UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

OFFICE OF THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
General Motors Automotive – North America	)	**DOCKET NO. RCRA-05-2004-0001**
	)	
	)	
RESPONDENT	)	

INITIAL DECISION

Issued: March 30, 2006

Before: Barbara A. Gunning
Administrative Law Judge

Appearances:

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I. BACKGROUND

Procedural Background

This civil administrative penalty proceeding arises under the authority of Section 3008(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(a). On October 17, 2003, the United States Environmental Protection Agency ("the EPA"), Region 5 ("Complainant" or "the Region"), filed a Complaint and proposed Compliance Order against General Motors Corporation ("GM" or "Respondent").[1] Complainant charges GM with violating Section 3005(a) of RCRA, 42 U.S.C. § 6925(a), as well as federal and state hazardous waste regulations promulgated pursuant to RCRA, at three of its facilities located in: Pontiac, Michigan; Lake Orion, Michigan, and; Moraine, Ohio.[2] Respondent filed its Answer and Request for Hearing on November 21, 2003.

GM opposes Complainant's application of RCRA hazardous waste regulations upon painting operations at the three facilities, contending *inter alia*, that certain materials at the facilities are not "solid wastes" under RCRA.

On November 26, 2003, GM filed a motion to stay the proceedings before me until the United States Court of Appeals for the District of Columbia ("D.C. Circuit") entered its final decision in a case between the EPA and General Motors. In the case before the D.C. Circuit, GM "petition[ed] for review of May 7, 2002 letters from an enforcement official at [the EPA] regarding nascent enforcement actions based on a regulatory interpretation that automobile manufacturing paint purge solvents are 'solid waste' under [RCRA] upon exiting the spray painting unit." *General Motors Corp. v. EPA*, 363 F.3d 442, 444 (D.C. Cir. 2004). The D.C. Circuit refers to these letters as the "Shimberg Letters," as they were written by Steven Shimberg, who was then Associate Assistant Administrator of EPA's Office of Enforcement and Compliance at EPA Headquarters. *Id.* at 446-47. The Shimberg Letters were written to the Alliance of Automobile Manufacturers and several of its members, including GM. *Id.* at 447. The Shimberg Letters state, *inter alia*:

> The EPA continues to stand by its' 1997 determination on the point of generation for hazardous waste at spray paint operations and, as such, ancillary equipment transporting

[1] Throughout this decision I refer collectively to Complainant and GM as "the parties."

[2] The GM facilities at issue in this matter are located as follows: (1) Pontiac East Assembly Plant, 2100 South Opdyke Road, Pontiac, Michigan 48341-3155; Orion Assembly Plant, 4555 Giddings Road, Lake Orion, Michigan 48359, and; Moraine Assembly Plant, 2601 West Stroop Road, Moraine, Ohio 45439.

> the hazardous waste purge solvent from the painting operations and the storage tanks to which the mixture is conveyed are subject to RCRA.

Id. Pursuant to Section 7006(a)(1) of RCRA, 42 U.S.C. § 6976(a)(1), GM petitioned for review of the Shimberg Letters on the ground that they constituted "final agency action ... regarding the RCRA classification of purge solvents in the automobile manufacturing industry." *Id.* at 447. The D.C. Circuit observed that its jurisdiction under Section 7006(a)(1) of RCRA was limited to review of an action of the EPA Administrator in promulgating any regulation or requirement, or denying any petition for the promulgation, amendment, or repeal of any regulation." *Id.* at 448.

The D.C. Circuit dismissed the petition for review on the ground that it lacked jurisdiction and did not reach the merits of GM's challenge to EPA's regulatory interpretation. *Id.* at 453. The D.C. Circuit observed that GM seized on the Shimberg Letters to overcome the jurisdictional hurdles to petition for review, because GM was too late to challenge EPA's regulatory interpretation on point of generation for hazardous waste at spray paint operations, which was expressed several years before the Shimberg Letters, and GM was too early to challenge the interpretation through final EPA adjudicatory action of RCRA violations at specific plants. *Id.* In this regard, the D.C. Circuit noted, "But the Shimberg letters were merely preliminary enforcement statements made as part of an informal agency-industry dialogue and, of themselves, finally determine no rights or obligations of involved parties." *Id.* Accordingly, on April 2, 2004, the D.C. Circuit dismissed the petition for review for petition for lack of jurisdiction and did not reach the merits of GM's challenge to EPA's regulatory interpretation. *Id.*

Nevertheless, the D.C. Circuit's decision in *GM* does not preclude Respondent from arguing that its paint purge solvent piping systems are not subject to RCRA. Indeed, in *GM* the D.C. Circuit stated that EPA's regulatory interpretation that paint purge solvent piping systems can be subject to RCRA is "[p]artly a factual question" appropriately addressed in an administrative agency hearing. *Id.* at 452.

In light of the D.C. Circuit's dismissal of GM's petition for review, I determined that GM's motion to stay the proceeding before me was moot and therefore issued an order on April 14, 2004, denying the motion to stay. After filing Joint Stipulations of the Parties (July 22, 2004), the Complainant and GM filed motions for accelerated decision and responses thereto on August 23, 2004 and September 23, 2004.[3] I held a telephonic

[3] The parties' motions for accelerated decision and responses thereto are as follows: General Motors Corporation's Motion for Accelerated Decision (Aug. 23, 2004) ("GM's Motion for Acc. Dec."); Complainant's Motion for Partial Accelerated Decision and (continued...)

conference with the parties on October 14, 2004, to advise the parties that I had found that genuine issues of material fact exist and that an evidentiary hearing would be necessary. Shortly thereafter I issued the written order (October 27, 2004) memorializing my denial of the parties' motions for accelerated decision.

The evidentiary hearing was held in Detroit, Michigan from June 20, 2005, through June 30, 2005. The parties submitted lengthy post-hearing briefs on September 29, 2005, and submitted their post-hearing reply briefs on October 17, 2005.

RCRA's Definition of "Solid Waste"

"RCRA is a comprehensive environmental statute that empowers EPA to regulate hazardous wastes from cradle to grave, in accordance with the rigorous safeguards and waste management procedures of Subtitle C, 42 U.S.C. §§ 6921-6934." *City of Chicago v. Environmental Defense Fund,* 511 U.S. 328, 331 (1994). The objective of RCRA is "to promote the protection of health and the environment and to conserve valuable material and energy resources . . . ." RCRA § 1003(a), 42 U.S.C. § 6902(a). In passing RCRA, Congress expressed concern over the "rising tide of scrap, discarded, and waste materials." RCRA § 1002(a)(2), 42 U.S.C. § 6901(a)(2) (cited in *American Mining Congress v. EPA.,* 824 F.2d 1177, 1179, 1185 (D.C. Cir. 1987) ("*AMC I*")).

"RCRA includes two major parts: one deals with non-hazardous solid waste management and the other with hazardous waste management." *AMC I,* 824 F.2d at 1179. "Under the latter, EPA is directed to promulgate regulations establishing a comprehensive management system." *Id.* "EPA's authority, however, extends only to the regulation of 'hazardous waste.'" *Id.* "Because 'hazardous waste' is defined as a subset of 'solid waste,' [42 U.S.C.] § 6903(5), the scope of EPA's jurisdiction is limited to those materials that constitute 'solid waste.'" *Id.*

"The term 'hazardous waste' means a *solid waste, or combination of solid wastes,* which because of its quantity, concentration, or physical, chemical, or infectious characteristics may – (A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when

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[3](...continued)
Supporting Brief on Threshold Legal Issue (Aug. 23, 2004) ("Complainant's Motion for Acc. Dec."); General Motors Corporation's Response to Complainant's Motion for Partial Accelerated Decision and Supporting Brief on Threshold Legal Issue (Sep. 23, 2004) ("GM's Response to EPA's Motion for Acc. Dec.), and; Complainant's Brief in Response to General Motors' Motion for Accelerated Decision (Sep. 23, 2004) ("Complainant's Response to GM's Motion for Acc. Dec.").

improperly treated, stored, transported, or disposed of, or otherwise managed." RCRA § 1004(5), 42 U.S.C.A. § 6903(5) (emphasis added).

In RCRA Congress defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility *and other discarded material*, including solid, liquid, semisolid, or contained gaseous material . . . ."[4] RCRA § 1003(27), 42 U.S.C. § 6903(27) (emphasis added). Pursuant to the applicable regulations, "solid waste" (which is referred to as "waste" in the Michigan and Ohio regulations) is "any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31." 40 C.F.R. § 261.2(a)(1); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D). "Discarded material" is defined in the regulations as including materials that are "Abandoned" or "Recycled," as further explained in the regulations.[5] 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

The regulatory definition of "Abandoned" is as follows: "Materials are solid waste if they are *abandoned* by being: (1) Disposed of; or (2) Burned or incinerated; or (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b); *accord* Mich. Admin. Code R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D). As discussed further herein, I conclude that the materials at issue in this case are "solid wastes" on the basis of being "recycled," as defined in the regulations.

Under the regulatory definition of "discarded," the subcategory of "Recycled" refers to the following: "Materials are solid wastes if they are recycled – or accumulated,

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[4] The full statutory definition of "solid waste" is "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations, and from community activities, but does not include solid or dissolved material in domestic sewage, or solid or dissolved materials in irrigation return flows or industrial discharges which are point sources subject to permits under section 1342 of Title 33 [Clean Water Act], or source, special nuclear, or byproduct material as defined by the Atomic Energy Act of 1954, as amended (68 Stat. 923) [42 U.S.C. § 2011 et seq.]." RCRA § 1003(27), 42 U.S.C. § 6903(27).

[5] The other two categories of "discarded material" are "inherently-wastelike" and "military munitions." 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

stored, or treated before recycling . . .” as further specified in four categories: (1) “Used in a manner constituting disposal,” (2) “Burning for energy recovery,” (3) “Reclaimed,” or (4) “Accumulated speculatively.” Materials are “solid wastes” if they are both in one or more of the latter four categories and dependent on other requirements being met, such as whether the materials are “spent materials,” or alternatively, whether they are listed sludges, characteristic sludges, listed by-products, characteristic by-products, listed commercial chemical products, or scrap metal other than excluded. 40 C.F.R. § 261.2 – Table 1; *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

The regulatory history often uses the term “Secondary Materials,” which appears to simply be a substitute for referring to the aforementioned regulatory definition of “recycled.” For instance, under the preamble to the final definition of “solid waste,” the term “secondary materials” is defined as “a material that potentially can be a solid and hazardous waste when recycled.” *Hazardous Waste Management System; Definition of “Solid Waste*,” 50 Fed. Reg. 614, 616 n.4 (Jan. 4, 1985). Moreover, the preamble references the following types of secondary materials: spent materials, sludges, by-products, scrap metal, and commercial chemical products recycled in ways that differ from their normal use. *Id.*

The instant decision focuses on, and much of the parties’ debate concerns, the category of “spent materials.” The regulations define “spent materials” 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); *accord* Mich. Admin. R. 299.9107; Ohio Admin. Code § 3745-51-01(c)(1). The parties’ debate further centers on whether GM’s used solvents are “spent” upon applying EPA’s continued use doctrine for solvents, and concerns the point of generation at which such solvents become wastes (if ever). Furthermore, GM argues that its used solvents were not “wastes” because they were not “discarded” within the statutory meaning of the term “solid waste,” as interpreted by the D.C. Circuit.

II. FACTUAL FINDINGS

EPA’s representatives conducted inspections of GM’s vehicle assembly facilities in Pontiac, Michigan; Lake Orion, Michigan, and; Moraine, Ohio in March 2001, January 2003, and April 2001, respectively. Joint Stipulations of the Parties (July 22, 2004) (“Joint Stipulations”) ¶ 1.[6] 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,

[6] The parties stipulated to facts concerning the generalized operations, including painting, at the Pontiac, Orion, and Moraine facilities. During the course of the hearing, GM presented testimony and exhibits concerning operations at the three facilities, but primarily focused on the Orion facility.

in lieu of the Federal program. The EPA authorized the State of Michigan ("Michigan") to administer portions of the hazardous waste program in lieu of the federal program. *Id.* ¶ 7. Specifically, the EPA has authorized Michigan to administer the base hazardous waste program (which includes subpart J), as well as the subpart BB and CC regulations. *Id.* However, the EPA did not authorize Michigan to administer subparts BB and CC until July 31, 2002. 67 Fed. Reg. 49,617. The EPA has authorized the State of Ohio ("Ohio") to administer the base hazardous waste program, which includes the Subpart J regulations. Joint Stipulations ¶ 8. The EPA administers the subpart BB and CC rules in the State of Ohio. *Id.* ¶ 9.

Various car and truck parts, including bodies, panels, axles, and engines, are sent to each of GM's three assembly facilities subject to this action where they are assembled into finished vehicles. *Id.* ¶ 10. The assembly process at each of the three GM facilities consists of three major operations that occur in sequence – body assembly, painting, and general/final assembly. *Id.* ¶ 12.

After vehicle bodies are assembled, the vehicles are prepared for painting. *Id.* ¶ 13. GM paints the vehicles in paint booths at each of GM's facilities. *Id.* GM uses various kinds of "solvent-based" paint to paint vehicles at each of its facilities. *Id.* ¶ 14. These paints are called "solvent-based" paints because the paint formulations contains organic solvent. *Id.* Solvent-based paint consists of (a) solids/pigments or resins, and (b) paint solvent. *Id.* ¶ 15. The solids/pigments (referred to herein as "paint solids") are what give paint its color. *Id.* 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. *Id.* The portion of the paint that actually remains on the vehicle after painting and curing is the solids, not the paint solvent. *Id.*

GM's painting operation at each facility involves the sequential application of three kinds of solvent-based paint – primer coat, basecoat, and clear coat. *Id.* ¶ 16. At Orion, GM uses water-borne basecoat, and at Moraine GM uses powder-coat primer and water-borne basecoat.[7] Tr. (June 23) at 91-94. GM uses solvent-based primer, basecoat, and clear coat at Pontiac and solvent-based primer and clear coat at Orion, and solvent-based clear coat at Moraine. *Id.* The non-solvent based paints are not purged into the system at issue here. At issue in this case is only the purged solvent-based paint/resin.

[7] Although the parties stipulated that "GM's painting operation at each facility involves the sequential application of three kinds of solvent-based paint – primer coat, basecoat, and clear coat," the record reflects that the basecoat at Orion and the primer and basecoat at Moraine are not solvent-based. Tr. (June 23) at 91-94.

The paints are applied to vehicles via paint applicators in paint booths. Joint Stipulations ¶ 16. The painting process in the paint booths at each facility uses robotic spray guns and electrostatic bells – collectively referred to herein as "paint applicators" – to paint the vehicles. *Id.* ¶ 17. As a vehicle reaches the paint applicators, the applicators are automatically triggered to begin painting their specific portions of the vehicle, then automatically turn off, and the robotic applicators then return to their ready positions. *Id.* The vehicle then continues traveling down the paint line until painting is complete. *Id.* Once a vehicle is fully painted, it exits the paint operations and travels to the general/final assembly area. *Id.* ¶ 18. GM does not paint vehicles downstream of the paint booths. Tr. (June 21) at 125.

All the different types of paints used at each of these facilities (*i.e.*, primers, different colored basecoats, and clear coats) are stored in various storage tanks or totes called "mix tanks" which are located in a portion of each facility called the "Paint Mix Room." Joint Stipulations ¶ 19. These mix tanks are equipped with agitators or mixers that help keep paint solids in suspension and prevent the paint solids and paint solvent from separating, and that minimize clogging of paint equipment and associated lines. *Id.* The Paint Mix Room is located "upstream" of the paint booths. *Id.* Paint is pumped through a system of paint delivery pipes or lines from the mix tanks to the paint booths. *Id.*

The paint applicators are located inside the paint booths. *Id.* ¶ 20. These paint applicators are equipped with a manifold system immediately prior to or "upstream" of the applicators. *Id.* The manifold system, which is generally depicted in Figure 2 attached hereto, consists of a system of valves, electronics, a manifold that keeps different color paints separated, and a flow meter. *Id.* The manifold system regulates the flow of paint, purge solvent (described below) and air to the paint applicators. *Id.* Prior to the time paint enters the manifolds at each facility, the paint is continuously circulated through the mix tanks and associated paint delivery lines upstream of the manifolds to prevent the paint solids and paint solvent from separating or clogging the paint delivery system. *Id.* ¶ 21. When it is time for a particular paint to be delivered to the paint applicators, the appropriate valve in the manifold opens.[8] *Id.* ¶ 22. That paint then flows through the manifold, the line between the manifold and the paint applicator, the flow meter, and the applicator itself ("the manifold and associated applicator"), and then out onto the vehicle. *Id.*

[8] GM also periodically uses purge solvent to clean the manifolds and associated applicators, even if there is no color change, to prevent solids from gumming up the equipment and to allow the continued free flow of paint. Joint Stipulations ¶ 36. These purge operations are functionally the same as the color change purge process described above, and the resulting purge mixture is managed just like the purge mixture generated from a color change. *Id.*

Not all vehicles are painted with the same color basecoat. *Id.* ¶ 23. The process of switching from one color to another requires a thorough cleaning of the manifold and the associated applicator to remove the previous colored paint. *Id.* This cleaning process is known as the "purge process" and uses a material called "purge solvent." *Id.* To perform the purge process in the applicators, air and purge solvent are introduced into the manifold and associated applicators to perform a scrubbing action that cleans the paint from this equipment. Tr. (June 23) at 107-12.

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. *Id.* ¶ 24. Purge solvent is used to clean the manifolds and associated applicators, and is different than the solvent used in solvent-based paint. *Id.* Purge solvent does not contain paint solids. *Id.* Purge solvent is stored in its own storage tanks in the Paint Mix Room, and is delivered to the manifolds through its own delivery lines which are constructed of the same materials as the lines used to deliver paint to the paint manifolds. *Id.*

Purge solvent is expressly formulated to perform solvent functions in the manifolds and associated applicators, as well as downstream of the applicators. *See* Tr. (June 24) at 223-25; 230-31, 255-56. Purge solvent 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. Tr. (June 21) at 33-34, 44-48. The purge solvent would not be used at the GM facilities if there were no need to clean the manifolds and associated applicators. CX 1 at ¶ 24; CX 5 at ¶ 13; CX 11 at ¶ 10; Tr. (June 24) at 137; Tr. (June 27) at 36; Tr. (June 28) at 296.

The Purge Process for robotic paint applicators occurs in the following four steps, (Joint Stipulations ¶ 25):

> a. First, air is blown through the manifold and associated applicator to push as much paint as possible onto the vehicle. Then the robotic applicator rotates into a structure called a "gun box" located in the paint booth. Each robotic paint applicator has its own gun box. A gun box is an open-top device approximately 8 inches wide, 8 inches long, and 1 foot high.
> b. Second, the purge solvent valve in the manifold opens and allows purge solvent to be pumped through the manifold and associated applicator just like paint. The purge solvent cleans the manifold and associated applicator of the previous paint to avoid "contaminating" the new

> color. The mixture of paint and purge solvent then flows into the gun boxes.[9] This mixture is referred to herein as the "Purge Mixture."
> c. Third, additional purge solvent is sprayed from nozzles in the gun box onto the outside of the paint applicator to clean any residual paint on the outside of the applicator. This Purge Mixture also flows into and through the gun box.
> d. Finally, air is again blown through the manifold and associated applicator to push as much paint and purge solvent as possible into the gun box.[10] The paint applicator then returns to its ready position and resumes painting vehicles.[11]

The paint, before it mixes with the purge solvent, consists of approximately 50% solids and 50% solvents. Tr. (June 21) at 34-37. The mixture of paint and purge solvent is referred to as purge mixture. Joint Stipulations ¶ 25; Tr. (June 20) at 72; Tr. (June 23) at 49. The purge mixture contains approximately 90% solvent and 10% solids. Tr. (June 21) at 34-37. Because it contains solids, the purge mixture deposits a residue on the inside of the pipes and equipment downstream of the paint applicators. Tr. (June 24) at 76-77; Tr. (June 21) at 57-58; Tr. (June 20) at 278.

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[9] However, at the hearing, GM's witnesses testified that approximately 90% of the purge mixture exits the robotic applicators through internal flexible tubing, approximately 1/4 or 1/2 inches in diameter, and travels directly to the purge pots outside the paint booths, or to the mini purge pots in the paint booths at Orion. Tr. (June 23) at 120-23; Tr. (June 27) at 128-29. The remaining 10% of the purge mixture entering at the gun box level consists of the purge mixture exiting the tip of the applicator and the external wash of the applicator. Stationary bell paint applicators do not purge into gun boxes, but purge to the purge pots outside the paint booth or to the mini purge pots in the paint booths, through internal flexible tubing 1/4 or 1/2 inches in diameter.

[10] GM uses a quick spurt of air, known as "air chop," to push and scrub out the manifolds, and to help clean the walls of the manifolds. Tr. (June 23) at 109-11.

[11] Some of the electrostatic bell paint applicators are stationary and some are attached to robots. Applicators attached to robots include spray nozzles, electrostatic bells, and reciprocators. Tr. (June 23) at 116, 120; Tr. (June 27) at 10. The purge process for stationary bell applicators is slightly different than the purge process for the robotic applicators. Joint Stipulations ¶ 35. Despite these differences, the purge process for the stationary bell applicators also generates a purge mixture. *Id.* That purge mixture goes through a valve associated with the bell applicator. *Id.*

The purge mixture flows from the gun boxes through pipes into devices called purge pots which typically have a capacity of about 30 gallons. Joint Stipulations ¶ 26. The purge mixture flows by gravity from the internal lines and from the gun boxes, which contain nozzles that clean the external portions of the robotic paint applicators, through pipes into purge pots. Joint Stipulations ¶ 27; Tr. (June 23) at 178-79, 214; Tr. (June 24) at 64-65. There is no painting of automobiles downstream of the gun boxes. Tr. (June 21) at 125.

The pipes carrying the purge mixture downstream of the paint booths are iron and approximately 1 and 1/2 inches in diameter. The purge mixture pipes, including the recirculation loops (*see* Figure 1), are colocated with many other similar-appearing pipes in the ceiling area of the facilities and are indistinguishable from the other pipes. In several instances, the purge mixture pipes ascend and descend to and from the ceiling, which ranges in height from 13 to 20 feet.

Each purge pot is equipped with a mixer or agitator to help keep the paint solids in the purge mixture in suspension, and a pump, level sensor, and vent. Joint Stipulations ¶ 26; Tr. (June 20) at 79; Tr. (June 24) at 55-56; Tr. (June 27) at 41. When the purge mixture rises to a predetermined level in a purge pot, the pump on that purge pot is automatically activated and pumps the purge mixture through a system of pipes, including recirculation loops at the Moraine and Orion facilities (discussed below), to the purge mixture storage tanks at each facility. Joint Stipulations ¶ 27; *see also* RX 2 at ¶ 19. The purge mixture tanks range in size from 6,000 to 23,000 gallons at the three facilities. Joint Stipulations ¶ 27.

GM uses agitation, pressure, and gravity and recirculation to move the purge mixture through the purge mixture conveyance system to the storage tanks. CX 23 at ¶¶ 21-23, 27. The purpose of the agitation is to continue to disburse and dissolve the purge mixture. Tr. (June 24) at 81. Maintaining optimal pressure in the pipes downstream of the manifolds and associated applicators is important in order to move the purge mixture downstream of the manifolds and associated applicators. Tr. (June 24) at 128-29. GM adds pressure in the purge mixture conveyance system to assist with the cleaning of the pipes, Tr. (June 24) at 129, and at Pontiac additional pressure is provided by a boost pump, Tr. (June 28) at 304, 311. **[REDACTED]** The movement of the purge mixture downstream of the manifolds and associated applicators is not accomplished by the residual solvent properties in the purge mixture, but rather is accomplished by the energy generated by agitation and pumping (and at some facilities, recirculation is added to this process) of the purge mixture, as well as by the volume of the purge mixture itself. CX 23 at ¶¶ 21-23, 27.

Recirculation loops have been installed at both the Moraine and Orion facilities. Joint Stipulations ¶ 27; RX 175; Tr. (June 20) at 80; Tr. (June 24) at 67-69, 76, 83; Tr. (June 27) at 52. Each loop recirculates purge mixture in the lines downstream of the gun

boxes and external to the paint booths. Joint Stipulations ¶ 28. Each recirculation loop directs the flow of the purge mixture through a purge pot and its corresponding return pump. *Id.* Where GM has installed recirculation systems, these systems recirculate the purge mixture and keep it flowing even during periods when no production is being carried out. Tr. (June 23) at 53-54; Tr. (June 27) at 141, 146-47.

After the purge mixture leaves the paint booths at Moraine and Orion, GM recirculates the purge mixture constantly, 24 hours per day, 7 days per week. Tr. (June 23) at 222; Tr. (June 27) at 146; Tr. (June 28) at 153-54. The purpose of the agitation is to continue to disburse and dissolve the purge mixture. Tr. (June 24) at 81. GM added the recirculation at the Moraine plant because there was a problem with clogging in the system prior to installing the recirculation. Tr. (June 28) at 157. GM installed the recirculation system at Orion as a solution to problems with clogging inside the purge pots and piping. Tr. (June 28) at 157-58. Recirculation provides the necessary volume of purge mixture to push itself to the storage tank. Tr. (June 23) at 243-44; Tr. (June 24) at 75-76.

At the Moraine facility, there are two recirculation loops downstream of the four paint booths. Joint Stipulations ¶ 28. Each loop recirculates purge mixture in the lines downstream of the gun boxes from two paint booths through a purge pot and its pump. *Id.*

At the Orion facility, the purge mixture flows from the paint applicators through internal lines first to several small purge pots ("mini purge pots") located in the clear coat and prime coat paint booths, and which **[REDACTED]**. Tr. (June 27) at 126-27. The purge mixture at Orion is pumped from the mini purge pots to a larger purge pot, located outside of the paint booth. Tr (June 23) at 178-79, 214; Tr. (June 27) at 127-28. At Orion, there are two recirculation loops downstream of the paint booths. Joint Stipulations ¶ 29. The first loop recirculates purge mixture in the lines downstream of the mini purge pots and gun boxes through a purge pot and its pump. *Id.* As that loop and purge pot fill to a pre-determined level, a valve opens to release purge mixture to a second recirculation loop. *Id.* The second loop recirculates purge mixture in between the purge pots and the purge mixture tank through another purge pot and its pump located in the Paint Mix Room. *Id.* Once the volume of purge mixture reaches a predetermined level in these recirculation systems, a valve opens and the purge mixture flows into the purge mixture storage tanks. *Id.* ¶ 30.

Purge mixture inevitably results from cleaning the manifolds and associated applicators. Tr. (June 24) at 137; Tr. (June 28) at 296. If GM did not clean the manifolds and associated applicators, it would never purchase the purge solvent and there would be no purge mixture to manage. Tr. (June 23) at 186; Tr. (June 24) at 137-38; Tr. (June 27) at 166. The design of the purge system allows GM to keep the painting operations running continuously and without interruption. Tr. (June 24) at 30, 70-74. Historically, the purge mixture was not reclaimed. *Id.* The downstream pipes, equipment, and storage

tanks at the facilities would not be there but for the need to convey the purge mixture off-site. Tr. (June 23) at 186.

The purge solvent cleans the manifolds and associated (paint) applicators by performing the following solvent functions: (1) dissolving the polymers or resins in the paint and removing any residue that may be present in the equipment, Tr. (June 21) at 33-34; (2) dispersing paint pigments, *id.* at 45-46; (3) suspending the paint solids and keeping 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, *id.* at 46; and (4) diluting the paint, which is an "inherent part" of the cleaning process, *id.* at 47-48.

The solvent contained in the purge mixture continues to perform solvent functions downstream of the paint applicators. Tr. (June 21) at 42, 45-49; Tr. (June 20) at 280-81. The purge mixture: (1) continues to dissolve the polymers after it exits the applicators, Tr. (June 21) at 42-45; (2) continues to disperse paint pigments after it exits the applicators; *id.* at 46; (3) continues to carry the paint solids after it exits the applicators by keeping them in suspension, *id.* at 46-47; and (4) continues to dilute the paint after it exits the applicators, which is an inherent part of painting, *id.* at 48-49. The solvent in the purge mixture "still possesses some cleaning capacity" and "performs cleaning functions" downstream of the applicators. Tr. (June 21) at 56. The purge solvent is formulated to perform solvent functions in the manifolds and paint applicators, and downstream of the applicators. *See* Tr. (June 24) at 223-25, 229-31, 249-50, 255-56.

The solvent in the purge mixture is redissolving and resuspending the same contaminants it already contains. Tr. (June 20) at 279-81; Tr. (June 21) at 43, 48, 63-64, 129. The contaminants in dissolution or suspension in the lines to the purge pots, in the purge pots, and in the lines and recirculation loops to the storage tanks, are the very same materials that first exited the manifolds and associated applicators. Tr. (June 21) at 64; Tr. (June 24) at 134; Tr. (June 28) at 312, 314. When a "new" slug of purge mixture comes through the pipes and equipment downstream of the manifolds and associated applicators, the purge mixture will have "met" some of the existing residue in that portion of the pipe when they were together in the purge pot. Tr. (June 24) at 82. When "new" purge mixture is added to "old" purge mixture downstream of the manifolds and applicators, they mix with each other. *See* Tr. (June 27) at 146, 151. A portion of the purge mixture remains in the recirculation system forever. *See id.* The pipes that convey the purge mixture are never truly clean, because there will always be a residue left behind by the purge mixture. Tr. (June 20) at 65-66.

[REDACTED]

[REDACTED]

GM does not add any material to the purge mixture downstream of the manifolds and associated applicators, except at Orion, where it occasionally adds fresh purge solvent, which is added at the purge pots. CX 5 at ¶¶ 21-22; Tr. (June 20) at 147; Tr. (June 21) at 130; Tr. (June 24) at 132-34; Tr. (June 27) at 70-71. The solvent in the purge mixture is not reused to clean the manifolds and associated applicators at GM's facilities before it is sent off-site. CX 5 at ¶¶ 17-18; CX 11 at ¶ 12; Tr. (June 20) at 108-09, 278-79.

GM does not take the purge mixture out of the purge mixture conveyance system downstream of the paint booths and use it to clean any equipment on site. Tr. (June 20) at 109; Tr. (June 23) at 210; Tr. (June 28) at 297-98. GM does not ship the purge mixture off-site to be used to clean any equipment off-site. Tr. (June 23) at 223-24. GM's purge mixture is never used to clean drums, containers, tanks, tanker trailers or other transport vessels. CX 5 at ¶ 19; CX 11 at ¶ 13; Tr. (June 28) at 297-98. GM does not reclaim the purge mixture on-site. Tr. (June 23) at 57; Tr. (June 28) at 40-41, 304.

GM labeled its purge mixture storage tanks at each facility with the words "hazardous waste." Tr. (June 20) at 114. After the purge mixture gets to the purge mixture storage tanks at each of the three facilities, it is sent off-site to a Treatment, Storage, or Disposal ("TSD") facility. Joint Stipulations ¶ 32; CX 110; Tr. (June 29) at 11, 17-18. When GM has sent purge mixture off-site to a TSD facility, it has been manifesting the purge mixture as a RCRA hazardous waste **[REDACTED]**. Joint Stipulations ¶ 33; Tr. (June 28) at 25; Tr. (June 28) at 26, 242. The purge mixture is shipped off-site at different frequencies at each GM facility, ranging between seven (7) and ninety (90) days. Joint Stipulations ¶ 32. **[REDACTED]** Once a load of purge mixture arrives at the TSD facility, it is reclaimed or burned as waste fuel. CX 136 Revised.

Some of the solvent in the purge mixture generated at Pontiac and Moraine is remanufactured by third parties and returned to those facilities and used as purge solvent. Joint Stipulations ¶ 34; Tr. (June 24) at 186, 270, 286; Tr. (June 28) at 17, 25.

[REDACTED]

[REDACTED]

GM's business is to produce automobiles. Tr. (June 20) at 48); Tr. (June 23) at 12; Tr. (June 28) at 156. GM is not in the business of manufacturing purge solvent, Tr. (June 28) at 17, 290, manufacturing purge mixture, Tr. (June 28) at 25, 290, or reclaiming purge mixture, Tr. (June 28) at 304; Tr. (June 23) at 57-58.

If the purge mixture at GM's facilities meets the legal definition of "solid waste," the purge mixture would be "ignitable" within the meaning of 40 C.F.R. § 261.21(a)(1). Joint Stipulations ¶ 38.

III. DISCUSSION

This Tribunal recognizes, and the parties stipulate, that the State program provisions pertinent to this case that have been authorized by EPA are the applicable rules that operate in lieu of EPA's corresponding rules. *See* Joint Stipulations of the Parties Regarding Michigan and Ohio Rules (June 16, 2005) ("Regulatory Stipulations"). Moreover, the parties have provided extensive stipulations as to the Michigan and Ohio regulations that are identical, or materially identical, to the corresponding EPA regulations, and the parties refer to EPA's rules as shorthand to simplify and streamline matters. *Id.* Accordingly, this decision shall generally refer to the Federal regulations with the understanding that the State regulations are identical or materially identical to the corresponding EPA regulations. Where the State regulations are materially different, this decision will point out those differences and rely on the language of the State regulations.

A. ***Point of Generation at Which the Purge Solvent Becomes "Waste"***

1. Summary of the Parties' Arguments

The Complainant correctly observes that at each of the three automobile assembly plants at issue in this case, GM "uses purge solvent to purge (i.e., clean) paint from paint applicators and their associated manifolds." Complainant's Post-Hrg. Br. at 6. Complainant argues that the purge solvent becomes contaminated with the paint during this cleaning process, and states that the resulting mixture is called "purge mixture" by GM. *Id.* The Complainant contends that the purge mixture is a RCRA "solid waste" and a "hazardous waste" from the time it exits the manifolds and associated applicators, and it remains a "solid waste" and a "hazardous waste" as it flows through the gun box or when it flows from the valve of the applicator into the internal "dump lines"; that the purge mixture remains a RCRA "hazardous waste" during the entire time it is conveyed through a series of pipes, lines, valves, pumps, purge pots, and recirculation loops to storage tanks, and that this purge mixture remains a RCRA "hazardous waste" while it is stored in the purge mixture storage tanks. *Id.* at 6-7. Moreover, the Complainant contends that the purge mixture is a RCRA "hazardous waste" when it is taken off-site to a TSD facility, and it remains RCRA-regulated "hazardous waste" during the entire time prior to reclamation or disposal. *Id.* at 7.

The Complainant argues, "The purge mixture is a 'solid waste' since, due to contamination (i.e., the residual paint contaminates the purge solvent), the purge solvent can no longer serve the purpose for which it was intended – to clean the manifolds and associated applicators." *Id.* Furthermore, the Complainant argues that the purge mixture is no longer used by GM; rather it is captured and conveyed away from the manufacturing process via a waste handling system (i.e., a series of pipes, lines, valves, purge pots, recirculation loops, and pumps to the purge mixture tanks). *Id.* Moreover, the Complainant argues, "The waste system merely holds and conveys the already discarded purge mixture until such time as it is moved to the hazardous waste storage tanks (purge mixture storage tanks) located on site and ultimately removed from the facility for further processing (e.g., reclamation, disposal)." *Id.*

The Complainant submits that the purge mixture meets the regulatory definition of "solid waste" by arguing that those materials are "abandoned" and/or "spent" on the following grounds: Retaining some solvent properties does not negate the fact that the purge mixture is "spent" and a "solid waste," and that the reason the purge mixture flows properly through the purge mixture conveyance system is due to the energy provided by pumps, agitation, and recirculation and not the presence of purge solvent. The Complainant asserts that its position in this case is consistent with previous EPA interpretation. The Complainant further argues that the purge mixture is not part of any manufacturing process after it exits the manifolds and associated applicators through the gun box or flows from the valve of the applicator to the internal "dump lines." According to the Complainant, GM abandons much of its purge mixture, and the purge

mixture that is not abandoned is, nevertheless, a "spent" material destined for reclamation. Complainant points out that historically, GM has managed the purge mixture as a "hazardous waste."

GM contends that once the purge solvent performs its solvent functions in the paint applicators, the solvent continues to disperse and dilute and solubilize that paint downstream of the applicators. GM's Post-Hrg. Br. at vii. Moreover, GM argues that "this once-used purge solvent is not so contaminated with paint that it cannot clean the pipes and equipment downstream of the paint applicators." *Id.* Accordingly, GM argues that the solvent is not a waste but is a product continuing to perform its intended functions. *Id.*

GM contends that a product being used for its intended purpose is not a "spent material" and is therefore not a solid or hazardous waste subject to EPA's jurisdiction under RCRA. *Id.* at 2. Accordingly, GM argues that this entire case rests on one and only one issue: "Is the purge solvent a product that is still *being used* for its intended purposes downstream of the paint applicators? If it is, then it is a product, not a 'spent material,' and not a waste." *Id*. GM submits that it provided abundant evidence that its "once-used" purge solvent is still being used downstream of the applicators for the "purposes" for which it was produced. *Id.* at 3.

Furthermore, GM argues the following: Even though the regulatory definition of "spent material" is unambiguous in GM's favor, the available extrinsic evidence in the record proves that the Complainant is wrong. EPA's "Continued Use Program" provides additional evidence that GM's "contaminated" purge solvent is not "spent." The use of recirculation loops is further evidence that the purge solvent continues to be used for purposes for which it was produced downstream of the applicators. The inconsistent positions taken by EPA over the years regarding the regulatory status of purge mixture undermines the credibility of EPA's position here, and is further evidence that EPA's current regulatory interpretation is arbitrary and capricious. GM also argues that the "contaminated" purge solvent is not a solid or hazardous waste while in the purge mixture storage tanks. Furthermore, GM argues that even if the "contaminated" purge solvent were a hazardous waste, it would not be subject to regulation at GM's facilities because of RCRA exclusions: namely, the Totally-Enclosed Treatment Facility Exclusion and the Manufacturing Process Unit Exemption. GM also submits that Michigan agrees that the "contaminated" purge solvent is not a solid waste or hazardous waste upstream of the purge mixture storage tanks.

2. Tribunal's Discussion

As discussed below, I find that the purge solvent becomes a waste within the meaning of RCRA and its implementing regulations upon cleaning the manifolds and associated applicators, whereby the paint solids and resins mix with and contaminate the

purge solvent, thus forming the purge mixture.[12] The evidence is not overwhelming in Complainant's favor, but the standard of proof is a preponderance of the evidence. *See* 40 C.F.R. § 22.24(b).

I recognize that the focus of GM's argument is on the purge mixture when it is in the pipes downstream of the manifold and associated applicators. GM primarily contends that the purge mixture is not a waste because, through "continued use," its solvents clean and thereby reduce clogging of the pipes. Moreover, GM argues that the transfer of the purge mixture through the pipes to the purge mixture storage tanks is part of the same manufacturing process.

As jurisdiction is at stake, however, consideration must be given to the next logical extension of GM's theory. If the purge mixture is not a waste in the pipes and the storage tank, then when under GM's theory does the purge mixture become a waste? From the purge mixture storage tank, the purge mixture is put into tanker trucks that are driven to TSD facilities, where they are recycled, in that much of the solvent in the purge mixture is reclaimed while some of the material was burned or incinerated. However, GM does not concede that the purge mixture *ever* becomes a waste at *any* stage in this process. Instead, GM stresses that its intent is that one-hundred percent of the solvent should be reclaimed. Moreover, GM suggests that the purge mixture is a non-waste in the tanker trucks, while they are on the highway, as purge mixture retains the ability to suspend the paint solids and reduce their ability to stick to the walls of the tanker truck.

The crux of this matter concerns the point of generation when solvents used at the GM facilities become "solid wastes" and thereby are subject to regulation under RCRA. The alleged violations pertain to GM's failure to comply with RCRA regulations at its facilities. Accordingly, if the solvents were not "solid wastes" while they were at the facilities, this case should be dismissed. For the reasons stated herein, I conclude that solvents became "solid wastes" while at GM's facilities, and that the point of generation was immediately after the solvents left the manifolds and associated applicators, when the paint solids mixed with the solvents, thereby contaminating the solvents and rendering them "spent."[13]

As discussed *supra*, in RCRA Congress defines "solid waste" as "any garbage, refuse, sludge from a waste treatment plant, water supply treatment plant, or air pollution control facility and other discarded material, including solid, liquid, semisolid, or

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[12] However, as discussed in further detail, **[REDACTED]**

[13] As noted, however, at Orion the point of generation begins after the purge mixture exits the mini purge pots.

contained gaseous material . . . ." RCRA § 1003(27), 42 U.S.C. § 6903(27). Pursuant to the applicable regulations, "solid waste" is "any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31." 40 C.F.R. § 261.2(a)(1); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D). "Discarded material" is defined as including materials that are "Abandoned" or "Recycled," as further explained in the regulations.[14] 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

a. The Abandonment Argument

The applicable regulations define the term "Abandoned" as follows: "Materials are solid waste if they are *abandoned* by being: (1) Disposed of; or (2) Burned or incinerated; or (3) Accumulated, stored, or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned, or incinerated." 40 C.F.R. § 261.2(b); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

As a preliminary matter, I address GM's argument that the Complainant is precluded at this time from arguing that the material at issue is "abandoned." GM's Post-Hrg. Reply Br. at 5. GM contends that the Complainant is bound by the legal theory set forth in its Complaint, and GM submits that the Complaint contained one and only one basis upon which it argued that the purge solvent was a solid waste: that the purge solvent is a "spent material." *Id.* The Complainant, on the other hand, contends that the major issue presented in this case is whether the purge mixture is a "solid waste," and that a core term in the definition of solid waste is "discarded material," and that throughout these proceedings everyone involved in the litigation has understood that whether the purge mixture was "discarded" was central to the determination of whether it was a "solid waste." Complainant's Post-Hrg. Reply Br. at 26. The Complainant submits that the definition of solid waste includes the term "abandoned" within it, and that GM's reading of the pleadings is overly strict. *Id.* at 26-27. Finally, the Complainant points out that the Rules of Practice allow the Complainant to amend the Complaint upon motion granted by the presiding judge. *Id.* at 27. In response, GM moves to prohibit such amendment of the Complaint. *See* GM's Response in Opposition to EPA's Purported "Motions" to Amend Its Complaint and to Strike Reference to RX 206, and Accompanying Memorandum (Nov. 7, 2005).

I rule that the Complainant did not raise the abandonment argument in a sufficiently timely manner. Prior to the hearing, Complainant's argument has been that

[14] The other two categories of "discarded material" are "inherently-wastelike" and "military munitions." 40 C.F.R. § 261.2(a)(2); *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

the purge mixture was discarded because it was "spent" and "reclaimed," and the Complainant did not argue that the purge mixture was "abandoned." I note that the Complainant filed this case two and a half years ago and had ample opportunity to amend its Complaint prior to the hearing. The Complainant did not seek to amend its Complaint until the submission of its post-hearing briefs. Accordingly, on grounds of fairness and untimeliness, I deny Complainant's proposed amendment to the Complaint. Moreover, it is unnecessary to decide whether the purge mixture is "abandoned," because I am determining that the purge mixture is "discarded" because it is "recycled" as "spent" and "reclaimed" material.[15]

Thus, I now return to the question of whether the purge mixture meets the statutory and regulatory definitions of "solid waste." As discussed *supra*, under the regulatory definition of "discarded," the subcategory of "Recycled" refers to the following: "Materials are solid wastes if they are recycled – or accumulated, stored, or treated before recycling . . . ." as further specified in four categories: (1) "Used in a manner constituting disposal," (2) "Burning for energy recovery," (3) "Reclaimed," or (4) "Accumulated speculatively." Materials are "solid wastes" if they are both in one or more of the latter four categories and dependent on other requirements being met, such as whether the materials are "Spent materials."[16] 40 C.F.R. § 261.2 – Table 1; *accord* Mich. Admin. R. 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

b. "Spent Materials"

The parties cross swords on the issue of whether the used purge solvents are "spent materials," and if so, the point at which such materials become "spent." The regulations define "spent materials" 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); *accord* Mich. Admin. R. 299.9107; Ohio Admin. Code § 3745-51-01(c)(1).

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[15] **[REDACTED]**

[16] Not at issue in this matter are the other classifications besides "Spent materials," which are: listed sludges; characteristic sludges; listed by-products; characteristic by-products; listed commercial chemical products, and; scrap metal other than excluded. *See* 40 C.F.R. § 261.2 – Table 1; *accord* Mich. Admin. R. § 299.9202(1), (2); Ohio Admin. Code § 3745-51-02(A)-(D).

As discussed below, I agree – for the most part[17] – with Complainant's conclusion that the solvent is "spent" once it cleans the paint off the manifolds and associated applicators, when the paint mixes with the purge solvent to form the purge mixture. However, I reach that conclusion on somewhat different grounds.

i. "Original Purpose" and the Scope of the Continued Use Doctrine

With regards to the point of generation at which purge solvent becomes "spent," the Complainant argues that GM's purge mixture comes within the definition of a "spent material" and is "discarded" when it exits the manifolds and associated applicators through the gun box or when it flows from the valve into internal "dump lines." Complainant's Post-Hrg. Br. at 9. Complainant contends that the purge mixture is purge solvent and waste paint. Furthermore, Complainant states that the waste paint in the purge mixture is certainly no longer fit to be used as paint, and the purge solvent in the purge mixture is no longer useful for its "original purpose" of cleaning the applicators. *Id.* at 9-10 (citing Tr. (June 21) at 128-29). Complainant contends that GM uses virgin purge solvent to clean the manifolds and associated applicators and as a consequence of that intended activity the purge solvent is too contaminated to serve that purpose again, and asserts that GM does not use the purge mixture for any reason. *Id.* at 10.

The Complainant argues, "Since GM would have no need to buy the purge solvent in the first place if it did not need to clean the manifolds and associated applicators, the *original purpose* of the purge solvent is to clean that equipment." *Id.* The Complainant states that the purpose of the purging process is to clean the manifolds and associated applicators. *Id.* at 12 (citing Tr. (June 27) at 36; Tr. (June 28) at 296). The Complainant points out the undisputed fact that there would be no purge mixture downstream of the manifolds and associated applicators but for the need to clean paint out of the manifolds and associated applicators. *Id.* at 12 (citing Tr. (June 28) at 296); Complainant's Post-Hrg. Reply Br. at 14 (citing Tr. (June 24) at 137). Moreover, the Complainant points out that there would be no lines downstream of the manifolds and associated applicators to clog or unclog if GM did not need to clean its upstream painting equipment. Complainant's Post-Hrg. Br. at 12 (citing Tr. (June 27) at 166).

GM contends that a product being used for its intended purpose is not a "spent material" and is therefore not a waste subject to EPA's jurisdiction under RCRA. GM's Post-Hrg. Br. at 2 (citing Tr. (June 21) at 90, 97). Accordingly, GM frames the defining issue in this case as follows: "Is the Purge Solvent a product that is still *being used* for its intended purposes downstream of the paint applicators." *Id.* Moreover, GM contends

[17] **[REDACTED]**

that it "provided abundant evidence that its 'once-used' Purge Solvent is still being used downstream of the applicators for the purposes for which it was produced without processing." *Id.* at 3.

GM argues that under the definition of "spent material," a material may be produced to perform multiple purposes. *Id.* at 4 n.5; GM's Post-Hrg. Reply Br. at 11-12. GM points out that, as explained in the preamble to the 1985 definition of "spent materials," the EPA had proposed to define "a spent material" as "one that had been used and no longer could serve its original purpose," but that in the promulgated definition, the EPA decided to delete this reference to "original purpose." GM's Post-Hrg. Br. at 4 n.5. (referring to 50 Fed. Reg. 614, 624 (Jan. 4, 1985)); *see also* GM's Post-Hrg. Reply Br. at 11-12. GM asserts that the EPA deleted the word "original" from the proposed definition in order to make clear that a material can be used for multiple and different purposes and still not be "spent." *Id.*; *see also* GM's Post-Hrg. Reply Br. at 11-12. Further, with regards to "the purpose for which it was produced," GM quotes an EPA Guidance manual on the RCRA Regulation of Recycled Hazardous Wastes, as stating, "EPA interprets the 'purpose for which a material was produced' to include all uses of the product that are similar to the original use." GM's Post-Hrg. Br. at 4 n.5 (quoting RX 34, at 1-7 and citing RX 110 at 2).

With regards to the preamble, GM points out that the courts and this Tribunal have long looked to what an agency said it intended at the time a rule was promulgated as reliable extrinsic evidence of agency intent, and that this includes the regulation's preamble. *Id.* at 21-22. Furthermore, GM makes the unrebutted argument that because the State regulations' definition of "spent materials" is identical to the Federal definition, the preamble to the Federal definition is persuasive evidence of what the EPA intended the definition to cover. *Id.* at 21 n.19.

GM argues that under EPA's "continued use of solvents doctrine," continued-use solvents are not wastes. *Id.* at 23-28. Specifically, GM argues that pursuant to the continued use doctrine, GM's solvent in the purge mixture continues to be used "as is" after it exits the paint applicators and is therefore not spent and is therefore not a waste. *Id.* at 23. First, GM contends that EPA's preamble to the 1985 definition of "spent materials" 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." *Id.*

The preamble to the 1985 definition of "spent materials," 50 Fed. Reg. 614, 624 (Jan. 4, 1985), provides:

> 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 not [sic] 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. (This reworded definition appropriately parallels the definition of "used oil" – a type of spent material – in RCRA section 1004(36).)

With regards to continued use, GM further argues that EPA's approval, in 1998, of Safety Kleen's Continued Use Program provides additional evidence that GM's "contaminated" purge solvent is not "spent." GM's Post-Hrg. Br. at 25 (referring to RX 13).[18] To support its argument, GM quotes the following passage, *id.* at 25-26 (citing RX 13, at 1):

> The [EPA] 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 . . . .

GM states that Safety-Kleen supplies solvents to its customers for cleaning, and that 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 25 (citing Tr. (June 27) at 179, 180-81, 203-06. For this statement, GM relies on the testimony of Safety-Kleen's Vice President, Billy Ray Ross, Jr. *Id.*

[18] Letter from David Bussard, Waste Identification Division, Office of Solid Waste, EPA, to Catherine A. McCord, Manager, Environmental and Business Integration, Safety-Kleen (Aug. 21, 1998).

The Complainant contests GM's view of the continued use doctrine, and it points out that several of EPA's documents, some of which specifically concern automobile painting facilities, indicate that if a previously used solvent does not dissolve additional contaminants, it is a waste. Complainant's Post-Hrg. Br. at 29-36. The Complainant notes that the EPA has long had the practice of answering letters regarding regulations from the regulatory community, and that the EPA has made its responses available to the public through the RCRA Policy Compendium and then later, on RCRA On-Line. *Id.* at 30 (citing Tr. (June 29) at 142-45, 253).

The Complainant contends that its position is consistent with EPA's previous stance regarding the continued use of a solvents and on similar issues. *See* Complainant's Post-Hrg. Br. at 30-35. First, the Complainant purports that in an August 1994 letter to Ashland Chemical, the EPA agreed with Ashland that if its customers used high quality chemicals and then sold those chemicals to others to remove additional waste contaminants, those chemicals are not "spent" at the time that they are sold. *Id.* at 30 (citing CX 21). With regards to the 1998 Safety-Kleen determination, the Complainant states that Safety-Kleen received used solvent from its customers and used that solvent to clean other drums at its facility. *Id.* at 31 (citing RX 32 at 2-3). The Complainant argues that the logical assumption is that the drums at Safety-Kleen contain new constituents that the solvent is dissolving for the first time (citing Tr. (June 27) at 264), and that this is clearly a new and different use (citing Tr. (June 27) at 209). The Complainant reads EPA's Safety-Kleen letter as concluding that there was a valid, continued use of the solvent, in that the solvent was being used for a new purpose: dissolving other constituents and cleaning other equipment. Complainant's Post-Hrg. Br. at 31. Furthermore, it reads the Safety-Kleen letter as an extension of the preamble, which it sees as the EPA concluding that a solvent too contaminated to clean circuit boards might be capable of cleaning some other equipment and thus not be solid waste until after the second cleaning. *Id.*

The Complainant points to a June 2, 2000 letter from Sonya Sasserville, Acting Chief of the Permits Branch in EPA Headquarters' Office of Solid Waste, to EPA Region 5, which addressed the specific issue of continued use in automobile painting operations. *Id.* at 33 (citing CX 17). Ms. Sasserville recounted that the Automobile Alliance had raised these issues with her office and that she understood that the industry's argument was that the solvent was "being used to keep the mixture flowing." In her response, Ms. Sasserville stated, "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 the contaminants in suspension until they reach the hazardous waste storage tank, *and if the solvent does not dissolve additional constituents, it is a waste*." *Id.* (emphasis added).

The Complainant contends that the situation described in the Sasserville Letter, when the solvent does not dissolve additional contaminants, is exactly the situation in the

present case. *Id.* Instead, so argues the Complainant, GM does not use the purge mixture to remove additional constituents as the purge mixture is captured and circulated through the pipes, purge pots, and purge mixture storage tanks downstream of the manifolds and associated applicators (or valves immediately upstream of the internal "dump lines"), but rather it is the same constituents that are being kept in solution or in suspension. *Id.* at 34. The Complainant goes on to point out, *id.* at 34-35, that subsequent EPA letters express opinions on solvents used at automobile manufacturing facilities consistent with the Sasserville Letter, such as: the March 2001 letters written by Robert Springer, Division Director of EPA Region 5's Waste, Pesticides and Toxics Division, to Michigan (CX 18) and Ohio (CX 95); the May 7, 2002 letter from Steven Shimberg, Associate Assistant Administration for EPA Headquarters' Office of Enforcement and Compliance Assurance, to GM (CX 19).

Although bound by the statute and by regulations, this Tribunal is not bound to follow EPA policy. *See In re Chem Lab Products, Inc.*, FIFRA Appeal No. 02-01, 10 E.A.D. 711, 725 (EAB 2002) (discussing the application of EPA penalty policies). However, when the text of the regulation is ambiguous, I turn to extrinsic evidence, which includes the preamble to the regulation.[19] The regulations define "spent materials" 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); *accord* Mich. Admin. R. 299.9107; Ohio Admin. Code § 3745-51-01(c)(1).

With regards to GM's argument that spent materials can have multiple "purposes," to the contrary, the regulatory definition of "spent materials" uses the singular form of the word "purpose." *See In re Howmet Corp.*, Docket Nos. RCRA 02-2004-7102; RCRA 06-2003-0912, 2005 EPA ALJ LEXIS 21 (ALJ, Apr. 25, 2005) (discussing how significant it is that the plain language of the definition of "spent

[19] "The plain meaning of words is ordinarily the guide to the definition of a regulatory term. *Consumer's Recycling,* slip op. at 30, 11 E.A.D. ___ (citing *T.S. v. Bd. of Educ.,* 10 F.3d 87, 89 (2nd Cir. 1993)). If the term's language is clear and unambiguous, the Board generally follows the unambiguous intent expressed by the language. *See, e.g., id.,* slip op. at 30-31, 36, 11 E.A.D. ___. However, language is ambiguous if it is 'capable of being understood in two or more possible senses or ways.' *In re U.S. Army, Fort Wainwright Cent. Heating & Power Plant,* CAA Appeal No. 02-04, slip op. at 21 (EAB, June 5, 2003), 11 E.A.D. ___ (quoting *Chickasaw Nation v. United States,* 534 U.S. 84, 90 (2001))." *In re Rochester Public Utilities, Inc.,* PSD Appeal No. 03-03, 11 E.A.D. 593, 603 (EAB 2004), *appeal docketed,* No. 05-1113 (8th Cir., Jan. 12, 2005). Moreover, "Only in a Humpty Dumpty world would Congress be required to use superfluous words while an agency could ignore an expansive word that Congress did use. We decline to adopt such a world-view." *State of New York v. EPA,* 2006 WL 662746, at *4, ___ F.3d ___ (D.C. Cir., Mar. 17, 2006) (footnote omitted).

materials" refers to "the purpose" rather than "purposes"), *appeal docketed*, RCRA (3008) Appeal No. 05-04 (EAB). Additionally, I note that the singular form of the word "purpose" is preceded by the use of the article "the," further supporting the position that a material is deemed "spent" when it can no longer serve *"the purpose"* for which it was produced. Accordingly, the plain language of the regulation defining "spent materials," calls for there to be one "purpose" rather than multiple purposes.

Regarding Complainant's assertion that "the purpose for which it was produced" refers to the "original purpose," the text of the regulation provides no clear language indicating that it refers to the original purpose. Accordingly, I turn to extrinsic evidence, which includes the preamble to the regulation. GM correctly points out that 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, and that this includes the regulation's preamble. *See* GM's Post-Hrg. Br. at 21-22. As I stated in *In re Harpoon Partnership,* "It is appropriate to use the preamble of a final rule to determine the meaning of a regulation and the promulgating agency's intent."[20] Docket No. TSCA-05-2002-0004, 2004 EPA ALJ LEXIS 111, at *93 n.11 (ALJ, May 27, 2004), *aff'd*, TSCA Appeal No. 04-02, slip op. (EAB, May 19, 2005), 12 E.A.D. ___.

In 1982, the EPA had originally proposed to define "spent material" as follows: "A 'spent material' is any material that has been used and has served its original purpose." 48 Fed. Reg. 14,472, 14,508 (Apr. 4, 1983). Significantly, in its 1985 promulgation of the definition of "spent material," the EPA changed the language defining that term and, in the preamble to the 1985 rule, the EPA repudiated the original purpose requirement. In contrast to the proposed definition, the current definition – which was promulgated in 1985 – states that a spent material is "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing."

As discussed previously, the applicable State regulations at issue in the instant matter – although they operate in lieu of the Federal regulations – are identical, or

[20] In support of this general principle, "*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 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 (3[r]d 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)." *Harpoon Partnership,* 2004 EPA ALJ LEXIS 111, at *93 n.11.

materially identical, to the Federal regulations. Taking into account that the EPA expressly chose not to use "original purpose" in the definition of "spent materials," I decline to interpret "spent materials" as requiring that the continued use of a material be identical to its "original purpose." Significantly, the Complainant has not responded to GM's arguments regarding EPA's exclusion of "original purpose" from the definition, and has not provided any reasoning for requiring "original purpose" in spite of the preamble.

This Tribunal concludes that, for purposes of determining the point of generation at which material becomes spent, the more appropriate test is to look at a material's "predominant purpose." The D.C. Circuit employed the "predominant purpose" test in *American Petroleum Institute v. EPA*, 216 F.3d 50, 57-58 (D.C. Cir. 2000) ("*API II*"),[21] in deciding where to "draw a line for deciding when discard has occurred." In so doing, the D.C. Circuit recognized that the issue of whether the predominant purpose of an activity is discard requires an inquiry into facts and circumstances, and that where an industrial by-product may be characterized as either discarded or "in process" material, EPA's choice of characterization is entitled to deference by the courts.[22] *Id.* at 57 (citing *American Mining Congress v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) ("*AMC II*")).

The distinction between original and predominant purpose may have ramifications such as when in a production process, the predominant purpose is usage of the material in the latter stages of the production process as opposed to how it was first used. For instance, assume there are two phases to production at a factory: Phase 1 and Phase 2. The material is used in Phase 1 for a relatively insignificant purpose and will continue to be used in Phase 2 for a relatively significant purpose, although that second purpose is not identical to its original purpose during Phase 1. The material would not be "spent" until after it exits Phase 2. Application of the D.C. Circuit's "predominant purpose" test can be further fleshed out on a case by case basis.[23]

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[21] Although the D.C. Circuit panel in *API II* states that its opinion was filed *per curiam*, it specifies which of the judges authored each part of the panel's opinion.

[22] However, this Tribunal is not bound to adhere to jurisdictional determinations of an EPA enforcement office, such as the Complainant. *See In re Lyon County Landfill*, CAA Appeal No. 98-6, 8 E.A.D. 559, 566-68 (EAB 1999), *aff'd*, No. CIV.02-907(JNE/JGL), 2004 WL 1278523 (D. Minn., June 7, 2004), *aff'd*, 406 F.3d 981 (8th Cir. 2005). Rather, it is this Tribunal's responsibility to independently make that determination, *id.*, and the final adjudicative determination, which is made by the Environmental Appeals Board, is subject to deference by the courts.

[23] In the instant case, the "predominant purpose" happens to be the same as the "original (continued...)

As the continued use doctrine is not a regulation, but rather consists of EPA's interpretations of the scope of "spent materials," this Tribunal is not bound by this doctrine but rather is bound by the regulation's language defining "spent materials." Nevertheless, I discuss the scope of the continued use doctrine, and in a following section I discuss whether GM's solvents qualify under that doctrine.

In documents from at least as early as June 2000, with regards to automobile painting facilities, the EPA explicitly opined that used solvents, although they kept contaminants in suspension until reaching the purge mixture storage tank, were wastes because the solvents did not dissolve additional contaminants. For instance, in the June 2000 Sasserville Letter, EPA's Office of Solid Waste at EPA Headquarters discussed the point of generation for hazardous waste with regards to used solvents at automobile painting facilities.[24] CX 17. Ms. Sasserville responded to questions from EPA Region V regarding a Ford Motor Company automobile painting facility, and addressed questions from the Alliance for Automobile Manufacturers. The solvents were used to clean paint from the spray guns at the time of paint changes. *Id.* After exiting the spray guns, the solvent and paint were transported by pipe and pumps to a hazardous waste storage tank for ultimate transfer to an off-site facility. *Id.* The question raised was whether the piping and other ancillary equipment following the paint spray guns were carrying hazardous waste and were therefore subject to all RCRA subtitle C regulations, including subpart BB (air emissions standards for equipment leaks). *Id.* Ms. Sasserville recognized that in the painting operation, the solvent/paint mixture may first be sent to a purge pot which is used primarily for flow equalization, and that the mixture may be recirculated to keep the paint in suspension to aid in the discharge to the storage tank. *Id.* Later, it was piped, either by gravity or pump, to the hazardous waste storage tank. *Id.* The industry asserted that the solvent/paint mixture leaving the spray guns was not a hazardous waste because the solvent was being used to keep the mixture flowing. *Id.*

In her response, Ms. Sasserville, speaking on behalf of EPA Headquarters, opined the following: "After the solvent and paint mixture is used to clean the spray gun, it is a waste if at that point it is no longer part of the manufacturing process." *Id.* "The purpose of the solvent is to remove the waste paint, clean the spray gun, and allow the use of new colors." *Id.* "If the solvent serves thereafter only to keep contaminants in suspension

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[23](...continued)
purpose," and therefore usage of the predominant purpose test does not alter the outcome.

[24] The Sasserville Letter followed in the wake of EPA Headquarters' Cotsworth Letter, dated July 29, 1997, focusing on the manufacturing process unit exemption, which provides an exemption from the definition of "solid waste." *See* CX 16. Ms. Cotsworth opined that the manufacturing process unit exemption does not exempt used solvent at automobile painting facilities that is removed (i.e., piped) from the spray painting unit and that will no longer be used to clean spray paint guns once removed. *Id.*

until they reach the hazardous waste storage tank, *and if the solvent does not dissolve additional contaminants, it is a waste.*" *Id.* (emphasis added). Subsequent documents sent from officials at the EPA to Michigan and Ohio are consistent with and even quote the language in the Sasserville Letter, including that if the solvent that has mixed with the paint does not dissolve additional contaminants, it is a waste. CX 18 (Letter from Robert Springer, EPA Region V, to Michigan (Mar. 28, 2001)); CX 95 (Letter from Robert Springer, EPA Region V, to Ohio (Mar. 28, 2001)).

Notwithstanding the determinations, such as the Sasserville Letter, made regarding solvents further used as automobile painting facilities, GM places much reliance on EPA's 1998 Safety-Kleen determination, which concerns using solvents to clean barrels. The Complainant, however, agrees that usage of the purge mixture would qualify as "continued use" and would not be a "solid waste" if GM were to use the purge mixture to clean contaminants other than purge mixture, such as cleaning out barrels or containers or equipment elsewhere at the facility. Complainant's Post-Hrg. Br. at 17.

Alternatively, I recognize that EPA's continued use doctrine also requires "legitimate" use. In the Safety-Kleen determination, the EPA addressed the issue of continued use of a solvent when it responded to Safety-Kleen's inquiry regarding the secondary use of solvent to clean drums at its facilities. RX 13. In the latter situation, Safety-Kleen received used solvent from its customers and continued to use that solvent to clean other drums at its facility. *Id.* The EPA, in its letter to Safety-Kleen, stated its awareness of the potential for the continued use policy to be abused, and noted that the continued use must be "legitimate" in order for the used solvents to be excluded from regulation as a solid waste. Significantly, the EPA set three conditions for qualifying as "legitimate" continued use, RX 13 at 2 (emphasis added):

> The [EPA] would consider the continued use of the used solvents for drum washing to be legitimate in situations in which: 1) the used solvents are *effective* for the drum-washing operation, especially if the used solvents substitute for solvents that would otherwise have to be purchased (if the used solvents in lieu of other effective drum-washing agents would not be considered legitimate), 2) the used solvents are used only for washing *drums that actually need it* (if the used solvents are used as drum-washing agent when the drums do not need washing, using the used solvents would not be considered legitimate), and 3) the used solvents are not used *in excess of* what would normally be required to wash drums (if the used solvents are being used in excess of the amount of solvents needed for the drum-washing operation, e.g., more than would be necessary to wash the drums effectively, using the used solvents would not be considered *legitimate*).

ii. Tribunal's Determination That the Solvents in the Purge Mixture Are "Spent"

The definition of "contaminate" includes "to soil, stain, corrupt, or infect by contact or association," "to make inferior or impure by mixture," or "to make unfit for use by the introduction of unwholesome or undesirable elements." Webster's Third New International Dictionary (Unabridged) 491 (2002). The question of contamination of a solvent was recently examined by an Administrative Law Judge ("ALJ") in *Brenntag Great Lakes, LLP*, Docket No. RCRA-5-2001-001 (ALJ, June 2, 2004). At issue was the solvent known as anhydrous IPA, which contains only trace amounts of water and is relatively more valuable than acqueous IPA, which contains relatively large amounts of water. A company used anhydrous IPA for the purpose of removing water from glass fibers in an adhesive mixture, and such removal resulted in turning the anhydrous IPA into acqueous IPA. Consequently, the anhydrous IPA was no longer effective for the purpose of removing water from the fibers. Accordingly, the ALJ found that once the anhydrous IPA became aqueous, it could no longer serve the purpose for which it was produced: namely, to extract the water from the glass fibers. In another example, an ALJ found that sulfuric acid that had been used in an alkylation process in the refining of gasoline became "contaminated" when that acid was diluted to below the strength or purity at which it was useful for the purpose of alkylation. *In re Royster Co.*, Docket No. RCRA-III-195 (ALJ, Dec. 17, 1993).

The Complainant points out that the purge mixture is a combination of purge solvent and waste paint. Complainant's Post-Hrg. Br. at 9. There is no dispute that after the purge solvent cleans the manifolds and associated applicators, and mixes with the paint and resins, that the paint solids in the purge mixture are not used to paint anything else at GM's facilities or anywhere else. Nor is there any assertion that the purge mixture is fit for use as a paint. Furthermore, there is no dispute that the purge mixture, in contrast to the purge solvent, is not and cannot be used to clean the manifolds and associated applicators. *Id.* at 10 (citing Tr. (June 20) at 278-79; Tr. (June 21) at 128). The solids in the paint contaminates the purge solvent. Only the purge solvent is pure enough for the purpose of cleaning the used paint off the manifolds and associated applicators. Complainant's Post-Hrg. Br. at 10. Due to mixture of the paint solids with the purge solvent, the solvents are rendered so inferior and impure that they cannot perform the function of cleaning the manifolds and associated applicators.

Mr. Barrett Benson, who works for EPA's National Enforcement Investigation Center and is an expert in the fields of engineering, hazardous waste determination, and hazardous waste management, persuasively testified that materials do not have to be "all used up" in order to be considered discarded. *See* Complainant's Post-Hrg. Br. at 18. Mr. Benson testified that if a material can no longer be used for the purpose for which it is produced, even if the material is "not depleted, it is spent for the purpose of what is was produced. So it can be spent even though it still has solvent properties." Tr. (June 21) at 134. In other words, a material does not have to be "all used up" in order to be

considered "spent" under RCRA. *Id.* Moreover, GM's expert witness Marcia Williams agrees that spent solvents may retain their properties after they are "spent" for purposes of RCRA. *See* Complainant's Post-Hrg. Reply Br. at 29 (citing Tr. (June 29) at 260).

The Complainant sagely warns that accepting GM's argument would allow facilities to add solvent to waste lines, which may modestly help keep the waste lines flowing after use, but could exempt such waste management systems from RCRA jurisdiction. Complainant's Post-Hrg. Br. at 18. In other words, GM's theory would open up a loophole large enough to exempt the waste in waste management systems throughout the country, thus circumventing RCRA's goal of regulating waste. I foresee that to classify the purge mixture as a non-waste would open a large loophole, in which used and contaminated materials escape regulation as "waste" materials merely because they retain some limited beneficial properties.[25] As technology develops to create more self-cleaning wastes, we could quickly be awash in a "rising tide" of contaminated materials that are predominantly waste materials masquerading as non-waste materials, due to limited beneficial properties.[26] This cannot be what Congress intended.

Regarding the predominant purpose, there is no dispute 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. Tr. (June 28) at 296. If GM did not need to clean the manifolds and associated applicators, it would never purchase the purge solvent in the first place and there would be no waste downstream of the equipment to manage. Tr. (June 24) at 137. Moreover, there would be no lines downstream of the

[25] The Complainant warns that GM's argument – that the purge mixture is not "spent" – if taken to its logical extreme, would eviscerate many, if not all, of the statutorily mandated safeguards applicable to many RCRA hazardous wastes. Complainant's Post-Hrg. Br. at 20. The Complainant submits that GM's argument could logically extend to wastewater, since water is a solvent for some materials, and the water in any wastewater system frequently keeps the materials moving within sewerage pipes and helps prevent the conveyance system from becoming clogged. *Id.* For instance, the Complainant aptly draws an analogy between the purge mixture and the situation in which a plant operator cleans a spill on a floor with clean water from a hose and lets the water carry the contaminants down a drain and into a storage or treatment tank. *Id.* The warning is that the entire mixture of the water and the contaminants would not be a waste under GM's theory, being that the water functions as a solvent to keep the contaminants in suspension or solution and to carry the contaminants away.

[26] In enacting RCRA, Congress expressed concern over the "rising tide of scrap, discarded, and waste materials." RCRA § 1002(a)(2), 42 U.S.C. § 6901(a)(2) (cited in *AMC I,* 824 F.2d 1177, 1179, 1185 (D.C. Cir. 1987)).

manifolds and associated applicators to clog or unclog if GM did not need to clean its upstream painting equipment. Tr. (June 24) at 138; Tr. (June 27) at 166; Tr. (June 23) at 186).

GM produced several witnesses who credibly testified that the purge mixture continues to perform solvent functions downstream of the paint applicators. Nonetheless, the residual cleaning function of the solvents in the downstream piping, after being contaminated with the paint solids, is secondary to the cleaning of the manifolds of associated applicators. The contaminated solvents in the purge mixture are not suitable for cleaning the manifolds and associated applicators. In fact, the solvents contaminated with the paint solids are not suitable to clean the manifolds and associated applicators until they are reclaimed and reconstituted, and some of the solvent in the purge mixture is never reclaimed. The value of the purge solvent is significantly higher than that of the purge mixture.

Furthermore, I agree with the Complainant that what accomplishes the movement of the purge mixture through the purge mixture conveyance system is not its solvent properties, but rather the energy generated by agitation and pumping (and also by recirculation at two of the facilities), as well as the volume of the purge mixture itself. *See* Complainant's Post-Hrg. Br. at 22 (citing CX 23 at ¶¶21-23, 27). For instance, at Orion GM uses small, half-inch diameter tubers through which to pump the purge mixture from the mini purge pots to the larger 30-gallon purge pot, and one of GM's witnesses testified that this small diameter tubing was selected in order to ensure that the "the evacuation process would be violent" and the turbulence "would help clean the lines out as that material was flowing through it." Tr. (June 27) at 64-65. Once the purge mixture arrives at the purge pots outside of the paint booths, it is agitated constantly within those purge pots to keep the paint solids in suspension. Tr. (June 24) at 57, 75; Tr. (June 27) at 56-57, 141. The purge pots (and pumps) then pump the purge mixture through the remainder of the conveyance system to the purge mixture storage tank. Tr. (June 23) at 212. Furthermore, GM adds pressure in the purge mixture conveyance system to assist with the cleaning of the pipes, Tr. (June 24) at 129, and at Pontiac additional pressure is provided by a boost pump, Tr. (June 28) at 304, 311.

[REDACTED]

At Orion and Moraine, their recirculation loops are operated under pressure, Tr. (June 27) at 60; Tr. (June 28) at 302-03, and GM recirculates the purge mixture in the recirculation systems constantly, 24 hours per day, 7 days per week. Tr. (June 23) at 222; Tr. (June 27) at 18, 146; Tr. (June 28) at 153-54. GM installed this downstream recirculation as a solution to problems with clogging inside the purge pots and piping encountered during the mid-1990s. Tr. (June 27) at 43-44, 49, 157-58. Moreover, Thomas Chaput, who is GM's Senior Engineer at Orion, testified that if the purge mixture was not recirculating, GM would "definitely have the same problem, I believe of plugging and the heavy pigments running back down the line, if we didn't continually

keep it moving." Tr. (June 27) at 176. With regards to Moraine, GM's witness Irvin Blair testified that downstream of the paint booths the purge mixture is "a homogenous mixture as well because it's being agitated and circulated continuously, and opportunities for it to have some settling is a lot less, because you are, you know, you're providing that agitation." Tr. (June 23) at 240; *see also* Tr. (June 24) at 129; Tr. (June 24) at 130. Furthermore, according to GM's witness John Wozniak, there is agitation in the purge pots at Pontiac, and in the recirculation loops and Orion and Moraine, Tr. (June 24) at 130, and the purpose of the agitation is to continue to disburse and dissolve the purge mixture, Tr. (June 24) at 81; *see also* Tr. (June 23) at 236. Moreover, GM's witness Margaret Winkler (a senior environmental engineer for GM) testified that, at GM's Moraine plant, GM added recirculation at the plant because there was a problem with clogging in the old system, and that recirculation reduces the likelihood of clogging. Tr. (June 28) at 157-58. Significantly, GM's solution to unclog the downstream piping at Orion was not to add additional purge mixture but rather to add an engineering solution: a recirculation loop, which would provide constant motion to prevent the purge mixture from settling out.[27] *See* Tr. (June 27) at 49; Tr. (June 27) at 57.

In addition to agitation and pressure (and recirculation), the movement of the purge mixture through the downstream pipes is also facilitated by the volume of the purge mixture. The Pontiac facility, in contrast to Moraine and Orion, generates a high enough volume of purge mixture so that it can travel through the pipes by gravity and pumping without being recirculated. It is the additional volume of the purge mixture at Pontiac that helps keep the downstream pipes wet, thus avoiding the drying of those pipes and settling of solids. *See* Tr. (June 23) at 243-44.

Accordingly, I agree with the Complainant that it is not the solvent properties of the purge mixture, but rather agitation, pressure, volume (and recirculation), that allows the purge mixture to be conveyed from the purge pots outside the paint booths to the purge mixture storage tanks. *See* Complainant's Post-Hrg. Br. at 25-26 (citing Tr. (June 20) at 281; Tr. (June 21) at 66-67; Tr. (June 21) at 142-43). In light of GM's usage of a complex system of agitation, pumping, pressure, and in some cases recirculation, I further agree with Complainant's contention that the remaining solvent properties in the purge mixture are insufficient to ensure that the purge mixture flows downstream without interruption. Moreover, GM treats the purge mixture as somewhat of a nuisance, in that the purge mixture clogs the downstream piping. At Orion, GM adds fresh purge solvent to the purge mixture downstream of the manifolds and associated applicators. CX 5 at ¶¶ 21-22; Tr. (June 20) at 147; Tr. (June 21) at 130; Tr. (June 24) at 132-34; Tr. (June 27) at 70-71. Although the purge mixture retains solvent functions, the solvent in the purge mixture is not used to clean anything besides other purge mixture. The purge mixture cleans itself, helping to prevent clogs, but its cleaning effectiveness is greatly diminished,

[27] At Orion, GM adds virgin purge solvent to the purge pots and conducts periodic manual purges. Tr. (June 27) at 70.

and has to be supplemented by agitation (and at two facilities is supplemented by recirculation loops downstream of the manifolds and associated paint applicators). I recognize that employing agitation and pressure may bolster the effectiveness of solvents, but the significant point in the present matter is the fact that the solvent in the purge mixture is too contaminated to clean the manifolds and associated applicators.

I hold that the predominant purpose of the solvents is to clean the manifolds and associated applicators. Secondary to this purpose, by far, is the limited cleaning power of the contaminated solvents present in the purge mixture.

iii. **[REDACTED]**

One slight variation as to the point of generation of waste is that, based on the record before me, the purge mixture containing **[REDACTED]**

[REDACTED] finish or coating on some of its vehicles. GM's Post-Hrg. Br. at 42. The **[REDACTED]** is used at the Orion facility, **[REDACTED]** at the Pontiac and Moraine facilities. Tr. (June 24) at 216-220; Tr. (June 27) at 14-15; Tr. (June 28) at 91-92. **[REDACTED]** are specifically designed **[REDACTED]** to form a **[REDACTED]** to protect the paint job from scratches, bird droppings, and acid rain. Tr. (June 24) at 217-18. GM uses **[REDACTED]** at the Orion plant, and **[REDACTED]** is added to the purge solvent used at Orion to prevent the purge mixture containing this **[REDACTED]** Tr. (June 24) at 240-42. **[REDACTED]**

In contrast, regarding **[REDACTED]** utilized at the Pontiac and Moraine facilities, there is no ingredient in the purge solvents that prevents hardening of paints that contain **[REDACTED].** Tr. (June 24) at 248-49. Instead, **[REDACTED].** *Id.*

In support of its argument that its solvent continues to perform intended solvent purposes downstream of the manifolds and associated applicators, GM points out that its purge solvent contains **[REDACTED]** from bonding together and thereby clogging the downstream pipes and equipment. GM's Post-Hrg. Br. at 44. **[REDACTED]** who formulates the purge solvent for GM, specially designs the purge solvent **[REDACTED]**

[REDACTED] so it will not form chunks downstream of the applicators and clog the lines and equipment. Tr. (June 24) at 238-40.[28]

The Complainant put on reliable testimony from its expert witness, Dr. Kendall, who works for EPA's National Enforcement Investigation Center, and is an expert in the fields of chemistry and hazardous waste analysis. Dr. Kendall persuasively testified that the **[REDACTED]** happens "fairly quickly," and is irreversible. Tr. (June 30) at 74. Moreover, Dr. Kendall persuasively explained that **[REDACTED],** and thereby prevent them from polymerizing, which would form a large, clogging mass. *Id.* at 75-77. Dr. Kendall provided a persuasive estimate that **[REDACTED]** is completed no later than the point when the purge mixture is inside the mini purge pots located inside the paint booths. *Id.* at 74-76.

Significantly, GM did not provide a rebuttal witness to Dr. Kendall's persuasive testimony on the point at which **[REDACTED]** is complete. For a direct witness, GM did call Jonathan Warren, who is a senior development chemist at **[REDACTED]**, and who formulates cleaners, purge solvents, and coatings. Tr. (June 24) at 167-68. Mr. Warren was admitted as an expert witness in the area of chemistry, with regards to the design, formulation, and use of purge solvents in vehicle painting operations. Mr. Warren testified that **[REDACTED]** occurs "downstream" of the applicators. Tr. (June 24) at 246-248. However, unlike Dr. Kendall, he did *not* pinpoint exactly where downstream **[REDACTED]** is complete. Accordingly, I find that **[REDACTED]** at Orion, is essentially complete in the mini purge pots inside the paint booths.

Before me, with regards to the purge mixture that is undergoing **[REDACTED]** at Orion, the Complainant has not proven by a preponderance of the evidence that it is contaminated to such an extent that it is more of a waste than a non-waste upon exiting the paint applicators. Specifically, there is insufficient proof that the purge mixture at Orion, upon exiting the applicators, versus upon exiting the mini purge pots, is contaminated to such an extent that it is "spent."

Rather, the **[REDACTED]** purge mixture during the **[REDACTED]** appears to be highly effective in cleaning up to the point of the mini purge pots. In contrast, the purge mixture that **[REDACTED]** is contaminated to such an extent that it is primarily a nuisance. Moreover, **[REDACTED]**

[28] With regards to **[REDACTED]**, the purge solvent performs necessary solvent functions downstream of the applicators even without **[REDACTED]**. GM's Post-Hrg. Reply Br. at 30.

[REDACTED] formulation to prevent clogging is credible. If **[REDACTED]** were not essentially complete at the mini purge pot juncture, the mini purge pots and/or purge pot equipment could not perform effectively.

iv. GM's Solvent in the Purge Mixture Does Not Qualify As a Non-Waste Under EPA's Continued Use Doctrine

With regards to continued use of solvents, GM places a great deal of reliance on the 1998 Safety-Kleen determination and the preamble. Far more on point are determinations such as those in the Sasserville Letter, that directly addressed used solvents at automobile painting facilities, rather than solvents that are further used to clean drums. Under the Sasserville Letter (written in June 2000) and its progeny, used solvents at automobile painting facilities were considered "wastes" even though they kept contaminants in suspension on the way to the purge mixture storage tanks.[29]

Nevertheless, with regards to the preamble to the definition of "spent materials," I find that EPA's policy requiring that used solvents pick up additional contaminants is not in conflict. *See* 50 Fed. Reg. at 624. In fact, the solvents described in the preamble as being in continued use appear to pick up additional contaminants. Notably, the solvents described in the preamble were first used to clean circuit boards and then, not being pure enough to clean circuit boards, were later used to as metal degreasers, 50 Fed. Reg. at 624 (emphasis added):

> 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 not [sic] 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. (This reworded definition appropriately parallels the definition of "used oil" – a type of spent material – in RCRA section 1004(36).)

[29] EPA's inspections that form the basis of the Complaint began on March 2001.

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.

Regarding the 1998 Safety-Kleen determination, GM's situation is quite different. GM is not picking up additional contaminants, but is using the solvent in the purge mixture to clean other purge mixture. The purge mixture is not used to pick up other contaminants but rather is used to re-dissolve and re-suspend itself. *See* Tr. (June 21) at 129 (cited in Complainant's Post-Hrg. Br. at 13. In other words, as EPA's expert witness Mr. Benson persuasively testified, the purge mixture "is seeing itself." *Id.*; *see also* Tr. (June 21) at 64; Tr. (June 24) at 134-35; Tr. (June 28) at 312, 314. Moreover, GM's witness, Mr. Wozniak, testified that when a "new" slug of purge mixture comes through the purge mixture conveyance system, it will have "met" some of the existing residue in that portion of the pipe when they were together in the purge pot. Tr. (June 24) at 82. Furthermore, the pipes always retain a residue left behind by the purge mixture. Tr. (June 20) at 65-66. 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. The continued uses previously approved by the EPA did not provide such a broad exemption.

The Complainant agrees that usage of the purge mixture would qualify as "continued use" and would not be a "solid waste" if GM were to use the purge mixture to clean contaminants other than purge mixture, such as cleaning out barrels or containers or equipment elsewhere at the facility. Complainant's Post-Hrg. Br. at 17. Although GM's witness, Mr. Ross, testified that Safety-Kleen utilizes used solvents "as is" from some of its customers to clean barrels, he did not specifically say that Safety-Kleen uses *GM's* purge mixture "as is" to clean barrels. In fact, GM does not use the purge mixture to clean barrels on-site and GM sends the purge mixture off-site for reclamation, and much of it is reclaimed.[30] Tr. (June 23) at 60; Tr. (June 24) at 266-67.

Furthermore, I note that, as discussed *supra*, the solvent in the purge mixture (other than **[REDACTED]**) is not "effective" in cleaning the downstream pipes and equipment at GM's facilities. Rather, the solvent in the purge mixture, which is contaminated by paint solids, is itself a nuisance and therefore a waste. Accordingly, the purge mixture at GM's facilities fails the first requirement for "legitimate" continued use under the 1998 Safety-Kleen determination: that the used solvent is "effective." *See* RX 13.

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[30] Although the purge mixture *might* in the future be used to clean contaminants other than purge mixture, the reality is that it is not used to do so. *Cf. AMC II*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (rejecting the argument that sludges from wastewater that are stored in surface impoundments and that *may* at some time in the future be reclaimed are not "discarded.").

Finally, I address Complainant's argument that the definition of "ancillary equipment" would be essentially nullified if the purge mixture is deemed in "continued use" while resolubilizing and resuspending itself while on its ways to the purge mixture storage tanks. *See* EPA's Post-Hrg. Br. at 21. The Complainant points out that "ancillary equipment" is defined as "any device including . . . piping, fittings, flanges, valves and pumps, that is used to distribute, meter or control the flow of hazardous waste from its point of generation to a storage or treatment tank . . . or to a point of shipment for disposal of-site." *Id.* (citing Mich. Admin. R. 299.9101(r); Ohio Admin. Code § 3745-50-10(A)(5)); *accord* 40 C.F.R. § 260.10. The Complainant further points out that this definition recognizes that there will be equipment at facilities that transport hazardous waste from its point of generation to a storage tank to await off-site disposal. Complainant's Post-Hrg. Br. at 21 (citing Tr. (June 29) at 259). Furthermore, the Complainant points out that any time an industry is transporting a spent material to a storage tank (even when that spent material will be reclaimed), the equipment used to convey the material is ancillary equipment. *Id.* The Complainant contends that the equipment mentioned in the regulatory definition of ancillary equipment is exactly the sort of equipment GM uses to convey the purge mixture to the storage tanks. *Id.* Moreover, the Complainant states that RCRA's rules ensure that the piping that conveys the hazardous waste to the storage tank will be regulated just as is the tank itself. *Id.* According to the Complainant, GM's argument of continued use of solvent due to re-suspension while traveling to the storage tank would eviscerate the need to define ancillary equipment at all. *Id.*

GM retorts that the Complainant is "bootstrapping" an ancillary equipment argument as a "scare tactic" that adds nothing to the analysis. GM's Post-Hrg. Reply Br. at 38-39. In support, GM argues that under its plain language definition, "ancillary equipment" refers to equipment that it used to control "the flow of hazardous waste *from its point of generation*," and points out that EPA's expert witness, Mr. Benson agrees.[31] GM's Post-Hrg. Reply Br. at 38 (citing Tr. (June 21) at 277).

I agree with GM that Complainant's argument on ancillary equipment simply begs the fundamental question of whether the purge solvent is a solid waste when it exits the applicators. *See id.* at 39. The definition means what it says when it clearly states that "ancillary equipment" is "any device including . . . that is used to distribute, meter or control the flow of hazardous waste *from its point of generation* to a storage or treatment tank . . . or to a point of shipment for disposal of-site." 40 C.F.R. § 260.10 (emphasis added). Accordingly, the devices at GM's facilities are only "ancillary equipment," for purposes of RCRA, beginning at the point at which hazardous waste is generated. In

[31] I recognize that Mr. Benson was not admitted as a legal expert, and I do not rely upon him as such an expert but rather I interpret the regulation independently.

other words, the ancillary equipment begins at the point at which the purge solvent is "spent."

v. Retaining Title to the Purge Mixture

The fact that GM retains title over the purge mixture until it is reclaimed or burned at the off-site TSD facility does not defeat classification as "waste." Admittedly, retention of title to material is relevant determining whether the material has been discarded. However, retention of title alone cannot be the only factor in determining whether a material is waste. Otherwise, RCRA jurisdiction could be circumvented simply by retaining titled to used and contaminated materials. Most of the purge mixture is destined to be reclaimed (or burned). Pursuant to the applicable regulations, spent materials that are either reclaimed or burned are classified as waste.

As applied to the facts in the present matter, the RCRA regulations are not invalid. Although GM retains title to the purge mixture, such material was not sold to other facilities and was not used to clean equipment at other facilities. Nor is the purge mixture sold or used to clean contaminants other than the contaminants in the purge mixture.

Finally, I note that GM labeled its purge mixture tanks with the words "hazardous waste," GM sends the purge mixture to a RCRA regulated Treatment, Storage, and Disposal ("TSD") facility, and GM manifests those shipments as hazardous waste. Admittedly, GM's identification of the purge mixture as hazardous waste does not, by itself, prove that it is hazardous waste.[32] However, such identification does provide some indicia of GM's underlying belief that the purge mixture is in fact hazardous waste.

vi. Conclusion

Contrary to GM's assertions, the purge mixture is not a product while residing at GM's facilities. *See* GM's Post-Hrg. Br. at 2-3; GM's Post-Hrg. Reply Br. at 1-2, 45. GM characterizes Complainant's position as overly simplistic. GM's Post-Hrg. Reply Br. at 52. I think that yes, one needs to step back and look at this process and operation overall, seeing the forest through the trees. The contaminated purge mixture is not a product, it is a waste.

GM posits that not only is the downstream piping and equipment not carrying waste to the purge mixture storage tanks, but that the tanks themselves are not storing hazardous waste and that the truck tankers carrying the purge mixture to the reclaimer are

[32] Similarly, the parties' reference to certain lines as "dump lines" is not determinative of whether those lines contain waste.

not transporting hazardous waste. GM's Post-Hrg. Br. at 65-67, 92; GM's Post-Hrg. Reply Br. at 3, 57-58; Tr. (June 24) at 291-92. Indeed, such position is the logical extension of GM's argument that the purge mixture is a "continued use" of the purge solvent. I find this to be the gravamen against GM's argument.[33] Clearly, the contaminated purge mixture being transported in the tanker truck to the reclaimer is waste, as is the purge mixture in the purge mixture storage tanks at GM's facilities. The purge mixture is a spent material that is being sent for reclamation, and therefore meets the regulatory definition of waste. The secondary solvent functions performed by the purge mixture in the downstream piping and equipment is the same as that performed in the tanker trucks and storage tanks. As discussed above, the purge solvent's retention of some of its solvent functions in the purge mixture as it travels downstream does not render it to be a legitimate and effective "continued use" of the solvent. GM's intent to possibly reuse the reclaimed solvent as "reconstituted purge solvent" does not alter the facts of what occurred in this matter at the time of the EPA inspections.[34]

B. ***Exemptions, Raised by GM, from the Definition of "Solid Waste"***

GM contends that, even if assuming *arguendo* that the purge mixture is "spent" material, exemptions from the definition of "solid waste" apply and therefore GM would not have to comply with RCRA. I note that, as a general proposition, exemptions from regulations are to be narrowly construed. *In re Consumers Scrap Recycling, Inc.*, CAA Appeal No. 02-06; CWA Appeal No. 02-06; RCRA (3008) Appeal No. 02-03; MM Appeal No. 02-01, 11 E.A.D. 269, 294 (EAB 2004) (citing *Comm'r v. Clark*, 489 U.S. 729, 739 (1989) (statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule)).

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[33] I note that even GM's expert witness Marcia Williams would not necessarily classify the purge mixture in the purge mixture storage tanks as a non-waste, and that the State of Michigan does not classify the purge mixture in the purge mixture storage tanks as a non-waste.

[34] This matter represents the tension between RCRA's mission of providing "cradle to grave" management of hazardous waste and EPA's desire to encourage and promote the reuse, recycling, or reclamation of used materials, such as solvents, through its continued use program. While the reuse, recycling, or reclamation of discarded hazardous materials is to be encouraged and promoted, such cannot be used as a reason to remove these materials from RCRA jurisdiction. Otherwise, the clear intent of Congress in enacting the *Resource Conservation and Recovery* Act is thwarted. *Accord Shell Oil Co. v. EPA*, 950 F.2d 741, 755-56 (D.C. Cir. 1992) (per curiam) (broad EPA authority to regulate the recovery of resources from wastes).

The exemptions GM raises are for: (1) the manufacturing process unit exemption, 40 C.F.R. § 261.4(c); *accord* Mich. Admin. R. 299.9204(3)(a); Ohio Admin. Code § 3745-51-04(c); and (2) the totally enclosed treatment facility ("TETF") exemption, 40 C.F.R. § 265.1(c)(9); *accord* Mich. Admin. R. 299.9601(6), 299.9503(1)(d).

1. Manufacturing Process Unit Exception

The manufacturing process unit exemption, 40 C.F.R. § 261.4 (*accord* Mich. Admin. R. 299.9204(3)(a); Ohio Admin. Code § 3745-51-04(c)), provides:

> Hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under Parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of Section 3010 of RCRA until it exists the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

An issue arises as to what is the "manufacturing process unit" – whether the unit ends at the manifolds and associated applicators, or is the unit more broadly defined to encompass the pipes and equipment downstream of the manifolds and associated applicators, including the purge mixture storage tank?

It is undisputed that painting automobiles is an integral part of the manufacturing process. Complainant's Post-Hrg. Br. at 37. Unrebutted testimony by GM's witnesses establishes that a clogging of the downstream purge mixture piping or equipment can totally disrupt the manufacturing process.[35] Specifically, when the paint operation is stopped, the preceding assembly process is halted shortly thereafter. Nonetheless, this is true of many waste delivery systems associated with manufacturing. Such interplay does not convert the facility's production system, including the painting operation and waste delivery system, into a "manufacturing process unit" within the purview of 40 C.F.R.

[35] I do not dispute that efficient operations at any manufacturing facility are to be valued, regardless of whether it faces what GM describes as a "competitive disadvantage," in the form of so-called "legacy costs." *See* Tr. (June 23) at 35-37. Although I am sympathetic toward the difficulties GM faces, my role in this matter is to apply the law, and I have a duty to find liability where persons violate the law.

§ 261.4. GM does not paint automobiles downstream of the gun boxes, which are immediately adjacent to the manifolds and associated applicators. GM's business is to produce automobiles, and is not in the business of manufacturing purge solvent, purge mixture, or reclaiming purge mixture. Moreover, GM has the purge mixture burned or reclaimed (which requires further processing).

GM's need to manage its spent material does not make such management part of the manufacturing process. GM is managing waste. Complainant's witness, Mr. Benson, persuasively testified that "a lot of industries have waste streams that are potentially – can clog, and those are waste streams, they can go to a sewer, they can go to a tank, and it causes problems if they do clog." Tr. (June 21) at 141. A malfunction or back-up in the waste management system may impact production processes such as by slowing efficiency elsewhere at a facility, but that impact does not make the waste management system part of the production process. In contrast to a production system, such as where the applicators/manifold equipment is used to paint vehicles, the downstream purge mixture system does not produce a product. *See id.*

It is well-established that when a material has become part of the "waste disposal problem," it is considered discarded. *E.g., American Mining Congress v. EPA*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) ("*AMC II*"). Furthermore, it is well-established that used materials that are contaminated can be considered waste even if those materials have value. *E.g., American Petroleum Institute v. EPA*, 906 F.2d 729, 741 & n.6 (D.C. Cir. 1990) (per curiam) ("*API I"*) (materials were considered discarded even though they ultimately would be reclaimed as valuable metals); *accord United States v. ILCO, Inc.*, 996 F.2d 1126, 1131-32 (11th Cir. 1993) (spent batteries were considered waste even though they were reclaimable). In the instant case, usage of the purge mixture downstream of the manifolds and associated applicators does not create a product. Instead, the production occurs at the point of the manifolds and associated applicators, which is where the painting of the vehicles occurs. Accordingly, the manufacturing process unit exemption does not apply to the instant case.[36]

As a final point, I address GM's arguments that the definition of painting operations in EPA's "Auto MACT" rule supports its position that the manufacturing process extends as far as the purge mixture storage tanks. *See* GM's Post-Hrg. Br. at 76-78; GM's Post-Hrg. Reply Br. at 52-53 (referring to RX 36: "National Emission

[36] With interest, I also note that in similar situations involving purge mixture at automobile painting facilities, the EPA has opined that the purge mixture transfer system (i.e, the piping and equipment downstream of the paint booths) is not exempt under the manufacturing process unit exemption. *See* CX 16 (Cotsworth Letter); CX 17 (Sasserville Letter).

Standards for Hazardous Air Pollutants: Surface Coating of Automobiles and Light-Duty Trucks," 69 Fed. Reg. 22,602 (Apr. 26, 2004), *codified at* 40 C.F.R. § 63.3176).

Pursuant to the Clean Air Act, the EPA has promulgated National Emissions Standards for Hazardous Air Pollutants ("NESHAP") with regards to the Surface Coating of Automobiles and Light-Duty Trucks. 40 C.F.R. part 63, subpart IIII (§§ 3080-3176). GM points out that the Auto MACT rule defines a "paint shop" to include the purge portion of the system. GM's Post-Hrg. Br. at 76. The "Auto MACT" rule defines "paint shop" as the collection of all areas at the facility in which vehicles are phosphated or coated, all areas in which substrates or equipments are cleaned relating to the coating of a new vehicle, and includes *"all areas at the facility used for storage, mixing, conveying and waste handling of coatings, thinners and cleaning materials related to the coating of new automobile* or new light-duty truck bodies, the coating of body parts for new automobiles or new light-duty trucks, or coating operations added to the affected source pursuant to [40 C.F.R.] § 63.3082(c)." 40 C.F.R. § 63.3176 (emphasis added).[37]

GM argues that the EPA must be consistent between its Clean Air Act and RCRA programs, and that the scope of a painting operation under the Clean Air Act should be consistent with the scope of the manufacturing process under RCRA. *Id.*; GM's Post-Hrg. Reply Br. at 53. Complainant responds by pointing out fundamental differences between the Clean Air Act and RCRA. *See* Complainant's Post-Hrg. Reply Br. at 36-38. For instance, the Complainant points out that the Clean Air Act regulates sources of air pollution and that its jurisdiction extends without regard to whether those sources are part

[37] The full definition of paint shop reads: "Paint shop means the collection of all areas at the facility in which new automobile or new light-duty truck bodies, or body parts for new automobiles or new light-duty trucks are phosphated and coated (including application, flash-off, drying and curing of electrodeposition primer, primer-surfacer, topcoat, final repair, glass bonding primer, glass bonding adhesive, deadener, adhesives and sealers); all coating operations added to the affected source pursuant to § 63.3082(c); all areas at the facility in which substrates or equipment are cleaned relating to the coating of new automobile or new light-duty truck bodies, the coating of body parts for new automobiles or new light-duty trucks, or coating operations added to the affected source pursuant to § 63.3082(c); and all areas at the facility used for storage, mixing, conveying and waste handling of coatings, thinners and cleaning materials related to the coating of new automobile or new light-duty truck bodies, the coating of body parts for new automobiles or new light-duty trucks, or coating operations added to the affected source pursuant to § 63.3082(c). If there is no application of topcoat to new automobile or new light-duty truck bodies, or body parts for new automobiles or new light-duty trucks at the facility, then for purposes of this subpart the facility does not have a paint shop." 40 C.F.R. § 63.3176.

of a manufacturing or waste disposal process. *See* Clean Air Act § 101, 42 U.S.C. § 7401. In contrast, RCRA's jurisdiction is limited to regulating waste activity.

I find that Congress chose to impose significantly different jurisdictional mandates for the Clean Air Act and for RCRA. Accordingly, EPA's definition of "paint shop" in the Clean Air Act Auto MACT rule is not persuasive for defining the extent of a manufacturing process unit under RCRA.

2. Totally Enclosed Treatment Facility Exemption

GM contends, *arguendo,* that even if its purge mixture is a solid waste, its piping and equipment downstream of the manifolds and associated applicators constitutes a single, continuous totally enclosed treatment facility ("TETF") and is thereby exempt from complying with hazardous waste regulations. GM's Post-Hrg. Br. at 67-71 (referring to 40 C.F.R. § 265.1(c)(9); *accord* Mich. Admin. R. 299.9601(6), 299.9503(1)(d)). TETF is defined as "a facility for the treatment of hazardous waste which is directly connected to an industrial production process and which is constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment during treatment. An example is a pipe in which waste acid is neutralized." 40 C.F.R. § 260.10; *accord* Mich. Admin. R. 299.9208(g); Ohio Admin. Code § 3745-50-10(A)(119).

I agree with the Complainant that GM's facilities fail the requirement of being "constructed and operated in a manner which prevents the release of any hazardous waste or any constituent thereof into the environment."[38] *See* Complainant's Post-Hrg. Reply Br. at 44-49. In Federal Register statements subsequent to promulgating the definition of TETF, the EPA has made clear that the term TETF is narrowly defined to the extent that it cannot leak, spill, or discharge waste, or release emissions into the air:

> The EPA believes that many on-site treatment facilities also are not totally enclosed. Distillation columns and other treatment technologies typically are designed to release emissions into the air. Therefore, by definition, these on-site technologies generally are not totally enclosed. (See 45 FR 33218, May 19, 1980 (no constituents released to air during treatment).)
>
> Two important characteristics define a totally enclosed treatment facility. The key characteristic of a totally enclosed treatment facility is that it does not release any hazardous waste or constituent of hazardous waste into the environment during

[38] Accordingly, I need not determine whether GM satisfies the "treatment" requirement.

> treatment. Thus, if a facility leaks, spills, or discharges waste or waste constituents, or emits waste or waste constituents into the air during treatment, it is not a totally enclosed treatment facility within the meaning of these regulations. The second important characteristic is that it must be directly connected to an industrial production process.

"Hazardous Waste Treatment, Storage, and Disposal Facilities – Organic Air Emission Standards for Process Vents and Equipment Leaks," 55 Fed. Reg. 25,454, 25,467 (June 21, 1990).

Significantly, at GM's facilities there are vents on the downstream purge pots, Tr. (June 20) at 79; Tr. (June 23) at 212; Tr. (June 24) at 55, and on the purge mixture storage tanks, Tr. (June 20) at 117; Tr. (June 20) at 155. The purge mixture contains Volatile Organic Compounds. Tr. (June 20) at 283-87; Tr. (June 29) at 3. GM vents out air from the purge mixture at its facilities, thereby releasing air emissions. Tr. (June 20) at 283-87. I also attach significance to the testimony of GM's witness, Mr. Chaput, Senior Plant Engineer at Orion, who testified that periodically the purge pots are opened in order to add virgin purge solvent to the downstream piping and equipment. Tr. (June 27) at 70.

Further, GM's own logs show that there have been leaks at Orion downstream of the manifolds and associated applicators. *See* RX 84; RX 88. Accordingly, GM does not qualify for the TETF exemption. The fact that the witnesses GM proffered have not personally observed air emissions or leaks does not negate the fact that the system at issue has vents from which air emissions may escape. After all, what is the purpose of a vent other than releasing air.

C. *Discussion of "Discarded"*

1. GM's Argument

Reverberating throughout these proceedings is GM's argument that the "contaminated" purge solvent is not a solid waste under RCRA because GM does not "discard" it. *See, e.g.,* GM's Post-Hrg. Br. at 85. GM argues that the EPA cannot interpret its (or a State's regulation) in a manner that would allow the EPA to regulate a material or conduct over which it has no jurisdiction under its governing statute. *Id.* Moreover, GM argues that EPA's rules must be read consistent with the statute, and that if not, then the rule is invalid. *Id.* at 85 & n.52.

GM states that, according to RCRA, before a material can be regulated as a "hazardous waste," it must first meet the definition of a "solid waste." *Id.* at 85 (citing 42 U.S.C. § 6903(5); *AMC I,* 824 F.2d 1177, 1179 (D.C. Cir. 1987)). GM points out that the statutory definition of "solid waste" is "any garbage, refuse, sludge from a waste

treatment plant, water supply treatment plant, or air pollution control facility and *other discarded material . . . .*" *Id.* (quoting 42 U.S.C. § 6903(5)). Accordingly, GM contends that a discussion of the D.C. Circuit case law, which discusses the meaning of "discarded," reveals the limits of EPA's enforcement authority under RCRA. *Id.* at 86-89.

GM points out that in that in *AMC I*, 824 F.2d at 1184-85, the D.C. Circuit determined that the statutory word "discarded," which is not defined in RCRA, must be given its plain and ordinary meaning. GM reads *AMC I* as holding that "discarded" means something that is "disposed of," thrown away," or "abandoned," and that a material that is not, in fact, disposed of, thrown away, or abandoned is not "discarded" and therefore cannot be regulated under RCRA as a solid waste. GM's Post-Hrg. Br. at 87 (citing *AMC I*, 824 F.2d at 1184, 1190). In characterizing *AMC I*, GM states that the D.C. Circuit "also was impressed" by the fact that materials in question in that case were being reused by the industry in a continuous industrial process. *Id.* GM quotes the following passage:

> To fulfill these 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.*

AMC I, 824 F.2d at 1186.

GM also places emphasis on the case of *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000) ("*Battery Recyclers"*). *See* GM's Post-Hrg. Br. at 67, 88. GM describes *Battery Recyclers* as involving 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 88 (citing 208 F.3d at 1050). GM recounts that in *Battery Recyclers* the EPA tried to distinguish *AMC I* by arguing that it only dealt with materials that were "immediately" reused in a production process. *Id.* (citing 208 F.3d at 1052). Furthermore, GM recounts that in that in *Battery Recyclers* the D.C. Circuit rejected EPA's position, and stated, "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.* (quoting 208 F.3d at 1053). The D.C. Circuit held that EPA's rule, as written, was invalid and beyond EPA's statutory authority. *Battery Recyclers*, 208 F.3d at 1056.

Finally, GM draws attention to the recently decided case of *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003), *revised in part and remanded upon petition for rehearing*, 365 F.3d 46 (D.C. Cir. 2004). GM points out that *Safe Food* upheld an EPA rule which provided that fertilizers manufactured from recycled by-

products of certain industrial processes were not solid wastes. GM's Post-Hrg. Br. at 89 (citing 350 F.3d at 1265). In promulgating its fertilizer rule, the EPA explained that the feedstocks used to create the fertilizer and the fertilizer itself were not discarded and should not be regulated as solid wastes if certain conditions were met. GM states that the D.C. Circuit was impressed by EPA's supporting rationale for not regulating these materials, and quotes the following passage:

> The EPA's explanation is that market participants *treat the exempted materials more like valuable products than like negatively-valued wastes*, managing them in ways inconsistent with discard, and that the fertilizers derived from these recycled feedstocks are chemically indistinguishable from analogous commercial products made from virgin materials.

350 F.3d at 1269 (emphasis added).

2. Case Law Concerning"Discarded" Materials

The landmark case on discarded materials is *AMC I.* In *AMC I*, trade associations, representing mining and oil refining interests, challenged an EPA rule amending the definition of "solid waste." 824 F.2d at 1178. The amended definition of "solid waste" was to establish and define EPA's authority to regulate secondary materials reused within an industry's ongoing production process. *Id.* The trade associations maintained that the EPA had exceeded its regulatory authority in seeking to bring materials that were not discarded or otherwise disposed of within the compass of "waste." *Id*. Writing for the majority on the panel, Judge Kenneth Starr agreed with the trade associations and ruled against the EPA.

AMC I addressed the following issue: "did Congress clearly intend to limit EPA's regulatory jurisdiction to materials disposed of or abandoned, as opposed to materials reused within an ongoing production process?" *Id.* at 1182. In answering that question, the D.C. Circuit noted that Congress defined "solid waste" as "discarded material," and that in the ordinary, plain-English meaning of the word "discarded" means "disposed of," "thrown away," or "abandoned." *Id.* at 1183-84. Accordingly, the D.C. Circuit determined that "Encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term." *Id.* at 1184.

AMC I concluded, "RCRA was enacted, as the Congressional objectives and findings make clear, in an effort to help States deal with the ever-increasing problem of solid waste *disposal* by encouraging the search for and use of alternatives to existing methods of disposal (including recycling) and protecting health and the environment by regulating hazardous wastes." *Id.* at 1185-86. "To fulfill these 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 (footnote omitted).

In *American Petroleum Institute v. EPA*, 906 F.2d 729 (D.C. Cir. 1990) (per curiam) ("*API I*"), the Natural Resources Defense Council ("NRDC") and other petitioners challenged an EPA rule that established treatment standards for K061 hazardous waste, but exempted the slag residues that result from the "treatment" of K061 in zinc smelters from RCRA's restrictions on land disposal of hazardous wastes. *Id.* at 732. The EPA concluded that it lacked authority to regulate K061 slag because the material was not a "solid waste," and thus not a "hazardous waste," for purposes of RCRA. *Id.* at 740. Although it was undisputed that K061 was a "solid waste" when it left the electric furnace in which it was produced, the EPA concluded that K061 ceased to be a "solid waste" when it arrived at a metal reclamation facility because at that point it was no longer "discarded material." *Id.* at 740.

In *API I*, the D.C. Circuit held that the EPA mistakenly concluded that *AMC I* left it without discretion to regulate the slag. *Id.* at 741. In reaching its conclusion, the D.C. Circuit paid close attention to the specific language it used in *AMC I:*

> The issue in *AMC [I]* was whether the EPA could, under the RCRA, treat as "solid wastes" "materials that are recycled and reused in an *ongoing* manufacturing or industrial process." We held that it could not because
>
> > [t]hese 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.* Materials subject to such a process were not 'discarded' because they were never "disposed of, abandoned, or thrown away."

Id. at 741 (citations omitted). In contrast to the situation in *AMC I*, the D.C. Circuit in *API I* held that the materials in question were "discarded" before being subject to reclamation, and the materials in question were not delivered to the reclamation facility as part of an ongoing manufacturing or industrial process within the generating industry:

> *AMC [I]* is by no means dispositive of EPA's authority to regulate K061 slag. Unlike the materials in question in *AMC [I]*, K061 is indisputably "discarded" *before* being subject to metals reclamation. Consequently, it *has* "become part of the waste disposal problem"; that is why EPA has the power to require that K061 be subject to

> mandatory metals reclamation. *See* 53 Fed. Reg. 11,752-53 (recognizing this point). Nor does anything in *AMC [I]* require EPA to cease treating K061 as "solid waste" once it reaches the metals reclamation facility. K061 is delivered to the facility not as part of an "*ongoing* manufacturing or industrial process" within "the generating industry," but as part of a mandatory waste treatment plan prescribed by EPA.

Id. at 741. Moreover, *API I* concluded that it was "immaterial under *AMC [I]* that the method of waste treatment prescribed by the agency results in the production of something of value, namely, reclaimed metals." 906 F.2d at 741 n.6. *API I* held that the EPA mistakenly concluded that *AMC I* left the EPA with no authority to regulate the discarded materials once it reached the reclamation facility, *id.* at 741, and therefore unlawfully exempted the residue produced from smelting K061 waste from RCRA's restrictions on land disposal of hazardous waste. *Id.* at 732, 742. Accordingly, the D.C. Circuit remanded to the EPA, warning that the EPA must reconcile failure to regulate the materials with RCRA's objective to establish a "cradle-to-grave" system for the safe handling of hazardous wastes. *Id.* at 741.

Similarly, in *United States v. ILCO, Inc.*, 996 F.2d 1126, 1131-32 (11th Cir. 1993), the Eleventh Circuit held that spent car and truck batteries, despite containing valuable lead components, became "part of the waste disposal problem" after the consumer had thrown them away. The materials were "waste" rather than raw materials, even though they were reclaimable. *Id.*

In a second case of *American Mining Congress v. EPA*, 907 F.2d 1179 (D.C. Cir. 1990) ("*AMC II*"), industry petitioners challenged EPA's listing of certain materials as hazardous wastes, on the ground that – pursuant to *AMC I* – the materials were not "discarded," and therefore were not "solid waste," and consequently could not be "hazardous wastes" within the meaning of RCRA. *Id.* at 1184. In *AMC II*, the petitioners argued "that sludges from wastewater that are stored in surface impoundments and that *may* at some time in the future be reclaimed are not "discarded.'" *Id.* at 1186.

In rejecting the industry petitioners' challenge in *AMC II*, the D.C. Circuit concluded that they "read *AMC [I]* too broadly." *Id.*

> *AMC [I]*'s holding concerned only materials that are "destined for *immediate reuse* in another phase of the industry's ongoing production process," *id.* at 1185 (emphasis added), and that "have not yet become part of the waste disposal problem," *id.* at 1186. Nothing in *AMC* prevents the agency from treating as "discarded" the wastes at issue in this case, which are managed in land disposal

> units that *are* part of wastewater treatment systems, which *have* therefore become "part of the waste disposal problem," and which are *not* part of ongoing industrial processes.

Id. (footnote omitted); *accord Owen Elec. Steel Co. of S.C., Inc. v. Browner,* 37 F.3d 146, 150 (4th Cir. 1994) (slag recycled after sitting for up to six months was reasonably classified as solid waste).

In the case of *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1992) (per curiam), AMC challenged EPA's authority to regulate resource recovery. *Id.* at 756. At issue was "whether the absence of the words 'resource recovery' from the statutory definition of 'treatment,' and the absence of any specific discussion of resource recovery in Subtitle C, requires the EPA to recede from its *clear regulatory role* in the management of hazardous wastes during periods when useable resources are being salvaged from them." *Id.* at 755 (emphasis added).

In *Shell Oil*, the D.C. Circuit discussed its decisions in *AMC I, AMC II, and API I*, and then held in favor of EPA's authority to regulate resource recovery. *Id.* at 755-56. "As Subtitle C, read as a whole, provides broad authority to the EPA to fashion rules to govern the management of hazardous wastes, it would seem entirely reasonable for the EPA to conclude that it has the authority to regulate the extraction of resources from the wastes committed to its care." *Id.* at 755. "If a hazardous material has been discarded, it becomes subject to Subtitle C regulation even if it is sent to a resource recovery facility." *Id.* at 756.

In *Chemical Waste Management, Inc. v. E.P.A.*, 976 F.2d 2, 13 (D.C. Cir. 1992) (per curiam), the D.C. Circuit characterized its holding in *AMC I* as being limited in reach, *id.* at 14 (emphasis added):

> *AMC I* turned on the question of whether secondary materials immediately reused within an industrial process had been "discarded" under the terms of RCRA. We concluded that they had not. *AMC I*, 824 F.2d at 1185- 87. *Our decision in that case stands for no more*. *See Shell Oil*, 950 F.2d at 755-56.

In *Association of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), industry challenged revisions to EPA regulations dealing with residual or secondary materials generated in mining and mineral processing operations and EPA's classification of these materials as "solid waste." *Id.* at 1050. At issue was whether the EPA properly defined "solid waste" in those regulations, and the D.C. Circuit concluded that it had not. *Id.*

In *Battery Recyclers*, the EPA had revised regulations dealing with materials reclaimed by the mineral processing industry, subjecting these materials to a new test for determining whether they constituted "solid waste." *Id.* at 1051. The D.C. Circuit panel in *Battery Recyclers* disputed EPA's authority to regulate secondary materials as "solid waste" when the materials were placed on the ground for a few minutes before being put back into the production process. *Id.* *Battery Recyclers* clarified the meaning of the word "immediate" in *AMC I*'s statement, "Encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term." *Id.* at 1052 (citing *AMC I*, 824 F.2d at 1184). *Battery Recyclers* held that the word "immediate" means "direct," and therefore it was impermissible for EPA to regulate materials placed on the ground for only a few minutes before being put back into the production process. *Id.* at 1053.

In light of Congress' definition of "solid waste" as "discarded," the D.C. Circuit concluded, "[a]t least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id.* at 1056. Nevertheless, the D.C. Circuit conceded that some of the secondary materials covered under the revised regulations may not proceed directly to an ongoing recycling process and therefore may be analogous to the sludge that the EPA properly classified as "solid waste" in *AMC II*. *Id.* In so doing, the D.C. Circuit acknowledged that "A term may be ambiguous as applied to some situations, but not as applied to others." *Id.*

In a second case of *American Petroleum Institute v. EPA*, 216 F.3d 50 (D.C. Cir. 2000) (per curiam)[39] ("*API II*"), industry petitioners challenged EPA rulemakings that oil-bearing "wastewaters" are "solid waste" for purposes of RCRA regulation, and that recovered oil from petrochemical facilities is excluded from the definition of solid waste only when specified conditions are met. *Id.* at 55. In petroleum refining, impurities are removed and usable hydrocarbon fractions are isolated from crude oil feedstock. *Id.* Large quantities of water are used, and the resulting wastewaters contain a small percentage of residual oil, referred to as "oilbearing wastewaters," which are destined for ultimate discharge but only after a three-step treatment process. *Id.* The first stage of the treatment process, known as "primary treatment" (1) meets a Clean Water Act requirement that refineries remove oil from their wastewater, and (2) allows refineries to recover a not insignificant quantity of oil, which is cycled back into the refinery production process. *Id.*

In *API II*, industry petitioners and the EPA disagreed over when these wastewaters become discarded for purposes of the solid waste definition. *Id.* Although no one disputed that discard certainly occurred by the time the wasters moved into the

[39] Although the panel in *API II* states that its opinion was filed *per curiam*, it specifies which of the judges authored each part of the panel's opinion.

later phases of treatment, the question was whether discard happens before primary treatment, allowing regulation of wastewater as solid waste at that point, or not until primary treatment is complete and oil has been recovered for further processing. *Id.* "At bottom, the parties disagree[d] over the proper characterization of primary treatment. Is it simply a step in the act of discarding? Or is it the last step in a production process before discard." *Id.* at 57. Accordingly, *API II* addressed where to "draw a line for deciding when discard has occurred." *Id.* In drawing the line where discard begins, *API II* announced a "predominant purpose" test. *Id.* at 57-58. In doing so, the D.C. Circuit recognized that the issue of whether the predominant purpose of an activity is discard requires an inquiry into facts and circumstances, and that where an industrial by-product may be characterized as either discarded or "in process" material, EPA's choice of characterization is entitled to deference by the courts. *Id.* at 57 (citing *AMC II*, 907 F.2d at 1186).

Finally, we arrive at the D.C. Circuit's most recent case dealing with the definition of "solid waste": *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263 (D.C. Cir. 2003), *revised in part and remanded upon petition for rehearing*, 365 F.3d 46 (D.C. Cir. 2004). In *Safe Food*, the EPA had promulgated a rule regarding zinc fertilizers produced from recycled byproducts of certain industrial processes. *Id.* at 1265. The rule "[r]esolved that Subtitle C of [RCRA] would not apply to the recycled materials used to make zinc fertilizers, or to the resulting fertilizers themselves, so long as they met certain handling, storage and reporting conditions and (in the case of the fertilizers themselves) had concentration levels for lead, arsenic, mercury, cadmium, chromium, and dioxins that fall below specified thresholds." *Id.*; *see* 67 Fed. Reg. 48,393 (July 24, 2002), *promulgated at*, 40 C.F.R. §§ 261.4(a)(20)-(21), 266.20(d). The EPA reasoned that so long as these materials met the specified conditions they should not be seen as "discarded" within the meaning of RCRA's definition of "solid waste," 42 U.S.C. § 6903(27)." *Safe Foods*, 365 F.3d at 1266.

Nonprofit organizations petitioned for review of the rule, claiming that both the materials and the fertilizer are "hazardous wastes" and that therefore the EPA must regulate them under RCRA. *Id.* at 1265. More specifically, the petitioners challenged EPA's decision that recycled materials complying with the specified conditions are not "discarded" material. *Id.* at 1268. The petitioners asserted that, as a matter of plain meaning, the materials in question are "discarded" even though they are recycled in a useful product. *Id.* Moreover, they claimed that under the D.C. Circuit's cases, recycled material destined for immediate reuse within an ongoing industrial process is never considered "discarded," whereas material that is transferred to another firm or industry for subsequent recycling must *always* be so viewed. *Id.*

In *Safe Foods*, 350 F.3d at 1268, the D.C. Circuit discussed its prior holdings:

> We have held that the term "discarded" cannot encompass materials that "are destined for beneficial reuse or recycling

> in a continuous process by the generating industry itself." *Am Mining Cong. v. EPA* ("*AMC I*"), 824 F.2d 1177, 1186 (D.C. Cir. 1987); *see also Ass'n of Battery Recyclers, Inc. v. EPA*, 208 F.3d 1047, 1056 (D.C. Cir. 2000). We have also held that materials destined for future recycling by another industry *may* be considered "discarded"; the statutory definition does not preclude application of RCRA to such materials if they can reasonably be considered part of the waste disposal problem. *Am. Petroleum v. EPA*, 906 F.2d 729, 740-41 (D.C. Cir. 1990); *Am. Mining Cong. v. EPA* ("*AMC II*"), 907 F.2d 1179, 1186-87 (D.C. Cir. 1990).

In rejecting petitioners' arguments, the D.C. Circuit wrote, "But we have never said that RCRA compels the conclusion that material destined for recycling in another industry is necessarily 'discarded.'" *Safe Foods*, 350 F.3d at 1268. "Although ordinary language seems inconsistent with treating immediate reuse within an industry's ongoing industrial process as a 'discard,' *see AMC I*, 824 F.2d at 1185, the converse is not true." *Safe Foods*, 350 F.3d at 1268.

In the rule promulgated in *Safe Foods*, the EPA found that the recycled materials used to make zinc fertilizers and the fertilizers themselves should not be regarded as "discarded" so long as they met EPA's conditions. *Id.* The EPA justified its finding of the "exempted materials" at issue in that case on a combination of two theories: the market participants' treatment of the materials (i.e., "market participation theory"), together with EPA's required management practices and contamination limits assuring substantial chemical identity (i.e., "the identity principle"). *Id.* The D.C. Circuit then framed the issue as follows: "The question, apparently of first impression, is whether the identity principle, when used in conjunction with indicators like market valuation and management practices, is a reasonable tool for distinguishing products from wastes." *Id.* The D.C. Circuit ruled in favor of EPA's exercise of its discretion to exempt the materials in question: "Nobody questions that virgin fertilizers and feedstocks are products rather than wastes. Once one accepts that premise, it seems eminently reasonable to treat materials that are indistinguishable in the relevant respects as products as well." *Id.* Accordingly, the D.C. Circuit rejected petitioners' challenge to EPA's exemption of those materials.

3. The Contaminated Purge Solvent Is "Discarded," Notwithstanding the Case Law

In my discussion, *supra*, I determined that the contaminated purge solvent contained in the purge mixture was "spent," within the context of the regulations defining "spent materials" that are reclaimed as "solid waste." Moreover, I determined that the contaminated purge solvent was more of a waste than a non-waste. As discussed below, the holdings in the case law on "discarded" materials are not inconsistent with my jurisdictional determination.

The holdings of both *Battery Recyclers* and the case it clarifies – *AMC I* – are quite narrow. In *AMC I*, the D.C. Circuit determined that "Encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term," and that "Encompassing materials retained for immediate reuse within the scope of 'discarded material' strains, to say the least, the everyday usage of that term." 824 F.2d 1177, 1184. Likewise, the D.C. Circuit's decision in *Battery Recyclers* was similarly narrow in focus. *Battery Recyclers*, 208 F.3d 1047, clarified that in requiring "immediate" reuse of secondary materials, it did not mean that materials placed on the ground for only a few minutes before being put back into the production process could be regulated as being "discarded."[40] Accordingly, in construing an EPA rule that failed to distinguish between such materials placed on the ground for a few minutes versus other materials, *Battery Recyclers* held that "at least some of the secondary material EPA seeks to regulate as solid waste is destined for reuse as part of a continuous industrial process and thus is not abandoned or thrown away." *Id.* at 1056. Nevertheless, the D.C. Circuit panel in *Battery Recyclers* conceded that some of the secondary materials covered under the revised regulations may not proceed directly to an ongoing recycling process and therefore may be analogous to the sludge that the EPA properly classified as "solid waste" in *AMC II*. *Id.*

As noted *supra*, the Complainant agrees that there may be situations in which solvent-paint mixtures (and the equipment in which they are handled) are not subject to RCRA, even if they have been used to clean paint spray equipment. *See* Complainant's Post-Hrg. Br. at 17. For example, the Complainant agrees that such solvent-paint mixtures may not be a "solid waste" if they are recirculated back and used to clean the manifolds and associated applicators a second time or are otherwise used again directly in the manufacturing (as opposed to waste management) process, without being regenerated." *Id.*

[40] In construing the definition of "immediate," the D.C. Circuit acknowledged that "A term may be ambiguous as applied to some situations, but not as applied to others." *Battery Recyclers*, 208 F.3d at 1056.

I note that the regulatory definition of "solid waste" provides an exemption from the "solid waste" definition for recycled materials when they can be shown to be recycled by being "returned to the original process from which they are generated, without first being reclaimed or land disposed." 40 C.F.R. § 261.2(e)(iii)[41]; *accord* Mich. Admin. R. 299.9202(3); Ohio Admin. Code § 3745-51-02(E). Although purge mixture is recirculated downstream of the manifolds and associated applicators at two of GM's facilities, none of these downstream recirculation loops takes the purge mixture back "as is" to clean the manifolds and associated applicators. In fact, none of the contaminated purge solvent in the purge mixture is used "as is" to clean the manifolds and associated applicators.

Regardless of GM's saving contaminated purge solvent (in the purge mixture) for reclamation (and reconstitution into purge solvent), a plethora of cases hold that saving used material for reclamation does *not* exempt it from being classified by the EPA as "discarded," but rather such materials are within EPA's broad authority to regulate waste. *See, e.g., Shell Oil,* 950 F.2d 741; *AMC II,* 907 F.2d 1179; *API I,* 906 F.2d 729*; see also Owen Electric Steel Co.,* 37 F.3d 146*; ILCO,* 996 F.2d 1126. Although reclamation is laudable, such activity is not removed from EPA jurisdiction. *Accord ILCO,* 996 F.2d 1126 (discussing recovery of lead from spent batteries).

Moreover, in *API II,* 216 F.3d 50, 57-58, the D.C. Circuit set forth a significant role for the EPA in drawing the line at which secondary materials become "waste" materials. As discussed, the D.C. Circuit recognized that the issue of whether the predominant purpose of an activity is discard requires an inquiry into facts and circumstances, and that where an industrial by-product may be characterized as either discarded or "in process" material, EPA's choice of characterization is entitled to deference by the courts. Similarly, the *Safe Foods* case is distinguishable on its facts, as the D.C. Circuit deferred to EPA's expertise in drawing the line at which zinc fertilizers, produced from industrial by-products, became waste. As discussed *supra,* the purge solvent contaminated with the paint solids and resins is best classified as a "waste" rather than a non-waste. Accordingly, pursuant to RCRA's definition of "solid waste," it is "discarded."

D. ***Arbitrary and Capricious***

GM contends that the EPA has taken inconsistent positions over the years regarding the regulatory status of the purge mixture, and therefore its position in the instant case is arbitrary and capricious. GM's Post-Hrg. Br. at 55-64. GM's review of

[41] The wording of the above provision would appear to place the burden of proof on the Respondent. Nevertheless, the Complainant would prevail in the instant case even if the regulation assigned the burden to the Complainant.

twelve years worth of inspection reports created prior to the late-1990s did not reveal that the EPA had ever alleged that purge mixture was a solid waste at the point it exited the paint applicators. Tr. (June 28) at 274-77; RX 180; RX 181, RX 118A-KK. Moreover, Complainant's witnesses confirm that the EPA did not claim the purge mixture was a hazardous waste when it exited the paint applicators until the late 1990s. Tr. (June 20) at 199-200, 207, 247; Tr. (June 21) at 201-03, 238-39.

Nevertheless, in July 1997, EPA Headquarters issued the Cotsworth Letter, CX 16, which opined that the purge mixture at automobile painting facilities is "waste" regulated by RCRA. Specifically, in a letter dated July 29, 1997, Elizabeth Cotsworth – Acting Director of EPA's Office of Solid Waste at EPA Headquarters – responded to a question about the applicability of RCRA regulations to indoor piping and flow equalization tanks used to convey solvents from spray painting booths to exterior accumulation tanks. CX 16 ("Cotsworth Letter"). The facility described in the Cotsworth Letter used solvent to clean automated spray painting guns when changing paint color, and collected the used solvent in funnels, which were then piped to a "flow equalization" tank located near the paint booth, and then finally piped to an outdoor above-ground accumulation tank. *Id.* The facility asked whether the EPA considers the flow equalization tanks and associated indoor piping to be part of a manufacturing process unit, pursuant to the exemption in 40 C.F.R. § 261.4. In response, Ms. Cotsworth (speaking on behalf of EPA Headquarters) stated her belief that the used solvent is a waste once it leaves the spray painting unit, and that the equalization tank and associated piping are subject to hazardous waste regulatory requirements. CX 16. Ms. Cotsworth further stated that since the used solvent is physically removed (i.e., piped) from the spray painting unit, and since it will no longer be used to clean spray paint guns once removed, the solvent is considered a waste when it leaves the unit. *Id.* Furthermore, Ms. Cotsworth stated that all tank system components (the equalization tank, outside accumulation tank, and all associated piping) are part of the waste storage tank system and are subject to the relevant generator accumulation requirements including those for secondary containment. *Id.* Ms. Cotsworth explained that, "The exemption at 261.4 [the manufacturing process unit exemption] applies where waste is generated and then contained for some period of time within process units (typically tank-like units), such as sludge that accumulates on the bottom of raw material product tanks." *Id.* "*However, the system you have described is not part of the production system, but serves solely to manage wastes*." *Id.* (emphasis added).

As mentioned previously, in the Sasserville Letter, CX 17, EPA Headquarters opined that, "After the solvent and paint mixture is used to clean the spray gun, it is a waste if at that point it is no longer part of the manufacturing process." *Id.* "The purpose of the solvent is to remove the waste paint, clean the spray gun, and allow the use of new colors." *Id.* "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 contaminants, it is a waste.*" *Id.* (emphasis added). Subsequent documents sent from high-level officials at EPA to Michigan, Ohio quote the language in the

Sasserville Letter, and add the statement that, "U.S. EPA does not accept the position that the solvents are still serving their intended purpose in the waste lines."[42] CX 18 (Letter from Robert Springer, EPA Region V, to Michigan (Mar. 28, 2001)); CX 95 (Letter from Springer, EPA Region V, to Ohio (Mar. 28, 2001)).

Looking at EPA inspection reports, GM contends that after the 1997 Cotsworth Letter, the EPA changed its position repeatedly as to whether purge mixture is regulated under RCRA. GM's Post-Hrg. Br. at 59-62 (citing, *inter alia,* RX 118).

With regards to EPA's silence about the status of the purge mixture in inspection reports, I agree with the Complainant that silence does not equal an official agency pronouncement. *See* Complainant's Post-Hrg. Reply Br. at 18-20. An inspector may decline to determine the regulatory status of a substance for a number of reasons, including the different configurations of facilities, the different uses of purge mixture at the different facilities (such as is it used on barrels to pick up additional contaminants), the scope of an inspection, whether the issue is raised by the generator, or prosecutorial discretion. *See* RX 118 (details the various factual circumstances behind each inspection); Tr. (June 20) at 249; Tr. (June 22) at 145, 174. Furthermore, the D.C. Circuit recognized that the particular facts of a case inform how EPA policies are applied to a facility. *GM v. EPA,* 363 F.3d 442, 452 (D.C. Cir. 2004) ("Whether paint purge solvent piping systems are subject to RCRA is partly a factual question dependent on the findings of inspections conducted at individual plants.").

The constant from the 1997 Cotsworth Letter to today is that the EPA consistently held to its general policy that the purge mixture is regulated under RCRA, as evidenced by the Sasserville and Springer letters, which even quote the Cotsworth Letter, and the May 7, 2002 "Shimberg Letter," sent from EPA Headquarters to GM (CX 19).[43] For instance, in the latter Shimberg Letter, EPA Headquarters states:

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[42] Moreover, I note that the D.C. Circuit pointed out an August 31, 2001 letter from Eric Schaeffer, who at the time was EPA's Director of Regulatory Enforcement, to the Association of Automobile Manufacturers. *GM,* 363 F.3d 442, 446 (D.C. Cir. 2004). Mr. Schaeffer reportedly wrote that EPA's viewpoint on the applicability of hazardous waste requirements (subparts J and BB) to piping systems conveying solvents from spray painting units "is quite clear" and that the EPA "has consistently articulated [this] viewpoint." *Id.* The D.C. Circuit observed, "In response to industry inquiries, EPA repeated its regulatory interpretation without change in the Schaeffer letter of August 31, 2001, and again in the Shimberg letters of May 7, 2002. Nothing in the record indicates that the paint purge solvent issue was 'unresolved'; rather, EPA's position was settled long before the Shimberg letters." *Id.* at 449.

[43] Furthermore, these letters put GM on fair notice of how the EPA intended to apply the law.

> The EPA continues to stand by its' 1997 determination on the point of generation for hazardous waste at spray paint operations and, as such, ancillary equipment transporting the hazardous waste purge solvent from the painting operations and the storage tanks to which the mixture is conveyed are subject to RCRA.

GM has not pointed to any EPA *policy* document after the Cotsworth Letter that deviates from EPA's policy of regulating purge mixture at automobile painting facilities.

GM states that the State of Michigan, through letters and opinions issued by officials from that State, contends that the purge mixture is not a solid waste or hazardous waste upstream of the purge mixture storage tanks, and GM argues that the EPA cannot "foist" its regulatory interpretation upon an authorized State such as Michigan. GM's Post-Hrg. Br. at 78-85. GM argues that if the EPA believes Michigan is implementing a hazardous waste program that is not as stringent as EPA's, then the EPA has the option of withdrawing all or part of the State's authorization to implement RCRA. *Id.* at 82-84 (citing RCRA § 3006(e), 42 U.S.C. § 6926(e), which provides that the EPA may withdraw authorization from an approved State program). As support, GM cites a case from the U.S. Court of Appeals for the Seventh Circuit ("Seventh Circuit"). *Id.* at 83-84 (citing *Northside Sanitary Landfill, Inc. v. Thomas,* 804 F.2d 371, 381-82 (7th Cir. 1986)). GM suggests that the EPA is bound by Michigan's interpretation of the law. GM also moves to reopen the hearing to admit a position letter from the Michigan Department of Environmental Quality's Deputy Director, Mr. Jim Sygo (dated July 25, 2005), RX 206, that purportedly supports GM's position.

I disagree with GM. In this very case, the D.C. Circuit reaffirmed that the EPA shares dual enforcement authority with authorized States: "Hazardous waste may also be subject to standards under state regulations, *see* 42 U.S.C. § 6926, and while an authorized state may enforce its hazardous waste program in lieu of the federal program, *id.* § 6926(d), *EPA has dual enforcement authority* under RCRA, *id.* § 6928, and may engage in pre-enforcement action or file a complaint without its state counterpart, so long as it notifies the authorized state. *Id.* § 6928(a)(2)." *GM*, 363 F.3d at 444 (emphasis added); *accord Florida Power & Light v. EPA,* 145 F.3d 1414, 1417 (D.C. Cir. 1998); *Waste Management of Illinois v. EPA,* 945 F.2d 419, 420 (D.C. Cir. 1991). Moreover, the Environmental Appeals Board ("EAB") has clearly determined that authorization does not divest the EPA of enforcement authority: "Authorization does not, however, divest EPA of authority to bring an enforcement action in an authorized State; EPA has the authority pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a), to enforce any requirement of the authorized State program, as well as any Federal requirement that is not part of the authorized State program." *In re Pyramid Chem. Co.*, RCRA (3008) Appeal No. 03-03, 11 E.A.D. 657, 669 (EAB 2004) (citing cases). As for the Seventh Circuit case cited by GM, *Northside Sanitary Landfill*, the instant matter does not arise within the Seventh Circuit and thus that case is not binding on these proceedings.

Furthermore, I observe that the EPA did not approve Michigan's letters and opinions that asserted the purge mixture to be a non-waste.[44] In fact, the EPA specifically notified Michigan (and Ohio) that the purge mixture is waste regulated by RCRA. What the EPA approved in authorizing the Michigan program was its hazardous waste regulations, *not* subsequent opinions issued by Michigan after its authorization.[45]

Accordingly, Michigan's opinion of the law does not bar the EPA from its authority under RCRA to bring an enforcement action in Michigan. Furthermore, despite Michigan's opinion on how the law should be applied, *EPA's* position is not arbitrary and capricious, but rather has been quite consistent.[46] Moreover, with regards to Michigan's Sygo Letter, it lacks sufficient probative value and therefore GM's motion to reopen the hearing in order to take further evidence is denied.[47] *See* 40 C.F.R. § 22.28(a).

E. *Liability and Penalty Determination*

The Complaint alleged violations of regulations governing tank systems (subpart J), air emission standards for equipment leaks (subpart BB), and air emission standards for tanks, surface impoundments, and containers (subpart CC). Specifically, the Complaint alleged the following violations: Count I alleged Storage of Hazardous Waste Without an Operating License or Interim Status by Failing to Meet the Conditions for Exemption for Generators of Hazardous Waste at Pontiac; Count II alleged Failure to Comply with Michigan's Interim Status Requirements Which Require Compliance with 40 C.F.R. part 264, subpart J for the Tank System at Orion; Count III alleged Failure to Comply with Michigan's Interim Status Requirements Which Require Compliance with 40 C.F.R. part 264, subpart BB at Orion, and; Count IV alleged Storage of Hazardous

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[44] Despite GM's assertions to the contrary, the Complainant did *not* stipulate that the Michigan opinions and letters are the controlling law. Rather, the parties stipulated that the state *regulations* are the operative law. *See* Regulatory Stipulations.

[45] *See Pyramid*, 11 E.A.D. at 669 (when the EPA grants authorization to a State, it is the State *regulations* that operate in lieu of the Federal hazardous waste program).

[46] Likewise, EPA's issuance of guidance letters, such as the Cotsworth Letter, put the regulated community on "fair notice" of its interpretation of the law. *See In re Coast Wood Preserving, Inc.*, EPCRA Appeal No. 02-01, 11 E.A.D. 59 (EAB 2003).

[47] Additionally, as pointed out by the Complainant, GM has not shown that such evidence is not cumulative or that there is good cause why such evidence was not adduced at the hearing. *See* 40 C.F.R. § 22.28(a).

Waste Without a Permit or Interim Status by Failing to Meet the Conditions for Exemption for Generators of Hazardous Waste at Moraine.

The Complainant based its allegations on inspections that it conducted on the following dates: March 20, 26-27, 2001 at Pontiac; April 17, 2001 at Moraine, and; January 28-29, 2003 at Orion. The EPA authorized Michigan to administer its base hazardous waste program in 1986, 51 Fed. Reg. 36,804-05 (Oct. 16, 1986), and the EPA authorized Michigan to administer subpart J of 40 C.F.R. part 265 in 1989. 54 Fed. Reg. 48,608 (Nov. 24, 1989). It was not until 2002 that the EPA authorized Michigan to administer subparts BB and CC. 67 Fed. Reg. 49,617 (July 31, 2002). Prior to 2002, the EPA directly administered subparts BB and CC.[48]

Throughout the relevant time period, the EPA has authorized Ohio to administer the base hazardous waste program and the subpart J regulations. Joint Stipulations of the Parties (July 22, 2004), at ¶ 9. However, the EPA has administered the subparts BB and CC rules in Ohio. *Id.*

Pursuant to federal regulation, a generator of hazardous waste who accumulates hazardous waste on-site for 90 days or less is exempt from the requirement to have a permit or interim status as a transportation, storage, or disposal ("TSD") facility, so long as, among other requirements, the waste is placed in tanks and the generator complies with 40 C.F.R. part 264, subparts J, BB, and CC. 40 C.F.R. § 262.34(a)(1)(ii). The corresponding Michigan regulation, Mich. Admin. R. 299.9306(1)(a)(ii), incorporates the Federal regulatory requirement that, for waste placed in tanks, the generator must comply with 40 C.F.R. part 264, subparts J, BB, and CC.

The Complainant prays for a compliance order and a penalty of $189,372 for each facility, for a total penalty of $568,116. Pursuant to the Rules of Practice, the Complainant "has the burdens of presentation and persuasion that the violation occurred as set forth in the complaint and that the relief sought is appropriate." 40 C.F.R. § 22.24(a).

The proposed Compliance Order requires GM's compliance with hazardous waste regulations, and that GM notify the EPA in writing within 30 days after achieving compliance, and that GM notify the EPA within 10 days upon failure to comply. GM does not challenge the terms of the Compliance Order, but rather confines its arguments to attacking the proposed penalty and challenging jurisdiction over the used solvent. As

[48] The EPA promulgated subparts BB and CC on June 21, 1990 (55 Fed. Reg. 25,512). Pursuant to Section 3006(g) of RCRA, 42 U.S.C. § 6926(g), amendments made by the Hazardous and Solid Waste Amendments of 1984 (which amended RCRA), take effect until the EPA authorizes a State to administer those requirements.

discussed, because I find that the purge mixture, which contains contaminated solvent, is a hazardous waste, the EPA has jurisdiction to regulate that material pursuant to RCRA. Accordingly, GM is ordered to comply with the terms of Complainant's Compliance Order, which is provided in the Complaint.

With regards to administrative penalties, RCRA provides that any penalty assessed shall not exceed $27,500 per day of noncompliance for each violation of a requirement.[49] RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3). Furthermore, RCRA provides that the penalty assessment shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements. *Id.*

In proposing the penalty, the Complainant employed EPA's RCRA Civil Penalty Policy (June 2003), at 5, whose stated purposes are to "ensure that RCRA civil penalties are assessed in a manner consistent with Section 3008; that penalties are assessed in a fair and consistent manner; that penalties are appropriate for the gravity of the violation committed; that economic incentives for noncompliance with RCRA requirements are eliminated; that penalties are sufficient to deter persons from committing RCRA violations; and that compliance is expeditiously achieved and maintained."[50] CX 112. An assessment employing the RCRA Civil Penalty Policy calls for a determination of a gravity-based component to measure the seriousness of the violations, and it allows for a multi-day component for violations lasting more than one day, and adjustments based on the economic benefit of noncompliance. Under the Policy, the gravity-based component takes into the account the extent of harm and the extent of deviation from the regulatory requirement(s), and then cross-references those two factors on a matrix of penalty amounts.

The parties stipulate that the potential for harm is "moderate." *See* Stipulation as to the "Potential for Harm" Component of Complainant's Proposed Penalty (June 16, 2005) ("Penalty Stipulations"), at 2. Furthermore, the Complainant did not attempt to prove any economic benefit at the hearing. The portion of the penalty based on multiple days of violation was calculated based on a violation occurring at least 180 days, and the Complainant does not propose higher penalty amounts even where the violation lasted for

[49] The $27,500 figure is the inflation-adjusted amount, pursuant to the Civil Monetary Inflation Adjustment Rule. 40 C.F.R. part 19.

[50] Although an ALJ must consider the penalty policy, 40 C.F.R. § 22.27(b), this requirement "does not compel an ALJ to use a penalty policy in making his or her penalty determination." *In re John A. Capozzi d/b/a/ Capozzi Custom Cabinets,* RCRA (3008) Appeal No. 02-01, 11 E.A.D. 10, 31 (EAB 2003).

more than 180 days. Still at issue is the "extent of deviation" factor, which is set at the "moderate" level in Complainant's penalty calculation.[51]

The Complainant alleged failure to comply with the subpart J (tank systems) regulations, which is required in order to exempt a hazardous waste generator from having a RCRA TSD or interim status permit for its facility. As explained by the Complainant, Counts I and IV pertain to the alleged storage of hazardous waste without a permit/license or interim status, but such action arose from GM's alleged failure to meet certain conditions for exemption from the permit/license requirement.

With regards to liability, GM only challenges the following allegations concerning the portion of GM's purge mixture storage tank systems, including the ancillary equipment, at GM's three facilities running from the paint booths to the purge mixture storage tanks: (1) failure to provide adequate secondary containment, (2) failure to comply with regulations requiring daily inspections to be performed for all portions of a hazardous waste tank system, and (3) failure to perform integrity assessments for tank systems and ancillary equipment, and failure to provide the necessary corrosion protection as determined pursuant to the assessment. With regards to the Moraine facility, GM also challenges its alleged failure to comply with the subpart BB requirements.

1. Failure to Comply with Regulations Requiring Daily Inspections

The owner or operator of a facility must perform inspections at least once each operating day, and must document such inspections in the operating record of the facility. 40 C.F.R. § 265.195(a), (c).

GM contends that it complied with the inspection requirement through its compliance with ISO 14001 procedures,[52] which require each employee to report whenever they detect a release of any material, including purge mixture. GM's Post-Hrg. Br. at 99 (citing Tr. (June 28) at 253-53; RX 48, RX 68, and RX 82). GM asserts that its ISO procedure is superior to EPA's inspection requirement because it requires its employees to observe the system and report any problems not just once per day, but continuously. *Id.* at 100.

[51] The Complainant also assigned the midpoint of the moderate cell ($7,150) in the assessment of "extent of deviation."

[52] "ISO" stands for International Organization for Standardization.

Significantly, the language of the regulation calls for daily "inspections" – *not* "observations."[53] GM's ISO procedure, with regards to the purge mixture piping, calls for its paint, security, and environmental employees, while performing normal job functions throughout each operating day, to report any evidence of corrosion or release. RX 48 at PT4851, PT 4852. In contrast, with regards to the purge mixture storage tanks, GM assigns responsibility to a specific person, the Resource Manager, to inspect the tanks. RX 48 at PT4852.

With regards to the employees who "observe" the purge piping, I conclude that there was inadequate training. The only training records that GM provided for this proceeding indicate that approximately eight employees out of at least 74 paint, security, and environmental employees were trained in "Hazardous Waste Tank Mgt/Purge" in May 2004. RX 49. Ms. Winkler, a senior environmental engineer for GM who was a witness for GM, did not know how those eight employees were trained, who did the training, or the duration of the training. Tr. (June 29) at 49-50. Moreover, the design of GM's facilities presents a challenge in detecting leaks. For instance, the purge mixture conveyance system is piped throughout the building, often at 15 feet above the ground floor, without markings indicating which pipes are the purge mixture pipes, and the purge mixture pipes are interwoven between other pipes that are not carrying purge mixture. Tr. (June 23) at 180; *see also* Tr. (June 29) at 38. Finally, I note that GM did not require logs documenting releases until November 2002, which was after the March 2001 inspection at Pontiac and after the April 2001 inspection at Moraine. *See* Complainant's Post-Hrg. Br. at 60 (citing RX 44U at PT1781).

For the extent of deviation penalty factor, the RCRA Penalty Policy sets three levels: (1) "MAJOR: The violator deviates from requirements of the regulation or statute to such an extent that most (or important aspects) of the requirements are not met resulting in substantial noncompliance," (2) "MODERATE: The violator significantly deviates from the requirements of the regulation or statute but some of the requirements are implemented as intended," and (3) "MINOR: The violator deviates somewhat from the regulatory or statutory requirements but most (or all important aspects) of the requirements are met."

Complainant's proposed penalty calculation assessed the extent of deviation at "moderate," and I agree. GM's program of observation fell significantly short of the

[53] Although I agree with the Complainant that GM's observations did not comply with the regulation, which calls for daily inspections, I cannot agree with Complainant's additional contention: that inspections must be performed on "any day, not just any operating day." *See* Complainant's Post-Hrg. Br. at 58, 69. Contrary to Complainant's assertion, the regulation clearly states that daily inspections are required on "operating days." 40 C.F.R. § 265.195(a). I note, however, that the term "operating days" is not defined in the regulation.

requirement for inspections, when taking into account the lack of adequate training for those employees and the difficulties in detecting leaks at the facilities.

2. Secondary Containment

The subpart J regulations require secondary containment for all new tank systems or components prior to being put into service, in order to prevent the release of hazardous waste or hazardous constituents to the environment (and for some existing tank systems). 40 C.F.R. § 265.193(a). Secondary containment must be designed, installed, and operated to prevent any migration of wastes or accumulated liquid out of the system to the soil, ground water, or surface water at any time during the use of the tank system, and must be capable of collecting releases and accumulating liquids until the collected material can be removed. 40 C.F.R. § 265.193(b). Ancillary equipment must be provided with full secondary containment that meets the requirements of 40 C.F.R. § 265.193(b), except for equipment that is visually inspected for leaks on daily basis. 40 C.F.R. § 265.193(f).

The Complainant alleged that at the time of its inspection, GM could not demonstrate that it operated a secondary containment system underneath the ancillary equipment which was designed, installed and operated to prevent any migration of accumulated liquid out of the system and which would be capable of collecting releases and accumulating liquids until the collected material could be removed. As discussed, *supra,* GM did not visually inspect for leaks on a daily basis.

GM points out that EPA guidance allows for buildings to be used as secondary containment if the relevant standards of 40 C.F.R. § 265.193(b)-(c) are met, and GM contends that it used its buildings as secondary containment. GM's Post-Hrg. Br. at 98. GM also points out that in January 2005, secondary containment assessments were performed at its facilities by an outside independent professional engineer. *Id.*

The Complainant does not contest that a building *may* be used as secondary containment, provided that the requirements for such usage, such as integrity assessments, are followed. However, the Complainant points out that the January 2005 assessments took place approximately four years after Complainant's inspections in 2001 at Pontiac and Moraine (and two years after the 2003 inspection at Orion). Complainant's Post-Hrg. Br. at 56. Furthermore, even the January 2005 assessments address only the indoor portions of the facilities. *See* RX 140. There is no secondary containment for the 20 to 30 feet of piping (which is located over concrete and soil) that carries the purge mixture out of the buildings and into the purge mixture storage tanks. Tr. (June 20) at 116. Moreover, Ms. Winkler, who is a senior environmental engineer for GM, conceded that in order to qualify a building as secondary containment, performance standards must be met, including a leak detection system that would detect a leak within a 24 hour period (pursuant to 40 C.F.R. § 193(b), (c)). Tr. (June 29) at 26. The secondary containment assessments state that no automatic leak detection was in place.

See RX 140 at GM130039. An alternative to the automatic leak detection system would be daily visual inspections, but – as discussed *supra* – GM did not conduct the requisite daily inspections.

Accordingly, GM failed to comply with secondary containment requirements and is still in noncompliance with those requirements. As such, I concur with Complainant's proposal to set the extent of deviation at the "moderate" level.

3. Integrity Assessments

a. The Parties' Arguments

GM contends that it performed integrity assessments of the pipes and equipment from the purge pots to the purge mixture storage tank at Pontiac, Moraine, and Orion, on November 4, 2002. GM's Post-Hrg. Br. at 96 (citing RX 47 at PT4849; RX 65 at GM070591, and; RX 81 at GM080004, respectively). Furthermore, GM contends that each integrity assessment was performed consistent with the requirements in 40 C.F.R. § 265.191(b) and that each confirmed the integrity of each of these systems pursuant to the requirements of that regulation. *Id.* (citing RX 47 at PT4847-49; RX 65 at GM070587-91, and; RX 81 at GM080001-05).

With regards to Moraine and Orion, GM contends that it is currently in compliance and has been in compliance since no later than November 4, 2002: GM's purported integrity assessments date. GM's Post-Hrg. Br. at 96. However, regarding Pontiac, GM contends that it has always been in compliance. *Id.* at 95-96. For its argument concerning the Pontiac (Michigan) facility, GM points to the language of the Michigan's hazardous waste regulations, which require that tank systems "put into service after July 14, 1989, or which are upgraded pursuant to the provisions of 40 C.F.R. § 264.193 . . . be assessed in accordance with the provisions of 40 C.F.R. § 264.192(a)(3) and provided with the necessary corrosion protection as determined pursuant to the assessment."[54] GM's Post-Hrg. Br. at 95 (citing Mich. Admin. Code R. 299.9615(3) (2004)).

GM admits that there were changes to the "purge solvent recovery systems" at Pontiac (and Orion). *Id.* at 96 n.58 (citing RX 61, RX 95, RX 95A). However, GM

[54] GM also points out that according to Ohio's hazardous waste regulations, existing tank systems that do not have adequate secondary containment must perform an assessment of the tank system. *Id.* (citing Ohio Admin. Code § 3745-66-91 (2004)). GM points out that Ohio defines an "existing tank system" as "a tank system or component that is used for the storage or treatment of hazardous waste and that is in operation, or for which construction commenced on or prior to July 14, 1986." *Id.* (citing Ohio Admin. Code § 3745-50-10(A)(35)).

states that the Complainant offered no evidence indicating that these changes triggered the integrity assessment requirement. *Id.* Therefore, GM asserts that the Complainant is precluded from claiming that these changes triggered the assessment requirements. *Id.* Without citing to the record, GM asserts that Ms. Winkler's and Mr. Chaput's testimony demonstrate that GM complies with the integrity assessment requirements and has been in compliance with these requirements for Pontiac for all applicable time periods (and since no later than November 4, 2002 at Moraine and Orion). *Id.* at 96.

Although the Complainant agrees with GM that an integrity assessment for Moraine was performed in November 2002, it challenges the dates for Pontiac and Orion. Complainant's Post-Hrg. Br. at 35. The Complainant contends that the integrity assessment was not performed at Pontiac until April 2003 and was not performed at Orion until February 2003. *Id.* (citing RX 47; RX 81).

Regarding whether Pontiac's tank system is "new" within the meaning of the regulations, the Complainant contends that the age of Pontiac's tank system is not relevant to demonstrating that GM was in violation of the regulations. Complainant's Post-Hrg. Br. at 61. The Complainant argues, if GM's tank system was not "new," it was "existing." *Id.* The Complainant argues that if the tank system was existing, GM was still required by 40 C.F.R. § 265.191(a) to have an integrity assessment performed (by January 12, 1988) unless the tank system had secondary containment meeting the requirements of 40 C.F.R. § 265.193. Complainant's Post-Hrg. Br. at 61.

With regards to the changes at the facilities, occurring after 1986, that GM identified in its Post-Hearing Brief, the Complainant contends that those exhibits are, indeed, evidence that both systems are "new" within the meaning of the regulations. Complainant's Post-Hrg. Reply Br. at 35. The Complainant asserts that it did not point those changes out in its brief because they did not matter. *Id.* at 35-36. The Complainant points out that "existing" tank systems still need integrity assessments if they do not have secondary containment, and points out that GM's facilities lacked secondary containment. *Id.* at 36.

b. Tribunal's Discussion

The Federal, the Michigan, and the Ohio regulations provide that owners and operators who use tank systems to treat or store hazardous waste shall comply with the requirements of 40 C.F.R. part 265, subpart J. 40 C.F.R. § 262.34(a)(1)(ii); *accord* Mich. Admin. R. 299.9615; Ohio Admin. Code § 3745-52-34. The Federal regulations' subpart J, 40 C.F.R. § 265.192(a), which governs new tank systems or components, provides:

> Owners or operators of new tank systems or components must ensure that the foundation, structural support, seams, connections, and pressure controls (if applicable) are adequately designed and

> that the tank system has sufficient structural strength, compatibility with the waste(s) to be stored or treated, and corrosion protection so that it will not collapse, rupture, or fail. The owner or operator must obtain a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with § 270.11(d) [*accord* Ohio Admin. Code § 3745-50-42(D)], attesting that the system has sufficient structural integrity and is acceptable for the storing and treating of hazardous waste.

Accord Ohio Admin. Code § 3745-66-92(A).

Similarly, 40 C.F.R. § 265.191, which governs existing tank systems, also provides an integrity assessment requirement:

> (a) For each existing tank system that does not have secondary containment meeting the requirements of § 265.193, the owner or operator must determine that the tank system is not leaking or is unfit for use. Except as provided in paragraph (c) of this section, the owner or operator must obtain and keep on file at the facility a written assessment reviewed and certified by an independent, qualified, registered professional engineer in accordance with § 270.11(d), that attests to the tank system's integrity by January 12, 1988.
>
> (b) This assessment must determine that the tank system is adequately designed and has sufficient structural strength and compatibility with the waste(s) to be stored or treated to ensure that it will not collapse, rupture, or fail . . .
>
> (c) Tank systems that store or treat materials that become hazardous wastes subsequent to July 14, 1986 must conduct this assessment within 12 months after the date that the waste becomes a hazardous waste.

Accord Ohio Admin. Code § 3745-66-91.

Under the Federal regulations, the terms "new tank system" or "new tank component" mean a tank system or component that will be used for the storage or treatment of hazardous waste and for which installation has commenced after July 14, 1986. 40 C.F.R. § 260.10; *accord* Ohio Admin. Code § 3745-50-10. The Federal regulations define the terms "existing tank system" and "existing component" to mean a tank system or components that is used for the storage or treatment of hazardous waste

and that is in operation, or for which installation has commenced on or before July 14, 1986. 40 C.F.R. § 260.10; *accord* Ohio Admin. Code § 3745-50-10.

As discussed *supra*, the outside piping at GM's facilities did not have secondary containment for its outdoor facilities, did not have proper leak detection systems, and GM did not perform daily inspections. Accordingly, under the Federal regulations, GM's tank systems and components, regardless of whether they were new or existing, would have to comply with the integrity assessment requirement. Furthermore, the Ohio regulations on this matter are indisputably consistent with the Federal regulations.

However, notwithstanding the Federal regulations, the EPA has approved Michigan's regulations, and therefore those State regulations provide the operative standards for the Michigan facilities. *In re Pyramid Chem. Co.*, 11 E.A.D. 657, 669 (EAB 2004) (once the EPA grants authorization to a State, the EPA-approved State regulations operate in lieu of the Federal hazardous waste program). As noted, with regards to the Pontiac (Michigan) facility, GM contends that it is an existing facility, and suggests that it is therefore exempt under the Michigan regulations. GM points out the Michigan regulation that reads, "All tank systems which are put into service after July 14, 1989, or which are upgraded pursuant to the provisions of 40 C.F.R. § 264.193 shall be assessed in accordance with the provisions of 40 C.F.R. § 264.192(a)(3) and provided with the necessary corrosion protection as determined pursuant to the assessment." Mich. Admin. R. 299.9615(3). The latter regulation appears to be analogous to the Federal regulation at 40 C.F.R. § 265.192 (and 40 C.F.R. § 264.192), which governs new tank systems and new components. In contrast, the Michigan regulatory code does not appear to contain an express requirement that is analogous to the language of 40 C.F.R. § 265.191 (and 40 C.F.R. § 264.191), which governs existing tank systems and existing components.

Therefore, the next logical question would be whether integrity assessments are required in Michigan for existing tank systems and existing components, due to the absence of a Michigan rule on that topic. Admittedly, it is peculiar that the Michigan rules would provide an express provision requiring integrity assessments for new tank systems but not for existing tank systems. On the other hand, however, the Michigan rules do not expressly exempt existing tank systems from the integrity assessment requirement. Filling in the gap is a Michigan rule, under the "Tank systems" section, which provides: "Owners or operators who use tank systems to treat or store hazardous waste shall comply with *all* of the requirements of 40 C.F.R. part 264 . . . ." Mich. Admin. R. 299.9615(1) (emphasis added). Among other requirements, 40 C.F.R. part 264 (at 40 C.F.R. § 264.191)[55] mandates integrity assessments for existing tank systems.

[55] The regulation at 40 C.F.R. § 264.191 is identical to the regulation at 40 C.F.R. § 265.191.

(continued...)

Accordingly, Pontiac was required to conduct integrity assessments. Therefore, I conclude that the Michigan rules in fact do require integrity assessments for existing tank systems.[56]

As noted *supra*, the Complainant agrees that an integrity assessment was performed for Moraine in November 2002, but contends that the assessments were performed at later dates for Pontiac and Orion. Regarding Pontiac, the record indicates that the written assessment of a certified engineer was executed on April 23, 2003.[57] RX 47 at PT 4846. With regards to Orion, the written certification was executed on February 26, 2003. RX 81 at GM080001. The Orion written assessment does indicate, however, that the "purge solvent recovery system" was "visually examined on November 4, 2002 to identify cracks, leaks, corrosion, and erosion." *Id.* at GM080004. Nevertheless, the applicable regulations require a certified, written assessment. Accordingly, I find that GM was not in compliance at Orion until the execution of the certified written assessment, on February 26, 2003.

I take note of Complainant's assertions that violations were occurring prior to the inspections. Although that may well be true, I believe the inspections are the first reliable indications that GM was in violation. As stated *supra*, the Complainant based its allegations on inspections that it conducted on the following dates: March 20, 26-27, 2001 at Pontiac; April 17, 2001 at Moraine, and; January 28-29, 2003 at Orion. Accordingly, with regards to the integrity assessment requirements, the violations occurred as follows: Moraine was in violation from its April 2001 inspection through its written, certified assessment on November 4, 2002; Pontiac was in violation from its March 2001 inspection through its written, certified assessment on April 23, 2003, and;

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[55](...continued)

[56] I observe that even the Michigan rule cited by GM, Mich. Admin. R. 299.9615(3), requires integrity assessments for tank systems "which are upgraded pursuant to the provisions of 40 C.F.R. § 264.193." GM itself admitted that there were "changes" to the so-called "purge solvent recovery systems" at Pontiac. GM's Post-Hrg. Br. at 96 n.58. Moreover, GM cited to the documents that indicate those changes. *Id.* (citing RX 61, RX 95, RX 95A). GM thereby opened the door to a factual determination on this point, notwithstanding Complainant's approach to this topic. At the same time, however, GM asserted that the Complainant has not provided any evidence that these changes triggered the integrity assessment requirement. *Id.* Indeed, even the documents cited by GM were not admitted into evidence. Accordingly, I do not reach a determination on this factual issue.

[57] The written assessment for Pontiac states that a visual inspection was conducted on April 22, 2003. RX 47 at PT 4849.

Orion was in violation from its inspection on January 28-29, 2003 through February 26, 2003.

The integrity assessment violation at Orion, I note, lasted just under 30 days, as opposed to the much lengthier integrity assessment violations at Moraine and Pontiac. Nevertheless, as discussed *supra,* Orion was also in noncompliance with regards to the daily inspection and secondary containment requirements, and was in noncompliance in that regard for a lengthy period of time. In order to be exempt from the requirement to have a permit or interim status as a TSD facility, a facility must fulfill the requirements of subpart J. The requirements of daily inspections, secondary containment, and integrity assessment are all requirements of subpart J. Even without the integrity assessment violations, the secondary containment and visual inspection violations demonstrates substantial noncompliance with subpart J. Accordingly, I concur with the Complainant that there is a "moderate" level of deviation. Moreover, as discussed *infra,* deterrence calls for a substantial penalty.

4. Subpart BB – Moraine Facility

Pursuant to 40 C.F.R. subpart J (§ 264.200), owners and operators of treatment, storage, and disposal facilities shall comply with the provisions in 40 C.F.R. subpart BB (§§ 264.1050-1090), which concerns air emission standards for equipment leaks requirements. In Count III, the Complainant alleged, *inter alia,* that at its inspection of the Moraine facility in 2001, GM was not in compliance with the subpart BB requirements.

GM concedes that it did not comply with subpart BB at Moraine prior to June 25, 2004, but points out that its operations were excluded from compliance with those regulations when the so-called "Auto MACT" rule became effective at the federal level. GM's Post-Hrg. Br. at 100. Therefore, GM argues, any penalty associated with these violations cannot include any time period after June 25, 2004. *Id.* The Complainant does not challenge GM's argument about the Auto MACT rule exempting compliance as of 2004, and appears to argue only in favor of liability from 2001 through 2004. *See* Complainant's Post-Hrg. Br. at 85.

Accordingly, I conclude that GM violated subpart BB requirements at Moraine from April 2001 through June 2004. Nevertheless, the portion of Complainant's penalty proposal based on multi-day violations did not increase the penalty based on violations that lasted more than 180 days. Therefore, the multi-day penalty assessment is not altered. With regards to "extent of deviation," I concur with Complainant's proposal to set that factor at the "moderate" level.

5. Good Faith Efforts to Comply

The Complainant contends that its assessment of the multi-day penalty is necessary to deter future non-compliance. Complainant's Post-Hrg. Br. at 102. Furthermore, the Complainant points out that long before its inspections in 2001 and 2003 of GM's facilities, the regulated community was on notice of EPA's position (such as expressed in the Cotsworth letter and subsequent EPA letters, which were posted via the internet), that purge mixture at automobile painting operations is waste at the point when it exits the paint applicators. *Id.* Moreover, the Complainant points out that even GM's own witnesses, Christine Bates and Margaret Winkler, testified that they personally became aware of EPA's position on the point of generation issue as early as 1999 or 2000. *Id.* at 103 (citing (Tr. (June 28) at 17-20; 30-31; Tr. (June 28) at 111-12). At that time, Ms. Bates was Director of the Environmental Services Area of GM's Worldwide Facilities Group, Global Facilities Regulatory Issues, Tr. (June 28) at 5-6, and Ms. Winkler was GM's Senior Environmental Engineer (since March 2000), Tr. (June 28) at 74. Finally, the Complainant points out that despite being on notice of EPA's position, and despite its size and sophistication, GM continued its noncompliance. Complainant's Post-Hrg. Br. at 103.

I agree. In light of GM's high level of awareness and its extended period of noncompliance, I find it appropriate to assess multi-day penalties.[58] Finally, in looking at the violations as a whole, I agree that Complainant's proposed penalty of $568,116 is appropriate.

IV. CONCLUSIONS OF LAW

1. The downstream purge mixture (the purge mixture exiting the paint applicators at the GM Pontiac, Orion, and Moraine facilities or the purge mixture exiting the mini purge pots in the clear coat booth at Orion) is spent material that is reclaimed. 40 C.F.R. §§ 261.1(c)(1), (4), 261.2(c)(3); Mich. Admin. Code R. 299.9107(b),(aa); Ohio Admin. Code § 3745-51-01(C)(1),(4).

2. The downstream purge mixture 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). 40 C.F.R. § 261.2 (a)(2)(ii), (c)(3), and Table 1; Mich. Admin. Code R. 299.9202(1)(b)(ii), (iii), 2(a); Ohio Admin. Code § 3745-51-02(A)(2)(b), (C)(2),(3), and Table 1.

3. The downstream purge mixture is discarded material that constitutes solid waste under Section 1003(27) of RCRA, 42 U.S.C. § 6903(27).

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[58] *See* RCRA § 3008(a), 42 U.S.C. § 6928(a): "In assessing . . . a penalty, the [ALJ] shall take into account the seriousness of the violation and any good faith efforts to comply with applicable requirements."

12344. The solid waste consisting of the downstream purge mixture is a characteristic hazardous waste because of its ignitability. 40 C.F.R. §§ 261.3(a)(2)(i), 261.21.

5. The downstream piping and equipment (including tubing, purge pots, pumps, valves, fittings, recirculation loops, and connectors) from the paint applicators (or the mini purge pots in the clear coat booths at Orion) to the purge mixture storage tanks constitute ancillary equipment. 40 C.F.R. § 260.10; Mich. Admin. Code R. 299.9101(q); Ohio Admin. Code § 3745-50-10(A)(5).

6. The ancillary equipment and the purge mixture storage tanks are "tank systems" within the meaning of 40 C.F.R. § 260.10 and are subject to the hazardous waste requirements of RCRA.

7. The downstream purge mixture is not exempt from regulation over hazardous waste pursuant to the "manufacturing process unit" exemption at 40 C.F.R. § 261.4(c); Mich. Admin. Code R. 299.9204(3)(a); Ohio Admin. Code § 3745-51-04(c), or the "totally enclosed treatment facility" exemption at § 265.1(c)(9). 40 C.F.R. § 260.10; Mich. Admin. Code R. 299.9108(g), 299.9503(1)(d), 299.9601(6); Ohio Admin. Code §§ 3745-50-10(A)(119), 3745-65-01(C)(9).

8. GM violated Michigan's and Ohio's hazardous waste regulations that apply to generators that store hazardous waste in tanks, which are equivalent to 40 C.F.R. parts 264 and 265, subparts J, BB, and CC hazardous waste requirements for tank systems at the time of the EPA's inspection of the Pontiac, Michigan facility in March 2001, at the Orion, Michigan facility in January 2003, and at the Moraine, Ohio, facility in April 2001, and for at least 179 days thereafter.

9. The proposed penalty in the amount of $568,116 is an appropriate and reasonable penalty for GM's violations of the hazardous waste regulations. *See* Section 3008(a)(3) of RCRA, 42 U.S.C. § 6928(a)(3); 40 C.F.R. part 19.

ORDER

1. Respondent General Motors is assessed a civil administrative penalty in the amount of $568,116.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days after the effective date of the Final Order by submitting a cashier's check or certified check in the amount of $568,116, payable to the "Treasurer, United States of America," and mailed to:

EPA Region 5
Attn: Regional Hearing Clerk
P.O. Box 70753
Chicago, IL 60673

3. A transmittal letter identifying the subject case title and EPA docket number (RCRA-05-2004-0001), as well as Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory period after entry of the Order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 31 C.F.R. § 901.9.

5. Respondent shall comply with the Compliance Order provided in the Complaint.

6. Failure to comply with the requirements of the Compliance Order shall subject the Respondent to liability for a civil penalty of up to twenty-seven thousand, five hundred dollars ($27,500) for each day of continued noncompliance with the deadlines contained in this Compliance Order. The EPA is authorized to assess such penalties pursuant to RCRA Section 3008(c), 42 U.S.C. § 6928(c).

Appeal Rights

This Order constitutes an Initial Decision as provided in Section 22.17(c) of the Rules of Practice, 40 C.F.R. § 22.17(c). Pursuant to Sections 22.27(c) and 22.30 of the Rules of Practice, this Initial Decision shall become the Final Order of the Agency unless an appeal is filed with the Environmental Appeals Board within thirty (30) days of service of this Order, or the Environmental Appeals Board elects, *sua sponte*, to review this decision.

Unredacted and redacted copies of this Order, the Initial Decision, are being served on both parties, as well as the Regional Hearing Clerk, in accordance with 40 C.F.R. § 22.27(a). However, neither the redacted nor unredacted Initial Decision is being

released or made available to the public at this time, but the redacted copy will be publicly released on April 14, 2006, barring any persuasive objections. If either party objects to the redacted Initial Decision on the basis of containing confidential business information ("CBI"), such objection must be served on the undersigned no later than April 12, 2006. The parties are reminded that the delayed public release of the redacted copy of this Initial Decision does not affect the appeal period specified in 40 C.F.R. § 22.30(a).

Dated: March 30, 2006
Washington, D.C.

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Barbara A. Gunning
Administrative Law Judge

(ATTACH “FIGURE 1”)

(ATTACH “FIGURE 2”)