).

EPA has promulgated lists identifying specific “hazardous waste” (“listed wastes”). 40 C.F.R. Part 261, Subpart D. Also, EPA has identified four characteristics of “hazardous wastes:” ignitability, corrosivity, reactivity and toxicity. 40 C.F.R. §§ 261.20-.261.24. Any “solid waste” exhibiting one or more of these characteristics is automatically deemed a “hazardous waste” subject to regulation under Subtitle C of RCRA even if it is not a listed waste. *See American Petroleum Inst. v. EPA*, 906 F.2d 729, 733 (D.C. Cir. 1990); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 270, 271 (D.C. Cir. 1988). These “hazardous wastes” are subject to stringent RCRA Subtitle C standards that govern their generation, transportation, treatment, storage and disposal. *See* 42 U.S.C. §§ 6921-25; 40 C.F.R. Part 261; *Chemical Waste Mgmt., Inc. v. EPA*, 976 F.2d 2, 8 (D.C. Cir. 1992). Some of these management standards are those set forth at 40 C.F.R. Parts 262, 264 and 265, three Subparts that have particular relevance to the issues raised in this action: Subpart J, which establishes requirements for tank systems; and Subparts BB and CC, which establish standards to control air emissions from equipment and tanks that handle “hazardous wastes.”

B. State Authorized “Hazardous Waste” Programs

RCRA allows a State to apply for EPA authorization of the State's “hazardous waste” program. 42 U.S.C. § 6926(b) (which consists of state statutes or regulations). EPA reviews the state program to ensure that its requirements are at least as high as the federal floor. Among other things, to be authorized, a state “hazardous waste” program must be “equivalent” to the federal Subtitle C program established by EPA, must be “consistent” with the federal and state programs applicable in other States, and must provide for “adequate” enforcement of compliance with the requirements of RCRA. *Id.*; *See generally Florida Power & Light Co. v. EPA*, 145 F.3d

1414, 1416-17 (D.C. Cir. 1998). These authorized requirements operate “in lieu” of the Federal program under Subtitle C. *See* 42 U.S.C. § 6926(b). Although RCRA allows states to impose more stringent requirements than does the federal scheme, “the federal guidelines establish the minimum hazardous waste standards below which a state hazardous waste program may not operate.” *In re Bil-Dry Corp.*, 9 E.A.D. 577, 596 (EAB 2001). Once authorized by EPA, the state hazardous waste regulations operate as requirements of RCRA Subtitle C and are enforceable by EPA pursuant to RCRA § 3008(a). 42 U.S.C. § 6928(a). *See, e.g., Martin Electronics, Inc.*, 2 E.A.D. 381, 385 (CJO 1987). While states continue to utilize state enforcement authority to enforce their own statutes and regulations, EPA retains its own independent enforcement authority under *federal law* (RCRA) in such states to enforce the requirements of RCRA Subtitle C. *See* 42 U.S.C. § 6928(a)(2); *General Motors Corp. v. EPA*, 363 F.3d 442, 444 (D.C. Cir. 2004) (“... while an authorized state may enforce its hazardous waste program in lieu of the federal program, EPA has dual enforcement authority under RCRA . . .”). *See also Florida Power & Light*, 145 F.3d at 1417; *Waste Management of Illinois v. EPA*, 945 F.2d 419, 420 (D.C. Cir. 1991). RCRA allows more stringent state requirements, but imposes a duty on states to maintain the authorized program requirements at a level at least as stringent as the federal floor. 42 U.S.C. § 6929. EPA may withdraw authorization of a state program after determining the state is not administering and enforcing an authorized program, and following withdrawal, establish the federal program. 42 U.S.C. § 6926(e).

The facilities subject to this administrative proceeding are located in Pontiac, Michigan, Lake Orion, Michigan and Moraine, Ohio. (CX 1 at ¶ 1). EPA has authorized certain Michigan “hazardous waste” programs to operate in lieu of the EPA hazardous waste program. (CX 1 at

¶ 7).⁶ Specifically, EPA authorized Michigan for the base RCRA program, including the definitions of “solid waste” and “hazardous waste” and the standards applicable to generators and facilities that treat, store or dispose of hazardous waste, in 1986, and it authorized Michigan to administer the Subpart J regulations in 1989. (Tr. June 22, 2005⁷ at 61). EPA authorized Michigan to administer the Subpart BB and CC regulations as they apply to generators of hazardous waste in July of 2002. (Tr. June 22, 2005 at 62).⁸ EPA authorized Ohio to administer the base “hazardous waste” program, including the definitions of “solid waste” and “hazardous waste” in 1989 and it authorized Ohio to administer the Subpart J program in 1991. (Tr. June 22 at 62).⁹ EPA has not authorized Ohio to administer Subpart BB or CC; therefore, the requirements in those EPA-issued regulations must be complied with in Ohio. (CX 1 at ¶ 9). In this action, EPA is enforcing those state regulations which have become requirements of RCRA Subtitle C as a result of authorization, or the federal HSWA regulations in the instance where there has been no state authorization for those HSWA regulations. The parties have stipulated that the pertinent state rules are identical or materially identical to the EPA-issued rules. (*Joint*

⁶The EPA authorized Michigan regulations, codified at 40 C.F.R. § 272.1151 *et seq.*

⁷The hearing was held from June 20, 2005 to June 30, 2005. Each separate day of transcript will be referred to hereafter without reference to the year.

⁸Regulations promulgated pursuant to HSWA, effective December 6, 1996, expanded generator conditions for operating without a permit or interim status. Generators could accumulate “hazardous waste” on-site for 90 days or less without a permit and without having interim status provided that, among other things, the waste was placed in tank systems and the generator complied with 40 C.F.R. Part 265, Subparts BB and CC. Prior to July 2002, EPA administered the HSWA requirements in Michigan which required generators to comply with 40 C.F.R. Part 265, Subparts BB and CC.

⁹The EPA authorized Ohio regulations, codified at 40 C.F.R. § 272.1800 *et seq.*

Stipulation of the Parties Regarding Michigan and Ohio Rules). EPA will, therefore, frequently cite to the EPA-issued regulation for ease of reference throughout this Brief.

C. Administrative Case Proceeding

EPA inspected the three GM facilities at issue in the instant case: in Pontiac Michigan, Lake Orion, Michigan, and Moraine, Ohio, in March 2001, January 2003, and April 2001, respectively. (CX 1 at ¶ 1; CX 2; CX 3; CX 4 and CX 5 at ¶ 8). On October 17, 2003, EPA filed an Administrative Complaint and Compliance Order with EPA's Regional Hearing Clerk for EPA, Region 5. (CX 1 at ¶ 2). EPA's complaint alleged that GM violated RCRA and the regulations found at 40 C.F.R. Parts 264 and 265, Subparts J, BB and CC, or the corresponding authorized state regulations at each of the GM facilities. (CX 1 at ¶ 3). GM filed its Answer on November 21, 2003. (CX 1 at ¶ 4). The parties filed Cross Motions for Partial Accelerated Decision on August 23, 2004, on the threshold legal issue concerning the point of "hazardous waste" generation. The Court denied both parties' Motions for Partial Accelerated Decision on October 27, 2004. An evidentiary hearing was held in Detroit, Michigan, from June 20 through June 30, 2005. On March 30, 2006, the Honorable Barbara A. Gunning issued her *Initial Decision* in which she found for EPA on all counts in the Complaint. Judge Gunning ordered GM to comply with the Compliance Order in the Complaint and to pay a civil penalty in the amount of \$568,116. On April 26, 2006, GM filed its Notice of Appeal of Judge Gunning's *Initial Decision* and it filed its Brief in Support of its Notice of Appeal ("GM Brief") on May 19, 2006.

V. FACTS

Various car and truck parts, including bodies, panels, axles, and engines, are sent to each

of GM's three assembly facilities which are the subject of this action where they are assembled into finished vehicles. (CX 1 at ¶ 10). The assembly process at each of the three GM facilities consists of three major operations that occur in sequence – body assembly, painting, and general/final assembly. (CX 1 at ¶ 12). After vehicle bodies are assembled, the vehicles are prepared for painting. GM paints the vehicles in paint booths at each of GM's facilities. (CX 1 at ¶ 13).

GM uses various kinds of “solvent-based” paint to paint vehicles at each of its facilities. (CX 1 at ¶ 14). These paints are applied to vehicles via paint applicators in paint booths. (CX 1 at ¶ 16). The painting process in the paint booths at each facility uses robotic spray guns and electrostatic bells – collectively referred to herein as “paint applicators” – to paint the vehicles. As a vehicle reaches the paint applicators, the applicators are automatically triggered and begin painting specific portions of the vehicle. When the robotic paint applicators are finished painting their specific portions of the vehicle, they automatically turn off and return to their ready positions. The vehicle then continues traveling down the paint line until painting is complete. (CX 1 at ¶ 17). Painting operations at GM's facilities are generally depicted in Figure 1 attached to CX 1. Once a vehicle is fully painted, it exits the paint operations and travels to the general/final assembly area. (CX 1 at ¶ 18). GM does not paint vehicles downstream of the paint booths. (Tr. June 21 at 125).

All of the different types of paints used at each of these facilities (*i.e.*, primers, different colored basecoats, and clearcoats) are stored in various tanks called “mix tanks” which are located in a portion of each facility called the “Paint Mix Room.” These mix tanks are equipped with agitators or mixers that help keep paint solids in suspension and prevent the paint solids and

solvent from separating and that minimize clogging of paint equipment and associated lines. The Paint Mix Room is located “upstream” of the paint booths. Paint is pumped from the mix tanks to the paint booths. (CX 1 at ¶ 19).

The paint applicators are located inside the paint booths. These paint applicators are equipped with a manifold system immediately prior to or “upstream” of the applicators. The manifold system, which is generally depicted in Figure 2 attached to CX 1, consists of a system of valves, electronics, a manifold that keeps different color paints separated, and a flow meter. The manifold system regulates the flow of paint, purge solvent (described below) and air to the paint applicators. (CX 1 at ¶ 20). Prior to the time paint enters the manifolds at each facility, the paint is continuously circulated through the mix tanks and associated paint delivery lines upstream of the manifolds, to prevent the paint solids and paint solvent from separating or clogging the paint delivery system. (CX 1 at ¶ 21).

When it is time for a particular paint to be delivered to the paint applicators, the appropriate valve to the manifold opens. That paint then flows through the manifold, the line between the manifold and the paint applicator, the flow meter, the applicator itself, and then out onto the vehicle. (Hereafter, the “manifold, line between the manifold and the paint applicator, the flow meter, and the applicator itself” are collectively referred to as “the manifold and associated applicator”). (CX 1 at ¶ 22).

Not all vehicles are painted with the same color. The process of switching from one color to another requires a thorough cleaning of the manifold and associated applicator to remove the previous colored paint. This cleaning process is known as the “purge process” and uses a material called “purge solvent.” (CX 1 at ¶ 23). To perform the purge process in the applicators, air and

purge solvent are introduced into the manifold and associated applicators to perform a scrubbing action that cleans the paint from this equipment. (Tr. June 23 at 107-112). Purge solvent is a separately purchased solvent mixture specifically formulated according to the design of the paint system at each facility and the types of paint being used and is purchased by GM to clean the manifolds and associated applicators. (CX 11 at ¶ 10). The purge solvent would not be used at the GM facilities if there were no need to clean the manifolds and associated applicators. (CX 1 at ¶ 24; CX 5 at ¶ 13; CX 11 at ¶ 10; Tr. June 24 at 137; Tr. June 28 at 295-296). Purge solvent used to clean the manifolds and associated applicators is different than the solvent used in solvent-based paint. Purge solvent does not contain paint solids. Purge solvent is stored in its own tank in the Paint Mix Room. Purge solvent is delivered to the manifolds through its own delivery lines. (CX 1 at ¶ 24).

As indicated earlier, the paint applicators at each facility are either robotic spray guns or electrostatic bells. Although there are many similarities between these two methods of paint application, there are some differences. The Purge process for robotic paint applicators occurs in four steps. First, air is blown through the manifold and associated applicator to push as much paint as possible onto the vehicle. Then the robotic applicator rotates to a structure called a “gun box” located in the paint booth. Each robotic paint applicator has its own gun box, which is an open-topped device. Second, the purge solvent valve in the manifold opens and allows purge solvent to be pumped through the manifold and associated applicator just like paint. The purge solvent cleans the manifold and associated applicator of the previous residual paint to avoid “contaminating” the new color. The mixture of residual paint and purge solvent (Purge Mixture)

then flows into the gun boxes.¹⁰ (CX 1 at ¶ 25). The Purge Mixture meets the definition of “ignitable” set forth in 40 C.F.R. § 261.21. (CX 1 at ¶ 38; CX 5 at ¶ 32).¹¹ Third, additional purge solvent is sprayed from nozzles in the gun box onto the outside of the paint applicator to clean any residual paint on the outside of the applicator. This generates additional Purge Mixture which also flows into and through the gun box. Finally, GM uses an “air chop” to quickly blow air through the manifold and associated applicator to push as much paint and purge solvent as possible into the gun box. This air chop also provides scrubbing action to clean the wall of the manifolds. (Tr. June 23 at 109-111). The paint applicator then returns to its ready position and resumes painting vehicles. (CX 1 at ¶ 25).

The Purge Mixture, generated from cleaning the robotic applicator, flows from the gun boxes through pipes into devices called purge pots which typically have a capacity of about thirty gallons. (CX 1 at ¶ 26). The flow of the Purge Mixture from the gun boxes through the pipes occurs as a result of gravity and the use of air. (CX 5 at ¶ 31). Each purge pot is equipped with a mixer or agitator to help keep the paint solids in the Purge Mixture in suspension and a pump, level control, and a vent. (CX 1 at ¶ 26; Tr. June 20 at 79; Tr. June 24 at 55-56, Tr. June 27 at 41).

The purge process for stationary bell applicators is slightly different than the purge process for the robotic applicators. (CX 1 at ¶ 35). Despite these differences, the purge process for the stationary bell applicators also generates Purge Mixture. That Purge Mixture goes through a valve

¹⁰See CX 5 at ¶ 11; CX 11 at ¶ 9.

¹¹RCRA defines the “hazardous waste” characteristic of “ignitable” in 40 C.F.R. § 261.21. Both Michigan and Ohio have adopted the same definition. (See footnote 3).

associated with the bell applicator. (CX 1 at ¶ 35). The Purge Mixture then flows by gravity, with the assistance of air, into a line that is connected directly into a purge pot. This Purge Mixture commingles with the Purge Mixture that was generated in the gun box. (CX 5, ¶ 12). There is no painting of automobiles downstream of the gun boxes. (Tr. June 21 at 125).

When the Purge Mixture rises to a predetermined level in a purge pot,¹² the pump on that purge pot is automatically activated and pumps the Purge Mixture through a system of pipes, including recirculation loops at the Moraine and Orion facilities. Each recirculation loop recirculates Purge Mixture in the lines downstream of the gun boxes and external to the paint booths. (CX 1 at ¶ 28). These recirculation systems recirculate the Purge Mixture and keep it flowing even during periods when no production is being carried out, twenty four hours a day, seven days per week. (Tr. June 23 at 53-54, 222; Tr. June 27 at 141, 146-147; Tr. June 28 at 153-154). GM added the recirculation at the Moraine facility because there was a problem with clogging prior to recirculation. (Tr. June 28 at 157). GM installed the recirculation system at Orion as a solution to problems with clogging inside the purge pots and piping. (Tr. June 27 at 16, 17, 49; Tr. June 28 at 157-158). Recirculation provides the necessary volume of Purge Mixture to push itself to the storage tanks. (Tr. June 23 at 243-244; Tr. June 24 at 75-76). There is no recirculation at Pontiac. (Tr. June 28 at 153).

The Purge Mixture is conveyed through the equipment (e.g., purge pots, pipes) by being pumped and agitated. (CX 1 at ¶ 27; CX 5 at ¶ 31; CX 11 at ¶ 14). GM uses agitation, pressure,

¹²At Orion, the Purge Mixture first flows via flexible tubing from the paint applicators to small purge pots ("mini purge pots") located inside the clear coat and prime coat paint booths. (Tr. June 27 at 124-126). The Purge Mixture is then pumped from the mini purge pots via small diameter piping out of the paint booths and into larger thirty gallon purge pots located outside the paint booths. (Tr. June 23 at 178-179, 214; Tr. June 27 at 50, 64-65, 125-129).

and gravity and recirculation to move the Purge Mixture through the conveyance system to the storage tanks. (CX 23 at ¶¶ 21-23, 27). The movement of the Purge Mixture downstream of the manifolds and associated applicators happens as a result of the energy generated by agitation and pumping (and recirculation at Moraine and Orion), as well as by the volume of the Purge Mixture itself. (CX 23 at ¶¶ 21-23, 27; Tr. June 20 at 281; Tr. June 21 at 66-67, 142-143).

The solvent in the Purge Mixture retains its solvent properties downstream of the paint booths, and will retain those solvent properties while in the Purge Mixture storage tanks. (Tr. June 20 at 281). Contaminated solvents left in drums at Superfund sites will retain solvent properties. (Tr. June 20 at 281-82; Tr. June 21 at 67). The solvent in the Purge Mixture, downstream of the manifolds and associated applicators, continues to dissolve and suspend the same contaminants it already contains. (Tr. June 20 at 279-281; Tr. June 21 at 43, 48, 63-64, 129). The pipes that convey the Purge Mixture are never completely clean because there will always be a residue of paint solids left behind by the Purge Mixture. (Tr. June 20 at 65-66).

Once the volume of Purge Mixture reaches a predetermined level in the recirculation loops, yet another valve opens and the Purge Mixture flows into the Purge Mixture storage tanks.¹³ (CX 1 at ¶ 30). The Purge Mixture storage tanks that hold the Purge Mixture range in size from 6,000 to 23,000 gallons at the three GM facilities. (CX 1 at ¶ 27). GM marked each Purge Mixture storage tank at each of the three facilities with the words “hazardous waste.” (CX 5 at ¶ 30.a; Tr. June 20 at 114). The Purge Mixture accumulates in these Purge Mixture storage tanks until it is shipped off-site to a “treatment, storage or disposal” (“TSD”) facility where the Purge Mixture is reclaimed or burned as waste fuel. (CX 136 Revised). When GM sends Purge

¹³At Pontiac, the Purge Mixture is pumped directly from the purge pots to the Purge Mixture tanks, without recirculation. (CX 5 at ¶ 23).

Mixture off-site to reclaim the solvent in the Purge Mixture, it manifests the Purge Mixture as a “hazardous waste.” (CX 1 at ¶ 33; CX 5 at ¶ 30.d; CX 30J; CX 60; CX 81; CX 82; CX 67; Tr. June 28 at 26, 242).

Purge Mixture inevitably results from cleaning the manifolds and associated applicators. (Tr. June 24 at 137; Tr. June 28 at 296-297). If GM did not clean the manifolds and associated applicators, it would never purchase the purge solvent and there would be no Purge Mixture to manage. (Tr. June 23 at 186; Tr. June 24 at 137-138; Tr. June 27 at 166). The downstream pipes, equipment, and storage tanks would not be there but for the need to convey the Purge Mixture off-site. (Tr. June 23 at 186). The Purge Mixture is never circulated back through the manifolds and associated applicators. (CX 5 at ¶¶ 15, 17-18; CX 11 at ¶ 12; Tr. June 20 at 108-109, 278-279; June 27 at 127). GM does not take the Purge Mixture out of the Purge Mixture conveyance system downstream of the paint booths and use it to clean any equipment on site. (Tr. June 20 at 109; Tr. June 23 at 210). GM does not ship the Purge Mixture off-site to be used to clean any other equipment off-site. (Tr. June 23 at 223-224). GM’s Purge Mixture is never used to clean drums, containers, tanks, tanker trailers or other transport vessels. (CX 5 at ¶ 19; CX 11 at ¶ 13; Tr. June 28 at 297-298). GM does not reclaim Purge Mixture on-site. (Tr. June 23 at 57; Tr. June 28 at 40-41, 304). GM’s business is to produce automobiles. (Tr. June 20 at 48; Tr. June 28 at 156, 290). GM is not in the business of manufacturing purge solvent. (Tr. June 28 at 290). GM is not in the business of manufacturing Purge Mixture. (Tr. June 28 at 25, 290). GM is not in the business of reclaiming Purge Mixture. (Tr. June 23 at 57-58; Tr. June 28 at 304).

VI. STANDARD OF REVIEW

Section 22.30 of the *Consolidated Rules*, 40 C.F.R. § 22.30, governs the scope of this appeal, and sets forth the standard for the Board’s review of this appeal. Section 22.30(f)

identifies the scope of the Board's authority on review. The Board may "adopt, modify or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed." 40 C.F.R. § 22.30(f). The Board conducts a *de novo* review of the Presiding Officer's factual and legal conclusions. *In re LVI Env'tl. Servs.*, 10 E.A.D. 99, 101 (EAB 2001); 40 C.F.R. § 22.30(f); *In re Larry Richner, Nancy Sheepbouwer & Richway Farms*, 10 E.A.D. 617, 619 (EAB 2002), citing *In re City of Marshall, Minnesota*, 10 E.A.D. 173, 180 (EAB 2001); *In re Billy Yee*, 10 E.A.D. 1, at 10 (EAB 2001), *pet. dismissed* No. 01-2627 (8th Cir. Jan. 24, 2002).

In an administrative case the standard of proof is "preponderance of the evidence." 40 C.F.R. § 22.24(b); *In re Roger Antkiewicz & Pest Elimination Products of America*, 8 E.A.D. 218, 227 (EAB 1999). Under this standard the proponent must show that the evidence as a whole proves that the fact sought to be proven is more probable than not (i.e., more credible or convincing to the mind). *In re The Bullen Companies, Inc.*, 9 E.A.D. 620, 624, n.7; 632 (EAB 2001) (quoting *In re Ocean State Asbestos Removal Inc.*, 7 E.A.D. 522, 530 (EAB 1998). EPA, as the complainant, has the burden of going forward with and of providing evidence that the violation occurred. 40 C.F.R. § 22.24(a); *In the Matter of Sandoz, Inc.*, 2 E.A.D. 324 (CJO 1987). The Respondent has the burden of presenting any defense to the allegations set forth in the complaint. The Respondent has the burdens of presentation and persuasion for any affirmative defenses. 40 C.F.R. § 22.24(a).

The Board has elaborated on the burden of proof, stating:

The term "burden of proof" * * * encompasses two concepts: the burden of production, and the burden of persuasion. The first of these to come into play is the burden of production -- that is, the "duty of going forward with the introduction of evidence." This burden may shift during the course of litigation; if a complainant satisfies its burden of production, the burden then shifts to the respondent to produce, or go forward with the introduction of, rebuttal evidence. The burden of persuasion comes into play only "if the parties have sustained their burdens of producing evidence and only when all of the

evidence has been introduced.” This burden refers to what a “litigating proponent must establish in order to persuade the trier of facts of the validity of his claim.” Importantly, this burden does not shift.

In re City of Salisbury, 10 E.A.D. 263, 278-79 (EAB 2002), citing *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 536-37 n.16 (EAB 1994).

Factual determinations involving issues of credibility are entitled to deference absent some compelling reasons to the contrary because the Presiding Officer has had the opportunity to observe the witnesses and determine their credibility. *In re Boliden-Metech, Inc.*, 3 E.A.D. 439, 446 (CJO 1990), citing *In re Mexico Feed and Seed Company, Inc.*, TSCA Appeal No. 85-2 (February 28, 1986), at 7; and *Ocean State*, 7 E.A.D. at 530 (EAB 1998); *In re Advanced Elecs., Inc.*, 10 E.A.D. 385, 392 n.17 (EAB 2002), *appeal voluntarily dismissed*, No. 02-1868 (7th Cir. May 21, 2003); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994) (citing *In re Great Lakes Div. of Nat'l Steel Corp.*, 5 E.A.D. 355, 372 (EAB 1994)); *See also In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000). In reviewing a Presiding Officer's findings of fact where the credibility of witnesses is at issue, the Board has consistently applied a deferential standard, in recognition of the fact that the ALJ who presided over the hearing was in a unique position to observe the witnesses' demeanor and assess their credibility. *See Bil-Dry*, 9 E.A.D. at 588 n.15 (“Although the Board generally reviews the Presiding Officer's factual and legal conclusions on a de novo basis, the Board may apply a deferential standard of review to issues such as the Presiding Officer's finding of fact where the credibility of witnesses is at issue”); *In re Tifa Ltd.*, 9 E.A.D. 145, 151 n.8 (EAB 2000); *Chempace*, 9 E.A.D. at 134; *Ocean State*, 7 E.A.D. at 530 (“the presiding officer had the opportunity to observe the witnesses testify and to evaluate their credibility”). Therefore, the Board should not disturb any factual findings that rested on Judge Gunning's evaluation and assessment of the credibility of witness testimony.

VII. ARGUMENT

A. Under RCRA Regulations, Purge Mixture is a “Solid Waste” and “Hazardous Waste” When it Exits the Manifolds and Associated Applicators (or Mini Purge Pots at Orion) Because it is Recycled “Spent” Material

As Judge Gunning correctly concluded, “solid waste” is generated when purge solvent mixed with unwanted paint leaves the manifolds and associated applicators, or mini purge pots at Orion. The point of generation is immediately after the Purge Mixture leaves these devices, when the “paint solids [have] mixed with the [purge] solvents, thereby contaminating the solvents and rendering them ‘spent.’” *Initial Decision* at 18. GM’s contention that the disputed Purge Mixture is not discarded, thereby not being a solid and hazardous waste, so long as the Purge Mixture helps keep the unwanted paint from solidifying and clogging the transport pipes and equipment of the plants’ waste collection system is wrong because it ignores the RCRA regulations defining “solid waste” and, in particular, “spent material.” As Judge Gunning decided, the Purge Mixture is a spent material. GM stores that spent Purge Mixture in various pipes and intermediate tanks until conveying it to an ultimate storage tank. At that point it is sent off site where it is either reclaimed or burned for energy recovery. Thus under the RCRA regulations the Purge Mixture is discarded and a solid waste. It is also a hazardous waste as it exhibits the characteristic of ignitability (and in some instances toxicity), and therefore is subject to the requirements of RCRA Subtitle C.

1. The Purge Mixture Is Discarded Under the RCRA Subtitle C Regulatory Program

The central issue is one of regulatory interpretation, and not as GM argues, the statute itself. In this case the RCRA Subtitle C regulations define the terms at issue, and those regulations control. To be subject to the Subtitle C “hazardous waste” requirements, a material must be a “solid waste,” that is either a listed “hazardous waste” or identified as a characteristic

“hazardous waste” and is not excluded from regulation.¹⁴ A “solid waste” is defined as “any discarded material that is not excluded [by other regulation] or variance.”¹⁵ A “discarded” material includes material that is recycled – or accumulated, stored, or treated before recycling.¹⁶ Recycled materials include “spent materials” that are “reclaimed” or materials that are burned for energy recovery.¹⁷ The regulations identify “regeneration of spent solvent” as an example of a “reclaimed” material.¹⁸ A “spent material” is “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.” 40 C.F.R. § 261.1(c)(1).¹⁹

¹⁴Mich. Admin. Code r. 299.9203(2004); Ohio Admin. Code (“OAC”) § 3745-51-03(2004). The definition of “hazardous waste” in both states is equivalent, in all material respects, to EPA’s definition of “hazardous waste” found at 40 C.F.R. § 261.3.

¹⁵Mich. Admin. Code r. 299.9202(2004); OAC § 3745-51-02(2004). The definitions of “waste” in the regulations of both states is equivalent, in all material respects, to EPA’s definition of “solid waste” found at 40 C.F.R. § 261.2. *See* CX 5 at ¶ 26; CX 11 at ¶ 17.

¹⁶Mich. Admin. Code r. 299.9202(1)(a)(2004); OAC § 3745-51-02(A)(2)(2004). These regulations are equivalent in all material respects to 40 C.F.R. § 261.2(a)(2)(ii).

¹⁷Mich. Admin. Code r. 299.9202(1)(b)(ii) and (iii)(2004); Mich. Admin. Code r. 299.9202(2)(a)(2004); OAC § 3745-51-02(C)(2) and (3)(2004). These regulations are, in all material respects, equivalent to 40 C.F.R. § 261.2(c)(2) and (3).

¹⁸*Id.*

¹⁹ Michigan and Ohio authorized regulations provide that a “discarded” material includes any material which is accumulated or stored before being abandoned (*See* Mich. Admin. Code r. 299.9202(1)(a)(2004); OAC § 3745-51-02(B)(3)(2004), or before recycling by reclamation (*See* Mich. Admin. Code r. 299.9202(1)(b)(2004); OAC § 3745-51-02(C)(2004)). Both Michigan and Ohio authorized regulations make clear that a recycled material also includes material that is “spent.” *See* Mich. Admin. Code r. 299.9202(1)(b)(iii) and (2)(a)(2004); OAC § 3745-51-02(A)(2)(b), (C)(3) and Table 1(2004). Michigan and Ohio authorized regulations provide that a “spent material” is “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.” *See* Mich. Admin. Code r. 299.9107(aa)(2004); OAC § 3745-51-01(C)(1)(2004).

Judge Gunning was correct when she held that GM's Purge Mixture comes within RCRA's definition of a "spent material" and is "discarded" when it exits the manifolds and associated applicators or when it exits the mini purge pots at Orion, and her decision should be affirmed by the EAB. *See Initial Decision* at 54. The facts of this case, as identified during the hearing and stated in the Presiding Officer's findings of fact, are that GM applies paint to automobiles through the paint manifolds and their associated applicators. After painting automobiles, GM cleans the manifolds and applicators with virgin (or reconstituted) purge solvent. The purge solvent becomes contaminated with unwanted paint cleaned from the paint manifolds and applicators. The Purge Mixture, which consists of used purge solvent contaminated with paint, is not used to clean the paint manifolds and applicators. GM stores this Purge Mixture in a system of piping and other equipment, including tanks, until GM ships it for solvent reclamation or to be burned for energy recovery. The Purge Mixture is conveyed through the piping and equipment to the storage tanks via agitation, gravity, pressure gradients and re-circulation. (*See also* pages 10-17 of this Brief). The Purge Mixture is a solid waste. The Purge Mixture is discarded because, as defined by the regulations, it is a spent material which GM is storing before it is recycled by either being reclaimed or burned for energy recovery. 40 C.F.R. § 261.2(a)(2) and (c). As the Purge Mixture is "ignitable" (*See* footnote 3), it is also a hazardous waste and, therefore, subject to the RCRA regulatory requirements for hazardous waste.

2. The Purge Mixture Is A "Spent Material" Under the RCRA Subtitle C Regulatory Program

The Purge Mixture is a RCRA spent material because it has been used and as a result of contamination it can no longer serve the purpose for which it was produced without processing. *See* 40 C.F.R. § 261.1(c)(1). EPA redefined "solid waste" under the regulations in 1985, and

when it did so, EPA clearly stated in the preamble that “[t]he amended definition adopts the approach that for secondary materials²⁰ being recycled, one must know both what the material is and how it is being recycled before determining whether or not it is a Subtitle C waste.”²¹ EPA stated that “RCRA embodies a general principle that most hazardous secondary materials are considered hazardous waste when recycled.”²² As found by Judge Gunning, the Purge Mixture is ultimately recycled either by reclaiming the solvent or burning it for energy recovery. In addition, she also found that the Purge Mixture is a spent material. These two facts result in the Purge Mixture being subject to the RCRA Subtitle C and the hazardous waste regulation program.

Based on the facts of this case, the ALJ found that, after the cleaning of the paint manifolds and applicators, the solvent in the Purge Mixture serves only to keep contaminants (i.e., unwanted paint) in solution or suspension while the Purge Mixture solution is accumulated, conveyed and stored prior to being shipped off-site for reclamation or burned for energy recovery. If the contaminated solvent in the Purge Mixture does not dissolve additional constituents in a further use, it is a spent material. In concluding that the Purge Mixture is a spent material, Judge Gunning correctly concluded that the Purge Mixture performs no additional uses prior to being sent for recycling since the contaminated solvent does not dissolve additional contaminants. The ALJ’s holding is consistent with the 1985 preamble which discussed the regulatory definition of “spent material.” In the example provided in the preamble, EPA acknowledged that a solvent that has been used to clean circuit boards may no longer be pure enough (i.e., it has become too

²⁰“Secondary materials” means a material that potentially can be a solid and hazardous waste when recycled. Spent materials are secondary materials. 50 Fed. Reg. 614, 616 (Jan. 4, 1985).

²¹50 Fed. Reg. 614, 618 (Jan. 4, 1985).

²²*Id.* at 616.

contaminated) to continue to clean circuit boards but may have a further use, such as use as a metal degreaser.²³ When that contaminated solvent is used as a metal degreaser, it is performing an independent use, cleaning and picking up additional contaminants.

GM greatly relies on the fact that EPA eliminated the word “original” as a modifier to the word “purpose” in the 1985 Final Rule. (GM Brief at 47). That reliance is misplaced. It is true that the Agency reworded the regulation in 1985 to clarify that a further use does not have to have the *identical* purpose (i.e., solvent purchased to clean circuit boards can only be reused to clean circuit boards).²⁴ The Agency has long maintained that the only interpretation that makes environmental sense is that a spent material “can no longer serve the purpose for which it was produced” when the material is no longer serving its original purpose and is instead being recycled (e.g., reclamation or burned for energy recovery).²⁵ This is exactly the instant case. The purge solvent cleans the paint manifolds and associated applicators by solubilizing the unwanted paint. This used purge solvent (i.e., the Purge Mixture) is not returned and reused to clean the paint manifolds and applicators. The Purge Mixture (i.e., used purge solvent contaminated with unwanted paint resins and pigment particles) is stored and conveyed in piping and other equipment until it is sent off-site where it is recycled by either solvent reclamation or burning for

²³50 Fed. Reg. 614, 624 (Jan. 4, 1985).

²⁴50 Fed. Reg. 614, 624 (Jan. 4, 1985)(CX 15) (“[t]he reference to contamination was added to clarify that a material such as a solvent may continue to be used for its original, though not identical, purpose and not yet be classified as a solid waste.”). (See also CX 20 at EPA 00166 (“the as a result of contamination’ language was added to avoid classifying as waste a material that was actually being put to further direct use.”)).

²⁵See Letter from Michael Shapiro (Director, Office of Solid Waste) to Hazardous Waste Management Division Directors (EPA, Regions I-X), March 24, 1994 (OSWER Directive 9441.1994(07)). (CX 20 at EPA 00166).

energy recovery. The Purge Mixture is stored and conveyed through the piping and equipment, as Judge Gunning determined, and does not pick-up any additional contaminants other than those that have been cleaned out of the paint manifolds and applicators.²⁶ The purge solvent has served its purpose, it is not being used again to clean or pick-up additional contaminants and it is being sent off-site to be reclaimed.

EPA's Sonya Sasseville, Acting Chief of the OSW Permits Branch, made the very same point clear in her June 2, 2000 memorandum. In that memorandum, Ms. Sasseville evaluated similar painting operations at another automobile manufacturer and she then stated "[t]he purpose of the solvent is to remove the waste paint, clean the spray gun, and allow the use of new colors. If the solvent serves thereafter only to keep contaminants in suspension until they reach the hazardous waste storage tank, and if the solvent does not dissolve additional constituents, it is a waste." (CX 17 at 2).²⁷

Judge Gunning, in holding that the Purge Mixture is a waste, analyzed the regulatory

²⁶Judge Gunning, after evaluating the testimony of all the witnesses and the exhibits at the hearing, held that "[a]lthough the purge mixture retains solvent functions, the solvent in the purge mixture is not used to clean anything besides other purge mixture." *Initial Decision* at 33.

²⁷Similarly, EPA has maintained its interpretation when reviewing other fact specific questions posed by the public regarding the use, reuse or continued use of a solvent. For example, David Bussard articulated EPA's position on this issue in his August 21, 1988 letter to Safety-Kleen. (CX 96). In that letter, Bussard explains that, in order for the solvent at issue to be considered a product (and not a waste): the entire load of such solvent must be used for drum washing, and none could be reclaimed; the solvent has to actually be suitable to clean the drums; the solvent has to be used to clean drums that actually need it; and the solvent cannot be used in excess of what would normally be used to clean drums. *Id.* Thus, EPA articulated fairly narrow boundaries for Safety-Kleen to follow, to ensure that the second solvent use was "legitimate" and not sham recycling. The statements in the Bussard letter articulate that the reuse of the contaminated solvent must include the activity of picking-up additional contaminants (i.e., cleaning the unwanted materials from the drums). Clearly, EPA has maintained its point of view regarding when solvents that have become contaminated are spent materials.

definition of the term “spent material.” She held that the words “the purpose” contained within the definition of “spent material” connotes a *singular* purpose for the solvent. *Initial Decision* at 26. *See also In the Matter of Howmet Corp.*, Docket Nos. RCRA 02-2004-7102; RCRA 06-2003-0912 (ALJ, Apr. 25, 2005), *appeal docketed*, RCRA (3008) Appeal No. 05-04 (EAB). The purpose for which GM produced the purge solvent was to clean the paint manifolds and associated applicators. GM’s own experts (Warren and Wozniak) concede that purge solvent is first produced and used to clean the manifolds and associated applicators. (RX 8 at ¶ 7; RX 6 at ¶5; Tr. June 24 at 137). Further, the purge solvent produced for each facility, as acknowledged and testified to by GM’s own witnesses,²⁸ is designed specifically to be able to clean the particular paints in manifolds and associated applicators at that particular facility. (RX 8 at ¶5; Tr. June 24 at 197; Tr. June 20 at 272; Tr. June 21 at 123). It is clear that the purge solvent used by GM to clean its manifolds and associated applicators has been manufactured for the particular purpose of cleaning paint from the applicators and manifolds at the particular facilities at issue.²⁹

Additionally, GM’s witnesses further buttress the ALJ’s focus on “the” purpose of the purge solvent. If GM did not need to clean that equipment, it would never purchase the purge solvent in the first place and there would be no waste downstream of the equipment to manage.

²⁸Specifically, Jonathan Warren, GM’s expert witness, stated that a customer such as GM “will say we [GM] want a purge solvent for this type of paint technology, here is the specification that this falls under” (Tr. June 24 at 189).

²⁹GM witness Jonathan Warren of PPG also stated that, when developing a purge solvent for a customer such as GM, PPG will test the solvent’s efficacy in PPG laboratories. These laboratories are equipped with gun applicators and bell applicators that simulate equipment used at the customer’s facility. (Tr. June 24 at 198-99). This supports the inference that, in the development of purge solvents, the focus is on cleaning the painting equipment (i.e., the manifolds and applicators).

(Tr. June 24 at 137). Indeed, there would be no lines downstream of the manifolds and associated applicators to clog or unclog if GM did not need to clean its upstream painting equipment. (Tr. June 24 at 138). In fact, GM's witness, Thomas Chaput, stated that "the system downstream of the applicators is designed to transport the purge mixture away from the automation equipment, [and] take it to the storage tank, ..." (Tr. June 27 at 166), and GM witness Fred Blair agreed that the Purge Mixture conveyance system would not be there but for the need to convey the Purge Mixture off-site. (Tr. June 23 at 186). Judge Gunning was correct when, after hearing from GM's own witnesses, she held that "[i]f GM did not need to clean the manifolds and associated applicators, it would never purchase the purge solvent in the first place and there would be no waste downstream of the equipment to manage." *Initial Decision* at 31. All of the pipes, pumps, purge pots and other equipment downstream of the manifolds and applicators are simply equipment designed to convey the hazardous waste Purge Mixture to the storage tanks; each of these pieces of equipment are part of the waste conveyance system.

It is equally clear that after GM uses the purge solvent a single time to clean the manifolds and associated applicators, the Purge Mixture is too contaminated to clean that equipment again. (Tr. June 20 at 278-79; Tr. June 21 at 128). Downstream of the paint manifolds and associated applicators the Purge Mixture is spent. GM must actually send the Purge Mixture off-site for reclamation and then for remanufacture (Tr. June 28 at 182) before the reclaimed solvent can be used to clean the manifolds and associated applicators. (Tr. June 23 at 57; Tr. June 29 at 18). Since the purge solvent was produced to clean paint manifolds and associated applicators, and since, as a result of contamination, it cannot be used to clean manifolds and associated applicators until after it has been processed (i.e. reclaimed and remanufactured), the Purge Mixture fits

squarely within the definition of a “spent” material and is a waste material at that point in time.

Judge Gunning also looked at the “predominant purpose” of the purge solvent to determine whether the Purge Mixture was a hazardous waste at the time it left the manifolds and associated applicators. In so doing, she looked to the holdings in *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (“API II”), and *American Mining Congress v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (“AMC I”). *Initial Decision* at 27. Complainant, however, respectfully disagrees with one aspect of the Initial Decision; specifically, Complainant believes that Judge Gunning’s reference to the “predominant purpose” language of the *API II* opinion (*Initial Decision* at 27) is not on point in this proceeding. The instant case before the Board is limited to the interpretation that the Purge Mixture, because it is a “spent” material which is reclaimed or burned for energy recovery, is a solid waste under EPA’s regulations. The *API II* opinion discusses, in the context of a challenge to a regulation, whether EPA correctly decided that a particular material should be regulated as a product or as a waste under the RCRA statutory definition of solid waste, 42 U.S.C. § 6903(27). The issue before the D.C. Circuit in *API II* was whether, in a rulemaking that had classified as a solid waste certain oil-bearing wastewaters (which were destined for an oil-recovery “primary treatment” stage prior to ultimate discharge), EPA had set forth a reasonable basis for its determination that such wastewaters were “discarded” prior to the “primary treatment” stage (i.e., the stage at which oil was recovered from the wastewaters). *API II*, 216 F.3d at 55-56, 57-58. Whether or not the material was “spent” was never an issue before the Court in *API II* (indeed, the concept of “spent” appears to be foreign to the nature of oil-bearing wastewaters). The entire issue in *API II* was simply whether the material at issue was “discarded,” resolution of which necessitated an inquiry into whether the particular

stage at which EPA had determined, for rulemaking purposes, the material to be “discarded” (i.e., the primary treatment stage) was an activity more akin to “discard” or more like “production.” *API II*, 218 F. 3d at 50-51, 57-58. In the instant case, the correctness of EPA’s regulation is not an issue, and as a matter of law, GM cannot challenge the applicable regulations at this time. *See* 42 U.S.C. § 6976(a) (final regulations under RCRA must be challenged in the D.C. Circuit within 90 days of promulgation).³⁰ Nonetheless, Judge Gunning was correct that *the* purpose of the purge solvent was to clean paint manifolds and their associated applicators and that after that use the resulting Purge Mixture was a hazardous waste; therefore, she did not need to examine the “predominant purpose” of the purge solvent to reach that correct result.

There clearly was a sufficient factual record before the Presiding Administrative Law

³⁰Moreover, the *API II* Court did not use a “predominant purpose” test to decide whether a material is a waste, even under the statute. Rather, the issue before the D.C. Circuit in *API II* was whether, in the context of a rulemaking, EPA had a reasonable basis for characterizing oil-bearing wastewaters generated by the petroleum industry as a “discarded” material and, therefore, a solid waste. Both the Court and EPA focused on the purpose of the activity involved in handling the material at issue (i.e., the primary treatment of oil-bearing wastewaters). The issue before the D.C. Circuit was how to characterize the “primary treatment” – i.e., whether the primary treatment of the oil-bearing wastewaters was “simply a step in the act of discarding” or “the last step in a production process before discard.” 216 F.3d at 57. In deciding that the record underlying EPA’s rulemaking failed to reflect whether EPA had “engaged in reasoned decisionmaking” when the Agency characterized primary treatment as “discard,” that Court stated as follows:

EPA has not set forth why it has concluded that the compliance motivation [behind industry petitioners’ method of handling the oily wastewater] predominates over the reclamation motivation. Perhaps equally importantly it has not explained why that conclusion, even if validly reached, compels the further conclusion that the wastewater has been discarded.”

API II at 58. Thus, the D.C. Circuit’s reference to “predominant purpose” focuses on the main purpose of the activity involved in handling the material in question, specifically examining whether such activity more closely resembles waste discard than production. Therefore, the “predominant purpose” test is not appropriate for determining whether a particular material is a spent material.

Judge for her to conclude that the *only* purpose of the purge solvent was to clean the manifolds and associated applicators.³¹ Certainly, as discussed in great detail above, GM would not have purchased the purge solvent but for the need to clean that equipment (Tr. June 24 at 137; Tr. June 27 at 36; Tr. June 28 at 296), and certainly the purge solvent can no longer serve that purpose once it has cleaned the manifolds and associated applicators a single time (Tr. June 20 at 278-79; Tr. June 21 at 128; Tr. June 28 at 182). Further, the downstream piping system was installed solely to transport the Purge Mixture to hazardous waste storage tanks to await off-site shipment to a treatment, storage and disposal facility (“TSD”).

In evaluating GM’s process in this case, Judge Gunning correctly held that the business of GM at these facilities is the manufacture of automobiles (CX 1 at ¶ 10; Tr. June 28 at 290); that the manufacturing process includes assembling and painting (CX 1 at ¶ 12; Tr. June 20 at 48); and that the Purge Mixture, which is the result of cleaning the painting equipment (i.e., manifolds and associated applicators) associated with the manufacturing process, is conveyed downstream in piping and other equipment to a storage tank. Judge Gunning found that GM does not assemble or paint automobiles (i.e., manufacture) downstream of the manifolds and associated applicators.

³¹Judge Gunning’s finding that “[p]urge solvent is expressly formulated to perform solvent functions in the manifolds and associated applicators, as well as downstream of the applicators,” (*Initial Decision* at 9) does not support GM’s argument that the solvent portion of the Purge Mixture is being “used” downstream of the applicators. The “functions” of the solvent are limited to keeping paint polymers or resins in solution and keeping paint pigment particles in suspension. As EPA’s expert chemist, Dr. Kendall, explained, even discarded solvents found in Superfund sites will continue to perform these “functions.” (Tr. June 20 at 260-61, 281-82). That is the nature of a solvent. The fact that the solvent portion of the Purge Mixture may continue to solubilize paint polymers or resins and suspend pigment particles is not a “use,” but rather simply a state of being of the solvent. The solvent is not being “used” downstream of the applicators, but is merely existing in the state in which a solvent exists.

(CX 22 at ¶ 1; CX 11 at ¶ 8; Tr. June 20 at 146; Tr. June 21 at 140) and that therefore, the Purge Mixture is not used in the assembly or the painting of automobiles (i.e., not used in the manufacturing of the automobiles). (CX 5 at ¶ 20; Tr. June 20 at 109, 146). Judge Gunning understood that the Purge Mixture is not a product (Tr. June 28 at 290) nor is it used as an ingredient in a product. (CX 11 at ¶ 9; CX 23 at ¶¶ 36, 37; Tr. June 20 at 152). The Purge Mixture is nothing more than used, unwanted solvent contaminated with waste paint; the solvent cannot be used for the purpose for which it was produced (i.e., specifically designed to clean manifolds and associated applicators at specific GM facilities) and the paint in the Purge Mixture cannot be used to paint vehicles. (Tr. June 20 at 279).

It is important to bear in mind that, historically, the purge solvent was not sought out as a cleaning agent needed to clean this waste conveyance system; rather, the conveyance system of piping, pumps, purge pots and recirculation loops was designed and installed in order to move the used, contaminated purge solvent (i.e., the Purge Mixture) that resulted from the need to clean the paint applicators and manifolds from the paint booths to the storage tanks. The purge solvent was not designed to clean the waste conveyance system; rather, the conveyance system was designed to handle and manage the waste purge solvent (the Purge Mixture). The evidence reveals that the only purpose of the activity in question is to move the Purge Mixture out of the facility and into the storage tanks, so that it can be taken off-site for reclamation (which is a form of discard under the regulations³²). Since reclamation of a spent material is a form of recycling that legally is

³²Under 40 C.F.R. § 261.2(a)(2), the term “discarded material” includes any material which is “recycled” within the meaning of 40 C.F.R. § 261.2©. 40 C.F.R. § 261.2(c)(3) provides that certain materials, including “spent materials,” are solid wastes if they are recycled by being, inter alia, “reclaimed.”

considered to be discard under 40 C.F.R. § 261.2(a)(2) and (c)(3), the purpose of the activity of the Purge Mixture conveyance system is to discard the Purge Mixture. Therefore, when Judge Gunning stepped back to look at the operation as a whole, she had no trouble concluding that “[t]he contaminated purge mixture is not a product, it is a waste.” *Initial Decision* at 39.

3. GM’s various arguments do not sustain its claim that the Purge Mixture is not a discarded spent material

GM, in order to substantiate its claim that Purge Mixture is not a hazardous waste subject to RCRA requirements, argues a series of what it believes to be independent theories or Agency interpretations regarding spent material and discard. However, GM’s arguments that the Purge Mixture downstream of the paint manifolds and applicators has a new second use, a continued use, or a permissible “step down” use of a solvent are just a recasting of the accepted concept that a material - such as a used solvent that is contaminated - which is legitimately used again is not discarded and, hence, not a solid waste. The following discussion will clearly expose GM’s assertions for what they are: unsubstantiated. Judge Gunning clearly identified the pertinent facts at the hearing and rightly concluded that the Purge Mixture is a spent material that is being sent off-site for reclamation or burned for energy recovery. The hazardous waste Purge Mixture has no downstream use, as GM would have us believe, and following its generation is just stored and transported through a waste conveyance system until it is sent off-site.

a. GM does not use the Purge Mixture for any “downstream” purpose

GM argues the purge solvent was produced for a second, “downstream” purpose to help the Purge Mixture reach the storage tanks, and therefore, is not “spent” when leaving the manifolds and associated applicators. In short, GM claims that the “downstream” purpose is to

help the Purge Mixture reach the Purge Mixture storage tanks by keeping the lines flowing efficiently. This “downstream” purpose that GM articulates is nothing more than waste pushing waste through waste conveyance lines to a waste storage tank. The Purge Mixture is not being used; rather, it simply behaves as spent solvents behave, even spent solvents found in Superfund sites.³³ GM uses the Purge Mixture *which inevitably results from cleaning the painting equipment* (Tr. June 24 at 137; Tr. June 28 at 296) to convey itself to a hazardous waste storage tank. There was no credible evidence submitted by GM that its formulation of purge solvent included any special components that were intended to keep the lines downstream of the paint booths flowing efficiently.³⁴ The mere assertion by GM that the purge solvent was produced for a second purpose, without any evidence³⁵ that the manufacturers of the purge solvent had to add any ingredient or subject the material to some special process to achieve results downstream cannot be enough to establish that the purge solvent was manufactured for a second purpose. The Board has recognized that similarly self-serving testimony, unsupported by documentary evidence, lacks probative value and is entitled to little weight. *See In the Matter of F&K Plating Company, 2*

³³As EPA’s expert Dr. Kendall testified, even contaminated solvents left in drums at Superfund sites (which clearly have been disposed of) will retain solvent properties and will continue to keep paint polymers in solution. (Tr. June 20 at 281-82; Tr. June 21 at 67).

³⁴The only exception to this is the purge solvent used to clean the manifolds and applicators at GM’s Orion plant, where *[CBI]* alcohol was added to prevent the 2K isocyanate clearcoat paint from hardening downstream of the applicators. However, even here, the purge solvent’s use is completed by the time the Purge Mixture exits the mini-purge pots located inside the paint booths. *See Initial Decision* at 18 n.13; and discussion below.

³⁵Respondent offered no design materials, no specifications identifying downstream “cleaning” as a necessary purpose, and no correspondence written contemporaneously with the development of the purge solvents that mentioned downstream “cleaning” as a necessary function of the purge solvents.

E.A.D. 443, 449 (CJO 1987); and *In Re Central Paint and Body Shop, Inc.*, 2 E.A.D. 309, 315 (CJO 1987).

As already noted, the purpose of the purging process is to clean the manifolds and applicators. (Tr. June 27 at 36; Tr. June 28 at 296). The purge solvent in the Purge Mixture is not serving a second or new “downstream” purpose; rather it merely continues to keep dissolved or suspended that which it dissolved or suspended while it was cleaning the paint manifolds and applicators. As Dr. Douglas Kendall, one of EPA’s expert witnesses,³⁶ testified, the purge solvent solubilizes paint resins and suspends paint solids in the manifolds and associated applicators during the cleaning process; once the resulting contaminated solvent (the Purge Mixture) exits the paint applicator or goes through the valve to the dump lines, the solvent component of the Purge Mixture is merely continuing to keep paint resins in solution and paint solids in suspension. (Tr. June 20 at 279-281; June 21 at 43, 48, 63-64). GM’s own witness, Jonathan Warren, agreed, stating that, after exiting the applicators, the Purge Mixture does not perform any new functions, but rather, simply continues to perform the same functions that were performed earlier in the manifold and applicator during the purging process. (Tr. June 24 at 229-30). The Purge Mixture never changes (i.e., it is always merely used purge solvent and waste paint). (Tr. June 20 at 279-81; Tr. June 21 at 43, 48). The solvent component of the Purge Mixture is not dissolving anything new. (Tr. June 21 at 63-64). As EPA’s expert witness Barrett Benson³⁷ testified, “[t]he purge

³⁶Dr. Kendall is a chemist at EPA’s National Enforcement Investigations Center, and holds a Ph.D. in Chemistry from Harvard University. (Tr. June 20 at 252, 255-56; CX 36).

³⁷Barrett Benson is the Senior RCRA expert at EPA’s National Enforcement Investigation Center (“NEIC”). (Tr. June 21 at 18). Further, Mr. Benson has a Master of Science degree in sanitary engineering (Tr. June 21 at 78), is a licensed professional engineer (Tr. June 21 at 79),

mixture comes along, re-dissolves its own self, re-suspends its own self. It's not doing anything new. . . ." (Tr. June 21 at 129).³⁸ Indeed, the Purge Mixture *cannot* dissolve any new constituent downstream of the manifolds and associated applicators because GM does not add any material to the Purge Mixture downstream of that equipment, except for the occasional addition of fresh purge solvent. (CX 5 at ¶¶ 21, 22; Tr. June 20 at 147; Tr. June 21 at 130).

The only material in the pipes downstream of the paint booths is Purge Mixture. There is nothing else for the Purge Mixture to dissolve except for itself. This is not "use," it is simply existence. GM attempts to base its "continued use" argument on the claim that Purge Mixture entering the pipes comprising the conveyance system will resuspend solids that settled out of previous "slugs" of Purge Mixture. However, the fact that the Purge Mixture may redissolve some paint constituents which had settled onto the piping or resuspend and move them does not mean it is dissolving or suspending something new, nor does it mean that the Purge Mixture is not a solid waste. The solids which GM states "soft-settled" onto the piping are the very same contaminants which the purge solvent in the Purge Mixture dissolved and suspended when it cleaned the manifolds and associated applicators in the first place.³⁹ (CX 28 at ¶ 17). Therefore,

has been a principal engineer for NEIC for 25 years (Tr. June 21 at 81) and he has conducted over 100 inspections for EPA to determine facilities' compliance with RCRA, TSCA and the Clean Water Act. (Tr. June 21 at 82).

³⁸This is similar to the case of a sewage line. In that case, waste is added to a piping system periodically. Each new addition of waste is materially the same as the previous waste even though it is a new "slug." Even if the new waste dissolved the old waste, there is no doubt that it is all waste.

³⁹GM witness Wozniak testified that when a "new" slug of Purge Mixture comes through the Purge Mixture conveyance system it will have "met" some of the existing residue in that portion of the pipe when they were together in the purge pot. (Tr. June 24 at 82). *See also* the testimony

any solids that may have dropped out of suspension inside the pipes or equipment are resuspended by the very same Purge Mixture from which they originated.

- b. GM's argument regarding the addition of [CBI] alcohol or use of silane paints falls short in advancing Respondent's position that the Purge Mixture has a continuous use

In an attempt to advance its “second use” or “continued use” arguments, Respondent relies on the explanations of certain of its witnesses regarding the types of paint and purge solvents used to clean the paint manifolds and applicators at these plants. With respect to the GM Orion plant, which differs from the Pontiac and Moraine plants in terms of the particular clearcoat used, GM discussed the need to add [CBI] alcohol to the purge solvent to clean the clearcoat paint containing “2K isocyanate.” GM also attempts to argue that its use of silane paints at other GM plants means that the Purge Mixture has a continuous downstream use. (Tr. June 24 at 216-220, 240-42; Tr. June 27 at 14-15; Tr. June 28 at 91-92). However, as explained below, none of GM's evidence demonstrates that the alcohol in the solvent portion of the Purge Mixture continues to do anything once the Purge Mixture flows out of the clearcoat paint booths, and none of the evidence discussed any “use” of the solvent for silane paints.

- I. The alcohol “[CBI (type of reaction)]” of 2K isocyanate paints is not continued use

GM's argument that the Purge Mixture continues to be “used” downstream of the mini-purge pots at Orion fails.⁴⁰ GM's claim that alcohol as an ingredient in the purge solvent results

of GM's witnesses, Thomas Chaput, a portion of the Purge Mixture remains in the recirculation system indefinitely. (Tr. June 27 at 146, 151).

⁴⁰2K isocyanate clearcoat is not used at Pontiac or Moraine, so the “[CBI]” function of the purge solvent is only present at GM's Orion plant. (See RX 59S; RX 74P-74S).

in an “[CBI]” reaction with isocyanates to prevent clogging was raised for the very first time at hearing.⁴¹ Judge Gunning held that the point of waste generation at Orion is at the point where the Purge Mixture exits the mini-purge pots located inside the paint booths. In fact, based on the evidence, Judge Gunning reasonably could have determined that the Purge Mixture is a waste upon exiting the paint applicators.

Even though this was new information being brought to the attention of the Court, Judge Gunning correctly concluded, even consideration of GM’s “[CBI (reaction type)]” theory fails to support Respondent’s claim that the Purge Mixture is “used” at any point in the equipment downstream of the paint booths at Orion. As Judge Gunning correctly noted, Warren could offer no opinion as to where within the Purge Mixture conveyance system the alcohol’s “[CBI]” reaction would be completed. *Initial Decision* at 35. (See also Tr. June 24 at 246, 255-56, 281-282). Therefore, Warren’s testimony failed to prove that any “[CBI (reaction type)]” takes place beyond the paint booths at the GM Orion plant.

In contrast, EPA offered the testimony of its expert chemist, Dr. Douglas Kendall, in rebuttal to address the 2K isocyanate and alcohol [CBI (reaction)] issues. Dr. Kendall testified that he was familiar with isocyanates, both from his previous chemistry analytical work, and through research he had conducted after hearing the testimony of GM’s witness, Mr. Warren. (Tr. June 30

^{41/}The fact that GM raised this issue at the “eleventh-hour” of these proceedings suggests that this was another desperate, “red-herring” contention. Even the affidavits of Jonathan Warren, GM’s principal witness on this subject, provided during the prehearing exchange process never even mentioned the word “isocyanate” or the phrase “[CBI (reaction type)],” nor did the affidavits discuss the special role of [CBI] alcohol in the purge solvent used at the Orion facility. (Tr. June 24 at 287-88; RX 8; RX 9).

at 72-73). Consistent with Mr. Warren's explanations,⁴² Dr. Kendall explained that the "[CBI (reaction)]" process involves the [CBI] alcohol molecule [CBI] the isocyanate molecule so that it is no longer available to polymerize. (Tr. June 30 at 74). Dr. Kendall further testified that this reaction happens "fairly quickly," and is irreversible (Tr. June 30 at 74),⁴³ and that the alcohol "[CBI]" reaction will be completed when the Purge Mixture is inside the 2 ½ to 3 gallon "mini purge pots" located inside the paint booths. (Tr. June 30 at 74-76).

While EPA produced the expert opinion of Dr. Kendall as to where within the Purge Mixture conveyance system the "[CBI]" reaction must be completed in order to prevent clogging problems due to the isocyanates, GM failed to introduce any credible evidence that the alcohol [CBI] reaction occurred anywhere downstream of the paint booths, and provided absolutely no evidence to rebut Dr. Kendall's expert opinion that the "[CBI]" reaction would be completed when the Purge Mixture was in the mini-purge pots within the paint (clearcoat) booths before it flowed into the larger 30-gallon purge pots located outside of the paint booths. GM's witness, Mr. Warren, admitted that he could not estimate how long it would take for isocyanate cross-linking to cause problems in the purge pot if there were no alcohol in the purge solvent, saying that an experiment was needed to determine this. (Tr. June 24 at 276-77). Nor could Mr. Warren offer an estimate as to how much time was required for the alcohol [CBI (type of reaction)] of the

⁴²Mr. Warren admitted that the alcohol [CBI (reaction type)] or [CBI] reaction with the isocyanate molecules would not be reversible, except by evaporating off the alcohol (Tr. June 24 at 282-83) which GM obviously does not do at the Orion plant.

⁴³In response to a question from the Court, Mr. Warren stated that the alcohol "[CBI]" reaction with the isocyanate molecules starts immediately, and that the reaction happens more quickly than the isocyanate cross-linking polymerization reaction. (Tr. June 24 at 240-41).

isocyanate molecules to be completed inside the purge pots (Tr. June 24 at 281-82). Warren admitted that he never conducted any sampling or testing at Orion to determine the time required for the [CBI] reaction to be completed inside the purge pots. (Tr. June 24 at 283). The best Mr. Warren could do to answer questions about the time required either for isocyanate cross-linking to occur, or for the alcohol "[CBI]" of the isocyanate molecules to take place, was to make a reference to the experiences with both reactions at a different GM facility; these anecdotal references also failed to support GM's argument. (See Tr., June 24, at 277-78; 281-82). None of the testimony GM offered with respect to the 2K isocyanate clearcoat or the alcohol "[CBI]" supports Respondent's "downstream use" or "continued use" arguments.

Therefore, based on the evidence, there is no "[CBI (reaction)]" of the isocyanate clearcoat in the Purge Mixture conveyance system at any point outside of the paint booths, nor do such reactions take place in the storage tanks as GM suggests. All "[CBI]" reactions are most likely completed by the time the Purge Mixture leaves the mini-purge pots inside the paint booths; certainly, all such reactions are completed by the time the Purge Mixture reaches the 30-gallon purge pots located just outside of the paint booths. Hence, not even the alcohol ingredient of the purge solvent is being "used" when the Purge Mixture is in the 30-gallon purge pots or any equipment further downstream.⁴⁴

⁴⁴As to any suggestion by GM that the alcohol in the purge solvent was somehow intended to function in the storage tanks, there is absolutely no evidence that the makers of the purge solvent manufactured the purge solvent to work in the storage tanks. To the contrary, it was GM's engineers who designed *the storage tanks* to hold the Purge Mixture which inevitably results from cleaning painting equipment.

- ii. The fact that GM uses silane paints does not mean the Purge Mixture is used downstream of the manifolds and applicators

GM's contention that the purge solvent was designed to handle silane paints is particularly specious. There is no continued use of Purge Mixture in connection with GM's silane paints. The testimony GM proffered to support its claim that the solvent in the Purge Mixture continues to be "used" downstream of the applicators for silane paints not only failed to prove any "use" or "continued use," but actually literally collapsed during the testimony of GM's own witness, Jonathan Warren. Mr. Warren testified that there was no special ingredient in the purge solvent designed to prevent clogging of the pipes as a result of the silane paints:

The function of the purge solvent downstream of the applicator for silanes is similar to that of a standard 1K paint. We just have to be aware that that process has to have enough purge solvent flowing through the system in order to move that material along at a sufficient rate or sufficient transfer from the equipment from the purge pot to the tank so that any presence of water does not cause any further problems. *There is no specific purge design function for silane technology.* That is more the responsibility of the plant and how they design and tailor their process in order to handle that.

(Tr. June 24 at 248-49 (emphasis added)). The solution to potential clogging problems lies only in ensuring that the volume of solvent in the Purge Mixture load is large enough to "move that material along at a sufficient rate or sufficient transfer from the equipment from the purge pot to the tank." As Warren himself explained, there is no special ingredient or "design function" of the "silane technology" that will prevent clogging due to silanes. Hence, it is clear from Mr. Warren's own testimony that the purge solvent has nothing to do with enabling Purge Mixture containing "silanes" to be moved through the system downstream of the applicators. Rather, the solution to clogging lies in the design of the Purge Mixture conveyance system; the solution is an engineering issue, one which is "the responsibility of the plant and how they design and tailor

their process.” (Tr. June 24 at 249). Therefore, the testimony about the presence of “silanes” in the Purge Mixture and their associated reactions is irrelevant, and in fact only proves that the solvents in the Purge Mixture have absolutely no “use” in handling silanes.

- c. Retaining some solvent properties does not mean that the Purge Mixture is cleaning the downstream waste conveyance system or performing any other function

GM argues that the purge solvent in the Purge Mixture cleans the downstream conveyance system because it continues to dissolve the same contaminants it just removed from the manifolds and associated applicators. (GM Brief at 26). EPA acknowledges that the solvent in GM’s Purge Mixture does retain some of its solvent properties while it is conveyed to the Purge Mixture storage tanks. (CX 11 at ¶ 19; CX 23 at ¶ 4). As stated above, however, those solvent properties relate only to the Purge Mixture keeping solubilized the paint resins or polymers *which were already there*. The fact that the solvent is not completely depleted by the time it reaches the downstream piping is not the relevant issue. The purge solvent can no longer be used for its intended purpose (removing paint from the manifolds and associated applicators) and is not used for solubilizing or dissolving additional contaminants. Therefore, it is “spent,” having no second use as a solvent. (CX 23 at ¶¶ 12, 28, 42 and 43; Tr. June 21 at 129-133).

RCRA, simply does not require that a solvent be entirely depleted of its solvent properties in order to be considered “spent.” Solvents often retain some of their solvent properties after they have been used for their original purpose. (CX 11 at ¶19; Tr. June 29 at 260). One of EPA’s expert witness, Barrett Benson testified that if a material can no longer be used for its original or intended purpose for which it was produced, even if that material is “not depleted, it is spent for the purpose of what it was produced. So it can be spent even though it still has solvent

properties.”⁴⁵ (Tr. June 21 at 134). Judge Gunning agreed with EPA’s expert witness, Barrett Benson, that a material does not have to be “all used up” in order to be considered spent under RCRA. *Initial Decision* at 30 (citing Tr. June 21 at 134).

GM’s Purge Mixture merely helps to keeps itself⁴⁶ in solution and suspension while it is being agitated inside the hazardous waste conveyance system. This is not a continued use, but rather is simply waste solvent behaving like waste solvent. GM’s own expert witness, Jonathan Warren,⁴⁷ made clear that there is not a new or additional use of the solvent component of the Purge Mixture. After exiting the paint applicator, the contaminated solvent (in the Purge Mixture) is not being used; it is simply existing in the same state in which it existed when the Purge Mixture exited the paint applicators (or, at the GM Orion plant, when it exited the mini purge pots).

Judge Gunning, after evaluating the testimony of all the exhibits and witnesses at hearing, held that “[a]lthough the purge mixture retains solvent functions, the solvent in the purge mixture is not used to clean anything besides other purge mixture.” *Initial Decision* at 33. Her decision is the only result which makes sense. If a “spent” solvent that retained any of its solvent properties (even a function as modest as helping to keep waste lines flowing after use) could not be

⁴⁵See also CX 20 in which Michael Shapiro, Director, Office of Solid Waste stated “[t]he mere potential for continued original use does not preclude a material from being defined as spent.” CX 20 at EPA 00168.

⁴⁶GM’s own witness, Margaret Winkler, admitted that the Purge Mixture was one cohesive substance (“the purge mixture is the purge mixture”). (Tr. June 29 at 10).

⁴⁷As Warren himself said, the solvent component of the Purge Mixture does not reduce paint viscosity further, but only maintains the viscosity reduction already achieved upstream. (Tr. June 24 at 229-30).

considered “discarded” as long as it retained those solvent properties, that sweeping position would result in exempting large portions of a plant's waste management system from complying with the very RCRA requirements intended to assure safe and appropriate management of “hazardous wastes.”

An argument that Purge Mixture is not “spent,” and hence not a RCRA “solid waste,” not only misinterprets the regulations and case law, but if taken to its logical extreme, would eviscerate many, if not all, of the carefully-crafted, statutorily-mandated safeguards applicable to the generation, storage, transportation, treatment and disposal of many RCRA “hazardous wastes.” For example, such an argument could logically extend to wastewater, since water is a solvent for some materials, and the water in any wastewater system frequently keeps the materials moving within sewerage pipes and helps prevent the conveyance system from becoming clogged. Wastewater is among the most ubiquitous of “solid wastes,” and many wastewaters have long been classified as RCRA “hazardous wastes,” either in specific listings, or by operation of other RCRA regulations. Where Congress intended wastewater to be exempted from the definition of “solid waste,” as in the case of certain industrial discharges regulated under the Clean Water Act, it expressly so provided -- right in the very definition of “solid waste.” 42 U.S.C. § 6903(27); *see also* 40 C.F.R. § 261.4(a)(2). Under GM's theory, however, this statutory exemption would be superfluous, and EPA's longstanding designations of certain wastewaters as RCRA “hazardous wastes” would be called into question, since most, if not all, wastewater would never be considered “discarded” in the first place. The situation present here is no different than the situation in which a plant operator cleans a spill on a floor with clean water from a hose and lets the water carry the contaminants down a drain and into a storage or treatment tank. The entire

mixture of the water and the contaminants is a waste, even though the water functions as a solvent to keep the contaminants in suspension or solution and to carry the contaminants away.

As the wastewater example illustrates, a sweeping, categorical position advocating that the Purge Mixture is not a “spent material” and “discarded” is not only inconsistent with the definition of “solid waste” and decades of regulatory practice, but it would also, somewhat perversely, allow facilities to claim that large parts of their waste collection system should be exempt from the very Subtitle C requirements that Congress directed EPA to apply to the management of “hazardous wastes.” Congress clearly did not intend EPA to sanction such a loophole in the RCRA Subtitle C regulatory regime, particularly for a class of wastes -- solvents -- that it specifically ordered EPA to decide whether or not to list as “hazardous” on an expedited schedule. *See* 42 U.S.C. § 6921(e)(2).

In GM’s view, no contaminated solvent is ever a waste as long as it continues to behave like a solvent – i.e., as long as it continues to keep the contaminants it originally dissolved in solution or in suspension. Therefore, GM believes that such contaminated solvents should be unregulated as hazardous waste, even if dangerously ignitable or toxic.⁴⁸ Under GM’s theory, all

⁴⁸(*See* RX 59S, the Material Safety Data Sheet (MSDS) for the Purge Solvent used at GM’s Pontiac, MI, plant at the time of EPA’s March 2001 inspection (specifically, information on flashpoint); RX 59T, MSDS for the Purge Solvent used currently at Pontiac (information on page 2); CX 44, PT5021; PT5024-33 (GM’s waste characterization report for the Purge Mixture generated at Pontiac); CX 54, “Generator Waste Update/Amendment Form,” dated 1-03-02, with attached analytical laboratory report for Report ID S07911.01(01), “Purge Solvent,” dated 12/20/2001; CX 62, Hazardous Waste Manifests showing at least ten shipments of “Recyclable Purge Solvent” manifested with hazardous waste codes D001 (ignitable), D018 and D035 between January and March 2002; CX 33, the Waste Characterization Report for Orion; RX 91X, the Material Safety Data Sheet for the purge solvents used at Orion; RX 92, the Waste Characterization for the Purge Mixture generated at Orion; RX 93, an Analytical Report (in Support of the Waste Characterization for the Purge Mixture generated at Orion); CX 43

used and contaminated waste solvents may be held in storage tanks free from RCRA regulatory requirements, because the solvents continue to keep the contaminants in solution or suspension, and thereby prevent clogging of the tank outlets. (See GM Brief at 52-53). In GM's view, such contaminated waste solvents, when transported across America's highways or on America's railroads, should also be un-regulated as hazardous waste, because the solvent properties of the material continue to exist, and by that existence prevent the solubilized contaminants from magically dropping out of solution and clogging the inlet/outlet valves of the tanker trucks or tanker cars. GM would try to convince this Board that such contaminated waste solvents stored at permitted TSD facilities should also be beyond RCRA regulation, since the condition of the waste solvent keeps the dissolved and dispersed contaminants in that state, and thereby helps prevent the tanks and other equipment at such facilities from becoming clogged. While convenient to GM, such a view cannot be what EPA intended when it promulgated RCRA. GM belittles the ALJ's reasonable concern for fulfilling the obvious intent of Congress by characterizing the very real examples of the fallout from GM's position raised by EPA and Judge Gunning as a "parade of horrors." (See GM Brief at 54). GM makes the specious argument that the "problem [is] with the regulation," when in fact the problem is not "with the regulation," but rather with GM's own strained interpretation of that regulation.

(Integrity Assessment, Moraine plant); CX 45 (Waste Characterization report); RX 74P - 74S, Material Safety Data Sheet for purge solvents used at Moraine; RX 75, the Waste Characterization with Backup Material Safety Data Sheet for the Purge Mixture generated at Moraine (Current); RX 76, the Waste Characterization with Backup Material Safety Data Sheet for the Purge Mixture generated at Moraine (at the time of EPA's inspection).

d. The presence of the Purge Mixture downstream does not constitute a permissible “step down” use of a solvent

GM contends that the Purge Mixture is not “spent” because it falls under EPA’s long-held policy of viewing solvents which have a “continued use” to not be considered hazardous waste until after their *final* “use.” (GM Brief at 38-46). However, the regulations do not state, nor has EPA ever proffered an interpretation that the *final* use and that point alone is the point at which a spent material that is being recycled becomes discarded. EPA has permitted the sequential, or “step down” use of solvents when a solvent which has been used for one purpose can be used for another solvent purpose before being reprocessed. (CX 23 at ¶¶ 41, 44; RX 12; Tr. June 21 at 217). A careful review of the situations in which EPA has concluded there has been a “continued use” all involve a new, independent use of the solvent in question. This use includes the solvent solubilizing new unwanted material (i.e., contaminants). The classic example is the example found in the Preamble to the 1985 Rule, when a solvent used to clean circuit boards can later be used for metal degreasing at some other, facility before the solvent is reclaimed. 50 Fed. Reg. 614, 624 (Jan. 4, 1985). In this scenario, it is clear that the solvent being reused picks up additional contaminants from cleaning the drums. That is clearly a second distinct use of the same solvent to solublize new constituents, prior to reclamation, and it is permissible. The circuit board analogy does not support GM’s position. GM has used purge solvent to clean only one contaminant (paint) and has cleaned only one type of equipment (manifolds and associated applicators) a single time. There is no second use downstream of the manifold; as the facts indicate and as expressed by Judge Gunning, there is no additional pick-up of contaminants in the purge system that did not already exist from the cleaning of the paint manifolds and their

associated applicators.

Under certain circumstances, such as when a company such as Safety-Kleen uses solvents which its customers have used to wash contaminants from parts to clean other contaminants from drums at Safety-Kleen's facility, the used parts solvent may not be "discarded" and, therefore, not a "solid waste" until after the second use. (CX 96; RX 32; Tr. June 27 at 206; Tr. June 29 at 204). However, even in the Safety-Kleen situation EPA articulated fairly narrow boundaries for Safety-Kleen to follow, in an effort to ensure that the second solvent use was "legitimate" and not some sort of sham recycling. *See* footnote 27.

GM's attempt to compare the Purge Mixture inside the pipes and other equipment downstream of the applicators to the use that Safety-Kleen makes of different used solvent is particularly specious. GM's Purge Mixture conveyance system bears no relationship to what occurs in the Safety-Kleen situation. Safety-Kleen, based on testimony of Safety-Kleen's own representative, takes used solvents from its customers, which may be transported in drums, and empties the used solvent into 200 gallon tanks which feed a drum washer. Safety-Kleen then puts used, contaminated drums into the drum washer and cleans them. This cleaning requires the use of high pressured jets. (Tr. June 27 at 217). No one, not GM and certainly not Safety-Kleen, argues that while the used solvents are in transit and the drums are still full, the drums are being *cleaned*, even though the likelihood is that the solvents continue to resolubilize and resuspend the contaminants they contain while en route. Rather, Safety-Kleen empties the drums and only then uses, for the first time at Safety-Kleen, the used solvent to clean other drums. Thus, Safety-Kleen uses the contaminated solvent because it picks up additional contaminants from the cleaning of the drums.

What GM does is more akin to collecting the used, contaminated solvent into a clean drum, and eventually disposing of the solvent waste that is contained in the drum. While it is in the drum, the solvent waste cannot be said to be “in use,” even though it is continuing to keep the contaminants in solution and/or suspension, and even though the drum may be, after it has been cleaned, re-used later to collect more solvent waste. GM does not put the Purge Mixture to any legitimate, second use; what GM does is manage hazardous waste within a hazardous waste management system (i.e., the Purge Mixture storage tanks and the piping and other equipment connected to those tanks (the Purge Mixture conveyance system)).

EPA *agrees* that there may even be other situations where solvent-paint mixtures (and the equipment in which they are handled) are not subject to RCRA, even if they have been used to clean paint spray equipment. For example, such solvent-paint mixtures may not be a “solid waste” if they are recirculated back and used to clean the manifolds and associated applicators a second time or are otherwise used again directly in the manufacturing (as opposed to waste management) process, without being regenerated. Similarly, if GM were to use the Purge Mixture to clean other equipment with other contaminants at its facility, such as drums or other containers (which it does not do), or if GM sent it off-site to another entity which used the Purge Mixture to clean equipment, (which it does not do), that could constitute a “continued use” of the solvent such that the solvent would not be a “solid waste” until after the second use.⁴⁹ However, GM does not *use* the purge mixture for any purpose, and any ability the purge solvent in the Purge Mixture has to continue to dissolve or to remobilize itself is not a second use of the solvent. First, the

⁴⁹As is the case at Honda. (See RX 118 EE; RX 118 GG; RX 118 FF).

Purge Mixture is never recirculated back upstream to clean anything. (Tr. June 20 at 146; Tr. June 27 at 142, 152). Second, there is no evidence that GM uses the Purge Mixture to clean any drums, containers or other equipment, nor is there any evidence that GM sends the Purge Mixture off-site to be used “as is” to clean equipment; as GM’s own witnesses testified to repeatedly, all Purge Mixture is sent off-site for reclamation or fuel blending.⁵⁰ (Tr. June 23 at 60-61; Tr. June 24 at 266-67). What GM does, downstream of the paint manifolds and associated applicators, is manage hazardous waste within a hazardous waste management system (i.e., the Purge Mixture storage tanks and the piping and other equipment connected to those tanks (the Purge Mixture conveyance system)).

The conveyance system is an internal plumbing system that allows GM to efficiently convey waste from one location to another. It is a better “mouse trap” in that it fits GM’s highly mechanized and robotic system. The fact that there are pipes does not change the fact that what is inside the pipes is a solid waste. The entire system of purge pots, pumps, pipes, valves and recirculation loops has only one purpose: to move waste. That the system was designed to handle a particular waste – the Purge Mixture – having particular characteristics and properties does not put that waste into any kind of “use.”

⁵⁰Even GM’s own expert, Billy Ray Ross, Jr., testified that if one of Safety-Kleen’s customers sent their used solvent for reclamation instead of sending it to Safety-Kleen for the second use, “then they’ve voided the continued use doctrine because it didn’t get used that second time and it got reclaimed before it got reused.” (Tr. June 27 at 263).

- e. It is GM's design of the waste conveyance system which moves the Purge Mixture to the storage tanks and not the presence of the purge solvent in the Purge Mixture; the Purge Mixture conveyance system is never truly clean.

GM places much emphasis on its theory that, as the Purge Mixture flows through the pipes and other equipment comprising the Purge Mixture conveyance system, it is picking up "soft-settled" pigment particles that may be on the insides of the piping. However, even if one accepts this theory as factually correct, this fails to demonstrate that the Purge Mixture is being used in the system downstream of the paint applicators. What is evident from the testimony at hearing, is that it is not the solvent properties of the Purge Mixture that will pick up "soft-settled" particles, but rather the force of the moving liquid generated by the pumps and recirculation loops used in the Purge Mixture conveyance system.

The evidence introduced into the record at the hearing revealed that what accomplishes the movement of the Purge Mixture through the conveyance system to the storage tanks is not "cleaning" or the presence of solvent properties, but rather the energy generated by agitation, pumping and recirculation of the Purge Mixture, as well as the volume of the waste itself. (CX 23 at ¶¶ 21, 22, 23 and 27). The Purge Mixture is not introduced to the conveyance system in order to "clean" it; rather, the conveyance system exists for the sole purpose of moving the Purge Mixture from the paint booths to the storage tanks. The Purge Mixture does not act upon the conveyance system; the conveyance system (i.e., the pumps, purge pots, pipes and recirculation loops) acts upon the Purge Mixture to push it out of the buildings and into the storage tanks.

The record contains undisputable testimony and evidence that details how the Purge Mixture is moved through GM's waste conveyance system to the storage tank where it awaits transportation for reclamation or to be burned for energy recovery. It also clarifies that the Purge

Mixture does not clean the pipes and equipment downstream of the paint manifolds and associated applicators. Clearly, all of GM's activities are undertaken to manage the unwanted material, the Purge Mixture, so that it can be moved to the hazardous waste storage tanks. In fact, Judge Gunning concluded that "GM treats the purge mixture as somewhat of a nuisance, in that the purge mixture clogs the downstream piping." *Initial Decision* at 33.

First, it is important to understand how the paint is handled upstream of the paint booth, because the principles involved in the upstream system form the basis for the system that manages the Purge Mixture. The paint is stored in mix tanks in the paint mix room. (CX 1 at ¶ 19; Tr. June 20 at 51). These mix tanks are equipped with agitators or mixers that help keep paint solids in suspension and prevent the paint solids and paint solvent from separating, and minimizes clogging of paint equipment and associated lines. (Tr. June 20 at 58). GM then continually circulates the paint upstream of the paint booths from the mix room to a point just upstream of the paint booths. (CX 1 at Figure 1; Tr. June 20 at 60; Tr. June 23 at 235-236, 238). The purpose of recirculating paint upstream of the paint booths is to keep things homogeneous and to prevent the paint solids from settling out. (Tr. June 23 at 239; Tr. June 24 at 43, 91).

Even in the manifold itself purge solvent alone would not clean the manifold of paint. After a painting cycle has been completed and the time comes for the paint manifold and associated applicator to be cleaned, purge solvent is introduced into the manifold with air to "scrub" the walls of the manifold. (Tr. June 20 at 76-77). This happens in rapid succession up to three times before the inside surfaces have been cleaned. (Tr. June 23 at 110). Each time, the air pushes the mixture of purge solvent and residual paint with pressure out of the manifold and associated applicator (Tr. June 27 at 126); this creates pulsing that is termed the "air chop." (Tr.

June 23 at 110). GM relies on this rapid succession of “air chops” to clean the manifold. The laminar flow of purge solvent does not scrub the walls of the manifold. Although the center of the manifold is cleaned, the walls retain a residual material. The air provides the necessary action to scrub the walls of the manifold. (Tr. June 23 at 111; Tr. June 24 at 48). In fact, GM witness Fred Blair testified that the “agitation that comes from the air being put behind the solvent, it stirs it, it causes it to progressively go through the manifold, and *when it does that, it actually cleans it.*” (Tr. June 23 at 111, (emphasis added)). Blair reiterated that “[i]t is movement, the actual aggressiveness of the air stream when it is introduced to the manifold and associated applicators that causes *it* [purge solvent] *to clean.*” (Tr. June 23 at 112, (emphasis added); *See also* Tr. June 27 at 121-22).

This process generates the Purge Mixture, and the system that conveys this Purge Mixture to the storage tank employs the same process of continuous movement that is used to manage the paint in the upstream system. GM’s witnesses testified that GM uses pumping and agitation of the Purge Mixture to prevent clogging within the conveyance system. For example, Tom Chaput testified that, at GM’s Orion plant, GM uses small diameter tubes through which to pump the Purge Mixture from the mini-purge pots to the larger 30-gallon purge pot located outside the paint booth; this diameter of tubing was selected in order to ensure that “the evacuation process would be violent” and the turbulence “would help clean the lines out as that material was flowing through it.” (Tr. June 27 at 64-65).

Once the Purge Mixture arrives at the purge pots outside the paint booths, it is agitated constantly within those purge pots to keep the pigment solids in suspension. (Tr. June 24 at 57, 75; Tr. June 27 at 56-57, 141). The purge pots then pump the Purge Mixture through the

remainder of the conveyance system to the storage tanks.⁵¹ Wozniak testified that GM adds enough pressure in the Purge Mixture conveyance system to redissolve and clean the pipe. (Tr. June 24 at 129).⁵² All of this testimony demonstrates that GM employs pressure to move the Purge Mixture downstream of the paint booths, and relies upon agitation of the purge pots to prevent clogging problems. The solvent properties of the Purge Mixture are clearly inadequate to ensure that the Purge Mixture flows downstream without interruption. Again, this illustrates how the different pieces of equipment that comprise the Purge Mixture conveyance system are each designed to act upon the Purge Mixture, to force it to move away from the paint booths and out into the storage tanks; the solvent properties of the Purge Mixture, while they help make the waste amenable to being so conveyed, do not actually perform any function on the conveyance system. The solvent portion of the Purge Mixture is not being used; rather, the system designed to move the Purge Mixture merely takes advantage of the waste's residual solvent properties, properties which exist in all waste solvent.

After the Purge Mixture leaves the paint booths at Moraine and Orion, GM recirculates the Purge Mixture constantly, twenty four hours per day, seven days per week. (Tr. June 23 at 222; Tr. June 27 at 18, 146; Tr. June 28 at 153-54). GM installed this recirculation system as a solution to problems with clogging inside the purge pots and piping encountered in the mid 1990's

⁵¹Fred Blair testified that the pumps "move back and forth and they suck the material out of the bottom and push it out to the recirc [sic] loop or out to the purge mixture storage tank." (Tr. June 23 at 212).

⁵²In the case of Pontiac, the downstream lines have the initial pressure from the pump (Tr. June 28 at 303) and additional pressure is added at the boost tank. (Tr. June 28 at 304, 311). At Orion and Moraine the recirculation loops are operated under pressure. (Tr. June 27 at 60; Tr. June 28 at 302, 303).

(Tr. June 27 at 43-44, 49, 157-58), and recirculation is currently the key to preventing such problems. The Senior Engineer of GM's Orion plant, Tom Chaput testified that "[i]f it [the Purge Mixture] wasn't recirculating we definitely would have the same problem, I believe of plugging and the heavy pigments running back down the line, if we didn't continually keep it moving." (Tr. June 27 at 176). In testimony applicable to GM's Moraine plant, Fred Blair testified that downstream of the paint booths the Purge Mixture is "a homogenous mixture as well because it's being agitated and circulated continuously, and the opportunities for it to have some settling is a lot less, because you are, you know, you're providing that agitation." (Tr. June 23 at 240). In addition, John Wozniak testified that GM uses enough energy to "redissolve material, clean the pipe and get it" to the storage tank⁵³ (Tr. June 24 at 129) and that the "pumps provide the initial motivation to get it" to the storage tanks and the "agitation provides the opportunity to keep this all in suspension." (Tr. June 24 at 130). The testimony by GM's own witnesses supports the conclusions of EPA expert witnesses Dr. Kendall and Mr. Benson, that it is not the solvent properties of the Purge Mixture, but the movement of the material via pumps and agitators, that allows the Purge Mixture to be conveyed from the purge pots outside the paint booths to the Purge Mixture storage tanks. (Tr. June 20 at 281; Tr. June 21 at 66-67, 142-43; Tr. June 23 at 218, 236; Tr. June 24 at 81, 130;⁵⁴ Tr. June 28 at 157-158).

⁵³GM suggests that the recirculating system allows it to use less volume of purge solvent than it might otherwise need. (Tr. June 27 at 70; Tr. June 28 at 307). Even if that is true, it is irrelevant. EPA endorses the minimization of waste but the act of minimizing the Purge Mixture does not mean it is no longer a solid waste.

⁵⁴Similarly, GM uses high pressure water to clean out the insides of the paint booths, demonstrating the value of pressure/energy in cleaning. In fact, GM witness Blair testified that "[t]hey use [*CBI*] pounds of water pressure. It acts almost like a knife, it cuts it right off. Very

downstream of the paint booths. (Tr. June 27 at 49). Chaput testified that “part of the [new] design was to circulate the purge mixture downstream of the applicator and keep that material flowing constantly on a 24-hour a day basis.” (Tr. June 27 at 49). Chaput also testified that the difference between the old system and the new system is that, in the current recirculation system, “material is taken out of the purge pot continuously and circulated around booth.” (Tr. June 27 at 57). It is striking to note that Orion had clogging problems downstream of the applicators *even with the solvent in the Purge Mixture*, and that the chief solution to that problem was not to provide more Purge Mixture but to provide constant motion to prevent the Purge Mixture from settling out.⁵⁵ This again reveals that the solvent in the Purge Mixture alone was incapable of ensuring the smooth conveyance of the Purge Mixture downstream to the storage tanks. Not only does Chaput’s testimony about the origin of the recirculation system demonstrate that it is the force generated by the system that moves the Purge Mixture, it further reveals that the exclusive purpose of this system was to facilitate movement of the Purge Mixture out of the building and into the storage tanks. This purpose is clearly a waste-handling purpose.

The recirculation not only provides constant motion to prevent settling out, but it also provides the necessary additional volume of Purge Mixture to help physically push the waste to the storage tanks. Wozniak testified that GM needs to have enough material in the downstream pipes so that it can travel to the storage tanks without clogging. (Tr. June 24 at 75-76). Pontiac generates enough Purge Mixture to do that without recirculation, while the plants at Orion and Moraine required a recirculation system to compensate for the lower volumes of Purge Mixture.

⁵⁵In fact, there is now a trend in the industry towards more recirculating systems. (Tr. June 23 at 192).

(Tr. June 24 at 75-76). Wozniak testified that, since originally there were insufficient volumes of Purge Mixture at the Moraine and Orion plants to “accomplish this job,” that is why GM looked to duplicating the upstream recirculating system by adding downstream recirculation, (Tr. June 24 at 76), to get to the Purge Mixture to the storage tank without clogging the piping. (Tr. June 24 at 75-76). Fred Blair agreed that an additional value to the recirculation is that it has more volume in the line and it helps keep the line wet so that there is no drying and settling inside the lines. (Tr. June 23 at 243-244).

The record, when looked at in its entirety, demonstrates that, rather than designing purge solvent for downstream use, GM designed and engineered equipment which maximized the volume of Purge Mixture in the conveyance system and required agitation or movement to reduce or minimize the occurrence of clogs. GM is merely using the waste which inevitably results from cleaning the manifolds and applicators to help push more waste Purge Mixture to the hazardous waste storage tanks. Clearly, all these activities undertaken by GM, as discussed in this section, demonstrate GM’s focus on developing engineering solutions to manage the hazardous waste Purge Mixture so that it ultimately reaches the storage tanks for removal from the facility, rather than on using Purge Mixture for downstream use. The entire purpose of the activities occurring within the Purge Mixture conveyance system is the handling and discard of a waste.

In addition, no “cleaning” is actually taking place. Dr. Kendall made it clear that, in his opinion, the solvent component of the Purge Mixture is not dissolving or suspending anything *new* when it flows into the pipes, purge pots and other equipment downstream of the applicators. What the solvent in the Purge Mixture is doing is maintaining the already existing paint polymers and pigment particles that have been removed from the manifold and applicator in their already

dissolved and suspended state. (Tr. June 21 at 42-43 (Kendall: “[the purge solvent] continues to dissolve the polymers that it dissolved when it was doing its cleaning”). That the solvent in the Purge Mixture is not dissolving anything new was further clarified by Dr. Kendall’s testimony about the dilution “function” of the solvent. Dr. Kendall testified that the purge solvent will dilute the paint left inside the manifold and applicator, that this dilution of the paint occurs inside the manifold and applicator, and that the Purge Mixture merely continues in that state – as diluted paint – when it is inside the equipment downstream of the applicator. (Tr. June 21 at 48-49).⁵⁶

Furthermore, contrary to Respondent’s suggestion, Dr. Kendall never conceded that there was residue inside the purge pots, pipes and other equipment downstream of the applicators. (Tr. June 21 at 54-55). While Dr. Kendall did believe that it may be likely that some residue would be left behind from the Purge Mixture, GM never provided any testing data to demonstrate how much, if any, paint residue was left inside the pipes or purge pots after a “slug” of Purge Mixture flowed through that equipment. Therefore, the extent to which each “slug” of Purge Mixture suspended and deposited any residues remains un-quantified, and is also irrelevant, since the Purge Mixture itself (the material moving through the piping and other equipment) clearly contains waste paint residues⁵⁷ and it is, therefore, simply waste pushing waste.

⁵⁶Dr. Kendall explicitly testified that as the Purge Mixture moves downstream into the purge pots and the pipes, the solvent component of the Purge Mixture is not dissolving anything new, but rather is “basically dissolving the same components it was dissolving in the beginning.” (Tr. June 21 at 64). All of this testimony is actually supported by that of GM’s witness, Mr. Warren. (See Tr. June 24 at 229-30).

⁵⁷In addition, contrary to GM’s assertions, no “cleaning” takes place in the pipes within the conveyance system, because such pipes are never truly clean. See, e.g., Tr. June 21 at 59; Tr. June 21 at 65-66. See also Tr. June 27 at 146.

B. Case Law Supports EPA's Position that GM's Purge Mixture is a Spent Material and a Discarded Material

1. GM's Purge Mixture is a "spent material" under applicable administrative case law

There is ample support for EPA's position in administrative case law. EPA, in at least three administrative cases, has stated when it believes a material becomes "spent" and, thus, considered a "solid waste" subject to regulation under RCRA Subtitle C. In *In the Matter of Brenntag Great Lakes, LLC*, Docket No. RCRA-5-2002-0001 (ALJ, Dec. 19, 2002), a company known as Cordova used anhydrous isopropyl alcohol ("IPA") to extract water from glass fibers. The anhydrous IPA could only be used once to remove the water because thereafter, it lost its capacity to efficiently extract additional water from the fibers. EPA argued that after the IPA was used once, it could no longer be used for the purpose for which it was purchased. Judge Charneski, based on the facts in that case and based upon the testimony of EPA's expert in that case (the same Barrett Benson who is EPA's expert in the instant case), agreed with EPA and held that the anhydrous IPA thus became "spent" once it was used to extract water a single time. *Id.* In *In the Matter of Royster Company*, Docket No. RCRA-III-195 (ALJ, December 17, 1993) sulfuric acid was diluted in an alkylation process at which point it was no longer useful as a catalyst. Even though that diluted sulfuric acid could later be used as a neutralizing agent in a fertilizer operation at another company, Judge Nissen held that "[p]rima facie, the used sulfuric acid met the definition of a "spent material" in 40 C.F.R. § 261.1(c)(1) as 'any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.'" *Id.* at 54. The Purge Mixture in the instant case is similar to the "spent material" in these two administrative cases because the purge solvent in this case can only be used one time to

clean the manifolds and associated applicators, which is the purpose for which it was purchased. Thus, the Purge Mixture (the purge solvent that has become contaminated with paint) is “spent” and a “solid” and “hazardous waste” subject to the requirements of RCRA Subtitle C. (CX 11 at ¶ 18).⁵⁸

2. GM’s Purge Mixture is “discarded” under applicable case law

GM is correct when it asserts that its Purge Mixture must be “discarded” under the applicable law before EPA can regulate its handling, but it fails to take into account the regulations already in place which define the term for purposes of Subtitle C. Judge Gunning correctly held that GM’s Purge Mixture is “discarded” when it leaves the paint manifolds and associated applicators (or when it leaves the mini purge pots at Orion). RCRA defines “hazardous waste” to mean a “solid waste” with certain physical, chemical or infectious characteristics.⁵⁹ RCRA’s regulations then define, with more particularity, how to determine if a solid waste, in fact, possesses the requisite characteristics to be considered “hazardous.”⁶⁰ RCRA defines “solid

⁵⁸In a third, recent administrative case, *In the Matter of Howmet Corp.*, Docket Nos. RCRA-02-2004-7102, RCRA 06-2003-0912 (ALJ, Apr. 25, 2005), *appeal docketed*, RCRA (3008) Appeal No. 05-04 (EAB), used potassium hydroxide was sent from a metals casting operation to a fertilizer manufacturer to be used as an ingredient. In finding that the potassium hydroxide was “spent” after use by the metals caster to clean the metal parts from the porcelain molds, the Presiding Officer stated that the term “spent material” involved a “reality-based determination which examines how the [potassium hydroxide] material *was* originally used.” Order on Motions at 14 (emphasis in original). In that case, the Presiding Officer was asked to determine whether a wholly separate, subsequent use of the material kept the material from being characterized as “spent.” He found that the subsequent use was too dissimilar to the original use to be merely continuous use of the potassium hydroxide. In the instant case, there is no second, wholly separate, subsequent use to compare with the original use.

⁵⁹42 U.S.C. § 6903(5).

⁶⁰40 C.F.R. § 261, Subparts B, C and D.

waste” as including, among other things, “other discarded materials.”⁶¹ Just as RCRA’s regulations flesh out which “solid wastes” are considered “hazardous,” RCRA’s regulations further inform what is meant by the term “discard.” As discussed above, in pertinent part, EPA’s regulations define “discarded” materials as including materials that are “recycled” or stored before recycling⁶² EPA defines materials that are being “recycled” for purposes of establishing “discard” as including spent materials that are burned for energy recovery and “spent materials” which are “reclaimed.”⁶³ After GM collects its unwanted, “spent” Purge Mixture in the Purge Mixture conveyance system and the hazardous waste storage tanks, it ships the Purge Mixture off-site to hazardous waste TSD’s where it is either burned as waste fuel or where it undergoes reclamation. (CX 110; CX 136 Revised). GM’s Purge Mixture fits squarely within the statutory and regulatory definitions of “solid waste” and that position is fully supported by the relevant case law.

GM’s reliance (GM Brief at 17-19) on *American Mining Congress v. EPA*, 824 F.2d 1177 (D.C. Cir. 1987) (“*AMC I*”) and *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) (“*ABR*”) is misplaced. In those cases, the D.C. Circuit held that

... at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away. Once again, ‘by regulating in-process secondary materials, EPA has acted in contravention of Congress’ intent,’

ABR at 1056, citing *AMC I* at 1193. Under no interpretation could the treatment of the spent solvent in this case be considered continuous processing within an industry, as the spent solvent

⁶¹42 U.S.C. § 6903(27).

⁶²40 C.F.R. § 261.3(a)(2)(ii).

⁶³40 C.F.R. §§ 261.3(c)(2) and 261.2(c)(3).

(i.e., the Purge Mixture) is sent off-site for reclamation is burned for energy recovery.

Instead, *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (“*API II*”), as noted by Judge Gunning is instructive. The D.C. Circuit considered whether certain wastewaters generated by petroleum refining facilities were, in fact, “solid waste.” Industry petitioners argued broadly that since the facilities were continuing to recover oil from the waters, the waters were therefore still in continuous processing and could not be viewed as “discarded.” *Id.* at 57. The Court disagreed, and concluded that the point at which processing ends and waste management begins is a factual question on which “EPA’s choice of characterization is entitled to deference” as long as it is supported by the record. *Id.* at 57. As *API II* suggests, at some point it is reasonable to conclude that the activity at issue in a particular part of a facility where solvents (or other materials) are present is waste management, not production.⁶⁴ *See Id.* at 58.

There clearly was a sufficient factual record before the Presiding Administrative Law Judge for her to conclude that *the* purpose of the purge solvent was to clean the manifolds and associated applicators and that the purpose of the Purge Mixture conveyance system was to store and transport waste. By “stepping back” and “looking at this process and operation overall,” Judge Gunning conducted a common-sense analysis of the nature and function of the Purge Mixture conveyance system that is perfectly consistent with the reasoning and analysis of the D.C. Circuit in *API II* and she had no trouble concluding that “[t]he contaminated purge mixture is not a

⁶⁴It may be that the proper functioning of a plant’s waste collection is important to the overall functioning of the plant. However, the Court in *AMC II* expressly (and logically) distinguishes elements of a plant’s waste disposal system -- such as “land disposal units” and “wastewater treatment systems” -- from a plant’s “ongoing production process.” The Court made clear that the former are properly regulated under RCRA, even if the latter are not, because they are “part of the waste disposal problem” that RCRA was intended to address. *Id.* at 1186.

product, it is a waste.” *Initial Decision* at 39. In *API II*, the D.C. Circuit focused its inquiry on the nature of the “primary treatment” activity at issue in *API II* (216 F.3d at 57); the Court looked to the predominant purpose of the activity involving the waste at issue, examining whether such activity could be properly characterized as “discard.” In the instant case, the critical “activity” consists of all the various actions that occur inside the Purge Mixture conveyance system, meaning the agitation, pumping, and recirculation that goes on inside the system of pipes, purge pots, pumps, flexible tubing, and (at the Orion and Moraine facilities) recirculation loops.

After evaluating the entire record in this case, Judge Gunning was able to see “the forest through the trees” (*Initial Decision* at 39) to properly conclude that the activity at issue is one of waste management. The purge solvent was not designed to clean this waste conveyance system; rather, the conveyance system was designed to handle and manage the waste purge solvent (the Purge Mixture). In fact, the evidence reveals that the only purpose of the activity in question is to move the Purge Mixture out of the facility and into the storage tanks, so that it can be taken off-site for reclamation (which is a form of discard under the regulations⁶⁵). Since reclamation of a spent material is a form of recycling that legally is considered to be discard under 40 C.F.R. §§ 261.2(a)(2) and 261.2(c)(3),⁶⁶ the purpose of the activity of the Purge Mixture conveyance system is to discard the Purge Mixture or to store the Purge Mixture before it is discarded by being

⁶⁵Under 40 C.F.R. 261.2(a)(2), the term “discarded material” includes any material which is “recycled” within the meaning of 40 C.F.R. 261.2(c). 40 C.F.R. 261.2(c)(3) provides that certain materials, including “spent materials,” are solid wastes if they are recycled by being, inter alia, “reclaimed.”

⁶⁶EPA, when it promulgated the regulations at 40 C.F.R. § 261.2, carefully considered and thoroughly reviewed what type of recycling activities do or do not constitute waste management. 50 Fed. Reg. 614, 616 (Jan. 4, 1985).

recycled/reclaimed. *See* 40 C.F.R. § 261.2(a)(2) and (c), and Table 1. Hence, the material being discarded in this fashion – the Purge Mixture – is a solid waste.

C. GM'S Purge Mixture is a Spent Material and is Discarded While it is in the Hazardous Waste Storage Tanks

1. GM's historical management of the Purge Mixture demonstrates that it knows the material is "solid" and "hazardous waste" while in the hazardous waste storage tanks

GM's actions speak volumes about its true understanding of the regulatory status of its unwanted Purge Mixture. It seems disingenuous to EPA that at this time GM suggests that the Purge Mixture storage tanks themselves are not subject to the "hazardous waste" regulations. (Tr. June 28 at 72). The Purge Mixture tanks are nothing more than hazardous waste accumulation and storage tanks at the end of the facility's waste management system. All that happens once the Purge Mixture arrives at the tanks is that it is stored before being shipped off-site for burning as waste fuel or reclamation.

Even though GM may have designed a system of pipes which integrates the delivery of product to the manifolds and associated applicators with the conveyance of the waste generated from cleaning that equipment, GM also demonstrated that it understood the difference between production and waste management when it managed the Purge Mixture in the storage tanks as "hazardous waste." For example, GM properly labeled its Purge Mixture tanks, at each facility, with the words "waste" or "hazardous waste." (CX 5 at ¶¶ 30 a. and c.; CX 6, CX 8, CX 9; Tr. June 20 at 114).⁶⁷ Further evidence that at the time of the inspections GM understood the Purge

⁶⁷CX 7 is a photograph, taken during EPA's 2001 inspection, of the area in which the Purge Mixture tanks are loaded onto tanker trucks which take the material off-site to a TSD. That photograph clearly shows the words "waste purge solvent" on one of the valves and is additional evidence that GM knew the Purge Mixture was a waste at the time of EPA's inspection.

Mixture was “hazardous waste” includes the fact that GM manifested the Purge Mixture going off-site to a hazardous waste facility (i.e., a TSD) as a RCRA “hazardous waste” with the waste code D001.⁶⁸ (CX 1 at ¶ 33; CX 5 at ¶ 30.d; CX 60, CX 61, CX 62, CX 64, CX 67).

Similarly, although GM had failed to conduct tank integrity assessments for the entire hazardous waste tank systems, it had conducted incomplete tank integrity assessments for the Purge Mixture tanks themselves. (CX 5 at ¶ 30.e). GM had constructed secondary containment immediately around the tanks even though it failed to construct secondary containment for the entire tank system. (CX 5 at ¶ 30.f). GM had installed high level alarms on the tanks and GM inspected those tanks each operating day, even though it did not inspect the entire tank systems each operating day. (CX 5 at ¶¶ 30.g, 30.h; RX 44A-44RR; RX 63; RX 78). GM handled the Purge Mixture tanks as subject to RCRA because it knew that the Purge Mixture is, in fact, a RCRA “hazardous waste.” In its waste characterization reports, GM frequently referred to the Purge Mixture as “Spent Purge for Reclamation” (RX 60 at PT5020), or listed the Purge Mixture under headings in the waste characterization forms entitled “Waste Information” or “Name of Waste” (RX 92 at OR0598). Finally, no new fact or regulatory change has occurred between the time of the inspection and the time of the hearing to change the legal status of the Purge Mixture. GM may argue that merely identifying and managing the waste as “hazardous” does not, by itself, make the waste “hazardous.” That is correct. Nevertheless, as Judge Gunning held, “such identification does provide some indicia of GM’s underlying belief that the purge mixture is in fact hazardous waste.” *Initial Decision* at 39. GM would try to have this Board believe that just

⁶⁸Certainly GM never advised EPA during any of the inspections that it manifested the Purge Mixture as RCRA “hazardous waste” merely as some sort of “protective” matter. (CX 5 at ¶ 30.I).

because it desires to capture as much of the Purge Mixture as is possible (because of its economic value), somehow the material is no longer “discarded.” (Tr. June 28 at 34, 199). Certainly every facility which can reclaim a spent material would wish to reclaim as much as possible. Yet, GM’s reading of the regulations would transform the clear regulatory language which exempts only the reclamation unit to include exempting the handling and storage of the waste prior to reclamation. As discussed above, the fact that some of the solvent in the Purge Mixture is *later reclaimed* and reused is irrelevant to the fact that the Purge Mixture is a spent and discarded material at GM. (See CX 23 at ¶ 46; Tr. June 21 at 191-192).

2. GM does not continue to use the Purge Mixture inside the hazardous waste storage tanks

GM argues that even when the Purge Mixture is in the storage tanks it is not hazardous waste because it continues to use the Purge Mixture while it is in the tanks. GM bases this claim on the argument that the solvent portion of the Purge Mixture is still solubilizing, suspending and dissolving while in the tanks. At the hearing, GM further contended that the Purge Mixture was not even waste in the tanker trucks on its way to the TSD. (Tr. June 24 at 291-292). This position strains credulity and it tars GM’s entire case. Indeed, Judge Gunning agreed that this extreme position was “the logical extension of GM’s argument that the purge mixture is a ‘continued use’ of the purge solvent” and, then she held: “I find this to be the gravamen against GM’s argument.” *Initial Decision* at 40.⁶⁹ Judge Gunning correctly noted that GM’s own expert witness, Marcia Williams did not necessarily agree with that position. *Initial Decision* at 40 n. 33. Moreover, the

⁶⁹In this single statement, Judge Gunning has captured the essence of GM’s argument, which is that the Purge Mixture is itself the “use,” simply by being Purge Mixture and behaving like a waste solvent (i.e., a solvent contaminated with paint polymers and pigment particles which it continues to hold in solution and suspension).

State of Michigan does not classify the Purge Mixture in the Purge Mixture storage tanks as a non-waste. *Id.*

Whether or not the solvent in the Purge Mixture continues to solubilize, suspend or dissolve already solubilized paint in the tanks is irrelevant. The issue is not whether those solvent properties remain present in the solvent component of the Purge Mixture, the issue is whether the retention of solvent properties constitutes a “use” of the solvent and transforms what is clearly waste - paint residues mixed with used solvent - into something that is not a solid waste. As EPA has stated previously, spent solvents will continue to solubilize and suspend long after they are used.⁷⁰ (*See* Tr. June 20 at 281-82; Tr. June 21 at 67). That passive retention of solvent properties is not a continued or second use of the solvent or of the waste (the Purge Mixture).⁷¹ The solvent is present in the downstream Purge Mixture, but it simply is not used to do anything new. The Purge Mixture is merely behaving as contaminated solvents behave.

Furthermore, as discussed above, there is no reaction between the alcohol in the purge solvent and the isocyanate clearcoat in the storage tanks as GM suggests; all such reactions are likely concluded by the time the Purge Mixture leaves the mini-purge pots inside the paint booths. Similarly, there is no ingredient or technology added to purge solvent to have any special effect on silane paints, as it is apparent that as far as the silane paints are concerned, the important element for downstream management of the waste is a high enough volume so that the waste can push itself to the tanks. The makers of the purge solvent did not make the purge solvent to work in the

⁷⁰GM’s expert Marcia Williams agrees that spent solvents may retain their properties after they are “spent” for purposes of RCRA. (Tr. June 29 at 260).

⁷¹*See* Brief, Section VII.A.3.c for a discussion on the retention of solvent properties.

tank; rather, engineers designed the storage tanks to hold the Purge Mixture which inevitably results from cleaning painting equipment.

The Purge Mixture inside the storage tanks (and inside the pipes, purge pots and other equipment leading to the storage tanks, for that matter) is akin to discarded air freshener inside a trash can. The air freshener that has been thrown away will still have some minimal effectiveness (not enough for a room but still fragrant) so that it masks odors in a trash can, and yet no one would argue that anyone is still “using” that air freshener as it sits in the trash can – even if it is making the trash smell better. Similarly, if the discarded air freshener were on its way to be reclaimed for subsequent use, no one would suggest it was anything other than waste until after it was reclaimed. By the same token, when one changes out the refrigerator baking soda container and throws it in the trash, if it still chemically has the capacity to absorb odors (its “use” in the refrigerator) and does so from the surrounding trash, thereby making the trash less odoriferous, no one would contend that they were continuing to “use” the baking soda as it sits in the trash can. These analogies point out the absurdity of GM’s position.

Finally, it is crucial to note, and to emphasize, that there is nothing different about the constituents or character of the Purge Mixture while it is in the Purge Mixture tanks than when it is in the conveyance lines immediately upstream of the tanks. (Tr. June 24 at 134-135; Tr. June 28 at 312-314). It is equally true that the piping system which conveys the Purge Mixture to the storage tanks would not exist but for the need to transport the unwanted Purge Mixture to storage tanks to await off-site shipment to a hazardous waste TSD. (Tr. June 28 at 296-97). The downstream piping system has but a single purpose: to take the waste from its point of generation to its point of storage. Therefore, if the material inside the hazardous waste storage tanks is

“discarded” and if that material is the same material that traveled in the piping system to the tanks, and if that piping system has no purpose other than to transport the material to the hazardous waste storage tanks, it is evident that the material in the pipes is also “discarded” while inside those pipes, and is, therefore, a “solid waste” under RCRA.

3. Even though GM burns its Purge Mixture for energy recovery or reclaims it after it leaves the hazardous waste storage tanks, the Purge Mixture is still “spent” under RCRA

Much of GM’s Purge Mixture is burned as waste fuel by the TSD’s. (CX 110; CX 136 Revised). That Purge Mixture which is later burned for energy recovery falls squarely within EPA’s definition of “discard” as it is a type of recycled material which is considered “solid waste.”⁷² GM tries to assert that even though some of its Purge Mixture was, in fact, burned as waste fuel, that was never GM’s intention. GM claims that the burning of the Purge Mixture was the doing of the TSD and that it, and not GM, was “generating” the waste once the TSD “decided” to burn it. First, as will be discussed in more detail below, even if *all* of GM’s Purge Mixture were, in fact, reclaimed, it would *all* still be a RCRA “solid waste.” GM may not like the state of EPA’s regulations but it remains a fact that EPA regulates “spent materials” on their way to a reclamation facility.⁷³ More importantly, EPA’s complaint alleged that the point of hazardous

⁷²40 C.F.R. § 261.2(c)(2).

⁷³It also appears remarkably disingenuous for GM to assert that its intention was truly to reclaim all the Purge Mixture. The record is clear that many loads of Purge Mixture during the relevant time period were, in fact, not reclaimed. (CX 110; CX 136 Revised, Tables A and C; Tr. June 21 at 172, 174, 183, 187, 188, 190, 263, 265 and 266). Because these loads were not reclaimed, GM was not receiving remanufactured purge solvent made from reclaimed Purge Mixture. GM had to know that it was not receiving remanufactured purge solvent because it had to then buy virgin purge solvent to accomplish the task of cleaning of the manifolds and associated applicators. Hence, GM must have realized that much of the Purge Mixture was not being reclaimed.

waste generation was at the manifolds and associated applicators; any argument by GM involving what happens to the Purge Mixture off-site is irrelevant to the Board's analysis.⁷⁴

GM suggests that it does not "throw away" the Purge Mixture because it is valuable and it intends to reuse the reclaimed solvent. First, it is important to note that the term "throw away" does not appear anywhere in the RCRA regulations.⁷⁵ The terms that are relevant here are "discard," "spent," and "recycle" and in the present case, the crux of the matter is whether the Purge Mixture is spent when it leaves the manifolds and associated applicators, or the mini purge pots at Orion. Each term is carefully defined in the regulations and neither EPA nor GM can add terminology to suit itself. Second, common sense dictates that any facility that chooses to reclaim some of its waste wishes to reclaim as much as possible on account of the economics of its choice. Certainly EPA knew that when it crafted its regulations. Just because the Purge Mixture might

⁷⁴To the extent that the Board wishes to examine the facts of GM's off-site shipment of Purge Mixture or the discussion of the case law cited by GM, Complainant respectfully refers the Board to Complainant's Post-Hearing Brief (pp. 45-48). Additional copies of Complainant's Post-Hearing Brief and Reply Brief can be provided to the Board with appropriate page citations upon request.

⁷⁵Indeed, GM often tries to use terminology not found in the regulations. For example, counsel for GM asked Duncan Campbell if the Purge Mixture was disposed of "on the ground" as if that were required under RCRA before a material could be a solid waste. (Tr. June 22 at 162). Later testimony during the cross examination of Duncan Campbell again illustrated this effort and the pitfalls of that approach:

Q By the word abandoned, I'm not trying to use legal terminology here.

A And I'm tied to it.

(Tr. June 22 at 163). Not only is Duncan Campbell tied to legal terminology, given that this entire case turns on the *legal* definition of "solid waste," but so is GM.

have some commercial value, that does not mean the material has not been “discarded.”⁷⁶ EPA is precise: “discarded” materials include those that are “recycled” and EPA’s definition of “recycled” includes “spent materials” that are “reclaimed.” It does not get any clearer.

D. GM’S Purge Mixture is not Subject to the “Manufacturing Process Unit” or the “Totally Enclosed Treatment Facility” Exemptions

1. GM is not entitled to rely on the “manufacturing process unit” exemption for its Purge Mixture

Pursuant to Mich. Admin. Code r. 299.9204(3)(a) (2004) and OAC § 3745-51-04(c) (2004),⁷⁷ an exemption⁷⁸ is provided from regulation of “hazardous waste” that is generated in a manufacturing process unit until it exits the unit from which it is generated. This exemption was created since the Agency did not intend to regulate product and raw material storage tanks, transport vehicles and vessels, or manufacturing process units in which hazardous wastes are generated.⁷⁹ EPA is not attempting to regulate units that contain paint, virgin purge solvent, or other products or raw materials (the units upstream from the paint booths). In this case EPA seeks

⁷⁶For example, the Court in *United States v. ILCO*, 996 F.2d 1126 (11th Cir. 1993), held that even though lead battery components were of some commercial value to the reclaimer, they were nevertheless “discarded” prior to their arrival at the lead smelter. The Court held that the materials are “no doubt, valuable feedstock for a smelting process,” but that “[s]omebody has discarded the battery in which these components are found” and that this fact “does not change just because a reclaimer has purchased or finds value in the components.” *Id.* at 1131 (emphasis added).

⁷⁷These provisions are identical in all material respects to 40 C.F.R. § 261.4(c).

⁷⁸The Environmental Appeals Board (EAB) has held that as a general proposition, exemption from regulations are to be narrowly construed. *In Re Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 294 (EAB 2004) citing *Comm’r v. Clark*, 489 U.S. 729, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule).

⁷⁹ See 45 Fed. Reg. 72424, 72035 (Oct. 30, 1980); CX 25.

only to regulate the waste conveyance system that moves the unwanted spent Purge Mixture from the manifolds and associated applicators⁸⁰ downstream to the Purge Mixture storage tanks. The evidence in this case demonstrates that Judge Gunning was correct when she held that GM's Purge Mixture does not remain in a manufacturing process after it exits the manifolds and applicators and enters the conveyance system leading to the storage tanks.

EPA agrees with GM that the term "manufacturing" is not defined in the RCRA regulations and, therefore, the word must be given its "ordinary" meaning and common sense must be used to determine what is and is not "manufacturing." EPA agrees that painting automobiles is part of the manufacturing process. Indeed, the paint booth is one of the stops along the assembly line at these three facilities; painting a car is as important as putting on the body and the tires. However, as EPA's expert witness Barrett Benson testified, the manufacturing process is over after the paint has been applied to the cars and "the automobiles or vehicles continue on down the line for additional production...[t]here is no assembly or production of any material downstream of the gun box." (Tr. June 21 at 125; *See also* Tr. June 22 at 112). Just because GM needs to clean its manufacturing equipment (i.e., the painting equipment), the waste generated from that cleaning is not part of the manufacturing process. (*See* CX 23 at ¶¶ 13, 14, 15).

The Purge Mixture is not returned to any manufacturing process within the GM facility because there is no manufacturing process downstream of the paint booths involving Purge Mixture. Both CX 1, Figure 1, and RX 175 demonstrate that there is no on-going manufacturing or production process at the GM facilities downstream of the manifolds and associated applicators; both drawings show production lines going in one direction and Purge Mixture

⁸⁰Or from the mini purge pots at Orion.

traveling in the opposite direction. The painted cars go in one direction – off for additional assembly – and the waste generated from that painting is conveyed to hazardous waste storage tanks.

GM's exhibit RX 130 at GM150208 provides additional support for the proposition that the part of the painting operation which is truly part of the manufacturing process is over after the paint is applied. The diagram is titled "GM Standard Coatings System" and it depicts the life of a GM automobile on the assembly line from the point when it leaves the body shop as it undergoes many steps in the coatings process (including painting) until it is acceptable to proceed to General Assembly. Significantly, the Purge Mixture conveyance lines are not shown anywhere on this diagram. Similarly, neither waste stream generated from the Phosphate or ELPO Dip stages of the coating process are shown on this diagram.⁸¹ That is because the waste management system designed to handle waste generated from a process is simply not part of the manufacturing process. The Purge Mixture is not part of the manufacturing process but rather, is part of the waste disposal problem.

GM's own witness, Marcia Williams conceded that what is supposedly "produced" in the downstream pipes is a "material that will become reconstituted purge solvent." (Tr. June 30 at 38). GM, however, is in the business of "producing" automobiles. (Tr. June 20 at 48; June 23 at 12; June 28 at 156). GM is not in the business of manufacturing purge solvent (Tr. June 28 at 17, 290), Purge Mixture (Tr. June 28 at 25, 290), or reclaiming Purge Mixture (Tr. June 28 at 304; Tr. June 23 at 57-58). Therefore, GM is not in the business of "producing" any "material that

⁸¹GM generates wastewater from its Phosphate line and it generates hazardous waste filters during its ELPO Dip process. (CX 2 at EPA 0004).

will become reconstituted purge solvent.

GM argues that it does not matter that there is nothing produced in the downstream piping (GM Brief at 59-60); rather the only relevant inquiry is whether the piping is “part of” a production process. For example, GM contends that nothing is “produced” upstream of the paint booths (in the Paint Mix room and lines from that room to the paint booths) and yet EPA does not regulate those lines. (GM Brief at 58). EPA does not regulate those activities because they involve the delivery of a product (paint and virgin or reconstituted purge solvent) to a production area (paint booth). Nothing has been “discarded” upstream of the paint booth.

GM essentially contends that because GM needs to get rid of the Purge Mixture quickly, so that it can produce more cars, the Purge Mixture conveyance system is part of production. (*See* GM Brief at 56-57). The mere need to move the waste to storage tanks efficiently is not a reason to conclude that the waste conveyance lines are part of production. The fact that a clog in the waste conveyance lines might impact production does not turn the waste into a product or the equipment managing the waste into part of the manufacturing process. (CX 23 at ¶¶ 9, 10). EPA’s expert Benson testified that “a lot of industries have waste streams that are potentially—can clog, and those are waste streams, they can go to a sewer, they can go to a tank, and it causes problems if they do clog. A production system itself will produce something at the end and this produces nothing.” (Tr. June 21 at 141).⁸²

Rather than the downstream lines being part of production or manufacturing, GM has

⁸²An analogy can be made to a restaurant preparing a meal. The “production” at a restaurant is the making of the meal. The sink, garbage disposal and associated plumbing are waste disposal. Certainly a clog in the sink or its plumbing may impact the ability of the restaurant to serve quickly, or even to stay open; nevertheless keeping the plumbing lines flowing freely is not part of the cooking of the meal.

effectively designed a system to capture the waste so that it can be stored and shipped off-site, hopefully for reclamation. GM's own Brief makes this clear: "Once the Purge Solvent⁸³ is created, GM's engineers had to figure out a way to create a system where the solvent in the Purge Solvent could be captured - not thrown away - so it could be reclaimed and reused- not discarded." (GM Brief at 57). In that statement is clear recognition that Purge Mixture is created, inevitably, as a result of cleaning the equipment which paints cars and that once the Purge Mixture is created, the next step is to manage it. Moreover, GM displays its blatant misunderstanding of the law: materials which are reclaimed and then reused *are* recycled solid wastes regulated by EPA up until *after* reclamation. 40 C.F.R. § 261.2©.

Further evidence that the Purge Mixture conveyance system is not part of production is found in the way in which GM manages its recirculation systems at Orion and Moraine. Those systems operate to recirculate the Purge Mixture and to keep it flowing even during periods when the plant has been shut down (i.e., when no production is being carried out). (Tr. June 23 at 53-54; Tr. June 27 at 141, 146-47). This underscores the fact that the Purge Mixture conveyance system is separate and distinct from the automobile assembly and painting operations; that operation of the Purge Mixture conveyance system, a waste management system, continues independent of whether painting operations (i.e., operations related to "production") are occurring or not. EPA certainly did not intend that the many waste streams generated in manufacturing plants all across the United States, be exempt from "hazardous waste" regulation just because a

^{83/}Although GM uses the term "Purge Solvent" here, it is really referring to Purge Mixture. This is a good example of GM's deliberate attempt to use smoke and mirrors to try to confuse this Board.

clog or malfunction could have an impact on production at their respective facilities.⁸⁴ (CX 23 at ¶ 10). As has been pointed out by the courts, when a material has become part of the waste disposal problem it is “discarded.”⁸⁵

Rather than using Purge Mixture as part of production, GM is merely managing the unwanted Purge Mixture (e.g., conveying and storing it) in and through a series of pipes, pumps, purge pots, valves and recirculation loops (i.e., ancillary equipment) to hazardous waste storage tanks where it awaits off-site shipment to a treatment, storage or disposal facility. (CX 1 at ¶32; CX 5 at ¶¶ 15, 16). The sole purpose of this equipment downstream of the manifolds and associated applicators (e.g., pipes, valves, purge pots, recirculation loops and storage tanks), and the only reason it exists at all, is to manage the waste - the unwanted Purge Mixture - prior to off-site reclamation.⁸⁶ (CX 5 at ¶ 14; CX 11 at ¶ 11). Finally, although GM complains that the Cotsworth letter (which will be discussed in more detail below) did not address the issue of continued use (Tr. June 29 at 211-212), GM surely must concede that Cotsworth clearly rejected

⁸⁴GM has frequently alluded to the fact that it has the burden to make automobiles efficiently in order to compete in the current economy. While EPA respects GM’s desire to run its operations efficiently, surely that cannot come at the sake of complying with the law.

⁸⁵See *AMC II*, 907 F.2d at 1186.

⁸⁶The Agency’s position in this matter is that the pipes, valves and recirculation loops that convey the Purge Mixture (i.e., the contaminated solvent mixed with paint residue) to the storage tanks constitute “ancillary equipment” of the tank system. Mich. Admin. Code r. 299.9101(r)(2004); OAC § 3745-50-10(A)(5)(2004). These regulations are equivalent in all material respects to 40 C.F.R. § 260.10 (which defines “tank system” as “a hazardous waste storage or treatment tank and its associated ancillary equipment and containment system,” and defining “ancillary equipment” in pertinent part as “any device, including, but not limited to, such devices as piping, fittings, flanges, valves, and pumps, that is used to distribute, meter, or control the flow of hazardous waste from its point of generation to a storage or treatment tank...”). (CX 5 at ¶ 28; CX 11 at ¶ 22).

the manufacturing process exemption as being applicable to this situation. (CX 16).

2. GM Does Not Qualify for the “Totally Enclosed Treatment Facility” Exemption

GM argues that it is not required to comply with RCRA’s regulations because its Purge Mixture qualifies for the “totally enclosed treatment facility” (“TETF”) exemption found at Mich. Admin. Code r. 299.9601(6)(2004); Mich. Admin. Code r. 299.9503(1)(d)(2004); OAC § 3745-65-01(C)(9)(2004); and 40 C.F.R. § 265.1(c)(9). The TETF exemption is an affirmative defense, and as such, it is GM’s burden to prove that it is entitled to the exemption. GM was not able to sustain that burden in front of Judge Gunning and it will not be able to sustain that burden before the Board.

The term TETF is defined as “a facility for the *treatment* of hazardous waste which is directly connected to an industrial production process and *which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment*. An example is a pipe in which waste acid is neutralized.” 40 C.F.R. § 260.10 (emphasis added). As will be discussed further below, GM does not treat the Purge Mixture and it has not constructed and operated the Purge Mixture conveyance system in a manner which prevents the release of any hazardous waste or hazardous waste constituent into the environment.

a. GM does not conduct any treatment in the Purge Mixture (waste) conveyance system

For purposes of RCRA, “treatment” is defined as:

any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recover energy or material resources from the waste, or so as to render such waste non-hazardous, or less

hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume.

40 C.F.R. § 260.10.⁸⁷ GM contends that it is using a method, technique or process designed to change the character of the hazardous waste so as to make it more amenable for recovery or storage. (GM Brief at 62; Tr. June 29 at 230-231). GM further states that the hazardous waste it is “treating” is the paint. (Tr. at June 28 at 280). Yet, GM does absolutely nothing to change the character of the paint once it leaves the manifolds and associated applicators. When the purge solvent meets the paint in the manifold for the first time, it dissolves the resins and polymers and suspends the paint particles (solids). Nothing new happens to the Purge Mixture, or to the paint in the Purge Mixture, once it leaves the paint booths. No chemical or any other substance is added to it⁸⁸ (Tr. June 21 at 130) and its character does not change. GM’s own witness, Margaret Winkler, testified that the Purge Mixture in the purge pots, in the pipes going to the boost tank at Pontiac, in the recirculation loops at Orion⁸⁹ and Moraine, and in the hazardous waste storage tanks is the same. (Tr. June 28 at 312-314). Ms. Winkler said it best when she said “[t]he purge mixture is the purge mixture.” (Tr. June 29 at 10). GM’s only argument is that the Purge Mixture is “treating” itself. That is not only nonsensical, but would create an exception in RCRA which would be in danger of swallowing the rule. All spent solvents consist of a solvent that has

⁸⁷Michigan and Ohio have a definition for “treatment” which is equivalent in all material respects to the EPA-issued regulation. Mich. Admin. Code. r. 299.9108(m)(2004); OAC § 3745-50-10(125)(2004).

⁸⁸Such as is the case in the example cited in RX 187 at GM130156.

⁸⁹Except that at Orion the Purge Mixture from the clearcoat booth and the prime booth do not meet up for the first time until the purge pot located at AA-45. (Tr. June 28 at 314).

dissolved or suspended contaminants; for example, as in the case of the Purge Mixture, solvents have solubilized paint polymers/resins and suspended pigment particles during the cleaning of the applicators and manifolds, resulting in contaminated solvent (Purge Mixture). Since spent solvents typically will partially redissolve and resuspend themselves,⁹⁰ if *that* were “treatment,” all the pipes which carry those spent solvents to hazardous waste storage tanks, the hazardous waste tanks themselves, any containers holding hazardous wastes and the tanker trucks transporting the hazardous wastes to the TSDs would be exempt from regulation. As with GM’s arguments on “use” and “continued use,” the result of GM’s illogical interpretation of “treatment” would not only eviscerate the regulatory requirements for “ancillary equipment” under RCRA, but would come close to eliminating the statute entirely, as a whole category of waste (spent solvents) would never be waste at all.

Not only does GM not change the character of the Purge Mixture or the paint in the Purge Mixture, it does not make the paint more amenable for recovery or storage. First, it is disingenuous for GM to even suggest that it has any desire to recover paint. GM’s expert witness, John Wozniak, designed the Purge Mixture conveyance system at Pontiac and he had no idea if GM even could recover solids using his system. (Tr. June 24 at 32-34, 135-136).⁹¹

When asked if paint solids in the Purge Mixture are ever reused by anybody, GM witness Margaret Winkler testified that EQ, a hazardous waste TSD that receives some of GM’s Purge

⁹⁰Of course, the energy provided by pumping which creates agitation and recirculation will also facilitate the redissolving and resuspending as well.

⁹¹Not only was the Purge Mixture conveyance system never designed to recover solids, but, as GM witness Fred Blair testified, GM does not, in fact, actually recover solids. (Tr. June 23 at 211).

Mixture, separates the paint solids from the Purge Mixture as part of the distillation process and sends them to “I think it’s Lexington Paint.” (Tr. June 28 at 163). The fact that Winkler was not even sure, during her direct examination, what happens to the recovered solids demonstrates that GM is not interested in the least in recovering the solids.⁹²

Additionally, GM offered no evidence that its Purge Mixture conveyance system made the recovery of paint solids easier. Logic would appear to indicate the opposite. If GM was operating out of a desire to make solids recovery easier, it would not first add a significant volume of another substance (purge solvent) into the piping system,⁹³ since the purge solvent solubilizes paint polymers/resins and disperses the paint particles (Tr. June 20 at 280), and a rather involved and complex reclamation system is needed to segregate the paint polymers/resins (the “solids” that are recovered) from the purge solvent (Tr. June 20 at 279; Tr. June 21 at 160-166; CX 110 at 3). Furthermore, if solids recovery were driving GM, it would not paint vehicles in a random order of colors, since it is the mix of colors that limits the amount of solids which can be recovered. (CX 110 at 9). GM’s Purge Mixture conveyance system does not make the solids in the Purge Mixture more amenable for storage either since it is axiomatic that dramatically

⁹²EQ does, in fact, send recovered solids to Lexington Paint for use in making new paints. (CX 110 at 5; Tr. June 21 at 165; Tr. June 28 at 193). GM, however, does not purchase any paints for the three facilities which are the subject of this matter from Lexington Paint; rather GM purchases its paints from Dupont and PPG. (RX 59; RX 74; RX 91; Tr. June 21 at 165; Tr. June 23 at 138, 162; Tr. June 28 at 139-141, 197).

⁹³Ms. Winkler testified that the Purge Mixture is approximately 80 to 90 percent solvent and 10 to 20 percent paint solids and resins (Tr. June 28 at 133-34). In a 20,000 gallon storage tank, this means that there are 16,000 to 18,000 gallons of solvent and 2,000 to 4,000 gallons of solids and resins. It is illogical to argue that adding up to nine times more solvent than paint solids (i.e., pigment particles and resins) will make it easier to reclaim the solids (or the resins portion of the solids).

increasing the volume of a substance cannot make it easier to store. More importantly, there is no evidence that the Purge Mixture is more “amenable” for storage as a result of it going through the pipes, because passing through the pipes does nothing to change the composition or volume of the Purge Mixture. The Purge Mixture is the same when it exits the applicators as when it enters the hazardous waste storage tank. It is not any more amenable to storage as a result of it going through the pipes. Therefore, in a regulatory sense there is no treatment in the pipes.

In other testimony, Ms. Winkler claimed that the purge solvent makes the paint solvent⁹⁴ more amenable to recovery. (Tr. June 28 at 281-82). Unfortunately for GM, there is no evidence that any of the TSDs who receive Purge Mixture from GM ever distill off paint solvents from the entire mass of solvents recovered from the Purge Mixture, in order to segregate paint solvents from the original purge solvents. Ms. Winkler’s testimony demonstrates that GM’s TETF affirmative defense (which was raised by GM for the first time only a few weeks before the hearing), is a last-minute, desperate defense, ill-reasoned, ill-conceived, illogical and devoid of credibility.

Rather than being designed to recover paint, the Purge Mixture conveyance systems at GM’s Facilities were designed to contain and convey waste; GM then has third parties recover *solvent* from that waste. Again, Winkler makes the point eloquently: “It is our intent to reclaim the purge mixture and bring it back to the facility as reconstituted purge solvent.” (Tr. June 28 at

⁹⁴There is solvent in the formulation of GM’s solvent based paints; therefore, there is some paint solvent in the Purge Mixture (along with the used purge solvent). (See Tr. June 20 at 273-74; 275-76; Tr. June 21 at 36-37; CX 46, 47 and 48).

162).⁹⁵ It is true that approximately 10% of the Purge Mixture is paint solvent (Tr. June 21 at 37) and that some of the paint solvent inevitably is reclaimed along with the purge solvent. However, nothing happens to the Purge Mixture in the pipes downstream of the paint booths that makes the solvent (either paint solvent or purge solvent) any more amenable for recovery. If anything, the fact that GM has a long series of pipes, purge pots, valves and recirculation loops through which the Purge Mixture has to navigate (and perhaps get clogged in) only makes the solvent less amenable for recovery.

b. GM's Purge Mixture (waste) conveyance system is not constructed and operated to prevent any releases into the environment

As Judge Gunning correctly noted (*Initial Decision* at 44-45) the second requirement which must be met for a system to qualify for the “totally enclosed treatment facility” exemption is that the treatment must be done in a manner “which prevents the release of *any* hazardous waste or constituent thereof into the environment.”⁹⁶ In fact, EPA has stated that the

key characteristic of a totally enclosed treatment facility is that it does not release any hazardous waste or constituent of hazardous waste into the environment during treatment. Thus if a facility leaks, spills, or discharges waste or waste constituents, or emits waste or waste constituents into the air during treatment, it is not a totally enclosed treatment facility within the meaning of these regulations.

55 Fed. Reg. 25454 (June 21, 1990). (CX 141 A). GM would have this Board believe that it was

⁹⁵GM witness Christine Bates agreed when she testified that “[i]t costs money to purchase it and so it makes sense for us to reclaim as much as we can so that we can have that reclaimed purge solvent given back to us.” (Tr. June 28 at 16). This would be true for any facility which reclaims any material.

⁹⁶Mich. Admin. Code r. 299.9601(6)(2004); Mich. Admin. Code r. 299.9503(1)(d)(2004); OAC § 3745-65-01(C)(9)(2004); and 40 C.F.R. § 265.1(c)(9) (emphasis added).

sufficient that releases were “rare” and that the vapor releases which can and do occur from the pressure relief devices some how do not count. On the contrary, in 1981, EPA stated that the phrase, “constructed and operated in a manner which prevents release of hazardous waste,” means “there must be essentially no possibility of escape from the vessel...even in the event of a process upset or human or equipment failure.” (CX 141E; *See also* CX 141F).

As Judge Gunning held, there are at least two sources of releases of Purge Mixture from the Purge Mixture conveyance systems at the three GM Facilities at issue in this case: from vents (on the purge pots, the booster tank at Pontiac, and hazardous waste storage tanks at all three facilities) and from the Purge Mixture conveyance system as a whole as documented in GM’s own logs and in photographs of the Facilities. *Initial Decision* at 45. It is undisputed that there are vents on the purge pots (Tr. June 20 at 79; Tr. June 23 at 212; Tr. June 24 at 55, 130-32), the boost tank at Pontiac (Tr. June 20 at 94) and on the hazardous waste storage tanks (Tr. June 20 at 117, 155).

The evidence in the record establishes that the vents are installed on the purge pots because when the Purge Mixture enters the purge pot, “the air has to go somewhere so it exits through the vent.” (Tr. June 20 at 79, 117; Tr. June 23 at 216; Tr. June 24 at 131). Since the Purge Mixture contains volatile organic compounds (Tr. June 20 at 283-287; Tr. June 29 at 3), those volatile organic compounds are being emitted from the vents to the atmosphere and those releases may contain hazardous constituents. Those emissions are releases which defeat the TETF exemption. GM, at a minimum, has failed to carry its burden - i.e., demonstrate that there are no emissions from the vents to the environment. Documentation of other releases at these facilities which also defeat the TETF exemption can be found in GM’s own logs of inspections or

observations.⁹⁷ There is no evidence whatsoever that these leaks occurred only during routine maintenance.⁹⁸ GM did not document any release at the Moraine Facility but that is probably because GM only began its minimal program of “observations” in April 2004. Not only does this evidence of releases defeat the TETF exemption but it also demonstrates the crucial importance of performing daily inspections to detect releases from the Purge Mixture conveyance system.

The last evidence demonstrating that there were releases at GM’s Facilities are the photographs of releases in the record. *[CBI (Description of photographs, testimony about*

*photographs******

*****)] These photographs demonstrate that

there are releases of Purge Mixture at the Facilities and those releases, by themselves, defeat the

⁹⁷See RX 44 Z at PT 2279; RX 44 AA at PT 2366, PT 2375; RX 44 BB at GM040146; RX 44 EE at PT 2693, PT 2696; RX 44 FF at PT 2816, PT 2855; RX 84 at GM 080030; RX 87 at GM080056, GM080073, GM080081, GM080083, GM080092, GM080096, GM080097, GM080143, GM080151; RX 88 at GM080179, GM080256, GM080271, GM080272, GM080284, GM080307, GM080321, GM080323, GM080342, GM080343, GM080347-GM080352.

⁹⁸In fact, RX 88 at GM080347-GM080353 indicate that first one and then both hoses in the Purge Mixture conveyance system at the prime booth and at the clearcoat booth were leaking at the Orion facility starting on October 15, 2004. Those leaks were not repaired until October 25, 2004.

TETF exemption.

The fact is, GM never considered that it was treating the paint or the Purge Mixture until it was “preparing for this case.” (Tr. June 29 at 83).⁹⁹ GM has never conducted any testing of the Purge Mixture in the purge pots or in the recirculation loops (Tr. June 29 at 96-97) and is not attempting to meet any target limits for the Purge Mixture (Tr. June 29 at 77) which is all additional, circumstantial evidence that GM is, in fact, not treating anything downstream of the paint booths. Lastly, GM’s broad reading of this exemption is at complete odds with what EPA intended when it drafted the rule. In 1986, EPA stated that “[a] review of the regulation and preamble demonstrates that the totally enclosed treatment exemption was intended to exclude from regulation a very narrow subset of treatment facilities. The regulation provides only one example: neutralization in pipes.” (CX 141 C). In fact, GM’s expert Margaret Winkler, a woman involved in RCRA compliance for her entire career, testified that she did not know of any other TETF in the United States. (Tr. June 29 at 97).

E. EPA’S Position in This Case is Consistent with Prior Interpretations

EPA’s position that GM’s Purge Mixture is a solid waste when it exits the manifolds and associated applicators through the gun box or from the valve to the internal dump lines is reasonable and correct. EPA has consistently and affirmatively taken that position and its position should be affirmed by this Board. GM contends that EPA has applied its rules to the solvent waste generated during automotive painting operations inconsistently from 1985 to the present and that EPA has changed its interpretation repeatedly since then. That assertion is wrong.

⁹⁹In particular none of GM’s affidavits submitted in support of its Motion for Partial Accelerated Decision ever once raised the notion that it was “treating” any part of the Purge Mixture. (See RX 2; RX 4; RX 5; RX 6; RX 8; RX 9; RX 14; RX 15).

1. GM's contention that EPA inspections are evidence of EPA's inconsistent Agency practice is unfounded

GM, to substantiate its position that EPA has been inconsistent in its interpretation, suggests that, when a government inspector fails to identify certain conduct or conditions as subject to regulation during an inspection, this somehow constitutes an affirmative statement on the part of the inspector that the conditions observed are not subject to regulation, and that this makes any subsequent decision that similar conditions in other facilities are regulated tantamount to "inconsistent agency practice." This inappropriately shifts the burden of compliance from the regulated community to the Agency. RCRA is generally viewed as a strict liability statute.¹⁰⁰ Compliance is the responsibility of the generator.

The fact that an inspection report does not cite violations could mean any number of things, including that the narrative report does not include a list of violations, that the company was in fact complying with the regulations, that the inspectors relied only on what they were shown and told, that the operation of the facility was fundamentally different than the processes and operations at issue,¹⁰¹ or that the inspectors were not as thorough as they could have been.

¹⁰⁰See *United States v. Production Plated Plastics, Inc.*, 742 F. Supp. 956, 960 (W.D. Mich. 1990)(finding that RCRA was a "remedial strict liability statute" to be construed liberally) *aff'd* 955 F.2d (6th Cir. 1992)(unpublished decision), *cert. denied* 506 U.S. 820 (1992); *United States v. Allegan Metal Finishing Co.*, 696 F. Supp. 275, 287, 295 (W.D. Mich. 1988)(finding RCRA strict liability statute); See also *United States v. Aceto Agricultural Chem. Corp.*, 872 F.2d 1373 (8th Cir. 1989)(finding generally that RCRA should be liberally construed); *In re: Bil-Dry Corp.*, 9 E.A.D. 575 (2001); *In re Pyramid Chemical Co.*, 11 E.A.D. 657 (2004)(asserting that a generator of hazardous waste is subject to strict liability and RCRA violations for hazardous waste requirements).

¹⁰¹For example, in footnote 26 of its Brief, GM cites to inspection reports for the Macungie, Pennsylvania Mack Truck to "demonstrate" that plants were not cited for these types of violations in the late 1990s. (GM Brief at 66; See also RX 118HH). A careful review of the

GM points to five inspections post 2000 in which it claims EPA took a position different than the one it takes in this action. GM is wrong.

Three of those inspections were of Honda facilities. (RX 118EE; RX 118GG; RX 118FF). The same Duncan Campbell who inspected GM's facilities was the inspector for each of those inspections. Campbell did not come to the same conclusion at Honda as he did at GM because the facts, as represented during the inspection, were fundamentally different. At each Honda facility referred to above, Honda sends its Purge Mixture off-site, either to a company named Essroc or a company named Onyz Environmental Services. In all three cases, the receiving company uses the unreclaimed Purge Mixture "as is" to clean equipment at its facility, equipment other than pipes and pumps whose only function is to convey Purge Mixture to a storage tank. The fact that the Purge Mixture is used to clean other equipment makes the Honda situation like the Safety-Kleen scenario where Safety-Kleen takes its customers' used solvent and uses it to clean other drums at its facility. In contrast to Honda, GM sends its Purge Mixture off-site either for reclamation or disposal. As Duncan Campbell himself testified "If GM had[,] as its competitor [Honda] has[,] a program where the material is delivered to a third party and used expressly for the purpose of cleaning out tanker trailers, then I would not have contested GM's claim" (Tr. June 22 at 174).

inspection reports for this facility, however, clearly reveals that the facility at issue is designed in a fundamentally different way than are the facilities at issue in this case. Specifically, the facility at issue in Pennsylvania does not have a piping system to convey the Purge Mixture directly to the hazardous waste storage tanks. Instead, the Pennsylvania facility collects the contaminated spent solvent in gondolas or carts in satellite accumulation areas and manages it as hazardous waste *from the time it leaves the paint booth*. (See RX 118HH at GM120550, GM 120580). That GM would suggest that the Pennsylvania reports demonstrate a failure of EPA to act consistently in this case is highly misleading, and it shows the inherent dangers in relying on inspection reports for facilities not at issue to show anything.

Just as GM incorrectly points to the Honda inspection reports as support for its position, GM misconstrues the EPA, Region 3 inspection reports. Jeanna R. Henry in Region 3 inspected a Ford facility in November 2002. Her report (RX118X at GM110710-110893) includes only her observations and does not identify any violations whatsoever.¹⁰² A careful review of her observations demonstrates that she understood the Purge Mixture was waste when it left the paint booths. For example, Section 4.1 of the report lists the hazardous waste at the facility and it includes “Waste Purge Solvent (Spent) - generated during initial and touch up painting operations.” (*Id.* at GM110713).¹⁰³

The final inspection report GM relies on is found at RX118X at GM110894-110907. That report documents Ms. Henry’s follow up inspection of the Ford Norfolk facility on June 13, 2003. On its face, the follow up inspection was for the sole purpose of inspecting the outdoor hazardous waste storage tanks. (RX118X at GM110894). That report made no mention whatsoever of the indoor piping. Neither of the Region 3 inspection reports that GM points to stands for the

^{102/}Inspection reports are often written as a summary of observations made, with the Notice of Violation identifying the actual violations issued as a separate document.

^{103/}The text of Ms. Henry’s inspection report provides other evidence that she clearly believed the Purge Mixture to be a solid waste. (See RX118X at GM110710-110893, GM110713, GM110716-17 (“[t]he majority of paint and solvent hazardous wastes generated at the Norfolk Assembly Plant comes from the purge solvent recovery system” and “every now and then he would have to open up the piping associated with the solvent recovery system to clean out lines that had become blocked with used paint.” (*Id.* at GM110716). (“[P]iping and equipment (pumps, valves, connectors, etc.) is used to transfer the used solvent/paint mixture from the paint booths to the two outside Gage hazardous waste storage tanks. These wastes contain high concentrations of volatile organic compounds.” (*Id.* at GM110723-GM110724). Ms. Henry also drafted a diagram to depict her findings. The diagram is entitled “General Flow Diagram for Path of Waste Solvents/Paints Through Ford Motor Co.” and it shows the starting point (point of generation) for the waste beginning when it exits the paint booth and it traces the journey of the waste as it is conveyed through intermediate purge “pots” to waste solvent/paint mixture storage tanks. (*Id.* at GM110795).

proposition that EPA changed its interpretation of its regulations several times in the recent past.

GM further attempts to bolster its argument by citing to several facilities which EPA inspected more than once, where, in the earlier inspection, there is an absence of a finding of violation, and in the later inspection a violation was found.¹⁰⁴ GM contends this “change” is evidence of “flip-flopping.” (GM Brief at 68). In this assertion, GM is absolutely incorrect. By GM’s own admission, the change in inspections was *only* from an absence of a finding of violation to a finding of violations. (GM Brief at 67). EPA did not go back and forth in its position. EPA did not “flip-flop;” rather there was a period of time in which EPA did not cite facilities for these types of violations.¹⁰⁵ The evidence clearly shows that once EPA notified a facility that it believed the point at which hazardous waste was generated was at the paint booth, EPA did not reverse its position. An absence of a finding of violation does not mean that there is no violation. EPA’s silence in previous inspections cannot prevent EPA from later identifying a violation and enforcing, nor can it substantiate GM’s claim that EPA has historically been inconsistent with its interpretations, because the facts do not support GM’s argument. GM has an obligation to comply with the RCRA regulations and GM cannot be heard to complain that EPA failed, during inspections not at issue in this proceeding, to inform GM of its potential liability. Significantly, GM has admitted that it had actual notice of EPA’s position on this *issue prior to*

¹⁰⁴(See RX 118S; CX 80; RX 118D at GM090122-43; CX 88; RX 118Z; CX 76)

¹⁰⁵It should be noted that the regulations cited by EPA as violations were promulgated and became effective during a range of years. For example, the air emission requirements associated with hazardous waste tank systems (the requirements in 40 C.F.R. Part 265, Subpart BB) became effective for generators of hazardous waste starting only in 1996 [cite]. Therefore, GM’s articulation that EPA has been inconsistent in its interpretations since 1985, needs to be put into context as to when certain regulatory requirements would have been effected and GM’s non-compliance would be identified as a violation.

any of the inspections at issue in this case. (Tr. June 28 at 17-20, 30-31, 111-112).

GM, for example, attacks EPA inspector Larry Lamberth's consistency in his inspections. Lamberth readily admitted that prior to 2000 he did not cite facilities for the types of violations at issue in the instant case, whereas he did so after 2000. We know why Lamberth's thinking regarding the issues in this case evolved. When asked why the agency's view changed, Larry Lamberth testified at the hearing that "[w]hat happened with me is that I learned more about how those facilities operated. I didn't really set foot inside a paint booth until probably 2000. I only saw what I was led to see... And I just didn't have a clear understanding of the process." (Tr. June 20 at 249). Lamberth's failure to have a good understanding of the process is evident in the very passage from Lamberth's report of his August 26, 1997, inspection of Ford's Louisville facility, which GM quotes on page 68 of its Brief. In his inspection report Lamberth states "[t]hese sub tanks collect the purge from the paint line and recirculate the purge until it is unusable. Once it is deemed unusable, it is pumped the distance from the sub-tanks to the hazardous waste storage tanks previously mentioned." (RX 118Z at GM120060). It is clear that Lamberth believed the purge was being "used" while in circulation and that only when it could no longer be used was it sent to the hazardous waste storage tanks. Once Lamberth had a chance to actually go inside the painting operations in 2000, he learned, as did Judge Gunning at the hearing, that the Purge Mixture is not "used" at all downstream of the paint booth.¹⁰⁶ The Purge Mixture is not used to clean manifolds and their associated applicators and the Purge Mixture is not recirculated until it

¹⁰⁶As Lamberth states in his 2002 inspection report of GM's Doraville, Georgia facility "EPA has determined that the used purge solvent is a waste since the used purge solvent is physically removed (i.e., piped) from the spray painting applicator unit and will no longer be used to clean the spray paint applicator." (CX 88).

is unusable; rather, once it is generated, Purge Mixture is conveyed directly to the storage tanks (Tr. June 23 at 214-216; 226-227). Once Lamberth learned what was really going on he, like Judge Gunning, had no difficulty determining that the point of hazardous waste generation was when the Purge Mixture left the paint applicators¹⁰⁷ (or the mini purge pots at Orion).¹⁰⁸

2. EPA's written responses when questioned about hazardous waste generation for automobile painting operations has been consistent.

EPA has clearly and consistently articulated its position regarding the point of hazardous waste generation in automobile painting operations, most notable in answering questions from the automobile industry starting in 1997. On July 27, 1997, in response to a letter from an attorney writing on behalf of a client in the automobile industry, Elizabeth Cotsworth, Acting Deputy Director of the Office of Solid Waste stated that “[s]ince the used solvent is physically removed (i.e. piped) from the spray painting unit, and since it will no longer be used to clean spray paint guns once removed, the solvent is considered a waste when it leaves the unit.” (CX 16). At the hearing in the instant case, GM’s witness, Marcia Williams, appeared to suggest that Cotsworth

^{107/}Moreover, it is crucial to note that, although Lamberth had not seen the Cotsworth letter prior to the time he conducted his 2000 inspections of automobile painting operations, once he learned more about these types of operations he came to the exact same conclusion as she did. (Tr. June 20 at 249).

^{108/}Lamberth’s August 23, 2000 inspection of GM’s Doraville facility is Lamberth’s only “anomaly.” Lamberth did fail to cite GM for these type of violations at that time. From [next one after], however, he consistently found the point of generation of hazardous waste to be at the paint applicator. Surely, one inspection which omits this finding cannot derail an entire regulatory program and render all future enforcement “off limits.” Further, given GM’s view that it is the authorized state, and not EPA, whose position should control, it is interesting to note that as early as February 1998, the State of Georgia notified GM that it considered the point at which GM was generating hazardous waste to be the “spray equipment.” (RX 118D). Georgia reiterated its position to GM in June 1998. (CX 74). Using GM’s own logic, therefore, any “confusion” generated by Lamberth’s 2000 inspection could not have been material.

merely assumed the used purge solvent was a waste since the term “incoming” assumed it was waste. (Tr. June 29 at 211-212). Ms. Williams’ statements should be given no weight since she was not in a position to know what assumptions Ms. Cotsworth made or did not make at the time of the 1997 letter. Moreover, her surmises are inconsistent with the text of the actual letter.

Cotsworth did not merely assume the used purge solvent was waste (although the “incoming” *had* made this assumption), rather, Cotsworth explained *why* it was a waste. Cotsworth stated that “[s]ince the used solvent is physically removed (i.e. piped) from the spray painting unit, and since it will no longer be used to clean spray paint guns once removed, the solvent is considered a waste when it leaves the unit.” (CX 16). Cotsworth then focused on the manufacturing process unit exemption because that was the exemption raised by the letter to which Ms. Cotsworth was responding. Cotsworth clearly rejected¹⁰⁹ the application of that exemption to the waste purge solvent at issue there, and that exemption should similarly be rejected here.¹¹⁰

In January 2000, EPA again addressed the issue of hazardous waste generated from the cleaning of paint equipment at automobile assembly plants. Sonya Sasseville, Acting Chief of the

¹⁰⁹See Section VII.D.1 above for a discussion of why GM is not entitled to the manufacturing process unit exemption for its Purge Mixture.

¹¹⁰Further, after the Cotsworth letter was issued, there was a great deal of conversation between the automobile industry and EPA regarding the regulatory status of the Purge Mixture. Those discussions began at least as early as 1999, and several GM representatives, including Christine Bates (Tr. June 28 at 17-20, 30-31) and Margaret Winkler (Tr. June 28 at 111-112) participated in those discussions. The Automobile Alliance, of which GM is a member, met with various EPA officials “as many as five times.” (Tr. June 28 at 318). The issues raised in those discussions were essentially the same issues as have been raised in this proceeding. (Tr. June 28 at 17-20; Tr. June 29 at 73). Indeed, Ms. Winkler admitted that, at the meeting with EPA headquarters that she attended, the position of the Automobile Alliance was that the Purge Mixture was in continual use and it made that position known to EPA at that time. (Tr. June 28 at 320).

Permits Branch in the Office of Solid Waste, wrote to EPA's Region 5 and she squarely addressed the specific issue of continued use in automobile painting operations. She explained that the Automobile Alliance had raised these issues with her office and she understood that the industry's argument was that the solvent is "being used to keep the mixture flowing." In response, Sasseville stated that "[t]he purpose of the solvent is to remove the waste paint,¹¹¹ clean the spray gun and allow the use of new colors. If the solvent serves thereafter only to keep the contaminants in suspension until they reach the hazardous waste storage tank, *and if the solvent does not dissolve additional constituents, it is a waste.*" (CX 17 (emphasis added)). Sasseville does not make up a "new test," she merely explains, based on the regulations, why the used solvent/paint mixture at issue is a waste. The situation described in the Sasseville memorandum, that is, when the solvent does not *dissolve additional constituents*, is exactly the situation present in this case. Indeed, the record demonstrates that the automobile industry, as a whole, generates Purge Mixture (used solvent contaminated with unwanted paint solids) in a similar fashion as does GM and that most of the entire industry pipes it to storage tanks for off-site disposal and reclamation. (Tr. June 28 at 19-20). Therefore, the facts at the GM facilities are exactly the same as those Cotsworth was addressing in 1997 and Sasseville was addressing in 2000.

Further, there can be no doubt that Sasseville's 2000 memorandum was written at a time where there was substantial communication with the automobile industry in which the industry presented EPA with the same arguments presented in this proceeding (Tr. June 28 at 17-20, 34-35,

¹¹¹GM's expert, Marcia Williams testified that the paint portion of the Purge Mixture is a hazardous waste if it were discarded. (Tr. June 29 at 267). Given that the paint portion of the Purge Mixture is never used again by GM (Tr. June 23 at 211) and is, instead, conveyed via waste delivery lines to storage tanks to await off-site shipment, it clearly is discarded.

111-112), that the Sasseville memorandum directly addressed the issue of continued use, and its explanation is consistent with the opinions expressed in the Cotsworth letter¹¹² and those expressed by the Agency regarding spent material and discard.¹¹³ Using the very same reasoning here, since the Purge Mixture does not dissolve any new constituents and is merely redissolving itself and keeping itself in suspension until it can reach the storage tanks, the Purge Mixture is “spent” and a “solid waste” when it exits the manifold and associated applicators through the gun box or flows from the valve to the internal dump lines. Finally, in November 2002,¹¹⁴ Robert Springer, Director of Solid Waste for EPA¹¹⁵ wrote a memorandum to the Agency’s Senior Policy Advisors in which he states, “[a]s you know, EPA has determined, with regard to spray painting operations at automobile assembly plants, that solid waste is generated at the point where a paint-

¹¹²Robert Springer, Division Director of EPA Region 5's Waste, Pesticides and Toxics Division reiterated the same position regarding the status of Purge Mixture as a hazardous waste in his March 2001-letters to the State of Michigan (CX 18) and to Ohio. (CX 95). EPA’s position was reiterated in the May 7, 2002 letter from Steven Shimberg, Associate Assistant Administrator for the Office of Enforcement and Compliance Assurance to GM. (CX 19).

¹¹³Additional proof that EPA’s position has been consistently held can also be found in Michael Shapiro’s March 24, 1994, memorandum on the subject of the definition of a “spent material” under RCRA. Mr. Shapiro stated that spent materials are those “materials that have been used and are no longer fit for use without being regenerated” and that the word “contamination” means “any impurity, factor or circumstance which causes the material to be taken out of service for reprocessing.” GM’s purge mixture is clearly a material which must be taken out of service, i.e. out of the piping, before it can be used again. (CX 20; Tr. June 21 at 127-130). Indeed, GM treats the purge mixture as a “spent material.” Since GM does not and cannot use the purge mixture to clean the manifold and associated applicators, it captures, accumulates and stores it in the purge mixture conveyance system to the storage tanks (and ultimately in the storage tanks themselves) until it can be sent off-site for disposal, reclamation or burning for energy recovery.

¹¹⁴This was six months after all the discussions between the Automobile Alliance and EPA had concluded. (Tr. June 28 at 318).

¹¹⁵Springer’s position at EPA in November 2002 was the very same position Ms. Williams held from 1985 to 1988. (Tr. June 29 at 132).

solvent mixture [i.e., purge mixture] exits the spray gun.” (RX 112). It is interesting to note that this memorandum was written only after the Automobile Alliance had engaged in substantial discussions with EPA Headquarters on this very issue and had had a full opportunity to explain the facts relevant to its various theories to Agency officials. (CX 91; CX 94; Tr. June 28 at 318).

Though EPA conducted several inspections after the Cotsworth letter in which the inspectors did not cite the facility for the types of violations at issue in this case, the absence of a finding of violation is not the same as a finding of no violation as previously discussed. EPA has been consistent regarding its interpretation of spent material and has not, with regard to the specific application to the automobile industry “flip-flopped” in its determination as to the correct location of the point of generation of hazardous waste in automobile painting operations. The truth is, through responses to the automobile industry and enforcement activities, EPA steadily and consistently determined that the point of hazardous waste generation at automobile manufacturing facilities was at the point where the used purge solvent contaminated with paint solids exits the manifolds and paint applicators. (See, CX 75; CX 112; CX 76; CX 77; RX 118N at GM100769-70; RX 118KK at GM120673; RX 118L at GM100734-35; CX 80; CX 81; CX 82; CX 83; CX 84; CX 87; CX 88; RX 118X at GM110717; CX 89). EPA’s position on this matter has been clear, consistent, and well known since at least 1998. *General Motors Corp. v. EPA*, 363 F.3d 442, at 449 (D.C. Cir. 2004).

3. Case law does not help GM

As established in the discussion above, GM has failed to set forth any facts that EPA historically interpreted the regulations at issue in an inconsistent manner. In addition, GM has failed to proffer any legal authority to support its argument that a government inspector’s failure

to affirmatively identify particular conduct as falling within regulatory jurisdiction constitutes an implied statement that such conduct is not regulated. In an effort to convince this Tribunal to examine EPA's alleged "conduct or practice in applying the regulations over time," Respondent cites to several decisions by federal courts. (See GM's Brief at 64-65). Unfortunately for GM, none of these cases stand for the proposition advanced by Respondent, and GM has failed to identify any other decision by a federal court or administrative tribunal that supports its strained view. GM cites to cases for vague, broad propositions, and in doing so relies on cases that are so glaringly distinguishable that they are utterly inapposite to the facts confronted by the Board in this case. For example, GM invokes the Supreme Court's decision in *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933), to argue that "the conduct and practice of an agency can be used to evaluate an agency's interpretation." (See GM's Brief at 64). However, the *Norwegian Nitrogen Products* case involved a set of circumstances totally unlike those present in the instant case. The *Norwegian Nitrogen Products* decision involved a tariff rate increase by the President of the United States, which was made without disclosing "costs of production" data at the hearing to persons petitioning for review of the rate increase. *Id.* at 297. A petitioner argued that the withholding of this data and the failure to provide petitioners with the right to cross examine witnesses about this data amounted to a denial of a valid hearing. *Id.* at 297-98. The issue was whether the Tariff Act's right to a hearing mandated that "every producer or importer affected by a tariff" be afforded the right to see cost of production data collected by the Tariff Commission. *Id.* at 303. The Supreme Court held that the Tariff Commission was not required to provide cost of production data and other trade secrets to petitioners for purposes of the hearing required under the Tariff Act. *Id.* at 324. While the Supreme Court did refer to historical agency

practice, that practice was an affirmative decision to withhold cost of production data from the hearing record; the Supreme Court referred to this affirmative agency practice in deciding to uphold the agency's decision to withhold cost of production data. The *Norwegian Nitrogen Products* case involved a clear, affirmative policy on the part of the Tariff Commission to withhold cost data and other trade secrets from the parties to a hearing; it did not involve an accusation that the Commission had a de facto practice which could be implied by virtue of silence on the part of staff-level employees (i.e., the absence of a citation of violation in an inspection report). The case is therefore inapposite to the instant case.

Similarly, GM's reliance on *Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423 (5th Cir. 2001) is misplaced. In *Trinity*, the company was cited in 1997 by OSHA for reusing frayed electrical cords in a certain manner. The company challenged this citation, claiming in part that because OSHA had issued, and then withdrawn, a similar citation to the company in 1989, it reasonably relied on the understanding that its practices were acceptable. The court concluded that since Trinity's only notice regarding the new interpretation was the citation at issue in the litigation, the company did not have fair notice of its violation. The court held that Trinity had a "fair expectation that OSHA found [its practices] satisfactory...." *Id.* at 430. We have an entirely different scenario here. GM can point to no instance at any of these three GM facilities (or that of any other automobile maker) where EPA affirmatively issued a notice of violation regarding the Purge Mixture conveyance lines, retracted it and then, without any warning, issued a second notice of violation for the very same offense. Rather, in the present case, there is a period of time of no citations, followed by a clear statement from the Agency regarding its position (the Cotsworth letter), followed by protracted conversation with the industry regarding that

interpretation, followed by the Agency affirming that interpretation (Sasseville¹¹⁶) followed by the Shimberg and Springer letters,¹¹⁷ followed by the three inspections at issue in this case, and only then followed by the complaint in this case. Certainly, GM had no fair expectation that EPA found its practices “satisfactory.”

GM relies on *Ohio Dep’t of Human Servs. v. U.S. Health & Human Servs.*, 862 F.2d 1228, 1234-35 (6th Cir. 1988), to establish that “contemporaneous expressions of opinion by low-ranking officials [are considered] highly relevant and material evidence of the general understanding of ambiguous regulatory provisions” (quoting *Phillips Petroleum Co. v. Dep’t of Energy*, 449 F. Supp. 760, 784 (D. Del. 1978)). In both *Ohio Dep’t of Human Servs.* and *Phillips Petroleum*, however, there were affirmative statements and actions taken on the part of the regulating agency which expressly conflicted with the newer interpretation the agency was advancing. In the context of those cases, the courts held that it was appropriate to look to conduct of an agency’s practice to determine the meaning of an ambiguous regulation. In the instant case, there were no earlier affirmative statements by EPA which are contrary to the position taken in this case, and the regulations EPA seeks to enforce are not ambiguous.

Other decisions cited by GM involved prior agency practice and policy that was formally articulated in written decisions. For example, *Watt v. Alaska et al, Kenai Peninsula Borough*, 451 U.S. 259 (1981), involved formal written and published opinions by the Comptroller General as to what law governed the distribution of revenues from mineral leases on wildlife refuges, not the ambiguous silence of staff-level employees. *Id.* at 267-268. And in *INS v. Cardoza-Fonseca*, 480

¹¹⁶(CX 17).

¹¹⁷(CX 18; CX 19).

U.S. 421 (1987), the inconsistent agency (INS) positions at issue were published decisions by the Bureau of Immigration Appeals, and published operating instructions written by the Department of Justice. *Id.* at 447 n. 30. The equivalent in EPA would be published decisions by the Environmental Appeals Board and published guidance documents from EPA Headquarters. GM has failed to identify any such written statements of interpretation that support GM's view with respect to the point-of-waste-generation issue.

United States v. Mead Corp., 533 U.S. 218 (2001), also cited by GM, involved tariff classification "ruling letters" issued by the Customs Service, which set forth an interpretation of the Harmonized Tariff Schedule that was inconsistent with prior classifications made by the Customs Service. *Id.* at 225. While the Supreme Court held that such tariff classification "ruling letters" were akin to interpretations by the agency as contained in policy statements, agency manuals, and enforcement guidelines, and were not entitled to *Chevron* deference (*Id.* at 232, 234), the Court actually found that such "ruling letters" could be entitled to "a respect proportional to its 'power to persuade,'" particularly in light of the fact that "the regulatory scheme is highly detailed, and Customs can bring the benefit of specialized experience to bear on the subtle questions in this case." *Id.* at 235. Under this precedent, in the case before this Tribunal, documents such as the Cotsworth letter should be accorded some measure of respect and given due weight, in view of the Agency's "specialized experience" with RCRA's "highly detailed" regulatory scheme and the fact that the incoming request for clarification from the regulated community was fact specific.¹¹⁸

¹¹⁸Further, *U.S. v. Mead* dealt with ruling letters that were at odds with prior classifications made by the Agency. EPA has not made any such inconsistent statements regarding the point at which Purge Mixture becomes hazardous waste at vehicle painting operations.

GM contends that the Cotsworth letter was in effect a new rule and, as such, EPA was required to subject it to a notice and comment period. (GM Brief at 69). GM cites to *Alaska Professional Hunters Ass'n v. FAA*, 177 F.3d 1030 (D.C. Cir. 1999) for this proposition. An examination of the facts in *Alaska Professional Hunters Ass'n*, however, will demonstrate why GM's reliance on this case is faulty. In *Alaska Professional Hunters Ass'n*, the FAA had "uniformly advised all guides, lodge managers and guiding services in Alaska that they could meet their regulatory responsibilities by complying with" only one provision of the pertinent regulations, and those "officials gave that advice for almost thirty years." *Id.* at 1035. When the FAA then proposed an contrary interpretation, the court held that it was required to make that change through a formal rulemaking process because "[t]hose regulated by an administrative agency are entitled to 'know the rules by which the game will be played.'" *Id.* (quoting Holmes, *Holdsworth's English Law*, 25 Law Quarterly Rev. 414 (1909)). Again, GM suggests that EPA's failure to cite violations over a period of time is equivalent to affirmative statements by agency officials blessing the activity in question. Unfortunately for GM, that sort of affirmative acceptance of the complained of behavior never happened in this case. EPA did not instruct GM that its Purge Mixture is not a hazardous waste and then, at a later date, reverse its position. If the goal is to ensure that the regulated community knows what the rules are, it is hard to imagine how EPA could have made itself any more clear. Indeed, at this point, the only way in which GM could be treated inconsistently by EPA would be if EPA were to refrain from enforcement action in this case. As RX 29 indicates, EPA communicated with the automobile industry as a whole in 2002 to reiterate EPA's view regarding the point of hazardous waste generation and to open the door to all members of the industry for settlement with the Agency. It does not get more

consistent or transparent than that.

F. RCRA Gives EPA the Authority to Enforce Subtitle C Requirement Against GM in Michigan

EPA has long interpreted RCRA as authorizing federal enforcement actions in states with authorized programs provided only that the Agency first give notice to the State. GM urges the EAB to add a new restriction on federal enforcement not found in the statute - that EPA be barred from taking an enforcement action against GM because Michigan allegedly has found or determined “purge solvent is not a waste.” GM’s argument fails because it is inconsistent with RCRA and established EAB and federal court decisions, and is a mis-characterization of Michigan’s position on the substantive issue in this appeal.

A determination by a State regarding the applicability of the State’s authorized regulations at a facility is “neither dispositive nor preclusive of EPA’s independent authority and obligation” to consider whether a person is complying with statutory and regulatory requirements. *In the Matter of Southern Timber Products, Inc.*, 3 E.A.D. 371 (JO 1990).¹¹⁹ In this case, the State of Mississippi’s Commission on Natural Resources decided that Respondents had clean-closed their facility pursuant to Mississippi hazardous waste regulations and thus did not have to comply with post-closure care or financial assurance regulations. *Id.* at 374. The Mississippi regulations at

¹¹⁹In *Southern Timber*, the EAB adopted the ALJ’s analysis and conclusions on the issue of EPA enforcement authority and incorporated them into the EAB’s decision. *Southern Timber* at 372. The ALJ’s decision, *In the Matter of Southern Pine Wood Preserving Co.*, RCRA-87-13-R (ALJ, Nov. 13, 1989), has a different title than the EAB decision. In this Brief, when citing to a portion of the ALJ’s decision which has been incorporated into the EAB’s decision, the citation will first be to the EAB’s decision in *Southern Timber* and then to the relevant language in ALJ’s decision in *Southern Pine*.

issue were authorized by EPA as part of the State hazardous waste program, and were identical to the EPA regulations. EPA disagreed with the Mississippi Commission's determination and, after notifying the State, initiated a federal enforcement action under RCRA § 3008(a) against the Respondents claiming that the facility had not clean-closed and thus Respondents had violated the authorized post-closure and financial assurance requirements. Respondents, like GM in this case, argued that EPA did not have the authority to bring the enforcement action in light of the Mississippi Commission's decision.

The EAB concluded that RCRA empowers EPA to bring an enforcement action even where the State had determined there was no violation based on the language of RCRA and its legislative history. The EAB decision is founded on the language of RCRA - the "statute itself makes clear that the only prerequisite to federal enforcement in an authorized State is notice to the State of the violation. *Southern Timber*, 3 E.A.D. at 376-378 (emphasis added). *See also, e.g., Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (EAB 1994); *In the Matter of Martin Electronics, Inc.*, 2 E.A.D. 381, 385 (CJO 1987); *U.S. v. Power Engineering Co.*, 303 F.3d 1232, 1237 (10th Cir. 2002). Although the EAB recognized that a State may be "authorized under RCRA § 3006(b) to implement its own hazardous waste program in lieu of the federal program EPA nevertheless retains overlapping jurisdiction under RCRA §3008(a), to bring an enforcement action in an authorized State."¹²⁰ *Southern Timber*, 3 E.A.D. at 376; 42 U.S.C. § 6928(a).

¹²⁰ *See also, e.g., General Motors Corp. v. EPA*, 363 F.3d 442, 444 (D.C. Cir. 2004) ("while an authorized state may enforce its hazardous waste program in lieu of the federal program, EPA has dual enforcement authority under RCRA."); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 44 (1st Cir. 1991) (upholding federal RCRA criminal enforcement authority in States with authorized programs); *Wyckoff Co. v. EPA*, 796 F.2d 1197, 1199 (9th Cir. 1986) (concluding that EPA could exercise its enforcement powers even though an authorized state program was in effect); *United States v. Elias*, 269 F.3d 1003, 1009 (9th Cir. 2001) (upholding

Southern Timber is consistent with other EPA decisions concluding that RCRA authorizes federal enforcement actions in States with authorized programs even where the State has taken an enforcement action. *See, e.g., Bil-Dry Corp.*, 9 E.A.D. at 589-93; *Gordon Redd Lumber Co.* 5 E.A.D. at 308-315; *Martin Electronics*, 2 E.A.D. at 385.

Legislative history also supports EPA enforcement action. In particular, the final 1976 Act struck language approved by the Senate that would have explicitly allowed EPA enforcement only “in the absence of state enforcement action.” S. 3622, 94th Cong., 2d Sess. 214 (as reported, June 25, 1976), reprinted in 1 Legislative History of the Solid Waste Disposal Act, 102d Cong., 1st Sess. at 370 (Comm. Print 1991).¹²¹ The absence of such a requirement from the final statute

federal criminal RCRA enforcement authority but recognizing that RCRA 3008(a) authorizes EPA civil enforcement in authorized States); *Power Engineering Co.*, 303 F.3d at 1237 (Upholding EPA civil enforcement authority even where State has taken an enforcement action); *United States v. Murphy Oil*, 143 F. Supp. 2d 1054, 1114-17 (W.D. Wis. 2001)(recognizing EPA enforcement authority in authorized States); *United States v. Conservation Chem. Co.*, 660 F. Supp. 1236, 1244-45 (N.D. Ind. 1987)(RCRA 3008(a) establishes dual enforcement and authorizes EPA enforcement provided only that EPA notify State).

^{121/} Other legislative history affirmatively describes two situations where EPA may take action, although without limiting EPA authority to only those two situations:

This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program

H.R. Rep. 94-1492(I), 1976 U.S.C.C.A.N., 6238. The observation in *Southern Timber* that this language provides particular support for EPA action where the State, after receiving notice from EPA that closure was deficient, fails to bring an action to correct the problem, is equally applicable in the present case. *Southern Timber*, 3 E.A.D. at 377-78.

emphasizes that EPA enforcement is not precluded even if a state has taken some sort of enforcement action itself.

Although the *Southern Timber* decision concludes that a determination by the Mississippi Commission regarding facility compliance is neither dispositive nor preclusive of EPA enforcement, it also acknowledges that the determination was “relevant.”¹²² *Southern Timber* at 378. However the Commission’s determination need only be “accorded such weight as its analysis intrinsically warrants.” *Id.* at 378. And as discussed further below, the Michigan statements in evidence in the instant case do not address the central issue before the EAB - whether the Purge Mixture is a “spent” material and thus discarded under Subtitle C regulations.

As it did in *Southern Timber*, the EAB should reject GM’s arguments that EPA is barred from finding the Purge Mixture is a waste under Subtitle C, even assuming that Michigan has actually made a formal determination that rises to the level of the determination made by the Mississippi Commission in *Southern Timber*. GM does not dispute that EPA notified Michigan of this enforcement action.¹²³ EPA thus complied with the sole prerequisite for a RCRA § 3008(a) enforcement action. In addition, as in *Southern Timber* at 378, the fact that Michigan, like Mississippi, failed to take appropriate action after receiving notice from EPA provides further

¹²²GM cites to testimony by Ms. Williams regarding the significance of state determinations in an attempt to bolster its case. But the opinions of Ms. Williams, a former EPA employee, can hardly override the final decisions of the Administrator of EPA, as announced in EAB decisions such as *Southern Timber*, *Gordon Redd*, and other decisions, and the position of the United States taken in various actions to enforce RCRA in federal court.

¹²³Joseph Boyle is the Chief of the Enforcement and Compliance Assurance Branch in the Waste, Pesticides and Toxics Division at EPA Region 5. (Tr. June 22 at 5). Boyle testified that his office discussed the issuance of the complaint which initiated this action with the State prior to the complaint being filed. (Tr. June 22 at 8-9, 10-11; CX 34)

support for EPA's subsequent enforcement action.

Although GM makes much of the Michigan pronouncements, they actually are little more than expressions regarding the State's exercise of its enforcement discretion, and do not rise to the level of the formal action taken by the Mississippi Commission in *Southern Timber*. As a result, the situation is more akin to that in *Gordon Redd Lumber*, where the Respondent argued that the State, which had an authorized program, had excused it from compliance with RCRA interim status requirements. *Gordon Redd*, 5 E.A.D. at 307. The EAB noted that this amounted to no more than a claim that the State had exercised its enforcement discretion by saying it would refrain from enforcement. The EAB concluded that a "State's exercise of its enforcement discretion is certainly not binding" on EPA. *Gordon Redd* 5 E.A.D. at 316-17.

As in *Gordon Redd*, Michigan's statements are more akin to expressions of enforcement discretion rather than to decisions growing from enforcement actions or to interpretations related to the issues now before the EAB. When Arthur Nash, Deputy Director, MDEQ, advised GM in February 2001 that he did not believe the application of RCRA's Subpart BB rules to the piping downstream of the paintbooths "make sense," (RX 21) that does not necessarily mean that he is finding that the regulations do not apply. (Tr. June 22 at 67-68). In that same letter, Nash stated that he thought the requirement for secondary containment inside the building was of "questionable environmental benefit." *Id.* Both of these statements indicate that Nash was questioning the benefits of taking an enforcement action, not that he was deciding that GM was not in violation of hazardous waste regulations. Moreover, Nash clearly thought that there was "spent solvent" subject to regulation at GM facilities because his letter says that MDEQ would require full compliance with the regulations "when the *spent solvent* is delivered to the

accumulation tank or leaves the building that is providing secondary containment.” (RX 21, emphasis added). Similarly, John Engler, Governor of Michigan, wrote to the Administrator of EPA in February 2002. He indicated that while he believed EPA was “strictly applying these regulations” he did not believe there would be environmental benefit from taking such action. (RX 27). Again, Engler appears to understand that GM is violating the regulations, but he would not choose to take an enforcement action for the violations. Finally, in October 2002, the MDEQ wrote another letter to GM which noted that “[e]quipment ancillary to the hazardous waste accumulation tank [at the GM facility] may not meet the requirements of 40 C.F.R. Part 265, Subpart J.” (CX 26). The MDEQ then deferred further discussion of the matter pending negotiations between EPA and GM. (CX 26). The EAB should determine that statements such as these are expressions of Michigan’s enforcement discretion, and not binding determinations as GM argues, and as in *Gordon Redd*, hold that they do not preclude EPA from exercising its discretion to take a federal enforcement action.

GM also cites to the *Amicus Brief* filed by the State of Michigan in the D.C. Circuit case (RX 182A), claiming it shows Michigan has been “clear and unambiguous” on the status of the Purge Mixture. (*See* GM Brief at 71-72). But the *Amicus Brief* does not live up to GM’s billing. First the *Amicus Brief* supports the ultimate conclusion that spent solvent is not a waste only “up to the point where the purge solvent is collected and stored in the solvent recovery tank,” suggesting that Michigan does not actually agree with GM’s arguments that the material in the recovery tanks is not a Subtitle C waste. (RX 182A at GM130148B). In addition, the *Amicus Brief* should be given no weight in determining Michigan’s position on the status of the Purge Mixture in this EAB appeal because it does not even address the central issue now before the

EAB - whether the Purge Mixture falls within the definition of “spent” material in the Subtitle C regulations. Instead, the *Amicus Brief* argues the material is not discarded because it is not “abandoned,” an argument not at issue in this EAB appeal.¹²⁴ (RX 182A at GM130148H-GM130148I). As a result the analysis in the *Amicus Brief* merits no weight in the EAB’s evaluation of the issues. In any event, even if Michigan actually disagrees with EPA’s interpretation, EPA is not prohibited from taking its own enforcement action as the EAB held in *Southern Timber*.¹²⁵

Further, GM misreads *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371 (7th Cir. 1986), by claiming it makes EPA’s role in authorized states “quite clear.” But EPA’s authority to enforce authorized state Subtitle C regulations was not even at issue in *Northside*, which involved issues of standing and ripeness in an action seeking judicial review of EPA statements about the scope of closure. As a result, the court’s statement on EPA enforcement authority is dicta and not controlling as GM suggests. Additionally, the EAB and a district court in the Seventh Circuit

¹²⁴EPA is not claiming, on appeal, that the Purge Mixture is “abandoned” (and thus a solid waste) but agrees with the ALJ that the Purge Mixture is a spent material that is stored prior to recycling and then reclaimed or burned for energy recovery.

¹²⁵Further, GM erroneously relies on “RX 206” for support. (GM Brief at 71). RX 206 is a letter from the State of Michigan to GM, written after the hearing, which GM obtained in a belated attempt to bolster its case. EPA opposed the record be reopened after the hearing to admit this new document because GM failed to show good cause as to why the purported “new evidence” was not introduced at the hearing. This letter was not newly *discovered* evidence, nor evidence that was created independently of this litigation; rather this was newly created evidence to address issues well known to GM long before the hearing. The rule allowing for the reopening of a hearing was never intended to enable parties to correct shortcomings in their presentations at hearing. See, e.g., *In the Matter of: Goodman Oil Company and Goodman Oil Company of Lewiston*, Docket No. RCRA-10-2000-0113 (ALJ, Jan. 30, 2003). Additionally, RX 206 is at best, cumulative of evidence already introduced at the hearing. Judge Gunning correctly refused to admit RX 206 into evidence and GM cannot now rely on this document which is not in the record of this case.

have both analyzed *Northside* and concluded it is not controlling in determining the extent of EPA's enforcement authority. In *Southern Timber*, the EAB concluded that *Northside* is not authoritative regarding whether EPA may take an enforcement action against a violator where the state had determined that there was no violation. *Southern Timber* at 378 (adopting the ALJ's analysis in *Southern Pine*, 1989 WL 253199 (E.P.A) (the ALJ concluded that he could "only speculate how the court would have decided if it had been asked to interpret Section 3006 in light of Section 3008, with its clear legislative history supporting the EPA's authority to bring enforcement action."))).

In *United States v. Conservation Chemical*, 660 F.Supp. 1236 (N.D. Ind. 1987), a district court in the Seventh Circuit reached the same conclusion regarding *Northside*. EPA brought an action in district court under RCRA 3008(a) alleging violations of Subtitle C requirements issued by Indiana and authorized by EPA. Indiana also initiated an action for violations of its regulations in a state proceeding but had not issued a decision. The defendant argued that EPA lacks enforcement authority, citing *Northside*. The district court, consistent with the EAB's decision, concluded that *Northside* did not involve a RCRA § 3008 enforcement action, and could not be read as a broad prohibition against EPA's enforcement authority in authorized states. *Id. at 1243*. The court also stated that Section 3008(a) establishes a "statutory scheme of dual enforcement" and makes it "clear" that EPA has the power to bring an independent enforcement action in an authorized state like Indiana, provided only that the Agency notify the state. *Id. at 1244-45*.

Finally the authority Congress granted to EPA in RCRA would be meaningless if EPA was barred from questioning state findings or interpretations and from taking enforcement actions based on its own evaluation of the law, but could only revoke a State's authorization if the two

governments disagreed. As discussed above, Congress gave EPA dual enforcement authority under RCRA § 3008(a) which is not contingent upon a State's actions. In addition, Congress gave EPA the responsibility of maintaining a federal floor of requirements for managing hazardous waste. *See, e.g., United States v. Marine Shale Processors*, 81 F.3d 1361, 1367 (5th Cir. 1996). Congress directed EPA to promulgate regulations, 42 U.S.C. § 6921, which then became the federal regulatory floor governing management of hazardous waste. *See, e.g., 40 C.F.R. Parts 260-272*. EPA authorizes the regulations and statutes in a State's hazardous waste program, only after review to assure that these requirements were at least as high as the federal floor. 42 U.S.C. § 6926(a). RCRA § 3009 allows more stringent state requirements, but imposes a duty on states to maintain the authorized program requirements at a level at least as stringent as the federal floor.¹²⁶ 42 U.S.C. § 6929.¹²⁷ GM's argument turns the system established by Congress on its head by undermining the federal floor established by Congress.

GM's argues that if a state has a less restrictive program than the federal floor, then EPA's only remedy is to withdraw authorization. But as the 10th Circuit has noted:

Withdrawal of authorization for a state program is an 'extreme' and 'drastic' step that requires the EPA to establish a federal program to replace the cancelled state program. . . . Nothing in the text of the statute suggests that such a step is a prerequisite to EPA enforcement or that it is the only remedy for inadequate enforcement.

¹²⁶ Specifically the statute provides "no State . . . may impose any requirements less stringent than those authorized under this subchapter [Subtitle C] respecting the same matter as governed by such regulation." 42 U.S.C. § 6929.

¹²⁷ The instant case provides an excellent example of the dangers of GM's suggested approach. The facilities which are the subject of this proceeding are located in two different states: Ohio and Michigan. If Ohio and Michigan are each allowed to interpret differently regulations which are the *minimum* requirements for an authorized program, that would eviscerate the very concept of a federal floor establishing the national requirements for all persons who handle solid and hazardous wastes.

Power Engineering, 303 F.3d at 1238-1239 (citing with approval *Waste Mgmt., Inc. v. EPA*, 714 F. Supp. 340, 341 (N.D. Ill., 1989)). Moreover, withdrawing authorization would subject all regulated entities in Michigan to dual federal and state sets of requirements while Congress sought to establish a federal floor that minimized dual sets of requirements.

Finally, GM's characterization of EPA's action here as "overfiling" is equally incorrect. This is *not* a case of overfiling – this is a case of an absence of state action and EPA stepping in to exercise its statutory powers of enforcement. Congress clearly gave EPA the authority to bring its own enforcement action in Michigan so long as it first provided notice to the State. EPA satisfied the one prerequisite to this action and the EAB should find that this enforcement action is not barred in Michigan.

VIII. CONCLUSION AND PRAYER FOR RELIEF

EPA has demonstrated that once GM uses purge solvent a single time to clean the manifolds and associated applicators at its automobile assembly plants, that purge solvent is contaminated and is not and cannot be used again for the purpose for which it was produced. After the purge solvent finishes its cleaning, it is contaminated with paint residue and resulting Purge Mixture is "spent." This "spent" material is clearly a "discarded solid waste" pursuant to RCRA's regulations. GM has also conceded that the Purge Mixture would be a "hazardous waste" (i.e., exhibits the hazardous waste characteristic of "ignitability") if it is was a "solid waste" as defined by the regulations. Thus, GM has generated a "hazardous waste" as soon as the Purge Mixture exits the manifolds and associated applicators, or the mini purge pots at Orion. The Purge Mixture storage tanks and the conveyance system (e.g., lines, pipes, purge pots, pumps, etc.) downstream of the manifolds and associated applicators (or mini purge pots at Orion) are

waste management systems that are managing “hazardous waste” and are subject to regulation under RCRA.

The Complainant requests this Board affirm Judge Gunning’s decision that the Respondent failed to comply with the requirements of Subparts J, BB and CC and her decision to impose a penalty of \$568,116 dollars. Such a penalty is fair, reasonable and consistent with the seriousness of the violations and Respondent’s failure to demonstrate good faith efforts to comply. The Complainant further requests that the Board affirm Judge Gunning’s Order directing the Respondent to immediately comply with the applicable hazardous waste regulations found in 40 C.F.R. Part 265, Subpart J and the Michigan and Ohio equivalent to those regulations. In particular, the Order should direct GM to perform daily inspections of the entire tank system (including the ancillary equipment – i.e., the purge pots, piping and other equipment comprising the Purge Mixture conveyance system), and keep a log of those inspections in its operating record. Those daily inspections will provide adequate leak detection to satisfy the secondary containment requirements and will provide compliance with the requirement to inspect the Purge Mixture conveyance system each operating day. The Order should also require GM to provide adequate secondary containment for all portions of the Purge Mixture conveyance systems at each Facility that are outdoors.

The Complainant recognizes that the Auto MACT rule exempts the Moraine, Ohio Facility from compliance with Subpart BB as of June 25, 2004, and EPA would request penalties for past violations only with respect to the Subpart BB violations at the Moraine Facility. With respect to the Pontiac and Orion Facilities, EPA understands that the State of Michigan intends to adopt a state law which would be equivalent to EPA’s Auto MACT rule and would then seek

authorization from EPA for that new State law. Given the likelihood that Michigan will enact the same provision and that it will receive authorization from EPA, EPA would propose extending the date by which GM should come into compliance with Subpart BB to such time as is necessary to determine if Michigan has, indeed, adopted a similar provision.

Respectfully submitted

July 21, 2006
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I hereby certify that the original and five copies of this Complainant's Response Brief were filed in the following manner on July 21, 2006

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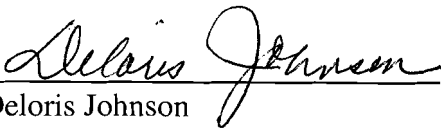
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