

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

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

Pursuant to 40 C.F.R. §§ 22.16(b) and 22.20, Complainant United States Environmental Protection Agency, Region 1, files this Reply to Respondent’s Response to Motion for Accelerated Decision (which Respondent captioned as an “opposition” to motion for accelerated decision). Respondent’s Response was filed on July 8, 2021; Complainant’s Motion for Accelerated Decision was filed on June 23, 2021.

Respectfully submitted,

Date: July 19, 2021

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TABLE OF CONTENTS

I. INTRODUCTION 4

II. RESPONDENT IS WRONG TO CLAIM THAT THE MPU EXEMPTION CAN BE APPLIED TO A SERIES OF CONNECTED TANKS OR EQUIPMENT 5

III. RESPONDENT WRONGLY CHARACTERIZES THE *GENERAL MOTORS* AND *CHEM-SOLV* CASES AND COMPLAINANT’S USE OF THESE CASES 11

IV. THE UNDISPUTED FACTS DEMONSTRATE THAT HAZARDOUS WASTE IS NOT GENERATED IN THE RECEIVER TANKS..... 17

V. NO MANUFACTURING OCCURS WITHIN THE RECEIVER TANKS..... 23

VI. CONCLUSION 26

TABLE OF AUTHORITIES

Cases

American Mining Congress v. EPA, 824 F.2d 1177 (D.C. Cir. 1987) 21-22
Association of Battery Recyclers v. EPA, 208 F.3d 1047 (D.C. Cir. 2000).....21
American Mining Congress v. EPA, 907 F.2d 1179 (D.C. Cir. 1990)..... 20-22
In re Chem-Solv, Inc., Docket No. RCRA-03-2011-0068, 2014 WL 2593697
 (ALJ, June 5, 2014) 4-5, 10-15, 17
In re Chem-Solv, Inc., 16 E.A.D. 594 (EAB 2015)5
In re General Motors Automotive - North America, Docket No. RCRA 05-2004-0001,
 2006 WL 3406333 (ALJ, Mar. 30, 2006)..... 4-5, 10-17
In re General Motors Automotive - North America, 14 E.A.D. 1 (EAB 2008) 5, 13-14
Safe Air for Everyone v. Meyer, No. CV-02-241-N-EJL, ECF No. 94 (D. Idaho July 19, 2002).11
United States v. Amoco Oil Co., 64 F. Supp. 2d 801 (N.D. Ind. 1999)11
United States v. Johnson, 256 F.3d 895 (9th Cir. 2001)14

Statutes

42 U.S.C. § 6903(27)21

Code of Federal Regulations

40 C.F.R. § 22.16(b)1
40 C.F.R. § 22.201
40 C.F.R. § 63.3176 (CAA Auto MACT Rule).....11
40 C.F.R. § 260.106, 9, 22
40 C.F.R. § 261.4(c)4, 6-7, 9-10, 12-13, 15, 17, 26
40 C.F.R. § 264.1(b)16
40 C.F.R. § 265.1(b)16

Federal Register Notices

45 Fed. Reg. 72,024 (Oct. 30, 1980) (preamble) 5-7, 10, 16, 26

EPA Guidance

RCRA Online 12727, Raw Material Transport Vessel Exclusion for All Wastes Generated on
 Such Vessels (Sept. 3, 1986)9
RCRA Online 14152 EPA Letter to Jill A. Weller re: Regulation of Equipment Used to Convey
 Solvents (July 29, 1997) 8-9

Other Authorities

Perry’s Chemical Handbook8

I. INTRODUCTION

The United States Environmental Protection Agency (“EPA”), Region 1 (“Complainant”), and ISP Freetown Fine Chemicals, Inc. (“Respondent”) have each filed a Motion for Accelerated Decision (“Motion”) in this case. Complainant and Respondent then each filed a Response to the opposing party’s Motion (“Response”).¹ Complainant now files its final Reply.

Respondent prefaces its Response by claiming that Complainant’s Motion “fail[ed] to address . . . key points” of law. R-Response p. 1. In fact, Complainant has addressed, in either its Motion or its Response, all of the matters listed by Respondent.² Respondent’s quarrel appears to be that Complainant’s views on these various matters are different than those of Respondent.³

This Reply focuses on the four main arguments made by Respondent in its Response. First, Respondent claims again that for the purposes of the Manufacturing Process Unit (“MPU”) Exemption set out in 40 C.F.R. § 261.4(c), a “manufacturing process unit” can be a series of connected tanks or equipment – a claim that is not supported by the text of the Exemption as

¹ Respondent captioned its Response as an “Opposition” to Complainant’s Motion. Complainant refers to Respondent’s Opposition as a “Response” for ease of comparison to Complainant’s own Response.

² See C-Motion pp. 32-33, 34 fn. 20 (discussing *General Motors* and *Chem-Solv*); *id.* at 27-29 (discussing the term “manufacturing process unit” and the scope of “unit” in 40 C.F.R. § 261.4(c)); C-Response pp. 19-23 (discussing *General Motors* and *Chem-Solv*); *id.* at 8-10 (discussing the term “distillation unit” in the Federal Register); *id.* at 26 (discussing discharge trays of screens); *id.* at 27 (discussing the term “manufacturing process unit”); *id.* at 24-27 (discussing the scope of “unit” in 40 C.F.R. § 261.4(c)). Complainant notes, as it did in its Motion (C-Motion p. 25, fn. 12), that because the parties submitted their Motions on the same deadline, Complainant might need to reply to arguments made by Respondent in Complainant’s Response or Reply.

³ For example, see *infra* Section III (discussion of case law).

confirmed by its regulatory preamble, EPA guidance, or case law. Second, Respondent claims there is a definitive “test” for MPU Exemption applicability derived from *In re General Motors Automotive - North America*, Docket No. RCRA-05-2004-0001, 2006 WL 3406333 (ALJ, Mar. 30, 2006) (“*General Motors*”), remanded on other grounds, 14 E.A.D. 1 (EAB 2008), and *In re Chem-Solv, Inc.*, Docket No. RCRA-03-2011-0068, 2014 WL 2593697 (ALJ, June 5, 2014) (“*Chem-Solv*”), *aff’d*, 16 E.A.D. 594 (EAB 2015). Respondent misreads both cases, and its test is erroneous and inapplicable.

Third, Respondent claims that hazardous wastes are generated within the Receiver Tanks. This claim fails on both the undisputed facts and the law. Finally, Respondent claims that manufacturing occurs within the Receiver Tanks. This claim, too, is unsupported and fails. Respondent’s erroneous claims thus do not disturb Complainant’s central assertion in this case: since neither manufacturing nor hazardous waste generation occurs in Respondent’s Receiver Tanks, the MPU Exemption cannot apply to the Tanks. Therefore, the Receiver Tanks are subject to RCRA regulation.

II. RESPONDENT IS WRONG TO CLAIM THAT THE MPU EXEMPTION CAN BE APPLIED TO A SERIES OF CONNECTED TANKS OR EQUIPMENT

In its Motion, Complainant demonstrated that the text of the MPU Exemption, along with its preamble, 45 Fed. Reg. 72,024 (Oct. 30, 1980), indicates that the Exemption is to be applied to individual pieces of equipment. *E.g.*, C-Motion p. 9 (“The MPU Exemption applies only to hazardous waste in individual pieces of equipment in which manufacturing occurs and in which hazardous waste is generated.”). Complainant further explained why that reading makes sense in order to determine if the terms of the MPU Exemption are met within individual units that are engaged in both manufacturing and hazardous waste generation/management – and that

conversely, examining a series of connected, discrete pieces of equipment to determine whether manufacturing is occurring somewhere within the series distorts the language and the purposes of the Exemption.

Respondent responds first by mischaracterizing Complainant's position and then by ignoring the import of the language of both Section 261.4(c) and its preamble. Complainant is not claiming that the MPU Exemption applies to individual pieces of "hardware."⁴ R-Response p. 2 (arguing that "a single piece of hardware" is not the appropriate framing for the MPU Exemption). Equipment can and does contain multiple pieces of hardware (*e.g.*, nuts, bolts, valves). Respondent's distraction here cannot obscure the fact that the language in the MPU Exemption and EPA's description of it in the preamble of Section 261.4(c) indicate that the Exemption applies to *individual pieces of equipment*. Respondent then takes its own responsive claim to an extreme by asserting that "unit" refers to a "system" rather than to an individual piece of equipment (going so far as to say that a vehicle is best characterized as "a system"). R-Response pp. 3-4. Respondent offers this claim even in the face of regulatory language that specifically refers to individual tanks and vehicles.⁵

Complainant urges this Tribunal to avoid the mire of Respondent's unhelpful discussion of plural language and countable versus uncountable nouns, and instead to focus on the examples provided in the preamble for what they are. These examples provide helpful illustrations of how the regulatory language might apply, not binding law to be applied rigidly and without context.

⁴ Indeed, the word "hardware" does not appear in Complainant's briefing. *See generally* C-Motion; C-Response.

⁵ For example, a "transport vehicle" is defined as "a motor vehicle or rail car used for the transportation of cargo by any mode. Each cargo-carrying body (trailer, railroad freight car, etc.) is a separate transport vehicle." 40 C.F.R. § 260.10.

The examples specific to the MPU Exemption – distillation columns, flotation units, discharge trays of screens – are generally individual pieces of equipment. *See* C-Response pp. 24-25. And Respondent’s assertion that “the examples of exempt units [are] all systems of equipment” does not make it so.⁶ R-Response p. 4.

Respondent claims, among other things, that the specific examples provided in the preamble – distillation columns, flotation units, and discharge trays of screens – are not individual pieces of equipment but rather “complex system[s] of equipment.” R-Response p. 5 n.2. As an initial matter, Respondent’s claim is not technically accurate. Common configurations of these pieces of equipment are considered individual devices (even if comprised of hardware and other component pieces). *See, e.g.*, C-Response pp. 25-26; Schanilec Supp. Aff. ¶ 13. A distillation column, for example, is regarded as an individual tank-like unit and is not appropriately or accurately referred to as a “system.” *See id.* Similarly, a flotation unit is a tank-like structure used for separating unwanted impurities from a liquid material within the device. *Id.* This tank-like structure would not be considered a system.⁷

Respondent also asserts that EPA RCRA guidance shows that the word “unit” means a “system” or production “system” for purposes of the MPU Exemption. *See* R-Response pp. 3,

⁶ If, as Respondent suggests, the MPU Exemption was always intended to cover multiple distinct pieces of equipment connected together by piping, one would expect EPA to have at least hinted at this in Section 261.4(c)’s preamble discussion in addressing, for example, how manufacturing might happen in one piece of equipment while hazardous waste generation and management would take place in a different but connected piece of equipment (or how a piece of equipment with both manufacturing and hazardous waste aspects might mean that connected pieces of equipment fall within the Exemption as well). But there is no such discussion, strongly suggesting that Respondent is simply wrong in its interpretation of the Exemption language.

⁷ Respondent’s arguments to the contrary are as unconvincing as Respondent’s suggestion that a vehicle is properly and normally considered “a system” rather than an individual means of transport. R-Response pp. 2, 4.

15. In so doing, Respondent erroneously describes and misinterprets EPA's position set out in a July 1997 letter from the Director of EPA's Office of Solid Waste, Elizabeth Cotsworth (RCRA Online ("RO") 14152, July 29, 1997) ("Cotsworth Letter").⁸ In the Cotsworth Letter, EPA considered a spray painting facility's question as to whether an equalization tank that collected used solvent from spray painting operations (and the tank's associated piping) was exempt under the MPU Exemption. Although the facility phrased its question in terms of whether tanks and piping together could be subject to the MPU Exemption, EPA's answer did **not** discuss whether the MPU Exemption could be applied to a "system." Instead, EPA properly focused on where hazardous waste generation occurred, and stated that all tanks and equipment downstream of that point were subject to hazardous waste regulatory requirements.

Specifically, EPA stated that "the used solvent is a waste once it leaves the spray painting unit, and that the equalization tank and associated piping are subject to hazardous waste regulatory requirements." Cotsworth Letter p. 1. EPA went on to list "tank system components" that would be subject RCRA regulation: the equalization tank, an outdoor accumulation tank that was already being managed under RCRA regulations, and associated piping. *Id.* But this list merely restates EPA's point above, that all of the equipment downstream of the spray painting unit were subject to RCRA regulation: it does not demarcate a "system" of equipment that would otherwise come within the MPU Exemption, particularly since the list included an identified RCRA-regulated tank. Respondent quotes EPA for the proposition that the

⁸ Apart from its misuse of EPA guidance, Respondent similarly persists in taking the definition of "unit" from Perry's Chemical Handbook out of context. R-Response pp. 6-7. As Complainant previously explained, "how a 'unit' is defined and used in [the relevant] section of Perry is much different than how the term 'unit' is otherwise used." C-Response p. 27; *see* CX-26, at 13-62.

“manufacturing process unit” exemption applies to a “production system” (R-Response p. 3). But EPA uses the phrase “production system” just once in the letter (not in a sentence with “manufacturing process unit’ exemption”) and only to assert the system as described by the facility is “not part of the production system, but serves solely to manage wastes.”⁹ Cotsworth Letter p. 2.

Respondent also argues that a vessel,¹⁰ referenced as one of the enumerated units in 40 C.F.R. § 261.4(c), is a “system” and not a singular “unit.” R-Response pp. 4-5. In support, Respondent cites to an EPA guidance letter to the American Institute of Merchant Shipping (RO 12727, Sept. 3, 1986) (“Williams Letter”). *Id.* But this letter does not have the interpretative effect Respondent is suggesting with respect to the MPU Exemption. In the Williams Letter, EPA clarified the intended application of 40 C.F.R. § 261.4(c) and then examined issues specific to the generation of hazardous waste aboard a watercraft. EPA confirmed that, like the other types of exempt units covered by Section 261.4(c), “the exemption [for vessels] was intended to cover only those hazardous sediments and residues produced in the units containing valuable product or raw material.” Williams Letter p. 1. However, after meeting with industry representatives and carefully weighing considerations specific to waste generation aboard vessels and the feedback from the affected regulated industry, EPA decided to specifically broaden the scope of the vessel exemption found in Section 261.4(c). *Id.* at 2; *see also* C-Response p. 25, fn.

⁹ Far from advancing Respondent’s claims, the Cotsworth Letter actually supports Complainant’s position. Respondent’s Receiver Tanks are analogous to the equalization tanks considered by EPA in the letter: the Tanks collect used solvent distillate from the condensers just as the equalization tanks collected used solvent from the spray paint units; and the Tanks send a significant amount of this used solvent liquid to another hazardous waste tank, just as the equalization tanks piped its used solvent to another accumulation tank.

¹⁰ “Vessel” includes every description of watercraft, used or capable of being used as a means of transportation on the water. 40 C.F.R. § 260.10.

11. EPA's explicit reliance on considerations exclusive to the circumstances aboard vessels formed the basis for its decision to expand the scope of the exemption beyond the original intended coverage. In doing so, EPA reaffirmed the narrow intent of the exemptions in Section 261.4(c). EPA's decision in this letter applies only to the vessel exemption in Section 261.4(c), based on vessel-specific rationales, and left unaffected the other exemptions in that Section. Respondent's suggestion that this specific decision has any interpretative bearing on, or somehow broadens by association, the scope of the MPU Exemption is wrong.

Respondent also claims that EPA's use of the word "process" in "manufacturing process units" means that "the relevant inquiry must occur at the *process* or *system* level." R-Response p. 12 (emphasis in original). In so claiming, however, Respondent misses or ignores the fact that in numerous instances in the preamble of Section 261.4(c), EPA used the term "manufacturing unit" interchangeably with "manufacturing process unit." *See* 45 Fed. Reg. at 72,025 ("EPA recognizes that *manufacturing units* and product and raw material storage tanks, transport vehicles and vessels are occasionally taken out of operation for temporary periods" (emphasis added)); *id.* at 72,026 ("[T]his amendment deals with hazardous wastes that are generated in product or raw material transport vehicles and vessels, as well as those generated in *manufacturing units* and product or raw material storage tanks." (emphasis added)); *id.* ("With respect to *manufacturing units*, the situation typically is not complicated." (emphasis added)).

Contrary to Respondent's assertion, there is thus no great import in the word "process" employed in the regulatory provision: a unit utilized *in manufacturing* can be similarly and appropriately described as a unit utilized *within a manufacturing process*. The key term in the phrase is not "process" but rather "manufacturing," as correctly recognized by the Tribunal in *General Motors* and *Chem-Solv*. Thus, it is wrong to claim, as Respondent does, that the word

“process” in “manufacturing process unit” means that EPA intended that multiple pieces of connected equipment could comprise a single “unit” for purposes of the MPU Exemption.

R-Response p. 13.

Respondent also points to a definition for “process unit” that a district court previously articulated in the context of a Clean Air Act (“CAA”) case. *See United States v. Amoco Oil Co.*, 64 F. Supp. 2d 801, 805 (N.D. Ind. 1999). But as Complainant has already explained, the CAA and RCRA “have radically different purposes.” C-Response p. 14; *see Safe Air for Everyone v. Meyer*, No. CV-02-241-N-EJL, ECF No. 94, at 11 & n.7 (D. Idaho July 19, 2002) (explaining that “RCRA by its very nature is designed to address areas that are more site specific (*i.e.* landfills and waste disposal facilities) [while] the CAA is designed to address air quality in a broader sense, which is what Plaintiffs seek to remedy in this case”), *aff’d*, 373 F.3d 1035 (9th Cir. 2004); *General Motors* at 43-44 (rejecting applicability of “definition of ‘paint shop’ in the Clean Air Act Auto MACT rule” to RCRA analysis due to “fundamental differences between the Clean Air Act and RCRA”). *Amoco* sheds little light on the meaning of “unit” in the context of the MPU Exemption. *See* C-Response pp. 14-15.

III. RESPONDENT WRONGLY CHARACTERIZES THE *GENERAL MOTORS* AND *CHEM-SOLV* CASES AND COMPLAINANT’S USE OF THESE CASES

In its Response, Respondent accuses “Region 1 [of] propos[ing] a variety of tests to define the manufacturing process unit exemption, most of which are apparently based in one line of dicta in this Tribunal’s decision in *Chem-Solv*.” R-Response p. 7. Respondent is wrong on both counts. First, Complainant’s position on the MPU Exemption has been the same throughout the course of this litigation: the MPU Exemption applies “only to a unit where ‘manufacturing’ occurs” and only when “hazardous waste [is] . . . generated within the exempted unit.”

C-Motion pp. 30, 36; *see also* C-Response p. 8 (explaining that the “pivotal question” before the Tribunal “is whether both manufacturing and hazardous waste generation occur within the Tanks”).¹¹ And second, as Complainant has repeatedly explained, these dual requirements flow directly from “the regulatory criteria set out in *the text of the MPU Exemption*” itself. *Id.* (emphasis added).

By contrast, Respondent has attempted to articulate a test for determining if there is a RCRA-exempt MPU that it claims was established in *General Motors* and *Chem-Solv*. R-Motion p. 27. But Respondent is incorrect. Both *General Motors* and *Chem-Solv* confirm that Complainant’s framing of the scope of the MPU Exemption is the correct one. Therefore, it is important to review the MPU Exemption inquiry in both cases.

First, as noted, the method for determining the application of the MPU Exemption is based on the words of the MPU Exemption itself. These words are: “A hazardous waste which is generated in a . . . manufacturing process unit” is not subject to regulation “until it exits the unit in which it was generated.” 40 C.F.R. § 261.4(c). The first central question is whether manufacturing is occurring in the unit in question. This type of inquiry has been confirmed and refined by the Tribunal in both *General Motors* and *Chem-Solv*. As Complainant stated in its

¹¹ Respondent alleges that Complainant has established a “locus” test (*see* R-Response pp. 8, 10), but Complainant uses the word “locus” just once in its Motion and nowhere in its Response. *See* C-Motion p. 29. Specifically, Complainant uses the phrase “locus of manufacturing and hazardous waste generation” in the middle of a paragraph discussing the proper way to determine MPU Exemption applicability. At both the beginning and at the end of this paragraph, Complainant states that an MPU Exemption determination should be based on whether manufacturing and hazardous waste generation occurs within the individual tank or other equipment in question. *See* C-Motion pp. 29-30. Thus, in context, it is clear that “locus” is being used in paraphrase, not as a separate test.

Response, in *General Motors*, the Tribunal looked at whether the equipment in question, *i.e.*, the pipes and equipment downstream of the manifolds and spray paint applicators, was part of the manufacturing process. *General Motors* at 42. *General Motors* held that since automobile painting was necessary to the production of automobiles, such production occurred at the point where the paint manifold and the spray paint applicators were operated, “which is where the painting of vehicles occurs.”¹² *Id.* However, because the “usage of the purge mixture downstream of the manifolds and associated applicators does not create a product,” the downstream equipment was not subject to the MPU Exemption. *Id.* This was true notwithstanding the fact that the downstream equipment was necessary to the proper functioning of the automobile painting process – the lack of manufacturing in the downstream equipment meant the MPU Exemption did not apply. C-Response p. 22.

While Respondent proclaims the development of a seminal MPU test in the *General Motors* decision, it is interesting (and telling) to note that neither the Environmental Appeals Board (“EAB”) in reviewing that *General Motors* decision nor the Tribunal in *Chem-Solv* noted any type of specific “test” emerging from the *General Motors* decision. *See In re General Motors Automotive - North America*, 14 E.A.D. 1 (EAB 2008). In fact, in its Remand Order, the

¹² Respondent insists that the Tribunal in *General Motors* “found that automated paint spray guns, and the containers of paint supplying them, were exempt from RCRA regulation as part of a “manufacturing process unit.” R-Response pp. 11, 15. However, the Tribunal found that the interplay between the paint operation and the waste delivery system “does not convert the facility’s production system, including the painting operation and waste delivery system into a “manufacturing process unit” within the scope of 40 C.F.R. § 261.4(c). It never said that the spray paint guns and the containers of paint supplying them were exempt from RCRA as part of a manufacturing process unit. *See General Motors* at 41-42. It would not make sense to do so because EPA was not asserting that the manifold and spray paint applicators were regulated under RCRA and there were no allegations that this equipment was managing hazardous waste.

EAB affirmed that the Order would not affect the “ALJ’s determination that ‘the downstream purge mixture system does not produce a product.’” *Id.* at 81.

In *Chem-Solv*, the Tribunal employed a similar analysis as the *General Motors* Tribunal in focusing on whether manufacturing occurred in “the Pit” that the respondent asserted fell within the MPU Exemption. *See Chem-Solv* at *75-76. In that case, the Tribunal reviewed the meaning of the word “manufacturing,” explaining that the word encompassed “mak[ing] (as raw material) into a product suitable for use”; this definition further entailed “an element of creation or transformation as raw materials or components are turned into substantively different products,” which the Tribunal also articulated as the occurrence of “intentional physical or chemical change.” The Tribunal explained that the Pit water was a “waste” rather than a “product” or “raw material,” and “the Pit’s sole function was to collect the rinsate for potential disposal or reuse (according to Respondent).” *Chem-Solv* at *79. Therefore, the Tribunal concluded, because the Pit was not engaged in manufacturing, it did not fall within the MPU Exemption.¹³ *Id.*

¹³ Respondent claims that *Chem-Solv*’s discussion of whether an “intentional physical or chemical change” occurred in the Pit somehow forms “the core” of Complainant’s conception of the MPU Exemption. R-Response p. 10. Respondent misses the forest for the trees. In using this language, the *Chem-Solv* Tribunal was applying the definition of “manufacturing” – which, again, is a requirement *embedded in the text of the MPU Exemption itself*. *Chem-Solv* at *76 (quoting *General Motors*, 14 E.A.D. at 75). Of course, the fact that Respondent strives so mightily to wave away the *Chem-Solv* Tribunal’s analysis is revealing; it underscores how devastating a straightforward application of the manufacturing requirement is to Respondent’s position. Further, contrary to Respondent’s claim, the *Chem-Solv* Tribunal’s analysis is not dicta. *See, e.g., United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (en banc) (explaining that if treatment of an issue is “germane to the eventual resolution of the case” and comes “after reasoned consideration in a published opinion,” it is not dicta, irrespective of whether it “is necessary in some strict logical sense”). In order to determine that the Pit was not engaged in “manufacturing” the Tribunal in *Chem-Solv* had to set out a legal analytical framework within which to conduct that inquiry.

These two cases confirm what is clear from the text of the MPU Exemption itself: in order for a piece of equipment to fall within the scope of the MPU Exemption, manufacturing must occur within it.¹⁴ Respondent claims that the definitive, overarching test for evaluating the MPU Exemption is whether a unit is an “integral part” of a “production system” used to “create a product.” R-Response p. 7. But this test is incorrect. C-Response p. 22. As explained above, the analysis in *General Motors* was whether the equipment and tanks were “part of the production system” used to “create a product.” *General Motors* at 41-44. The inquiry in *Chem-Solv* was basically the same: the Tribunal looked at whether manufacturing was occurring in the Pit. Thus, the essence of the inquiry in both cases, simply stated, is whether or not the equipment in question actually produces or manufactures a product because there has to be manufacturing occurring in the equipment for the MPU Exemption to apply. The Receiver Tanks themselves clearly do not produce a product. Rather, they collect used liquid solvent that previously has been removed from Respondent’s products, and that is then condensed back into liquid upstream of the Receiver Tanks. Based on this relatively simple analysis, the MPU Exemption cannot apply to the Receiver Tanks.

¹⁴ Respondent misunderstands, or intentionally misapplies, the definition of “manufacturing” discussed by the Tribunal in *Chem-Solv* in relation to discharge trays of screens and flotation units. R-Response pp. 13-14. Respondent claims that no intentional physical or chemical change occurs in the discharge tray of a screening device. But Respondent misses the point. The screening device intentionally changes the raw materials by removing unwanted particles of a particular size with the waste material being collected in the discharge tray. In common configurations, the tray is a manufactured part of the screening device. *See Schanilec Supp. Aff.* ¶ 13. Similarly, in flotation units, desired material is separated from unwanted material within the unit through the use of small gas bubbles. *Id.* The key to the inquiry is whether there is a requisite transformation of raw materials in the piece of equipment – the “unit” for purposes of Section 261.4(c) – not whether there is a change in raw materials in the part of the device that collects the unwanted material. In each of Respondent’s Receiver Tanks, the only units in question in this matter, there is no intentional raw material transformation taking place; instead, that occurs in separate pieces of equipment.

The foregoing case law also confirms the second central aspect of the MPU Exemption: the MPU Exemption only applies when “hazardous waste [is] . . . generated within the exempted unit.” C-Motion p. 36. Indeed, and notwithstanding Respondent’s mischaracterizations to the contrary, the manifolds and paint applicators in *General Motors* were not covered by the MPU Exemption precisely because the Tribunal held that “[t]he point of generation was immediately after the solvents left the manifolds and associated applicators.” *General Motors* at 18; *see also id.* at 71 (noting that “purge mixture at automobile painting operations is waste at the point when it exits the paint applicators”). Because the manifolds and associated applicators did not generate and hold hazardous waste, they were outside the scope of the MPU Exemption – and, indeed, they were outside the scope of RCRA regulation altogether.

This aspect of the MPU Exemption obviates Respondent’s “parade of horrors” argument that manufacturing equipment everywhere is or could be subject to needless MPU Exemption scrutiny. R-Response pp. 13-14. Generally speaking, RCRA does not regulate manufacturing operations. This is so not because these operations are exempt under the MPU Exemption; they are not regulated because *there is no hazardous waste generation and management occurring within them*. While Respondent would apparently divide the world into exempt MPUs and RCRA-regulated operations, the reality is much different. A vast sphere of production equipment and materials has nothing to do with RCRA regulation. A smaller sphere consists of the equipment in which RCRA hazardous waste is managed and regulated.¹⁵ And in

¹⁵ RCRA regulates hazardous waste that is treated, stored, or disposed of. *See* 40 C.F.R. § 264.1(b) and 40 C.F.R. § 265.1(b). When hazardous waste is stored within a unit such as a tank or tank-like unit, even for a short period of time, the unit becomes subject to RCRA regulation. Necessarily, it is these types of units, which would normally be subject to RCRA regulation, that are potentially exempt under the MPU Exemption. *See* 45 Fed. Reg. at 72,024, 72,025, 72,028.

the overlap between the two spheres lies the segment of equipment that qualifies as “manufacturing process units” as that term is used in the MPU Exemption, *i.e.*, equipment in which both manufacturing and hazardous waste generation occur. This equipment is within the RCRA jurisdictional universe because of the presence of regulated hazardous waste but is specifically exempted under Section 261.4(c).

In sum, *General Motors* and *Chem-Solv* confirm what Complainant has maintained over the course of this litigation, and what flows naturally from the text of the MPU Exemption itself: the MPU Exemption applies “only to a unit where ‘manufacturing’ occurs” and only when “hazardous waste [is] . . . generated within the exempted unit.” C-Motion pp. 30, 36. As explained *infra*, and throughout Complainant’s briefing, because the Receiver Tanks satisfy neither requirement, they fall outside the scope of the MPU Exemption.

IV. THE UNDISPUTED FACTS DEMONSTRATE THAT HAZARDOUS WASTE IS NOT GENERATED IN THE RECEIVER TANKS

Respondent claims that the Receiver Tanks fall within the scope of the MPU Exemption in part because hazardous wastes are generated within the receivers. R-Response pp. 23-25. Specifically, while agreeing that used liquid solvent distillates are “produced upstream of the receivers, in the condensers,” Respondent contends that the used liquid solvent “distillates are not generated as wastes until after they are collected in the receivers.” *Id.* at 23 (emphasis omitted). This is so, according to Respondent, because the used liquid solvent distillates “are not discarded materials, and are not wastes as long as the process is still ongoing.” They become hazardous wastes only “at the end of the process, when all of the distillates have been collected in the receiver[s] and there is no longer any need for the facility to retain the material.” *Id.* at 24-25.

Respondent's argument fails for both factual and legal reasons. First, as a factual matter, and as Complainant previously explained in its Motion, the disposition of the used liquid solvents in the Receiver Tanks is predetermined in all or almost all instances before production begins. C-Motion pp. 34-35. For each of the batch chemical processes at issue in this case, Respondent's batch forms specify at the outset one of four dispositions for the used liquid solvents collected in the Receiver Tanks: they are either (1) sent to hazardous waste tank S-535 for disposal as hazardous waste; (2) sent to the facility's wastewater treatment plant; (3) transferred to totes or drums for reuse; or (4) reclaimed and recycled. *Id.* at 35; Piligian Aff. ¶ 29; CX-34. The batch forms do not provide for any evaluation of the used liquid solvents once collected in the Receiver Tanks that would alter their disposition from those specified in the steps of the batch forms, including those steps directing that the used solvents are to be sent to hazardous waste tank S-535. C-Motion p. 35. Even in the one instance where Respondent does conduct sampling of used liquid solvent before it enters the Receiver Tank, the disposition of the solvent in the Tank is known in advance.¹⁶ *See* C-Motion p. 35, fn. 21.

As explained above, all of the batch forms contain steps that specify the disposition of the used liquid solvents that are collected in the Receiver Tanks. In addition, some of the batch forms contain steps specifying exact volumes of used liquid solvent that are to be collected in the Receiver Tanks at certain stages of the production processes, and whether those used liquid solvents should be sent from the Receiver Tanks to hazardous waste tank S-535. [REDACTED]

¹⁶ In its Response, Respondent concedes that "it may be true that ISP knows upfront that some of the distillates from certain processes" will be disposed of as hazardous waste. *See* R-Response p. 25, fn. 18. Although not all of the used liquid solvent distillates collected in the Receivers are sent to hazardous waste tank S-535 (as explained above, there are three other possible dispositions), it remains true that all of the dispositions as specified in the batch forms for the eight processes at issue are known in advance.

[REDACTED]¹⁷

These facts defeat Respondent’s argument that the used liquid solvents are somehow “not generated as wastes” until after the production process has terminated. R-Response p. 25 (emphasis omitted). The used liquid solvents do not hang suspended in a state of uncertainty in the Receiver Tanks until one of Respondent’s operators chooses what to do with them; on the contrary, the disposition of the used liquid solvents that are collected in the Receiver Tanks is determined in advance of production, including those times when the used solvents collected in the Tanks will be sent to hazardous waste tank S-535 for disposal as hazardous wastes. In these circumstances, the used liquid solvents are generated as hazardous waste at the moment they are produced in the condensers, before they reach the Receiver Tanks.

Respondent resists the force of this conclusion by asserting that “industrial production processes do not always proceed according to plan.” *Id.* at 25 n.15. Respondent points to the possibility of “bumping and other incidents” that may alter the prescribed disposition of the used liquid solvents in waste tank S-535. *Id.* As to “bumping,” and as Complainant has previously

¹⁷ Respondent admits that in these two processes (RX-21 and RX-24), it “collects a small amount of distillate in the receiver and then sends that material to the facility-wide hazardous waste accumulation tank S-535.” *See* R-Response p. 20, fn. 15. In so doing, Respondent concedes that there are specified volumes of used liquid solvent routinely predetermined to be hazardous waste that are collected in the Receiver Tanks.

explained, Respondent has provided no evidence that bumping has ever actually occurred in any of the eight processes at issue in this case. *Id.* Indeed, even on Respondent’s account, bumping is “rare” or – more euphemistically – “not frequent.” R-Motion p. 3; R-Response p. 24, fn. 16. And as to the potential “other incidents” Respondent cites, unnamed hypothetical disruptions are more speculative still. Respondent cannot sidestep RCRA by invoking the bare possibility that something, at some point, may go wrong in the manufacturing process, which could in theory lead Respondent to reuse used liquid solvents collected in the Receiver Tanks. *Cf. Am. Mining Congress v. EPA (AMC II)*, 907 F.2d 1179, 1186 (D.C. Cir. 1990) (rejecting the argument “that under RCRA, potential reuse of a material prevents the agency from classifying it as ‘discarded’”).

Respondent also claims that it uses the volume of the used liquid solvents collected in the Receiver Tanks to track the progress of the production process and make certain “production decisions.” R-Response p. 24. But as outlined *supra*, it is uncontested that several of these “production decisions” entail determining when enough used liquid solvents have accumulated in the Receiver Tanks during production to be sent to hazardous waste tank S-535. *E.g.*, R-Motion p. 43; Morin Decl. ¶ 27; RX-21 (Step 29); RX-24 (Step 41). The fate of these used liquid solvents is predetermined from the moment they enter the Receiver Tanks; the only question is when enough has accumulated to be sent to the hazardous waste tank S-535. The mere fact that Respondent’s operators monitor the volume of the used liquid solvents in the Receiver Tanks does not change the fact that they are hazardous waste.

Finally, Respondent claims that it “saves the distillates in the [Receiver Tanks] because the distillation has to be performed in a system closed off from the intrusion of air, and releasing distillates requires that the system be opened.” R-Response p. 24. Even taken at face value, this

assertion says nothing about the used liquid solvents themselves; it is at most a claim about the Receiver Tanks and the role they play during the production process. *See* R-Motion pp. 38-40 (arguing that the need for a closed system during distillation shows that the Receiver Tanks “are inextricable from the distillation process”). Respondent’s argument does nothing to show that used liquid solvents are somehow not generated as waste until they are contained within the Receiver Tanks.¹⁸

Respondent’s argument also fails for legal reasons. Respondent is correct that only material that has been “discarded” qualifies as “solid waste” under RCRA. 42 U.S.C. § 6903(27). However, Respondent dramatically overreads both the nature of this requirement and the case law construing it. Respondent cites both *American Mining Congress v. EPA (AMC I)*, 824 F.2d 1177 (D.C. Cir. 1987), and *Association of Battery Recyclers v. EPA*, 208 F.3d 1047 (D.C. Cir. 2000), for the proposition that “that materials being saved are clearly not being discarded, and thus are not wastes.” R-Response p. 23. But those cases do not support Respondent’s broad claim. The cases cited by Respondent stand, instead, for the narrower proposition that “materials that are ‘destined for *immediate reuse* in another phase of the industry’s ongoing production process’ and that ‘have not yet become part of the waste disposal problem’” have not been “discarded” under RCRA. *AMC II*, 907 F.2d at 1186 (quoting *AMC I*, 824 F.2d at 1185-86); *see also Ass’n of Battery Recyclers*, 208 F.3d at 1056 (concluding that

¹⁸ In line with the foregoing, the undisputed facts undermine Respondent’s claim that the Receiver Tanks perform “critical manufacturing functions.” R-Response pp. 19-22. As Complainant previously explained, in making this claim, Respondent relies on “mischaracterized engineering principles or erroneous technical assertions in its attempt to inflate the role of the Receiver Tanks.” C-Response p. 29. Respondent’s latest attempt should be rejected for the same reasons outlined in Complainant’s Response. *Id.* at 29-38.

because material was “destined for reuse as part of a continuous industrial process,” it was not “discarded” under RCRA).

Contrary to Respondent’s argument, merely saving used liquid solvents does not remove them from the scope of RCRA. That much is clear from *AMC II*, which held that “sludges from wastewater that are stored in surface impoundments and that *may* at some time in the future be reclaimed” are still properly categorized as “discarded” under RCRA.¹⁹ 907 F.2d at 1186. Respondent must instead show that the used liquid solvents are ““destined for *immediate reuse* in another phase of the industry’s ongoing production process’ and that [they] ‘have not yet become part of the waste disposal problem.’” *Id.* (quoting *AMC I*, 824 F.2d at 1185-86). Of course, it is undisputed that some of the used liquid solvents collected within the Receiver Tanks are not “destined for *immediate reuse*.” On the contrary, and as outlined *supra*, the batch forms specify in advance of production that some used liquid solvents are “destined” to wind up in hazardous waste tank S-535. *See* C-Motion p. 35; Piligian Aff. ¶ 29. The bare theoretical potential that these solvents could be reused after they are collected in the Receiver Tanks – due to “bumping and other incidents,” for instance – cannot alter their status as RCRA hazardous wastes.

The undisputed facts demonstrate that it is predetermined that some of the used liquid solvents collected in the Receiver Tanks will be sent to hazardous waste tank S-535, and that these solvents are generated as hazardous waste in the condensers before they reach the Receiver Tanks. The law dictates that temporarily holding the solvents in the Receiver Tanks does

¹⁹ Moreover, “saving” the used solvents in the Receiver Tanks is the same thing as storing the used solvents. “Storage” is defined in RCRA as the “holding of hazardous waste for a temporary period, at the end of which the hazardous waste is treated, disposed or stored elsewhere.” 40 C.F.R. § 260.10. This is precisely what occurs at Respondent’s facility with temporary storage in the Receiver Tanks and subsequent storage in the facility’s consolidated hazardous waste tank S-535.

nothing to alter their status as hazardous waste. Accordingly, the Receiver Tanks are not the point of generation for these hazardous wastes and the Tanks cannot benefit from the MPU Exemption.

V. NO MANUFACTURING OCCURS WITHIN THE RECEIVER TANKS

At the end of its Response Brief, Respondent makes two separate arguments in an attempt to show that “manufacturing” is taking place “within” the Receiver Tanks. *See* R-Response pp. 25-26. Both arguments rely on faulty premises, mischaracterize Complainant’s positions, and fail. Respondent’s first argument is as follows: (1) a “unit” for purposes of the MPU Exemption is a system, not a single tank; (2) the relevant system is a “distillation system;” (3) Complainant does not contest that manufacturing takes place within the distillation units; and (4) distillation units “necessarily include receivers” – therefore, “manufacturing” must be occurring within the Receiver Tanks. *Id.* at 25.

Complainant rejects Respondent’s first premise, since Complainant has argued in this Reply (*see supra* Section II) and consistently throughout this action (*see* Rebuttal PHE p. 5; C-Motion pp. 27-30; C-Response pp. 23-28) that the MPU Exemption must be applied to individual tanks or other pieces of equipment, not to a series or systems of connected tanks or equipment. Further, Complainant rejects the claim that the term “distillation unit” as advanced by Respondent in this action is relevant to determining whether the Receiver Tanks are covered by the MPU Exemption. *See* C-Response pp. 8-10, 13-15. Given this, Respondent’s characterization of Complainant’s position regarding distillation units is unfounded and incorrect.

In addition, Respondent distorts Complainant’s view of “distillation” in the facility’s manufacturing processes. Complainant has stated that during distillation at Respondent’s

facility, “solvents are separated from products in the reactors as vapor and routed to the condensers, where the solvent vapor is condensed.” See C-Motion p. 17; see also Schanilec Aff.

¶ 25 (“distillation occurs in the reactors and condensers”). Complainant further has stated that

[REDACTED]

[REDACTED] *Id.* [REDACTED]

[REDACTED]

[REDACTED] Schanilec Aff. ¶ 26. [REDACTED]

[REDACTED] Schanilec Aff. ¶ 27; Schanilec Supp. Aff. ¶ 7. All of these descriptions of distillation involve only the facility’s reactors and condensers: the Receiver Tanks are not mentioned at all. Given Complainant’s statements, Respondent cannot credibly enlist Complainant to support its claims that “distillation” and “manufacturing” occur within the Receiver Tanks.

Respondent’s second argument is also based on a mischaracterization of Complainant’s position. Respondent claims that because Complainant has stated manufacturing occurs in the condensers, and only condensation occurs in the condensers, Complainant has necessarily agreed that manufacturing takes place in the Receivers (since, Respondent asserts, condensation occurs there too). R-Response p. 3; R-Motion p. 46. Given that Complainant has argued consistently and extensively that no manufacturing occurs within the Receiver Tanks, Respondent’s claim is surprising to say the least.

As the foundation of this argument, Respondent extracts a single phrase from Complainant’s Rebuttal Pre-Hearing Exchange: “manufacturing occurs in . . . condensers.” This quote is taken out of context, and in any event, it cannot support Respondent’s claims. In its Rebuttal Prehearing Exchange, Complainant explained that the plain language of the MPU

Exemption requires that “manufacturing” must occur within the unit for the Exemption to apply.” Rebuttal PHE p. 6. Then, immediately following, Complainant stated: “No manufacturing of product occurs in the facility’s Receiver Tanks: instead, manufacturing occurs in other tanks – specifically, reactors and condensers. . . .” *Id.* Respondent quotes that “manufacturing occurs in . . . condensers” (R-Response p. 26), but in context, Complainant is merely emphasizing a point it has made repeatedly throughout this action, *i.e.*, that no manufacturing of Respondent’s chemical products takes place in the Receiver Tanks.

Further, and as discussed above in this Section, [REDACTED]

[REDACTED]

[REDACTED] Schanilec Aff. ¶ 26. [REDACTED]

[REDACTED]

Thus, Respondent’s initial contention that the condensers and Receivers are somehow involved in the same sort of “manufacturing” is unfounded, and Respondent’s argument fails at its outset.

Respondent also claims that any potential condensation of distillate in the Receiver Tanks constitutes “manufacturing.” R-Response p. 26; *see also* LeBlanc Aff. ¶ 19 (“additional distillate **may** form from vapors and mists . . . that carry over from the condensers to the receivers” (emphasis added)). Although Respondent’s argument has already been rebutted, Complainant notes (as it has previously) that this additional claim is without merit. *See* C-Motion p. 37, fn. 25; C-Response pp. 34-35. Any minute, potential condensation or evaporation of solvent vapor in the Receiver Tanks is not part of the intended operation of the Tanks and does not change the Tanks’ function of collecting condensed liquid solvents, including hazardous wastes, that flow from the condensers. *See* C-Motion p. 37, fn. 25 (referencing Schanilec Aff. ¶¶ 20, 32).

VI. CONCLUSION

This case focuses on the important contours of RCRA jurisdiction at the intersection of hazardous waste management and facility production processes. EPA carefully and narrowly excised particular types of units from the regulatory protections of the hazardous waste management program when it promulgated the MPU Exemption in Section 261.4(c). EPA ensured, through the plain language of the Exemption, that only a unit in which both manufacturing and hazardous waste generation occur can operate beyond the confines of RCRA protection. The goals of RCRA in protecting human health and the environment can only be achieved when the proper scope of RCRA regulatory protections is applied.

The only issue before this Tribunal is whether the MPU Exemption applies to Respondent's Receiver Tanks. The text of the Exemption, as confirmed by its preamble, EPA guidance, and case law, requires that for the MPU Exemption to apply to the Receiver Tanks, both manufacturing and hazardous waste generation must occur within the Tanks. Neither of these activities occur within the Tanks. The Tanks do, however, at times collect and hold regulated hazardous waste that is generated upstream of the Tanks. Accordingly, Respondent's affirmative defense must be rejected, its motion for accelerated decision denied, and Complainant's motion for accelerated decision granted on liability for the remaining alleged violations in this case.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Reply to Respondent's Response to Motion for Accelerated Decision ("Complainant's Reply") was served on this 19th day of July, 2021, on the addressees listed below. Because Complainant's Reply contains claimed Confidential Business Information, a redacted version of Complainant's Reply was served electronically via the Office of Administrative Law Judges ("OALJ") E-Filing System, and an unredacted version was transmitted in accordance with instructions provided by the Headquarters Hearing Clerk. Both the redacted and unredacted versions of Complainant's Reply were served on Respondent's counsel.

By OALJ E-Filing System:

Mary Angeles, Headquarters Hearing Clerk
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