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June 25, 2019

BY FEDEX OVERNIGHT AND EMAIL

Wanda I. Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square
Suite 100, Mail Code ORC 04-6
Boston, MA 02109-3912
santiago.wanda@epa.gov

Re: In the Matter of: ISP Freetown Fine Chemicals, Inc.
U.S. EPA Docket No. RCRA-01-2018-0062

Dear Ms. Santiago:

Enclosed for filing in the above-referenced matter are (1) the original and one copy of the Answer and Reaffirmation of Request for Hearing of Respondent ISP Freetown Fine Chemicals, Inc.; and (2) the original and one copy of the Motion of Respondent ISP Freetown Fine Chemicals, Inc. to Dismiss Counts Two Through Eight for Failure to State a Claim and the Memorandum in Support of that Motion.

Pursuant to 40 C.F.R. § 22.5, and as indicated in the enclosed Certificates of Service, copies of these documents have also been served on Audrey Zucker, Enforcement Counsel, U.S. Environmental Protection Agency, Region 1, in her capacity as Attorney for Complainant, and LeAnn Jensen, Regional Judicial Officer, U.S. Environmental Protection Agency, Region 1.

If possible, would you send me an email confirming your receipt and filing of the enclosed Answer, Motion, and Memorandum?

If you have any questions about the enclosed documents, please do not hesitate to contact me at (617) 419-2316 or eklein@bdlaw.com. Please also note that I am working on this matter with my colleagues Aaron Goldberg and Brook Detterman, and you may contact them for any purpose as well. Their contact information is in the signature block of all documents.

Many thanks for your assistance in this matter.

Sincerely yours,

Eric L. Klein

Counsel for Respondent
ISP Freetown Fine Chemicals, Inc.

Enclosures

cc:

Audrey Zucker
Enforcement Counsel
U.S. Environmental Protection Agency, Region 1

LeAnn Jensen
Regional Judicial Officer
U.S. Environmental Protection Agency, Region 1

CERTIFICATE OF SERVICE

I certify that the foregoing Answer and Reaffirmation of Request for Hearing of Respondent ISP Freetown Fine Chemicals, Inc., was served this 25 day of June, 2019, in the following manner on the addressees listed below:

Original and one copy
by FedEx and copy by email to:

Wanda I. Santiago
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 1
5 Post Office Square
Suite 100, Mail Code ORC 04-6
Boston, MA 02109-3912
santiago.wanda@epa.gov

Copy by FedEx and copy by email to:

Attorney for Complainant
Audrey Zucker
Enforcement Counsel
U.S. Environmental Protection Agency, Region 1
5 Post Office Square
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Boston, MA 02109-3912
zucker.audrey@epa.gov

Copy by FedEx and copy by email to:

LeAnn Jensen
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(Signature on following page)

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Counsel for Respondent
ISP Freetown Fine Chemicals, Inc.

Dated: June 25, 2019

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of: ISP Freetown Fine Chemicals, Inc. MAR000009605 Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, U.S.C. § 6928(a)	Docket No. RCRA-01-2018-0062 ISP FREETOWN FINE CHEMICALS' ANSWER AND REAFFIRMATION OF REQUEST FOR HEARING

ANSWER AND REAFFIRMATION OF REQUEST FOR HEARING

Respondent ISP Freetown Fine Chemicals, Inc. ("ISP" or the "Company"), by its attorneys, hereby responds to the allegations in the Amended Complaint (hereinafter referred to simply as the "Complaint"), and denies each and every allegation included therein, except to the extent specifically admitted below:

DEFENSE #1

I. EPA'S STATEMENT OF PURPORTED AUTHORITY

1. Paragraph 1 of the Complaint declares the alleged statutory authority for and administrative regulations allegedly applicable to Complainant's action and requires no response. To the extent a response is required, ISP denies the allegations of Paragraph 1.

2. Paragraph 2 of the Complaint purports to characterize later paragraphs of the Complaint, which speak for themselves. To the extent a response is required, ISP denies the allegations of Paragraph 2.

3. Paragraph 3 of the Complaint purports to characterize later paragraphs of the

Complaint, which speak for themselves. To the extent a response is required, ISP denies the allegations of Paragraph 3.

4. ISP lacks knowledge or information sufficient to form a belief as to the truth of the allegation in Paragraph 4 of the Complaint.

II. EPA'S DESCRIPTION OF THE NATURE OF ITS ACTION

5. Paragraph 5 of the Complaint purports to describe EPA's purpose and goals in the present action. ISP lacks knowledge or information sufficient to form a belief as to EPA's purpose and goals in the present action, other than as described in the language of the Complaint, which speaks for itself. To the extent that Paragraph 5 purports to declare the alleged legal basis for EPA's action and the Agency's proposed penalties, no response is required.

III. EPA'S DESCRIPTION OF THE STATUTORY AND REGULATORY FRAMEWORK

6. ISP admits the factual allegations in Paragraph 6 of the Complaint.

7. ISP admits the factual allegations in Paragraph 7 of the Complaint, except that ISP denies the allegation that all of the federal hazardous waste regulations promulgated pursuant to Subtitle C of the Resource Conservation and Recovery Act ("RCRA") are codified at 40 C.F.R. Parts 260-271. Additional federal hazardous waste regulations promulgated pursuant to Subtitle C of RCRA are codified, among other places, at 40 C.F.R. Parts 272 and 273.

8. Paragraph 8 of the Complaint purports to describe EPA's authority to authorize state hazardous waste programs under 42 U.S.C. § 6926. In response, ISP states that 42 U.S.C. § 6926 speaks for itself.

9. ISP admits the factual allegation in Paragraph 9 of the Complaint that EPA has authorized the Commonwealth to administer *portions* of its hazardous waste program in lieu of the corresponding portions of the federal hazardous waste regulations, but the Company denies

that EPA has authorized the Commonwealth with respect to the entirety of its hazardous waste program. ISP admits that the portions of the Massachusetts regulations that have been authorized are codified in Title 310, Chapter 30 of the Code of Massachusetts Regulations ("C.M.R."), but it denies that all of the provisions in Chapter 30 have been authorized by EPA.

10. ISP denies that Section 3004(n) of RCRA can properly be cited as 42 U.S.C. § 6921(n), and states instead that the proper citation is 42 U.S.C. § 6924(n). Otherwise, ISP admits the factual allegations in Paragraph 10 of the Complaint, except that to the extent Paragraph 10 purports to describe the requirements of 42 U.S.C. § 6924(n), ISP states that this statutory provision speaks for itself. ISP admits that EPA has not authorized the Commonwealth to administer the Subpart AA, BB, and CC regulations.

11. Paragraph 11 of the Complaint purports to describe the provisions of 42 U.S.C. §§ 6926 and 6928. In response, ISP states that these provisions speak for themselves.

12. Paragraph 12 of the Complaint purports to describe the scope of EPA's enforcement authority under Section 3008 of RCRA, 42 U.S.C. § 6928, and it also purports to describe how civil penalties are calculated under other statutes and regulations. In response, ISP states that the provisions of 42 U.S.C. § 6928, and the other statutes and regulations cited by EPA, speak for themselves.

IV. EPA'S GENERAL ALLEGATIONS

13. Paragraph 13 of the Complaint states conclusions of law to which no response is required, except that ISP admits that it is a Delaware corporation doing business in the Commonwealth.

14. Paragraph 14 of the Complaint states conclusions of law to which no response is required, except that ISP admits it has owned and operated a facility located at 238 South Main Street in Assonet, Massachusetts (the "Facility") since 1998.

15. ISP admits the factual allegations in Paragraph 15 of the Complaint.

16. ISP admits the allegation in Paragraph 16 of the Complaint that it submitted a Notice of Hazardous Waste Activity to the Commonwealth on or about January 29, 1998, which speaks for itself.

17. ISP admits the allegation in Paragraph 17 of the Complaint that the Facility includes storage units for solvents, acids, and reactants, which are used in batch chemical production operations. The characterization of these or other materials as "hazard[ou]s wastes" is a legal conclusion to which no response is required, but ISP denies that solvent, acids, reactants or other materials used in production are wastes, much less hazardous wastes with waste codes D001, D022, F002, F003, and F005.

18. Paragraph 18 of the Complaint states legal conclusions to which no response is required.

19. ISP admits the factual allegation in Paragraph 19 of the Complaint that EPA conducted an inspection at the Facility on August 1, 2017.

20. ISP admits the factual allegation in Paragraph 20 of the Complaint that it maintains eight storage tanks, among others, at the Facility. EPA's characterization of the materials in the eight referenced tanks as "hazardous wastes" is a legal conclusion to which no response is required.

a. ISP admits the factual allegation in Paragraph 20(a) of the Complaint that Tank S-716A is a 600-gallon tank that collects material from the Facility's steam stripper.

EPA's characterization of this material as a "hazardous waste" is a legal conclusion to which no response is required.

b. ISP denies the allegation in Paragraph 20(b) of the Complaint that Tanks S-505, S-507, S-526, S-503A, S-545, and S-502A ("Receiver Tanks") are used to collect materials from ISP's "condensate receiver," and states instead that these Receiver Tanks are used to collect materials from various condensers at the Facility. EPA's characterization of the materials collected in the Receiver Tanks as "hazardous wastes" is a legal conclusion to which no response is required.

c. ISP admits the factual allegation in Paragraph 20(c) of the Complaint that Tank S-535 is a 16,000-gallon tank that collects material from the Receiver Tanks and from cleaning of reactor vessels. The allegation that Tank S-535 stores materials transferred from "other processes" at the Facility is vague and ambiguous, and ISP therefore lacks sufficient knowledge or information to form a belief as to the truth of the allegation. EPA's characterization of the materials in Tank S-535 as "hazardous waste" is a legal conclusion to which no response is required.

21. Paragraph 21 of the Complaint begins by introducing the sub-paragraphs, and no response is required to this introductory clause.

a. ISP admits the allegation in Paragraph 21(a) of the Complaint that, at the time of the inspection, it maintained, in addition to the eight tanks described in Paragraph 20, transfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds to transfer materials to and from Tank S-716A, to and from the Receiver Tanks, and to and from Tank S-535. EPA's characterization of the materials transferred using this equipment as "hazardous wastes" is a legal conclusion to which no response is required.

b. The allegation in Paragraph 21(b) of the Complaint that, at the time of the inspection, ISP maintained transfer hoses and valves in its Pilot Plant to transfer material to and from "variously-sized reactor vessels" is vague and ambiguous, and ISP therefore lacks sufficient knowledge or information to form a belief as to the truth of the allegation. EPA's characterization of certain materials in the Pilot Plant as "hazardous waste" is a legal conclusion to which no response is required.

22. Paragraph 22 of the Complaint purports to describe the requirements of 40 CFR § 262.34(a)(1)(ii). In response, ISP states the referenced provision does not exist and did not exist at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. 85732, 85818 (Nov. 28, 2016), Item 31 ("Remove and reserve § 262.34"); *id.* at 85732 ("This final rule [removing § 262.34] is effective on May 30, 2017"). Even if former 40 C.F.R. § 262.34 applies, it speaks for itself.

Paragraph 22 of the Complaint and footnote 1 thereto also purport to describe the requirements of 40 C.F.R. § 262.17(a)(2), which was promulgated by EPA in 2016. In response, ISP states that the referenced provision is moot, inasmuch as it is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. at 85801 ("the [new generator] standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs"); 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts . . . received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"). Even if 40 C.F.R. § 262.17(a)(2) is relevant, it speaks for itself.

23. Paragraph 23 of the Complaint sets forth legal conclusions to which no response is required, except that ISP admits that it does not have a RCRA permit and that it places certain materials in tanks. To the extent a further response is required, ISP states that any requirement to comply with Subparts BB and CC as referenced by 40 C.F.R. § 262.34(a)(1)(ii) is inapplicable because, as stated in Paragraph 22 above, 40 C.F.R. § 262.34 does not and did not exist at the relevant times under the Complaint.

24. Paragraph 24 of the Complaint purports to describe the requirements of 40 C.F.R. § 265.1064(g)(6). In response, ISP states that the referenced provision speaks for itself.

25. Paragraph 25 of the Complaint is a legal conclusion to which no response is required.

26. ISP admits the first sentence in Paragraph 26 of the Complaint. The second sentence in Paragraph 26 of the Complaint purports to describe the content of documents that ISP provided to EPA, which speak for themselves. ISP admits providing additional documentation and information to EPA since January 24, 2018.

V. EPA'S ALLEGATIONS OF RCRA VIOLATIONS

27. Paragraph 27 of the Complaint merely states that EPA has determined that ISP violated RCRA and regulations promulgated pursuant to RCRA. No response is required. ISP denies the purported allegations, except to the extent specifically admitted herein.

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

28. Paragraph 28 of the Complaint purports to incorporate by reference Paragraphs 1 through 27 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 27 of the Complaint.

29. Paragraph 29 of the Complaint purports to summarize the requirements of certain regulatory provisions. In response, ISP states that the referenced provisions speak for themselves.

30. Paragraph 30 purports to describe what EPA inspectors observed. ISP lacks sufficient knowledge or information to admit or deny what the inspectors observed. The statement that certain tanks were "operating as hazardous waste storage tanks" is a legal conclusion to which no response is required.

31. Paragraph 31 of the Complaint begins by introducing the sub-paragraphs, and no response is required to this introductory clause.

a. ISP lacks sufficient knowledge or information to admit or deny the factual allegations in Paragraph 31(a) of the Complaint.

b. ISP lacks sufficient knowledge or information to admit or deny the factual allegations in Paragraph 31(b) of the Complaint.

c. ISP admits the allegation in Paragraph 31(c) that *some* of the solvents held in the Receiver Tanks are transferred to Tank S-535, but denies that all of the solvents held in the Receiver Tanks are transferred to Tank S-535. The allegations that the solvents held in the Receiver Tanks are wastes and that Tank S-535 stores hazardous wastes are legal conclusions to which no response is required.

32. The first sentence of Paragraph 32 of the Complaint states legal conclusions to which no response is required. ISP admits the factual allegations in the remainder of Paragraph 32 of the Complaint.

33. Paragraph 33 states legal conclusions to which no response is required.

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

34. Paragraph 34 of the Complaint purports to incorporate by reference Paragraphs 1 through 33 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 33 of the Complaint.

35. Paragraph 35 of the Complaint purports to summarize the requirements of 40 C.F.R. § 262.34(a)(1)(ii), which allegedly incorporates requirements in Subpart CC of 40 C.F.R. Part 265 ("Subpart CC"). In response, ISP states the referenced provision does not exist and did not exist at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. 85732, 85818 (Nov. 28, 2016), Item 31 ("Remove and reserve § 262.34"); *id.* at 85,732 ("This final rule [removing § 262.34] is effective on May 30, 2017"). Even if former 40 C.F.R. § 262.34 applies, it speaks for itself.

Paragraph 35 of the Complaint also purports to describe the requirements of 40 C.F.R. § 262.17(a)(2), which was promulgated by EPA in 2016. In response, ISP states that the referenced provision is moot, inasmuch as it is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. at 85,801 ("the [new generator] standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs"); 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts . . . received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"). Even if 40 C.F.R. § 262.17(a)(2) is relevant, it speaks for itself.

36. Paragraph 36 of the Complaint purports to summarize the requirements of § 265.1083(b) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

37. Paragraph 37 of the Complaint purports to describe the requirements of § 265.1085(c)(4) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

38. Paragraph 38 of the Complaint purports to describe the requirements of § 265.1089(a) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

39. Paragraph 39 of the Complaint purports to describe the requirements of § 265.1089(b) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

40. Paragraph 40 of the Complaint purports to describe the requirements of § 265.1090(a) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

41. Paragraph 41 of the Complaint purports to describe the requirements of § 265.1090(b) of Subpart CC. In response, ISP states that the referenced provision speaks for itself.

42. Paragraph 42 of the Complaint purports to describe what EPA inspectors observed. ISP lacks sufficient knowledge or information to admit or deny what EPA inspectors observed. Further, the allegation that the referenced tanks operate as hazardous waste storage tanks is a legal conclusion to which no response is required.

43. ISP lacks sufficient knowledge or information to admit or deny the factual allegations in Paragraph 43 of the Complaint.

44. Paragraph 44 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with Subpart CC "as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 35 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

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

45. Paragraph 45 of the Complaint purports to incorporate by reference Paragraphs 1 through 44 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 44 of the Complaint.

46. Paragraph 46 of the Complaint purports to summarize the requirements of 40 C.F.R. § 262.34(a)(1)(ii), which allegedly incorporates requirements in Subpart BB of 40 C.F.R. Part 265 ("Subpart BB"). In response, ISP states the referenced provision does not exist and did not exist at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. 85732, 85818 (Nov. 28, 2016), Item 31 ("Remove and reserve § 262.34"); *id.* at 85,732 ("This final rule [removing § 262.34] is effective on May 30, 2017"). Even if former 40 C.F.R. § 262.34 applies, it speaks for itself.

Paragraph 46 of the Complaint also purports to describe the requirements of 40 C.F.R. § 262.17(a)(2), which was promulgated by EPA in 2016. In response, ISP states that the referenced provision is moot, inasmuch as it is not in effect in Massachusetts and was not

effective within the Commonwealth at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg. at 85801 ("the [new generator] standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs"); 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts . . . received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"). Even if 40 C.F.R. § 262.17(a)(2) is relevant, it speaks for itself.

47. Paragraph 47 of the Complaint purports to describe the requirements of § 265.1050(c) of Subpart BB. In response, ISP states that the referenced provision speaks for itself.

48. Paragraph 48 of the Complaint contains legal conclusions, to which no response is required.

49. Paragraph 49 of the Complaint purports to describe what EPA inspectors observed. ISP lacks sufficient knowledge or information to admit or deny what EPA inspectors observed.

50. Paragraph 50 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with 40 C.F.R. § 265.1050(c) "as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 46 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

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

51. Paragraph 51 of the Complaint purports to incorporate by reference Paragraphs 1 through 50 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 50 of the Complaint.

52. Paragraph 52 of the Complaint purports to describe the requirements of 40 C.F.R. § 265.1052(a)(1). In response, ISP states that the referenced provision speaks for itself.

53. Paragraph 53 of the Complaint purports to describe the requirements of 40 C.F.R. § 265.1052(a)(2). In response, ISP states that the referenced provision speaks for itself.

54. Paragraph 54 of the Complaint purports to describe the requirements of 40 C.F.R. § 265.1057(a). In response, ISP states that the referenced provision speaks for itself.

55. Paragraph 55 of the Complaint purports to describe the requirements of 40 C.F.R. § 265.1058(a). In response, ISP states that the referenced provision speaks for itself.

56. Paragraph 56 of the Complaint contains legal conclusions, to which no response is required.

57. ISP admits the factual allegation in Paragraph 57 of the Complaint that, at the time of the inspection, it had no records of inspections or monitoring of the transfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds used to transfer materials to and from the Receiver Tanks, or the transfer hoses and valves used in the Pilot Plant to transfer materials to and from variously-sized reactor vessels. The allegations that the materials transferred using such equipment was "hazardous waste" are legal conclusions to which no response is required.

58. Paragraph 58 of the Complaint refers to a non-existent regulatory provision and is vague and ambiguous about the types of records to which it is referring. ISP therefore lacks

sufficient knowledge or information to form a belief as to the truth of the allegation in this paragraph.

59. Paragraph 59 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with Subpart BB of 40 C.F.R. Part 265 (including §§ 265.1052(a)(1) and (2), 265.1057(a), and 265.1058(a)) "as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 46 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

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

60. Paragraph 60 of the Complaint purports to incorporate by reference Paragraphs 1 through 59 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 59 of the Complaint.

61. Paragraph 61 of the Complaint (including its sub-paragraphs) purports to describe the requirements of 40 C.F.R. § 265.1056. In response, ISP states that the referenced provision speaks for itself.

62. Paragraph 62 of the Complaint states legal conclusions to which no response is required.

63. Paragraph 63 of the Complaint states legal conclusions to which no response is required. It is premised on the assumption that the lines listed in Paragraph 62 are "open-ended lines," which is a legal conclusion.

64. Paragraph 64 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with 40 C.F.R. § 265.1056(a)-(c) "as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 46 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

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

65. Paragraph 65 of the Complaint purports to incorporate by reference Paragraphs 1 through 65 of the Complaint. ISP assumes that EPA meant to refer instead to Paragraphs 1 through 64. In response, ISP hereby incorporates its responses to Paragraphs 1 through 64 of the Complaint.

66. Paragraph 66 of the Complaint (including its subparts) purports to describe the requirements of 40 C.F.R. § 265.1064(a). In response, ISP states that the referenced provision speaks for itself.

67. Paragraph 67 of the Complaint (including its subparts) purports to describe the requirements of 40 C.F.R. § 265.1064(b). In response, ISP states that the referenced provision speaks for itself.

68. Paragraph 68 of the Complaint (including its subparts) purports to describe the requirements of 40 C.F.R. § 265.1064(g). In response, ISP states that the referenced provision speaks for itself.

69. Paragraph 69 of the Complaint alleges that, at the time of the inspection, ISP had "no documentation" concerning some of the equipment described in Paragraph 21 of the

Complaint that were used to transfer hazardous waste. EPA's reference to "documentation" is vague and ambiguous, and so ISP lacks knowledge or information sufficient to admit or deny this allegation. EPA's characterization of the materials transferred using the specified equipment as "hazardous waste" is a legal conclusion to which no response is required.

70. Paragraph 70 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with 40 C.F.R. §§ 265.1064(a),(b), and (g) "as referenced by § 262.24(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 46 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

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

71. Paragraph 71 of the Complaint purports to incorporate by reference Paragraphs 1 through 70 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 70 of the Complaint.

72. Paragraph 72 of the Complaint purports to describe the requirements of 40 C.F.R. §§ 265.1063(a) and 265.1084(d). In response, ISP states that the referenced provisions speak for themselves.

73. Paragraph 73 of the Complaint purports to describe the requirements of Method 21, 41 C.F.R., Part 60, Appendix A ("Method 21"). In response, ISP states that the referenced method speaks for itself.

74. Paragraph 74 of the Complaint purports to describe the calibration standards under Method 21. In response, ISP states that the referenced method speaks for itself.

75. Paragraph 75 of the Complaint purports to describe the requirements of 40 C.F.R. §§ 265.1063(b)(4) and 265.1084(d). In response, ISP states that the referenced provisions speak for themselves.

76. ISP admits the factual allegations in the first sentence of Paragraph 76 of the Complaint, but notes that some of the information specified in that sentence was otherwise recorded. The second sentence of Paragraph 76 of the Complaint sets forth legal conclusions to which no response is required, except that ISP admits the allegation that the Facility's SOP and calibration records listed the calibration gas concentration in use at the Facility as 500 parts per million ("ppm"), and denies that such concentration is not less than 10,000 ppm. To the extent that a further response is required, ISP denies that it failed to use a "proper" concentration. The Company contends instead that use of a calibration gas concentration of 500 ppm is proper when done in the manner that the Facility did, and also meets the requirements of 40 C.F.R. §§ 265.1063(b)(4) and 265.1084(d), to the extent (if any) such provisions are applicable.

77. Paragraph 77 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP states that any requirement to comply with 40 C.F.R. §§ 265.1063(b)(4) and 265.1084(d) "as referenced by 40 C.F.R. § 264.32(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]" is inapplicable because, as explained in Paragraph 46 above, 40 C.F.R. § 262.34 does not exist and did not exist at any of the relevant times under the Complaint, and because 40 C.F.R. § 262.17(a)(2) is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint.

Count 8: Alleged Failure to Have an Adequate Training Program

78. Paragraph 78 of the Complaint purports to incorporate by reference Paragraphs 1 through 77 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 77 of the Complaint.

79. Paragraph 79 of the Complaint purports to describe the requirements of 310 C.M.R. §§ 30.516(1)-(2) and § 30.341(1)(a), which speak for themselves. To the extent that EPA alleges that the specified Massachusetts regulations require training to ensure compliance with "RCRA" (*i.e.*, the federal statute and/or regulations), ISP denies that allegation and states instead that the specified Commonwealth regulations require training to ensure compliance only with certain other Commonwealth regulations. Nothing in 310 C.M.R. §§ 30.516(1)-(2) and § 30.341(1)(a) requires training with respect to Subpart BB and CC (which are federal regulatory provisions).

Paragraph 79 of the Complaint also purports to describe the requirements of 40 C.F.R. § 262.17(a)(7), which was promulgated by EPA in 2016. In response, ISP states that the referenced provision is moot, inasmuch as it is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* 81 Fed. Reg.85732, 85801 (Nov. 28, 2016) ("the [new generator] standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs"); 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts ... received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"). Even if 40 C.F.R. § 262.17(a)(2) is relevant, it speaks for itself.

Paragraph 79 of the Complaint also purports to describe the requirements of 40 C.F.R. § 265.16. In response, ISP states that the referenced provision is moot, inasmuch as it is part of the base federal hazardous waste management program under RCRA, and Massachusetts has been authorized to implement its corresponding regulations in lieu of such federal RCRA regulations. *See, e.g.*, 75 Fed. Reg. at 35662 ("The Commonwealth of Massachusetts ... received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"); 42 U.S.C. § 6926(b) (authorized state regulations operate "in lieu of" the federal regulations). Even if 40 C.F.R. § 265.16 is relevant, it speaks for itself.

80. ISP lacks knowledge or information sufficient to admit or deny the factual allegations in the first two sentences of Paragraph 80 of the Complaint. ISP denies the allegation in the last sentence of Paragraph 80 of the Complaint.

81. Paragraph 81 of the Complaint states legal conclusions to which no response is required. To the extent that a response is required, ISP denies that any alleged failure to train employees with respect to Subparts BB and CC could have or would have constituted a violation of 310 C.M.R. § 30.516(1)-(2), as referenced by § 30.341(1)(a), because as noted in Paragraph 79 above, those Commonwealth provisions do not impose a training requirement with respect to the federal Subpart BB and CC regulations. ISP also denies that any alleged failure to train employees with respect to Subparts BB and CC could have or would have constituted a violation of 40 C.F.R. § 262.17(a)(7) or § 265.16 because, as also noted in Paragraph 79 above, those federal regulations are not in effect in Massachusetts and were not effective within the Commonwealth at any of the relevant times under the Complaint.

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

82. Paragraph 82 of the Complaint purports to incorporate by reference Paragraphs 1 through 81 of the Complaint. In response, ISP hereby incorporates its responses to Paragraphs 1 through 81 of the Complaint.

83. Paragraph 83 of the Complaint purports to describe the requirements of 310 C.M.R. § 30.696. In response, ISP states that the referenced provision speaks for itself.

84. Paragraph 84 of the Complaint purports to describe what EPA inspectors reviewed. ISP lacks sufficient knowledge or information to admit or deny what EPA inspectors reviewed. EPA's characterization of certain tanks as "hazardous waste tanks" is a legal conclusion to which no response is required.

85. Paragraph 85 of the Complaint purports to describe what the EPA inspectors found when reviewing inspection logs for Tank S-716A. In response, ISP lacks sufficient knowledge or information to admit or deny what EPA inspectors found.

86. Paragraph 86 of the Complaint states legal conclusions to which no response is required.

VI. EPA'S PROPOSED PENALTIES AND PAYMENT INSTRUCTIONS

87. The first sentence of Paragraph 87 of the Complaint purports to describe the requirements of Section 3008(a) of RCRA (42 U.S.C. § 6928). In response, ISP states that the referenced provision speaks for itself. ISP lacks knowledge or information sufficient to form a belief as to the truth of the allegation that Complainant has taken into account the particular facts and circumstances of this case with reference to EPA's RCRA Civil Penalty Policy dated June 2003 ("Penalty Policy"). ISP admits the allegation in the third sentence of Paragraph 87 of the Complaint that a copy of the Penalty Policy was enclosed with the Complaint. The fourth

sentence in Paragraph 87 of the Complaint purports to describe and characterize the Penalty Policy. In response, ISP states that the Penalty Policy speaks for itself.

88. The proposed penalties summarized in Paragraph 88 of the Complaint and the purported calculations of such penalties in Attachment 1 are conclusions of law that require no response. To the extent a response is required, ISP denies that the proposed penalties are appropriate or lawful, and denies that they were calculated in accordance with EPA's Penalty Policy or relevant federal statutory and regulatory provisions. To the extent Paragraph 88 and Attachment 1 reference factual allegations that appear elsewhere in the Complaint, ISP hereby incorporates its responses to those allegations.

89. Paragraph 89 of the Complaint purports to explain how to pay a penalty, and no response is required. Paragraph 89 of the Complaint also provides the mailing address for a check that is sent via regular mail, and no response is required.

90. Paragraph 90 of the Complaint provides the mailing address for a check that is sent via express mail, and no response is required.

91. Paragraph 91 of the Complaint provides the mailing address for mailing a notice of penalty payment and a copy of the check, and no response is required.

VII. PROPOSED COMPLIANCE ORDER

92. In response to Paragraph 92 of the Complaint, ISP admits that compliance is required with all *applicable* RCRA Subtitle C requirements, including *applicable* implementing regulations promulgated or authorized thereunder. ISP denies that all requirements cited in Paragraph 92 are legally applicable. ISP also denies that all of the Commonwealth regulations cited in Paragraph 92 have been authorized by EPA. The Agency lacks authority to order compliance with any regulations that are not applicable, or with any Commonwealth regulations

that are not part of Massachusetts' authorized hazardous waste program. To the extent that Paragraph 92 directs ISP to take the actions required by Paragraphs 93 through 102 of the Complaint, the Company hereby incorporates by reference, as if fully set forth herein, its responses to Paragraphs 93 through 102 of the Complaint.

93. In response to Paragraph 93 of the Complaint, ISP denies that 310 C.M.R. § 30.343(1) is part of the Commonwealth's authorized RCRA program. Thus, EPA lacks authority to order compliance with that provision or any of the other Commonwealth regulations referenced by that provision.

94. In response to Paragraph 94 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks authority to order compliance with those provisions or any of the other regulations referenced by those provisions. Further, ISP states that EPA lacks authority to impose any hazardous waste requirements on the Receiver Tanks mentioned in Paragraph 94, because such tanks are exempt from hazardous waste regulation.

95. In response to Paragraph 95 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks

authority to order compliance with those provisions or any of the other regulations referenced by those provisions.

96. In response to Paragraph 96 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks authority to order compliance with those provisions or any of the other regulations referenced by those provisions.

97. In response to Paragraph 97 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks authority to order compliance with those provisions or any of the other regulations referenced by those provisions.

98. In response to Paragraph 98 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks authority to order compliance with those provisions or any of the other regulations referenced by those provisions.

99. In response to Paragraph 99 of the Complaint, ISP denies that it is subject to 40 C.F.R. § 262.34, inasmuch as that provision does not exist and did not exist at any of the relevant times under the Complaint. ISP also denies that it is subject to 40 C.F.R. § 262.17(a)(2), inasmuch as that provision is not in effect in Massachusetts and was not effective within the Commonwealth at any of the relevant times under the Complaint. Accordingly, EPA lacks authority to order compliance with those provisions or any of the other regulations referenced by those provisions.

100. In response to Paragraph 100 of the Complaint, ISP denies that 310 C.M.R. § 30.343(1) is part of the Commonwealth's authorized RCRA program. Thus, EPA lacks authority to order compliance with that provision or any of the other Commonwealth regulations referenced by that provision. ISP also denies that 40 C.F.R. § 265.16 applies within Massachusetts. Thus, EPA lacks authority to order compliance with that provision.

101. In response to Paragraph 101 of the Complaint, ISP denies that 310 C.M.R. § 30.343(1) is part of the Commonwealth's authorized RCRA program. Thus, EPA lacks authority to order compliance with that provision or any of the other Commonwealth regulations referenced by that provision.

102. In response to Paragraph 102 of the Complaint, ISP denies that tanks and equipment associated with the Cryogenic Condensation Vapor Recovery Units ("VRUs") at the Facility are subject to the cited regulations because such tanks and equipment are not managing hazardous wastes and/or are otherwise excluded or exempt from hazardous waste regulation. In addition, the VRU tanks and equipment are not subject to Subparts BB and CC, because there are no federal or state regulations currently in effect in Massachusetts that make those subparts applicable to hazardous waste generators. Thus, EPA lacks authority to order the actions

specified in Paragraph 102. To the extent that Paragraph 102 directs ISP to achieve and maintain compliance as required by Paragraphs 93 through 101 of the Complaint, the Company hereby incorporates by reference, as if fully set forth herein, its responses to Paragraphs 93 through 101 of the Complaint.

103. Paragraph 103 of the Complaint orders ISP to submit to EPA written confirmation of its compliance or noncompliance with Paragraphs 93 through 102 of the Complaint. In response, ISP states that the Agency lacks authority to order the actions specified in Paragraphs 93 through 102 of the Complaint, for the reasons set forth in Paragraphs 93 through 102 of this Answer (which are hereby incorporated by reference, as if fully set forth herein). Accordingly, the Agency also lacks authority to order ISP to submit confirmation of its compliance or noncompliance with Paragraphs 93 through 102 of the Complaint (and it would make no sense to require confirmation of compliance or noncompliance with requirements that do not apply).

104. Paragraph 104 of the Complaint specifies where certain information and notices should be submitted, and it requires no response. ISP also notes that, to the extent that EPA cannot require the referenced information and/or notices, Paragraph 104 would have no effect.

105. Paragraph 105 of the Complaint purports to characterize a provision of RCRA. In response, ISP states that the referenced provision speaks for itself.

106. Paragraph 106 of the Complaint purports to characterize various federal statutory and regulatory previsions, which speak for themselves.

DEFENSE # 2

The Complaint fails to identify the equipment alleged to be subject to and in violation of federal and state hazardous waste regulations with sufficient particularity to enable ISP to respond fully to the allegations, in violation of RCRA § 3008(a)(3), 42 U.S.C. § 6928(a)(3)

(stating that RCRA penalty and compliance orders must "state with reasonable specificity the nature of the [alleged] violation"). Similarly, the Complaint fails to specify the purported basis for EPA's allegations that such equipment is or was subject to and in violation of the hazardous waste regulations with sufficient particularity to enable ISP to respond fully. Therefore, ISP reserves the right to supplement and/or modify this Answer if and when EPA provides more detail regarding its allegations and its purported basis. If EPA fails to provide such additional information but nevertheless proceeds with this matter, ISP's right to due process under the U.S. Constitution will be violated.

DEFENSE # 3

The regulatory section that EPA cites as the cornerstone of most of its allegations, *i.e.*, 40 C.F.R. § 262.34, does not exist and did not exist at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). *See* Complaint, Paragraphs 35, 44, 46, 50, 59, 64, 70, and 77 (stating that the Subpart BB and CC provisions addressed in Counts 2 through 7 apply to hazardous waste generators *by operation of 40 C.F.R. § 262.34*). Section 262.34 was deleted from the RCRA regulations effective on May 30, 2017 – before EPA's inspection of the ISP Facility. *See* 81 Fed. Reg. 85732, 85818 (Nov. 28, 2016), Item 31 ("Remove and reserve § 262.34"); *id.* at 85732 ("This final rule [removing § 262.34] is effective on May 30, 2017"). Accordingly, none of the Counts based on 40 C.F.R. § 262.34 state a claim upon which relief may be granted.

Although the former regulatory provision that EPA cites as the cornerstone of most of its allegations, 40 C.F.R. § 262.34, has been replaced with a new provision in 40 C.F.R. § 262.17, that new provision is not yet applicable in Massachusetts; thus, it cannot serve as the basis for EPA's allegations. As EPA itself explained in the preamble to the rule establishing the new

provision, "the [new generator] standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs." *See* 81 Fed. Reg. at 85801. Massachusetts has such an authorized base RCRA program. *See, e.g.*, 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts ... received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"). Accordingly, new Section 262.17 cannot serve as the basis for EPA's allegations and proposed compliance obligations. Once again, none of the Counts based on 40 C.F.R. § 262.34 (*e.g.*, Counts 2 through Count 7) state a claim upon which relief may be granted.

DEFENSE # 4

EPA lacks authority to enforce the Massachusetts regulations for hazardous waste generators, which form the basis of Counts 1, 8, and 9 of the Complaint. The Agency has never determined that such state regulations are equivalent to, consistent with, and at least as stringent as the current federal regulations for hazardous waste generators and has never granted Massachusetts authorization for the state rules on that basis. *See* RCRA § 3006(b), 42 U.S.C. § 6926(b) (providing that states may be granted authorization only if their hazardous waste programs are equivalent to and consistent with the federal program); RCRA § 3009, 42 U.S.C. § 6929 (providing that authorized state programs generally must be at least as stringent than the federal program). Although EPA previously authorized the Massachusetts generator rules based on earlier federal regulations, the federal regulations that formed the basis for the previous authorization no longer exist; thus, the prior authorization is now without legal foundation. *See* 81 Fed. Reg. 85732, 85818, Item 31 ("Remove and reserve § 262.34").

DEFENSE # 5

To the extent any Subpart BB or Subpart CC regulations may still be relevant, Tank S-716A and its ancillary equipment are exempt from hazardous waste regulation under 40 C.F.R. Part 265 (including but not limited to Subparts BB and CC) by virtue of the so-called "wastewater treatment unit exemption." In particular, Tank S-716A qualifies as a wastewater treatment unit ("WWTU"), inasmuch as it is a tank, part of a wastewater treatment facility subject to regulation under the Clean Water Act, and engaged in one of the activities covered by the WWTU definition (*i.e.*, storage of a wastewater treatment sludge). *See* 40 C.F.R. § 260.10 (defining a wastewater treatment unit). As a WWTU, Tank S-716A is exempt from regulation under 40 C.F.R. Part 265. *See* 40 C.F.R. § 265.1(c)(10). In addition, the ancillary equipment associated with Tank S-716A is covered by the WWTU exemption; thus, it is also exempt from regulation under Part 265. *See* 40 C.F.R. § 260.10 (defining WWTUs to include both tanks and "tank systems," and defining a tank system as a tank together its ancillary equipment); *see also* 53 Fed. Reg. 34079, 34080 (Sept. 2, 1988) ("if a wastewater treatment [tank] is not subject to the RCRA Subtitle C hazardous waste management standards, the ancillary equipment connected to the exempted [tank] is likewise not subject to the Subtitle C standards").

Because Tank S-716A and its ancillary equipment are not subject to the requirements of Part 265, EPA's allegations (*e.g.*, in Counts 2, 3, 5, and 9) that the tank and/or the ancillary equipment were in non-compliance with such requirements are without foundation, and those allegations fail to state a claim upon which relief may be granted.

DEFENSE # 6

To the extent that EPA is alleging that ISP failed to operate the tanks and equipment associated with the Facility's Cryogenic Vapor Recovery Units ("VRUs") in accordance with

federal or state hazardous waste requirements, or is seeking to require that such tanks and equipment be operated in accordance with hazardous waste requirements (*e.g.*, through Paragraph 102 of the Agency's proposed Compliance Order), such allegations and requirements have no foundation and cannot be sustained, because the tanks and equipment are not managing hazardous wastes and/or are otherwise excluded or exempt from hazardous waste regulation.

The VRU organics tanks (and their associated equipment) are not managing solid wastes, much less hazardous wastes, because the Facility's Clean Air Act ("CAA") permit requires the materials stored in such tanks to be retained until the tanks are full and the contents have been weighed, sampled, and analyzed to ensure permit compliance. *See, e.g.*, Memorandum from Barnes Johnson, Director, Office of Resource Conservation and Recovery, EPA, to EPA RCRA Regional Directors, *et al.* (June 23, 2017) (RCRA Online #14893) ("EPA does not consider [materials] ... to be 'discarded' and therefore subject to the hazardous waste regulations while they are being stored pending ... investigations"); 83 Fed. Reg. 61552, 61556 (Nov. 30, 2018) (discussing and reaffirming this guidance).

The VRU decanter tanks (and their associated equipment) are similarly not subject to hazardous waste regulation because the CAA permit requires that the materials going to these tanks be decanted so that the organic portion can be routed to the VRU organics tanks for inclusion in the same weighing, sampling, and analysis process discussed above. The VRU aqueous tanks (and their associated equipment) manage the water decanted from the materials in the decanter tanks, but are exempt from hazardous waste regulation by virtue of the WWTU exemption discussed above in the context of Tank S-716A.

In addition, all of these tanks (and their associated equipment) are integral to the Facility's air pollution control ("APC") system, such that the materials they manage are not

subject to hazardous waste regulation until they exit the tanks. *See, e.g.*, Letter from Elizabeth A. Cotsworth, Acting Director, Office of Solid Waste, EPA, to William M. Guerry, Jr. (June 1, 1998) (RCRA Online #14200) (explaining that a storage silo that receives APC dust from an adjacent baghouse via piping, holds the dust for a limited amount of time, and contains the dust against releases into the environment is "an integral part of the ... emission control system," and thus "the applicability of RCRA [is] determined when the material is removed from the silos").

DEFENSE # 7

EPA was notified of ISP's position that the VRU tanks and their associated equipment are not subject to hazardous waste regulation at least as early as 2009, and has never disputed this position – even in a Notice of Violation issued to the Company a few months after being notified. *See, e.g.*, Letter from Eric R. Morin, Environmental Manager, ISP Freetown, to Richard W. Hull, Environmental Engineer, EPA Region 1 (Jan. 23, 2009) (stating that the VRU tanks "are an integral part of the air pollution control [system] and ... [are] not subject to the storage or tank requirements of RCRA"); Letter from John Kilborn, Acting Chief, RCRA, EPCRA, and Federal Programs Unit, EPA Region 1, to Eric Morin, Environmental Manager, ISP (Nov. 30, 2009) (lacking mention of the VRU tanks or their associated equipment in the Notice of Violation). It would be manifestly unfair, and a violation of due process, for the Agency, after all this time, to now assert that these tanks and their associated equipment have been subject to hazardous waste regulation all along and to seek penalties from ISP for operating such tanks/equipment in the same way that EPA has acquiesced to for over a decade. EPA is barred from pursuing penalties and/or issuing a compliance order with respect to the VRU tanks and associated equipment under the doctrines of waiver, estoppel, and laches.

DEFENSE # 8

Because EPA has not alleged that the VRU tanks and/or their associated equipment were in non-compliance with any hazardous waste regulatory requirements, the Agency has no basis upon which to order in Paragraph 102 of the Compliance Order that such tanks or equipment be operated in accordance with the hazardous waste regulations. *See* RCRA § 3008(a)(1), 42 U.S.C. § 6928(a)(1) ("*whenever ... the Administrator determines that any person has violated or is in violation of any requirement* ... the Administrator may issue an order ... requiring compliance" (emphasis added)).

DEFENSE # 9

To the extent that the Receiver Tanks may contain hazardous wastes, such tanks and their ancillary equipment are exempt from hazardous waste regulation by virtue of the Manufacturing Process Unit ("MPU") exemption, which provides that hazardous wastes generated within an MPU are exempt from regulation until they exit the unit in which they were generated (or until the MPU ceases to be used for manufacturing purposes for more than 90 days). *See* 40 C.F.R. § 261.4(c); 310 C.M.R. 30.140(1)(f). The Receiver Tanks qualify as MPUs because they serve to initially and immediately collect condensed vapors within product manufacturing units and are integral parts of such units. *See, e.g.*, 45 Fed. Reg. 72024, 72025 (Oct. 30, 1980) ("EPA did not intend to regulate ... manufacturing process units in which hazardous wastes are generated ... *e.g.*, distillation units"); 55 Fed. Reg. 25454, 25471 (June 21, 1990) ("a hazardous waste distillation [unit] ... includes ... distillate receivers"); 40 C.F.R. § 63.101 (defining a "chemical manufacturing process unit" as "the equipment assembled and connected by pipes or ducts to process raw materials and to manufacture an intended product," including specifically "distillation units *and their associated distillate receivers*" (emphasis added)).

Indeed, if there were no Receiver Tanks within the production units, or if the structural integrity of the Receiver Tanks was compromised, the production operations could not take place. *See* 45 Fed. Reg. at 72,025 (justifying the MPU exemption on the ground that operators of MPUs have "[an] incentive to maintain the integrity of the unit to prevent leaks or other unintended release of products, raw materials or manufacturing intermediates into the environment"). In addition, all of the Receiver Tanks at the ISP Facility are used or are capable of being used to charge raw materials into the production reactor vessels and/or to collect valuable materials from such vessels for subsequent use.

As MPUs, the Receiver Tanks and their ancillary equipment are exempt from hazardous waste regulation. Thus, EPA's allegations (*e.g.*, in Counts 1 through 4, and 6) that the Receiver Tanks and/or their ancillary equipment were in non-compliance with various hazardous waste regulations are without foundation, and those allegations fail to state a claim upon which relief may be granted.

DEFENSE # 10

EPA's allegations (*e.g.*, in Counts 3, 4, and 6) regarding equipment used in the Pilot Plant "to transfer hazardous waste to and from variously-sized reactor vessels" are without foundation because hazardous wastes are generally not transferred to and from reactor vessels, and in any event such reactor vessels and their associated equipment qualify as exempt MPUs.

DEFENSE # 11

To the extent that EPA may be alleging (*e.g.*, in Counts 3, 4, or 6) that equipment used to transfer hazardous wastes to and from *receivers* in the Pilot Plant – or such receivers themselves – were in non-compliance with hazardous waste regulatory requirements, such allegations are without foundation because such equipment (and tanks) qualify as exempt MPUs. In addition,

none of the equipment in the Pilot Plant is associated with any of the types of units that could potentially trigger Subpart BB regulation, *i.e.*, units subject to hazardous waste permitting, units located at a facility subject to permitting, or a 90-day tank or container. *See* 40 C.F.R. § 265.1050(b) (limiting the applicability of Subpart BB to equipment associated with these three types of units). The Facility and its components are not subject to hazardous waste permitting. Although materials are transferred from the receivers to containers within the Pilot Plant, the equipment involved in such transfers are not subject to Subpart BB, even if the materials qualify as hazardous wastes. As EPA itself has stated, "[c]ontainers in SAAs [*i.e.*, satellite accumulation areas where hazardous wastes are initially accumulated near the point of generation, such as in the Pilot Plant] are not required to comply with the air emission standards of Part 265 Subparts AA, BB, and CC. ... LQGs [*i.e.*, Large Quantity Generators], however, are required to comply with the RCRA air emission standards *at their 90-day accumulation areas*. Therefore, when an LQG transfers waste from an SAA to a 90-day central accumulation area, the applicable portions of the air emission standards of Part 265 Subparts AA, BB, and CC must be met *at the 90-day central accumulation area*." *See* Memorandum from Robert Springer, Director, Office of Solid Waste, EPA, to RCRA Directors, EPA Regions 1-10 (Mar. 17, 2004) (RCRA Online #14703) (emphases added)).

DEFENSE # 12

To the extent that any equipment at the Facility contained or contacted hazardous waste with greater than 10 percent organics, it did so for less than 300 hours per calendar year; thus, it was generally exempt from Subpart BB requirements. *See* 40 C.F.R. § 265.1050(e). Under the Facility's "clean as you go" policy and practice, such equipment is generally used for only very brief periods of time, after which residues are immediately removed, for example by flushing

with hot water or purging with nitrogen. Such practices effectively ensure that the 300-hour time limit for exemption is not exceeded.

DEFENSE # 13

Tank S-535 at the Facility has routinely been inspected by ISP (*e.g.*, for damaged, leaking, or inoperative vents, valves, or piping joints that could potentially result in air emissions), and such inspections have been documented. Accordingly, EPA lacks a factual basis upon which to determine that the Company failed to inspect, monitor, and document inspections of Tank S-535, as alleged in Count 2 of the Complaint.

DEFENSE # 14

To the extent that any equipment is subject to the requirement in Subpart BB for marking to distinguish the equipment from other equipment at the Facility, ISP has been using a tagless system commonly used throughout industry that provides such markings. Accordingly, EPA lacks a factual basis upon which to determine that the Company failed to mark the equipment, as alleged in Count 3 of the Complaint.

DEFENSE # 15

The Facility's use of a calibration gas with a methane concentration of 500 parts per million ("ppm") was proper, consistent with regulatory requirements, and substantially more protective of human health and the environment than required. By using a 500 ppm calibration gas and using 500 ppm as the relevant "leak definition" (*i.e.*, having a policy of handling any releases measured to be greater than 500 ppm as leaks requiring repair under Subparts BB and CC), ISP was ensuring that even very slight releases would be remedied. In contrast, the Subpart BB and CC regulations require remedial action only when much more substantial releases occur, by allowing use of calibration gases and leak definitions up to 10,000 ppm. *See, e.g.*, 40 C.F.R.

§ 265.1063(b)(4) (calibration gas for Subpart BB); §§ 265.1052(b)(1), 265.1057(b), and 265.1058(b) (leak definitions for Subpart BB); § 265.1084(d)(5) (calibration gas for Subpart CC); §§ 265.1084(d)(9) (leak definition for Subpart CC). Because the Facility used a calibration gas that was consistent with regulatory requirements and, in fact, substantially more protective than required, EPA's allegation in Count 7 of the Complaint that the calibration gas was "improper" and in non-compliance with regulatory requirements is without foundation.

DEFENSE # 16

The Massachusetts regulations upon which Count 8 is based, *i.e.*, 310 C.M.R. §§ 30.516(1)-(2) and 30.341(1)(a), do not require that employees be trained with respect to compliance with Subparts BB and CC of 40 C.F.R. Part 265. Accordingly, EPA's allegation in Count 8 that ISP violated the specified regulations by not training employees with respect to Subparts BB and CC is without foundation, and Count 8 fails to state a claim upon which relief may be granted.

The federal regulatory provisions cited in Count 8 also cannot serve as a basis for EPA's allegations, because they are not in effect in Massachusetts and were not effective within the Commonwealth at any of the relevant times under the Complaint (*e.g.*, at the time of the August 1, 2017 inspection). One of these provisions, 40 C.F.R. § 265.16, is part of the base federal hazardous waste management program under RCRA, and Massachusetts has been authorized to implement its corresponding regulations in lieu of such federal RCRA regulations. *See, e.g.*, 75 Fed. Reg. 35660, 35662 (June 23, 2010) ("The Commonwealth of Massachusetts ... received Final Authorization on January 24, 1985, effective February 7, 1985 (50 FR 3344), to implement its base hazardous waste management program"); 42 U.S.C. § 6926(b) (authorized state regulations operate "in lieu of" the corresponding federal regulations). The other referenced

federal provision, 40 C.F.R. § 262.17(a)(7), was promulgated by EPA in 2016 as part of a rule that EPA explicitly stated "will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs." 81 Fed. Reg. 85732, 85801 (Nov. 28, 2016). Since Massachusetts has received final authorization for its base hazardous waste program, 40 C.F.R. § 262.17(a)(7) is not yet effective with the Commonwealth. Accordingly, neither 40 C.F.R. § 265.16 nor 40 C.F.R. § 262.17(a)(7) can serve as the basis for EPA's allegations in Count 8 and the proposed compliance obligations in Paragraph 100 of the Complaint. Count 8 does not state a claim upon which relief may be granted.

DEFENSE # 17

The ISP employees assigned to perform all Subpart BB leak detection monitoring and Subpart CC monitoring have been and continue to be trained with respect to the relevant RCRA requirements. EPA lacks a factual basis upon which to determine that ISP failed to ensure that its employees were adequately trained in this regard, as alleged in Count 8.

DEFENSE # 18

To the extent that EPA is alleging that units or materials excluded or exempted from federal hazardous waste regulation are in non-compliance with the Massachusetts hazardous waste regulations, or is seeking to require that such units or materials be operated or managed in accordance with the Commonwealth's regulations, the Agency is precluded from doing so, since such Commonwealth regulations – to the extent, if any, that they reach to units or materials not subject to federal regulation – are not part of the authorized hazardous waste program and thus are not enforceable by EPA. *See, e.g.*, 40 C.F.R. § 271.1(i)(2) ("Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program"); Memorandum from William A. Sullivan, Jr.,

Enforcement Counsel, EPA, to EPA Regional Administrators, Regions I-X, *et al.* (Mar. 15, 1982) (RCRA Online #12046) ("State program requirements that are greater in scope of coverage than the federal program are not a part of the federally-approved program ... Therefore, EPA may not enforce that portion of a state program which is broader in scope of coverage than the federal program.").

DEFENSE # 19

To the extent that EPA is alleging that ISP was in non-compliance with recordkeeping or reporting requirements under the Massachusetts hazardous waste regulations, the Agency lacks authority to enforce such Commonwealth requirements because EPA failed to comply with the requirements of the Paperwork Reduction Act ("PRA") with respect to the Massachusetts requirements or the federal authorization rules purporting to make the Commonwealth requirements part of the federally enforceable RCRA program. For example, EPA did not submit the Massachusetts requirements or the federal authorization rules to the Office of Management and Budget ("OMB"), obtain OMB control numbers, or display the control numbers in association with the authorization rules. The "Public Protection" provision of the PRA states – "[n]otwithstanding any other provision of law" – that "no person shall be subject to any penalty for failing to comply with a collection of information that ... does not display a valid [OMB] control number." *See* 44 U.S.C. § 3512. Accordingly, EPA cannot penalize ISP for any alleged violation of the Massachusetts recordkeeping or reporting requirements.

DEFENSE # 20

Certain of the federal and Commonwealth regulations were unlawfully vague and failed to provide ISP with adequate notice of its compliance obligations. Given the uncertainty in these regulations, ISP acted with a reasonable belief that its actions were lawful. Accordingly, EPA

cannot penalize ISP for alleged violations of these regulations. *See, e.g., Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n,* 528 F.2d 645, 649 (5th Cir.1976) (an agency cannot enforce standards unless it has "state[d] with ascertainable certainty what is meant by the standards"); *General Electric Co. v. U.S. EPA,* 53 F.3d 1324, 1333-34 (D.C.Cir.1995) (where "EPA did not provide [a company] with fair warning of its interpretation of the regulations . . . [it] may not hold [the company] responsible in any way"); *U.S. v Lachman,* 387 F.3d 42, 57 (1st Cir. 2004) (an agency "may fail to give sufficient fair notice to justify a penalty if the regulation is so ambiguous that a regulated party cannot be expected to arrive at the correct interpretation using standard tools of legal interpretation, must therefore look to the agency for guidance, and the agency failed to articulate its interpretation before imposing a penalty"); *In the Matter of R.R. Donnelley & Sons Co.,* No. V-W-004-95, 1996 EPA ALJ Lexis 63, (Dec. 16, 1996) (holding that adequate fair notice of covered conduct is required in order for civil penalties to be imposed, and declining to find such notice where it was not "obvious" in the language of the relevant regulations).

DEFENSE # 21

Because EPA's June 7, 2019 Amended Complaint alleges violations of RCRA regulatory provisions that were not alleged in its original Complaint of September 25, 2018, the Agency was required by law to provide the Commonwealth of Massachusetts notice prior to doing so (and prior to issuing an order to comply with such regulatory provisions). *See* RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2) ("In the case of a violation of any requirement of [RCRA] ... in a State which is authorized to carry out a hazardous waste program ... the Administrator shall give notice to the State ... prior to issuing an order or commencing a civil action"). To the

extent that EPA failed to provide such advance notice, the allegations added in the Amended Complaint cannot stand.

DEFENSE #22

ISP acted in good faith at all times and all places covered by the Complaint.

DEFENSE # 23

ISP's actions at all time and all places covered by the Complaint were protective of human health and the environment.

DEFENSE # 24

The proposed penalties are inconsistent with the intent of RCRA, the penalty assessment guidelines set forth in 42 U.S.C. § 6928(a)(3), EPA's RCRA Penalty Policy, and sound environmental enforcement policy.

DEFENSE # 25

The proposed penalties are inappropriate, unlawful, and excessive as the result of EPA's improper calculation of the alleged potential for harm, alleged extent of deviation from requirements, and days of alleged violation.

DEFENSE # 26

In calculating the proposed penalties, EPA has failed to include an adequate downward adjustment to properly account for ISP's good faith.

DEFENSE # 27

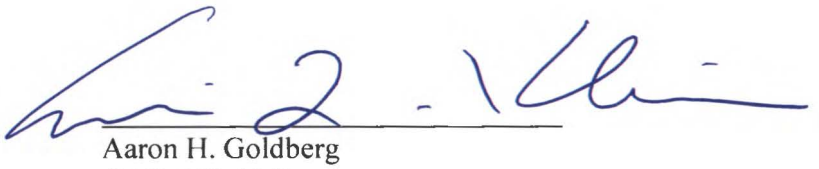
In calculating the proposed penalties, EPA has failed to include a downward adjustment to reflect ISP's lack of willfulness and/or negligence.

REAFFIMATION OF REQUEST FOR A HEARING

In ISP's Unopposed Motion for Extension of Time to File Answer, dated October 23, 2018, the Company requested a hearing on all contested issues of fact and law raised in the Complaint and on the propriety and magnitude of the proposed civil penalty and the actions requested by EPA under the proposed Compliance Order. ISP hereby reaffirms this request. However, ISP respectfully requests that the scheduling of the hearing be delayed until one or both parties move for scheduling of the hearing, so as to provide the parties additional time to try to reach a mutually agreeable resolution, which would serve the interest of judicial economy and enable the parties to avoid a potentially unnecessary expenditure of time and resources.

DATED: June 25, 2019

Respectfully submitted,



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Counsel for Respondent
ISP Freetown Fine Chemicals, Inc.

CERTIFICATE OF SERVICE

I certify that the foregoing Motion of Respondent ISP Freetown Fine Chemicals, Inc. to Dismiss Counts Two Through Eight for Failure to State a Claim and the Memorandum in Support of that Motion were served this 25 day of June, 2019, in the following manner on the addressees listed below:

Original and one copy by FedEx and copy by email to:	Wanda I. Santiago Regional Hearing Clerk U.S. Environmental Protection Agency, Region 1 5 Post Office Square Suite 100, Mail Code ORC 04-6 Boston, MA 02109-3912 santiago.wanda@epa.gov
Copy by FedEx and copy by email to:	Attorney for Complainant Audrey Zucker Enforcement Counsel U.S. Environmental Protection Agency, Region 1 5 Post Office Square Suite 100, Mail Code ORC 04-2 Boston, MA 02109-3912 zucker.audrey@epa.gov
Copy by FedEx and copy by email to:	LeAnn Jensen Regional Judicial Officer U.S. Environmental Protection Agency, Region 1 5 Post Office Square Suite 100, Mail Code ORC04-6 Boston, MA 02109-3912 jensen.leann@epa.gov

(Signature on following page)

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Counsel for Respondent
ISP Freetown Fine Chemicals, Inc.

Dated: June 25, 2019

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

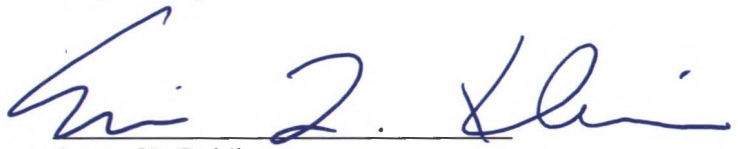
In the Matter of: ISP Freetown Fine Chemicals, Inc. MAR000009605 Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, U.S.C. § 6928(a)	Docket No. RCRA-01-2018-0062

RESPONDENT'S MOTION TO DISMISS
COUNTS TWO THROUGH EIGHT FOR FAILURE TO STATE A CLAIM

Respondents ISP Freetown Fine Chemicals, Inc., pursuant to 40 C.F.R. §§ 22.16 and 22.20 of the Consolidated Rules of Practice, respectfully requests that Counts Two through Eight of the Amended Complaint in this matter be dismissed with prejudice for reasons detailed in the attached Memorandum In Support Of Respondent's Motion To Dismiss Counts Two Through Eight for Failure to State a Claim.

DATED: June 25, 2019

Respectfully submitted,



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