UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109-3912

BY OVERNIGHT MAIL

July 25, 2019

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Rm M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

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

Dear Ms. Angeles:

Enclosed please find for filing in the above-referenced matter the original and one copy of:

1. Complainant's Motion to Strike the Third and Sixteenth Defenses From Respondent's Answer;
2. Complainant's Response to Respondent's Motion to Dismiss Counts Two Through Eight for Failure to State a Claim and Memorandum in Support of Complainant's Motion to Strike Defenses
3. Certificate of Service.

Thank you for your assistance in this matter.

Very truly yours,

Audrey Zucker, Esq.

Enclosures a/s

cc: Aaron H. Goldberg, Beveridge & Diamond, P.C.

Docket No. RCRA-01-2018-0062

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Motion to Strike the Third and Sixteenth Defenses From Respondent's Answer together with Complainant's Response to Respondent's Motion to Dismiss Counts Two Through Eight for Failure to State a Claim and Memorandum in Support of Complainant's Motion to Strike Defenses, both dated July 25, 2019, were sent this day to the following parties in the manner indicated below:

Original and One Copy by Overnight Mail to:

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Ronald Reagan Building, Rm. M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Copy by Electronic and Regular Mail to:

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Audrey Zucker

Audrey Zucker, Esq.
U.S. Environmental Protection Agency
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

Dated: July 25, 2019

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of:	)	
ISP Freetown Fine Chemicals, Inc. 238 South Main Street Assonet, MA 02702-1699	)	Docket No. RCRA-01-2018-0062
MAR000009605	)	
Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)	)	

COMPLAINANT'S MOTION TO STRIKE THE THIRD AND SIXTEENTH DEFENSES FROM RESPONDENT'S ANSWER

Pursuant to Rules 22.16 and 22.20 of the Consolidated Rules of Practice, 40 C.F.R. §§ 22.16 and 22.20, Complainant hereby moves to strike Defenses No.'s 3 and 16 from Respondent's Answer for the reasons set forth in Complainant's Response to Respondent's Motion to Dismiss Counts Two Through Eight For Failure to State a Claim and Memorandum in Support of Motion to Strike Defenses.

Respectfully submitted,

Audrey Zucker, Esq.
U.S. Environmental Protection Agency
Region 1
5 Post Office Square, Suite 100
Boston, MA 02109

Peter J. Raack, Esq.
Office of Enforcement and Compliance Assurance
Mail Code 2249A
1200 Pennsylvania Ave., NW
Washington, DC 20460

Dated: July 25, 2019

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1

In the Matter of:	
ISP Freetown Fine Chemicals, Inc. 238 South Main Street Assonet, MA 02702-1699	Docket No. RCRA-01-2018-0062
MAR000009605	
Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)	

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS COUNTS TWO THROUGH EIGHT FOR FAILURE TO STATE A CLAIM
AND
MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE DEFENSES

Complainant files this Response Memorandum to Respondent's June 25. 2019, motion to dismiss. Because Respondent's arguments also comprise the substance of Respondent's third and sixteenth defenses in the Answer and the parties have substantively briefed the merit of the issues, Complainant moves to strike these defenses as they are unable as a matter of law to defeat the claims in the Amended Complaint. This Memorandum is also submitted in support of that motion.

Respondent's motion to dismiss is premised on two arguments, both of which have no merit. First, Respondent claims that, as a matter of law, it was not subject to the Resource Conservation and Recovery Act ("RCRA") air emission requirements at the time of the inspection because, when EPA issued its Generator Improvement Rule ("GIR") in 2016, language in the preamble to the Rule caused the RCRA air emission requirements to become no longer applicable in the Commonwealth of Massachusetts ("Commonwealth" or "Massachusetts"). Second, Respondent

claims that, as a matter of law, it was not subject to RCRA training requirements with respect to RCRA air emission requirements because neither federal nor state law require such training. As shown below, Complainant's Amended Complaint clearly sets forth claims upon which relief may be granted, and Respondent is incorrect that the specified requirements of RCRA are inapplicable and unenforceable as a matter of law. Therefore, Respondent's motion must be denied and the defenses premised upon these arguments (Resp. Answer, third and sixteenth defenses) should be struck from the Answer.

I. Summary of Amended Complaint and RCRA Requirements

The Amended Complaint includes the following nine counts:

Count 1: Failure to Comply with Standard for the Storage of Hazardous Waste in Tanks
Count 2: Failure to Comply with Hazardous Waste Tank Air Emission Standards (Subpart CC)
Count 3: Failure to Comply with Hazardous Waste Air Emission Standards for Labeling Subpart BB Equipment (Subpart BB)
Count 4: Failure to Comply with Hazardous Waste Air Emission Standards for Monitoring Valves in Light Liquid and Gas/Vapor Service, Pumps and Flanges (Subpart BB)
Count 5: Failure to Comply with Hazardous Waste Air Emission Standards for Open-Ended Valves and Lines (Subpart BB)
Count 6: Failure to Comply with Hazardous Waste Air Emission Standards for Maintaining Records (Subpart BB)
Count 7: Failure to Comply with Subparts BB and CC Air Monitoring Methods
Count 8: Failure to Have an Adequate Training Program
Count 9: Failure to Conduct and Document Daily Inspections of Hazards Waste Tanks.

Complainant seeks of total penalty of $203,792 from Respondent and a compliance order to ensure compliance with the requirements of the alleged violations.

As set forth in the Amended Complaint, Respondent operates a facility located in the Commonwealth, where it manufactures various polymers used in health and beauty products. Respondent generates hazardous waste and accumulates such waste at its facility for 90 days or less, without a permit, and stores the waste in tanks. On or about January 29, 1998, Respondent submitted a Notice of Hazardous Waste Activity to the Commonwealth identifying itself as a

large quantity generator ("LQG") of hazardous waste.

Consistent with Section 3006 of RCRA, 42 U.S.C. § 6926, EPA has authorized the Commonwealth's hazardous waste program to operate in lieu of the federal program. *See* 75 Fed. Reg. 35660, 35662 (June 23, 2010) and 50 Fed. Reg. 3344 (January 24, 1985).

As relevant here, pursuant to the Hazardous and Solid Waste Amendments ("HSWA") of 1984 which amended RCRA, Congress required EPA to promulgate hazardous waste air emission control regulations. The regulations promulgated under the authority of HSWA take effect in each state having an authorized program on the same date as such requirements take effect in non-authorized states. Section 3006(g) of RCRA, 42 U.S.C. § 6926(g). The import of this provision which Congress added in 1984 is best understood when contrasted with the way new federal regulations promulgated under RCRA (non-HSWA) authority affect authorized state programs. Before HSWA, once a state program was authorized, any subsequent changes to the federal program only went into effect in authorized states after the state adopted corresponding provisions; EPA, through notice and comment rulemaking, would then authorize the new state provisions. Recognizing the inherent delay in that process, Congress in 1984 altered the way that new federal regulations would go into effect in authorized states for those regulations that stem from the provisions of HSWA, allowing for immediate effectiveness in all states regardless of authorization status. *See, e.g.*, *Ciba-Geigy Corp. v. Sidamon-Eristoff*, 3 F.3d 40, 42-43 (2d Cir. 1993). When a HSWA-based federal regulation is effective in a state, it remains effective (and applicable and enforceable) until it is replaced by a corresponding EPA-authorized state regulation through the state authorization process. *Id.* at 43.

Pursuant to Section 3004(n), 42 U.S.C. § 6924(n), which was added in the 1984 HSWA, EPA promulgated the air emission control regulations at 40 C.F.R. Part 265 Subparts AA and BB

in 1990 (55 Fed. Reg. 25454 (June 21, 1990)) and Subpart CC in 1994 (59 Fed. Reg. 62896 (December 6, 1994).[1] In the 1994 rulemaking, EPA incorporated these regulations into the 40 C.F.R. Part 262 conditions for generators who are seeking to store hazardous waste under the permit and storage facility requirements exemption. More specifically, EPA added the air emission requirements to the list of conditions for exemption with which a generator seeking to store hazardous waste without a permit and without meeting the storage facility operating requirements must comply to ensure safe storage of the waste.[2]

The Commonwealth has not enacted corresponding hazardous waste air emissions regulations and, therefore, EPA has not authorized the Commonwealth to administer the Subpart AA, BB and CC regulations. These federal regulations were clearly identified at the time of promulgation as HSWA-based provisions. In the 1994 Federal Register notice for the final rule, EPA was clear that the RCRA air emission regulations were promulgated under the authority of HSWA and were applicable immediately in all states regardless of authorization status. 59 Fed. Reg. 62896, 62921 (December 6, 1994). Furthermore, EPA has identified these provisions as HSWA-based in the Code of Federal Regulations and continues to do so today. *See* 40 C.F.R. § 271.1(j) Table 1 "Regulations Implementing the Hazardous and Solid Waste Amendments of 1984." EPA also maintains an up-to-date website that lays out the authorization status of the regulations, both by regulatory citation and by state, which indicates these rules are based on HSWA authority and that Massachusetts is not yet authorized for them.[3] Pursuant to Section

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[1] Subpart CC went into effect in December 1996. 61 Fed. Reg. 59932 (Nov. 25, 1996). There are virtually identical regulations in 40 C.F.R. Part 264 that apply to permitted facilities enacted at the same time.

[2] As a result, the provisions of 40 C.F.R. Part 265 Subparts BB and CC serve a dual purpose: they are conditions for exemption appearing in Part 262 imported from Part 265 (incorporated by reference rather than repeated in their entirety due to their length) and, in Part 265, they serve as storage facility requirements applicable to facilities subject to that Part.

[3] https://www.epa.gov/sites/production/files/2019-05/documents/authall.pdf (last updated March 2019) (last viewed July 12, 2019).

3006(g) and 3008(a) of RCRA, 42 U.S.C. §§ 6926(g) and 6928(a), the federal air emission regulations remain applicable in the Commonwealth and EPA may enforce violations of these regulations along with the other requirements of Subtitle C of RCRA.

II. Standard of Review

A. Respondent's Motion to Dismiss

Respondent's motion is alternatively styled as a motion to dismiss for "failure to state a claim" and "failure to show a right to relief." Respondent cites 40 C.F.R. § 22.20 of the Rules of Practice as the authority for its motion. While there is no provision in the Rules addressing such motions, the Environmental Appeals Board and administrative law judges have looked to procedure and caselaw regarding Rule 12(b)(6) of the Federal Rules of Civil Procedure. *See Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 (EAB 1993); *DMB North Carolina 2, LLC,* No. CWA-04-2002-5005 (ALJ, July 10, 2003). "A complaint need contain only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Haley v. City of Boston,* 657 F.3d 39, 46 (1st Cir. 2011) (citing Fed.R.Civ.P. 8(a)(2)). Under Rule 12(b)(6) motions, "it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Where all the elements of the claims are alleged and there is a set of facts that plaintiff can prove to support the claims which would entitle plaintiff to relief, the motion for dismissal must be denied. *See Commercial Cartage Company, Inc.*, 5 E.A.D.112, 117 (EAB 1994).

B. Complainant's Motion to Strike Defenses

As with the motion to dismiss, the Rules of Practice do not explicitly provide for motions to strike defenses, so here, too, the Federal Rules are looked to for guidance on ruling on such

motions. Federal Rule of Civil Procedure 12(f) provides that a "court my strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Courts have noted, however, that the remedy to strike a defense is not favored as pleadings are to be read liberally and parties should be given the opportunity to develop the defenses at trial. *Carbon Injection Systems LLC*, EPA Docket No. RCRA-05-2011-0009 at 2 (EPA ALJ February 14, 2012). Such a motion will be granted only upon a showing that the insufficiency of the defense is clearly apparent. *Dearborn Refining Company*, 2003 EPA ALJ LEXIS 10, *8 (January 3, 2003).

III. The Amended Complaint Clearly States a Claim Upon Which Relief Can be Granted

A. Counts 2 Through 8 Sufficiently State Claims Upon Which Relief May Be Granted

Applying the above standard to Respondent's motion to dismiss, it is clear the Amended Complaint sufficiently states a claim in Counts 2 through 8 upon which relief can be granted. The Amended Complaint alleges Respondent stored hazardous waste, was subject to the storage facility operating requirements of 40 C.F.R. Part 265, including Subparts BB and CC, and failed to comply with the cited requirements.[4] For example, Count 2 alleges that Respondent was engaged in storage of hazardous waste in eight tanks as observed during EPA's 2017 inspection. Amended Complaint, Paragraph 42. The Amended Complaint alleges that such storage must be conducted in accordance with multiple requirements of 40 C.F.R. Part 265 Subpart CC including inspections, monitoring and documentation of inspections. Amended Complaint, Paragraphs 35-

[4] While the premise of this case is that Respondent was subject to storage permit and companion storage facility requirements, Complainant elected not to bring an independent count for failure to have a permit. Instead, the counts in the Amended Complaint focus on the specific substantive requirements Respondent failed to comply with that compromised the safe storage of hazardous waste.

41. The Amended Complaint alleges that Respondent failed to meet the specified requirements of 40 C.F.R. Part 265 Subpart CC and this failure resulted in violations of Subpart CC. Amended Complaint, Paragraphs 43 and 44, respectively. Lastly, the Complaint alleges that RCRA Section 3008 provides authority for enforcement, including the issuing of a compliance order and the assessment of a penalty, of all noncompliance for both authorized requirements and for not-yet-authorized HSWA requirements of RCRA Subtitle C which includes regulatory provisions promulgated under the authority of Subtitle C. Amended Complaint, Paragraphs 11,12 *inter alia.*

Similar to Count 2, Counts 3 through 8 of the Amended Complaint rely on or refer to the RCRA air emission requirements in 40 C.F.R. Part 265 Subparts BB and CC and are pleaded in the same manner as Count 2. Counts 2 through 7 are direct claims of violation of 40 C.F.R. Part 265 Subparts BB and CC; while Count 8 is a claim for failure to have an adequate training program pursuant to 40 C.F.R. § 265.16, based on the failure to adequately train employees with respect to 40 C.F.R. Part 265 Subpart BB and CC requirements.

Therefore, the Amended Complaint alleges all necessary elements, both factual and legal, of the claims brought in the pleading and Respondent's motion to dismiss must be denied.

B. <u>The Basis for Respondent's Motion to Dismiss Does Not Identify A Deficiency With Complainant's Alleged Prima Facie Case</u>

Respondent's motion to dismiss relies primarily on the argument that the Amended Complaint cites to the generator storage facility condition for exemption that it claims was not in effect nor applicable in Massachusetts after May 2017. Contrary to Respondent's claim that the generator storage condition is "the cornerstone" of the allegations in this case, Complainant's prima facie case for the violations alleged in the Amended Complaint is not actually based on

Part 262.

As set forth in the Amended Complaint, a large quantity generator may accumulate hazardous waste on-site for 90 days or less, without a permit, provided the generator complies with all the conditions for exemption. *See* 40 C.F.R. § 262.17. Among the conditions, an LQG must comply with 40 C.F.R. Part 265 Subparts BB and CC and provide a training program that ensures the facility's compliance with RCRA. The legal context for Counts 2 through 8 of the Amended Complaint, which reference, among other things, 40 C.F.R. § 262.34(a)(1)(ii) [renumbered as 40 C.F.R.§ 262.17(a)(2)][5] and 40 C.F.R. § 265.16, is that Respondent's storage of hazardous waste was not exempt because it did not comply with all the conditions for exemption and was therefore subject to the storage facility requirements found in Part 265. *See, e.g., U.S. v. Baytank (Houston) Inc.*, 934 F.2d 599, 607 (5th Cir.1991) (government can prove a hazardous waste generator's criminal violation of the RCRA storage permit requirement "either by showing unpermitted storage for longer than 90 days . . . or by showing unpermitted storage for any period of time in violation of any of the safe storage conditions of 40 C.F.R. Sec.262.34(a) [renumbered to Sec. 262.17]). This concept is incorporated in 40 C.F.R. § 262.10(g) and further described in the preamble to the GIR.[6] *See* 81 Fed. Reg. 85732, 85746 (November 28, 2016). Because Complainant's prima facie case is not based on Part 262 allegations, Respondent's arguments related to the renumbering of provisions in the GIR (shown below to be without merit in any event) are irrelevant to a determination of whether the Amended Complaint is sufficiently pleaded. As established above, the Amended Complaint

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[5] The conditions for exemption for large quantity generators were listed in 40 C.F.R. § 262.34(a) beginning in 1980 until they were renumbered in the Generator Improvements Rule that was effective in May 2017.

[6] The generator storage exemption has always been a conditional exemption since its initial promulgation. In an effort to clarify this and make the regulations more user-friendly, the Agency discussed the conditional nature of the storage exemption and the legal effects of noncompliance in detail in the 2016 GIR.

clearly states claims under RCRA upon which relief may be granted.

The provisions of Part 262 that Respondent argues suffer from a supposed regulatory deficiency comprise an exemption from the full storage facility regulations, but Complainant does not have the burden to demonstrate the lack of exemption from regulations. The general requirement under RCRA is that any person who engages in storage of hazardous waste must meet the permit and storage facility requirements. Section 3005(a), 42 U.S.C. § 6925(a); 40 C.F.R. § 270.1(c). Respondent bears the burden to prove whether an exemption applies. *See* 40 C.F.R. 22.24(a); *see also General Motors Automotive – North America*, 14 E.A.D. 1, 54 (EAB 2008) *and* 50 Fed. Reg. 614, 642 (January 4, 1985) ("parties claiming the benefits of an exception to a broad remedial statutory or regulatory scheme have the burden of proof to show that they fit the terms of the exception" (citing cases)).[7] Respondent's arguments to dismiss Counts 2 through 7 relate to provisions of an exemption upon which Respondent bears the burden to present and persuade. Because these arguments do not reveal any flaw with the prima facie case alleged in the Amended Complaint, Respondent's motion to dismiss must be denied.

IV. Respondent's Argument that the Preamble to the Generator Improvement Rule Makes Subpart BB and CC Inapplicable in the Commonwealth Has No Merit

With respect to Counts 2 through 7, Respondent's entire argument in support of dismissal is based on two sentences contained in the preamble to the 2016 Hazards Waste Generator Improvements Rule. (A copy of the relevant section of the preamble to the GIR is attached as

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[7] Because of the prevalence of generators who engage in storage of hazardous waste and elect to be exempt (or *attempt* to be exempt) from the Part 265 (or authorized state equivalent) storage facility requirements, EPA's general practice is to include in the pleadings the legal citation that provides the link between why the generator's storage of hazardous waste is not exempt and the storage facility requirement alleged to be violated. Experience indicates that generators will claim to be exempt at some point in the proceeding and EPA believes, generally, a more informative and complete way to plead is for the complaint to lay out why the storage is not exempt from the storage facility operating requirements in the first instance. This discretionary decision to include citations to provisions beyond the elements of the violations alleged, of course, does not change the prima facie case.

Exhibit A). For the reasons set out below, Respondent's argument is without merit.

In 2016, EPA issued the final Generator Improvements Rule. One of the main purposes of the GIR was to reorganize the hazardous waste generator regulations to make them more user friendly. 81 Fed. Reg. at 85733. Some revisions contained in the GIR are more stringent than prior regulations, some revisions are less stringent than prior regulations, and some provisions are neither more stringent nor less stringent than prior regulations. *Id.*, at 85801. With respect to the provisions at issue here, the GIR merely renumbered the condition requirements without making any substantive changes to them.[8]

Former Section 262.34(a)(1)(ii) states, in relevant part:

> (a) Except as provided in paragraphs (d), (e) and (f) of this section, a generator may accumulate hazardous waste on-site for 90 days or less without a permit . . . provided that:
> (1) The waste is placed: . . .
> (ii) In tanks and the generator complies with the applicable requirements of subparts J, AA, BB and CC of 40 CFR part 265 . . .

Section 262.17(a)(2), the renumbered provisions in the GIR, states, in relevant part:

> A large quantity generator may accumulate hazardous waste on site without a permit . . . provided that all of the following conditions for exemption are met:
> (a) . . . A large quantity generator accumulates hazardous was on site for no more than 90 days . . .
> (2) . . . . If the waste is placed in tanks, the large quantity generator must comply with the applicable requirements of subparts J . . . as well as the applicable requirements of AA, BB, and CC of 40 CFR part 265.

The preamble to the GIR makes clear that the changes set forth immediately above amount to renumbering. The preamble to the GIR states:

> SQGs and LQGs may accumulate their hazardous waste on site without complying with

[8] In multiple places in its Supporting Memorandum (p.2 and p.6, note 3), Respondent asserts that the Agency's reorganization of the 40 C.F.R. Part 265 Subparts BB and CC reference from 40 C.F.R. § 262.34(a) to 40 C.F.R. § 262.17 was not a mere renumbering. Respondent provides no actual reason why the assignment of new regulatory citations is not a renumbering. In its footnote, Respondent only offers that the change in citation is not renumbering because EPA had previously identified the provisions as HSWA-based. This, while accurate, provides no support for Respondent's argument because any regulatory provision, whether based on HSWA or non-HSWA, can always be renumbered in the Code of Federal Regulations.

> the storage facility permit and operating requirements, provided they follow all of the conditions of exemption established originally in § 262.34. . . [New section] §262.17 identifies the conditions for exemption for LQGs.

81 Fed. Reg. at 85736. In addition, in one of the many "cross-walk" charts found in the preamble, the Agency indicates that the "previous citation" § 262.34(a)(1)(ii) is now found in the "new citation" §262.17(a)(2). *Id.*, at 85739, Table 5. In short, the GIR merely renumbered this section.

In spite of the fact that the relevant provisions were only renumbered without any substantive change, Respondent claims that two sentences in the preamble to the GIR Rule caused Subparts BB and CC, which had been applicable in the Commonwealth since 1996, to no longer be applicable in the Commonwealth. Respondent bases its argument on the following language contained in a section of the preamble describing the effect of the GIR on state authorization:

> These changes [as provided in the GIR] are promulgated under non-HSWA authority.
>
> Thus, the standards 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. at 85801 (attached as Exhibit A). Because the Commonwealth had final authorization on the effective date of the GIR, Respondent claims that 40 C.F.R. § 262.17(a)(2) never went into effect in the Commonwealth and therefore cannot be a basis for a claim.

Respondent's argument has no merit for several reasons. First, Respondent takes the above sentences in the preamble out of context and reads into them a legal effect that does not exist. The GIR included many different types of revisions, ranging from simple renumbering (such as that done to the Subpart BB and CC conditions) to substantive re-drafting to the adding of new provisions. The sentences Respondent points to refer to the substantive changes provided

in the GIR. The context of the sentences indicates this. Just prior to the sentences in question, EPA included a discussion of how new regulatory provisions are incorporated into state programs depending upon whether they stem from HSWA statutory amendments or statutory provisions that pre-date HSWA (*see, supra,* Section I). 81 Fed. Reg. at 85801, column 1. EPA then discussed when states with authorized programs must modify their programs based on *substantive* changes to the federal regulations that are considered either more stringent or broader in scope. The sentences in question are followed by detailed discussions that point out the *substantive* changes made in the GIR rule that the Agency determined to be either more stringent or less stringent changes (or neither) to the previous version of the federal regulations. When the sentences pointed to by Respondent are examined in the context of language immediately preceding and following in the preamble, it is clear Respondent's claims are unfounded.

The Agency's authority to renumber pre-existing regulatory provisions is never measured with a HSWA vs. non-HSWA analysis, nor is renumbering subject to an analysis of whether it is more stringent or less stringent. This is because the renumbering of pre-existing provisions is a non-substantive rule revision. EPA does not invoke any specific RCRA statutory authority when it assigns new numbers to pre-existing provisions in the Code of Federal Regulations. Respondent's reliance on the preamble language concerning how implementation of the substantive changes in authorized states would proceed could not have had the effect of making § 262.17(a)(2) ineffective in the Commonwealth because no substantive change was made in this provision in the GIR in comparison to the prior requirement.[9]

Secondly, Respondent does not, and cannot, point to any provision or discussion in the

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[9] As Respondent pointed out in its supporting memorandum (Resp. Supp. Memorandum, note 3), EPA identified the Parts 264 and 265 Subparts BB and CC regulations as HSWA-based regulations in 1994. The Agency has always regarded these provisions to be HSWA-based. On that fact alone, it is clear that the reference in the GIR preamble Respondent is relying upon did not cover the renumbering of the generator conditions provisions.

final GIR, the preamble to the GIR, the proposed GIR, the preamble to the proposed GIR, or the administrative record for the rulemaking that expressly states or implicitly indicates that these changes to the regulations would repeal the RCRA air emission regulations in Massachusetts. EPA cannot repeal a substantive regulation without providing notice and public comment. *See* 5 U.S.C. § 551 ("rule making" includes formulating, amending or repealing a rule); 5 U.S.C. § 553 (establishes process for rule making, including providing notice and opportunity for public participation); *Perez v. Mortgage Bankers Ass'n,* 575 U.S. ____ (2015), 135 S. Ct. 1199, 1206 (Mar. 9, 2015) (affirming the Court of Appeals for the D.C. Circuit's conclusion that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance"). Respondent's suggestion that EPA somehow repealed an entire substantive portion of the RCRA regulations, without publishing a proposal to do so nor providing any opportunity for public input nor providing any other notice or indication for this alleged repeal anywhere in the administrative record to the Rule, is not credible and, in any event, not allowed by law.

Nor does Respondent argue or provide any statement that it actually held a good faith belief or relied in some manner on the belief that the requirements of Subparts BB and CC no longer applied to its facility based on the language in the preamble to the GIR. In fact, as referenced in the Amended Complaint, at the time of EPA's inspection in 2017, Respondent had employees whose job responsibilities included monitoring pursuant to Subpart BB and prior to the filing of the original Complaint, Respondent provided EPA with documentation indicating some steps it took to partially comply with the air emissions regulations throughout the facility. Amended Complaint, Paragraph 80. Therefore, Respondent cannot argue that it relied on the statements in the GIR preamble to form a good faith belief that it was not required to comply with Subparts

BB and CC. In evaluating whether a party has a legitimate claim that it could not discern that a regulation applied to it, courts and the EAB have looked, in part, to the conduct of that party to evaluate that claim. *National Parks Conservation Ass'n, Inc. v. TVA*, 618 F. Supp. 2d 815, 832 (E.D. Tenn. 2009); *Carbon Injection Systems, LLC*, 17 E.A.D. 1, 20 (EAB 2016).

Finally, even if the language in the preamble on which Respondent relies was overly broad, imprecise, or even ambiguous, Respondent's suggestion that a statement in a preamble can alter or void the clear statutory language in Section 3006(g) of RCRA, 42 U.S.C. § 6926(g) is unsustainable.[10] While preamble statements are generally held to be informative and useful in discerning the meaning of regulations, they are not legally binding nor capable of undoing operative regulatory or statutory provisions. *See, Peabody Twentymile Mining, LLC v. Secretary of Labor*, 2019 WL 3228930 (10th Cir. 2019) (citing cases). The requirements in the regulations based on the authority of HSWA, including the air emission requirements set out in Part 265 Subparts BB and CC, remain in effect in the Commonwealth, and may be enforced by EPA.

V. Respondent's Claim that it is Not Subject to Training Requirements Related to the RCRA Air Emissions Requirements is Without Merit

With respect to Count 8, Respondent raises several arguments to support its motion to dismiss this Count. First, Respondent relies on the same argument raised for Counts 2-7; that is, that 40 C.F.R. § 262.17(a)(7) was not effective (and therefore not applicable) in the Commonwealth after May 2017. Next, Respondent argues that because the state authorized

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[10] At its core, Respondent's argument is internally contradictory. If, as Respondent asserts, the description of the rule revisions in the preamble created a legal prohibition making none of the provisions of the GIR effective in Massachusetts, then that aspect of the revision that acted to move the LQG provisions from 262.34(a) would not have gone into effect in Massachusetts either. But Respondent argues, without support for this "partially-effective" theory, that in Massachusetts the rule went into effect *just enough* for the LQG conditions to be lifted out of 262.34(a) but *not enough* for the HSWA-based provisions to go into effect in 262.17, leaving them in some sort of administrative rule purgatory. This view of the HSWA-RCRA rulemaking process is unprecedented and erroneous.

personnel training provision referenced in the Amended Complaint does not directly reference the RCRA air emissions provisions, the state provision does not require training to ensure compliance with those RCRA air emissions provisions. Lastly, Respondent argues that because the federal personnel training provision cited in the Amended Complaint was enacted as part of the base RCRA program (non-HSWA), it was supplanted by the state authorized provision and thus inapplicable and unenforceable.

Respondent is incorrect as to how the personnel training regulations operate and the scope of obligations applicable to its facility. As described in Section III above, Respondent is an LQG that engaged in storage of hazardous waste and was attempting to qualify for the LQG storage permit exemption. As such, Respondent was required to comply with all the conditions for exemption. One of the conditions is the requirement that facility personnel be trained to ensure compliance with the provisions in the hazardous waste generator regulations. In Massachusetts, this conditional requirement is found in 310 CMR § 30.341 and, in the federal regulations, this is found in 40 C.F.R. § 262.17(a)(7). The federal requirement provides that facility personnel must be trained in a manner that "teaches them to perform their duties in a way that ensures compliance with this part." As laid out above in Section III, the full list of conditions that LQGs must meet in order to be exempt from the full storage facility requirements includes both non-HSWA requirements for which Massachusetts is authorized and HSWA requirements in the federal regulations for which Massachusetts is not authorized. Therefore, the reference in the personnel training condition that lays out the requirement to ensure compliance with the regulations by necessity must include training for those requirements found in the Massachusetts program *as well as* those HSWA requirements found in the federal program.[11]

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[11] This is not a novel concept; rather, it has been widely understood among both the regulated and regulator communities for many years. *See, e.g.*, 1997 Hazardous Waste Guidance *Personnel Training for Large Quantity*

Respondent, it seems, has failed to grasp this fundamental aspect of the RCRA program.[12]

Similar to the analysis above for the other counts, Respondent's violation began when it failed to meet the personnel training condition for exemption and became subject to the storage facility operating requirements of Part 265. It was then subject to the companion personnel training requirement found in 40 C.F.R. § 265.16, which similarly requires that facility personnel be trained to ensure compliance with all requirements in Part 265 including, of course, Subparts BB and CC.

It is true as Respondent asserts that Massachusetts is authorized for both a personnel training LQG condition and storage facility personnel training requirements, but these do not (and legally cannot) encompass the full scope of the training obligations. Given the plain wording of the training requirement provisions and the operation of the Section 3006(g) statutory mandate for HSWA provisions, it is evident that training must be administered for all the hazardous waste requirements the facility is subject to, regardless of whether those are HSWA or non-HSWA in origin. And those that are HSWA-based requirements are federal requirements that are applicable through application of 40 C.F.R. § 265.16.

The alternative conclusion that Respondent urges, that facilities in Massachusetts have been subject to RCRA air emission requirements for 22 years without any companion requirement to train employees how to comply with those requirements, cannot be valid. Nor is

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Generators of Hazardous Waste (Colorado Department of Public Health and Environment)(describing the scope of the training requirements of Section 265.16 (adopted verbatim from the federal regulations) as including "[t]he primary regulatory areas included in Part 265 with which generators must comply are: preparedness and prevention, contingency plan and emergency procedures, personnel training, use and management of containers, tanks, drip pads, containment buildings, and air emission standards.") (p.2, emphasis added) (https://www.colorado.gov/pacific/sites/default/files/HM_hw-lqg-personnel-training.pdf).

[12] The heart of the violation in Count 8 is that Respondent failed to ensure adequate training for its employees on the RCRA air emissions requirements which are federal HSWA requirements and clearly apply to the Respondent. For this reason, the citations to the state authorized provisions in Count 8 may technically be unnecessary; however, they are included in the Amended Complaint in order to provide a complete picture of the full scope of the training obligations.

the conclusion sustainable that references in the regulations to the necessary training to ensure compliance with the hazardous waste regulations not include federal HSWA requirements, despite the clear application of those obligations to facilities in Massachusetts.

VI. Complainant's Motion to Strike Defenses is Appropriate at this Point in the Proceeding

Although motions to strike defenses are generally disfavored to allow a party to present its arguments at trial, Respondent has already taken the opportunity to present its arguments on the third and sixteenth Defenses in its motion to dismiss supporting memorandum. Through the present memorandum, Complainant has had the opportunity to respond. Respondent's arguments are legal in nature, so further development of a factual record at trial is not necessary. By its motion to dismiss, Respondent is asking the presiding officer to rule substantively on the issues raised in those defenses and those issues are now ripe for adjudication. Through this memorandum, Complainant asserts that it is apparent that these defenses cannot, as a matter of law, defeat the allegations in the Amended Complaint.

VII. Conclusion

For the reasons listed above, Counts 2 through 8 of the Amended Complaint sufficiently state claims upon which relief may be granted and Respondent's motion to dismiss must be denied. Because the arguments raised by Respondent to support its motion also comprise Respondent's Defenses No.'s 3 and 16 and are without merit as a matter of law, Complainant's motion to strike these defenses must be granted.

DATED: July 25, 2019

Respectfully submitted,

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Docket No. RCRA-01-2018-0062

Exhibit A

To

COMPLAINANT'S RESPONSE TO RESPONDENT'S MOTION TO DISMISS
COUNTS TWO THROUGH EIGHT FOR FAILURE TO STATE A CLAIM
AND
MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION TO STRIKE DEFENSES

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Part III

Environmental Protection Agency

40 CFR Parts 257, 258, 260, et al.
Hazardous Waste Generator Improvements Rule; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 257, 258, 260, 261, 262, 263, 264, 265, 266, 267, 268, 270, 271, 273, and 279

[EPA–HQ–RCRA–2012–0121; FRL 9947–26–OLEM]

RIN 2050–AG70

Hazardous Waste Generator Improvements Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action, the United States Environmental Protection Agency (EPA) is finalizing revisions to the Resource Conservation and Recovery Act's (RCRA) hazardous waste generator regulatory program proposed on September 25, 2015. There are several objectives to these revisions. They include reorganizing the hazardous waste generator regulations to make them more user-friendly and thus improve their usability by the regulated community; providing a better understanding of how the RCRA hazardous waste generator regulatory program works; addressing gaps in the existing regulations to strengthen environmental protection; providing greater flexibility for hazardous waste generators to manage their hazardous waste in a cost-effective and protective manner; and making technical corrections and conforming changes to address inadvertent errors and remove obsolete references to programs that no longer exist. This final rule responds to the comments of EPA stakeholders, taking into consideration the mission of EPA and the goals of RCRA.

DATES: This final rule is effective on May 30, 2017. The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of May 30, 2017.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA–HQ–RCRA–2012–0121. All documents in the docket are listed on the *http://www.regulations.gov* Web site. Although listed in the index, some information is not publicly available, *e.g.,* CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through *http://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Jim O'Leary, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, (MC: 5304P), 1200 Pennsylvania Ave. NW., Washington, DC 20460, (703) 308–8827, (*oleary.jim@epa.gov*) or Kathy Lett, U.S. Environmental Protection Agency, Office of Resource Conservation and Recovery, (MC: 5304P), 1200 Pennsylvania Ave. NW., Washington, DC 20460, (703) 605–0761, (*lett.kathy@epa.gov*).

SUPPLEMENTARY INFORMATION:

I. Table of Contents

The information presented in this preamble is organized as follows:

XV. State Authorization

A. Applicability of Rules in Authorized States

Under section 3006 of RCRA, EPA may authorize states to administer the RCRA Subtitle C hazardous waste program. Following authorization, the authorized state program operates in lieu of the federal regulations. EPA retains authority to enforce the authorized state Subtitle C program, although authorized states have primary enforcement authority. EPA also retains its authority under RCRA sections 3007, 3008, 3013, and 7003. The standards and requirements for state authorization are found at 40 CFR part 271.

Prior to enactment of the Hazardous and Solid Waste Amendments of 1984 (HSWA), a state with final RCRA authorization administered its hazardous waste program entirely in lieu of EPA administering the federal program in that state. EPA did not issue permits for any facilities in that state, since the state was now authorized to issue RCRA permits. When new, more stringent federal requirements were promulgated, the state was obligated to enact equivalent authorities within specified time frames. However, the new requirements did not take effect in an authorized state until the state adopted the equivalent state requirements.

In contrast, under RCRA section 3006(g) (42 U.S.C. 6926(g)), which was added by HSWA, new requirements and prohibitions imposed under HSWA authority take effect in authorized states at the same time that they take effect in unauthorized states. While states must still adopt HSWA-related provisions as state law to retain authorization, EPA implements the HSWA provisions in authorized states, including the issuance of any permits pertaining to HSWA requirements, until the state is granted authorization to do so.

Authorized states are required to modify their programs only when EPA promulgates federal requirements that are more stringent or broader in scope than existing federal requirements.[104] RCRA section 3009 allows the states to impose standards more stringent than those in the federal program (see 40 CFR 271.1). Therefore, authorized states may, but are not required to, adopt federal regulations, both HSWA and non-HSWA, that are considered less stringent than previous federal regulations.

[104] EPA notes that decisions regarding whether a state rule is more stringent or broader in scope than the federal program are made when the Agency authorizes a state program for a particular rule.

B. Effect on State Authorization of Final Rule

This document finalizes regulations that amend certain sections of the hazardous waste generator regulations in 40 CFR parts 260 through 265, 268, 270, 273, and 279. These regulations were promulgated under the authority of sections 2002, 3001, 3002, 3003, 3004, 3007, and 3010 of RCRA). These changes are promulgated under non-HSWA authority.

Thus, the standards will be applicable on the effective date only in those states that do not have final authorization of their base RCRA programs. Moreover, authorized states are required to modify their programs only when EPA promulgates federal regulations that are more stringent or broader in scope than the authorized state regulations. For those changes that are less stringent, states are not required to modify their programs.

Several of the revisions to the hazardous waste generator regulations are more stringent than those promulgated earlier. These include the following: (1) Requiring SQGs, LQGs and transfer facilities to better define the risks of hazardous wastes accumulated in tanks, containers, drip pads, and containment buildings, as well as when hazardous waste is accumulated in satellite accumulation areas (section IX.E. of this preamble); (2) requiring LQGs to notify EPA or their authorized state when they plan to close their facilities (section IX.I of this preamble); (3) requiring SQGs to re-notify every four years (section IX.L of this preamble); (4) requiring LQGs to submit a biennial report that identifies all of the hazardous wastes generated in the calendar year, not just for the months the facility was an LQG (sections IX.N of this preamble); (5) requiring LQGs updating their contingency plans to prepare a quick reference guide for their contingency plans to assist responders in an emergency (section XI of this preamble); and (6) requiring facilities that recycle hazardous waste without storing the waste to prepare and submit a Biennial Report. Therefore, states that have adopted the base RCRA program will be required to modify their hazardous waste programs to incorporate equivalent provisions if these standards are finalized.

On the other hand, three of the final revisions are less stringent than the current hazardous waste regulations. These revisions include the following: (1) Allowing VSQGs to voluntarily send hazardous waste to LQGs under the control of the same person (section IX.K of this preamble); (2) allowing LQGs to apply for a waiver from their local fire department to accumulate ignitable and reactive wastes within the 50 foot facility boundary (section IX.H of this preamble); and (3) allowing VSQGs and SQGs to voluntarily maintain their existing regulatory status if they have an episodic event that generates additional amounts of hazardous waste which would have resulted in them moving into a higher generator category for a short period of time, so long as they comply with specified conditions (section X of this preamble). Thus, authorized states may, but are not required to, adopt these changes.

This final rule also includes several revisions that are neither more nor less stringent, such as (1) reorganizing the hazardous waste generator regulations to make them more user-friendly (section VI of this preamble); (2) defining central accumulation area and the generator categories (section VII of this preamble); (3) mixing a non-hazardous waste with a hazardous waste (section IX.C of this preamble); (4) repeating the prohibition for generators from sending hazardous liquids to landfills (section IX.M of this preamble); (5) replacing the list of specific data elements with a requirement to complete and submit all data elements required in the Biennial Report form (section IX.N of this preamble); (6) deleting the performance track and laboratories XL regulations (section IX.P of this preamble); and (7) technical corrections and conforming changes to various parts of the RCRA regulations (section XII of this preamble). Thus, authorized states may, but are not required to, adopt these changes.

XVI. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at *https://www.epa.gov/laws-regulations/laws-and-executive-orders.*

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. This action is a "significant regulatory action" in that it may raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. Any changes made in response to OMB recommendations have been documented in the docket.

In addition, EPA prepared an analysis of the potential costs and benefits associated with this action. This