UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
ISP Freetown Fine Chemicals, Inc.,	)	**Docket No. RCRA-01-2018-0062**
	)	
Respondent.	)	

ORDER GRANTING RESPONDENT'S MOTION FOR ACCELERATED DECISION/ORDER DENYING COMPLAINANT'S MOTION FOR ACCELERATED DECISION/INITIAL DECISION

This action was initiated on September 26, 2018, by Complainant United States Environmental Protection Agency ("EPA"), Region 1 ("Region 1" or "Complainant") filing an Administrative Complaint, Compliance Order and Notice of Right to Request Hearing against Respondent, ISP Freetown Fine Chemicals, Inc. ("ISP" or "Respondent"), pursuant to Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a). This Administrative Complaint alleges in nine counts that Respondent violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and federal and state hazardous waste regulations promulgated pursuant to RCRA. Respondent was granted an extension of time to file its Answer to the Administrative Complaint, and in the interim, Complainant amended the Administrative Complaint on June 7, 2019 to provide clarification with regard to the renumbering of certain cited regulatory provisions, to add citations with regard to count 8, to correct Region 1's mail code based on recent reorganization/realignment, and to correct typographical errors. For simplicity, the Administrative Complaint and the subsequent Amended Complaint will be referred to collectively as the Complaint ("Complaint" or "Compl."). Respondent filed its answer to the Complaint on June 26, 2019 ("Answer").

After extensive negotiations on their own, the parties filed a joint motion to initiate Alternative Dispute Resolution ("ADR") proceedings, which this Tribunal granted on February 10, 2020. On October 16, 2020, the parties filed a Partial Consent Agreement and Final Order ("Partial CAFO"), which fully resolved four of the counts and partially resolved four other counts. *See* Partial CAFO at 3-4. In a Joint Proposed Plan attached to the Partial CAFO, the parties agreed that the "central remaining issue in dispute is whether the tanks and equipment cited in the unresolved claims are subject to regulation under Subtitle C of [RCRA], 42 U.S.C. §§ 6921-6939e, and federal and state hazardous waste regulations promulgated pursuant to RCRA." Joint Proposed Plan at 2. The parties then engaged in the prehearing exchange of information pursuant to 40 C.F.R. § 22.19.

On June 23, 2021, Respondent filed a Motion for Accelerated Decision regarding its liability for the remaining counts. Also on June 23, 2021, Complainant filed its own Motion for

Accelerated Decision regarding Respondent's liability. For reasons that follow, I shall **GRANT** Respondent's Motion for Accelerated Decision and **DENY** Complainant's Motion for Accelerated Decision.

As this order resolves all remaining issues and claims in this proceeding, this decision constitutes an initial decision. *See* 40 C.F.R. § 22.20(b)(1).

I. RELEVANT FACTUAL BACKGROUND

Respondent has owned and operated the Assonet, Massachusetts facility at issue in this case since 1998. Compl. ¶ 14; Answer ¶ 14. In the Assonet facility, Respondent manufactures polymers that are used in health and beauty products, including toothpaste, hair gel, hair spray, skin creams, and sunscreens. Compl. ¶ 15; Answer ¶ 15. Respondent produces approximately 14 million pounds of products annually. Compl. ¶ 15; Answer ¶ 15. Since January 1998, Respondent has identified its facility as a large quantity generator of hazardous waste. Compl. ¶ 16; Answer ¶ 16. Respondent maintains the following eight tanks: Tank S-716A, a 600-gallon waste tank; Tanks S-505, S-507, S-526, S-503A, S-545, and S-502A, receiver tanks used to collect materials from various condensers at the Facility; and Tank S-535, a 16,000-gallon tank used for collecting hazardous waste generated from a variety of Respondent's operations, including from the receiver tanks. Compl. ¶ 20, Answer ¶ 20(b), Partial CAFO at 2.

Respondent manufactures the majority of its products, and all of the products relevant here, through a batch chemical distillation process. Piligian Aff. ¶ 10.[1] Products are produced by "first dissolving raw materials in a solvent (e.g., water or an organic solvent, such as alcohol) inside a reactor vessel then allowing them to chemically react." Morin Decl. ¶ 4.[2] In all the production processes at issue in this case, "once the reaction is complete, some or all of the organic solvent must be removed from the contents of the reactor in order to produce a final product[.]" Morin Decl. ¶ 4. To remove the solvent, the reactor vessel is "heated and/or subjected to reduced pressure, so that the liquid turns into vapor." Morin Decl. ¶ 5. The solvent vapor is then piped into a condenser, in which the vapor is cooled "by routing it through narrow tubes surrounded by a liquid coolant, causing most of it to turn back into liquid distillate." Morin Decl. ¶ 5. The liquid distillate is then piped into a receiver tank. Morin Decl. ¶ 5.

When the production process is over, the condensed distillate is removed from the receiver tanks. Distillate that is "slightly contaminated" but not considered a hazardous waste is reclaimed and reused. Morin Decl. ¶ 11. Distillate that is "largely water" is piped to an on-site wastewater treatment plant. Morin Decl. ¶ 11. Approximately 39% of collected distillate solvent is considered hazardous waste and is piped to S-535, the facility's hazardous waste storage tank. Morin Decl. ¶ 11. The hazardous waste accumulated in S-535 is shipped offsite for recycling and disposal. Morin Decl. ¶ 11.

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[1] The affidavit of Richard Piligian, a Region 1 scientist, was executed on June 23, 2021, and provided as an attachment to Complainant's Motion for Accelerated Decision.

[2] The declaration of Eric Morin, the Process Engineering Manager at ISP, was executed on June 18, 2021, and provided as an attachment to Respondent's Motion for Accelerated Decision.

On August 1, 2017, Richard Piligian, an environmental scientist with Region 1's RCRA program and a member of the technical working group for the RCRA National Compliance Initiative ("NCI"), conducted a compliance inspection at Respondent's Assonet facility. Piligian Aff. ¶ 6. The inspection, as part of the NCI, aimed to "evaluate general RCRA compliance with a focus on compliance with RCRA air emission standards." Piligian Aff. ¶ 8. Mr. Piligian conducted the inspection alongside Eric Morin, Respondent's Environmental Manager; Fred Hanna, Respondent's Plant Manager; David Armstrong, Respondent's Environmental Program Manager; and Jay Daley, a facility supervisor. Piligian Aff. ¶ 13.

During the inspection, Mr. Piligian observed the reactor vessels that the facility uses for batch chemical reactions. Piligian Aff. ¶ 16. Mr. Morin and Mr. Daley informed Mr. Piligian that:

> each reactor is connected by pipes to a condenser, and each condenser is connected by pipes to a receiver tank. As part of the production process, the reactors are heated in order to separate solvent from the product being produced. When a reactor is heated, solvent vapor is created that is piped to a condenser. The solvent vapor is condensed into liquid in the condenser, and then sent to a receiver tank for collection and storage.

Piligian Aff. ¶ 16. Mr. Piligian also observed Respondent's manufacturing processes and waste storage facilities and reviewed Respondent's records, including "manifests, training records, contingency plan, and inspection logs." Piligian Aff. ¶ 12. Mr. Daley informed Mr. Piligian that "he was not aware of the RCRA air emission standards for hazardous waste tanks" and that the facility did not have a compliance program in place for the receiver tanks. Piligian Aff. ¶ 22. Mr. Piligian also found that while "some equipment at the facility was being monitored in accordance with 40 C.F.R. Part 265, Subpart BB ('Subpart BB'), no hoses, valves, connectors or common lines connected to the [r]eceiver [t]anks were identified by ISP as being subject to Subpart BB." Piligian Aff. ¶ 23.

Following this inspection, Complainant issued an Early Warning Notice to Respondent regarding potential RCRA violations identified during the inspection. Compl. ¶ 26. Complainant then initiated this action to compel Respondent's compliance with RCRA Subparts BB and CC of 40 C.F.R. Part 265.

II. APPLICABLE LAW AND REGULATIONS

A. Substantive Law

Congress enacted RCRA in 1976 as an amendment to the Solid Waste Disposal Act "to promote the protection of health and the environment and to conserve valuable material and energy resources." RCRA § 1003(a), 42 U.S.C. § 6902(a). To reach this objective, Subtitle C of RCRA "empowers EPA to regulate hazardous wastes from cradle to grave[.]" *City of Chicago v. Env't Def. Fund*, 511 U.S. 328, 331 (1994). "Under the relevant provisions of Subtitle C, EPA has promulgated standards governing hazardous waste generators and transporters, . . . and

owners and operators of hazardous waste treatment, storage, and disposal facilities[,]" directing them "to comply with handling, recordkeeping, storage, and monitoring requirements." *Id.* at 331-32; *see* 40 C.F.R. Parts 260 through 281.

In 1984, Congress enacted the Hazardous and Solid Waste Amendments ("HSWA") to RCRA, which required EPA to promulgate hazardous waste emission control regulations. *See* 42 U.S.C. §§ 6921-6939g. EPA's HSWA regulations are set forth at 40 C.F.R. Parts 264-65, Subparts AA, BB, and CC. Subpart BB requires equipment that contains or contacts hazardous waste to be "marked in such a manner that it can be distinguished readily from other pieces of equipment." 40 C.F.R. § 265.1050(c). Under Subpart BB, facilities are required to equip sampling connection systems with a closed-purge, closed-loop, or closed-vent system, *id.* § 265.1055(a), and manage pumps, compressors, and pressure relief devices in gas/vapor services in compliance with the emission standards in 40 C.F.R. §§ 265.1052-54. Additionally, Subpart BB requires facilities to comply with monitoring and recording of valves, pumps, and connectors. *Id.* §§ 265.1057-58.

Subpart CC establishes air emission standards and air emission control for hazardous waste storage tanks, *id*. § 265.1085, surface impoundments, *id.* § 265.1086, containers, *id.* § 265.1087, and closed-vent systems and control devices, *id.* § 265.1088. Under Subpart CC, the owner and operator of a facility is required to "inspect and monitor air emission control equipment," *id.* § 265.1089(a), and "develop and implement a written plan and schedule to perform the inspections and monitoring required by paragraph (a) of this section," *id.* § 265.1089(b). Facilities must also comply with recordkeeping requirements mandated by the rule. *Id.* § 265.1090.

While the Administrator of the EPA generally oversees federal RCRA standards, a state may apply to "administer and enforce" its own hazardous waste program that is equivalent to the national standards. RCRA § 3006, 42 U.S.C. § 6926; *see* 40 C.F.R. Parts 271-72. When a state administers its own hazardous waste program, the Administrator retains authority to enforce the federally-authorized program by assessing administrative penalties and imposing compliance orders for violations of RCRA, the federal regulations, or the state hazardous waste program. RCRA §§ 3008(a), 3006(g), 42 U.S.C. §§ 6928(a), 6926(g). The Administrator has granted the Commonwealth of Massachusetts authority to administer its own federally equivalent hazardous waste program, which is codified in Title 310 of the Code of Massachusetts Regulations ("C.M.R."), 310 C.M.R. § 30.001, et seq. ("MAHW regulations").

Both the federal RCRA regulations and the MAHW regulations limitedly exempt hazardous wastes from regulation under specific circumstances. Of importance here is the "manufacturing process unit" exemption ("MPU exemption"), codified at 40 C.F.R. § 261.4(c) and 310 C.M.R. § 30.140(1)(f). Under the MPU exemption:

> A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and

> 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

40 C.F.R. § 261.4(c).

B. Standard for Adjudicating a Motion for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. Under Section 22.20(a) of the Rules of Practice, an Administrative Law Judge is authorized to:

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

40 C.F.R. § 22.20(a). Rule 22.20(a) is considered analogous to Rule 56 of the Federal Rules of Civil Procedure and, while the Federal Rules do not apply here, the Environmental Appeals Board ("EAB") has "consistently looked to Rule 56 and its jurisprudence when adjudicating motions for accelerated decisions under Part 22." *U.S. Dep't of the Army*, EPA Docket No. CERCLA-08-2020-0001, 2021 WL 3137174, at *1 (ALJ, July 14, 2021) (Order on Motions for Accelerated Decision); *see BWX Techs.*, 9 E.A.D. 61, 74 (EAB 2000) ("Though the Federal Rules do not apply to these proceedings, we have in our previous rulings turned to Rule 56 and its copious jurisprudence for guidance."). Federal courts, too, have "endorsed this approach, describing Rule 56 as 'the prototype for administrative summary judgment procedures' and its associated jurisprudence as 'the most fertile source of information about administrative summary judgment.'" *U.S. Dep't of the Army*, 2021 WL 3137174, at *1 (citing *P.R. Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994)).

Under Rule 56, federal courts may "grant summary judgment if the movant shows that there is no dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A fact is material if "it may affect the outcome of the proceeding." *U.S. Dep't of the Army*, 2021 WL 3137174, at *1. A factual dispute is "genuine" if a fact finder could reasonably find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The facts must be construed "in the light most favorable to the nonmoving party." *BWX Techs.*, 9 E.A.D. at 75 (citing *Anderson*, 477 U.S. at 252).

Therefore, to prevail on a motion for accelerated decision, the moving party must "show that it has established the critical elements of [statutory or regulatory] liability and that [the nonmoving party] has failed to raise a genuine issue of material fact on its affirmative defense[.]"

Rogers Corp. v. EPA, 275 F.3d 1096, 1103 (D.C. Cir. 2002) (citing *BWX Techs.*, 9 E.A.D. at 75). In so doing, the moving party must

> support its assertion that a material fact cannot be . . . genuinely disputed by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact."

U.S. Dep't of the Army, 2021 WL 3137174, at *2 (citing Fed. R. Civ. P. 56(c)(1)).

The nonmoving party must support its allegations by, similarly, citing to "'particular parts of materials in the record' or by 'showing that the materials cited "do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *U.S. Dep't of the Army*, 2021 WL 3137174, at *2 (citing Fed. R. Civ. P. 56(c)(1)). While evidence offered by the nonmoving party "is to be believed and all justifiable inferences are to be drawn in his favor[,]" *BWX Techs*., 9 E.A.D. at 75 (quoting *Anderson*, 477 U.S. at 255), if the evidence provided by the nonmoving party "is merely colorable, or is not significantly probative, summary judgment may be granted." *AFS/IBEX v. AEGIS Managing Agency Ltd.*, 517 F. Supp. 3d 120, 123 (E.D.N.Y. 2021) (citing *Anderson,* 477 U.S. at 249-50).

When both parties move for accelerated decision, as in this case, the standards for review are "the same as those applied when only one party has filed a[n] [accelerated decision] motion." *Selected Risks Ins. Co. v. Schwabenbauer*, 540 F. Supp. 22, 24 (E.D. Pa. 1982). The court must "determine whether either of the parties deserves judgment as a matter of law[.]" *AFS/IBEX*, 517 F. Supp. 3d at 123; *see Morales v. Quintel Ent., Inc.*, 249 F.3d 115, 121 (2d Cir. 2001). "[E]ven if both parties move for summary judgment and assert the absence of any genuine issue of material fact[,]" this Tribunal may still find that a material fact remains in dispute and deny the motions of both parties. *AFS/IBEX*, 517 F. Supp. 3d at 123. Thus, this Tribunal will examine each party's motion "on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Id.* (quoting *Morales*, 249 F.3d at 121).

If an accelerated decision is issued "as to all issues and claims in the proceeding, the decision constitutes an initial decision of the Presiding Officer[.]" 40 C.F.R. § 22.20(b)(1).

III. PROCEDURAL HISTORY

The Complaint alleges that Respondent, a generator of hazardous waste, failed to comply with RCRA, specifically Subparts BB and CC of 40 C.F.R. Part 265. It includes the following allegations:

Count 1: Failure to Comply with Standard for the Storage of Hazardous Waste in Tanks

Complainant alleges that Respondent failed to manage its distillate receiver tanks as hazardous waste tanks and failed to label the distillate receiver tanks with the words "Hazardous Waste,"

identify the types of hazardous wastes being stored, the hazards associated with the hazardous wastes, and the date upon which each accumulation period began, in violation of 310 C.M.R. §§ 30.341(2), 30.694, and 30.696. Compl. ¶¶ 28-33.

Count 2: Failure to Comply with Hazardous Waste Tank Air Emission Standards (Subpart CC)

Complainant alleges that Respondent failed to maintain documents, inspection plans, or inspection records verifying compliance with Subpart CC for any of the eight hazardous waste tanks at its facility, in violation of Subpart CC of 40 C.F.R. Part 265, including Sections 265.1083(b), 265.1085(c)(4), 265.1089(a) and (b), and 265.1090(a) and (b). Compl. ¶¶ 34-44.

Count 3: Failure to Comply with Hazardous Waste Air Emission Standards (Subpart BB) for Labeling Subpart BB Equipment

Complainant alleges that Respondent failed to label its eight hazardous waste tanks in such a manner that the tanks could be distinguished readily from other pieces of equipment, in violation of 40 C.F.R. § 265.1050(c). Compl. ¶¶ 45-50.

Count 4: Failure to Comply with Hazardous Waste Air Emission Standards (Subpart BB) for Monitoring Valves in Light Liquid Service, Gas/Vapor Service, Pumps and Flanges

Complainant alleges that Respondent failed to monitor and maintain records of inspections of the equipment used for transferring hazardous waste to and from the distillate receiver tanks, including transfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds, in violation of Subpart BB of 40 C.F.R. Part 265, including Sections 265.1052(a)(1) and (2), 265.1057(a), and 265.1058(a). Compl. ¶¶ 51-59.

Count 5: Failure to Comply with Hazardous Waste Air Emission Standards (Subpart BB) for Open-Ended Valves and Lines

Complainant alleges that Respondent failed to equip its three open-ended lines with a cap, blind flange, plug, or second valve, in violation of 40 C.F.R. § 265.1056(a)-(c). Compl. ¶¶ 60-64.

Count 6: Failure to Comply with the Hazardous Waste Air Emission Standards (Subpart BB) for Maintaining Records

Complainant alleges that Respondent failed to maintain requisite records for its transfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds used to transfer hazardous waste to and from the distillate receiver tanks and to and from the reactor vessels, in violation of 40 C.F.R. § 265.1064(a), (b), and (g). Compl. ¶¶ 65-70.

Count 7: Failure to Comply with Subparts BB and CC Air Monitoring Methods

Complainant alleges that Respondent inadequately performed gas leak detection monitoring of its tanks and equipment, in violation of 40 C.F.R. §§ 265.1063(a) and (b) and 265.1084(d). Compl. ¶¶ 71-77.

Count 8: Failure to Have an Adequate Training Program

Complainant alleges that Respondent failed to ensure that all employees assigned to perform leak detection monitoring under Subpart BB and monitoring under Subpart CC were adequately trained to ensure the facility's compliance with RCRA standards, in violation of 40 C.F.R. § 265.16 and 310 C.M.R § 30.516(1) and (2). Compl. ¶¶ 78-81.

Count 9: Failure to Conduct and Document Daily Inspections of Hazardous Waste Tanks

Complainant alleges that Respondent failed to perform daily inspections of Tank S-716A, one of its hazardous waste storage tanks, in violation of 310 C.M.R. § 30.696. Compl. ¶¶ 82-86.

Complainant sought a proposed civil penalty of $203,792. Compl. ¶ 88.

On June 26, 2019, Respondent filed an Answer, in which it denied each allegation in the Complaint, a Request for Hearing, and a Motion to Dismiss for Failure to State a Claim. On July 29, 2019, Complainant responded to Respondent's Motion to Dismiss and filed its own Motion to Strike.

The parties then engaged in extensive negotiations on their own. After being unable to reach a settlement, the parties filed a joint motion to initiate the ADR process, which this Tribunal granted on February 10, 2020.

On October 16, 2020, the parties filed the Partial CAFO. The Partial CAFO fully resolved Counts 5, 7, 8, and 9. Partial CAFO ¶ 8. The Partial CAFO partially resolved the portions of Counts 2, 3, 4, and 6 concerning the mid-stream equipment and the downstream equipment.[3] Partial CAFO ¶ 9. The Partial CAFO left unresolved Count 1, as well as the portions of the allegations in Counts 2, 3, 4, and 6 that concern the distillate receiver tanks and the upstream equipment (hereinafter referred to collectively as "receiver tanks" or "distillate receiver tanks").[4] Partial CAFO ¶ 10.

In a Joint Proposed Plan filed with the Partial CAFO, the parties withdrew their then pending motions. *See* Joint Proposed Plan at 1. In the Joint Proposed Plan, the parties agreed that the "central remaining issue in dispute is whether the tanks and equipment cited in the unresolved claims are subject to regulation under Subtitle C of [RCRA], 42 U.S.C. §§ 6921-6939c, and federal and state hazardous waste regulations promulgated pursuant to RCRA." Joint

[3] "Mid-stream equipment" refers to the equipment used to transfer waste from the Receiver Tanks to the facility-wide hazardous waste storage tank, and "downstream equipment" refers to equipment used to transfer waste from the hazardous waste storage tank to transportation vehicles for off-site shipment. *See* Partial CAFO ¶ 9.

[4] "Upstream equipment" refers to "transfer hoses, valves, connectors, flex hoses, pumps and pipe manifolds used to transfer material from condensers to the Receiver Tanks." Partial CAFO ¶ 6.

Proposed Plan at 2. Pursuant to a Prehearing Order issued on October 22, 2020, the parties began engaging in the prehearing exchange of information process.

On June 23, 2021, Respondent filed a Motion for Accelerated Decision as to its liability for the remaining allegations ("Resp't MAD"). Respondent's Motion was accompanied by written declarations from Joel LeBlanc, an expert in chemical engineering, and Eric Morin, the Process Engineering Manager at Respondent's facility. In its Motion, Respondent argues that there are no genuine disputes of material fact concerning Count 1 and the remaining portions of Counts 2, 3, 4, and 6. Instead, Respondent contends that the only issue is whether the receiver tanks are exempt from RCRA regulations under the MPU exemption.

That same day, Complainant filed its own Motion for Accelerated Decision ("Compl't MAD"). Complainant's Motion was accompanied by affidavits from Kevin Schanilec, a Senior Enforcement Engineer with EPA Region 10, and Richard Piligian. In its motion, Complainant too asserts that there are no genuine issues of material fact regarding the remaining counts in the Complaint. Complainant argues that Respondent's "only claimed defense to liability"—the MPU exemption—"fails on the plain language of the exemption and the undisputed facts of the case." Compl't MAD at 3.

On July 8, 2021, Complainant filed a Response to Respondent's Motion for Accelerated Decision ("Compl't Response"). Complainant's Response was accompanied by a supplemental affidavit of Kevin Schanilec. Respondent replied to Complainant's Response on July 19, 2021, with a Reply in Support of its Motion for Accelerated Decision ("Resp't Reply").

On July 8, 2021, Respondent filed an Opposition to Complainant's Motion for Accelerated Decision ("Resp't Response"). Complainant filed a Reply to Respondent's Opposition on July 19, 2021 (Compl't Reply").

IV. PARTIES' ARGUMENTS FOR ACCELERATED DECISION

The parties agree that there are no genuine disputes of material fact concerning the remaining allegations in the Complaint (Count 1 and the remaining portions of Counts 2, 3, 4, and 6), all which concern Respondent's distillate receiver tanks. *See* Resp't MAD at 1; Compl't MAD at 3. Respondent admits that its distillate receiver tanks are "not operated pursuant to the RCRA regulations[.]" Resp't MAD at 8. Even so, Respondent argues that its distillate receiver tanks are "manufacturing process units" that are exempt from RCRA regulation under 40 C.F.R. § 261.4(c) and 310 C.M.R. § 30.140(1)(f). If the MPU exemption applies, Respondent argues, and its distillate receiver tanks are exempt from the MAHW and Subpart BB and CC regulations, then Respondent is not liable for the remaining alleged violations.[5] Resp't MAD at 8. Complainant argues that Respondent's distillate receiver tanks are not exempt from the regulations and, thus, Respondent is liable for the remaining violations. Compl't MAD at 9.

[5] As stated above, the MPU exemption exempts from regulation "hazardous waste which is generated in a . . . manufacturing process unit . . . until it exits the unit in which it was generated." 40 C.F.R. § 261.4(c).

A. Respondent's Argument for Accelerated Decision

Respondent argues that this Tribunal should grant its motion because its distillate receiver tanks are exempt from RCRA regulation under the MPU exemption. Resp't MAD at 8.

Respondent first maintains that its receiver tanks are "components" of its distillation units, which are "explicitly identified" as "an example of the type of unit covered by the exemption." Resp't MAD at 13-14, 12. Respondent suggests this tribunal turn to 40 C.F.R. § 264.1031, in which EPA defined "distillation operation" to include distillate receiver tanks. Resp't MAD at 13-14. Respondent also argues that "EPA has unambiguously and explicitly defined 'distillation unit' to include distillate receiver tanks in a related regulation under the Clean Air Act." Resp't MAD at 17. Respondent contends that the doctrine in statutory construction of *in pari materia* requires this Tribunal to "look at the Clean Air Act definition" because, Respondent claims, the Clean Air Act and RCRA regulations at issue are . . . so interrelated[.]" Resp't MAD at 17-18.

Respondent contends, too, that distillation units include distillate receiver tanks "as a matter of engineering and basic logic." Resp't MAD at 22. Respondent argues that batch distillation, the type of distillation used to manufacture products at Respondent's facility, requires the use of "three irreducible components"—the reactor, condenser, and "one or more receiving tanks." Resp't MAD at 23. Because batch distillation "physically requires a receiver," and because distillation units are exempt from RCRA regulations under the MPU exemption, "distillate receivers are also exempt from RCRA regulation." Resp't MAD at 23-24. Respondent argues, too, that distillate receiver tanks are part of a manufacturing process unit "under RCRA text and precedent." Resp't MAD at 25. Respondent contends that because "RCRA does not grant EPA authority to regulate the generation of hazardous waste, nor the manufacturing or production processes that generate it[,]" the distillate receiver tanks are "definitively outside [Complainant's] RCRA authority." Resp't MAD at 25-26.

Respondent next argues that two earlier decisions by this Tribunal, *General Motors Automobile-North America*, EPA Docket No. RCRA-05-2004-0001, 2006 WL 3406333 (ALJ, March 30, 2006) ("*General Motors*"), and *Chem-Solv, Inc.*, EPA Docket No. RCRA-03-2011-0068, 2014 WL 2593697 (ALJ, June 5, 2014), *aff'd*, 16 E.A.D. 594 (EAB 2015) ("*Chem-Solv, Inc.*"), established that the MPU exemption applies "where the 'integral parts' of a 'production system' are used to 'create a product'—but the exemption does not apply downstream of production, where wastes have become a 'waste disposal problem.'" Resp't MAD at 27. Respondent contends that, based on this "legal test," the MPU exemption applies because the receiver tanks are "an 'integral part' of a 'production system' that is 'creating a product' at the ISP facility" and are not "downstream of the manufacturing process." Resp't MAD at 27.

Respondent further contends that its distillate receiver tanks are "part of a 'manufacturing process unit'" as the term is "reflected elsewhere in law." Resp't MAD at 30-31. Respondent claims that *General Motors* established that a "manufacturing process unit" can include a "*collection* of equipment." Resp't MAD at 30-31. Respondent also argues that the language of the exemption itself lists "comparable exemptions, all of which are clearly systems[.]" Resp't MAD at 31 (emphasis omitted) (asserting that "[a] 'vehicle,' a 'vessel,' and a 'pipeline' are all

complex systems including many individual parts, and a 'manufacturing process unit' can be too"). Respondent suggests that the preamble to the rule containing the exemption lists examples of manufacturing process units, including discharge trays of screens, distillation columns, and flotation units. Resp't MAD at 33-34; *see* 45 Fed. Reg. at 72,025. Respondent claims that distillate receiver tanks are part of the manufacturing process as the tanks also collect "undesired components" that are exempt from regulation "until they are removed[.]" Resp't MAD at 34.

Respondent further suggests that the MPU exemption applies because the distillate receiver tanks "perform a variety of critical manufacturing functions in the production process" that are "integral to the manufacturing process[.]" Resp't MAD at 40. Respondent contends that the distillate receiver tanks "control and monitor various system parameters[,] . . . share the condensing work of the condenser and help to charge raw materials in the reactor." Resp't MAD at 41. Respondent asserts that the receiver tanks, too, "serve[] as a central element in controlling the pressure of the entire production system" and serve as a "vital tool for tracking the progress of the production process[.]" Resp't MAD at 41-42. Respondent explains, thus, that the receiver tanks are "integral" to the manufacturing process because of their "role in tracking the progress of each batch and making critical production decisions." Resp't MAD at 44. Respondent argues, too, that the receiver tanks "play an important role throughout the entirety of distillation as a place for materials that unexpectedly 'bump' out of the reactor, without being properly distilled[.]" Resp't MAD at 44. Additionally, Respondent claims, the distillate receiver tanks "act to a degree like condensers," because "some vapors and fine liquid droplets suspended in the vapor" enter the receiver tanks, in which they "condense or coalesce into additional distillates within the receiver[.]" Resp't MAD at 45-46. As such, Respondent argues, "the formation of distillates in the receivers" is "manufacturing." Resp't MAD at 46.

Lastly, Respondent contends that two of the four receiver tanks at issue are "sometimes used for charging" the reactors, which "underscores how the receivers are integral parts of the ISP manufacturing process." Resp't MAD at 47. Respondent argues that this further demonstrates that the receivers are "designed and operated specifically for performance in a production capacity, not as mere storage tanks." Resp't MAD at 47. Respondent claims the receiver tanks are "used solely for production" and hold liquids "only during the production batches, which frequently last less than 24 hours and never last more than a few days – precisely the type of timeframe that EPA envisioned when it promulgated the MPU exemption." Resp't MAD at 48. Thus, Respondent contends, the "design and operational characteristics of the receiver" are "fundamentally different" from those of a hazardous waste storage tank. Resp't MAD at 48. Because the receiver tanks "function – and are designed and operated – as manufacturing process units," Respondent maintains, "they are exempt from regulation." Resp't MAD at 50.

1. Complainant's Response

In response to Respondent's Motion for Accelerated Decision, Complainant argues, foremost, that Respondent failed to meet its burden of showing that the MPU exemption applies to the distillate receiver tanks. First, Complainant argues the MPU exemption does not apply to distillation units, in general. Complainant suggests EPA substituted the word "distillation unit" for the word "distillation column" in the preamble to the regulation promulgating the exemption.

Compl't Response at 9. Complainant contends that Respondent's reliance on the term "unit" in the preamble to Subparts AA and BB is erroneous because "the term 'distillation unit' is not defined in the text of Subpart AA." Compl't Response at 10. Further, Complainant argues that the "regulatory subject matter and purposes" of Subpart AA are "very different from those of Section 261.4(c) and the MPU Exemption." Compl't Response at 10. Thus, Complainant alleges that the "Subpart AA definitions of covered equipment or processes would scarcely be relevant in construing potentially covered equipment under the MPU Exemption." Compl't Response at 12. Additionally, Complainant contends that Respondent's reliance on the Subpart AA definition of "distillation operation" is misplaced, as, according to Complainant, "distillation operation" refers to "the process that happens exclusively in the reactor tanks[,]" not the receiver tanks. Compl't Response at 13. Complainant argues, too, that this Tribunal should not "look to" the Clean Air Act's definition of "distillation unit." Compl't Response at 13. Complainant contends that the doctrine of *in pari materia* "does not apply to statutes and regulations that have different purposes or objectives" and that, here, the Clean Air Act and RCRA "have radically different purposes." Compl't Response at 14.

Next, Complainant maintains that the test put forward by Respondent—that the MPU exemption applies "where the 'integral parts' of a 'production system' are used to 'create a product' . . . finds no support in *General Motors* and *Chem-Solv*." Compl't Response at 20. Complainant contends that, in *Chem-Solv, Inc.*, this Tribunal "considered whether or not manufacturing was occurring" in the facility's hazardous waste storage pit, not whether the storage pit was "an integral part of the production process." Compl't Response at 21. Instead, Complainant argues, the test to determine whether the MPU exemption applies is to consider whether the equipment is "'part of the production system' used to 'create a product.'" Compl't Response at 21 (referencing *General Motors*, 2006 WL 3406333, at *41-44). Because "[no] product is produced in the Receiver Tanks," Complainant argues, "the Receiver Tanks are part of Respondent's waste management system" and the exemption should not apply. Compl't Response at 22.

Complainant argues, too, that Respondent incorrectly asserts that "manufacturing process unit" is "generally considered to be a 'collection of equipment' or 'system[.]'" Compl't Response at 23. Complainant contends that 40 C.F.R. § 261.4(c) is "tailored" to cover only "single pieces of equipment[,]" not "systems" of equipment. Compl't Response at 24. Complainant suggests that "all of the exemptions in Section 261.4(c) refer to individual pieces of equipment" and "singular" terms, such as "the tank of a tank truck" and "the hold of a ship or a barge." Compl't Response at 25 (referencing Hazardous Waste Management Systems, 45 Fed. Reg. at 72,025). Complainant argues that the Section 261.4(c) preamble "lists three specific examples of MPUs: distillation columns, flotation units, and discharge trays of screens[,]" all of which are "clearly singular pieces of equipment." Compl't Response at 26. Additionally, Complainant disagrees with Respondent's assertion that other EPA guidance and RCRA exemptions demonstrate that "'units' can include multi-equipment systems." Compl't Response at 26.

Additionally, Complainant disagrees that Respondent's receiver tanks "serve functions" in the production process other than collecting and managing used liquid solvent. Compl't Response at 29. Complainant disputes Respondent's claim that the distillate receiver tanks

"serve a pressure control role" in the distillation process. Compl't Response at 32. "Using pressure control to ensure the proper flow of unwanted solvents to the [receiver] Tanks," Complainant argues, "does not convert the Receiver Tanks into manufacturing process units for the purpose of the MPU Exemption." Compl't Response at 33. Similarly, Complainant argues that Respondent's use of the receiver tanks to monitor solvent levels is not a "manufacturing process" that would "convert the Receiver Tanks into manufacturing process units." Compl't Response at 33. Complainant contends, too, that manufacturing does not occur within the receiver tanks because of the "potential" for "bumping" of material from reactor into the receiver tanks and the potential for "minute and insignificant trace fugitive vapors" to condense in the receiver tanks. Compl't Response at 34.

Complainant disagrees, too, that receiver tanks "are the only way to manage the material exiting the condenser" and suggests alternative distillation designs that "do not utilize receiver tanks." Compl't Response at 30. Accordingly, Complainant argues, "the act of distillation" does not require receiver tanks, as distillation can occur "without any open connection" to the receiver tanks. Compl't Response at 31. Therefore, Complainant argues that Respondent has not met its burden of proving that products are manufactured within the tanks. As such, Complainant contends that the receiver tanks are not subject to the MPU exemption. Compl't Response at 38.

2. Respondent's Reply

Respondent counters Complainant's Response by first arguing that a manufacturing process unit can, in fact, be a "system" of equipment. Respondent argues that "vessels, vehicles, [and] pipelines," which Complainant referred to as "singular," are all "multicomponent systems." Resp't Reply at 2. If those "multicomponent systems" are exempt from RCRA, Respondent argues, then distillate receiver tanks, as "part of a single, collective, multicomponent manufacturing distillation system[,]" are, as well. Resp't Reply at 2.

Next, Respondent suggests that the test proposed by Complainant is "more favorable" to Respondent as "there is no actual dispute in this case that ISP's distillate receivers are 'part of the production system.'" Resp't Reply at 5-6. Respondent also disputes Complainant's response that the distillate receiver tanks are used for "'waste disposal' rather than production[.]" Resp't Reply at 7. Respondent argues that without the receiver tanks, it "could not produce its finished product[.]" Resp't Reply at 8. Thus, Respondent contends, equipment that is "physically necessary" for production to begin is "part of the production process" and exempt from RCRA under the MPU exemption. Resp't Reply at 7.

Respondent argues, too, that Complainant's arguments "about the nature and mechanics of distillation are both wrong and mutually inconsistent." Resp't Reply at 10. Respondent contends that "distillation" is the "actual, permanent separation of components," not the mere act of separation that first occurs in the reactor, as Complainant alleges. Resp't Reply at 11. Because the separation of components could not occur "in ISP's reactors alone[,]" Respondent argues that distillation requires the condenser and receiver, as well. Resp't Reply at 11-12. And, without the receiver to collect the liquids, the condensed liquids would be "immediately returned to the reactor in a reflux loop." Resp't Reply at 12. Therefore, Respondent contends that the

distillate receiver tanks are "physically necessary" to allow for the "permanent separation of components." Resp't Reply at 12-13.

B. Complainant's Argument for Accelerated Decision

In its own Motion for Accelerated Decision, Complainant argues that Respondent's receiver tanks are subject to the RCRA standards and that no exemption applies. According to Complainant, "Respondent has effectively admitted" liability because Respondent's affirmative defense "necessarily includes an acknowledgment that the Receiver Tanks hold hazardous waste that would be RCRA-regulated but for the asserted defense." Compl't MAD at 18. Thus, Complainant argues, "if Respondent's MPU Exemption defense fails, the Receiver Tanks and their associated equipment are subject to RCRA regulation as hazardous waste storage tanks and hazardous waste-contacting equipment, and Respondent has admittedly not complied with the MAHW and federal RCRA regulations set forth in the remaining counts of this case." Compl't MAD at 24.

In arguing that the MPU exemption does not apply to Respondent's Receiver Tanks, Complainant first contends that the "plain language of the MPU exemption dictates that it applies to individual pieces of equipment." Compl't MAD at 27. Complainant argues that the term "manufacturing process unit" is "singular" and that the "larger list of terms" in the exemption are all "singular" as well. Compl't MAD at 27. Complainant further argues that because "unit" is not defined by the regulations, the ordinary definition of "unit" should apply. Compl't MAD at 27. Complainant suggests that the ordinary definition of "unit" is "a singular component, with a discrete function, that is a part of a larger system." Compl't MAD at 28. Thus, Complainant contends, it is "erroneous" to analyze "the exemption's applicability as including the reactor vessels and the condensers along with the Receiver Tanks[.]" Compl't MAD at 28.

Complainant next argues that the MPU exemption "applies only to a unit where 'manufacturing' occurs." Compl't MAD at 30. Relying on this Tribunal's definition of "manufacturing" established in *Chem-Solv, Inc.*, Complainant suggests that "manufacturing" requires "the transformation of raw materials or components into products." Compl't MAD at 30-31. Because "no 'manufacturing' occurs in the Receiver Tanks," and because "no creation of products occurs in them[,]" Complainant contends that no manufacturing occurs in the receiver tanks. Compl't MAD at 31.

Finally, Complainant argues that the "plain language" of the MPU exemption requires that hazardous waste be generated "within the exempted unit." Compl't MAD at 36. Complainant contends that hazardous waste is "generated in the condensers prior to its collection in the Receiver Tanks." Compl't MAD at 37. Thus, Complainant argues that the MPU exemption does not apply to the receiver tanks and that Respondent is liable for the remaining portions of the violations alleged in Counts 1, 2, 3, 4, and 6 of the Complaint.

1. Respondent's Response

In responding to Complainant's Motion for Accelerated Decision, Respondent again argues that a "unit" includes "equipment systems." Resp't Response at 2. Respondent argues

that "EPA has explicitly clarified that the exemption covers the *whole* system, not just individual components within it." Resp't Response at 4. Respondent contends that both the ordinary and chemical engineering definitions of "unit" provide that a manufacturing process unit can be a "system" of equipment used for the purpose of manufacturing. Resp't Response at 7. As such, "distillation systems – including the receivers – are manufacturing process units." Resp't Response at 7.

Respondent argues, too, that Complainant erred in formulating a test to define the MPU exemption. Respondent argues that Complainant "offers no citation" for the assertion that manufacturing requires "raw materials" to be "transformed into products within the exempted unit." Resp't Response at 8. Further, Respondent argues that this Tribunal should not consider "dicta from *Chem-Solv* about 'intentional physical or chemical changes' in a liquid trash pit" as the "global test" for the MPU exemption. Resp't Response at 10. Respondent argues that "[i]n referencing 'physical or chemical change'" in *Chem-Solv, Inc.*, "the Tribunal was not defining the scope of the 'manufacturing process unit' in general and for future cases, and it was not drawing the line between manufacturing and waste management[.]" Resp't Response at 11.

Respondent responds, too, that "this Tribunal has already established a clear test for determining the scope of the exemption – i.e., where 'manufacturing' ends and waste management begins." Resp't Response at 15. Citing *General Motors*, Respondent argues that the MPU exemption "applies to 'integral parts' of a production system that is used to create a product, but not downstream of production, where wastes have become a 'waste disposal problem.'" Resp't Response at 15. As set forth in Respondent's Motion for Accelerated Decision, Respondent contends that its distillate receiver tanks are integral to the manufacturing process and that distillation "physically could not occur without the receivers." Resp't Response at 18.

2. Complainant's Reply

Much of the argument contained within Complainant's Reply to Respondent's Response to its Motion for Accelerated Decision has been discussed. In brief, Complainant responds, first, that the MPU exemption applies to "individual pieces of equipment" and not to individual pieces of "hardware," nor to "systems" of equipment. Compl't Reply at 6. Complainant explains that the "examples specific to the MPU Exemption – distillation columns, flotation units, discharge trays of screens – are generally individual pieces of equipment." Compl't Reply at 7. Complainant disagrees with Respondent's assertion that those "specific examples" are comprised of "complex system[s] of equipment," arguing that "[c]ommon configurations of these pieces of equipment are considered individual devices (even if comprised of hardware and other component pieces)." Compl't Reply at 7.

Complainant responds, too, that Respondent erred in articulating Complainant's own test. Complainant contends that its "position on the MPU Exemption has been the same throughout the course of this litigation: the MPU Exemption applies 'only to a unit where "manufacturing" occurs' and only when 'hazardous waste [is] . . . generated within the exempted unit.'" Compl't Reply at 11. Complainant explains that "these dual requirements flow directly" from the "text of the MPU Exemption itself." Compl't Reply at 12 (internal citations omitted).

V. DISCUSSION

As stated, the parties agree that the only remaining issue in dispute is whether Respondent's distillate receiver tanks are exempt from RCRA regulation under the MPU exemption. The MPU exemption, codified at 40 C.F.R. § 261.4(c), provides that:

> A hazardous waste which is generated in a . . . manufacturing process unit . . . is not subject to regulation under Parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of Section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

As Respondent "does not dispute that the four receivers were not operated pursuant to the RCRA requirements," if the MPU exemption does not apply, Respondent is liable for the remaining counts set forth in the Complaint. Resp't MAD at 8. If the MPU exemption *does* apply, then Respondent's receiver tanks are not subject to RCRA regulation, and the remaining counts will be dismissed.

For the reasons discussed below, I find that while Respondent's distillate receiver tanks are not operated in compliance with applicable sections of Subparts BB and CC of 40 C.F.R. Part 265, Respondent's distillate receiver tanks are exempt from regulation under the MPU exemption. Thus, Respondent's Motion shall be **GRANTED**, and Complainant's Motion shall be **DENIED**. As Respondent is not liable for the remaining charges in the Complaint, this matter shall be **DISMISSED.**

A. The MPU Exemption Exempts Respondent's "Distillation Unit(s)" from RCRA Regulation

While the term "manufacturing process unit" is not defined within the exemption itself, the preamble to the rule containing the MPU exemption is instructive of the Agency's intent in promulgating the rule. In the preamble, the Agency explained that manufacturing process units are units that "are capable of holding, and are typically operated to hold, the hazardous wastes which are generated in them, until the wastes are purposefully removed." 45 Fed. Reg. 72,024, 72,025 (Oct. 30, 1980). Because hazardous wastes contained in such units are "contained against release into the environment . . . [,] the risks they pose to human health or the environment are very low and are only incidental to the risks posed by the valuable product or raw material with which they are associated." *Id.* Thus, "hazardous waste generated in process units, such as distillation columns, flotation units, and discharge trays of screens and in associated non-waste-treatment process units such as cooling towers . . . should only be subject to regulation when it is removed from the unit." *Id*.

The preamble further clarifies that:

> [a]s represented by the above examples, most of these are tanks or tank-like units (e.g. *distillation units*) which are designed and operated to hold valuable products or raw materials in storage or transportation or during manufacturing. Because of their design and operation, these units are capable of holding, and are typically operated to hold, the hazardous wastes which are generated in them, until the wastes are purposefully removed.

Id. (emphasis added).

Respondent suggests that the preamble "explicitly identified 'distillation units' as an example of the type of unit covered by the exemption." Resp't MAD at 12. As its distillate receiver tanks are part of its distillation unit, Respondent contends, its receiver tanks should be considered manufacturing process units, as well. Resp't MAD at 12.

Complainant disagrees, contending that EPA did not intend to exempt "distillation units" from the RCRA regulations. Instead, Complainant argues, EPA intended to list "distillation columns" as the type of unit "potentially exempt" under the MPU exemption. Compl't Response at 9. To support this argument, Complainant turns to an EPA guidance document, in which the Agency referred to "distillation columns that treat such hazardous wastes" as an example of the type of equipment exempt from RCRA standards under the MPU exemption. Compl't Response at 9-10 (citing *Hazardous Waste TSDF-Technical Guidance Document for RCRA Air Emission Standards for Process Vents and Equipment Leaks*, EPA-450/3-89-021, July 1990 (p. 3-3)).

There is little merit to Complainant's argument, as the preamble plainly lists "distillation units" as an example of a "tank-like unit" that temporarily holds hazardous waste during manufacturing. Had EPA intended "distillation unit" to mean "distillation column," it was incumbent upon the Agency to write "distillation column." *See* 45 Fed. Reg. at 72,025. Further, as Respondent contends, "EPA's parenthetical reference to 'distillation units' in the preamble to the rule was not a one-off or otherwise incidental to the definition of manufacturing process unit." Resp't MAD at 13. In its own directives and memoranda that later clarified the MPU exemption, EPA explicitly identified both distillation columns *and* distillation units. *See* Memorandum from Barnes Johnson, Director, EPA Office of Resource Conservation and Recovery, to RCRA Division Directors (Oct. 3, 2016) (available at https://rcrapublic.epa.gov/files/14884.pdf) (Resp't MAD, Attach. 3) (explaining that "in the preamble to the interim final rule promulgating the exemption . . . most . . . [manufacturing process] units are tanks or tank-like units (e.g. distillation units)"); Letter from David Bussard, Director, EPA Characterization and Assessment Division, to Charles D. Duthler, ICI Composites, Inc. (Jan. 26, 1995) (available at https://rcrapublic.epa.gov/files/11935.pdf) (Resp't MAD, Attach. 2) (describing examples of manufacturing process units as "tanks, or tank-like units (e.g., distillation units) which are designed to hold valuable products or raw materials in storage or transportation or during manufacturing")

Thus, when distillation units are operated to hold incidental wastes during the manufacturing process, such distillation units can be categorized as "manufacturing process

units." The issue before this tribunal, therefore, turns on whether Respondent's distillate receiver tanks are part of its distillation units.

B. Respondent's Distillate Receiver Tanks are Part of Its Distillation Unit(s)

Respondent argues that while neither the preamble nor the rule containing the MPU exemption define "distillation unit," this Tribunal can utilize other EPA regulatory text to find that its distillate receiver tanks are part of its distillation units. *See* Resp't MAD at 14. First, Respondent turns to the regulations promulgated under the Clean Air Act to support its position that "distillation units" encompass receiver tanks. Respondent argues that "EPA has unambiguously and explicitly defined 'distillation unit' to include distillate receivers in a related regulation under the Clean Air Act." Resp't MAD at 17. In the Clean Air Act regulations, EPA defines "distillation unit" as:

> a device or vessel in which one or more feed streams are separated into two or more exit streams, each exit stream having component concentrations different from those in the feed stream(s). The separation is achieved by the redistribution of the components between the liquid and the vapor phases by vaporization and condensation as they approach equilibrium within the distillation unit. Distillation unit includes the *distillate receiver*, reboiler, and any associated vacuum pump or steam jet.

40 C.F.R. § 63.101(b) (emphasis added).

To explain how Clean Air Act regulations can bear on the interpretation of RCRA regulations, Respondent relies on the doctrine of *in pari materia*. Respondent contends that "regulations should be read *in pari materia* when the two regulations 'relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object.'" Resp't MAD at 18 (citing *In re Robison*, 665 F.2d 166, 171 (7th Cir. 1981) (quoting 2A Sands, Sutherland Statutory Construction, § 51.03 (4th ed. 1973))). Respondent further explains that when one statute or regulation "deals with a subject in general terms, and another deals with a part of the same subject in a more detailed way, the two should be harmonized if possible[.]" *In re Guardianship of Penn*, 15 F.3d 292, 294 (3d Cir. 1994) (further citations omitted).

Here, Respondent contends that the Clean Air Act and RCRA share an "overarching purpose" of regulating "the exact same equipment" to prevent emissions and leaks; thus, the "regulatory regimes overlap directly." Resp't MAD at 19. Respondent argues that because the Clean Air Act definition of "distillation unit" includes a "distillate receiver," "then a distillation unit must also include a distillate receiver under closely intertwined RCRA regulations." Resp't MAD at 21. Further, Respondent contends that RCRA "directs" the Agency to "avoid duplication, to the maximum extent possible, with the appropriate provisions of the Clean Air Act" in promulgating its RCRA regulations. Resp't MAD at 20 (citing 42 U.S.C. § 6905(b)). Respondent thus argues that, in promulgating the MPU exemption, the Agency not only "avoid[ed] duplication" with the Clean Air Act but also "explicitly borrowed" and "cross-

referenced" standards from the Clean Air Act. Resp't MAD at 20; *see* 55 Fed. Reg. at 25,471; 40 C.F.R. § 263.1063(b)(1).

Complainant argues that Respondent misconstrues a primary principle of *in pari materia*: that "canons of statutory construction are guidelines, not hard-and-fast rules." Compl't Response at 14 (citing *Chickasaw Nation v. United States*, 534 U.S. 84, 93-95 (2001)); *see Env't Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007) (citing *Atl. Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)) (holding that the term "modification" could be defined differently throughout the Clean Air Act as "[m]ost words have different shades of meaning and consequently may be variously construed, not only when they occur in different statutes, but when used more than once in the same statute or even in the same section"). Importantly, Complainant continues, *in pari materia* should not be applied if the statutes or regulations at issue "have radically different purposes." Compl't Response at 14.

In the present case, Complainant suggests, and I agree, that the relevant sections of the Clean Air Act and RCRA indeed have "radically different purposes." Compl't Response at 14. While both the Clean Air Act and Subparts BB and CC of RCRA regulate air pollution, the MPU exemption "does not deal with air emissions at all[.]" Compl't Response at 14. Instead, as Complainant argues, "in contrast" to the Clean Air Act air emission regulations, "which seek to control air emissions from various emission points, Section 261.4(c) and the MPU Exemption define a limited exemption from full RCRA regulation as long as—and only as long as—certain defined conditions are met." Compl't Response at 14. Furthermore, this Tribunal previously declined to apply the "significantly different jurisdictional mandates [of] the Clean Air Act" to the MPU exemption. *General Motors*, 2006 WL 3406333, at *34 (finding that EPA's definition of "paint shop" in the Clean Air Act regulations was "not persuasive for defining the extent of a manufacturing process unit under RCRA"). Thus, I shall decline to apply the Clean Air Act regulations' definition of "distillation unit" to the MPU exemption.

Respondent next turns to the preamble to the RCRA Organic Air Emission Standards, Subparts AA and BB, to support its argument that distillate receiver tanks are part of distillation units under the MPU exemption. *See* 40 C.F.R. Parts 264-65; 55 Fed. Reg. 25,454, 25,471 (June 21, 1991). In the preamble to the Subparts AA and BB rulemaking, EPA explained that a "process vent" is subject to RCRA standards "if the vent is part of a hazardous waste distillation, fractionation, thin-film evaporation, solvent extraction, or air or steam stripping unit[.]" Resp't MAD at 15 (citing 55 Fed. Reg. at 25,471). The preamble further clarified that this updated standard applies to "process vents on tanks (e.g. *distillate receivers* or hot wells) if emissions from the process operations are vented through the tank." Resp't MAD at 15 (emphasis added). Respondent contends that, by "explain[ing] the extent of a 'distillation unit' under RCRA" in the Subpart AA preamble, EPA "made clear . . . that a distillate receiver is part of a 'distillation unit.'" Resp't MAD at 15.

Complainant disagrees, arguing that the Subparts AA/BB preamble simply defines the types of process vents and related equipment that are controlled by the updated standards. Compl't Response at 11-12. Complainant contends that "even if the Subpart AA regulations contained a definition of 'distillation unit' . . . , that definition would not control an inquiry into what 'distillation unit' might mean" as applied to the MPU exemption, as Subpart AA regulates

"hazardous waste emissions vented into the atmosphere" and not hazardous waste during the manufacturing process. Compl't Response at 12.

Indeed, while the Subparts AA/BB preamble clarifies that process vents on a wide array of hazardous waste processing equipment are subject to the amended standards set forth in the regulation, the preamble does not define "distillation unit" as the term is used in the MPU exemption. The fact that process vents on distillate receiver tanks are now subject to the amended standards does not inherently suggest that *all* distillation units include distillate receiver tanks. Instead, the Subparts AA/BB preamble makes clear that if a hazardous waste facility's distillation unit includes a distillate receiver tank, the standards apply to the vents of that tank, as well. The preamble does not suggest, though, that distillate receiver tanks are natural, requisite parts of *all* distillation units. *See* Resp't MAD at 15.

The final regulatory text that Respondent turns to is the RCRA Subpart AA definition of "distillation operation." *See* 40 C.F.R. § 264.1031; *see also* 40 C.F.R. §§ 265.1031, 265.1051. Subpart AA defines "distillation operation" as "an operation, either batch or continuous, separating one or more feed stream(s) into two or more exit streams. . . . The separation is achieved by the redistribution of the components between the liquid and vapor phase as they approach equilibrium within the distillation unit." *Id*. Respondent argues that a "distillation operation," like its "distillation unit," is comprised of "distinct chambers where separated components are redistributed within the unit while distillation occurs." Resp't MAD at 16. Because a distillation operation inherently includes separate components that allow for separation and redistribution, Respondent contends, "distillate receivers *must* be part of 'distillation units.'" Resp't MAD at 16-17.

Complainant contends that Respondent "misconstrues" Subpart AA's "straightforward description of distillation[.]" Compl't Response at 13. Complainant argues that "separation is accomplished *through* redistribution; it is not 'separation *and* redistribution,' as if they were two separate steps." Compl't Response at 13. Complainant thus provides that a distillation operation requires only a reactor vessel, as "the only unit in which the separation/redistribution of the feed streams occurs is the reactor." Compl't Response at 13. Once the solvent vapor is separated from the product in the reactor, Complainant explains, "no further redistribution between phases can occur." Compl't Response at 13. Therefore, Complainant claims, "the entirety of" the Subpart AA definition of "distillation operation" describes "the process that happens exclusively in the reactor tanks." Compl't Response at 13.

I agree with Complainant's contention that the Subpart AA definition does not "define" a distillation unit under the MPU exemption. However, the Subpart AA definition of "distillation operation" requires the separation of the liquid and vapors into "two or more exit streams," indicating that a distillation operation, and therefore the distillation unit used in the distillation operation, must be comprised of each individual component that is essential to the separation and redistribution process. Thus, the definition clarifies that, under RCRA, a distillation operation is comprised of not just the vessel in which distillation begins, but of the components in which liquid solvents settle after being redistributed and exiting the reactor. Here, I find that Respondent's distillation units are comprised, too, of not just the reactor vessels, but of the condensers and distillate receiver tanks, as well.

C. Because Respondent's Distillate Receiver Tanks are Part of its Manufacturing Process, its Distillate Receiver Tanks are Exempt Under the MPU Exemption

Finding that Respondent's distillate receiver tanks are parts of its "distillation units" does not, on its own, exempt the receiver tanks from RCRA under the MPU exemption. Instead, as this Tribunal's precedent established, the MPU exemption applies only if the distillate receiver tanks are part of the "manufacturing process." Resp't MAD at 21-22.

In *Chem-Solv, Inc.,* this Tribunal found that a hazardous waste storage pit was not exempt under the MPU exemption because the "primary purpose" of the waste pit was to store waste, and not to produce a product or store raw materials. 2014 WL 2593697, at *77. In *Chem-Solv, Inc.*, the complainant alleged that the respondent, Chem-Solv, Inc., operated a hazardous waste storage pit (referred to as "the Pit") at its chemical blending and distribution facility in violation of RCRA and the Commonwealth of Virginia's federally authorized hazardous waste management program. *Id.* at *12-14, *1. Chem-Solv, Inc. argued that the Pit, which the facility primarily used to dispose of rinsate, line flushes, wastewater, and other waste products, was exempt from regulation under the MPU exemption. *Id.* at *47. Chem-Solv, Inc. claimed that the Pit was a manufacturing process unit because "rinsate" from the Pit was occasionally used to wash used storage drums and to manufacture one of its products. *Id.* at *72. Chem-Solv, Inc. argued that "these activities [met] the definition of 'manufacturing'" and so "the materials generated inside" the Pit could not be subject to regulation as "hazardous waste under RCRA." *Id.* The complainant argued that the MPU exemption did not apply to the Pit because, first, the Pit was not used in the manner Chem-Solv, Inc. suggested and, second, even if the Pit was used in such a manner, the Pit was not part of a manufacturing process because it "functioned at least part of the time as a waste treatment tank." *Id.* at *74.

This Tribunal agreed with the complainant and found that the MPU exemption did not apply to the Pit. *Id.* at *75. The Pit, this Tribunal explained, "was a tank dedicated to storing waste generated by line-flushing and drum-washing activity." *Id.* "[E]ven if the Pit water was used as [Chem-Solv] claim[ed]," this Tribunal continued, the MPU exemption "still would not apply" because neither "repackaging chemicals" from the Pit into a de novo product nor "drum washing fall[] into the definition of 'manufacturing.'" *Id.* at *75-76. While "manufacturing" is not defined in the RCRA statute nor regulations, this Tribunal considered the "ordinary, everyday meaning" of the word as applied by the Environmental Appeals Board in *General Motors Automotive-North America*, 14 E.A.D. 1 (EAB 2008) (Remand Order). There, the Environmental Appeals Board defined "manufacturing" as "to make (as raw material) into a product suitable for use . . . [;] to make from raw materials by hand or by machine . . . [;] to produce according to an organized plan and with division of labor . . . ." 14 E.A.D. at 79 n.54 (quoting *Manufacturing*, *Webster's Third New Int'l Dictionary* 1378 (Philip Babcock Gove ed., 1993)). This Tribunal determined that, "[r]ead in its entirety, this definition implies that 'manufacturing' entails an element of creation or transformation as raw materials or components are turned into substantively different products." *Chem-Solv, Inc.*, 2014 WL 2593697, at *76. Based on these definitions of manufacturing, this Tribunal disagreed that manufacturing encompassed the act of "repackaging chemicals from bulk storage containers into drums suitable for sale and distribution." *Id.* at *75. Defining "manufacturing" in such a manner would be

"overbroad," this Tribunal explained, as it would allow "every tank, hose, or pipeline associated with industry or manufacturing" to be exempt as a manufacturing process unit "without regard to the unit's specific function." *Id.* This Tribunal found that Chem-Solv, Inc.'s argument that "its drum washing falls within the definition of manufacturing" was equally "unpersuasive" as "the act of cleaning dirty drums[,]" no matter how routine and organized, "was simply not the same as 'manufacturing' clean drums." *Id.* at *76. Instead, this Tribunal found that "the Pit's sole function was to collect [] rinsate for potential disposal or reuse[;]" thus, the Pit was equivalent to "a waste storage unit rather than a[] [manufacturing process unit]." *Id.*

This Tribunal further found that the Pit was similar to units that EPA had earlier identified as waste storage units, not manufacturing process units, in its own memoranda and directives. For example, in a May 2000 memorandum, Elizabeth A. Cotsworth, the director of the EPA Office of Solid Waste, explained that the piping system used to pipe hazardous waste from a reactor discharge unit to a manifold, where the waste would then be "reused, recycled, or sent for off-site disposal as a hazardous waste" was "not part of the process unit." Memorandum from Elizabeth A. Cotsworth, Director, Office of Solid Waste, to George Pavlou, Director, Division of Enforcement and Compliance Assistance, EPA Region II, Kodak Claim for Manufacturing Process Unit Exemption to the RCRA Subpart BB Air Emission Requirements, RO14469, at 1 (May 26, 2000) ("Cotsworth Memorandum"). Further, in a December 1986 letter from an EPA director to a manufacturer, EPA explained that "process transfer equipment" used to "transfer hazardous waste residue during equipment washout/cleanout procedures to a hazardous waste storage/treatment tank" was considered "part of a hazardous waste tank system and thus subject to the standards for such[.]" Letter from Joseph E. Carra, Acting Director, Waste Mgmt. Div., to Mr. Hadley Bedbury, Diamond Shamrock Chems. Co., RO13790 (Dec. 19, 1986). *See also* RCRA/Superfund Hotline Monthly Summary, Wastes Generated in Process Units, RO12790, at 1-2 (Dec. 1986) (explaining that "parts washers cannot be described as manufacturing process units"). The Pit, this Tribunal explained, was "comparable to the drum of the solvent-based parts washer" cited in the December 1986 "RCRA/Superfund Hotline Monthly Summary" as "both [were] mere catch basins for used, and sometimes spent, material." *Chem-Solv, Inc.*, 2014 WL 2593697, at *76. The Pit, this Tribunal reasoned, was "comparable to the manifold described in the Cotsworth Memorandum because both are ancillary to the alleged manufacturing process, and both hold or convey solid waste at least part of the time." *Id.* Therefore, as "[n]o intentional physical or chemical change would occur in the Pit as part of the alleged manufacturing process," even if the Pit was used in the manner that Chem-Solv, Inc. claimed, the Pit "would [still] be a waste storage unit rather than" a manufacturing process unit. *Id.* Because the "primary purpose" of the Pit was to store waste, not a product or raw material, this Tribunal found that the Pit was a waste storage unit and that the MPU exemption did not apply. *Id.* at *77.

Similarly, in *General Motors*, this Tribunal considered whether a paint solvent system was subject to the MPU exemption. 2006 WL 3406333. *General Motors* concerned three automobile manufacturing facilities in which assembled automobiles were painted with solvent-based paints. *Id.* at *6. Because different vehicles were painted different colors, the facilities periodically cleaned the paint applicators and sprayers through a "purge process" in which a purge solvent and air were piped into a manifold system and then piped to the applicators. *Id.* The purge solvent mixture would recirculate for additional "purge processes" before being piped

into hazardous waste tanks for storage. *Id.* at *6-7. The mixture would then be shipped off-site for treatment, storage, and disposal. *Id.* at *11.

The complainant alleged that the purge mixture—comprised of the purge solvent that had been contaminated with paint post-cleaning—was a hazardous waste subject to RCRA regulations because it was not "part of any manufacturing process after it exit[ed] the manifolds and associated applicators[.]" *Id.* The respondent, General Motors, argued that because the purge mixture was circulated for reuse, "the transfer of the purge mixture through the pipes to the purge mixture storage tanks [was] part of the same manufacturing process." *Id.* at *14. The respondent argued, too, that if the "downstream purge mixture piping or equipment" became clogged, it could "totally disrupt the manufacturing process" and halt the "preceding assembly process." *Id.* at *32. The issue in *General Motors*, thus, was whether the "manufacturing process" "ends at the manifolds and associated applicators" or whether a manufacturing process unit is "more broadly defined to encompass the pipes and equipment downstream of the manifolds and associated applicators, including the purge mixture storage tank[.]" *Id.*

This Tribunal determined that while "painting automobiles is an integral part of the manufacturing process[,]" the facility's "need to manage its spent material does not make such management part of the manufacturing process." *Id*. This Tribunal acknowledged that a "malfunction or back-up in the waste management system may impact production processes such as by slowing efficiency elsewhere at a facility" but found that "that impact does not make the waste management system part of the production process." *Id.* This Tribunal found that "[s]uch interplay does not convert the facility's production system, including the painting operation and waste delivery system, into a 'manufacturing process unit' within the purview of 40 C.F.R. § 261.4." *Id.* Additionally, this Tribunal determined that General Motors's reuse of the purge mixture did not make the purge mixture system a "manufacturing process," explaining that "[i]n contrast to a production system, such as where the applicators/manifold equipment is used to paint vehicles . . . usage of the purge mixture downstream of the manifolds and associated applicators does not create a product." *Id.* Instead, as in *Chem-Solv, Inc.*, the MPU exemption applied to the units in which "production occur[ed]"—where the vehicles were painted—but not to the "ancillary" cleaning system. *Id.*

Relying on this Tribunal's decisions in *Chem-Solv, Inc.* and *General Motors*, the parties provide divergent tests that they argue should be used to determine whether Respondent's distillate receiver tanks are part of its manufacturing process. First, relying primarily on *Chem-Solv, Inc.*, Complainant contends that the "test" to determine whether a component is part of the manufacturing process is whether (1) "manufacturing occurs within the unit," or whether there is the "transformation of materials" or an "intentional physical or chemical reaction," and (2) "whether hazardous waste is formed." Compl't MAD at 29-33, 36. Complainant argues that, under such an analysis, "manufacturing" requires "chemical or physical reactions relevant to the manufacturing" of products, and that the unit must be "operated to produce a product." Compl't MAD at 29-33, 36; Compl't Response at 21. The "emphasis," Complainant explains, "is on whether raw materials are being transformed into products within the exempted unit." Compl't MAD at 31. Respondent's distillate receiver tanks, Complainant argues, "clearly do not produce a product." Compl't Response at 15. Instead, Complainant contends, "the purpose of the Receiver Tanks is to collect used liquid solvents that have been separated through distillation

from Respondent's manufactured products in the reactors." Compl't MAD at 33. Complainant suggests that the distillate receiver tanks are "like the [P]it in *Chem-Solv*, whose function was to collect liquids for disposal or reuse." Compl't MAD at 33. Thus, Complainant contends that the distillate receiver tanks are not part of the manufacturing process because "no 'manufacturing' occurs in the Receiver Tanks[.]" Compl't MAD at 33.

Respondent contends, meanwhile, that *General Motors* and *Chem-Solv, Inc.* established that the MPU exemption applies where "the 'integral parts' of a production system are used to 'create a product,'" but not "downstream of production, where wastes have become a 'waste disposal problem.'" Resp't MAD at 27. Under this test, Respondent argues, its distillate receiver tanks are parts of its manufacturing process units because the tanks are "integral" to the production process and not "downstream of production." Resp't MAD at 27. Respondent argues that Complainant's inquiry and analysis is erroneous because it "treats the exemption as if it were a mere 'manufacturing unit' exemption, rather than a 'manufacturing process unit' exemption." Resp't Reply at 12. Such an inquiry would be "inconsistent with the focus in Section 261.4(c)," Respondent reasons, as "EPA has already clarified that these exemptions apply to the entire units specified, at the system level." Resp't Reply at 12. Instead, Respondent argues, "'manufacturing' in a 'manufacturing process unit' must be evaluated at the level of the *process*—the system—not in each individual manufacturing component." Resp't Reply at 13 (emphasis in original).

While I agree that the proper inquiry is whether each component at issue is part of the manufacturing process, and not whether "manufacturing" occurs within that component, I conclude that a component is part of the manufacturing process if it is operated to produce a product. *See Chem-Solv, Inc.*, 2014 WL 2593697, at *77. Such an inquiry does not require, as Complainant contends, that there be a "transformation of materials" or an "intentional physical or chemical reaction" directly within the component, such as the condenser or, here, the receiver tank. Rather, the component must have the "specific function" of being part of the manufacturing process.

And, while the "manufacturing process" does not require a "transformation of materials" directly within the component, the component must be operated to produce a product, and not as part of the post-production process.[6] Here, Respondent's distillate receiver tanks are part of a batch distillation process, in which the batch distillation unit is operated with the primary purpose of producing a product, and are not used solely to "collect used liquid solvent that previously has been removed from Respondent's products." Compl't Response at 15. Unlike the paint purge system at issue in *General Motors*, Respondent's distillate receiver tanks serve a distinct role *during* manufacturing, not solely after the production process ends. While the tanks do collect distillate solvent, the primary purpose of the tanks is not to store hazardous waste, but

[6] Respondent argues that the component must be "an integral part[] of a 'production system.'" Resp't MAD at 27. However, the word "integral" appears to be gleaned from one sentence of dicta in *General Motors*, in which this Tribunal stated that "[i]t is undisputed that painting automobiles is an integral part of the manufacturing process." *General Motors*, 2006 WL 3406333, at *32. Thus, I am not persuaded by this line of argument.

rather to allow for the batch distillation process to continue. As such, the tanks are continuously used during the production process. Unlike *General Motors*, where production would simply halt if there was a "back-up" in the waste management system, the batch distillation process at Respondent's facility could not *begin* without the distillate receiver tanks.

Moreover, in *General Motors*, this Tribunal explained that "downstream" equipment is "ancillary" to the manufacturing process, as it is not used to "create a product." *General Motors*, 2006 WL 3406333 at *33, *59; *see Chem-Solv, Inc.*, 2014 WL 2593697, at *76 (finding that the Pit, too, was "ancillary to the alleged manufacturing process"). The paint purge system, there, was "ancillary" to the manufacturing process because it was used solely for cleaning and storing hazardous waste before disposal. Here, Respondent's distillate receiver tanks are not ancillary to the manufacturing process because the receiver tanks are part of the production process in which the product is created. In fact, the receiver tanks are more akin to other "mid-stream" instruments and "process units" that EPA explicitly identified as "manufacturing process units" in the preamble to the MPU exemption, including "distillation columns, flotation units, and discharge trays of screens." 45 Fed. Reg. at 72,025.[7] Similarly, Respondent's distillate receiver tanks "initially receive the wastes that have been screened or filtered out in a screening process during manufacturing." Resp't MAD at 34. The distillate receiver tanks "interact" with the other components of the distillation unit and, like the other mid-stream units, temporarily hold waste during the batch distillation process. Once manufacturing concludes, the distillate solvent is removed and directed to the hazardous waste storage tanks or is recycled and reused. Morin Decl. ¶ 11. Therefore, because Respondent's distillate receiver tanks are not ancillary to the manufacturing process, but rather are part of the production process, the tanks are exempt from RCRA regulation under the MPU exemption.

In addition to the endorsement provided by this Tribunal's precedent, "basic engineering" and "logical principles governing distillation" further support finding that Respondent's distillate receiver tanks are part of the manufacturing process that is operated to produce a product. *See* Resp't MAD at 22. As stated, Respondent manufactures its products through a batch distillation process. Batch distillation is comprised, in its "simplest form, [of] a heated vessel (pot or boiler), a condenser, and one or more receiving tanks." M.F. Doherty, Z.T. Fidkowski, M.F. Malone, and R. Taylor, Perry's Chemical Engineers' Handbook, at 13-109 (8th ed. 2008) ("Perry's Chemical Engineers' Handbook"); *see* Resp't MAD at 23. A nearly identical definition can be found in the EPA's own technical guidance document: "[t]he simplest form of batch distillation is a batch operation that consists of a heated vessel (called the pot), a condenser, and one or more

[7] A distillation column is a "tank-like unit in which a feed material is separated into two or more fractions by vaporizing part of the feed in the column[.]" Schanilec Supp. Aff. ¶ 13. Waste material remains in a distillation column "on a temporary basis and is periodically removed." Schanilec Supp. Aff. ¶ 13. Similarly, a flotation unit is a "tank-like structure in which air or another gas is bubbled up through a liquid material[.]" Schanilec Supp. Aff. ¶ 13. The gas bubbles "selectively adhere to a suspended impurity in the liquid, causing that impurity to rise to the surface, where it temporarily accumulates and can be periodically skimmed off." Schanilec Supp. Aff. ¶ 13. Finally, a discharge tray of screen is also defined as a collection unit in which material is "temporarily" collected and screened before being separated. Schanilec Supp. Aff. ¶ 13.

distillate receiving tanks." EPA Office of Air Quality Planning and Standards, EPA-450-3-89-021, Hazardous Waste TSDF—Technical Guidance Document for RCRA Air Emission Standards for Process Vents and Equipment Leaks (July 1990), at 5-4. The batch distillation operation at Respondent's facility, too, is comprised of a "trio"—the reactor, condenser, and receiver—each of which is necessary for the distillation unit to operate "as a single integrated production system." LeBlanc Decl. ¶ 14.

As Respondent's expert Joel LeBlanc persuasively explains in his declaration, and as Perry's Chemical Engineers' Handbook confirms, Respondent's distillate receiver tanks are "one of three irreducible components of batch distillation[.]" Resp't MAD at 23; *see* Perry's Chemical Engineers' Handbook at 13-96. To produce its products through batch distillation, Respondent first removes chemical solvents from the manufactured products "by selectively boiling components of the products in a reactor via heating or decreased pressure, so that the liquid solvent turns into vapor." LeBlanc Decl. ¶ 13. The solvent vapor is removed from the reactor "through a pipe to a dedicated condenser, located above the reactor," wherein the vapor is cooled by being routed "through narrow tubes surrounded by liquid coolant, causing most of the solvent vapor to condense to form liquid distillate." LeBlanc Decl. ¶ 13. The liquid distillate "is then initially collected in a dedicated receiver, mounted slightly lower than the condenser." LeBlanc Decl. ¶ 13. As the condenser lacks the requisite reservoir to collect and hold condensed solvents, "[w]ithout a receiver as part of the system to continuously 'clear' the condenser of liquids," the condenser would "fill with liquid, be unable to admit and condense more vapors, and/or overflow back into the reactor." LeBlanc Decl. ¶ 17. Thus, "as a matter of engineering," the distillate receiver tank must share a "common atmosphere with the entire distillation unit[.]" LeBlanc Decl. ¶ 17; *see* Perry's Chemical Engineers' Handbook at 13-96. Accordingly, Respondent's batch distillation process requires all three components—the reactor, condenser, and receiver tanks—to operate "as a single integrated production system." *See* LeBlanc Decl. ¶ 14.

Furthermore, "[t]he three components must share a common, inert internal atmosphere so that gases and liquids may flow uninterrupted throughout the distillation process, including as pressures are adjusted to facilitate the process." LeBlanc Decl. ¶ 14. The distillation unit, as a whole, "must contain distinct chambers, where separated components are redistributed within the unit while distillation occurs." LeBlanc Decl. ¶ 17. The distillate receiver tanks, thus, are the "necessary reservoir within this closed system, and in order for the condensed liquids (and uncondensed vapors) to get there, the receiver must share the same common internal atmosphere with the reactor and condenser." LeBlanc Decl. ¶ 17. A distillate receiver tank must be part of the closed distillation system, therefore, "to allow separation and redistribution of components to occur within the distillation unit during the distillation process" as, without the receiver tanks, batch distillation could not begin. LeBlanc Decl. ¶ 17. As such, I am persuaded that Respondent's distillate receiver tanks are a vital part of a closed manufacturing system that is operated to produce a product, not to collect and store waste. Because the distillate receiver tanks are part of the manufacturing process, Respondent's receiver tanks are exempt from RCRA regulation.

Complainant provides several additional arguments to support its argument that the MPU exemption does not apply to the distillate receiver tanks. As I fail to find the following

arguments persuasive, and I conclude that the receiver tanks are, in fact, part of the manufacturing process, I shall address them only briefly. First, as mentioned above, Complainant argues that the MPU exemption applies solely to units in which hazardous waste is generated. Compl't MAD at 36. Complainant suggests that the language of the exemption itself supports this conclusion, as the regulation reads "hazardous waste which is generated in . . . a manufacturing process unit . . . is not subject to [RCRA regulation or statutory notice provisions] *until it exits the unit in which it was generated*." 40 C.F.R. § 261.4(c) (emphasis added). Complainant argues that because "hazardous waste has been generated in the condensers prior to its collection in the Receiver Tanks, the MPU Exemption cannot apply to the Receiver Tanks." Compl't MAD at 37.

Complainant's argument does not alter my finding that the MPU exemption applies to components that are part of the process in which a product is manufactured, not only the components in which hazardous waste is first generated. As Respondent contends, "the relevant unit to be evaluated here is the *distillation unit*, consisting of the reactor, condenser, and receiver, together with their connecting pipes and related equipment." Resp't Response at 23. As the distillate receiver tank is an integrated part of the distillation unit, hazardous waste collected in the distillate receiver tank is exempt from RCRA regulation for limited periods of time. Once hazardous waste exits the distillate receiver tank and is piped to the storage tanks, the waste becomes subject to RCRA standards.

Complainant next argues that the term "manufacturing process unit," as used in the regulation is singular; thus, Complainant suggests, the MPU exemption can apply only to a single piece of equipment and not to a "system" of units. Compl't MAD at 27. Complainant contends that, if the MPU exemption *does* apply to "distillation units," the exemption does not extend to each individual component of a distillation system. Compl't MAD at 27. Complainant submits that if the MPU exemption applied to "distinct pieces of equipment" within a singular unit, the exemption could be "asserted where product manufacturing occurred in one tank, hazardous waste generation occurred in another tank, and hazardous waste storage occurred in a third tank." Compl't MAD at 28-29. "If such equipment aggregation were allowed under the MPU Exemption[,]" Complainant argues, "a hazardous waste storage tank in which neither product manufacturing nor waste generation was occurring could be exempt from RCRA regulation, in direct contradiction to the purposes of the MPU Exemption and RCRA[.]" Compl't MAD at 29-30. Accordingly, Complainant contends that "each individual tank, vessel, or other piece of equipment that is potentially exempt" should be examined individually. Compl't MAD at 29.

To support this argument, Complainant first turns to the language of the exemption itself. Complainant contends that the term "manufacturing process unit" is listed alongside a "larger list of terms in Section 261.4(c), each of which is singular: a tank, a vehicle, a vessel, a pipeline." Compl't MAD at 27; *see* 40 C.F.R. § 261.4(c). Complainant argues that these exemptions listed in Section 261.4(c) all "refer to individual pieces of equipment[.]" Compl't MAD at 27. Complainant next argues that, because "unit" is not defined in the RCRA regulations, the "ordinary, everyday meaning of that term should be employed." Compl't MAD at 28. Relying on the Cambridge Dictionary, Complainant first defines "unit" as "a single thing or a separate part of something larger" or "a small machine or part of a machine that has a particular purpose."

Compl't MAD at 28 (citing *Unit*, *Cambridge Dictionary* (Cambridge University Press 2021)). Complainant also provides a "technical" definition of "unit": "an item of process equipment or plant designed to carry out a specific task." Compl't MAD at 28 (citing *Unit*, *Oxford Dictionary of Chemical Engineering* (1st ed. 2014)). Complainant contends that "these definitions demonstrate . . . [that] the ordinary use of the term 'unit' as used in the context of the MPU Exemption is a singular component, with a discrete function, that is part of a larger system." Compl't MAD at 28. Therefore, Complainant argues, the MPU exemption does not extend to each distinct component of a distillation unit. Compl't MAD at 28.

Respondent suggests this Tribunal turn instead to Webster's Third International Dictionary, which defines "unit" as "'a piece or complex apparatus serving to perform one particular function,' where 'apparatus' is 'a collection or set of materials, instruments, appliances, or machinery designed for a particular use.'" Resp't Response at 6 (citing *Unit*, *Apparatus*, *Webster's Third New Int'l Dictionary*, 1808, 2500 (1971)). Respondent contends that EPA previously applied this definition of "unit" in arguing that multiple thermal reactors made up one "process unit." Resp't Response at 6; *see United States v. Amoco Oil Co.*, 64 F. Supp. 2d 801, 804-05 (N.D. Ind. 1999) (determining that a "process unit" includes its associated "catalytic reactor" groupings). Additionally, Respondent contends that a more accurate technical definition of "unit" can be found in Perry's Chemical Engineers' Handbook, which defines "unit" as "'a combination of elements,' where 'elements' are characterized as single pieces of equipment like condensers." Perry's Chemical Engineers' Handbook at 13-56; *see* Resp't Response at 6-7.

The multitude of common and technical definitions put forward by the parties suggest that a manufacturing process unit can very well be a "small machine" with several components that, together, become "part of something larger." *See Unit*, *Cambridge Dictionary* (Cambridge University Press 2021). This definition does not pose the threat of permitting the "aggregation" of multiple, distinct pieces of equipment into one manufacturing process unit, as Complainant cautions. *See* Compl't MAD at 29. Additionally, as Respondent further argues, "[t]he term 'manufacturing process unit' appears in a list of equipment *systems*, none of which is limited to a singular piece of hardware[.]" Resp't Reply at 3. Despite Complainant's contention, the other equipment identified as potentially "exempt" units in Section 261.4(c) are all "multicomponent systems," made up of individual, interconnected components. For example, while "vehicle" may be a "singular" unit, a vehicle is clearly made up of multiple, interconnected components. Similarly, a singular pipeline is not one singular piece of equipment, but rather a system of interconnected components. Likewise, the MPU exemption does not inherently cover the entirety of a multicomponent system. Here, Respondent's batch distillation unit is comprised of a "trio" of elements—a reactor, condenser, and receiver tank. As each of those individual components are utilized to "carry out a specific task" within the manufacturing process, the individual components that comprise *this* manufacturing process unit are exempt from RCRA regulation under the MPU exemption.[8] *See Unit*, *Webster's Third Int'l Dictionary*, at 2500.

[8] Importantly, the analysis here is limited to the specific circumstances of this case. A fact-intensive analysis is required in all other cases in which a respondent cites the MPU exemption as a defense to a RCRA violation.

Complainant next argues that because manufacturing *could* occur without the distillate receiver tanks, the MPU exemption does not apply. Compl't Response at 30. Complainant contends that, although the batch distillation process requires distillate to be removed from the condenser, the "equipment in which the liquid distillate is collected, stored and managed" does not have an "engineering role in the separation of materials and condensing of vapor to liquid[.]" Compl't Response at 30. However, as explained, an interconnected system of components may comprise one manufacturing process unit under the MPU exemption. Here, Respondent's distillate receiver tank is but one part of Respondent's batch distillation unit. While products are not produced directly in the distillate receiver tanks, the tanks are continuously utilized, and depended upon, throughout the batch distillation process. The reactor cannot properly function without the condenser, which in turn cannot function without the receiver tanks to collect the condensed waste. Accordingly, because each component is required for batch distillation to occur, and for the raw materials to be "transformed" into the final product, each component of Respondent's distillation unit, including the distillate receiver tanks, are part of the manufacturing process.

Complainant also contends that distillate receiver tanks are not necessary for the distillation process. Relying on the supplemental affidavit of Kevin Schanilec, attached to its Response to Respondent's Motion, Complainant contends that, while "distillate must be removed or 'cleared' from the condenser" for the condenser to function, this process does not "necessarily" require the use of a receiver tank "acting as a reservoir for the 'cleared' distillate." Schanilec Supp. Aff. ¶ 8. Instead, distillate solvents can be removed, for example, "through the use of a barometric leg and hot well[,]" in which "desired pressure . . . remain[s] in the condenser while providing a means for the distillate to flow out of condensers and be managed elsewhere." Compl't Response at 30 (citing Schanilec Supp. Aff. ¶ 8). Complainant acknowledges that it is "not necessarily claiming this engineering design could take the place of the Receiver Tank at Respondent's facility." Compl't Response at 30. Rather, Complainant "offer[s] this example to show" that distillation does not "physically require" receiver tanks. Compl't Response at 30-31.

However, as Complainant itself agrees, while Mr. Schanilec's observations are factually accurate, they are not relevant here. While distillate receiver tanks may not be necessary at *some* facilities, Respondent's distillate receiver tanks are a requisite part of the process that is operated to produce its products. The fact that some facilities manufacture their products through other forms of distillation has no bearing here. Therefore, Respondent's distillate receiver tanks are part of the manufacturing process operated to produce a product and, thus, are exempt from RCRA regulation under the MPU exemption.

D. The Policy and Purpose of RCRA and the MPU Exemption Support Applying the Exemption to Respondent's Distillate Receiver Tanks

Finally, Respondent contends, and I agree, that the policy and purpose of RCRA and the MPU exemption are not thwarted in applying the MPU exemption to exempt Respondent's distillate receiver tanks from RCRA regulation. Resp't MAD at 26. Congress enacted RCRA without the intent of "establish[ing] any Federal regulatory authority with respect to requirements in the manufacturing process." H.R. Rep. No. 94-1491(I), at 36 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6238, 6264; *see also* Resp't MAD at 25. Instead, RCRA aims to

manage hazardous waste *once generated*. *See* 42 U.S.C. § 6902(a)(5)-(6). "By allowing short-term accumulation" of hazardous waste "without a permit," RCRA and its implementing regulations "reflect[] the congressional intent that the RCRA program not interfere with the manufacturing process." Resp't MAD at 26 (citing Hazardous Waste Management System; Standards Applicable to Generators of Hazardous Waste, 45 Fed. Reg. 76,624, 76,624 (Nov. 19, 1980)).

The MPU exemption further reflects this intent. As the preamble to the rule implementing the MPU exemption explains, hazardous waste generated in manufacturing process units "are contained against release into the environment . . . and the risks they pose to human health or the environment are very low and are only incidental to the risks posed by the valuable product or raw material with which they are associated." 45 Fed. Reg. at 72,025. Once the manufacturing process ends, the "incentive" to maintain the integrity of containment for the product or raw materials also ends, and the risk of accidental release increases. *See id.* (explaining that "the incentive to maintain the integrity of the unit to prevent leaks . . . or release of hazardous wastes which may remain in the unit after cessation of operation . . . [is] substantially reduced" after manufacturing). Accordingly, the regulation implicitly acknowledges that hazardous waste may be unregulated while the equipment in which it is generated is in operation; it is only after operations cease and the hazardous waste is removed from the equipment that RCRA regulations take effect.

Respondent's batch distillation process is operated in such a manner to prevent the accidental release of hazardous wastes. As explained in the uncontested declarations of Mr. LeBlanc and Mr. Morin, Respondent monitors the entire production system during batch distillation, including the distillate receiver tanks, to ensure a "common internal atmosphere." LeBlanc Decl. ¶ 16. The distillation system requires a common, precise pressure to control the flow of solvents from the reactor to the receiver tanks, as "the system typically requires a slightly lower pressure in the receiver to establish [the] direction for vapor flow." LeBlanc Decl. ¶ 21. The "single integrated production system" must share a "common internal atmosphere," too, to ensure that there is "an uninterrupted path for gases and liquids to flow throughout the distillation process, including as pressures are adjusted to facilitate the process." Morin Decl. ¶ 9. Additionally, the closed pressure system is required to minimize the potential for "bumping," a "common issue in virtually all distillation processes," in which materials in the reactor "foam and/or create large bubbles in a way that forces some of the materials out of the reactor and through the condenser, without being converted to vapor and condensed." LeBlanc Decl. ¶ 16. The facility minimizes the risk of bumping through "closely monitoring and controlling various parameters," such as temperature and pressure, and "checking the levels of materials in reactors and receivers for any unexpected changes." Morin Decl. ¶ 8. The batch distillation production process is consistently monitored by the facility's operators, too, because "[e]ach time the facility performs a production run, the operators fill in a copy of the relevant batch form with notations about observed process parameters and/or actions taken[.]" Morin Decl. ¶ 16.

Thus, Respondent's distillation unit is consistently monitored to ensure that the components are properly functioning and to guarantee that its products are properly produced. As such, during the manufacturing process, the unit poses little risk of accidental release of

hazardous wastes. Unlike the hazardous waste storage tank at issue in *Chem-Solv, Inc.*, where there was "little incentive to maintain or operate the Pit in a way that would secure the contents against a release into the environment," Respondent has a significant incentive to monitor and maintain the distillation unit. *See Chem-Solv, Inc.*, 2014 WL 2593697, at *75. Respondent's incentive to maintain the distillation unit to prevent leaks or releases of hazardous waste does not dissipate once the solvent reaches the distillate receiver tank. Because the distillate receiver tanks are operated, maintained, and monitored together with the reactor and the condenser, the risk of harm does not occur until the "hazardous waste leaves the manufacturing units" and is piped to the appropriate storage tank for disposal. Respondent, thus, operates its distillate receiver tanks as manufacturing process units as intended by the MPU exemption. Therefore, the purposes of RCRA are not frustrated by this Tribunal's conclusion that Respondent's distillate receiver tanks are exempt from RCRA regulation under the MPU exemption.

VI. Conclusion

For the aforementioned reasons, Respondent's Motion for Accelerated Decision as to liability is **GRANTED**, and Complainant's Motion for Accelerated Decision is **DENIED**.

As this Order Granting Accelerated Decision for Respondent is issued as to all issues and claims that remain in this proceeding, this Order constitutes an Initial Decision as provided in 40 C.F.R. § 22.20(b). Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a Final Order 45 days after its service upon Complainant and Respondent unless a party appeals or moves to set aside this Initial Decision, or unless the Environmental Appeals Board elects to review this Initial Decision on its own initiative.

SO ORDERED.

Christine Donelian Coughlin
Administrative Law Judge

Dated: August 15, 2022
Washington, D.C.

In the Matter of *ISP Freetown Fine Chemicals, Inc.*, Respondent.
Docket No. RCRA-01-2018-0062

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Granting Respondent's Motion for Accelerated Decision/Order Denying Complainant's Motion for Accelerated Decision/Initial Decision**, dated August 15, 2022, and issued by Administrative Law Judge Christine Donelian Coughlin, was sent this day to the following parties in the manner indicated below.

Mary Angeles
Paralegal Specialist

Copy by OALJ E-Filing System to:
Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Rm. M1200
1300 Pennsylvania Ave. NW
Washington, DC 20004

Copy by Electronic Mail to:
Andrea Simpson
Christopher P. Milione
U.S. Environmental Protection Agency, Region 1
Email: simpson.andrea@epa.gov
Email: milione.christopher@epa.gov
Attorneys for Complainant

Aaron H. Goldberg
Eric L. Klein
Beveridge & Diamond, P.C.
Email: agoldberg@bdlaw.com
Email: eklein@bdlaw.com
Attorneys for Respondent

Emilio Cortes
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Email: clerk_EAB@epa.gov
Email: cortes.emilio@epa.gov

Wanda Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
Email: R1_Hearing_Clerk_Filings@epa.gov
Email: santiago.wanda@epa.gov

Lawrence Starfield
Acting Assistant Administrator
Office of Enforcement and Compliance Assurance
U.S. Environmental Protection Agency
Email: starfield.lawrence@epa.gov

Dated: August 15, 2022
Washington, D.C.