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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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ENVIR. APPEALS BOARD

IN RE:

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

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) RCRA Appeal No. (3008) 06-02
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GENERAL MOTORS CORPORATION'S
BRIEF IN SUPPORT OF ITS NOTICE OF APPEAL
OF THE INITIAL DECISION ISSUED IN
DOCKET NO. RCRA-05-2004 0001

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I. INTRODUCTION

Pursuant to 40 C.F.R. § 22.30(a)(1), General Motors Corporation (“GM”), by counsel, respectfully files its Brief in Support of Its Notice of Appeal of the Initial Decision issued by the Honorable Barbara A. Gunning, the Administrative Law Judge (hereafter, the “ALJ”) in Docket No. RCRA-05-2004 0001, *In the Matter of General Motors Corporation-North America*, 300 Renaissance Center, Detroit, Michigan, 48265-3000, U.S. EPA ID MID 005 356 902, MID 000 718 544, OHD 041 063 074 (the “Initial Decision”).¹

This case is about when Purge Solvent, which is used in the painting process at GM’s vehicle assembly plants (and all other plants in the industry), is a “product being” used for its intended purpose by General Motors and when, if at all, that Purge Solvent becomes a “waste” subject to the RCRA regulatory regime.

In its simplest terms, a product is something that is used by GM and serves the purpose for which it was produced in a process. A waste is something that is “discarded” and is no longer of value or is so used up that it becomes “spent” and no longer capable of being used by GM for its intended purpose. Under the RCRA program, the user’s intent with respect to a material determines when it no longer is able to use the material and thus when it becomes a “waste.”

In this case, the record demonstrates that the Purge Solvent performs a valuable, indispensable, and intended function in GM’s painting operations both upstream and downstream of its paint booths. GM uses and carefully manages the Purge Solvent in such a manner, and

¹ On March 30, 2006, the ALJ issued an Initial Decision as a confidential document as well as a redacted version. The redacted version also contained confidential information, however, so the ALJ ordered that version of the decision destroyed and issued a second redacted decision on April 14, 2006. *See, In re General Motors*, EAB RCRA Appeal No. (3008) 06-02 Order, May 1, 2006 at 2. Citations to the Initial Decision herein are for the April 14, 2006 Initial Decision, unless otherwise noted.

never discards the Purge Solvent because it has significant economic value to the company. GM collects and saves the Purge Solvent and provides it to a reclaimer so that it can be reconstituted and used again.

The specific issue in this case is whether GM's Purge Solvent becomes a waste once it is finished cleaning paint applicators and associated equipment, or whether it continues to perform intended solvent functions downstream of the applicators. The evidence in this record supporting GM's position is undisputed: First, the Purge Solvent is expressly formulated to perform intended solvent functions of dissolving and diluting paint and cleaning equipment both upstream and downstream of the applicators. Indeed, the ALJ explicitly and properly so found. Initial Decision at 9. Second, the Purge Solvent in fact performs these intended solvent functions downstream of the applicators. EPA stipulated to this fact (Resp't Ex. (hereafter ("RX 1") at ¶ 37; *id.* at ¶ 27), EPA's expert chemist testified to this fact (Hr'g Tr. (June 21) at 45-48 (Kendall)), and the ALJ, once again, properly found this fact to be true. Initial Decision at 13. Third, these solvent functions are an important part of GM's painting operations. Again, EPA's expert chemist, Dr. Kendall, agreed that if these downstream solvent functions were not performed, "bad things" would happen to GM's painting process. Hr'g Tr. (June 21) at 61. *See also, id.* at 59, 61-62. As a result, the Purge Solvent continues to perform the purpose for which it was produced downstream of the applicators, and is thus not a "spent material" under the plain language of EPA's rules. It is therefore not a "waste" subject to EPA's RCRA jurisdiction.

Faced with these established facts and clear regulatory language – which compel finding in GM's favor – the ALJ made up a brand new "predominant purpose test" for determining when a material is "spent." This new test has no basis in the statute or regulations. To find in EPA's favor, the ALJ had to adopt the view that the (1) Purge Solvent has one "predominant purpose"

that is limited to cleaning only paint applicators and manifolds; and (2) that although solvent functions *are* performed downstream, they are “secondary” functions not allowed under EPA’s rules. This extra-regulatory distinction is clear error. It also leads to wholly illogical results. The ALJ acknowledged that if the Purge Solvent downstream of the paint applicators was not used in GM’s ongoing process, but instead was used by GM or some third party to clean *other* equipment such as drums, then the Purge Solvent would *not* be spent, and would not be a waste. *See*, Initial Decision at 39. The ALJ’s line of reasoning, therefore, concludes that the Purge Solvent, which is indisputably being used in GM’s ongoing process, is a waste, but if that same Purge Solvent were used again elsewhere by GM or others, it would not be a waste. Such an illogical interpretation of EPA’s regulatory scheme makes no sense and cannot be sustained. How can Purge Solvent specifically formulated to serve a purpose throughout GM’s operation be a waste when it is still being used for its intended, necessary purpose in that operation, but it is not a waste if that same Purge Solvent were used for some other purpose, such as cleaning drums elsewhere? And how can these other purposes, which would clearly be “secondary” uses, be legitimate while GM’s ongoing continued use for its intended purpose be illegitimate? It cannot, and the EAB must reject the Initial Decision before it.

II. ISSUES PRESENTED FOR REVIEW

1. When the ALJ found that the Purge Solvent is a “waste,” even though it is still being used in General Motor’s continuous industrial operations, did that determination expand the scope of RCRA to materials not yet “discarded” and thus reach beyond authority delegated by Congress?

2. Whether Purge Solvent, which is specifically formulated to suspend and solubilize paint solids used in General Motors’ vehicle painting operations and to clean paint

applicators, manifolds and other pieces of equipment downstream of the applicators, is “spent” within the meaning of the RCRA regulations when it is still being used for its intended purpose of cleaning and suspending and solubilizing paint solids downstream of the paint applicators.

3. Whether, even if EPA Enforcement’s interpretation that the scope of RCRA extends to the regulation of Purge Solvent being used downstream of the paint applicators is a reasonable interpretation of the statute, EPA may properly subject General Motors to enforcement of that interpretation without undertaking notice and comment rulemaking.

4. Whether the ALJ erred in concluding that General Motors’ Purge Solvent was not exempt from regulation under either the “manufacturing process unit” or “totally enclosed treatment” facility exemption, assuming the Purge Solvent was a waste.

5. Whether when EPA is enforcing state law and the state authority expressly found GM’s Purge Solvent is not a waste under RCRA when it exits the paint applicators, EPA is bound by the state’s interpretation.

6. Whether the Purge Solvent material sent off-site by General Motors and reclaimed for reuse by General Motors in its painting operations is “discarded” and therefore a “waste” under RCRA.

III. STATEMENT OF THE CASE

The Initial Decision at issue in this case results from a civil administrative proceeding arising under Section 3008(a) of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6928(a). Initial Decision at 2. As a result of hazardous waste compliance inspections performed by EPA at the GM vehicle assembly plants located in Pontiac, Michigan; Lake Orion (hereafter, “Orion”), Michigan; and Moraine, Ohio, in March 2001, January 2003, and April 2001, respectively, the United States Environmental Protection Agency, Region 5 (“EPA Region

5”), filed a Complaint and proposed Compliance Order against GM on October 17, 2003 alleging that GM violated Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), and certain federal and state hazardous waste regulations promulgated pursuant to RCRA at those vehicle assembly plants. *Id.* at 6, 2. Specifically, EPA Region 5 alleged that these three plants violated certain hazardous waste regulations that apply to hazardous waste tank systems and hazardous waste air emission requirements because, in its opinion, the Purge Solvent, after it is used to clean the paint applicators is a “spent material” and subject to the hazardous waste regulations. Compl.’s Ex. (hereafter “CX”) 2 at EPA 0005-0006, EPA 0007-0008; CX 3 at 5, 7-9; CX 4 at 5-6; U.S. EPA’s Complaint and Compliance Order at ¶ 23. On November 21, 2003, GM filed its Answer and Request for Hearing in response to EPA Region 5’s Complaint and proposed Compliance Order. Initial Decision at 2.

Following GM’s and EPA Region 5’s (collectively, the “Parties”) submission of cross-motions for accelerated decision and responses thereto, the ALJ informed the Parties that she “had found that genuine issues of material fact exist and that an evidentiary hearing would be necessary.” *Id.* at 3-4. The evidentiary hearing was held in Detroit, Michigan, from June 20, 2005, through June 30, 2005. *Id.* at 4. The Parties filed post-hearing briefs and replies thereto. *Id.* The ALJ issued the Initial Decision in this case on March 30, 2006 and a revised Initial Decision on April 14, 2006 (hereafter “Initial Decision”).

In the Initial Decision, the ALJ concluded that the Purge Solvent was “discarded” as defined by RCRA and that the Purge Solvent was spent and therefore a “solid waste” under RCRA.² *Id.* at 71. Contrary to these conclusions, the ALJ found that the Purge Solvent was

² Upstream of the paint applicators, the Purge Solvent is just that – entirely Purge Solvent. As discussed in more detail below, downstream of the applicators the Purge Solvent is partially contaminated with some additional constituents, but the Purge Solvent is still performing its intended purpose. As EPA’s expert chemist, Dr. Kendall, testified, Purge Solvent comprises 75%-80% of the purge material. Hr’g Tr. (June 21) at 34-36. Furthermore, as the

specifically produced to perform, and was in fact used by GM downstream of the paint applicators and it did perform a function in keeping the manufacturing process going. However, the ALJ ruled that the definition of “spent material” looks at the “predominant purpose” for which the material was produced to determine whether a material was spent.

The ALJ also found that the Purge Solvent is not exempt from RCRA jurisdiction under the manufacturing process unit exemption or the totally enclosed treatment facility exemption. *Id.* at 72. Because the ALJ found that the Purge Solvent was a waste while at GM’s sites, it was also a waste subject to RCRA when removed from GM’s facilities for recycling. *See, id.* at 71.

IV. STATEMENT OF FACTS

Mass production of vehicles was first mastered by Henry Ford. Today, in order to remain competitive, every automobile manufacturer produces vehicles in a continuous and highly complex integrated vehicle assembly operation where thousands of parts are put together to produce a vehicle to be delivered to the customer. *See*, RX 5 at ¶ 21; RX 2 at ¶ 36; RX 1 at ¶ 10. The vehicle painting process is an integral and complex part of that assembly operation. Initial Decision at 7; RX 1 at ¶ 12; Hr’g Tr. (June 24) at 22, 40-42 (Wozniak). The plants involved in this case produce anywhere from 500 to 1250 vehicles on a typical day, and 120,000 to 320,000 vehicles annually. RX 2 at ¶ 6; *See also*, RX 1 at ¶ 11. Hr’g Tr. (June 23) at 24-25 (Hresko). To facilitate that rapid production process many different parts of an assembly operation must work together seamlessly and continuously. *See*, RX 1 at ¶ 12; Hr’g Tr. (June 23) at 30 (Hresko). A stoppage in one part of the operation can halt the entire production line. *See*, RX 1 at ¶ 12; Hr’g

ALJ determined, “[t]he paint, before it mixes with the purge solvent, consists of approximately 50% solids and 50% solvents. . . . [and t]he purge solvent contains approximately 90% solvent and 10% solids.” Initial Decision at 10 (citing Tr. (June 21) at 34-37) (bracketed materials added). For clarification in this brief, GM often refers to the Purge Solvent downstream of the application as “once-used” or “contaminated” Purge Solvent or “Purge Mixture.” Purge Mixture is the mixture of paint and Purge Solvent. *Id.* Whether upstream or downstream of the paint applicators, however, as discussed below, it is the Purge Solvent that is at issue in this case.

Tr. (June 23) at 15, 30 (Hresko). The plants at issue in this case are GM's vehicle assembly plants in Pontiac, Michigan (the "Pontiac facility"); Lake Orion, Michigan (the "Orion facility"); and Moraine, Ohio (the "Moraine facility") (collectively, the "GM facilities" or the "three GM facilities"). *See*, RX 2 at ¶ 4. *See also*, RX 1 at ¶ 1. U.S. EPA conducted inspections of GM's Pontiac, Orion, and Moraine facilities in March 2001, January 2003, and April 2001, respectively that resulted in U.S. EPA's October 17, 2003 Administrative Complaint and Compliance Order. Initial Decision at 6. The assembly process at each of the three GM facilities consists of three major operations that occur in sequence – body assembly, painting, and general/final assembly. Initial Decision at 7; RX 1 at ¶ 12. After vehicle bodies are assembled, the vehicles are prepared for painting. GM paints the vehicles in paint booths at each of the three GM facilities. Initial Decision at 7; RX 1 at ¶ 13. *See also*, RX 2 at ¶ 8; and Hr'g Tr. (June 23) at 26-29 (Hresko).

The modern vehicle painting operation is a continuous integrated process that begins in a "paint mix kitchen" where paint is stored prior to use. Hr'g Tr. (June 23) at 150-51 (Blair). Paint is held in paint storage tanks and delivered to the paint booths through an elaborate set of piping systems because it must be kept in constant motion by recirculation. Hr'g Tr. (June 23) at 150-52, 154-55 (Blair); Hr'g Tr. (June 24) at 43-44 (Wozniak); Hr'g Tr. (June 20) at 167 (Lamberth). *See also*, RX 1 at ¶ 21. Manifolds at the applicator open to allow the flow of paint into one of two types of paint applicators. *See* RX 1 at ¶¶ 17, 20. Purge Solvent is used in these lines periodically to keep the lines clear and to clean the applicators and manifolds. RX 1 at ¶ 23; *see also*, Hr'g Tr. (June 23) at 106-07 (Blair); RX 2 at ¶ 15; RX 8 at ¶ 8; and RX 14 at ¶ 7. When paint colors change, the equipment must also be cleaned to prevent the first paint color from contaminating the second paint. RX 1 at ¶ 23; *see also*, Hr'g Tr. (June 23) at 106-07 (Blair); RX 2 at ¶ 15; RX 8 at ¶ 8; and RX 14 at ¶ 7. The Purge Solvent then suspends and

solubilizes the paint solids through a system of lines similar to the paint and solvent lines coming into the booth from the raw paint storage tanks. RX 1 at ¶¶ 27 and 37; *see also*, RX 2 at ¶ 19; Hr'g Tr. (June 21) at 42-49 (Kendall); *id.*, at 323 (Benson); Hr'g Tr. (June 23) at 229-235 (Warren). In addition to helping to solubilize and suspend the paint solids downstream of the paint applicators, the Purge Solvent also helps clean residue in the pipes to keep the system from clogging and stopping the painting process. Hr'g Tr. (June 24) at 76-77 (Wozniak); Hr'g Tr. (June 21) at 57-58, 59, 69, 72 (Kendall); Hr'g Tr. (June 24) at 230-31 (Warren); RX 5 at ¶¶ 17 and 21. The Purge Solvent and suspended solids is piped in a closed system to a Purge Mixture Storage Tank where it is held by General Motors for pick up by an off-site reclaimer where the paint solids are removed and the solvent material is recovered, and typically this recovered solvent is returned to General Motors for use as Purge Solvent in the paint system. Hr'g Tr. (June 28) at 159-60, 170-71 (Winkler); *id.* at 16, 25 (Bates). General Motors receives an economic credit for the solvent recovered. *Id.* at 198 (Winkler); RX 2 at ¶ 27. This program allows GM to reduce the amount of "new" solvent it must purchase. *See*, Hr'g Tr. (June 28) at 159-60.

Various kinds of "solvent-based" paints are used to paint vehicles at each of the three GM facilities. The solvent portion of the paint also helps maintain the viscosity of the paint by serving as a diluent; minimizes clogging of the paint equipment and associated lines; and allowing the paint solids to flow and to be evenly and smoothly applied to the vehicle. Initial Decision at 7; RX 1 at ¶ 15. The portion of the paint that actually remains on the vehicle after painting and curing is the solids, not the paint solvent. Initial Decision at 7; RX 1 at ¶ 15; RX 2 at ¶ 11; and RX 5 at ¶ 12.

GM's painting operations at each of the three GM facilities involve the sequential application of three kinds of paint – primer coat, basecoat, and clear coat. Initial Decision at 7; RX 1 at ¶ 16. *See also*, Hr'g Tr. (June 23) at 27-29 (Hresko). These paints are applied to vehicles via paint applicators in paint booths. Initial Decision at 8; RX 1, ¶ 16; RX 2 at ¶ 12. *See also*, Hr'g Tr. (June 23) at 117-18 (Blair). The painting process in the paint booths at each facility uses robotic spray guns and electrostatic bells – collectively referred to herein as “paint applicators” – to paint the vehicles. *Id.* at 8; Hr'g Tr. (June 23) at 117-18 (Blair). *See also*, RX 1 at ¶ 17. As a vehicle reaches the paint applicators, the applicators are automatically triggered and begin painting specific portions of the vehicle. When the paint applicators are finished painting their specific portions of the vehicle, they automatically turn off, and the robotic applicators return to their ready positions. The vehicle then continues traveling down the paint line until painting is complete. Initial Decision at 8. *See also*, RX 2 at ¶ 13.

Prior to the time paint enters the manifolds in the paint booths at each facility, the paint is continuously circulated through the paint mix tanks in the Paint Mix Room and associated paint delivery lines upstream of the manifolds. This circulation keeps the paint solids suspended in the paint solvent, prevents them from settling out and clogging the lines and keeps the paint homogeneous until it can be applied to vehicles. Hr'g Tr. (June 23) at 152, 154-55 (Blair); Hr'g Tr. (June 24) at 43-44 (Wozniak); Hr'g Tr. (June 20) at 167 (Lamberth). *See also*, Initial Decision at 8; RX 1 at ¶ 21.

The paint applicators are located inside the paint booths. These applicators are equipped with a manifold system immediately prior to or “upstream” of the applicators. The manifold system consists of a system of valves, electronics, and a manifold that keeps different color paints separated. The manifold system regulates the flow of paint, Purge Solvent and air to the

paint applicators. Initial Decision at 8; *See*, RX 1 at ¶ 20. When it is time for a particular paint to be delivered to the paint applicators, the appropriate valve in the manifold opens. That paint then flows through the manifold, the line between the manifold and the paint applicator, the flow meter, the applicator itself (collectively, the “manifold and associated paint applicators”), and then out onto the vehicle. Initial Decision at 8; RX 1 at ¶ 22.

The process of switching from one color to another requires a thorough cleaning of the paint applicator to remove the previous colored paint. Initial Decision at 9; RX 1 at ¶ 23. This cleaning process is known as the “purge process” and uses a specially formulated material called “Purge Solvent.” Initial Decision at 9; RX 1 at ¶ 23. To perform the purge process in the applicators, air and Purge Solvent are introduced into the paint applicators to perform a scrubbing action that solubilizes and suspends paint solids and cleans the paint from this equipment. Initial Decision at 9 (citing Tr. (June 23) at 107-12)); RX 1 at ¶¶ 23 and 25. *See also*, Hr’g Tr. (June 23) at 106-107 (Blair); RX 2 at ¶ 15; RX 8 at ¶ 8; and RX 14 at ¶ 7. Purge Solvent is specifically formulated according to the design of the paint system at each facility and the types of paint being used. Initial Decision at 9 (citing RX 1 at ¶ 24). The ALJ correctly found Purge Solvent is expressly formulated to perform solvent functions in the paint applicators as well as downstream of the applicators. *Id.* (citing Tr. (June 24) at 223-25; 230-31, 255-56). The purge process is an integral part of these painting operations, and it is designed to allow GM to keep painting operations running continuously. Hr’g Tr. (June 24) at 29-30, 41-42, 136-37, 164 (Wozniak). *See also*, Initial Decision at 9-10 (footnotes omitted) (citing RX 1 at ¶ 25). Approximately 90% of the purge takes place internally in the paint applicators. Hr’g Tr. (June 23) at 121 (Blair). The Purge Solvent from the internal purge travels by hoses or pipes to purge pots located adjacent to the paint booths. Hr’g Tr. (June 24) at 54 (Wozniak). *See also*, Hr’g Tr.

(June 23) at 121-22 (Blair). Robotic paint applicators also rotate into the gun boxes where the remaining 10% of the purge flows into the gun box which is connected to the purge pots by pipes. Hr'g Tr. (June 23) at 122-23 (Blair). In addition to the remaining 10% of the purge through the paint applicators, some amount of additional Purge Solvent is sprayed onto the tip of the robotic paint applicator to remove any residual paint; that too flows into the gun boxes and on into the purge pots. *See*, Hr'g Tr. (June 23) at 122 (Blair).

GM's entire system is designed to capture the material downstream of the paint applicators and to continue to use the Purge Solvent's solvent properties in this continuous industrial process to achieve this laudable goal. Hr'g Tr. (June 24) at 30, 70-74 (Wozniak); *id.*, at 223-35, 249-50, and 255-56 (Warren); Hr'g Tr. (June 23) at 159, 183 (Blair); Hr'g Tr. (June 28) at 38 (Bates). Many decades ago, this same material was simply discarded into water troughs located under the paint booths. Hr'g Tr. (June 24) at 70-71 (Wozniak). The Purge Solvent must be managed efficiently and effectively downstream of the paint booths so the paint solids in the mixture do not clog those lines and equipment and do not interrupt or slow down the painting inside the paint booths. RX 5 at ¶¶ 17 and 21. The Purge Solvent flows from the gun boxes through pipes into devices called purge pots which typically have a capacity of about 30 gallons. Initial Decision at 11; RX 1 at ¶ 26.

When the Purge Solvent rises to a predetermined level in a purge pot, the pump on that purge pot is automatically activated and pumps the Purge Solvent through a system of pipes, including recirculation loops at the Moraine and Orion facilities, to the Purge Mixture Storage Tanks at each facility. Initial Decision at 11; RX 1 at ¶ 27. *See also*, RX 2 at ¶ 19.

The Purge Solvent accumulates in these Purge Mixture Storage Tanks until it is shipped off-site. *See*, RX 1 at ¶ 32. The solvent from the Pontiac and Moraine Purge Mixture is

reclaimed at an off-site facility and that same solvent is segregated and returned to the Pontiac and Moraine Facilities and beneficially reused as “reconstituted” Purge Solvent in the manufacturing process.³ See RX 2 at ¶ 21; Hr’g Tr. (June 28) at 16, 25 (Bates); *id.*, at 170-71 (Winkler).

The purge system is specifically designed to allow GM to save the solvent in the Purge Mixture so it can be reclaimed and reused instead of being thrown away. Hr’g Tr. (June 24) at 30, 70-74 (Wozniak). When GM sends its Purge Mixture off-site, its intent is to have as much of the Purge Solvent as possible reclaimed and beneficially reused, preferably to be reclaimed and returned to GM for reuse. Hr’g Tr. (June 28) at 16, 25 (Bates); *id.*, at 170-71 (Winkler).

The Purge Solvent must clean the paint applicators quickly – within seconds. Hr’g Tr. (June 23) at 109-111 (Blair). This cleaning is accomplished by the Purge Solvent performing the following solvent purposes – solubilizing paint, reducing viscosity, dispersing paint solids, and dilution. Hr’g Tr. (June 24) at 223-29 (Warren). The Purge Solvent performs the same solvent functions downstream of the paint applicators as it does in the paint applicators and is specifically created to perform these same solvent functions at both locations. Hr’g Tr. (June 24) at 223-25, 229-35 (Warren); Initial Decision at 9. These solvent functions include solubilizing the resins and solids, maintaining the reduced viscosity, keeping the resins from reacting especially in the case of the two clear coats (2-K Isocyanate and silanes) and keeping paint solids suspended and dispersed so they will not clog the lines and equipment downstream of the paint applicators. Hr’g Tr. (June 24) at 223-25, and 229-35 (Warren). *See also*, Initial Decision at 9.

³ The solvent in the Purge Mixture in the Purge Mixture Storage Tanks from the Orion facility used to be segregated, reclaimed and returned to the facility. However, the volume of Purge Solvent generated at Orion has been so low in recent years that it has proven uneconomical to segregate and return this solvent to the plant for reuse. RX 2 at ¶ 22. However at the time of the hearing, the Orion facility had developed a program with its new reclaimer and purge supplier to use reconstituted Purge Solvent to clean the paint system during shutdowns. Hr’g Tr. (June 28) at 192 (Winkler); Hr’g Tr. (June 29) at 19 (Winkler).

The Purge Solvent continues to dissolve the polymers all the way from the paint booth to the storage tank; continues to disperse paint pigments after it exits the applicators; continues to carry the paint solids after it exits the applicators by keeping them in suspension; and continues to dilute the paint after it exits the applicators. Hr'g Tr. (June 21) at 42, 45-49 (Kendall); Hr'g Tr. (June 20) at 280-81 (Kendall). Once the Purge Solvent enters the Purge Mixture Storage Tanks, the Purge Solvent continues to perform several solvent functions, including keeping the paint solids mobilized and in suspension and preventing these tanks from becoming clogged. Hr'g Tr. (June 20) at 280-81 (Kendall); Hr'g Tr. (June 24) at 291-292 (Warren); Hr'g Tr. (June 29) at 110-11 (Winkler).

Because it contains paint solids, GM's once-used Purge Solvent will deposit a residue on the inside of the pipes and equipment downstream of the paint applicators. Hr'g Tr. (June 24) at 76-77 (Wozniak); Hr'g Tr. (June 21) at 57-58 (Kendall); Hr'g Tr. (June 20) at 278 (Kendall). Subsequent slugs of once-used Purge Solvent dissolve and remove some of the previously deposited film from the pipes and equipment downstream of the applicators and deposit a new layer of film. Hr'g Tr. (June 24) at 77 (Wozniak); Hr'g Tr. (June 24) at 230-31 (Warren); Hr'g Tr. (June 21) at 58-59, 72 (Kendall). The continual depositing and dissolving of film in the pipes and equipment downstream of the paint applicators allows the piping to reach equilibrium which prevents that piping from clogging. Hr'g Tr. (June 24) at 77, 82-83 (Wozniak). Obtaining this state of equilibrium is a necessary part of the design of the purge recovery portion of the painting operations. *Id.*, at 82 (Wozniak). EPA's Dr. Kendall testified that if this cleaning function was not performed downstream of the applicators, "bad things" would happen to GM's painting operations, including eventually shutting those operations down. Hr'g Tr. (June 21) at 59, 61-62.

The 2k-isocyanate and silane clear coats used at the three GM facilities pose unique cleaning challenges downstream of the applicators because those clearcoats are specifically designed to create a hard surface on the vehicles. Hr’g Tr. (June 24) at 217 (Warren). These same properties can cause these particular paints to harden within and clog the pipes and equipment downstream of the applicators. *Id.* at 236-40 (Warren). Purge Solvent is designed to include alcohol which prevents the two components of the 2k-isocyanate from reacting downstream of the paint applicators and clogging the lines and equipment. Hr’g Tr. (June 24) at 255-56, and 238-40 (Warren). Similarly, the Purge Solvent prevents the silane from reacting with moisture downstream of the paint applicators by performing the solvent functions it is produced to perform, specifically, dispersing, solubilizing, diluting, suspending and carrying. Hr’g Tr. (June 24) at 294-95 (Warren). If the Purge Solvent was not present and performing those intended functions, paint solids would “gum up” or clog the gun boxes, purge pots, and lines running from the purge pots to the Purge Mixture Storage Tanks which would slow down and eventually interfere with painting in the paint booths. RX 2 at ¶ 29. *See also*, RX 8 at ¶ 12; and RX 5 at ¶¶ 15 and 17. GM’s design of its painting operations specifically relies on this Purge Solvent performing these functions. RX 2 at ¶ 28. *See also*, RX 5 at ¶ 16.

GM does not need to process its once-used Purge Solvent before it can be used to perform the solvent functions for which it was produced downstream of the paint applicators or in the Purge Mixture Storage Tanks at each of the three GM facilities at issue in this case. Hr’g Tr. (June 24) at 94 (Wozniak); Hr’g Tr. (June 24) at 255 (Warren); Hr’g Tr. (June 20) at 280-81 (Kendall); Hr’g Tr. (June 21) at 42-45 (Kendall). It simply performs those functions “as is.” Hr’g Tr. (June 24) at 94 (Wozniak).

U.S. EPA has authorized the State of Michigan to administer portions of the hazardous waste program in lieu of the federal program, including the base hazardous waste program (which includes Subpart J) as well as the Subpart BB and CC regulations. Initial Decision at 7; RX 1 at ¶ 7. The Michigan Department of Environmental Quality determined that GM's once-used Purge Solvent was not subject to Michigan's hazardous waste regulations until it exits the building or enters the Purge Mixture Storage Tanks because the Purge Solvent is designed to keep the paint solids in suspension and to allow flow through the lines, purge collection is a necessary process uniquely tied to painting, and the purge piping system is integral to the production process and would shutdown the entire manufacturing process if it becomes clogged. RX 21 at GM000073-74; RX 182A at 9.

U.S. EPA has also authorized the State of Ohio to administer portions of the hazardous waste program in lieu of the federal program. Specifically, EPA has authorized Ohio to administer the base hazardous waste program which includes the Subpart J regulations. Initial Decision at 7; RX 1 at ¶ 8.

Several years ago EPA's Enforcement office began taking the position that once the Purge Solvent exited the applicators, it was a "waste" because it was "discarded" by GM and thus subject to regulation as a hazardous waste under RCRA. The Initial Decision in this case upheld the basic position of EPA's enforcement office despite clear factual findings that the material is still being used by GM for its intended solvent purposes after it exits the applicators.

V. STANDARD OF REVIEW

The EAB reviews the factual and legal conclusions of the ALJ on a *de novo* basis. 40 C.F.R. § 22.30(f); *See In re Norman C. Mayes*, RCRA (9006) Appeal No. 0401, slip op. at 11 (EAB March 3, 2005).

VI. ARGUMENT

A. GM'S PURGE SOLVENT IS NOT A "DISCARDED MATERIAL" UNDER RCRA'S STATUTORY DEFINITION OF "SOLID WASTE".

1. *To Be Subject to the RCRA Regulatory Regime, GM's Purge Solvent Must Be Discarded.*

The central question in this case, as it relates to EPA's statutory authority to regulate the once-used Purge Solvent (or "Purge Mixture") as hazardous waste, is whether the Purge Solvent is "discarded" under the RCRA statute. An administrative agency only has those powers conferred on it by the legislature. *See Louisiana Public Service Comm'n. v. FCC*, 476 U.S. 355, 374, 1-6 S.Ct. 1890, 1901 (1986) (*hereafter*, "*Louisiana Pacific*") ("[A]n agency literally has no power to act, ... unless and until Congress confers power upon it. ...An agency may not confer power upon itself"); *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204,208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *Michigan v. E.P.A.*, 268 F.3d 1075, 1081 (D.C. Cir. 2001). Therefore, neither EPA's Enforcement Office nor the ALJ can interpret EPA's regulation in a manner that would allow EPA to regulate a material over which it has no statutory jurisdiction. *Louisiana Pacific*, 476 U.S. at 374 ("To permit an agency to expand its power in the face of a congressional limitation in its jurisdiction would be to grant to the agency the power to override Congress. This we are both unwilling and unable to do."). Moreover, EPA's rules must be read to be consistent with the statute. If not, then the rule is invalid. Such a result can be avoided in this case by simply reading the plain language of the rules as GM (and Michigan) have argued.⁴

⁴ At the hearing, the ALJ stated she has no authority to strike down an EPA regulation on its face. Hr'g Tr. (June 22) at 37. GM is not suggesting that either the ALJ or the Environmental Appeals Board must do that for GM to prevail. GM only argues EPA's rules must be read so they are consistent with EPA's governing statute to avoid the need for a court later to strike down this rule (whose validity as an overly broad rule has been subject to litigation since it was published in 1985). GM did argue that the ALJ should have approached (and does argue that the

Under RCRA, before a material can be regulated as a “hazardous waste,” it must first meet the definition of a “solid waste.” 42 U.S.C. § 6903(5); *See also, Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) (hereafter, “*AMC I*”).⁵ The pertinent portion of the statutory definition of “solid waste” reads as follows:

[A]ny garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material*

42 U.S.C. § 6903(27) (emphasis added).

There is no claim that GM’s Purge Solvent is garbage, refuse, or any kind of sludge from any type of treatment operation. Therefore, the only way the Purge Solvent can be a solid waste is if it is some kind of “other discarded material.”

Environmental Appeals Board should approach) the reading of EPA’s rules much like a court reads a statute a certain way so as to avoid a constitutional issue. *Rosales-Garcia v. Holland*, 322 F.3d 386, 420 (6th Cir. 2003) (“[A]n Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available.”) (*citing NLRB v. Catholic Bishop*, 440 U.S. 490, 500 (1979).); *see also Rucker v. Wabash Railroad Co.*, 418 F.2d 146, 149 (7th Cir. 1969) (“Administrative regulations, like statutes, must be construed by courts, and the same rules of interpretation are applicable in both cases.”).

⁵ Of course, the Michigan and Ohio statutes govern these proceedings and their statutes define solid waste in materially identical terms. While neither mirror the RCRA statute’s definitions of solid waste and hazardous waste completely, they do in all material ways relevant in this case. Michigan’s definition of hazardous waste is not dependent on the definition of “solid waste” (as RCRA’s definition is), but Michigan law defines hazardous waste to include a “waste or combination of waste and other **discarded material**” MICH. COMP. LAWS § 324.11103(3) (emphasis added). Similarly, Ohio’s definition of “solid waste” specifically excludes “hazardous waste”, while the definition of “hazardous waste” in Ohio “includes any substance identified by regulation as hazardous waste under [RCRA].” OH. REV. CODE §§ 3734.01(E) and 3734.01(J). Therefore, as Michigan’s statute requires the Court to interpret “discarded material” as does RCRA, and Ohio’s statute specifically includes any hazardous wastes identified under RCRA, the same analysis that is used to determine whether a substance is first a “solid waste” (as a “discarded material”), and then a “hazardous waste” under RCRA should apply when determining whether a substance is a “hazardous waste” in Michigan and Ohio. Moreover, EPA is barred from enforcing Michigan and Ohio law to the extent that the states’ statutory definitions of “hazardous waste” are broader than RCRA’s. It is an accepted principle that EPA’s enforcement authority is limited to that which Congress assigned it. *See, supra*, at p. 16. EPA cannot overreach its Congressional imposed statutory bounds by usurping enforcement authority state legislatures have granted state agencies. For convenience, however, except as otherwise noted, in this brief all references to statutory or regulatory language will be to the federal rules and not to Ohio or Michigan law because the relevant state language is materially identical.

The D.C. Circuit has issued a number of decisions that govern what materials may be classified as “discarded” and therefore a “solid waste” under RCRA.⁶ In *AMC I*, the court dealt with EPA’s efforts to regulate secondary materials that were generated in an industrial process and were then reused by that industry as part of its ongoing production process. 824 F.2d at 1178. The *AMC I* court determined that the statutory word “discarded”— must be given its plain and ordinary meaning. *Id. at* 1184-85. The court held that “discarded” means something which is “disposed of,” “thrown away,” or “abandoned,” and that a material which is not, in fact, disposed of, thrown away, or abandoned is not “discarded” and therefore cannot be regulated under RCRA as a solid waste. *Id. at* 1184, 1190. The court’s holding and instructions to EPA were clear and direct:

In sum, our analysis of the [RCRA] statute reveals clear Congressional intent to extend EPA’s authority **only to materials that are truly discarded, disposed of, thrown away, or abandoned.**

* * *

We are constrained to conclude that, in light of the language and structure of RCRA, the problems animating Congress to enact it, and the relevant portions of the legislative history, **Congress clearly and unambiguously expressed its intent that “solid waste” (and therefore EPA’s regulatory authority) be limited to materials that are “discarded” by virtue of being disposed of, abandoned, or thrown away.**

Id. at 1190, 1193 (bracketed word and emphasis added).

The *AMC I* court also was impressed by the fact that the materials in question in that case were being reused by the industry in a continuous industrial process. After noting that Congress’ purposes in enacting RCRA were to address the problems of waste that is actually “disposed of” or “abandoned,” the court said:

⁶ As noted, EPA’s RCRA authority is limited by Congress. EPA can only regulate materials that are “solid wastes.” In this case, that means the only way the Purge Solvent could qualify as a solid waste under the statute is if it is “discarded.”

To fulfill these [statutory] purposes, it seems clear that EPA need not regulate “spent” materials that are recycled and reused in an ongoing manufacturing or industrial process. These materials *have not yet become part of the waste disposal problem*; rather, they are destined for beneficial reuse or recycling in a continuous process by the generating industry itself.

Id. at 1186 (emphasis added, footnote and emphasis in original omitted).

Thirteen years later, the D.C. Circuit had occasion to reaffirm its *AMC I* holding when it was again forced to rein-in EPA’s attempt to regulate materials in the mining and mineral processing industry that were not, in fact, discarded. *Ass’n. of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000) (hereafter “ABR”). *ABR* involved an EPA rule that sought to classify as solid waste secondary materials generated by an industrial process that were temporarily stored by the facility before being reclaimed and reintroduced into its production process. *Id.* at 1050. EPA tried to distinguish *AMC I* by arguing that decision only dealt with materials that were “immediately” reused in a production process. *Id.* at 1052. The court found EPA guilty of “misread[ing]” its holding in *AMC I*, *Id.* at 1052, and rejected EPA’s position, stating:

Petitioners . . . ask how secondary material held for recycling in production could possibly qualify as “waste” when the statute defines “waste” as “discarded materials”?

The question is not a new one. It was asked and answered in [*AMC I*]. The court [in *AMC I*] began by referring to the “ordinary, plain-English meaning” of “discarded” – “‘disposed of,’ ‘thrown away,’ or ‘abandoned.’” Secondary materials destined for recycling are obviously not of that sort. **Rather than throwing these materials away, the producer saves them; rather than abandoning them, the producer reuses them.**

* * *

. . . To say that when something is saved it is thrown away is an extraordinary distortion of the English language. Yet that is where EPA’s definition leads.

Id. at 1051, 1053 (bracketed words and emphasis added; citations omitted). The *ABR* court held EPA's rule invalid and beyond EPA's statutory authority because it purported to regulate as a solid waste materials that were not, in fact, disposed of, abandoned, or thrown away. *Id. at* 1056.

2. ***GM Does not "Discard" the Purge Solvent At Its Plants.***

GM never "discards" the Purge Solvent while that material is at its facilities. In fact, the opposite is true.

As relates to the Purge Solvent between the paint applicators and the storage tanks. The record is replete with undisputed evidence that GM continues to use it. Moreover, the fact is that the Purge Solvent is never thrown away, it is never abandoned, it is never disposed of *while at GM's facilities*. Indeed, GM considers it a valuable commodity. Hr'g Tr. (June 28) at 16 (Bates). Instead of being discarded, it is carefully saved and managed, and its solvent component is used downstream for solvent functions.

The evidence overwhelmingly demonstrates that GM never intends to "discard" the Purge Solvent at any point at its facility. Indeed, as Ms. Bates and Ms. Winkler testified, GM takes great pains to manage its Purge Solvent very carefully. It has economic value. Hr'g Tr. (June 28) at 159-160 (Winkler); *id.* at 16 (Bates). Ms. Winkler testified that GM does not throw the Purge Solvent away; it does not dispose of it; it does not abandon it; it does not discard it. *Id.* at 159. This evidence is undisputed in the record. Instead, Ms. Winkler explained:

We manage it in the same way we do all of our materials, it's valuable to us, we want to be able to reclaim it and bring it back to the facility . . . – it's a lot less costly to buy reclaimed – reconstituted purge solvent than it is to buy virgin purge solvent. Plus we save on resources.

Id. at 159-160. *See also, id.* at 161 ("[w]e treat the purge solvent just like we treat the incoming purge and the paint"). Moreover, once the once-used Purge Solvent is in Purge Mixture Storage

Tanks, GM's intent is to send it off-site so as much of it as possible can be reclaimed and beneficially reused. GM also intends that the Purge Solvent be reclaimed and returned to GM to be reused as reconstituted Purge Solvent. Hr'g Tr. (June 28) at 162-163 (Winkler); *id.* at 25 (Bates). Mr. Wozniak testified that the whole design and operation of the purge recovery system is *to save* as much of the Purge Solvent as possible. Hr'g Tr. (June 24) at 30, 74-75. Part of that design intent is to ensure nothing extraneous can enter the Purge Solvent so it remains "pure" and can be reclaimed and beneficially reused. *Id.* at 74.

The D.C. Circuit Court of Appeals has made it clear that before a material can be a hazardous waste under the statute, it first must be a solid waste. The only relevant portion of the statutory definition is "discarded material." However, for a material to be "discarded," it must be thrown away, abandoned or disposed. *AMC I*, 824 F.2d at 1184, 1190, and 1193. That is not the case for the "contaminated" Purge Solvent either downstream of the paint applicators or in the Purge Mixture Storage Tanks. Rather than throwing it away, abandoning it, or disposing of it, GM carefully saves it so it can be reclaimed and reused again and again. The D.C. Circuit was right on point in *ABR*: "[t]o say that when something is saved it is thrown away is an extraordinary distortion of the English language." *ABR*, 208 F.3d at 1053. GM's intent and practice is never to throw away, abandon, or dispose of this material; it is to continue to use it and save it. Therefore, the Purge Solvent is not "discarded" under the statute and it is outside EPA's statutory jurisdiction under RCRA. The ALJ's finding to the contrary is clearly erroneous and contrary to the undisputed facts in the record.

Not only does the overwhelming evidence in this case establish that the "contaminated" Purge Solvent is not "discarded" by GM at its three facilities, it also establishes that the "contaminated" Purge Solvent is used in a continuous industrial process. As the Court in *AMC I*

stated, “materials that are recycled and reused in an ongoing manufacturing or industrial process . . . have not yet become part of the waste disposal problem” 824 F.2d at 1186 (emphasis added, footnote and emphasis in original omitted).

The overwhelming evidence in this case establishes that the locations where the “contaminated” Purge Solvent is being used are part of GM’s painting operation, which is a manufacturing process. GM’s painting operation includes the following five steps: (1) Storage of paint in the paint mix room; (2) Delivering the paint to the paint booths through a number of lines that are in constant circulation; (3) Applying the paint to vehicles in the paint booths; (4) The purge process; and (5) Storage of the Purge Mixture. Hr’g Tr. (June 23) at 150-52, 155-56, 159-60 (Blair). *See also*, Hr’g Tr. (June 27) at 5 (Chaput) (Mr. Chaput’s reference to the paint shop includes the five steps identified above and “much, much more.” *Id.*). The purge process is part of this integrated painting operation and was designed to efficiently remove and transport paint solids from the paint booths so they do not interrupt or adversely affect painting operations. RX 5 at ¶ 21. *See also*, RX 2 at ¶ 36.

The undisputed evidence in this case establishes that this purge process is essential to allow GM to switch paint colors and to keep the manifolds and applicators clean so they deliver the high-quality paint job GM’s customers demand. *See, e.g.* Hr’g Tr. (June 23) at 107-115 (Blair). So, GM’s design engineers, like Mr. Wozniak, developed the purge reclaim system which exists at all three plants involved in this litigation and has become the industry standard. *See, e.g.*, Hr’g Tr. (June 23) at 149-50 (Blair); Hr’g Tr. (June 24) at 30, 71-74 (Wozniak). Moreover, a clog or malfunction in this system can adversely affected the need for continuous, uninterrupted painting operations. RX 5 at ¶¶ 17, 18; RX 14 at ¶¶ 10-12; Hr’g Tr. (June 24) at 83 (Wozniak).

As Mr. Wozniak, Mr. Chaput, and Mr. Blair testified, GM's entire painting operation is a single, integrated, continuous industrial manufacturing process. Hr'g Tr. (June 23) at 150-52, 155-56, 159-60 (Blair); Hr'g Tr. (June 24) at 6-7 (Wozniak). *See also*, Hr'g Tr. (June 27) at 5 (Chaput). Even though it is true that nothing is manufactured in the purge recovery portion of that process, that does not mean it is not part of GM's "manufacturing or industrial process." No one disputes that the lines and equipment located upstream of the paint booths are part of GM's painting operation even though nothing is manufactured in those lines or equipment. The evidence in this case is clear, GM's painting operation is a "manufacturing or industrial process" and that operation consists of a various steps, including the purge recovery operation. Therefore, the locations where the "contaminated" Purge Solvent is used are part of GM's continuous industrial process, are not yet part of the waste disposal problem, and are not "discarded" under statute pursuant to the holding in *AMC I*.

3. *The Purge Solvent is Not a Waste when it is Shipped Off-site for Reclamation.*

The contaminated Purge Solvent also is not a solid or hazardous waste when it is shipped off-site for reclamation because, once again, it has not been *discarded*. As Ms. Bates and Ms. Winkler made clear, GM's intent is not to abandon, throw away, or dispose of the Purge Solvent when it is sent off-site. Hr'g Tr. (June 28) at 16, 25 (Bates); Hr'g Tr. (June 28) at *e.g.*, 162 (Winkler).

It is only at the reclaimer's facility when a decision is made as to what, if any, material is discarded. GM's intent is to have the Purge Solvent reclaimed, reconstituted, and brought back. *Id.* EPA's only response to this evidence is that some of the Purge Solvent sent off-site was diverted by the reclaimer and blended into fuel instead of being reclaimed. Hr'g Tr. (June 21) at 291 (Benson).

EPA is correct: sometimes material is diverted by the reclaimer. But that is not GM's decision. EPA's own witness, Mr. Benson, testified that the decision about whether a material is a "waste" must be made by the generator at the point of generation. Hr'g Tr. (June 21) at 290 (Benson). When GM sends its contaminated Purge Solvent off-site, if GM intends to reclaim its Purge Solvent at the time, GM's intent governs because "that is the point of generation and that is where you make your decision, not downstream, not someplace else." *Id.* EPA did not submit any evidence to rebut GM's actual generator intent. The fact that some reclaimers sometimes later make a decision to divert some portion of this material to a fuels program is irrelevant. *See, e.g.,* Hr'g Tr. (June 28) at 172-173 (Winkler). What happens at the reclaimer's facility, based on the reclaimer's intent, does not change and cannot be equated with GM's intent back at its facilities.

Mr. Benson admits that the solvent separated at the reclaimers that is destined to be reused by GM (or others) is a product, and is not a waste. Hr'g Tr. (June 21) at 173. So that portion of the Purge Solvent is never discarded and never becomes a waste. Similarly, Mr. Benson testified that even the solids reclaimed from this process can now be used by others to make paint. *Id.* at 165. Solids that are created and then sold to a company as an ingredient in making paint are not waste. The only material from this reclamation process that is a waste is the still bottoms or other non-usables that are not turned into solvent or paint because they are "disposed of." That would be the first point where any of the material in question would in fact be "discarded" under the statute. But that decision is made by the reclaimer, not GM. GM does not control that decision. That is the reclaimer's intent, not GM's.⁷ That decision is the first

⁷ As Ms. Winkler testified, the reclaimer may make the decision whether to recycle or fuel blend based on economics. Hr'g Tr. (June 28) at 173. For example, the reclaimer may get a better value for GM's purge mixture by diverting it to a blending program because of its high BTU content.

point of generation of any waste in this fact setting under the statute.⁸ The ALJ's conclusion to the contrary is erroneous.

B. THE PURGE SOLVENT DOWNSTREAM OF THE PAINT APPLICATORS IS NOT A "SPENT MATERIAL" UNDER THE PLAIN LANGUAGE OF THE REGULATION BECAUSE IT IS BEING USED FOR THE PURPOSE FOR WHICH IT WAS PRODUCED WITHOUT PROCESSING.

The ALJ correctly observed that the primary issue in this case is at what point, if any, does GM's Purge Solvent become a "spent material" and, therefore, become a "waste" and "hazardous waste" subject to RCRA regulation. Initial Decision at 6. The ALJ concluded that the Purge Solvent downstream of the paint applicators is a "spent material that is reclaimed" and that "[t]he downstream purge solvent is a discarded material that is recycled as a reclaimed spent material, thereby constituting solid waste under 40 C.F.R. § 261.2(a)(2)." Initial Decision at 71 (citing 40 C.F.R. §§ 261.1(c)(1), (4), 261.2(c)(3), and 261.2(a)(2)(ii)).

To support this conclusion, the ALJ incorrectly determined GM's Purge Solvent becomes a "spent material" and "a waste within the meaning of RCRA and its implementing regulations upon cleaning the manifolds and associated [paint] applicators" because the paint solids have "contaminated" the Purge Solvent and the point of generation of this "waste" is "immediately after the solvents [leave] the manifolds and associated [paint] applicators . . .". *Id.* at 17-18

⁸ Still bottoms diverted to a waste fuels program is a closer question. According to Mr. Benson, "burning for energy recovery" in a cement kiln or incinerator results in the material being "abandoned" and therefore discarded. Hr'g Tr. (June 21) at 210. Mr. Benson is wrong. The rules clearly state that burning for energy recovery is not abandoning the materials. 40 C.F.R. § 261.2(b) and (c) (respectively, explanation of "abandoned" materials in the definition of "spent material" and explanation of "recycled" materials in the definition of "spent material" – which includes those materials burned for energy recovery in subpart (c)(2)). EPA admitted that reusing the "contaminated" Purge Solvent in a fuels program saved natural resources and had many environmental benefits. Hr'g Tr. (June 21) at 264-266 (Benson). One could argue that industrial fuels that are being beneficially reused are not discarded under the statute, but that is a fight for another day. Under the current regulatory scheme, still bottoms sent off to a fuels program by the reclaimer would be considered discarded under the rules.

(bracketed words added).⁹ The ALJ is wrong. The ALJ's decision – and the EPA Enforcement staff's view for that matter – rest on the misconception that there are only two worlds the Purge Solvent can exist in: (1) pure raw product; or (2) waste material. They believe, therefore, that once the Purge Solvent is partially contaminated with the paint solids, it must be a waste under RCRA. This premise is fundamentally false. Legally it is wrong. Factually it is wrong. The regulations and EPA's RCRA program have long recognized that solvent (or other materials) may no longer be "pure product" without becoming a waste because they have not yet been "discarded" or "spent." EPA's regulation defining "spent material" and the "continued use" doctrine which flows from it are clear demonstrations that, outside this enforcement context, a solvent material may become partially contaminated but still be able to be a valuable material serving the purpose for which it was produced.

Moreover, the ALJ's efforts to interpret "spent material" is flawed from the start because the definition of "spent material" in the relevant hazardous waste regulations is clear and unambiguous on its face and does not require interpretation. Therefore, the words of this definition must be applied as written. Hr'g Tr. (June 22) at 40. *See also, In re: Julie's Limousine & Coachworks, Inc.*, EPA App. LEXIS 23, *35-36 (July 23, 2004); *In the matter of United States Air Force Tinker Air Force Base*, 1999 EPA ALJ LEXIS 33, *40-41 (May 19, 1999); *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) ("[I]n interpreting a statute a court should always turn to one cardinal canon before all others...that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Id.* "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). This cardinal

⁹ As it relates to the 2K Isocyanate paint at GM's Orion vehicle assembly facility, the ALJ identified a different location where the Purge Solvent is allegedly "spent." March 30 Initial Decision at n.12.

canon also applies to regulations because courts apply the same rules of interpretation to administrative rules as are used to interpret statutes. *Ala. Tissue Ctr. of Univ. of Ala. v. Sullivan*, 975 F.2d 373, 379 (7th Cir. 1992); *United States v. Ray*, 488 F.2d 15, 18 (10th Cir. 1973) (“Where the language is clear and the purpose appears with reasonable certainty, there is no need to resort to rules of construction to ascertain its meaning... *this same rule applies in construing administrative regulations...*” *Id.* (emphasis added)).

1. The Record Demonstrates that Purge Solvent is Performing the Function for Which It was Produced Downstream of the Paint Applicators.

“Spent material” is defined as “any material that has been used and as a result of contamination *can no longer serve the purpose for which it was produced* without processing.” 40 C.F.R. § 261.1(c)(1) (emphasis added).¹⁰

Therefore, to determine if a material is a “spent material” under the regulations, the threshold question – What is the purpose for which that material was produced? – must be determined.¹¹ The undisputed facts in this case establish that purpose for which GM’s Purge Solvent is produced is to perform solvent functions at several points in the painting process, including: (1) in the paint applicators and associated manifolds; and (2) downstream of the paint applicators. Initial Decision at 9 (citing Tr. (June 24) at 223-25, 230-31, and 255-56).

As the ALJ already determined, the Purge Solvent has a purpose downstream of the paint applicators. The ALJ found:

¹⁰ The definition of “spent material” in Michigan’s and Ohio’s hazardous waste regulations is identical to EPA’s. MICH. ADMIN. CODE r. 299.9107(aa) (2004); OHIO ADMIN. CODE § 3745-51-01(C)(1) (2004).

¹¹ The ALJ determined the word “purpose” in the definition of “spent material” was limited to a singular purpose and not multiple purposes. Initial Decision at 25-26. While GM disagrees with that interpretation as set forth below, the undisputed evidence in this case establishes, the “purpose” for which GM’s Purge Solvent is produced is to perform the same solvent functions in two locations. RX 2 at ¶ 28; *see also*, RX 5 at ¶¶ 12 and 17. Performing these solvent functions in these discrete locations is the sole purpose for which GM’s Purge Solvent is produced.

Purge Solvent is a separately purchased solvent mixture specifically formulated according to the design of the paint system at each facility and the types of paint being used. [Resp't Ex. ("RX") 1 at] ¶ 24.

. . .

Purge Solvent is expressly formulated to perform solvent functions in the manifolds and associated [paint] applicators, as well as downstream of the [paint] applicators. *See* Tr. (June 24) at 223-25[,] 230-31, 255-56.

Initial Decision at 9 (bracketed words added).¹²

The fact that Purge Solvent “is expressly formulated to perform solvent functions in the manifolds and associated [paint] applicators, as well as downstream of the [paint] applicators” is not in dispute. Moreover, GM’s specifically purchases it to perform those solvent functions in those two locations. As Ms. Bates testified,

[w]e don’t buy purge solvent for only one purpose. We buy it for the purpose as has been described here, of cleaning applicators and then continuing to function as a solvent to continue to mobilize and solubilize the solids as they are conveyed to the purge mixture storage tank.

Hr’g Tr. (June 28) at 38.

The ALJ correctly found that the Purge Solvent within the paint applicators dissolves the polymers or resins in the paint and removes any residue that may be present in the painting equipment; disperses paint pigments; suspends the paint solids and keeps them in suspension so they can be carried from one point to another and will not fall out and accumulate in the paint applicators and manifolds; and dilutes the paint, which is an inherent part of the cleaning process. Initial Decision at 9. This Finding of Fact is consistent with the undisputed testimony of both EPA’s and GM’s expert chemist witnesses, Dr. Kendall and Mr. Warren. Hr’g Tr. (June 21) at 33-34, 44-48 (Kendall); Hr’g Tr. (June 24) at 223-29 (Warren).

¹² This Finding of Fact is based on the testimony of Mr. Jonathan Warren who stated that he expressly formulates Purge Solvent to perform necessary solvent functions at two distinct locations – in the paint applicators and downstream of the paint applicators. *See, e.g.*, Hr’g Tr. (June 24) at 223-25, 229-31, 266-56.

It also is undisputed that the Purge Solvent performs solvent functions downstream of the paint applicators. Indeed, EPA stipulated that the Purge Solvent performed solvent functions downstream of the paint applicators in the Joint Stipulations of the Parties:

The solvent contained in the Purge Solvent helps *to perform* the following functions: solubilize some of the paint solids in the Purge Solvent into solution; mobilize some of the paint solids in the Purge Solvent in suspension; and keep the lines open for flow to the Purge Solvent tanks. The solvent in the Purge Solvent also helps to lower the viscosity of the Purge Solvent to make it easier to flow.

RX 1 at ¶ 37 (emphasis added).¹³ EPA's own expert chemist witness Dr. Kendall testified as follows:

- First, "the purge solvent continues to dissolve the polymers after it exits the applicators . . . ". Hr'g Tr. (June 21) at 45. *See also, id.* at 42, 42-45.
- Second, the Purge Solvent *continues to disperse* paint pigments after it exits the applicators. *Id.* at 46.
- Third, the Purge Solvent *continues to carry* the paint solids after it exits the applicators by keeping them in suspension. *Id.* at 46-47.
- Fourth, the Purge Solvent *continues to dilute* the paint after it exits the applicators, which is, again, an inherent part of painting. *Id.* at 47-48.

Finally, Mr. Benson, EPA's hazardous waste regulatory expert, also acknowledged that the Purge Solvent performs solvent functions downstream of the paint applicators:

Q: . . . Is there purge solvent in the purge mixture?

A: Yes, there's purge solvent –

Q: And Dr. Kendall testified today that that purge solvent is not totally saturated, didn't he?

A: That's correct.

Q: And, therefore, that the **purge solvent** that is in the purge mixture **continues to perform solvent functions**?

A: **We have not denied that.**

¹³ EPA similarly stipulated, and the ALJ determined, the solvent in the paint "helps perform" many of the same solvent functions. RX 1, ¶ 15; Initial Decision at 7 ("The solvent in the paint helps perform the following functions: solubilize some of the paint solids into solution; mobilize some of the paint solids in suspension; maintain the viscosity of the paint by serving as a diluent; minimize clogging of the paint equipment and associated lines; and allow the paint solids to flow and to be evenly and smoothly applied to the vehicle.").

Q: Okay

THE COURT: Pardon me? I didn't hear the answer.

THE WITNESS: We did not deny that.

THE COURT: Okay.

Hr'g Tr. (June 21) at 323 (emphasis added).

The evidence establishes conclusively, and everyone agrees, that the Purge Solvent is performing solvent functions downstream of the paint applicators and performing those solvent functions is the purpose for which it was produced. The ALJ agrees, the solvent manufacturer agrees, the system designer agrees, EPA's Chemist agrees, and EPA stipulated. Therefore, the Purge Solvent downstream of the paint applicators is being used; it does not satisfy the regulatory definition of "spent material;" and thus cannot be a "discarded material" or "waste" under RCRA. The ALJ's conclusion to the contrary ignores the undisputed facts in the record, is clearly erroneous, and must be set aside.

2. Cleaning Lines and Equipment and Suspending Solids, Whether Upstream or Downstream of the Paint Applicators, is The Purpose for Which the Purge Solvent was Produced.

The ALJ determined that the solvent properties of the Purge Solvent in the Purge Solvent were not cleaning the lines and equipment downstream of the paint applicators on their own. *See*, Initial Decision at 33-34. She concluded that it is the force provided by pressure, pumps, recirculation, and the volume of Purge Solvent that keeps the lines open and not the solvent properties of the Purge Solvent by itself. *Id.* at 33. The ALJ seems to have determined that since the Purge Solvent is not acting alone, it does not have a purpose, and therefore is a "waste." *Id.* at 33-34.¹⁴ This determination and the ALJ's basis for this determination are not supported by the undisputed facts.

¹⁴ While GM disagrees with that interpretation as set forth below, the undisputed evidence in this case establishes, the "purpose" for which GM's Purge Solvent is produced is to perform the same solvent functions in two locations.

As discussed above, the undisputed evidence establishes that the Purge Solvent in fact performs the solvent functions for which it was produced both in the paint applicators and downstream of the paint applicators. Hr'g Tr. (June 24) at 223-25, 229-31 (Warren). Furthermore, that evidence conclusively establishes that the Purge Solvent is not too contaminated after it cleans the paint applicators and associated manifolds to perform the solvent functions for which it is produced downstream of the paint applicators. Hr'g Tr. (June 24) at 229-35 (Warren). As Mr. Warren and EPA's Dr. Kendall testified, the once-used Purge Solvent does in fact dissolve, disperse, suspend, carry, and dilute paint and paint solids downstream of the paint applicators. Hr'g Tr. (June 24) at 231-35 (Warren); Hr'g Tr. (June 21) at 45-48 (Kendall).¹⁵ This evidence alone establishes that the Purge Solvent does play a role cleaning the lines downstream of the paint applicators. Moreover, as noted, EPA stipulated that the Purge Solvent performs this solvent purpose downstream of the applicators. RX 1 at ¶ 37; *see also, id.* at ¶ 27. The ALJ's conclusion that force, not solvent, is solely responsible for this cleaning sets aside the Parties stipulated facts, ignores the chemistry testimony, and is just plain wrong.

The lines and equipment downstream of the paint applicators require cleaning because paint solids are deposited on the inside of that equipment and would, if not removed, clog the lines downstream of the paint applicators. As Mr. Wozniak testified, over time, a residue or film will develop on the inside of pipes and equipment downstream of the applicators. Hr'g Tr. (June 24) at 76-77. EPA's Dr. Kendall agreed that this build-up of residue in these same pipes and equipment occurs. Hr'g Tr. (June 21) at 57-59, 69, 72. Mr. Warren also agreed with Dr. Kendall

Hr'g Tr. (June 24) at 223-25, 229-31, 255-56. Performing these solvent functions in these discrete locations is the sole purpose for which GM's Purge Solvent is produced.

¹⁵ EPA has identified various practices that constitute using a solvent for its "solvent properties." RX 11 at 53,316. Those solvent property uses include "to solubilize (dissolve) or mobilize other constituents. For example, solvents are used in degreasing, cleaning, fabric scouring, as diluents, extractants, reaction and synthesis media, and similar uses" *Id.*

and Mr. Wozniak that a residue is deposited in the pipes and equipment downstream of the applicators over time, and that subsequent slugs of Purge Solvent would come along and clean these pipes and equipment by dissolving and suspending those residues. Hr’g Tr. (June 24) at 230-231 (Warren). Furthermore, if this residue is allowed to build up over time and is not removed, it eventually will clog the lines. *Id.* at 76-77 (Wozniak).

GM does not dispute that force is helpful to facilitate this cleaning process. In fact, GM relies on the combination of force and the paint’s solvent properties upstream of the paint booths to keep the paint tank and the paint supply lines from clogging. See, Hr’g Tr. (June 24) at 43-44, 76 (Wozniak); Hr’g Tr. (June 20) at 167 (Lamberth). Then, GM relies on the same combination of force and the Purge Solvent’s solvent functions to perform cleaning both in the paint applicators and downstream of the paint applicators. Hr’g Tr. (June 23) at 110-11 (Blair). EPA would not say the material upstream of the paint booths is a “waste” just because force is used there. By the same token, the Purge Solvent is not a “waste” downstream just because force is used in conjunction with the solvent in that location. The Purge Solvent’s chemical properties perform the dissolving, dispersing, and other solvent functions necessary for cleaning as testified to by Dr. Kendall and Mr. Warren while force provides the “elbow grease.” *See*, Hr’g Tr. (June 23) at 111-12 (Blair).

As the ALJ correctly observed in the Findings of Fact, the Purge Solvent’s solvent properties dissolve, disperse, and perform other solvent functions necessary for cleaning in the paint applicators. Initial Decision at 9. However, for that cleaning to be efficient, air chops are used to provide turbulence to the Purge Solvent so paint is removed from the walls of the paint applicators. *Id.* at n. 10 (citing Hr’g Tr. (June 23) at 109-11).

The same thing is true downstream of the paint applicators. Force and solvent work hand in hand in the system. Indeed, EPA's own witnesses testified the force provided by pumps, gravity, agitators, and recirculation loops works with the Purge Solvent to provide the "elbow grease" to clean those lines and equipment. Hr'g Tr. (June 21) at 66 (Kendall); *id.* at 143 (Benson). Similarly, Mr. Wozniak testified that if Purge Solvent was not present and performing its intended solvent functions, no amount of pumping or gravity would keep the equipment clean and flowing. Hr'g Tr. (June 24) at 103.

The exact same thing is true for the recirculation loops. The recirculation loops downstream of the paint applicators at GM's Moraine and Orion facilities serve the same function as the circulation loops located upstream of the paint applicators at all of GM's vehicle assembly facilities, including Pontiac, Orion, and Moraine. Hr'g Tr. (June 24) at 76 (Wozniak). Paint is circulated upstream of the booths at all three facilities to keep the paint solids suspended and dispersed in the paint solvent and to prevent those solids from settling out and clogging the lines. *Id.* at 43-44 (Wozniak); Hr'g Tr. (June 20) at 167 (Lamberth). Just like the circulation systems upstream of the paint booths, the recirculation loops downstream of the paint booths help keep paint solids suspended and dispersed, and reduce the opportunity for solids to settle out in the pipes and equipment. Hr'g Tr. (June 23) at 236, 240 (Blair). These "downstream" recirculation loops help to eliminate or reduce problems due to clogging of these pipes and equipment. Hr'g Tr. (June 27) at 157-58 (Chaput).

However, the pumps and agitators downstream recirculation loops do not operate in a vacuum and they would not achieve the desired end result without the active use of solvents. The constant recirculation movement actually works with and enhances the solvent functions being performed by the Purge Solvent to keep these lines and equipment free and flowing, and

solids suspended and moving. *Id.* at 156 (Chaput). *See also*, Hr’g Tr. (June 24) at 76 (Wozniak); Hr’g Tr. (June 28) at 158-59 (Winkler).

The ALJ recognized the interrelationship between the Purge Solvent’s chemical properties and force to perform cleaning inside the paint applicators, but failed to acknowledge that the same interrelationship exists downstream of the paint applicators. This is baffling in light of the undisputed testimony on this very issue, much of which came from EPA’s own expert chemist. The ALJ’s determination that the Purge Solvent is spent and that only force keeps the lines open downstream of the paint applicators is unsupported by the contradicted evidence in this case. The undisputed facts demonstrate that Purge Solvent is being used downstream of the paint applicators for the precise purpose which it was produced and it is not force alone that cleans the equipment.

3. *The “Predominant Purpose Test” Adopted by the ALJ is Inconsistent with EPA’s Definition of “Spent Material” and Leads to Wholly Illogical Results.*

If, as the record demonstrates, the solvent is performing the same function upstream and downstream of the applicators, how can it be a “waste” on the downstream side? With the facts on the record showing the Purge Solvent is not spent and is performing its intended purpose, the only way the ALJ could sustain the enforcement position of EPA Region 5 was to read into the regulation a “predominant purpose test.” Initial Decision at 27. Under the “predominant purpose test”, the ALJ found that even though the solvent had a “purpose” downstream of the applicators, it was not the “predominant” purpose, and therefore the contaminated Purge Solvent was a waste. *Id.* at 34.

The ALJ’s findings and conclusions regarding the “predominant purpose test” are fundamentally flawed for several reasons. First, there is no “predominant purpose test” in the rule. Second, the ALJ’s construction of the definition of “purpose” in the definition of spent

material is at odds with a basic canons of construction. Third, the ALJ's construction is at odds with the intent of EPA adopting the definition of "spent material." If accepted, the ALJ's "predominant purpose test" would lead to the completely illogical result that if the same person uses the solvent material for a "secondary" purpose on site, the material is a waste, but if that material is taken off-site and used by a third person for another purpose, it is not a waste. *See, id.* at 34. EPA's regulation cannot be interpreted to lead to such an illogical result when a straight forward interpretation leads to a logically consistent result.

The RCRA regulations define a "spent material" as a "material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing[.]" 40 C.F.R. § 261.1(c)(1). That language is clear. Nowhere in the regulation does the word "predominant" appear. The ALJ added it completely out of whole cloth. Indeed, the ALJ's importation of the word "predominant" purpose to the rule is at odds with basic canons of construction.

The ALJ formulated the "predominant purpose test" after concluding that the definition of "spent material" was unambiguous with respect to whether a material could have more than one purpose because "the purpose" meant a singular purpose. Initial Decision at 26-27. The ALJ's conclusion flies in the face of basic principles of statutory construction that the singular includes the plural and the plural includes the singular. *See* 1 U.S.C. § 1; *Central & Southern Motor Freight Tariff Assn., Inc. v. United States*, 843 F.2d 886, 894 (D.C. Cir 1988). *See also Public Citizen v. Mineta*, 340 F.3d 39, 54 (D.C. Cir. 2003) holding that Agency interpretation of statute that required warning systems "when a tire is significantly underinflated" to be arbitrary and capricious when Agency determined that a warning system was not required to provide warning if more than one tire was underinflated because the statute said only "a tire." "The

[Act's] 'a tire' plainly means one tire, two tires, three tires, or all four tires, under the elementary rule of statutory construction that the singular ('a tire') includes the plural ('tires')." *Id.*

If there is any ambiguity as to whether EPA intended there to be only a singular purpose contrary to basic rules of construction, that question is resolved by looking at what EPA said when it wrote the rule. In 1983, EPA proposed to define "spent material" as "any material that has been used and has served its original purpose." RX 148 at 14,508 (emphasis added). In 1985, EPA finalized the definition of "spent material" to read as now provided in 40 C.F.R. §261.1(c)(1) - - "any material that has been used and as a result of contamination can no longer serve the *purpose for which it was produced*[".]” RX 12 at 663 (emphasis added). The word "original," which might have implied a "singular" purpose was removed.

In the preamble to the 1985 final rule – EPA explained its reasoning for removing the word "original" from the proposed definition:

We are continuing to define spent materials as those which have been used and are *no longer fit for use* without being regenerated, reclaimed, or otherwise re-processed . . . The Agency's reference to original purpose was ambiguous when applied to situations where a material can be further used without being reclaimed, but the further use *is not identical to the initial use*.

Id. at 624 (emphasis added). EPA's clarification makes clear that the definition of "spent material" in 40 C.F.R. §261.1(c)(1) was intentionally worded to allow for the further use of a material even if that use is "not identical to the initial use" of the material, but which is a use that is the original purpose for which the material was produced.

In this case, the ALJ's construction of the term "spent material" improperly requires that there be a "predominant" use and that any secondary or different use by GM involves a waste. The ALJ decision reasons that if the once-used Purge Solvent was reused in the paint applicators it would not be considered spent. Initial Decision at 34. But the ALJ also recognized that if a third party used the once-used Purge Solvent off-site for a different purpose (citing Safety Kleen

example) then it also would not be spent. *Id.* at 39. Even if you construe the downstream use as a different, secondary use, the ALJ's conclusion is flawed. That construction does not square with the express regulatory definition of "spent material," or with EPA's clarification of that definition in the preamble to its 1985 rulemaking – that a material may be reused for any use for which the material was *produced* to serve and is still fit to serve. Nowhere in the preamble to the regulation does EPA state that the initial use and subsequent use or uses of the material must be the same or similar. Indeed, EPA's statements in the preamble make clear that if the used material is still "fit for use" – *any use for which it was produced* – the material is not spent. The ALJ's test would lead to the wholly illogical conclusion that GM may not continue to use the Purge Solvent in the painting process to clean equipment because the "predominant purpose" is to clean the applicators but the material is not a waste if it was used by GM to clean drums (a secondary purpose used by GM) or to clean drums or perform a similar function by a third party. That construction of the rule is absurd. The ALJ's "predominant purpose test" has no basis and must be rejected.

However, even if the "predominant purpose test" was a legitimate and defined test in the regulations, the conclusion would be the same. GM's Purge Solvent is produced for one purpose - to perform solvent functions in the paint applicators and downstream of the paint applicators. That is its purpose, its predominant purpose, and its original purpose. The factual record discussed above demonstrates that Purge Solvent was produced to be used both upstream and downstream of the applicators. EPA Region 5's enforcement team concedes this because they offered no evidence to rebut Mr. Warren's testimony. The ALJ found it so as well of her decision. *Id.* at 9. Moreover, the record in this case does not establish that "EPA engaged in reasoned decision making" as required in *American Petroleum Institute v. EPA*, 216 F.3d 50, 57-

58 (D.C. Cir. 2000) (“*API II*”) to determine that the Purge Solvent’s “predominant purpose” is anything other than the purpose that has been conclusively established in this case.¹⁶ When the purpose for which a material is produced is clear (or, as in this case, undisputed), the question is answered and the inquiry ends.

In finding the Purge Solvent’s “predominant purpose,” the ALJ notes that “there would be no purge mixture downstream of the manifolds and associated applicators but for the need to clean paint out of those applicators and manifolds,” and it would never purchase the Purge Solvent in the first place but for the need to clean the paint applicators. *Id.* at 9, 31. That argument is nonsensical and only demonstrates that this material is part of the manufacturing process and not part of the waste system. GM needs the Purge Solvent to perform solvent functions in the paint applicators and downstream of the paint applicators BECAUSE IT PAINTS CARS. Of course, if it did not use paint it would not need Purge Solvent. But like every other vehicle manufacturer GM paints vehicles so customers will buy them. Because it paints cars, it uses Purge Solvent at several points in the process to clean equipment, which is precisely why the Purge Solvent was produced.

4. *The Use of the Purge Solvent Downstream of the Applicators is a “Continued Use” of that Purge Solvent.*

As noted, a “spent material” is “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.”

¹⁶ The “predominant purpose test” was employed by the D.C. Circuit Court of Appeals in *API II* to determine if the primary treatment of oil-bearing wastewaters at petroleum refineries is “simply a step in the act of discarding” or “the last step in a production process before discard.” 216 F.3d. at 55, 57. According to the D.C. Circuit, “[w]here an industrial by-product may be characterized as discarded or ‘in process’ material, EPA’s choice of characterization is entitled to deference. However, the record must reflect that EPA engaged in reasoned decision making to decide which characterization is appropriate.” *Id.* at 57. The Court then found against EPA and decided that the record in that case was deficient. *Id.* at 57-58. As the Court noted, “EPA has not set forth why it has concluded that the compliance motivation predominates over the reclamation motivation. Perhaps equally importantly it has not explained why that conclusion, even if validly reached, compels the further conclusion that wastewater has been discarded. Therefore, because the agency has failed to provide a rational explanation for its decision, we hold the decision to be arbitrary and capricious.” *Id.* at 58.

40 C.F.R. § 261.1(c)(1) (2004). As previously discussed, the undisputed facts before this Board demonstrate beyond any question that the Purge Solvent downstream of the paint applicators is not so contaminated that it cannot be used for the purpose for which it was produced. Moreover, it is undisputed that the solvent is formulated for the purpose of being used both in the paint applicators and downstream from them. Initial Decision at 9 (citing Hr’g Tr. (June 24) at 223-25, 230-31, 255-56). GM has shown above how the “predominant purpose test” is erroneous. Flowing from the same rationale, however, the ALJ also rejected the applicability of EPA’s “continued use” doctrine. That analysis is also incorrect.

Based on the definition of “spent material” and the undisputed facts, the Board does not need to address the “continued use doctrine” to conclude that the Purge Solvent is not spent. If, however, any ambiguity exists, it is clear when you look beyond the plain language that GM’s construction of the regulation is correct.

Courts have long looked to what an agency said it intended at the time a rule was promulgated as reliable extrinsic evidence of agency intent. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). It is appropriate to use the preamble of a final rule to determine the meaning of a regulation and the promulgating agency’s intent. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) (preamble to a regulation is evidence of an agency’s contemporaneous understanding of its rules); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (10th Cir. 2000) (while language in the preamble of a regulation is not controlling over the language of the regulation itself, it may serve as a source of evidence concerning contemporaneous agency intent); *Commonwealth of Pa. Dep’t of Pub. Welfare v. US. Dep’t of Health and Human Serv.*, 101 F.3d 939, 944 (3d Cir. 1996) (preamble to regulations may be used as an aid in determining

the meaning of the regulations); *Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (same).

These decisions, and common sense, lead to the conclusion that the best evidence of what EPA intended the term “spent material” to mean is found in EPA’s 1985 preamble. The full text of what EPA said about the definition of “spent material” in that preamble – specifically as relates to continued use of solvents – reads as follows:

We are continuing to define spent materials as those which have been used and are no longer fit for use without being regenerated, reclaimed, or otherwise re-processed. In response to comments, however, we have altered the wording of the definition of spent material to express this concept more clearly. As the proposal was worded, a spent material was one that had been used and no longer could serve its *original* purpose. The Agency’s reference to original purpose was ambiguous when applied to situations where a material can be used further without being reclaimed, *but the further use is not identical to the initial use.* An example of this is where solvents used to clean circuit boards are no[] longer pure enough for that continued use, but are still pure enough for use as metal degreasers. These solvents are not spent materials when used for metal degreasing. The practice is simply *continued use of a solvent.* (This is analogous to using/reusing a secondary material as an effective substitute for commercial products.) The reworded regulation clarifies this by stating that spent materials are those that have been used, and as a result of that use become contaminated by physical or chemical impurities, and can no longer serve the *purpose* for which they were produced.

RX 12 at p. 624 (emphasis added; last italic in original). In this preamble, EPA made it absolutely clear that a solvent is not “spent” after one use so long as it can be used again for the same or a different solvent purpose “as is.” This preamble articulates what has come to be known as EPA’s “continued use of solvents doctrine.” This is *exactly* what is happening with GM’s Purge Solvent - it continues to be used “as is” for its solvent purposes after it exits the paint applicators and is therefore not spent and is therefore not a waste. Hr’g Tr. (June 24) at 94 (Wozniak); *id.* at 255 (Warren). It is, to use EPA’s own words, “simply continued use of solvent.” RX 12 at 624.

As previously discussed, GM demonstrated through its witnesses and through the testimony of EPA's Dr. Kendall, and even EPA's Mr. Benson, that the Purge Solvent performs many of the same functions downstream of the paint applicators as it performs in the manifolds and paint applicators themselves. The Purge Solvent continues to solubilize paint. It continues to clean pipes and equipment. It continues to disperse and dilute and suspend and carry. It just performs these same functions *in a different geographic location*. As a result, GM believes the best analysis is that the Purge Solvent continues to perform the same purposes for which it was produced downstream of the paint applicators.

But even if this Board were to decide that cleaning manifolds and paint applicators on the one hand, and cleaning equipment downstream of the paint applicators on the other, are two different purposes or uses, there is no dispute that all these solvent purposes *are in fact performed* downstream of the paint applicators. As established above, Dr. Kendall admitted the Purge Solvent continues to clean, dissolve, disperse, carry and dilute downstream of the applicators. Hr'g Tr. (June 21) at 44-46. Regardless of whether these solvent purposes downstream of the paint applicators are viewed as the "original use" or a "further use," the conclusion remains the same - the Purge Solvent is not "spent." It is still a product - albeit slightly contaminated - still performing its intended purposes and functions without being processed. And these purposes are not some unintended, unnecessary, frivolous purposes. These purposes must be performed to keep GM's fast-paced painting operations running without interruption and to avoid, as Dr. Kendall put out, bad things from happening. Hr'g Tr. (June 21) at 59, 61-62.

GM's Purge Solvent is no different than the "contaminated" solvent in the circuit board example EPA provided in the 1985 preamble. After the Purge Solvent is first used to clean the

manifolds and paint applicators, it is then no longer pure enough to clean manifolds and applicators again. So what? That's not what the 1985 Preamble was all about. The relevant point is the Purge Solvent is still pure enough to clean the pipes and equipment downstream of the paint applicators, and it does, in fact, do that. In the words of Dr. Kendall, the Purge Solvent is only "partially saturated" with paint so it can, and does, continue to perform its intended solvent functions once it exits the applicators. Hr'g Tr. (June 21) at 41, 42; Hr'g Tr. (June 20) at 278. In fact, since the mixture at that point is 80 to 90% solvent and only 10-20% paint solids, the solvent is no where near saturated and can easily continue to dissolve, dilute and suspend solids. See, Hr'g Tr. (June 21) at 34-37, 41, 42 (Kendall); Hr'g Tr. (June 20) at 278 (Kendall).

GM's Purge Solvent is just like the circuit board solvent that had become too contaminated to clean circuit boards, but had not become so contaminated that it could not continue to be used to degrease metal. In each case, the solvents retain enough solvency that they can and do continue to serve the purposes for which they were produced. GM's continued use of its "contaminated" Purge Solvent is simply continued use of a solvent.

The conclusion that solvents in continued-use are not solid waste because of the continued use of solvent doctrine is not some isolated quotation plucked from an obscure 1985 Federal Register preamble. This consistent, long-standing doctrine is the foundation of continued use programs all over the country, including Safety-Kleen's Continued-Use Program or "CUP."

As Mr. Ross, Safety-Kleen's Vice President of Environmental Compliance, testified, Safety-Kleen supplies solvents to its customers for cleaning. Hr'g Tr. (June 27) at 179, 180-81. After that solvent has been used by those customers, Safety-Kleen picks up the "dirty" solvent and transports it to Safety-Kleen facilities where that solvent is used again – as is – to clean

drums. *Id.* at 203-206. And what is the hazardous waste regulatory status of these once-used, “contaminated” solvents that Safety-Kleen picks up and reuses to wash drums? U.S. EPA has made clear that those once-used, “contaminated” solvents are products continuing to be used, not wastes:

The Agency has previously stated that when a used solvent is employed for another solvent use, this continued use indicates that the solvent remains a product. The used solvent in this case is a material continuing to be used as a solvent, the purpose for which it is intended, rather than a spent material being reused. Consequently, the used solvent to be used for drum washing would not be considered a solid waste and would not be subject to the . . . hazardous waste regulations

RX 13 at 1 (emphasis added). Just like Safety-Kleen’s solvents, GM’s Purge Solvent “is a material continuing to be used as a solvent.” It is therefore not a waste; it’s a product.

In fact, Mr. Ross testified that GM’s continued use of its Purge Solvent downstream of the paint applicators is an even “purer” application of the continued use doctrine than Safety-Kleen’s EPA-approved continued-use program. Hr’g Tr. (June 27) at 233. According to Mr. Ross,

... you’ve got the same solvent being used for multiple purposes which that solvent was designed for at the same location by the same company. . . . So I would say it’s a much more fitting definition of continued use and by far fits within the example and the guidance that was prepared in that preamble. That went as far as saying from washing a printed circuit board to now degreasing a part. Well, this never leaves a paint loop and the solvent was designed explicitly, not just to circuit boards to degreasing something, but it was a paint-type solvent used in paint operations within a plant, within a single closed-loop system . . . [I]t’s still a product in service for its original solvent purposes. . . .

Id. at 233-34.

EPA’s position regarding Safety-Kleen’s continued use of “dirty” solvent is hardly unique. For example, in 1994, EPA’s Michael Shapiro issued a memo entitled “Definition of Spent Material.” RX 110. The issue being evaluated in the Shapiro Memo was: when do solvents used for one purpose become “spent.” *Id.* at 1. Mr. Shapiro analyzed the underlying

regulatory definition of solid waste and spent materials, and went back to EPA's 1985 preamble. Mr. Shapiro noted that the reference to "contamination" in the definition of spent material "was added to clarify that a material such as a solvent may continue to be used for its original, *though not identical*, purpose and not "yet be classified as a solid waste." *Id.* (emphasis added). Mr. Shapiro further stated that the

"as a result of contamination" language was added [to the definition of spent material] to avoid classifying as waste a used material that was actually being put to further direct use. 50 FR at 624. The preamble gives the example of a solvent that is not clean enough to clean circuit boards but is still clean enough for use as a metal degreaser.

Id. at 2 (quotations, emphasis, and bracketed words added).¹⁷

Similarly, in 1994, EPA issued a letter from David Bussard, then Director of EPA's Characterization and Assessment Division, to Ashland Chemical Company. RX 113. The question being addressed in Mr. Bussard's letter involved a chemical that was initially used by Ashland and was then sold to other companies for reuse. *Id.* at 1. Here is what EPA said to Ashland Chemical:

[A] "spent material" is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." As you correctly note, the RCRA definition of spent material does not include materials that are reused for their original purpose, provided that the materials do not undergo reclamation or reprocessing, prior to their reuse. For example, as you note, the reuse of a solvent (first used to clean circuit board) as a metal degreaser constitutes a legitimate use of a product for its original purpose. In this example, the fact that the solvent is "spent" in terms of its use as a circuit boards cleaner does not make it a spent material as defined by RCRA. Rather, as long as the solvent does not undergo reclamation prior to its reuse as a metal degreaser, it would be considered a product excluded from jurisdiction under RCRA. It is important to point out here that the determining factor is not whether a used chemical is marketable, but rather whether it is reused in a manner consistent with its original use without prior reclamation.

¹⁷ This memo ultimately did conclude that a material which "could continue to be used," but was *not, in fact*, reused, was spent. RX 110. (emphasis added). But that is not GM's situation. The Shapiro Memo directly supports GM's legal analysis presented in this case and undermines the credibility of EPA's arguments and claims in this case.

Id. at p. 1 (emphasis added).

These are EPA's words spoken outside of an enforcement proceeding. A solvent (actually, any material) being reused without first being reclaimed is a **“product excluded from jurisdiction under RCRA.”** We are hard-pressed to say it any better. GM's continued use of Purge Solvent to perform solvent functions downstream of the paint applicators is no different than the 1985 circuit board solvent example EPA articulated. Or EPA's rationale contained in that Preamble. Or Safety-Kleen's CUP program. Or the statements in Mr. Shapiro's memo or Mr. Bussard's letter. GM's Purge Solvent is in continued use after it leaves the applicators and is not spent. It is a product. As Mr. Benson admitted, EPA has no jurisdiction over products that are continuing to be used. Hr'g Tr. (June 21) at 90, 97.

EPA's position in this case inexplicably and shockingly ignores its consistent, long-standing “continued use of solvent doctrine.” EPA cannot allow “continued use” in other contexts and refuse to allow GM to use the same doctrine, right in its own facilities, downstream of the applicators. EPA's Region 5's position here is arbitrary, capricious, and wrong; the ALJ erred in deciding otherwise.

Given that the Purge Solvent downstream of the paint applicators is not a “spent material” and, thus, cannot be a “waste,” what is the contaminated Purge Solvent? As discussed above, the undisputed evidence establishes that the Purge Solvent downstream of the paint applicators is not a waste, it is a product that is still being used.

As Ms. Williams, the former Director of the Office of Solid Waste, testified, the Purge Solvent, or “contaminated” Purge Solvent, even though it contains paint solids, still remains a product. Hr'g Tr. (June 29) at 132, 206-07. The ALJ and Ms. Williams had this exchange as it relates to why the Purge Solvent remains a product even though it contains the paint solids:

THE COURT: Okay. If I could just return to that line of questioning. You're saying the paint is a waste, and the purge solvent is not a waste, but the mixture of the two in the purge solvent piping is not a waste.

THE WITNESS: Correct.

THE COURT: Okay. And the reason being?

THE WITNESS: Well, the mixture rule doesn't apply, so what you have is a contaminated product at that point. And the question I then ask is, is that contamination severe enough to call it to be spent, meaning it can't be used anymore at that point; or can it still continue to be used, it's a contaminated product. And in my analysis it can still continue to be used for the solvent function of cleaning the downstream pumps and lines and so on, so it's a contaminated product that's in use.

Hr'g Tr. (June 29) at 206-207. Ms. Williams' reasoning is exactly consistent with the reasoning behind the "continued use" doctrine, which has been articulated, adopted and applied by EPA for many years. *See* RX 12 at 624. The Purge Solvent has been contaminated by something, but not so contaminated that it cannot continue to be used as a product for an intended use. It is not a waste. It is not subject to EPA's reach under RCRA.

5. *The ALJ's Determination that the Purge Solvent is a Waste Because It does not Dissolve "New" or "Different" Material Downstream of the Paint Applicators is Both Factually and Legally Erroneous.*

The ALJ and EPA appear to interpret the purported "dissolve additional constituents" prerequisite contained in an EPA guidance document purporting to discuss the regulatory status of solvent first used to clean paint applicators in vehicle manufacturing facilities as requiring the Purge Solvent downstream of the paint applicators to dissolve "new" or "different" constituents than it previously dissolved. Initial Decision at 36-37 (citing Hr'g Tr. (June 21) at 129). In other words, dissolving something other than paint solids. First, there is no prerequisite in the plain language of the regulation that a solvent must dissolve "additional" constituents to be in "continued use." In fact, to impose such a condition would undermine that very doctrine of

continued use of solvents. However, even if GM's solvent has to dissolve additional constituents, it does so, because it also can mean dissolving more of the same constituents as it previously dissolved thereby increasing the concentration of those constituents.

EPA's continued use of solvents doctrine was established in the 1985 final rule defining "spent material" to assist EPA, states, and regulated industries in evaluating the regulatory status of solvents that are first used for one purpose, become contaminated from that use, and then are used for other solvent purposes without first being reclaimed. RX 12 at 624. As EPA stated in the preamble to this final rule, this "practice is simply the continued use of a solvent" and, therefore, "these solvents are not spent materials . . ." *Id.* Nowhere in this preamble does EPA ever state that a prerequisite for "continued use" is that the solvent must pick up additional, new, or different constituents in its second use that were not picked up in its first use. *See, id.* at 624.

In this case, the ALJ looked to a 2000 EPA memorandum issued by Sonya Sasseville and its progeny addressing the regulatory status of solvents used to clean paint applicators in the vehicle manufacturing industry. Initial Decision at 36. The Sasseville memo was issued to address a question concerning a Ford vehicle assembly facility and states in part that

solvents are used to clean paint from the spray guns at the time of paint changes. * * * The purpose of the solvent is to remove the waste paint, clean the spray gun, and allow the use of new colors. If the solvent serves thereafter only to keep contaminants in suspension until they reach the hazardous waste storage tank, and if the solvent does not dissolve additional constituents, it is a waste.

RX 111 at 2 (bracketed words and emphasis added). The ALJ then determined that, because the Sasseville memo and its progeny are allegedly on point in this case, dissolving additional constituents is a prerequisite for solvents to be considered in "continued use" and thus not a "waste." Initial Decision at 36-37. First, the Sasseville memo is not on point. Second, there is no requirement in the "continued use" doctrine to "dissolve additional constituents." Third, even

if the Sasseville memo were on point, and even if dissolving additional constituents were a requirement, in this case the Purge Solvent is dissolving additional constituents.

First, the Sasseville memo, its progeny, and a 1997 EPA letter upon which the Sasseville memo builds, are irrelevant to the question of whether the Purge Solvent is a “spent material” in this case. According to a 1997 EPA letter from Elizabeth Cotsworth (the letter that constituted EPA’s first determination whether solvent that has been used to clean paint applicators in vehicle painting operations is regulated), the Sasseville memo, and the Sasseville memo’s progeny each of which rely on the reasoning in the Sasseville memo, the solvent in question is used “to clean automated spray painting guns when changing paint color.” RX 16 at GM000054; RX 111 at GM090012A (“As described in your memo, and as explained in correspondence from, and in a meeting with, the Alliance [for Automobile Manufacturers], solvents are used to clean paint from the spray guns at the time of paint changes. . . . The purpose of the solvent is to remove the waste paint, clean the spray gun, and allow the use of new colors.”) (emphasis added); RX 29 at GM000089; RX 30 at GM000093. When analyzing these statements to determine if the solvent being addressed in these documents is a “spent material,” the only conclusion that can be drawn is that in each of these documents, EPA either assumed or was told that the purpose for which that solvent was produced was only to clean the paint applicators. EPA, therefore, logically presumed there was no further purpose. Without a purpose, material can be a waste. As former Director Williams testified, EPA does not have the staff to fully investigate all facts; they must take incoming requests for interpretation at face value. Hr’g Tr. (June 29) at 216-17. However, an ALJ, at a hearing, has a different role – that of fact-finder. In this case, the ALJ’s reliance on the facts provided in those incoming requests was misplaced and irrelevant to whether GM’s Purge Solvent is a “spent material” downstream of the paint applicators. The ALJ in this case

was bound to use the stipulated facts presented, the testimony of both sides' chemists, and her own finding, that GM's Purge Solvent actually performs the same functions upstream and downstream of the paint applicators.

Based on the statement in the Sasseville memo "requiring" the solvent to "dissolve additional constituents," the ALJ then looked to the 1985 preamble of the final regulation defining "spent material" and, because the example in that preamble discussed circuit boards and degreasing, determined as follows: "Presumably, the contaminants that were to be cleaned off of circuit boards would not be the same as the contaminants that are cleaned during metal degreasing." Initial Decision at 37. She also evaluated a 1998 letter EPA issued to Safety Kleen, which determined Safety Kleen's use of contaminated solvents obtained from other parties to clean drums at its facilities constituted "continued use" of solvents and, therefore, was not subject to the hazardous waste regulations. *Id.* The ALJ then determined Safety Kleen's reuse of solvents previously used by others also picks up additional contaminants when Safety Kleen uses it for drum washing. *See, id.*; RX 13 at 2. She then concluded her analysis by stating

GM would stretch EPA's continued use doctrine beyond its previous limits, by trying to exempt used solvents *that are itself the waste*, as it is the contaminated purge solvent mixture that is clogging the machinery, despite retaining some residual cleaning power.

Initial Decision at 37 (emphasis added). This conclusion indicates that ALJ had already decided the solvent was a "waste" *before* asking if it was in "continued use." But, if the solvent is being continuously used, it simply is not a "waste" at all. RX 12 at 624. The Purge Solvent is not a "spent material" under the regulations downstream of the paint applicators and her claim that "used solvents . . . are itself the waste" is simply wrong based on the facts in the record. Furthermore, as previously discussed, it is not the "contaminated purge solvent mixture that is clogging the machinery," it is the paint solids component of the Purge Solvent or "contaminated purge solvent mixture." Hr'g Tr. (June 24) at 76-77, 82-83 (Wozniak); Hr'g Tr. (June 21) at 57-

58 (Kendall); Hr'g Tr. (June 20) at 278 (Kendall). Therefore, the ALJ's decision puts the cart before the horse, conflicts with the conclusively established facts, and the plain language of the rule, and must be overturned.

As relates to Safety Kleen's continued use of solvents program, the ALJ's finding also ignores the testimony of Mr. Ross, the individual in charge of Safety Kleen's continued use program. Mr. Ross testified there are times when once-used solvent is removed from a container and used to clean residue from that very same container. Hr'g Tr. (June 27) at 217. That solvent is not seeing anything new; there are no "new" or "different" constituents. It is simply reusing the solvent removed from the container to clean the residue remaining in that container - residue that was in suspension and fell out. Moreover, EPA's letter determining that once-used solvent can be reused by Safety Kleen to wash drums does not exclude solvents removed from containers and then reused to wash those same containers from continued use. *See*, RX 13. Therefore, the Safety Kleen letter does not support the ALJ's determination that "continued use" of solvents requires the dissolving of "new" or "different" constituents.

According to the ALJ, GM does not reuse the Purge Solvent to clean the paint applicators a second time. Initial Decision at 14 (citing CX 5 at ¶¶ 17-18; CX 11 at ¶ 12; Hr'g Tr. (June 20) at 108-09, 278-79. This statement is only relevant if such use would result in the Purge Solvent not being regulated. Would this reuse result in dissolving "new" or "different" constituents? Not necessarily. For example, in the prime booth, GM uses one type of prime coating. Reusing the Purge Solvent that previously was used to clean the paint applicators in the prime booth a second time to clean these very same paint applicators does not dissolve anything "new" or "different." The constituents dissolved in the second use are the same type of constituents dissolved in the first. The only difference is that more of those very same constituents will be

dissolved in the second use thereby increasing the concentration of those constituents in the Purge Solvent; it just dissolves more of the same constituents. As such, it is dissolving “additional” constituents, just like Ms. Sasseville’s memo purports to require. And it does this because it is not saturated, it can and does dissolve more, and therefore is in “continued use” and is not a “waste.”

The end result of reusing Purge Solvent to dissolve additional constituents by cleaning paint from the paint applicators a second time is no different than what is occurring now. In GM’s painting operation, some cleaning occurs in the paint applicators and some cleaning occurs downstream of the paint applicators. But downstream, the once-used Purge Solvent is dissolving paint solids that were previously removed from the paint applicators and have become stuck again, downstream. These paint solids are no different than the paint solids that would be removed if the once-used Purge Solvent were used to clean the paint applicators and associated manifolds a second time - they are just in a different location. Therefore, if the Sasseville memo applies, and if there were a prerequisite to dissolve “additional” constituents, GM’s “continued use” of solvents meets that test downstream of the paint applicators where the solvent continues to dissolve deposited paint solids and becomes more and more saturated.

Furthermore, the fact that some of the Purge Solvent being used to clean these paint solids that are deposited on the inside of the lines and equipment downstream of the paint applicators may have previously “seen” some of the paint solids it is now re-dissolving is irrelevant to the question of whether the Purge Solvent is a “spent material.” The Purge Solvent’s re-dissolving paint solids that it previously dissolved but that subsequently fell out and deposited on the inside of the equipment and lines downstream of the paint applicators is no

different than the solvent Safety Kleen removes from containers and uses to clean those very same containers and that reuse of solvent is not regulated.

In addition to being inconsistent with the rule, imposing a requirement that the second use of a solvent dissolve “new” or “different” constituents leads to nonsensical results. The only logical conclusion is that the purported prerequisite that “additional constituents” be dissolved means that the solvent must dissolve constituents that are not already dissolved in it. That is exactly what GM’s Purge Solvent is doing downstream of the paint applicators. Furthermore, regardless of what the preamble and guidance documents do or do not say, what governs is the regulatory definition of “spent material.” As previously established, the Purge Solvent downstream of the paint applicators is not “spent” under that definition because it is being used for the purpose it was produce without processing. The ALJ’s conclusions to the contrary are erroneous.

6. *The Purge Solvent is also not a “Spent Material” in the Purge Mixture Storage Tanks at GM’s Facilities Because It Continues to Perform the Purpose for Which It was Produced.*

The Purge Solvent also is not a “waste” or “hazardous waste” while it is in the Purge Mixture Storage Tanks for all the same reasons it is not a solid or hazardous waste upstream of those tanks – it is a contaminated product that is still being used to perform its intended, necessary functions.

Just like immediately downstream of the paint applicators, the “contaminated” Purge Solvent is still performing all the same intended solvent functions (solubilizing, suspending, dissolving, etc.) while it is in the Purge Mixture Storage Tanks. Hr’g Tr. (June 20) at 280-281 (Kendall); Hr’g Tr. (June 24) at 291-292 (Warren). It also continues to dilute the silane paint and to cap the reactive sites on the 2k-isocyanate component so they do not harden and clog these tanks. Hr’g Tr. (June 24) at 240-242 (Warren); Hr’g Tr. (June 30) at 88-89 (Kendall).

Just like the solvent functions performed by the “contaminated” Purge Solvent upstream of the Purge Mixture Storage Tanks, the “contaminated” Purge Solvent continues to perform those very same solvent functions in these tanks. Mr. Warren testified that “one of the design functions of purge, yes, is to keep that bulk storage [tank] flowable and thus polymers solubilized.” Hr’g Tr. (June 24) at 292. Ms. Winkler agreed and testified why those are also important and necessary functions that need to occur in these tanks. Hr’g Tr. (June 29) at 110-111. This testimony reveals the following: If the Purge Solvent did not perform all these intended functions, “bad things” would happen in these tanks. Hr’g Tr. (June 21) at 59, 61-62. In fact, all of the intended solvent functions must continue to be performed in these tanks so the pigments stay suspended and the polymers stay dissolved and the solids don’t settle out and clog the tanks. GM could not keep these materials in suspension and pump out the mixture into trucks and send it off-site to be reclaimed and beneficially reused if these solvents were not continuing to be used for their intended solvent functions. In fact, Ms. Winkler, who was qualified as an expert in hazardous waste determination, testified the Purge Solvent is not “spent” up to and through the Purge Mixture Storage Tanks because it continues to perform its intended purposes without having to be reclaimed. Hr’g Tr. (June 28) at 279.

These are legitimate, intended solvent functions and they do not magically stop being performed once the “contaminated” Purge Solvent enters the tanks. In fact, EPA’s Dr. Kendall confirmed that that “contaminated” Purge Solvent continues to perform these solvent functions in the Purge Mixture Storage Tanks. Hr’g Tr. (June 20) at 280-281. The fact is the “contaminated” Purge Solvent in the Purge Mixture Storage Tanks is no different than any other contaminated product still performing its intended purpose. It is not subject to regulation until it is discarded.

The Purge Solvent is still performing the purpose for which it was produced and, therefore, the Purge Solvent is merely a contaminated product that still is in use and is not a “waste” or “hazardous waste” while in the Purge Mixture Storage Tanks.

EPA Region 5 and the ALJ express concern that GM’s position in this case could result in a whole array of other materials not being captured in RCRA’s regulatory regime. Initial Decision at 31. Even if that were true, it does not allow EPA or the ALJ to ignore the current rule, as written. GM’s position merely applies the plain and unambiguous language of the statute and regulation to the uncontradicted facts that the Purge Solvent downstream of the paint applicators is not “spent.” The ALJ’s decision must address the facts presented in this case, not a speculative fear of a “parade of horrors” based on “facts” not before her. If indeed there is any “parade of horrors,” that is a problem with the regulation that must be addressed through notice and comment rulemaking going forward and does not impact the application of regulation as it is currently written. In fact, the EPA RCRA policy makers are heading in the opposite direction – rather than fear a “parade of horrors,” EPA’s RCRA program recognizes that, if anything, EPA’s current regulation too narrowly implements the statutory directive. *See*, RX 169.

C. **EVEN IF THE PURGE SOLVENT WERE A “SPENT MATERIAL” DOWNSTREAM OF THE PAINT APPLICATORS, IT IS NOT REGULATED BECAUSE IT IS SUBJECT TO TWO REGULATORY EXEMPTIONS.**

1. *The “Manufacturing Process Unit” Exemption Would Apply to the Lines and Equipment Downstream of the Paint Applicators.*

The ALJ determined that the lines and equipment downstream of the paint applicators are not part of GM’s manufacturing process because GM does not “produce anything” downstream of the paint applicators. Initial Decision at 42. This ruling 1) ignores the undisputed testimony of GM’s witnesses that any clog downstream of the paint applicators “can totally disrupt the manufacturing process”, Initial Decision at 41-42, and 2) discounts the fact that EPA already

includes downstream equipment as part of the definition of “paint shop” (and thus as part of the “manufacturing process unit”) under the Clean Air Act. *Id.* at 43.

According to Michigan’s manufacturing process unit exemption,

[a] hazardous waste that 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 a manufacturing process unit or an associated nonwaste treatment manufacturing unit [is not subject to the hazardous waste regulations until] . . . the waste exits the unit in which it was generated, . . . [unless] the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for . . . manufacturing

MICH. ADMIN. CODE r 299.9204(3)(a) (2004).¹⁸ According to the regulations, hazardous waste in “manufacturing process units” is not subject to hazardous waste regulation until the hazardous waste is removed from the unit. *Id.*

Neither the state nor federal hazardous waste regulations define what constitutes a Manufacturing Process Unit or a manufacturing process. As a result, we are left to apply the plain meaning of the rules. Since the meaning of “manufacturing process unit” is a technical, engineering inquiry, the most appropriate people to ask if the system of pipes and equipment downstream of the paint applicators is part of a manufacturing process are the people most familiar with it – the people who actually design, build, and operate these systems.

GM presented overwhelming evidence to demonstrate that the system of pipes and equipment downstream of the paint applicators is an integral part of GM’s painting operations

¹⁸ The exemption for hazardous waste in manufacturing process units under Ohio’s and EPA’s hazardous waste regulations is virtually identical and the differences are only in the phrasing used. *See*, OHIO ADMIN. CODE § 3745-51-04(C) (2004) and 40 C.F.R. § 261.4(c) (2004). According to Ohio’s and EPA’s manufacturing process unit 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 an associated non-waste-treatment-manufacturing unit, is not subject to [the hazardous waste] regulation[s] . . . until it exits the unit in which it was generated, . . . unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing” OHIO ADMIN. CODE § 3745-51-04(C) (2004) and 40 C.F.R. § 261.4(c) (2004).

which are indisputably manufacturing processes.¹⁹ Vehicle manufacturing involves three basic steps that occur sequentially: (1) body assembly; (2) painting; and (3) general or final assembly. RX 1 at ¶ 12. GM's painting operation is located in the middle of its overall vehicle manufacturing operation. *Id. See also*, Hr'g Tr. (June 23) at 158 (Blair). These three integrated steps must operate together and without interruption to produce the number of vehicles GM must produce each day to remain competitive. *Id.* at 25, 30 (Hresko).

GM's painting operation must be designed and operated to reduce downtime and increase the number of vehicles that have an acceptable, high-quality paint jobs after passing through the painting operation just once. Hr'g Tr. (June 23) 32-33 (Hresko). The entire painting operation is designed to be a continuous process and if anything stops or slows down, you begin to experience quality problems. *Id.* at 115 (Blair). This continuous, integrated system consists of (1) storage of paint and Purge Solvent in the paint mix room; (2) delivery of paint and Purge Solvent to the paint booths; (3) applying paint to the vehicles; (4) purging the paint applicators, manifolds, and lines between the manifolds and applicators; and (5) storing the Purge Solvent in the Purge Mixture Storage Tank. *Id.* at 150-160. Mr. Blair explained that these five steps all make up one continuous, integrated process. If any of these steps stops, the others stop. *Id.* at 182-83. These five steps form a "continuous, contained, integral manufacturing system for paint." *Id.* at 182 (Blair). And the purge cycle must be integrated into this process. The purge cycle typically takes 7-10 seconds. *Id.* at 98, 106-110, 115.

Mr. Wozniak testified that this entire painting operation is designed, built, and operated as a single integrated manufacturing system. Hr'g Tr. (June 24) at 158-159. A vehicle painting operation cannot function without the purge system. Hr'g Tr. (June 28) at 119, 136 (Winkler).

¹⁹ According to Mr. Wozniak, "[a] paint shop is an extremely complex manufacturing facility." Hr'g Tr. (June 24) at 22.

This purge process is essential to allow GM to switch paint colors and to keep the manifolds and applicators clean so they deliver the high-quality paint job GM's customers demand. *See, e.g.* Hr'g Tr. (June 23) at 107-115 (Blair).

These purge cycles occur continually throughout each manufacturing day. Once the Purge Solvent is created, GM's engineers had to figure out a way to create a system where the solvent in the Purge Solvent could be captured – not thrown away – so it could be reclaimed and reused – not discarded. The Purge Solvent is almost as valuable to GM as paint. Hr'g Tr. (June 23) at 160, 183 (Blair).

So, GM's design engineers, like Mr. Wozniak, developed the purge reclaim system which exists at all three plants involved in this litigation and has become the industry standard. *See, e.g.* Hr'g Tr. (June 23) at 150 (Blair); Hr'g Tr. (June 24) at 30, 71-74 (Wozniak). As discussed above, this system of pipes and equipment is directly connected to the paint booths. A clog or malfunction in this system can and has adversely affected the need for continuous, uninterrupted painting operations.

Mr. Wozniak's affidavit made clear that the only place Purge Solvent can stop moving and not impact the painting operation is at the Purge Mixture Storage Tank. RX 5 at ¶ 23. He therefore believes a logical end point for GM's manufacturing process would be the point at which the Purge Solvent enters the Purge Mixture Storage Tanks. *Id.*

Ms. Williams evaluated the applicability of the Manufacturing Process Unit exemption to GM's purge recovery system. Hr'g Tr. (June 29) at 236-238. To evaluate the applicability of the exemption, Ms. Williams testified that the purge recovery portion of GM's painting operations is integrated into and an integral component of GM's overall painting process: “. . . in listening to various testimony that's been given as to the integrated system that exists at GM [] [b]oth the

upstream part of the painting operations and the downstream part of the purging operations, they do seem to me to be an integrated process because you can't run one unless you're running the other." *Id.* at 237. She also noted that the Auto MACT rule includes the purge portion of the system as part the painting system. *Id.* at 237-238. Because these lines and equipment are part of an integrated system, and because the Auto MACT rule defines the painting operation to include the purge process, Ms. Williams concluded the system of pipes and equipment running from the applicators to the Purge Mixture Storage Tanks is all part of GM's manufacturing process unit and qualifies for this exemption. *Id.* at 236-238, 241. *See also*, RX 196.

Despite GM's overwhelming evidence to the contrary, the ALJ determined the connected system of pipes and equipment downstream of the applicators is not part of GM's manufacturing process. Initial Decision at 42. Her view is based on the fact that GM does not manufacture anything downstream of the gun box and, therefore, this equipment is not part of the manufacturing process. *Id.* *See also*, Hr'g Tr. (June 21) at 124-125 (Benson). There is nothing in the manufacturing process unit exemption that requires something to be manufactured in that particular component of the process unit to be subject to the exemption. As previously discussed, Mr. Wozniak and Mr. Blair both testified that GM's entire painting operation is a single, integrated, continuous industrial manufacturing process. It is designed together. It is built together. It is used together - as part of one, continuous integrated manufacturing process.

Nothing is "manufactured" upstream of the paint booths either - e.g., the paint mix room and lines supplying paint to the booths, - and no one claims those portions of GM's integrated painting operation located upstream of the paint booths, are not part of GM's manufacturing process. The test is not whether something is produced in a unit. **The test is whether a unit is part of a manufacturing process.** The system of pipes and equipment downstream of the

applicators - just like the paint delivery system upstream of the applicators - clearly is part of GM's manufacturing process. The ALJ erred in concluding otherwise.

2. *The Lines and Equipment Downstream of the Paint Applicators Would Be Subject to the "Totally Enclosed Treatment Facility" Exemption.*

The ALJ also determined that the lines and equipment downstream of the paint applicators and the Purge Mixture Storage Tanks are not subject to the Totally Enclosed Treatment Facility exemption because 1) the pressure relief valves on the tanks and purge pots allow emissions to occur and 2) there is evidence of some releases. Initial Decision at 44-45. Each of the ALJ's bases for denying the applicability of the Totally Enclosed Treatment Facility exemption are true. However, the Totally Enclosed Treatment Facility exemption is not lost downstream of the paint applicators.

Michigan defines a "totally enclosed treatment facility" as "a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent of a hazardous waste into the environment during treatment." MICH. ADMIN. CODE R 299.9108(g) (2004).²⁰ The TETF exclusion can apply to various types of units such as pipes, tanks and tank-like units and would apply to the purge recovery systems at the three GM facilities *if* the "contaminated" Purge Solvent were a hazardous waste. *See*, RX 158 at 2, 4.

Ms. Williams testified about the applicability of the TETF exclusion to GM's purge recovery system which starts from the point the Purge Solvent exits the applicators and continues

²⁰ Ohio's and EPA's definitions of TETF are virtually identical and the differences are only in the phrasing used. *See*, OHIO ADMIN. CODE § 3745-50-10(A)(119) (2004) and 40 C.F.R. § 260.10 (2004). Ohio and EPA define a TETF as "a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment." OHIO ADMIN. CODE § 3745-50-10(A)(119) (2004) and 40 C.F.R. § 260.10 (2004).

through the Purge Solvent Storage Tanks. Ms. Williams discussed three key elements to the TETF definition - (1) the TETF system must be directly connected to a manufacturing process; (2) the TETF in question must be a closed system that is constructed and operated in a manner that prevents releases into the environment; and (3) the TETF must perform treatment. Hr'g Tr. (June 29) at 228.

Regarding the first element, there is no dispute that the systems of pipes and equipment downstream of the applicators at the three facilities at issue are directly connected to a manufacturing process - the paint booths.²¹ No one suggests the paint booths are not part of GM's manufacturing process. The purge reclaim systems are directly connected to the paint booths through a continuous system of flexible lines and/or hard piping that run from the gun boxes and the internal purge apparatus for the paint applicators all the way through the Purge Mixture Storage Tanks. Hr'g Tr. (June 24) at 68-69, 72-74 (Wozniak); Hr'g Tr. (June 29) at 228-229 (Williams). Therefore, this entire system of pipes and equipment satisfies the first element of the TETF definition.

GM also proved that this system of pipes and equipment downstream of the applicators is a closed system that is designed, constructed and operated to prevent any release of the contaminated Purge Solvent into the environment. As the designer of painting operations at vehicle assembly facilities, Mr. Wozniak, testified, this system is designed, constructed, and operated to be an enclosed system that does not allow Purge Solvent to escape or allow anything other than Purge Solvent to enter. Hr'g Tr. (June 24) at 74. Mr. Wozniak also testified that liquid releases from the purge pots occur "seldom to never" (*id.* at 162) and Mr. Lamberth

²¹ This discussion assumes, arguendo, that the Manufacturing Process Unit exemption does not apply to these pipes. GM firmly believes they are integral to and a part of the manufacturing process. But, if the EAB concludes otherwise, this exception would apply.

testified that he did not observe any release of Purge Solvent from the piping downstream of the applicator. Hr’g Tr. (June 20) at 192. Mr. Chaput and Ms. Winkler further testified that they had never seen any leaks from the actual pipes downstream of the applicators. Hr’g Tr. (June 27) at 95 (Chaput); Hr’g Tr. (June 28) at 169 (Winkler). Just like the system of pipes and equipment between the applicators and the Purge Mixture Storage Tanks, those storage tanks are also operated to prevent releases of liquid Purge Solvent. Moreover, they are inspected daily to ensure no releases occur. Hr’g Tr. (June 28) at 242-43, 244 (Winkler).

We acknowledge that there are rare events when a release could occur from this system when some part of the system (e.g., a pump) has to be taken out of service for repairs or maintenance. Furthermore, vapor releases can and do occur from the pressure relief devices. However, the TETF exclusion is intended to apply to pipes, tanks, and tank-like structures. RX 158 at 2, 4. All systems of pipes and tanks and equipment will, at some point, require opening for maintenance. In addition, including pressure relief devices on tanks is part of good engineering design. Hr’g Tr. (June 20) at 194-95 (Lamberth). If those types of events rendered the exemption inapplicable, then the TETF exemption would never apply to any tanks or pipes, even though EPA has made it clear that this exclusion is intended to apply to tanks and pipes. The pertinent fact, which Mr. Wozniak made clear, is that this entire system has been constructed and operated to prevent releases, period. Hr’g Tr. (June 24) at 74. Therefore, GM’s purge recovery systems satisfy the second element of the TETF definition.

GM’s purge systems also satisfy the third element of the TETF definition because “treatment” is occurring.²² Michigan defines “treatment” as:

²² The ALJ did not reach a decision regarding whether treatment was occurring in the lines and equipment downstream of the paint applicators. Initial Decision at n. 38.

any method, technique, or process, including neutralization, that is designed to change the physical, chemical, or biological character or composition of any hazardous waste to neutralize the waste, to recovery energy or material resources from the waste, or to render the waste non-hazardous or less hazardous, safer to transport, store, or dispose of, amenable to recovery or storage, or reduced in volume.

MICH. ADMIN. CODE r 299.9108(m) (2004).²³

As Ms. Winkler testified, the material being treated downstream of the paint applicators is the paint. Hr'g Tr. (June 28) at 280. The paint is treated by the Purge Solvent. The Purge Solvent makes the paint "more amenable for storage" and "more amenable for recovery." Hr'g Tr. (June 29) 230-231 (Williams). As described repeatedly above, the Purge Solvent continues to solubilize, suspend, carry, dilute, and disperse the paint downstream of the paint applicators. These functions make the paint more amenable for storage and recovery because the paint can be kept in tanks and stored and later pumped out; it makes the paint easier to flow; it prevents too many paint solids from settling out and clogging pipes and tanks. It allows the paint to be pumped out into a tanker truck and transported to a reclaimer where the paint solvent and paint solids can be removed and reused by GM and others. Moreover, EPA offered no evidence to contradict the evidence that the Purge Solvent is treating paint downstream of the applicators in this enclosed system of pipes and equipment. Therefore, this fact is undisputed. Indeed, Dr. Kendall testified the solvent was dissolving, solubilizing, dispersing, and suspending paint,²⁴ and

²³ Ohio's and EPA's definition of "treatment" is virtually identical to Michigan's and the differences are only in the phrasing used. See, OHIO ADMIN. CODE § 3745-50-10(A)(125) (2004) and 40 C.F.R. § 260.10 (2004). They define "treatment" as "any method, technique, or process, including neutralization, designed to change the physical, chemical, or biological character or composition of any hazardous waste so as to neutralize such waste, or so as to recovery energy or material resources from the waste, or so as to render such waste non-hazardous, or less hazardous; safer to transport, store, or dispose of; or amenable for recovery, amenable for storage, or reduced in volume." OHIO ADMIN. CODE § 3745-50-10(A)(125) (2004) and 40 C.F.R. § 260.10 (2004).

²⁴ Hr'g Tr. (June 21) at 45-48.

all of this, of course, changes the physical or chemical character of the paint and makes it easier to pump, store and reclaim. Ms. Williams agreed as well. Hr'g Tr. (June 29) at 230-31.

Therefore, the system of pipes and equipment downstream of the paint applicators through the Purge Mixture Storage Tanks would qualify for the TETF exclusion if it were a hazardous waste and the ALJ's determination to the contrary conflicts with the overwhelming weight of the evidence in this case.

D. EPA'S INTERPRETATION IN THIS CASE IS INCONSISTENT WITH PRIOR INTERPRETATIONS BUT WAS NOT SUBJECT TO NOTICE AND COMMENT RULEMAKING.

The undisputed evidence in this case is that EPA never claimed Purge Solvent downstream of the paint applicators was a "waste" and subject to the hazardous waste regulations until the late 1990s, even though the definition of "discarded material" has remained unchanged in all relevant manners since 1985. EPA's subsequent decision that Purge Solvent is a "spent material" downstream of the paint applicators is arbitrary and capricious.

So what happened between 1985 and the late 1990s to cause EPA to claim Purge Solvent downstream of the paint applicators is a "spent material" when it never took that position before? What happened was EPA issued the 1997 Cotsworth Letter. *See*, RX 16.

As discussed previously, there is no ambiguity in the definition of "spent material" and, therefore, interpretation and extrinsic evidence are unnecessary and inappropriate to determine what this rule means. However, if the Board does decide to consider such evidence, another source to examine is an agency's conduct or practice in applying the regulations over time. At trial, the ALJ expressed concern about being able to admit and evaluate EPA's practice or conduct over time in applying the rules at issue to vehicle painting operations.²⁵ *See, e.g.*, Hr'g

²⁵ The ALJ indicated GM had not provided authority to support its claim that she can and should evaluate EPA's conduct and practice over time. Hr'g Tr. (June 22) at 26-47.

Tr. (June 22) at 26-47. The following authority shows this is a relevant inquiry *if* a statute or rule is ambiguous.

As long ago as 1933, the U.S. Supreme Court established that the conduct and practice of an agency can be used to evaluate an agency's interpretation. *See, e.g., Norwegian Nitrogen Prod. Co. v. U.S.*, 288 U.S. 294, 314-15 (1933). *See also, Trinity Marine Nashville, Inc. v. OSHRC*, 275 F.3d 423, 430-31 (5th Cir. 2001); *Ohio Dep't of Human Svcs. v. U.S. Health & Human Svcs.*, 862 F.2d 1228, 1234-35 (6th Cir. 1988) ("contemporaneous expressions of opinion by low-ranking officials [are considered] highly relevant and material evidence of the general understanding of ambiguous regulatory provisions") (quoting *Phillips Petroleum Co. v. Dep't of Energy*, 449 F. Supp. 760, 784 (D. Del. 1978)); *U.S. v. American Elec. Power Svcs. Corp.*, 2001 U.S. Dist. LEXIS 18722, 7-8 (D. Ohio, 2001) ("... assuming the ambiguity of the regulation in question, defendants should be entitled to discover contemporaneous interpretations of the regulation by EPA personnel, even if those persons were not the ultimate decision-makers within the agency."). *See also, In the Matter of Motiva Enterprises LLC*, 2001 EPA ALJ LEXIS 161, *3-4 (Oct. 10, 2001). The *Norwegian Nitrogen* case has been recognized as "perhaps our leading case on the use of administrative practice as a guide to statutory interpretation." *SEC v. Sloan*, 436 U.S. 103, 126 (1978) (Brennan, J. and Blackmun, J., concurring). In the context of using a practice to determine the meaning of a statute, the Court in *Norwegian Nitrogen* held:

True indeed it is that administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction. True it also is that administrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons if the scope of the command is indefinite and doubtful. *The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.*

288 U.S. at 315 (emphasis added, internal citations omitted).

The purposes of examining EPA's conduct include determining if EPA has been consistent in its application of these very rules to these very operations over time. If the facts and the law have not changed, and yet EPA's application of that law to these facts has changed over time, then EPA must undertake rulemaking to effect that change. *See Alaska Professional Hunters Association v. FAA*, 177 F. 3d 1030 (D.C. Cir. 1999) (Even informal advice given by one regional office of FAA was deemed to require the Agency to change interpretation through notice and current rulemaking. "Those regulated by an administrative agency are entitled to know the rules by which the game will be played." *Id.* at 1035 (citations omitted)). Moreover, where courts have found that an agency which has been inconsistent in its interpretation over time is entitled to little or no deference. *U.S. v. Mead*, 533 U.S. 218, 228 (2001) ("The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements . . . (brackets contained in original) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446, n.30 (citations omitted) (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (citation omitted). An agency's interpretation of a rule contemporaneous to the time the rule was developed may provide "peculiar weight" in evaluating the agency's later, different interpretation. *Norwegian Nitrogen Prod. Co. v. U.S.*, 288 U.S. 294, 314-15 (1933). *See also Ohio Dept. of Human Svcs. v. U.S. Health & Human Svcs.*, 862 F.2d 1228, 1234-35 (6th Cir. 1988).

The record demonstrates that no regulatory agency, including EPA, had ever alleged the Purge Solvent was a "waste" at the point it exited the paint applicators from 1985 when the definition of spent material was promulgated until 1997. Hr'g Tr. (June 28) at 274-75, 276-77 (Winkler). *See also*, RX 180, 181, and 118A-KK. Ms. Winkler's testimony was corroborated by

the testimony of EPA's Larry Lamberth and Barrett Benson, who both admitted that EPA did not claim the Purge Solvent was a hazardous waste when it exited the paint applicators until the late 1990s, despite the fact the relevant hazardous waste regulatory definitions and facts had not changed since 1985. Hr'g Tr. (June 20) at 199-200, 206-07, 247 (Lamberth); Hr'g Tr. (June 21) at 201-04, 237-39 (Benson).²⁶ The uncontradicted evidence in this record is that for over twelve years following the adoption of the definition of spent material, not a single state or federal environmental agency ever took the position that the Purge Solvent was a hazardous waste when it exited the applicators.

Then, in 1997, the Cotsworth Letter arrived on the scene and stated, with no analysis, that Purge Solvents were a "waste" when they exited the paint applicators, ignoring the continued use of solvents doctrine. RX 16. However, the Cotsworth Letter hardly ushered in a new round of consistency. Again, the uncontradicted evidence in this record is that after the Cotsworth Letter in July 1997, EPA changed course in its interpretation repeatedly. Between 1997 and 2004, EPA's interpretations "flip flop" all over the place in what can only be described as a poster child for inconsistent agency interpretations.

In 1997, EPA conducted RCRA inspections at four different automobile facilities and in each case and in no instance did EPA determine that the purge solvent was a "hazardous waste" when it exited the paint applicators. RX 118DD at GM120449-50; RX 118Z at GM120055-72; RX 118S at GM110352-62; RX 118CC at GM120418-40. Two additional EPA inspections occurred in 1999 and another inspection at a General Motors facility in Georgia in 2000. RX 118JJ at GM120649-70; RX 118D at GM090122-43. In 1998, at a Ford facility EPA concluded

²⁶ Ms. Winkler's review also determined that state regulatory agencies did not claim the Purge Solvent was a solid and hazardous waste when it exited the paint applicators at vehicle assembly facilities prior to the late 1990s. Hr'g Tr. (June 28) at 274-75, 276-77. See also, RX 180, RX 181, 118 A-R, T-Y, AA-EE, and HH-II.

that the purge solvent was a waste. *General Motors v EPA*, 363 F.3d, 442, 445 (D.C. Cir. 2004). In late 1999 and in 2000 it also conducted seven inspections and determined that the Purge Solvent was a waste immediately upon exiting the applicators. CX 122; CX 77; CX 76; 118N at GM100772-91; CX 93; RX 118KK at GM120672-74; CX 78. By then the EPA's enforcement initiative was underway and EPA enforcement began a more consistent view of the issue. However, even well after the Cotsworth letter, and well after the enforcement effort began in earnest, there were still inspections in 2002 (Honda Lincoln and Ford Norfolk), 2003 (Ford Norfolk) and in 2004 (Honda East Liberty and Honda Marysville) where EPA conducted RCRA inspections but failed to identify the Purge Solvent material as a compliance issue. RX 118FF at GM120515-25; RX 118X at GM110710-907; RX 118EE at GM120501-13; RX 118GG at GM120527-40.

This record documents at least twelve times EPA changed its regulatory interpretation over a period of eight years. Looking at GM's Doraville facility, EPA's position regarding whether the Purge Solvent is a hazardous waste from the point it exits the paint applicators went from no violations in 1999 and 2000 to a violation in 2002. RX 118D at GM090122-43; CX 88. Likewise, GM's Bowling Green facility went from no violation in 1997 to a violation in 2001. RX 118S at GM110352-62; CX 80. Similarly, Ford's Louisville facility went from no violation in 1997 to a violation in 2000. RX 118Z at GM120055-72; CX 76.

Not only was EPA as an agency inconsistent in its interpretation of the regulatory status of the Purge Solvent when it exits the paint applicators, so too was Mr. Lamberth. For example, Mr. Lamberth performed the August 26, 1997 inspection of Ford's Louisville facility. RX 118Z at GM120057. According to his inspection report,

The hazardous waste storage tanks are the final on-site storage of purge from the paint lines. Prior to reaching the tanks, the paint first collects in sub-tanks of

approximately 100-gallon capacity in the paint line area. These sub-tanks collect the purge from the paint line and recirculate the purge until it is unusable. Once the purge is deemed unusable, it is pumped the distance from the sub-tanks to the hazardous waste storage tanks previously mentioned. Two of the four sub-tanks (the two in the CPL paint area) were marked "hazardous waste". **If the KTP determines that the material in these sub-tanks is not a waste, or that the sub-tanks are ancillary to the main hazardous waste storage tanks outside, then the tanks need not be labeled with words "hazardous waste".**

RX 118Z at GM120060. As Mr. Lamberth testified, KTP is the Kentucky Truck Plant. Hr'g Tr. (June 20) at 203, 205. Therefore, he clearly understood EPA's continued use of solvents doctrine and its potential applicability to Ford's operations downstream of the paint booths at least at that time.

Mr. Lamberth also performed the August 27-28, 1997 inspection of GM's Bowling Green facility and the August 23, 2000 inspection of GM's Doraville facility. RX 118S at GM120649; RX 118D at GM090136. He did not claim the Purge Solvent was a hazardous waste when it exited the paint applicators during those inspections.²⁷ However, during his April 17, 2000 inspection of Ford's Louisville facility, an inspection that happened to be flanked by the two GM inspections mentioned above, he reached the opposite conclusion. CX 76.²⁸

At trial, and in a valiant effort to "put as good a face as possible" on what are clearly bad facts, Ms. Peaceman said the following:

Mr. Kyle talks about flip-flopping and inconsistent agency action. If there were documents that show, after a certain point in time, you know, one year we do it one way, one year we do it the next way, we go back and forth, that would be different story. That's not the evidence here. . . . It's not a case of inconsistent dealings

²⁷ EPA will claim that every so-called non-compliance does not have to be written up in an inspection report. But would EPA have this tribunal believe that its lead witness just missed it at some facilities? Mr. Lamberth didn't "miss it"; he said the Kentucky Truck Plant could decide. All other inspectors didn't miss an item that was so important to the agency that it pursued every auto manufacturer.

²⁸ Mr. Lamberth also testified that there are a lot of similarities between vehicle assembly plants, in terms of the basic purge processes used at each. Hr'g Tr. (June 20) at 199-200.

Hr'g Tr. (June 28) at 266 (Peaceman). Unfortunately for EPA, the picture the evidence presents is exactly – “one year we do it one way, one year we do it the next way, we go back and forth . . .” That is not a “different story.” That is this story. These are the uncontradicted facts established in this record.

If an agency is going to change its mind, it must provide a “reasoned basis” for the switch. *Motor Vehicle Mfrs. Assn v. State Farm Mut.*, 463 U.S. 29, 42-44 (1983); *In re The Port Authority of New York and New Jersey*, 10 E.A.D. 61, 91 (EAB 2001). *See also, Immigration and Naturalization Serv. v. Yang*, 519 U.S. 26, 31 (1996). Further, it must do so through notice and comment rulemaking. *See, Alaska Professional Hunters Assn., supra*, 177 F.3d 1030. Otherwise its actions are arbitrary and capricious.

The 15 years of history of silence on the issue and then an inconsistent enforcement history cannot be excused as the use of enforcement discretion as the ALJ suggests. *See, Initial Decision* at 57. It smacks of fundamental unfairness to the regulated industry. EPA must adhere to the basic principles of administrative law. If it wants to change the definition of “spent material” it must go through the rulemaking process. If it wants to change the definition of solid waste in RCRA to not require a material be “discarded,” then it must go to Congress. What is untenable in this regulatory world is for the EPA enforcement program to devise a new enforcement initiative and lead a concerted attack on the industry through enforcement to impose a view that even EPA itself could not discern from its rules for many years.

E. **WHEN EPA IS ENFORCING MICHIGAN'S STATE LAW, IT IS BOUND BY MICHIGAN'S FINDING THAT THE PURGE SOLVENT IS NOT A WASTE.**

In the Initial Decision, the ALJ determined that EPA is authorized to bring an enforcement action in an authorized state. *Id.* at 58. That determination is legally correct and would be relevant if GM had ever disputed EPA's authority to bring an enforcement action in

this case. It did not. What GM did and does dispute is whether EPA can foist an interpretation that Purge Solvent downstream of the paint applicators is a “waste” under Michigan’s hazardous waste regulations when Michigan already has determined it is not, and then use that foisted interpretation to allege GM is in violation of those Michigan regulations.

The parties stipulated that Michigan is authorized for the substantive requirements at issue in this case, Subparts J, BB, and CC, as well as the “base” RCRA program which includes determining what is and is not a solid and hazardous waste. RX 1 at ¶ 7. Therefore, Michigan state law applies to GM’s two Michigan plants, and the Michigan Department of Environmental Quality (MDEQ) is the appropriate agency to determine if GM’s Purge Solvent is subject to these regulations. In fact, MDEQ has made an evaluation and has determined that the Purge Solvent is not subject to the hazardous waste regulations when it exits the paint applicators. RX 21. Moreover, Michigan’s decision on this point is not only convincing (because it actually analyzed the law and applied it to the facts), it is also conclusive and binding upon EPA.

Michigan’s position on this issue is and has been clear and unambiguous. On February 14, 2001, MDEQ’s Deputy Director, Mr. Arthur Nash, issued a letter to GM stating as follows:

We recognize that there are some aspects of the operation that support the idea that the solvent is still being used. First, the solvent is apparently specifically designed to keep the paint solids in suspension and to allow flow through the lines. Second, the purge collection is a necessary process uniquely tied to painting. In addition, the United States Environmental Protection Agency (USEPA) has used solvent as an example of a material that may continue to serve a purpose, even if not its original one.

* * *

If the purge piping system, which is integral to the production process, becomes clogged then the entire manufacturing process would be shut down.

RX 21 at GM000073. Later, MDEQ, through its Attorney General, filed an *Amicus Brief* in support of GM in the related case *GM v. U.S. EPA*, pending before the D.C. Circuit Court of Appeals. MDEQ further stated in support of this position:

The *sine qua non* of EPA's enforcement actions is the determination that the paint purge solvents, after exiting the paint spray guns, are "discarded material." Unquestionably, however, the solvents continue to serve a useful purpose by keeping paint solids suspended and preventing the blockage of paint lines until they are collected in the solvent recovery tank. Thus . . . the solvents are not "discarded material."

* * *

In the State's view, purge solvents that remain continuously in-use in the paint purge piping system need not be regulated under Michigan's hazardous waste scheme; the solvents are not considered solid waste after they exit the paint spray guns by virtue of the continued useful purpose they serve in the purge piping system.

RX 182A at 1-2, 9 (emphasis added).²⁹ MDEQ's position is crystal clear: the material is not a waste at GM's facilities. The MDEQ recently confirmed that the position stated in its amicus brief is its current position. RX 206.³⁰

EPA's efforts to second guess Michigan's determination as an authorized state regarding the regulatory status of the Purge Solvent simply flies in the face of the governing statute and

²⁹ Michigan's D.C. Circuit brief was filed December 18, 2003, well after the October 25, 2002 letter from a Mr. Yocum, a lower-level MDEQ employee whose letter EPA relies on to manufacture its claim that Michigan's position regarding the regulatory status of the Purge Solvent is in doubt. *See*, CX 26. Even assuming this letter could overturn the prior determination by Mr. Nash, the Yocum letter does not call into question the determinations made in Mr. Nash's February 21, 2001 letter and does not support EPA's claim of doubt. The October 25, 2002 letter simply says:

Based on the February 14, 2001 letter from Art Nash to Patrick McCarroll, no violations were cited as a result of the inspection. However, the following issue was identified:

Equipment ancillary to the hazardous waste accumulation tank may not meet the requirements of 40 CFR 265, Subpart J.

Further evaluation of this situation has been deferred pending the outcome of negotiations between USEPA and GM regarding similar circumstances at other GM facilities.

CX 26 at 1 (emphasis added).

³⁰ GM also appeals the ALJ's determination to exclude RX 206 from the record in this case on the basis of it lacking sufficient probative value. RX 206 has sufficient probative value because EPA raised as an issue during the hearing whether Michigan had determined the Purge Solvent is not subject to the hazardous waste regulations as a matter of Michigan law and pointed to various documents that it alleged put that issue in doubt. RX 206 was offered to remove the alleged doubt regarding Michigan's position on this issue.

EPA's own directives that a company must contact its authorized state for its determination on this very issue. In no less than the Cotsworth Letter itself, EPA stated:

We suggest that you contact your state agency with questions you may have about a specific location or about the specific units described in your letter since this letter is a general interpretation of the federal regulations and your authorized state agency is responsible for interpreting its own regulations and making site specific regulatory determinations.

RX 16 at GM000055 (emphasis added). That is exactly what GM did in this case. The result was the February 14, 2001 Nash letter. RX 21. And what Michigan said in its D.C. Circuit Court brief. RX 182A.

Ms. Williams testified that when an authorized state makes a determination regarding applicability under its own hazardous waste regulations, EPA defers to that determination. Hr'g Tr. (June 29) at 247. Furthermore, Ms. Williams testified that if an authorized state's determination results in that state being less restrictive than EPA, EPA has various mechanisms it can use against that state, including financial and regulatory mechanisms (*e.g.*, withdrawal of money, withdrawal of the state's authorization). *Id.* Ms. Williams' testimony is consistent with the statutory provisions addressing authorization that allow EPA to "deauthorize" all or part of a state's hazardous waste program if the state is less restrictive or inconsistent with EPA's own requirements. 42 U.S.C. § 6926(e). However, instead of using these established mechanisms, EPA has attempted an end run to supplant Michigan's decision as an authorized state through this enforcement action – a method that is neither contemplated nor allowed under the statute.

EPA is not entitled to substitute its interpretation of Michigan's EPA-authorized, *state-law*, hazardous waste program for Michigan's interpretation of its own laws. As an authorized state, Michigan, not EPA, is responsible for interpreting and administering its authorized state regulations and making site-specific regulatory determinations.

GM does not dispute that the EPA has the authority to enforce a state's authorized program if it finds the State is not enforcing the approved program. That is true. If EPA "determines that any person has violated or is in violation of any requirement of this subchapter," EPA can either issue an order or go into federal court to enforce those state laws. 42 U.S.C. § 6928(a) (emphasis added). However, when EPA takes such an enforcement action in an authorized *state*, EPA is enforcing state law because that authorized state law operates "in lieu of" the corresponding federal laws. 42 U.S.C. § 6926(b). In cases where EPA brings an enforcement action against a facility in an authorized state (which is commonly referred to as "overfiling"), EPA takes that state's laws – and the state agency's or courts' interpretations of those laws – as "it finds them." If a state has provided a definitive interpretation of its state laws – as Michigan has here – EPA may not substitute its interpretation for that of the state.

If EPA finds the authorized state is not enforcing those "requirements" as so established, it can come in and enforce. But that does not give EPA the authority to foist its regulatory interpretation upon the state.

The Seventh Circuit Court of Appeals has made EPA's role in authorized states quite clear. *Northside Sanitary Landfill, Inc. v. Thomas*, 804 F.2d 371, 381-82 (7th Cir. 1986), involved the issue of the scope of RCRA closure obligations for the Northside Landfill located in Indiana. At the time (as today), Indiana had been delegated authority by EPA to administer the closure rules for facilities like Northside. Northside was complaining about comments EPA had made during a public meeting regarding the scope of Northside's RCRA closure obligations. The Seventh Circuit laid out the roles of EPA and an approved state clearly and concisely:

Once the state agency has received authorization for its program, it shall 'carry out such program in lieu of the Federal program.' 42 U.S.C. § 6926(a). The EPA simply does not have the legal authority to determine whether, for what purposes, or which areas of Northside's facility must be closed. . . . The State of Indiana

alone is responsible for these determinations. Even if the EPA is dissatisfied with, for example, the enforcement action taken by a state against a specific hazardous waste disposal facility, or the settlement agreement reached between the state and the facility, so long as the state has exercised its judgment in a reasonable manner and within its statutory authority, the EPA is without authority to commence an independent enforcement action or to modify the agreement.

Id. (citations omitted; emphasis added).

According to the ALJ, it is Michigan's regulations that are part of Michigan's authorized hazardous waste program - not Michigan's interpretation of those regulations. Initial Decision at 59 and n. 44. However, when EPA believes a state's interpretation of a regulation results in that state's hazardous waste program being less strict than the federal program, RCRA provides a mechanism to address the situation.

If a state elects to have a hazardous waste program that is less restrictive than the federal program, RCRA allows EPA to revoke its authorization of that state's hazardous waste program. 42 U.S.C. § 6926(e). In this case, if EPA does not like Michigan's position, the RCRA statute provides EPA with its sole remedy – it must “unauthorize” Michigan's program, put a *federal* program in its place, and then enforce federal law against GM. But EPA cannot simply substitute its interpretation of Michigan state law upon Michigan or upon GM's Michigan's plants. The carefully crafted federalism scheme Congress made part of the RCRA statute must be respected. Congress created EPA's remedy for circumstances just like this case. EPA must follow that remedy if it objects to what Michigan has done.

GM is being whip-sawed between two agencies, which places GM in an untenable position. Congress never envisioned that its statutory scheme would be perverted to reach such a result. This is yet another reason the ALJ's decision must be overturned.

VII. CONCLUSION

The details of this case are complex. Understanding how GM's vehicle painting system works and the elaborate system for ensuring it can paint vehicles in a high speed assembly line process involves a lot of technical information about how solvent works is not easy. In the end, however, this case comes down to the basic issue about what authority Congress gave to EPA to regulate under RCRA, a program to manage materials that are discarded. Any plain and simple meaning of that term cannot be squared with how GM acts towards the Purge Solvent downstream of the paint applicators in the vehicle painting process. GM's interpretation of EPA's implementing regulations - particularly the definition of spent materials - is consistent with what authority Congress delegated to EPA. The ALJ's interpretation of the regulations is not.

Many years ago, GM redesigned its painting operations in order to capture solvent that has cleaned paint applicators so it can continue to be used to dissolve, dilute and suspend paint in the enclosed process equipment at our facilities - indeed, to prevent it from being discarded. The solvent material is collected and sent off-site where it is recycled, so it can be re-used again. GM operated its assembly facilities for the first 12 years after EPA enacted the "waste" regulations with no complaints from EPA. The Resource Conservation and Recovery Act does not regulate a material unless it has been "discarded," such as when it is abandoned or thrown away. GM does not discard this material at any time.

GM's modern painting operation reuses and recycles solvent which is both economically and environmentally superior to older systems. By reusing and recycling, rather than disposing of its Purge Solvent, GM prevents creating a wastestream that would otherwise need to be disposed.

The series of findings and determinations by the ALJ in this case are add odds with RCRA's basic statutory scheme, the implementing regulations, and the facts in the record which demonstrate that GM's Purge Solvent downstream of the paint applicators is not part of the waste management problem Congress sought to address in enacting RCRA. EPA Region 5's efforts to so expand RCRA in this way can not be sustained. Accordingly, the Initial Decision of the ALJ must be rejected by the EAB.

VIII. APPENDIX – PROPOSED ALTERNATIVE FINDINGS OF FACT AND CONCLUSIONS OF LAW.

GM's proposed alternative findings of fact are the facts contained in the Statement of Facts portion of this brief. GM's proposed alternative conclusions of law are as follows:

1. Pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, a State may be authorized to operate that state's hazardous waste program, or a portion thereof, in lieu of the federal program. RX 1 at ¶ 6.

2. Because Michigan has received authorization for the relevant regulations, its hazardous waste program, including the definition of "spent material" and "waste," operates in lieu of U.S. EPA's for purposes of this case. *See*, RX 1 at ¶ 7.

3. Because Ohio has received authorization for the base hazardous waste program, including the definition of "spent material" and "waste," and its counterpart to U.S. EPA's Subpart J regulations, those portions of its hazardous waste program operate in lieu of U.S. EPA's for purposes of this case. *See*, RX 1 at ¶ 8.

4. Under relevant hazardous waste regulations, a material must first meet the hazardous waste regulatory definition of "waste" before it satisfies the regulatory definition of

“hazardous waste.” MICH. ADMIN. CODE r. 299.9203(1) (2004); OHIO ADMIN. CODE § 3745-51-03(A) (2004). *See also*, 40 C.F.R. § 261.3(a) (2004).

5. Products that are used for their intended purpose are not wastes and are not subject to the hazardous waste regulations. *See, e.g.*, Hr’g Tr. (June 21) at 90, 97 (Benson); RX 151; RX 157; RX 187.

6. The only basis by which the Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks could be regulated as a hazardous waste at GM’s three facilities is if it first is a “spent material.” *See*, U.S. EPA’s Complaint and Compliance Order at ¶ 23; Initial Decision at 19-20.

7. The relevant hazardous waste regulations in this case all define “spent material” as “any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing[.]” MICH. ADMIN. CODE r. 299.9107(aa) (2004); OHIO ADMIN. CODE § 3745-51-01(C)(1) (2004). *See also*, 40 C.F.R. § 261.1(c)(1) (2004).

8. The definition of “spent material” in the relevant hazardous waste regulations is clear and unambiguous on its face and does not require interpretation. Therefore, the words of this definition must be applied as written. Hr’g Tr. (June 22) at 40. *See also*, *In re: Julie’s Limousine & Coachworks, Inc.*, EPA App. LEXIS 23, *35-36 (July 23, 2004); *In the matter of United States Air Force Tinker Air Force Base*, 1999 EPA ALJ LEXIS 33, *40-41 (May 19, 1999); *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (“[I]n interpreting a statute a court should always turn to one cardinal canon before all others...that courts must presume that a legislature says in a statute what it means and means in a statute what it says there.” *Id.* “When the words of a statute are unambiguous, then, this first canon is also the last: ‘judicial inquiry is

complete.” *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)). This cardinal canon also applies to regulations because courts apply the same rules of interpretation to administrative rules as are used to interpret statutes. *Ala. Tissue Ctr. of Univ. of Ala. v. Sullivan*, 975 F.2d 373, 379 (7th Cir. 1992); *United States v. Ray*, 488 F.2d 15, 18 (10th Cir. 1973) (“Where the language is clear and the purpose appears with reasonable certainty, there is no need to resort to rules of construction to ascertain its meaning... *this same rule applies in construing administrative regulations...*” *Id.* (emphasis added)).

9. To determine if a material is a “spent material,” the purpose for which it was produced first must be determined and then it must be determined if the material has been used and so contaminated from that use that it can no longer be used for the purpose it was produced without processing. *See*, MICH. ADMIN. CODE r. 299.9107(aa) (2004); OHIO ADMIN. CODE § 3745-51-01(C)(1) (2004). *See also*, 40 C.F.R. § 261.1(c)(1) (2004).

10. Basic principles of statutory construction state that the singular includes the plural and the plural includes the singular. *See* 1 U.S.C. 1; *Central & Southern Motor Freight Tarriff Assn., Inc. v. United States*, 843 F.2d 886,894 (D.C. Cir 1988). *See also Public Citizen v. Mineta*, 340 F.3d 39, 54 (D.C. Cir. 2003) holding that Agency interpretation of statute that required warning systems “when a tire is significantly underinflated” to be arbitrary and capricious when Agency determined that a warning system was not required to provide warning if more than one tire was underinflated because the statute said only “a tire.” “The [Act’s] ‘a tire’ plainly means one tire, two tires, three tires, or all four tires, under the elementary rule of statutory construction that the singular (‘a tire’) includes the plural (‘tires’).” *Id.* Therefore, the word “purpose” in the relevant hazardous waste regulatory definition of “spent material” includes both the singular and plural forms of that word.

11. The undisputed evidence establishes that the purpose for which the Purge Solvent is produced is to perform solvent functions in the paint applicators and downstream of the paint applicators. Hr'g Tr. (June 24) at 223-25, 230-31, and 255-56.

12. The undisputed evidence establishes that the Purge Solvent in fact performs solvent functions downstream of the paint applicators and all the way to and in the Purge Mixture Storage Tanks. RX 1 at ¶ 37; Hr'g Tr. (June 21) at 42-49 (Kendall); Hr'g Tr. (June 20) at 280-81 (Kendall); Hr'g Tr. (June 21) at 323 (Benson).

13. It is undisputed that GM's Purge Solvent is not processed prior to performing the solvent functions for which it was produced downstream of the paint applicators all the way through the Purge Mixture Storage Tank. Hr'g Tr. (June 24) at 255 (Warren); *id.* at 94 (Wozniak). *See also*, Hr'g Tr. (June 21) at 42-45; Hr'g Tr. (June 20) at 280-81 (Kendall).

14. Therefore, the Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks does not satisfy the relevant hazardous waste regulatory definition of "spent material" at GM's three facilities.

15. Because the Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks does not satisfy the relevant hazardous waste definition of "spent material" at GM's three facilities, it is not a "waste" or "hazardous waste" under the relevant hazardous waste regulations or a "solid waste" under EPA's hazardous waste regulations.

16. Because this case involves federally-authorized state hazardous waste regulations, EPA is bound in this case by Michigan's determination that the Purge Solvent is not a "spent material" when it exits the paint applicators.

17. Using the “predominant purpose test” articulated in *American Petroleum Institute v. EPA*, 216 F.3d 50, 55, 57 (D.C. Cir. 2000), to interpret the definition of “spent material” is not appropriate because that definition is clear and unambiguous and requires no interpretation. However, even if the use of the “predominant purpose test” were appropriate, the “predominant purpose” of the Purge Solvent is to perform solvent functions in the paint applicators and downstream of the paint applicators. Because the Purge Solvent is performing solvent functions at these locations, GM’s use of Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks would satisfy the “predominant purpose test” if it were appropriate.

18. The fact that force works in conjunction with the solvent functions performed by the Purge Solvent in the paint applicators and downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks does not negate the undisputed evidence that the Purge Solvent is performing solvent functions, the purpose for which it was produced, downstream of the paint applicators and in the Purge Mixture Storage Tanks and does not change the above conclusion of law that said Purge Solvent is not a “spent material.”

19. Even if the definition of “spent material” under the relevant hazardous waste regulations was ambiguous, the best evidence of what that term means is language in the preamble to the 1985 Federal Register that promulgated the definition. Courts have long looked to what an agency said it intended at the time a rule was promulgated as reliable extrinsic evidence of agency intent. *Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988). This would include the regulation’s preamble. *See, Public Citizen v. Carlin*, 184 F.3d 900, 911 (D.C. Cir. 1999); *Nat’l Mining Ass’n v. EPA*, 59 F.3d 1351, 1355 n.7 (D.C. Cir. 1995). In fact, as noted in the case *In the matter of Harpoon P’ship*, 2004 EPA ALJ LEXIS 111, *93 n. 11 (May 27, 2004),

the preamble is some of the best evidence of an agency's contemporaneous intent in promulgating a regulation:

It is appropriate to use the preamble of a final rule to determine the meaning of a regulation and the promulgating agency's intent. *See HRI, Inc. v. EPA*, 198 F.3d 1224, 1244 n.13 (10th Cir. 2000) (preamble to a regulation is evidence of an agency's contemporaneous understanding of its rules); *Wyoming Outdoor Council v. U.S. Forest Serv.*, 100 [sic] F.3d 43, 53 (D.C. Cir. 1999) (while language in the preamble of a regulation is not controlling over the language of the regulation itself, it may serve as a source of evidence concerning contemporaneous agency intent); *Commonwealth of Pa. Dep't of Pub. Welfare v. U.S. Dep't of Health and Human Serv.*, 101 F.3d 939, 944 (3d Cir. 1996) (preamble to regulations may be used as an aid in determining the meaning of the regulations); *Martin v. American Cyanamid Co.*, 5 F.3d 140, 145 (6th Cir. 1993) (same).

GM's use of Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks is entirely consistent with the discussion of the types of materials that are not "spent materials" in U.S. EPA's 1985 preamble. RX 12 at 624.

20. GM's use of Purge Solvent downstream of the paint applicators and in the Purge Mixture Storage Tanks also is entirely consistent with U.S. EPA's long standing continued use of solvents doctrine. *See, e.g.*, RX 13, RX 12 at 624; RX 110.

21. It is black letter law that an agency must follow its own regulations. *See United States v. Nixon*, 418 U.S., 683, 694-96 (1974); *Accardi v. Shaughnessy*, 347 U.S. 260, 265-67 (1954); *Service v. Dulles*, 354 U.S. 363, 388 (1957); and *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 536 (D.C. Cir. 1986). By failing to apply the continued use of solvents doctrine to GM's Purge Solvent downstream of the paint applicators all the way to and in the Purge Mixture Storage Tanks, U.S. EPA failed to follow its own rules.

22. U.S. EPA's determination articulated in the Cotsworth Letter, Sasseville memo, and their progeny that solvent used to clean paint applicators at vehicle manufacturing facilities is subject to the hazardous waste regulations after it has cleaned the paint applicators is not

relevant in the instant case because the purpose for which the solvent addressed in those documents was produced is not the same as the purpose for which GM's Purge Solvent is produced. RX 16 at GM000054; RX 111 at GM090012A; RX 29 at GM000089; RX 30 at GM000093.

23. The ALJ's determination that GM's Purge Solvent must dissolve new or different constituents than the constituents that were dissolved when the Purge Solvent cleans the paint applicators and her reliance on the Sasseville memo and its progeny that articulate said purported requirement constitutes an impermissible revision to the plain and unambiguous definition of "spent material" because it was imposed without complying with the notice and comment rulemaking requirements.

24. EPA Region 5's position about the regulatory status of Purge Solvent after it exits the paint applicators is entitled to no deference given the history of inconsistent interpretations by the Agency. *United States v. Mead*, 533 U.S. 218, 228, 121 S.Ct. 2164, 2172 (2001) ("The weight [accorded to an administrative] judgment in a particular case will depend upon...its consistency with earlier and later pronouncements...which give it power to persuade if lacking power to control.") (brackets contained in original) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *Immigration and Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446, 107 S.Ct. 1207, 1221 n.30 (citations omitted) (1987); *Watt v. Alaska*, 451 U.S. 259, 273 (1981) (citation omitted). Furthermore, the underlying inspection reports are relevant to this case because they demonstrate that U.S. EPA has treated similarly situated facilities inconsistently which constitutes arbitrary and capricious government conduct. *See, Immigration and Naturalization Svcs. v. Yang*, 519 U.S. 26, 31 (1996). *See also In the matter of: Motiva*

Enterprises LLC, 2001 EPA ALJ LEXIS 161, *2-4 (Oct. 10, 2001) (evidence of the treatment of similarly situated entities may be admissible to show differences).

25. Because GM's Purge Solvent is not a "waste," "solid waste," or "hazardous waste" under the relevant hazardous waste regulations downstream of the paint applicators all the way to and through the Purge Mixture Storage Tanks at each of the three GM Facilities at issue in this case, the relevant hazardous waste requirements applicable to generators that store hazardous waste in tanks, including the Subpart BB and CC hazardous waste requirements, do not apply to the purge portion of GM's painting operation located downstream of the paint applicators and the Purge Mixture Storage Tanks at each of the three GM Facilities at issue in this case.

26. Therefore, the three GM Facilities at issue in this case did not violate the relevant hazardous waste regulations that apply to generators that store hazardous waste in tanks, including the Subpart BB and CC hazardous waste requirements, at the time of U.S. EPA's inspections of those facilities as described in CX 2, 3, and 4 or at any time subsequent to those inspections.

27. Even if the Purge Solvent downstream of the paint applicators were a hazardous waste, it also is not subject to the relevant hazardous waste regulations because the purge recovery system at each of the three GM Facilities is a manufacturing process unit. MICH. ADMIN. CODE r 299.9204(3)(a) (2004); OHIO ADMIN. CODE § 3745-51-04(C) (2004).

28. Even if the Purge Solvent downstream of the paint applicators and in the Purge Mixture Storage Tanks were a hazardous waste, it is not subject to the relevant hazardous waste regulations because the purge recovery system and Purge Mixture Storage Tanks at each of the three GM Facilities are totally enclosed treatment units. MICH. ADMIN. CODE r 299.9108(g)

(2004), 299.9601(6) and 299.9503(1)(d) (2004); OHIO ADMIN. CODE §§ 3745-50-10(A)(119) (2004), 3745-65-01(C)(9)(2004).

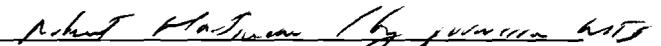
29. The D. C. Circuit Court of Appeals has made it clear, before a material can be a solid or hazardous waste, it must be “discarded” by being “disposed of,” “thrown away,” or “abandoned.” *Am. Mining Cong. v. U.S. EPA*, 824 F.2d 1177, 1184, 1190 (D.C. Cir. 1987). *See also, Ass’n of Battery Recyclers, Inc. v. U.S. EPA*, 208 F.3d 1047, 1051, 1053 (D.C. Cir. 2000). Furthermore, that court also has made it clear that its prior rulings do not require all materials sent off-site for recovery to be treated as hazardous wastes. Because GM’s intent is to have the Purge Solvent component of the Purge Mixture recovered and returned to it and its actions support its stated intent, we conclude that the Purge Solvent component of the Purge Mixture and the Purge Mixture itself are not solid or hazardous wastes when sent off-site for reclamation. *Safe Food & Fertilizer v. U.S. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003) (“*Safe Food*”), *reh’g granted*, 2004 U.S. App. LEXIS, 3565 (D.C. Cir. 2004), *reh’g en banc denied*, 2004 U.S. App. LEXIS 8194 (D.C. Cir. 2004), *reh’g granted in part and denied in part*, 2004 U.S. App. LEXIS 8189 (D.C. Cir. 2004), *remanded by*, 365 F.3d 46 (D.C. Cir. 2004), *reconsideration denied*, 2004 U.S. App. LEXIS 12715 (D.C. Cir. 2004).

30. For the reasons set forth above, the Initial Decision of Judge Gunning is vacated and EPA Region 5’s Complaint and Compliance Order against GM is hereby dismissed with prejudice.

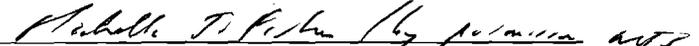
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **General Motors Corporation's Brief in Support of Its Notice of Appeal of the Initial Decision Issued in Docket No. RCRA-05-2004 0001** has been sent via Hand Delivery or Federal Express, as indicated, on this 19th day of May, 2006, to:

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Michael T. Scanlon

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

IN RE:)
)
General Motors Automotive-North America) RCRA Appeal No. (3008) 06-02
)
Docket No. RCRA-05-2004-0001)
_____)

ATTACHMENT A

**TO THE GENERAL MOTORS CORPORATION'S BRIEF IN
SUPPORT OF ITS NOTICE OF APPEAL OF THE INITIAL
DECISION IN THE ABOVE-REFERENCED DOCKET**

**COPY OF GENERAL MOTORS CORPORATION'S
NOTICE OF APPEAL**

**Filed with the Environmental Appeal Board on April 27, 2006
as Noted in the Order Clarifying Date Upon Which Appellate
Brief is Due**

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

IN THE MATTER OF:)

General Motors Automotive-North America)
300 Renaissance Center)
Detroit, Michigan 48265-3000)
U.S. EPA ID MID 005 356 902)
MID 000 718 544)
OHD 041 063 074)
Respondent)

DOCKET NO. RCRA-05-2004-0001

**GENERAL MOTORS CORPORATION'S NOTICE OF APPEAL
OF THE MARCH 30, 2006 INITIAL DECISION ISSUED IN
DOCKET NO. RCRA-05-2004-0001**

General Motors Corporation ("GM"), through its counsel, submits this Notice of Appeal of the March 30, 2006 Initial Decision issued by Honorable Barbara A. Gunning in Docket No. RCRA-05-2004-0001. This notice of appeal is being filed pursuant to 40 C.F.R. § 22.30, which provides, in relevant part ". . .[w]ithin 30 days after the initial decision is served, any party may appeal any adverse order or ruling of the Presiding Officer by filing . . . a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board." The Initial Decision issued by Judge Gunning in Docket No. RCRA-05-2004-001 is dated March 30, 2006 and was served upon GM, pursuant to 40 C.F.R. § 22.7(c), on April 4, 2006; therefore, this notice of appeal is being filed in a timely manner.

This appeal is from an Initial Decision by Judge Gunning in a civil administrative penalty proceeding arising under Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA") 42 U.S.C. § 6928(a). The case involves a complaint and proposed compliance order filed by U.S. Environmental Protection Agency ("EPA") Region 5 against three of GM's

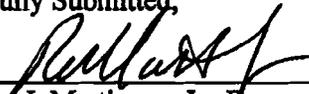
facilities located in Pontiac, Michigan, Lake Orion, Michigan, and Moraine, Ohio. The case involves the applicability of the RCRA hazardous waste regulatory regime to solvent material used by GM in its automobile assembly plant vehicle painting operations. In its complaint and proposed compliance order, EPA Region V contends that the solvent material – often referred to as purge solvent – is a “waste” or “discarded” by GM and, therefore, subject to regulation while that material is still in the paint booth. Furthermore, EPA contends the purge solvent is a “waste” downstream of the paint booth, even though it continues to clean and suspend solids just as the solvent was designed to do. GM, on the other hand, contends that the purge solvent material is an integral part of its painting process, is in continuous use as a solvent at several points in the process, and is neither a “waste” nor “discarded” by GM at the point in time alleged by EPA. Alternatively, GM contends that even if the purge solvent is considered a “waste” at the point EPA alleges, it is exempt from the RCRA regulatory regime under the “manufacturing process unit” exemption or the “totally enclosed treatment facility” exclusion provided for under the RCRA rules.

The Honorable Barbara A. Gunning held an evidentiary hearing from June 20, 2005 through June 30, 2005 and rendered her Initial Decision on March 30, 2006. In her decision, from which GM files this Notice of Appeal, Judge Gunning found many of the core elements of GM’s factual contentions to be correct and undisputed. Nevertheless, Judge Gunning concluded that the purge solvent material is “spent” material when it exits the paint applicators (or the mini purge pots in one case), that the material is discarded and is subsequently recycled and reclaimed; therefore, it constitutes a solid waste (and therefore a hazardous waste) under the RCRA regime.

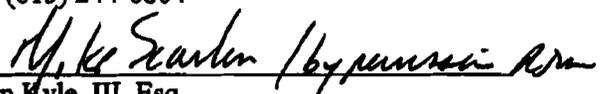
She further concluded that the purge solvent material is not exempt from RCRA under the manufacturing process unit exemption or the totally enclosed treatment facility exemption in the RCRA regulations. Accordingly, Judge Gunning concluded that a penalty assessment of \$568,116 was an appropriate and reasonable penalty.

GM, through its counsel, files this Notice of Appeal because the conclusions of law reached by Judge Gunning in this matter are in contradiction of the undisputed facts presented in the record and not supported by established case law or prior EPA regulatory interpretation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Notice of Appeal has been sent via first-class United States mail, postage prepaid, on this 26th day of April, 2006, to:

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