



Eric L. Klein
155 Federal Street
Suite 1600
Boston, MA 02110
(617) 419-2316
eklein@bdlaw.com

January 8, 2021

VIA U.S. MAIL

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave. NW
Mail Code 1900R
Washington, DC 20460

VIA OALJ E-FILING SYSTEM

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

Re: *In the Matter of: ISP Freetown Fine Chemicals Inc.*
U.S. EPA Docket No. RCRA-01-2018-0062: Respondent's Prehearing Exchange

Dear Ms. Angeles:

Enclosed for filing in the above-referenced matter, please find the Prehearing Exchange and corresponding exhibits of Respondent ISP Freetown Fine Chemicals Inc. ("ISP"). Many of ISP's exhibits contain Confidential Business Information. Accordingly, redacted versions were filed via the OALJ E-Filing system on January 8, 2021, and unredacted versions are being mailed to the Hearing Clerk via U.S. Mail. As outlined in ISP's certificate of service, filing and service methods are consistent with this Tribunal's October 22, 2020 Prehearing Order, including the "Guidance on Use of OALJ E-Filing System" attached to the Order, 40 C.F.R. § 22.5(1)-(3), and 40 C.F.R. § 2.305(g).

The unredacted, confidential version will be mailed to the Hearing Clerk on Monday, January 11, 2021. Due to current COVID-19 protocols, only our law firm's Washington D.C. office is handling paper productions. As a result of events in Washington, D.C. on January 6, 2021, our Washington D.C. office service department temporarily closed and paper productions were delayed.

Mary Angeles, Headquarters Hearing Clerk
U.S. Environmental Protection Agency
January 8, 2021
Page 2

Both an unredacted and redacted version of ISP's Prehearing Exchange were emailed to Complainant on January 8, 2021. Please do not hesitate to reach out with any questions.

Respectfully submitted,



Eric L. Klein

*Counsel for Respondent
ISP Freetown Fine Chemicals Inc.*

Enclosures

cc: Audrey Zucker, Esq.
Andrea Simpson, Esq.
Steven Viggiani, Esq.
Aaron Goldberg, Esq.
Sarah Munger, Esq.
via email

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 1**

In the Matter of:

ISP Freetown Fine Chemicals Inc.

MAR000009605

Proceeding under Section 3008(a) of the
Resource Conservation and Recovery Act,
U.S.C. § 6928(a)

Docket No. RCRA-01-2018-0062

RESPONDENT’S PREHEARING EXCHANGE

Respondent ISP Freetown Fine Chemicals Inc. (“ISP”), by undersigned counsel, submits this Prehearing Exchange in accordance with the October 22, 2020 Order of this Tribunal.

This case has been narrowed down to a single substantive issue: whether four distillation receivers at the ISP facility (“Facility”) and certain associated equipment are part of “manufacturing process units” at the Facility and therefore exempt from hazardous waste regulation under 40 C.F.R. § 261.4(c) and its state counterpart – the “manufacturing process unit exemption” (herein “MPU Exemption”). All other issues previously contested in this case have been resolved. The question of the MPU Exemption in this case, however, is at the heart of all the remaining counts not resolved by the Partial Consent Agreement and Final Order (“Partial CAFO”), as explained below and in EPA’s December 18, 2020 Prehearing Exchange.

1.A. Respondent’s witness list

ISP intends to call the following witnesses at the hearing.

1. Eric Morin
Process Engineering Manager
ISP Freetown Fine Chemicals, Inc.
238 South Main Street
Assonet, MA 02702

Eric Morin will testify as a fact witness. Mr. Morin is a longtime ISP employee, responsible for environmental management and compliance at the Facility. He may testify in a factual capacity regarding the following topics:

- the general history, background, and description of the Facility and its products;
- his understanding, experience, and observations regarding the use and operation of product distillation processes at the Facility;
- his understanding, experience, and observations regarding the engineering and chemistry used at the Facility;
- his understanding, experience, and observations regarding the nature and operation of the equipment in use at the Facility, including without limitation reactors, condensers, receivers, storage tanks, and connecting equipment;
- his understanding, experience, and observations regarding the nature, handling, and disposition of materials used and produced at the Facility, including without limitation reactants, solvents, products, intermediates, recyclable materials, and wastes;
- his understanding, experience, and observations regarding the storage and disposition of wastes at the Facility;
- his understanding, experience, and observations regarding the differences between receivers and storage tanks at the Facility;
- ISP policies regarding equipment upkeep and maintenance, including of the receivers;
- ISP compliance with environmental rules, regulations, laws, and policies.

Mr. Morin may also offer rebuttal testimony regarding any subject of testimony offered by EPA witnesses and within the scope of Mr. Morin's capacity to testify. ISP reserves the right to supplement the scope of Mr. Morin's testimony as circumstances require.

Mr. Morin has also been proposed as an EPA witness in EPA's December 18, 2020 Prehearing Exchange. To the extent EPA wishes to elicit direct testimony on its own behalf from Mr. Morin outside the scope of Mr. Morin's direct testimony on behalf of ISP, ISP consents

to EPA's examination of Mr. Morin during its case-in-chief, but will seek to require in that circumstance that EPA conduct a direct examination of Mr. Morin, not cross-examination.

2. Joel LeBlanc, P.E.
General Manager, Houston
Ashworth Leininger Group
2219 Sawdust Rd., Suite 1604
Spring, TX 77380

Mr. LeBlanc will testify as an expert witness. He is a licensed Professional Engineer with a Bachelor of Science in Chemical Engineering. He is a member of the American Institute of Chemical Engineers and specializes in environmental compliance. His CV is submitted as RX-59. He may offer factual evidence and expert opinion regarding the following topics:

- the use and operation of product distillation processes at the Facility, at similar facilities, and in industry more generally;
- the engineering and chemistry used at the Facility, at similar facilities, and in similar processes in industry more generally;
- the nature and operation of the equipment in use at the Facility, at similar facilities, and in industry more generally, including without limitation reactors, condensers, receivers, storage tanks, and connecting equipment;
- the nature, handling, and disposition of materials used and produced at the Facility, at similar facilities, and in industry more generally, including without limitation reactants, solvents, products, intermediates, recyclable materials, and wastes;
- the storage and disposition of wastes at the Facility, at similar facilities, and in industry more generally;
- the differences between receivers and storage tanks at the Facility, at similar facilities, and in industry more generally.

In particular, Mr. LeBlanc will offer his expert opinion regarding the nature of the distillation receivers at the Facility, at similar facilities, and in industry more generally. This testimony will include how the receivers work, what they do, their relationship to condensers and reactors, the role they play in the manufacturing process, and why they are integral to the manufacturing process at the Facility.

Mr. LeBlanc may also offer rebuttal testimony regarding any subject of testimony offered by EPA witnesses and within the scope of Mr. LeBlanc's capacity to testify. ISP reserves the right to supplement the scope of Mr. LeBlanc's testimony as circumstances require.

ISP objects on relevance grounds to certain testimony proposed in EPA's Prehearing Exchange, which concerns issues outside the scope of the parties' dispute. ISP will confer with EPA and file any required motions *in limine* consistent with this Tribunal's October 22, 2020 Order governing this Prehearing Exchange.

1.B. Respondent's exhibit list

ISP intends to introduce the following exhibits. ISP reserves the right to introduce (i) exhibits EPA included in its Prehearing Exchange; (ii) additional exhibits to rebut evidence that EPA presents; and (iii) such other exhibits as may become necessary. Certain exhibits below contain confidential business information, which is marked and will be handled in accordance with the 40 C.F.R. Part 2, Subpart B and this Tribunal's October 22, 2020 Order.

<u>Exhibit</u>	<u>Description</u>
RX 1	Floor Arrangement
RX 2	Floor Arrangement
RX 3	Floor Arrangement
RX 4	Site Plan
RX 5	Condenser Arrangement
RX 6	Overview Table
RX 7	Production Summary
RX 8	Flow Diagram
RX 9	P&ID
RX 10	P&ID
RX 11	P&ID
RX 12	P&ID
RX 13	P&ID
RX 14	P&ID
RX 15	P&ID
RX 16	P&ID
RX 17	P&ID
RX 18	P&ID
RX 19	P&ID
RX 20	P&ID

RX 21	Batch Packet
RX 22	Batch Packet
RX 23	Batch Packet
RX 24	Batch Packet
RX 25	Batch Packet
RX 26	Batch Packet
RX 27	Batch Packet
RX 28	Batch Packet
RX 29	Batch Packet
RX 30	Batch Packet
RX 31	Tally Sheet
RX 32	PE Certification
RX 33	P&ID
RX 34	MOP
RX 35	RO1173
RX 36	RO14281
RX 37	Partial CAFO
RX 38	CAFO Report
RX 39	CAFO Report Attachments
RX 40	Tag List
RX 41	Photo
RX 42	Photo
RX 43	Photo
RX 44	Photo
RX 45	Photo
RX 46	Photo
RX 47	Photo
RX 48	Photo
RX 49	Photo
RX 50	Photo
RX 51	Photo
RX 52	Photo
RX 53	Perry's Chemical Engineers Handbook (handbook excerpt)
RX 54	Unit Operations of Chemical Engineering (textbook excerpt)
RX 55	Control of Volatile Organic Emissions from Batch Processes (EPA report)
RX 56	Distillation Control & Optimization (ebook excerpt)
RX 57	Control of Reactive Batch Distillation Columns via Extents Transformation (paper)
RX 58	Dynamic Modeling of Batch Reactors & Batch Distillation (paper)
RX 59	J. LeBlanc CV

1.C. Respondent's statement regarding case length and interpretation

ISP is likely to require 2-3 days to present its defense, and does not require an interpreter.

2. [RESERVED FOR COMPLAINANT PREHEARING EXCHANGE]

3.A. Additional documents in support of denied allegations in dispute

Documents in support of denials in ISP’s June 25, 2019 Answer to Amended Complaint (“Answer”) are included in the list above at § 1.B.

3.B. Additional documents and explanation in support of affirmative defenses

The only affirmative defense in ISP’s Answer that remains in contention is Defense #9 regarding the applicability of the MPU Exemption; *see* Answer at 31-32. Documents in support of Defense #9 are included in the list above at § 1.B. ISP’s explanation of the arguments in support of Defense #9, in brief, is as follows. This explanation is a summary, and is not intended to be a substitute for a full explication of ISP’s argument in advocacy briefing or at a hearing. ISP additionally reserves its right to continue to develop and refine its arguments.

The receivers at the Facility¹ are part of “manufacturing process units” (“MPUs”) as a matter of clear black-letter law. The receivers serve to initially and immediately collect condensed vapors within product manufacturing units and are integral parts of such units. *See, e.g.*, 45 Fed. Reg. 72024, 72025 (Oct. 30, 1980) (“EPA did not intend to regulate... manufacturing process units in which hazardous wastes are generated... *e.g.*, distillation units”); 55 Fed. Reg. 25454, 25471 (June 21, 1990) (“a hazardous waste distillation [unit]... includes... distillate receivers”); 40 C.F.R. § 63.101 (defining a “chemical manufacturing process unit” as equipment that specifically includes “distillation units *and their associated distillate receivers*”) (emphasis added).

As an engineering matter, the manufacturing processes that occur at the Facility would not be possible, even theoretically, without each receiver being part of a closed system in which the receiver and its associated reactor and condenser share the same inert, oxygen-free internal

¹ To the extent that the receivers are part of manufacturing process units, the Upstream Equipment connecting each receiver to the rest of its MPU (*i.e.*, its associated condenser) would obviously also be part of the MPU. Accordingly, we focus here solely on the receivers.

atmosphere. A distillation cannot occur within such a closed system without a receiver – in the absence of a receiver, the distillate would back up in the condenser and overflow back into the reactor, causing the distillation to cease/fail. Accordingly, receivers within a closed system under common internal atmosphere are irreducibly necessary to the production process in a way that simple waste storage – the function that EPA apparently believes that the receivers serve – is not. The distinction is that distillation *can* occur without waste storage. This occurs, for example, if the distillate is not a waste (as is the case in some ISP processes) or if the distillate is a waste but can be immediately treated, recycled, or disposed without prior storage – or (in theory) if a facility simply ignores the law and disposes of waste by releasing it into the environment. By contrast, however, distillation cannot occur at all, even as a purely physical or theoretical matter, without receivers. Receivers are therefore part of the manufacturing “process,” and part of the engineering “unit” in which the process is performed.

Receivers are also a necessary component of the feedback cycle that is a part of all distillation processes run at the Facility. All such processes at the Facility involve a step in which distillate accumulated in the receivers is held for evaluation for potential return to the reactors for further use in the process. At this stage, the distillate is either sent back to the reactor for continued processing, or it is allowed to exit the system. Most of the distillate that exits the system is not waste, either because it is drummed for subsequent reuse “as is” or reclaimed and recycled in a closed-loop process, although in some processes some or all of the exiting distillate is disposed as waste. In any event, the holding of distillate evaluation occurs in all processes, and must happen in the receivers before any distillate exits the manufacturing process unit.

Moreover, there is overlap between the functions of the receivers and those of the condensers, which EPA appears to recognize as part of a “manufacturing process unit” and

therefore as exempt under the MPU Exemption. As a general matter, solvent vapors from the reactor are “condensed” into liquid distillate in the condenser and the resulting distillate is “received” in the receiver. But while this generalization is accurate as to most distillate, which is formed in the condenser and received in the receiver, the general description belies a fuzzier reality in which the work of the condenser actually carries over to a degree into the receiver, as some vapors and fine liquid droplets suspended in the internal atmosphere of the system exit the condenser and form additional distillate in the receiver. By seeking to draw a bright line between the function of the condensers and receivers – the former admittedly a part of “manufacturing,” the latter allegedly just storage – EPA is oversimplifying the way the two vessels interact, and superimposing legal categories on a physical reality that does not match.

While EPA appears to conceive of the manufacturing process at the Facility as unidirectional, with the receivers as solely an end-point, the manufacturing unit’s design is actually more holistic, with the receivers also serving a critical function at the outset of the process. Specifically, in some processes the receivers are necessary to generate sufficient vacuum force in the system to fully “charge” the reactors with the liquid raw materials needed to manufacture products. Without the extra volume the reactors add to the system, the system vacuum could not generate sufficient force to pull or suck all of the required liquids into the reactors, as necessary to operate the manufacturing process efficiently.

Additionally, the Facility’s receivers are used not just to collect distillate, but to regulate the pressure of the entire manufacturing unit during the distillation process. Throughout each distillation, the internal atmosphere within the closed system needs to be carefully and continuously adjusted and controlled to ensure that solvents are removed in an orderly and thorough way. The necessary adjustments and controls are – and must be – made through the receiver, for two reasons. First, the source of vacuum in the system must be connected to the

receiver so that vapors and suspended droplets are drawn in the proper direction from reactor to condenser to receiver, and so that distillate liquids collect in the receiver without being sucked into the vacuum system. Since the connection to the vacuum source must be on the receiver, the valve that is opened and closed to control the level of vacuum in the closed production system must also be on the receiver. Second, in order to protect against excessive vacuum, there must be a valve connected to a nitrogen tank that can be opened or closed to add varying amounts of nitrogen into the closed system as needed. This nitrogen valve has to work in tandem with the vacuum valve and needs to be together with the vacuum valve – on the receiver – in order to facilitate proper control and to avoid unwanted pressure differentials within the closed system that might result if the valves were in different locations. The internal pressure of the system could not be controlled anywhere except the receiver, or in the absence of the receiver.

EPA has not addressed the MPU Exemption in its Prehearing Exchange. EPA's position in this case appears to be that a receiver is no more than a waste storage tank, unintegrated and unnecessary to the engineered system to which it is linked under common atmosphere, and no more essential to the Facility's manufacturing process than a waste drum or a hole in the ground. The basis for EPA's position remains unclear to ISP.

3.C-D. Penalty calculation

EPA has attached its penalty calculation as Exhibit CX-5 to its December 18, 2020 Prehearing Exchange. ISP has attached its response as Appendix A here, rather than as an exhibit, because it is argumentative rather than evidentiary in nature. Appendix A contains references to the factual information called for in § 3.C of the Court's October 22, 2020 Order, and is the "narrative statement" called for in § 3.D. The factual predicates of ISP's proposed penalty calculation will be proved by the witness testimony and documentary exhibits listed above.

DATED: January 8, 2021

Respectfully submitted,

/s/ Eric L. Klein

Aaron H. Goldberg
(202) 789-6052
agoldberg@bdlaw.com
BEVERIDGE & DIAMOND, P.C.²
1900 N Street, NW, Suite 100
Washington, D.C. 20036

Eric L. Klein
(617) 419-2316
eklein@bdlaw.com
BEVERIDGE & DIAMOND, P.C.
155 Federal Street, Suite 1600
Boston, MA 02110

*Counsel for Respondent
ISP Freetown Fine Chemicals Inc.*

² Note change of DC office address.

APPENDIX A

**ISP STATEMENT ON WHY EPA’S PROPOSED PENALTY
SHOULD BE ELIMINATED OR REDUCED**

INTRODUCTION

In response to this Tribunal’s Prehearing Order of October 22, 2020, Respondent ISP Freetown Fine Chemicals Inc. (“ISP” or the “Company”) hereby provides a detailed narrative statement explaining the precise factual and legal bases for its position that the penalty proposed by Complainant U.S. Environmental Protection Agency (“EPA” or the “Agency”) in its Initial Prehearing Exchange should be eliminated or reduced. A copy of all documents upon which ISP intends to rely in support of this position are provided elsewhere in the Company’s Prehearing Exchange. ISP also intends to rely in support of this position on the testimony of witnesses identified elsewhere in the Company’s Prehearing Exchange.

All of the allegations in EPA’s Amended Complaint in this case have either partially or fully been resolved through the Partial Consent Agreement and Final Order (“Partial CAFO”) filed with the Regional Hearing Clerk on October 14, 2020. ISP addresses each remaining unresolved portion of the original allegations separately below, in each case providing (i) a summary of EPA’s original allegation and proposed penalty, (ii) an explanation of what remains of the original allegation after the Partial CAFO, (iii) a brief recap of EPA’s revised penalty proposal as set forth in its Initial Prehearing Exchange, and (iv) ISP’s position on why EPA’s revised penalty should be eliminated or reduced (together with an explanation of the basis for that position).

As discussed below, all of the remaining portions of the original allegations relate to four Receiver Tanks at the ISP facility or to “Upstream Equipment” used to transfer materials into such tanks from their associated and adjacent condensers. It is ISP’s position (as set forth in ISP’s Prehearing Exchange) that these Receiver Tanks and the Upstream Equipment are not subject to hazardous waste regulation under the Resource Conservation and Recovery Act (“RCRA”) and its Massachusetts counterpart, on the ground that they are part of Manufacturing Process Units (“MPUs”) that are explicitly exempt under such regulations. *See* 40 C.F.R. § 261.4(c) (hazardous wastes generated in an MPU are exempt until they exit the unit in which they were generated); 310 C.M.R. § 30.140(1)(f) (same). Accordingly, ISP believes that the remaining portions of the original EPA allegations are without merit, and ***the Agency’s revised proposed penalty should be eliminated in its entirety.***

While ISP hopes and expects to prevail on the MPU Exemption issue, in order to respond as fully as possible to this Tribunal’s request, ISP also addresses below what ISP believes the penalties should be in the event that ISP does not prevail on the MPU Exemption issue. As discussed in detail below for the remaining portion of each allegation, ISP believes that, in such a case, the Agency’s revised proposed penalties should be substantially reduced, for example because the potential for harm associated with each remaining allegation is very low and/or because the alleged noncompliance represents much less deviation from regulatory requirements than claimed by EPA.

COUNT 1 (AS REMAINING)
Alleged Failure to Manage Receiver Tanks as Hazardous Waste Tanks

COUNT 1: Overview³

EPA's allegation that ISP violated RCRA requirements by not managing the Receiver Tanks as hazardous waste tanks lacks merit because those tanks are exempt from regulation under the MPU Exemption. Accordingly, no penalty should be assessed under Count 1. Moreover, even if ISP were not to prevail on the MPU Exemption issue, the penalty should be much lower than proposed by EPA, because the potential for harm associated with the alleged violation is Minor. For example, the tanks are designed and operated in a manner that is highly protective against releases, ensures that any releases that could potentially occur would be detected and addressed quickly, and would keep any liquid releases from entering the environment. In addition, the alleged noncompliance represents at most a Moderate extent of deviation from hazardous waste tank regulatory requirements because the Facility-Wide Hazardous Waste Tank – which handles far more material than any of the Receiver Tanks (or all of the Receiver Tanks together) and does so for far longer periods than the Receiver Tanks – is in compliance with the relevant tank standards.

COUNT 1: EPA's Original Allegation & Proposed Penalty

Count 1 of the Amended Complaint alleged that ISP “fail[ed] to manage its Receiver Tanks as hazardous waste tanks and thus violated 310 C.M.R. §§ 30.341(2), 30.694, 30.695, and 30.696,

³ Although the focus here is on the calculation of the penalty, ISP must highlight and correct several factual and legal inaccuracies in EPA's own penalty calculation, in particular regarding EPA's description of operations at the Company's facility. These inaccuracies are largely, though not entirely, in EPA's text regarding the proposed penalty associated with Count 1, and several examples are highlighted here for illustrative purposes only. For example, EPA states that “solvent wastes are the only materials that go to the receivers.” *See* CX 5, Page 2 of 14. However, as ISP will prove at a hearing, the materials that go to the receivers are not wastes and are not exclusively solvents. EPA also asserts that “[i]f [the material in the receivers] is waste isopropyl alcohol (‘IPA’) then it is sent for reclamation.” *Id.* This is a misstatement of law; the IPA collected in the receivers is generally not “waste” *because* it is reclaimed and reused in a closed-loop process. *See* 40 C.F.R. § 261.4(a)(8) (materials that are reclaimed and returned to the original production process in an enclosed system consisting of tanks and pipes are not wastes, subject to limited conditions which are not relevant here); *see also* 310 C.M.R. § 30.202(4) (substantially similar). Further, EPA states that “[a]ll remaining solvents [other than IPA] are sent from the receivers... to hazardous waste (‘HW’) tank S-535.” *See* CX 5, Page 2 of 14. But many of these “remaining solvents” are not sent to Tank S-535, but rather to other dispositions, including drumming for direct reuse “as is” in other facility operations. *See, e.g.*, Letter from David Bussard, Waste Identification Division, Office of Solid Waste, EPA, to Catherine A. McCord, Manager, Environmental and Business Integration, Safety-Kleen (August 21, 1998) (RCRA Online #14281) (RX-36) (“when a used solvent is employed for another solvent use, this continued use indicates that the solvent remains a product”).

as referenced by 310 C.M.R. § 30.343(1).” See Amended Complaint ¶ 33. For these purposes, the Receiver Tanks were defined to include the following tanks:

- (1) Tank S-505;
- (2) Tank S-507;
- (3) Tank S-526;
- (4) Tank S-503A;
- (5) Tank S-545; and
- (6) Tank S-502A.

Id. ¶ 20.b. In Attachment 1 to the Amended Complaint, EPA proposed a penalty for this count in the amount of \$24,364, based on its view that the alleged violation posed Moderate potential for harm and represented a Major extent of deviation from regulatory requirements, and based on the application of multiday penalties for the alleged violation for all of the tanks other than the first one, as well as a 10% reduction based on ISP’s good faith.

COUNT 1: Portion of the Allegation Remaining to be Addressed

In the Partial CAFO, EPA agreed that two of the 6 originally referenced Receiver Tanks (*i.e.*, Tanks S-505 and S-507) are not subject to federal RCRA requirements. See Partial CAFO ¶11 (“EPA agrees ... (d) that Tanks S-505 and S-507 are not subject to federal RCRA requirements”). Accordingly, what remains to be addressed here is the part of Count 1 relating to the 4 other receivers (*i.e.*, #3 through #6 above).

COUNT 1: EPA’s Revised Proposed Penalty

In its Initial Prehearing Exchange, EPA proposes a revised penalty for Count 1 of \$20,404. The Agency calculates this value essentially the same way as it calculated the proposed penalty under the Amended Complaint (*i.e.*, as a Moderate/Major violation with multiday penalties for all tanks other than the first one and a 10% reduction for good faith), except that it has reduced the original proposed penalty to reflect the reduced number of tanks for which violations are now being alleged. See CX 5, Page 4 of 14.

COUNT 1: ISP’s Response

As set forth in ISP’s Prehearing Exchange, ISP believes that the Receiver Tanks still at issue under Count 1 are exempt from RCRA regulation under the MPU Exemption. Accordingly, no penalty should be assessed for Count 1. In the event that ISP does not prevail on the MPU Exemption issue, the Company believes that the appropriate penalty for Count 1 under EPA’s RCRA Penalty Policy should be reduced substantially to **\$2,437**. The basis for this value is as follows:

Potential for Harm (Count 1)

The potential for harm from ISP’s alleged failure to manage the four Receiver Tanks as hazardous waste tanks was at most Minor. EPA claims that the potential for harm is Moderate

because “ISP did not have adequate secondary containment systems for these tanks or their ancillary equipment. These tanks were not marked or labeled as hazardous waste tanks. ISP also did not conduct daily inspections of these tanks or their ancillary equipment. ... These failures present a significant risk of harm to the environment because any releases from the tanks would not be adequately contained.” See CX 5, Page 3 of 14. But there is actually little or no risk of releases from the Receiver Tanks into the environment, for several reasons including:

First, the Receiver Tanks are integral parts of closed production systems that must be kept under an oxygen-free or “inert” atmosphere (*i.e.*, vacuum or nitrogen) throughout the production process, for safety reasons (because of the presence of flammable solvents), to prevent unwanted reactions with oxygen, and/or to prevent degradation of raw materials or products. For this reason, the entire production systems – including the Receiver Tanks and the Upstream Equipment – are designed and operated to prevent leaks. Indeed, before each batch, the facility generally tests the entire closed production system as one to ensure against the presence of leaks, by subjecting the whole system to vacuum and checking to make sure the vacuum pressure is maintained.

Second, the Receiver Tanks only contain liquids during production batches, which in most cases last no more than 36 hours, and during each production batch, the system is monitored closely (*e.g.*, with process parameters like pressure, temperature, and vessel volumes being recorded at regular intervals throughout). As a result, any significant release from a Receiver Tank would be detected and addressed promptly.

Third, during each distillation, the facility generally reduces the pressure of the inert atmosphere within the entire closed production system – including the Receiver Tanks and the Upstream Equipment – so that less heat (which could degrade the products being distilled) is needed to effectuate the distillation. As a result of this “negative pressure,” in the unlikely event of a leak, air from the ambient atmosphere would be drawn into the system and vapors from the system would not be released.

Fourth, as EPA acknowledges, “[t]hese tanks [a]re located inside the production building.” See CX 5, Page 3 or 14. Accordingly, ISP contends that there is little chance that any liquids that might escape from the Receiver Tanks would enter the environment.

Extent of Deviation (Count 1)

As noted above, ISP believes that the Receiver Tanks still at issue under Count 1 were exempt from RCRA regulation based on the MPU Exemption, such that there was no deviation from regulatory requirements. In the event that the Company does not prevail on the MPU Exemption issue, ISP believes that the extent of deviation should be characterized as at most Moderate. While the four Receiver Tanks at issue were not operated in accordance with the hazardous waste tank standards, the facility’s central hazardous waste storage tank, Tank S-535, was operated pursuant to such standards (although ISP notes that the Partial CAFO resolved EPA allegations of minor noncompliance associated with that tank). Tank S-535 has a storage capacity approximately 2.5 times greater than the four Receiver Tanks *combined*. Moreover, while the Receiver Tanks (as noted above) only contain liquids during production batches, which

in most cases last no more than 36 hours, Tank S-535 contains its much greater volume for up to a few weeks until shipment to an appropriate hazardous waste facility. In light of these facts, ISP was in substantial compliance with the hazardous waste tank standards – even if it is ultimately determined that the four Receiver Tanks were not.

Gravity-Based Penalty Calculation (Count 1)

Under EPA’s RCRA Penalty Policy (with the relevant inflation adjustment), the matrix cell range for a Minor/Moderate violation (as discussed above) is \$846 - \$2536. The midpoint of this range is \$1691. The multiday matrix cell range of such a Minor/Moderate violation is \$169 - \$508, with a midpoint of \$339. Adding \$1691 for the first tank, and \$339 for each of the other three tanks, the total gravity-based penalty would be **\$2,708**.

Other Adjustments (Count 1)

ISP agrees with EPA that no adjustments are warranted for economic benefit, willfulness/negligence, history of noncompliance, or other unique factors. However, ISP also agrees with the Agency that a 10% reduction for good faith efforts should apply. Applying such a reduction to the gravity-based penalty discussed above yields a final alternative proposed penalty amount of **\$2,437** for Count 1 (as remaining).

COUNT 2 (AS REMAINING)

Alleged Failure to Satisfy Subpart CC Air Emission Standards for Receiver Tanks

COUNT 2: Overview

EPA’s allegation that ISP violated RCRA requirements by not satisfying Subpart CC air emission standards for the Receiver Tanks lacks merit because those tanks are exempt from regulation under the MPU Exemption. Accordingly, no penalty should be assessed under Count 2. Moreover, even if ISP were not to prevail on the MPU Exemption issue, the penalty should be much lower than proposed by EPA, because the potential for harm associated with the alleged violation is Minor. For example, the tanks are designed and operated in a manner that is highly protective against releases and ensures that any releases that could potentially occur would be detected and addressed quickly. In addition, the alleged noncompliance represents at most a Moderate extent of deviation from Subpart CC requirements because the Facility-Wide Hazardous Waste Tank – which handles far more material than any of the Receiver Tanks (or all of the Receiver Tanks together) and does so for far longer periods than the Receiver Tanks – is in compliance with the Subpart CC standards.

COUNT 2: EPA’s Original Allegation & Proposed Penalty

Count 2 of the Amended Complaint alleged that “eight tanks at the [ISP] Facility .. were operating as hazardous waste storage tanks, as described in Paragraphs 20” but were in violation of Subpart CC because the Company “fail[ed] to inspect, monitor, and document inspections of [such] hazardous waste storage tanks ... under Sections 265.1083(b), 265.1085(c)(4), 265.1089(a) and (b) and 265.1090(a) and (b), as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-

numbered as 40 C.F.R. § 262.17(a)(2)].” See Amended Complaint ¶ 42 and ¶ 44. The referenced “tanks, as described in Paragraphs 20” consisted of the following tanks:

- (1) Tank S-505;
- (2) Tank S-507;
- (3) Tank S-526;
- (4) Tank S-503A;
- (5) Tank S-545;
- (6) Tank S-502A;
- (7) Tank S-535; and
- (8) Tank S-716A.

Id. ¶ 20. In Attachment 1 to the Amended Complaint, EPA proposed a penalty for this count in the amount of \$66,229, based on its view that the alleged violation posed Major potential for harm and represented a Major extent of deviation from regulatory requirements, and based on the application of multiday penalties for the alleged violation for all of the tanks other than the first one, as well as a 10% reduction based on ISP’s good faith.

COUNT 2: Portion of the Allegation Remaining to be Addressed

In the Partial CAFO, EPA agreed that 3 of the 8 originally referenced tanks (*i.e.*, Tanks S-505, S-507, and S-716A) are not subject to federal RCRA requirements. See Partial CAFO ¶11 (“EPA agrees (a) that Tank S-716A and its associated equipment are not subject to RCRA requirements ... and (d) that Tanks S-505 and S-507 are not subject to federal RCRA requirements”). In addition, the Partial CAFO resolved the portion of Count 2 relating to Tank S-535 (*i.e.*, #7 above). *Id.* ¶ 9 (stating that the Partial CAFO resolved Count 2 with respect to the Facility-Wide Hazardous Waste Tank); see also ¶ 6.a (defining the Facility-Wide Hazardous Waste Tank as Tank S-535). Accordingly, what remains to be addressed here is the part of Count 2 relating to the 4 other tanks (*i.e.*, #3 through #6 above).

COUNT 2: EPA’s Revised Proposed Penalty

In its Initial Prehearing Exchange, EPA proposes a revised penalty for Count 2 of \$47,959. The Agency calculates this value essentially the same way as it calculated the proposed penalty under the Amended Complaint (*i.e.*, as a Major/Major violation with multiday penalties for all tanks other than the first one and a 10% reduction for good faith), except that it has reduced the original proposed penalty to reflect the reduced number of tanks for which violations are being alleged. See CX 5, Page 7 of 14.

COUNT 2: ISP’s Response

As set forth in ISP’s Prehearing Exchange, ISP believes that the tanks still at issue under Count 2, all of which are Receiver Tanks, are exempt from RCRA regulation under the MPU Exemption. Accordingly, no penalty should be assessed for Count 2. In the event that ISP does not prevail on the MPU Exemption issue, the Company believes that the appropriate penalty for

Count 2 under EPA's RCRA Penalty Policy should be reduced substantially to **\$2,437**. The basis for this value is as follows:

Potential for Harm (Count 2)

The potential for harm from ISP's alleged failure to satisfy Subpart CC air emission requirements for the four Receiver Tanks was at most Minor. EPA claims that the potential for harm is Major because "[t]anks containing hazardous wastes with high volatile organic compound ("VOC") concentrations have the potential to pollute when tank openings are not properly maintained and monitored. ... The violations ... pose a major potential for harm to human health and the environment due to the potential for uncontrolled VOC emissions at ISP's facility." See CX 5, Pages 5-6 of 14. However, the issue here is not whether failure to comply with Subpart CC requirements for high-VOC tanks *in general* might pose a substantial risk, but whether the alleged failure to comply *for the specific tanks at issue* might pose a substantial risk. As discussed above in the context of the remaining portions of Count 1, there is little or no risk of emissions or other releases from the specific Receiver Tanks at issue in this case. Accordingly, the potential for harm associated with the alleged violation is Minor.

Extent of Deviation (Count 2)

In the event that the Company does not prevail on the MPU Exemption issue, ISP believes that the extent of deviation should be characterized as at most Moderate. While the four Receiver Tanks at issue were not operated in accordance with the hazardous waste tanks standards, the facility's central hazardous waste storage tank, Tank S-535, was operated pursuant to such standards (although ISP notes that the Partial CAFO resolved EPA allegations of minor noncompliance associated with that tank). Tank S-535 has a storage capacity approximately 2.5 times greater than the four Receiver Tanks *combined*. Moreover, while the Receiver Tanks (as noted above) only contain liquids during production batches, which in most cases last no more than 36 hours, Tank S-535 contains its much greater volume for up to a few weeks until shipment to an appropriate hazardous waste facility. In light of these facts, ISP was in substantial compliance with the hazardous waste tank standards – even if it is ultimately determined that the four Receiver Tanks were not.

Gravity-Based Penalty Calculation (Count 2)

Under EPA's RCRA Penalty Policy (with the relevant inflation adjustment), the matrix cell range for a Minor/Moderate violation (as discussed above) is \$846 - \$2536. The midpoint of this range is \$1691. The multiday matrix cell range of such a Minor/Moderate violation is \$169 - \$508, with a midpoint of \$339. Adding \$1691 for the first tank, and \$339 for each of the other three tanks, the total gravity-based penalty would be **\$2,708**.

Other Adjustments (Count 2)

ISP agrees with EPA that no adjustments are warranted for economic benefit, willfulness/negligence, history of noncompliance, or other unique factors. However, ISP also agrees with the Agency that a 10% reduction for good faith efforts should apply. Applying such

a reduction to the gravity-based penalty discussed above yields a final alternative proposed penalty amount of \$2,437.

COUNT 3 (AS REMAINING)
Alleged Failure to Mark Upstream Equipment

COUNT 3: Overview

EPA’s allegation that ISP violated RCRA requirements by not marking Upstream Equipment as being subject to Subpart BB lacks merit because such equipment is exempt from regulation under the MPU Exemption. Accordingly, no penalty should be assessed under Count 3. Moreover, even if ISP were not to prevail on the MPU Exemption issue, the penalty should be much lower than proposed by EPA, because only a limited number of pieces of Upstream Equipment were not marked and they would be readily obvious to even an inexperienced inspector, such that the potential for harm from the alleged violation and the extent of deviation from regulatory requirements (if any) were at most minor.

COUNT 3: EPA’s Original Allegation & Proposed Penalty

Count 3 of the Amended Complaint alleged that ISP “fail[ed] to label the Equipment described in Paragraph 21 above, in such a manner that it could be distinguished readily from other pieces of equipment [in violation of] 40 C.F.R. § 1050(c), as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)].” *See* Amended Complaint ¶ 50. The referenced “Equipment described in Paragraph 21” consisted of “[t]ransfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds used to transfer hazardous waste to and from” the following:

- (1) Tank S-716A;
- (2) Specified “Receiver Tanks” (defined in ¶ 20.b to include tanks S-505, S-507, S-526, S-503A, S-545, and S-502A);
- (3) Tank S-535; and
- (4) “[V]ariouly sized reactor vessels” in the facility’s Pilot Plant.

See id. ¶ 21. In Attachment 1 to the Amended Complaint, EPA proposed a penalty for this count in the amount of \$9,869, based on its view that the alleged violation posed Moderate potential for harm and represented a Moderate extent of deviation from regulatory requirements, with a 10% reduction based on ISP’s good faith.

COUNT 3: Portion of the Allegation Remaining to be Addressed

The only part of this allegation that remains to be addressed in this case is a small portion of the original allegation as it related to *some* of the equipment associated with *some* of the Receiver Tanks (*i.e.*, a small portion of #2 above). In the Partial CAFO, EPA agreed that the equipment associated with Tank S-716A (#1 above) and the equipment in the Pilot Plant (#4 above) are not subject to 40 C.F.R. Part 265, Subpart BB (which includes § 1050(c)). *See* Partial CAFO, ¶ 11 (“EPA agrees (a) that Tank 716-A and its associated equipment are not subject to RCRA requirements ... [and] (b) that the equipment in the Pilot Plant is not subject to Subpart BB of

RCRA”). Further, the Partial CAFO resolved the portion of Count 3 relating to the equipment associated with Tank S-535 (#3 above). *Id.* ¶ 9 (stating that the Partial CAFO resolved Count 3 with respect to the Mid-Stream Equipment and the Downstream Equipment); *see also* ¶ 6.b (defining Mid-Stream Equipment as equipment used to transfer material “from the Receiver Tanks to the Facility-Wide Hazardous Waste Tank” and defining Downstream Equipment as equipment used to transfer material “from the Facility-Wide Hazardous Waste Tank to transportation vehicles for off-site shipment”) and ¶ 6.a (defining the Facility-Wide Hazardous Waste Tank as Tank S-535).

With respect to the final item covered by Count 3 (#2 above), EPA agreed in the Partial CAFO that two of the 6 originally referenced Receiver Tanks (*i.e.*, Tanks S-505 and S-507), as well as their associated equipment, are not subject to federal RCRA requirements. *Id.* ¶11 (“EPA agrees ... (d) that Tanks S-505 and S-507 are not subject to federal RCRA requirements”). Moreover, the Partial CAFO resolved the portion of Count 3 relating to equipment that transfers material *from* the other four Receiver Tanks. *Id.* ¶ 9 (stating that the Partial CAFO resolved Count 3 with respect to the Mid-Stream Equipment); *see also* ¶ 6.b (defining Mid-Stream Equipment as equipment used to transfer material “*from* the Receiver Tanks to the Facility-Wide Hazardous Waste Tank” (emphasis added)) and ¶ 6.a (defining the Facility-Wide Hazardous Waste Tank as Tank S-535).

In light of the above, the only part of Count 3 that remains to be addressed in this case is a small portion of #2 above – namely, the portion relating to the equipment that is used to transfer material *to* 4 of the 6 Receiver Tanks covered by the original allegation. *Id.* ¶ 10 (stating that the Partial CAFO does not resolve the portion of Count 3 relating to the Upstream Equipment); *see also* ¶ 6.b (defining Upstream Equipment as equipment “used to transfer material from condensers to the Receiver Tanks”) and ¶ 6.a (defining Receiver Tanks for purposes of the Partial CAFO as just 4 tanks – Tanks S-502A, S-503A, S-526, and S-545).

COUNT 3: EPA’s Revised Proposed Penalty

In its Initial Prehearing Exchange, EPA proposes a revised penalty for Count 3 of \$4,948. The Agency calculates this value essentially the same way as it calculated the proposed penalty under the Amended Complaint (*i.e.*, as a Moderate/Moderate violation with a 10% reduction for good faith), except that it has reduced the original proposed penalty “by 50% because the Upstream Equipment is about half of the violating equipment that was originally cited in the Amended Complaint.” *See* CX 5, Page 8 of 14.

COUNT 3: ISP’s Response

As set forth in ISP’s Prehearing Exchange, ISP believes that the equipment still at issue under Count 3 is exempt from RCRA regulation under the MPU Exemption. Accordingly, no penalty should be assessed for Count 3. In the event that ISP does not prevail on the MPU Exemption issue, the Company believes that the appropriate penalty for Count 3 under EPA’s RCRA Penalty Policy should be reduced substantially to **\$456**. The basis for this value is as follows:

Potential for Harm (Count 3)

The potential for harm from ISP's alleged violation of the Subpart BB marking requirement for the Upstream Equipment (*i.e.*, the equipment used to transfer materials from 4 condensers to their respective and adjacent Receiver Tanks) is at most Minor. EPA claims that the potential for harm is Moderate because "ISP made it difficult to locate the equipment to conduct monitoring and visual inspections. ... Only an individual with detailed knowledge of the entire piping and control systems at ISP would be able, over time, to identify and locate subject equipment." *See* CX 5, Page 8 of 14. However, to the extent that EPA thought that the Receiver Tanks were regulated hazardous waste units, and therefore that the equipment carrying materials into such tanks from the associated condensers were subject to Subpart BB, there would have been no mystery about what pipes and valves were covered.

For each of the four production systems at issue, all of the Upstream Equipment is along a single line starting at the receiver and extending a short distance back to the associated condenser. An inspector would not need "detailed knowledge of the entire piping and control systems at ISP... to identify and locate subject piping," as EPA claims. The relevant equipment would be immediately obvious from even a passing glance. The alleged lack of markings on the Upstream Equipment clearly posed little or no potential for harm.

Extent of Deviation (Count 3)

The alleged violation of the Subpart BB marking requirement for the Upstream Equipment represented at most a Minor deviation from regulatory requirements. EPA claims that the extent of deviation was Moderate, because ISP marked "some" – but only some – of the equipment subject to Subpart BB regulation. *See* CX 5, Page 8 of 14 ("At the time of the inspection, ISP had piping and instrumentation diagrams ('P&IDs') that documented *some* of the equipment subject to Subpart BB regulations" (emphasis added)). However, EPA is minimizing the large amount of equipment that had already been marked in accordance with Subpart BB at the time of the inspection, and the Agency appears to be improperly trying to bootstrap additional penalties based on the portion of Count 3 that was previously resolved in the Partial CAFO (and for which ISP has already paid a penalty).

At the time of the inspection, ISP had already taglessly marked (with P&IDs) a significant amount of equipment pursuant to Subpart BB, namely (1) all of the equipment dedicated to carrying hazardous waste from a manifold referred to as the "F-5 Hazardous Waste Manifold," (on the inside wall of the F-5 building in which the Receiver Tanks are located) to the outside facility-wide hazardous waste tank (Tank S-535), and (2) all of the equipment used to carry hazardous waste from that tank to tanker trucks for offsite shipment. Although the Company had not marked the equipment used to carry both hazardous wastes and other materials from the receivers to the F-5 Hazardous Waste Manifold, EPA's concerns about that lack of marking were resolved in the Partial CAFO. *See* Partial CAFO ¶ 9. ISP has paid a penalty covering the issue, and pursuant to Paragraph 13.a of the Partial CAFO, ISP has since physically marked all of the Mid-Stream Equipment (including #1 above (which was already being taglessly marked) and the equipment between the receivers and the F-5 Hazardous Waste Manifold (which was not)) and

for all of the Downstream Equipment (#2 above, which again was already being taglessly marked).

The only equipment that remains at issue under Count 3 is the Upstream Equipment between the condensers and their adjacent receivers, which represents only a small proportion of all the equipment regulated (or allegedly regulated) under Subpart BB. Because each receiver is associated with and in close proximity to a condenser, the Upstream Equipment extends only a limited distance in each of the four production systems at issue.

In light of this, it is inaccurate to say that only “some” (or “about half” as EPA claims at CX 5, Page 8 of 14) of the Subpart BB equipment was marked. Instead, *the vast majority* of the (alleged) Subpart BB equipment either was marked at the time of the inspection or has already been addressed in the Partial CAFO. The alleged failure to mark just a small proportion of all the potentially relevant equipment represented at most a Minor deviation from regulatory requirements.

Gravity-Based Penalty Calculation (Count 3)

Under EPA’s RCRA Penalty Policy, the matrix cell range for a Minor/Minor violation (as discussed above) is \$169 - \$844. The midpoint of this range is \$507.

Other Adjustments (Count 3)

ISP agrees with EPA that multi-day penalties are not appropriate for Count 3, and that no adjustments are warranted for economic benefit, willfulness/negligence, history of noncompliance, or other unique factors. However, ISP also agrees with the Agency that a 10% reduction for good faith efforts should apply. Applying such a reduction to the gravity-based penalty discussed above yields a final alternative proposed penalty amount of \$456.

COUNT 4 (AS REMAINING)

Alleged Failure to Monitor Upstream Equipment

COUNT 4: Overview

EPA’s allegation that ISP violated RCRA requirements by not monitoring Upstream Equipment pursuant to Subpart BB lacks merit because such equipment is exempt from regulation under the MPU Exemption. Accordingly, no penalty should be assessed under Count 4. Moreover, even if ISP were not to prevail on the MPU Exemption issue, the penalty should be much lower than proposed by EPA, because only a limited number of pieces of Upstream Equipment were not monitored, and such equipment is designed and operated in a manner that ensures the potential for any releases is minimal, such that the potential for harm from the alleged violation and the extent of deviation from regulatory requirements (if any) were at most minor.

COUNT 4: EPA’s Original Allegation & Proposed Penalty

Count 4 of the Amended Complaint alleged that ISP “fail[ed] to monitor the equipment described in Paragraph 57 above [and thereby] violated Subpart BB of 40 C.F.R. Part 265, including Sections 265.1052(a)(1) and (2), 265.1057(a) and 265.1058(a), as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)].” *See* Amended Complaint ¶ 59. The referenced “equipment described in Paragraph 57” consisted of “[t]ransfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds ... used to transfer hazardous waste to and from” the following:

- (1) Specified “Receiver Tanks” (defined in ¶ 20.b to include tanks S-505, S-507, S-526, S-503A, S-545, and S-502A); and
- (2) “[V]ariouly sized reactor vessels” in the facility’s Pilot Plant.

See id. ¶ 57. In Attachment 1 to the Amended Complaint, EPA proposed a penalty for this count in the amount of \$26,689, based on its view that the alleged violation posed Major potential for harm and represented a Moderate extent of deviation from regulatory requirements, with a 10% reduction based on ISP’s good faith.

COUNT 4: Portion of the Allegation Remaining to be Addressed

The only part of this allegation that remains to be addressed in this case is a small portion of the original allegation as it related to *some* of the equipment associated with *some* of the Receiver Tanks (*i.e.*, a small portion of #1 above). In the Partial CAFO, EPA agreed that the equipment in the Pilot Plant (#2 above) is not subject to Subpart BB. *See* Partial CAFO, ¶ 11 (“EPA agrees ... (b) that the equipment in the Pilot Plant is not subject to Subpart BB of RCRA”).

With respect to #1 above, EPA agreed in the Partial CAFO that two of the 6 originally referenced Receiver Tanks (*i.e.*, Tanks S-505 and S-507), as well as their associated equipment, are not subject to federal RCRA requirements. *Id.* ¶11 (“EPA agrees ... (d) that Tanks S-505 and S-507 are not subject to federal RCRA requirements”). Moreover, the Partial CAFO resolved the portion of Count 4 relating to equipment that transfers material *from* the other four Receiver Tanks. *Id.* ¶ 9 (stating that the Partial CAFO resolved Count 4 with respect to the Mid-Stream Equipment); *see also* ¶ 6.b (defining Mid-Stream Equipment as equipment used to transfer material “*from* the Receiver Tanks to the Facility-Wide Hazardous Waste Tank” (emphasis added)) and ¶ 6.a (defining the Facility-Wide Hazardous Waste Tank as Tank S-535).

In light of the above, the only part of Count 4 that remains to be addressed in this case is a small portion of #1 above – namely, the portion relating to the equipment that is used to transfer material *to* 4 of the 6 Receiver Tanks covered by the original allegation. *Id.* ¶ 10 (stating that the Partial CAFO does not resolve the portion of Count 4 relating to the Upstream Equipment); *see also* ¶ 6.b (defining Upstream Equipment as equipment “used to transfer material from condensers to the Receiver Tanks”) and ¶ 6.a (defining Receiver Tanks for purposes of the Partial CAFO as just 4 tanks – Tanks S-502A, S-503A, S-526, and S-545).

COUNT 4: EPA's Revised Proposed Penalty

In its Initial Prehearing Exchange, EPA proposes a revised penalty for Count 4 of \$13,344. The Agency calculates this value essentially the same way as it calculated the proposed penalty under the Amended Complaint (*i.e.*, as a Major/Moderate violation with a 10% reduction for good faith), except that it has reduced the original proposed penalty “by 50% because the Upstream Equipment is about half of the violating equipment that was originally cited in the Amended Complaint.” *See* CX 5, Page 10 of 14.

COUNT 4: ISP's Response

As set forth in ISP's Prehearing Exchange, ISP believes that the equipment still at issue under Count 4 is exempt from RCRA regulation under the MPU Exemption. Accordingly, no penalty should be assessed for Count 4. In the event that ISP does not prevail on the MPU Exemption issue, the Company believes that the appropriate penalty for Count 4 under EPA's RCRA Penalty Policy should be reduced substantially, to **\$456**. The basis for this value is as follows:

Potential for Harm (Count 4)

The potential for harm from ISP's alleged violation of the Subpart BB monitoring requirement for the Upstream Equipment (*i.e.*, the equipment used to transfer materials from 4 condensers to their respective and adjacent Receiver Tanks) is at most Minor. EPA claims that the potential for harm is Major because “[v]alves, pumps and flanges in hazardous waste service with high VOC concentrations have the potential to release hazardous constituents affecting human health and the environment when these pieces of equipment are not properly ... monitored,” and thus failure to perform Subpart BB monitoring “poses a substantial potential for harm to human health and the environment due to the potential for VOC emissions at the facility.” *See* CX 5, Page 10 of 14. However, the issue here is not whether failure to perform monitoring on Subpart BB equipment *in general*, or “at the facility” *as a whole*, might pose a substantial risk, but whether the alleged failure to perform Subpart BB monitoring *on the specific equipment at issue* (*i.e.*, the short segments of Upstream Equipment between the condensers and the adjacent receivers) might pose a substantial risk. ISP believes it does not.

As discussed in detail above in the context of the remaining portions of Count 1, there is little or no risk of emissions or other releases from the four Receiver Tanks at issue in this case or from their associated Upstream Equipment. Indeed, given that the Upstream Equipment is commonly operated at reduced or “negative” pressure (as also discussed above), it would likely be exempt from the monitoring requirements of Subpart BB. *See* 40 C.F.R. § 265.1050(d) (“Equipment that is in vacuum service is excluded from the requirements of § 265.1052 to § 265.1060 if it is identified as required in § 265.1064(g)(5)”); *see also* § 264.1031 (“*In vacuum service* means that equipment is operating at an internal pressure that is at least 5 kPa below ambient pressure”).

Extent of Deviation (Count 4)

The alleged violation of the Subpart BB monitoring requirement for the Upstream Equipment represented at most a Minor deviation from regulatory requirements. EPA claims that the extent

of deviation was Moderate, because ISP monitored “some” – but only some – of the equipment subject to Subpart BB regulation. *See* CX 5, Page 10 of 14. However, EPA is minimizing the large amount of equipment that was already being monitored in accordance with Subpart BB at the time of the inspection, and the Agency appears to be improperly trying to bootstrap additional penalties based on the portion of Count 4 that was previously resolved in the Partial CAFO (and for which ISP has already paid a penalty).

At the time of the inspection, ISP was already performing monitoring pursuant to Subpart BB on a significant amount of equipment, namely all of the equipment dedicated to carrying hazardous waste from the F-5 Hazardous Waste Manifold to the outside facility-wide hazardous waste tank (Tank S-535). In addition, all of the equipment used to carry hazardous waste from that tank to tanker trucks for offsite shipment was being monitored annually, and full Subpart BB monitoring for this equipment was instituted shortly after the inspection. Although the Company was not performing Subpart BB monitoring on equipment used to carry both hazardous wastes and other materials from the receivers to the F-5 Hazardous Waste Manifold, EPA’s concerns about that lack of monitoring were resolved in the Partial CAFO. *See* Partial CAFO ¶ 9. ISP has paid a penalty covering the issue, and pursuant to Paragraph 13.b of the Partial CAFO, ISP has committed to perform Subpart BB monitoring for all of the Mid-Stream Equipment (much of which was already being monitored) and for all of the Downstream Equipment (all of which was already being monitored).

The only equipment that remains at issue under Count 4 is the Upstream Equipment between the condensers and their adjacent receivers, which represents only a small proportion of all the equipment regulated (or allegedly regulated) under Subpart BB. Because each receiver is associated with and in close proximity to a condenser, the Upstream Equipment extends only a limited distance in each of the four production systems at issue.

In light of this, it is inaccurate to say that only “some” (or “about half” as EPA claims at CX 5, Page 10 of 14) of the Subpart BB equipment was being monitored. Instead, *the vast majority* of the (alleged) Subpart BB equipment either was being monitored at the time of the inspection or has already been addressed in the Partial CAFO. The alleged failure to monitor just a small proportion of all the potentially relevant equipment represented at most a Minor deviation from regulatory requirements.

Gravity-Based Penalty Calculation (Count 4)

Under EPA’s RCRA Penalty Policy, the matrix cell range for a Minor/Minor violation (as discussed above) is \$169 - \$844. The midpoint of this range is \$507.

Other Adjustments (Count 4)

ISP agrees with EPA that multi-day penalties are not appropriate for Count 4, and that no adjustments are warranted for economic benefit, willfulness/negligence, history of noncompliance, or other unique factors. However, ISP also agrees with the Agency that a 10% reduction for good faith efforts should apply. Applying such a reduction to the gravity-based penalty discussed above yields a final alternative proposed penalty amount of \$456.

COUNT 6 (AS REMAINING)
Alleged Failure to Keep Certain Records on Upstream Equipment

COUNT 6: Overview

EPA's allegation that ISP violated RCRA requirements by not keeping certain records on Upstream Equipment pursuant to Subpart BB lacks merit because such equipment is exempt from regulation under the MPU Exemption. Accordingly, no penalty should be assessed under Count 6. Moreover, even if ISP were not to prevail on the MPU Exemption issue, the penalty should be much lower than proposed by EPA, because Subpart BB records for only a limited number of pieces of equipment were not being maintained, and such Upstream Equipment is designed and operated in a manner that ensures the potential for any releases is minimal, such that the potential for harm from the alleged violation and the extent of deviation from regulatory requirements (if any) were at most minor.

COUNT 6: EPA's Original Allegation & Proposed Penalty

Count 6 of the Amended Complaint alleged that ISP "fail[ed] to maintain records for the equipment described in Paragraph 69 above [and thereby] violated 40 C.F.R. §§ 265.1064(a), (b), and (g), as referenced by 40 C.F.R. § 262.34(a)(1)(ii) [re-numbered as 40 C.F.R. § 262.17(a)(2)]." See Amended Complaint ¶ 70. The referenced "equipment described in Paragraph 69" consisted of "[t]ransfer hoses, valves, connectors, flex hoses, pumps, and pipe manifolds ... used to transfer hazardous waste to and from" the following:

- (1) Specified "Receiver Tanks" (defined in ¶ 20.b to include tanks S-505, S-507, S-526, S-503A, S-545, and S-502A); and
- (2) "[V]ariouly sized reactor vessels" in the facility's Pilot Plant.

See *id.* ¶ 59. In Attachment 1 to the Amended Complaint, EPA proposed a penalty for this count in the amount of \$26,689, based on its view that the alleged violation posed Major potential for harm and represented a Moderate extent of deviation from regulatory requirements, with a 10% reduction based on ISP's good faith.

COUNT 6: Portion of the Allegation Remaining to be Addressed

The only part of this allegation that remains to be addressed in this case is a small portion of the original allegation as it related to *some* of the equipment associated with *some* of the Receiver Tanks (*i.e.*, a small portion of #1 above). In the Partial CAFO, EPA agreed that the equipment in the Pilot Plant (#2 above) is not subject to Subpart BB. See Partial CAFO, ¶ 11 ("EPA agrees ... (b) that the equipment in the Pilot Plant is not subject to Subpart BB of RCRA").

With respect to #1 above, EPA agreed in the Partial CAFO that two of the 6 originally referenced Receiver Tanks (*i.e.*, Tanks S-505 and S-507), as well as their associated equipment, are not subject to federal RCRA requirements. *Id.* ¶11 ("EPA agrees ... (d) that Tanks S-505 and S-507 are not subject to federal RCRA requirements"). Moreover, the Partial CAFO resolved the portion of Count 6 relating to equipment that transfers material from the other four Receiver

Tanks. *Id.* ¶ 9 (stating that the Partial CAFO resolved Count 6 with respect to the Mid-Stream Equipment); *see also* ¶ 6.b (defining Mid-Stream Equipment as equipment used to transfer material “*from* the Receiver Tanks to the Facility-Wide Hazardous Waste Tank” (emphasis added)) and ¶ 6.a (defining the Facility-Wide Hazardous Waste Tank as Tank S-535).

In light of the above, the only part of Count 6 that remains to be addressed in this case is a small portion of #1 above – namely, the portion relating to the equipment that is used to transfer material *to* 4 of the 6 Receiver Tanks covered by the original allegation. *Id.* ¶ 10 (stating that the Partial CAFO does not resolve the portion of Count 6 relating to the Upstream Equipment); *see also* ¶ 6.b (defining Upstream Equipment as equipment “used to transfer material from condensers to the Receiver Tanks”) and ¶ 6.a (defining Receiver Tanks for purposes of the Partial CAFO as just 4 tanks – Tanks S-502A, S-503A, S-526, and S-545).

COUNT 6: EPA’s Revised Proposed Penalty

In its Initial Prehearing Exchange, EPA proposes a revised penalty for Count 6 of \$13,344. The Agency calculates this value essentially the same way as it calculated the proposed penalty under the Amended Complaint (*i.e.*, as a Major/Moderate violation with a 10% reduction for good faith), except that it has reduced the original proposed penalty “by 50% because the Upstream Equipment is about half of the violating equipment that was originally cited in the Amended Complaint.” *See* CX 5, Page 13 of 14.

COUNT 6: ISP’s Response

As set forth in ISP’s Prehearing Exchange, ISP believes that the equipment still at issue under Count 6 is exempt from RCRA regulation under the MPU Exemption. Accordingly, no penalty should be assessed for Count 6. In the event that ISP does not prevail on the MPU Exemption issue, the Company believes that the appropriate penalty for Count 6 under EPA’s RCRA Penalty Policy should be reduced substantially to \$456. The basis for this value is as follows:

Potential for Harm (Count 6)

The potential for harm from ISP’s alleged violation of the Subpart BB recordkeeping requirement for the Upstream Equipment (*i.e.*, the equipment used to transfer materials from 4 condensers to their respective Receiver Tanks) is at most Minor. EPA claims that the potential for harm is Major because “[n]ot maintaining adequate records concerning waste streams and equipment subject to air emission regulations poses a substantial risk of release of hazardous constituents affecting human health and the environment.” *See* CX 5, Page 12 of 14. However, the issue here is not whether failure to keep records on Subpart BB equipment *in general* might pose a substantial risk, but whether the alleged failure to keep Subpart BB records *on the specific equipment at issue* (*i.e.*, the short segments of Upstream Equipment between the condensers and the adjacent receivers) might pose a substantial risk. As discussed above in the context of the remaining portion of Count 4, there is little or no potential for air emissions from the Upstream Equipment, much less potential for air emissions that would significantly affect human health or the environment.

Extent of Deviation (Count 6)

The alleged violation of the Subpart BB recordkeeping requirement for the Upstream Equipment represented at most a Minor deviation from regulatory requirements. EPA claims that the extent of deviation was Moderate, because “ISP did not maintain *most* of the records required.” *See* CX 5, Page 13 of 14 (emphasis added). However, EPA is minimizing the large amount of equipment for which records were already being kept in accordance with Subpart BB at the time of the inspection, and the Agency appears to be improperly trying to bootstrap additional penalties based on the portion of Count 6 that was previously resolved in the Partial CAFO (and for which ISP has already paid a penalty).

At the time of the inspection, ISP was already keeping Subpart BB records on a significant amount of equipment, namely (1) all of the equipment dedicated to carrying hazardous waste from a manifold on the inside wall of the building where the Receiver Tanks are located to the outside facility-wide hazardous waste tank (Tank S-535), and (2) all of the equipment used to carry hazardous waste from that tank to tanker trucks for offsite shipment. Although the Company was not keeping Subpart BB records on equipment used to carry both hazardous wastes and other materials from the receivers to the manifold, EPA’s concerns about the lack of records for such equipment were resolved in the Partial CAFO. *See* Partial CAFO ¶ 9. ISP has paid a penalty covering the issue, and pursuant to Paragraph 13.c of the Partial CAFO, ISP has since started to keep Subpart BB records for all of the Mid-Stream Equipment (including #1 above (which was already covered by Subpart BB records) and the equipment between the receivers and the manifold (which was not)) and for all of the Downstream Equipment (#2 above, which again was already covered by Subpart BB records).

The only equipment that remains at issue under Count 6 is the Upstream Equipment between the condensers and their adjacent receivers, which represents only a small proportion of all the equipment regulated (or allegedly regulated) under Subpart BB. Because each receiver is associated with and in close proximity to a condenser, the Upstream Equipment extends only a limited distance in each of the four production systems at issue.

In light of this, it is inaccurate to say that “most” of the Subpart BB records were missing, as EPA claims at CX 5, Page 13 of 14. Instead, records for *the vast majority* of the (alleged) Subpart BB equipment either existed at the time of the inspection or have already been addressed in the Partial CAFO. The alleged failure to keep records on just a small proportion of all the potentially relevant equipment represented at most a Minor deviation from regulatory requirements.

Gravity-Based Penalty Calculations (Count 6)

Under EPA’s RCRA Penalty Policy, the matrix cell range for a Minor/Minor violation (as discussed above) is \$169 - \$844. The midpoint of this range is \$507.

Other Adjustments (Count 6)

ISP agrees with EPA that multi-day penalties are not appropriate for Count 6, and that no adjustments are warranted for economic benefit, willfulness/negligence, history of noncompliance, or other unique factors. However, ISP also agrees with the Agency that a 10% reduction for good faith efforts should apply. Applying such a reduction to the gravity-based penalty discussed above yields a final alternative proposed penalty amount of \$456.

OVERALL PENALTY CONCLUSION

As discussed above, ISP believes that the remaining portions of the original EPA allegations are without merit because they all relate to four Receiver Tanks and their associated Upstream Equipment that are integral parts of manufacturing process units and thus exempt from hazardous waste regulation. Accordingly, *the Agency's revised proposed penalty should be eliminated in its entirety.*

In the alternative, however, ISP believes that EPA's revised proposed penalties should be substantially reduced, because the potential for harm associated with each remaining allegation is very low and/or because the alleged noncompliance represents much less deviation from regulatory requirements than claimed by EPA. Adding up ISP's alternative proposals for the remaining portions of the original allegations, ISP's total alternative proposal for the entire case is **\$6,242**.