

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

In the Matter of:

ISP Freetown Fine Chemicals, Inc.

MAR000009605

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

Docket No. RCRA-01-2018-0062

COMPLAINANT’S REBUTTAL PREHEARING EXCHANGE

Pursuant to the October 22, 2020, Prehearing Order of this Tribunal, Complainant submits this Rebuttal Prehearing Exchange. In Respondent’s Prehearing Exchange (“RPE”) filed on January 8, 2021, Respondent represents that this case has been narrowed down to a single substantive issue: whether the four used solvent receiver tanks (“Receiver Tanks”) and associated transfer equipment are exempt from RCRA regulation pursuant to the exemption found at 40 C.F.R. § 261.4(c), referred to as the Manufacturing Process Unit (“MPU”) Exemption. Respondent apparently concedes that if its MPU Exemption defense fails, it is liable for each of the five counts alleged by Complainant for noncompliance with RCRA, its implementing regulations and federally-authorized state regulations.

As summarized below, Complainant believes that the MPU Exemption does not apply to this case. Complainant reserves its rights to refine and expand its arguments, identify any additional factual or technical disputes, and more fully explain its position on this matter in briefs or at hearing.

Additional Scope of Expected Rebuttal Witness Testimony
(in response to Paragraph 1.A. of RPE)

Beyond those witnesses identified in Complainant's Initial Prehearing Exchange, filed on December 18, 2020, Complainant does not currently intend to call additional witnesses in rebuttal to Respondent's witnesses. However, Complainant is providing the following supplemental information regarding witnesses already identified.

Complainant supplements the subject matter of the expected testimony of Richard Piligian to include testimony regarding Respondent's exhibits as they relate to any matters in dispute and in response to any arguments and evidence presented by Respondent.

Complainant supplements the subject matter of the expected expert testimony of Kevin Schanilec in order to respond to the expected testimony of Respondent's witnesses. Specifically, in addition to the description of witness testimony previously described, Mr. Schanilec may also offer expert testimony about the following topics:

- The configuration and operation of Respondent's Receiver Tanks as discrete units;
- How the collection and accumulation of used liquid solvent in the Receiver Tanks occurs at Respondent's facility;
- The configuration and operation of the Respondent's equipment connecting the Receiver Tanks to the condensers;
- The configuration and operation of Respondent's condensers, including the transformation of solvent vapor into used liquid solvent;
- The operation of Respondent's reactor units;
- Distillation processes generally and the distillation operations at Respondent's facility;
- The use of vacuum pressure and reactor pressure, and their significance to systems generally and to Respondent's facility;
- The use of pressurized nitrogen generally and at Respondent's facility;

- The pressures and atmospheres in the head space of the reactor and Receiver Tank during various phases of production operations;
- Respondent's general facility operations that relate to vapor and condensed liquid solvent collection and management as set forth in Complainant's and Respondent's exhibits.

Complainant's Supplemental Exhibits (in response to Paragraph 1(B) of RPE)

Complainant intends to introduce the following additional exhibits:

CX#	DESCRIPTION
26	Perry's Chemical Engineers Handbook, 8 th Edition 2008, (Cover and Chapt. 13)
27	RCRA Online 11935 (EPA letter to Charles D. Duthler) January 26, 1995 https://rcrapublic.epa.gov/files/11935.pdf
28	RCRA Online 12634 (RCRA/Superfund Hotline Monthly Summary) May 1986 https://rcrapublic.epa.gov/files/12634.pdf
29	RCRA Online 12790 (RCRA/Superfund Hotline Monthly Summary) Dec. 1986 https://rcrapublic.epa.gov/files/12790.pdf
30	RCRA Online 14089 (EPA letter to Mitchell L. Press) June 3, 1997 https://rcrapublic.epa.gov/files/14089.pdf
31	RCRA Online 14262 (EPA letter to Susan Pendleton) April 9, 1998 https://rcrapublic.epa.gov/files/14262.pdf

Complainant's Rebuttal of Respondent's Affirmative Defense Based on the MPU Exemption (in response to Paragraph 3(B) of the RPE)

Respondent's sole defense is an affirmative defense - that the Receiver Tanks and associated equipment utilized to convey used liquid solvent to the Receiver Tanks are exempt from RCRA regulation because of the MPU Exemption. Respondent has the burden of persuasion regarding this defense. Accordingly, Complainant did not discuss the defense in its Initial Prehearing Exchange and addresses it here. First, Respondent's MPU Exemption claim fails as a matter of law: Respondent's use of the Receiver Tanks to accumulate and hold used liquid solvent does not meet the plain language of the MPU Exemption. Second, the Agency has previously addressed the question presented here through rule preamble, administrative case adjudications, and EPA guidance to the regulated community, all of which indicate that the MPU

Exemption does not apply to these storage tanks. Third, Respondent's description of its facility operations is either unsupported by facility documents or irrelevant to the MPU Exemption question (or both), and therefore, Respondent cannot meet its burden to show that the Exemption applies in this case.

The MPU Exemption is one of several regulatory exemptions set out in 40 C.F.R.

§ 261.4(c), which provides as follows:

Hazardous wastes which are exempted from certain regulations. A hazardous waste which is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to [RCRA regulation or notice requirements] until it exits the unit in which it was generated ...

As an initial matter, it is unrefuted that Respondent generates used liquid solvent that is at times managed as RCRA-regulated hazardous waste, and that this used liquid solvent is conveyed through equipment connecting the condenser units to the Receiver Tanks and is accumulated in the Receiver Tanks. Complainant asserts, as the fundamental basis for its claims, that the used liquid solvent that exhibits hazardous characteristics and is not destined for reuse or reclamation is regulated under RCRA when conveyed in the equipment and accumulated and held (*i.e.*, stored) in the Tanks.

While Respondent cannot refute the basic facts referred to above, Respondent claims the storage of the used liquid solvent in the Receiver Tanks is nonetheless exempt from regulation under the MPU Exemption. This regulation clearly states that the Exemption applies to (1) individual units or pieces of equipment (2) that serve a manufacturing function at the facility and (3) in which hazardous waste is generated. All three elements must be met for the Exemption to

apply. Complainant will show that these elements are not present with regard to the Receiver Tanks.

Although Respondent asserts that the Receiver Tanks are part of a larger, exempt MPU (encompassing multiple pieces of equipment), the plain language of the MPU Exemption dictates that it applies on an individual unit-by-unit basis. Not only does the regulation specifically refer to an individual “manufacturing process unit” which appears in a list of exemptions comprised of individual units (*e.g.*, a tank, a vehicle, a vessel), but also this reading is the only way the Exemption makes sense.¹ The MPU Exemption applies to an individual piece of equipment that is *itself* a “manufacturing process unit,” not to a larger manufacturing system. Accordingly, in the present case, the MPU Exemption must be analyzed for each individual Receiver Tank (indisputably, a “tank”), and not, as Respondent seeks to apply it, to the Receiver Tanks and other equipment simply because the Receiver Tanks are part of a wider manufacturing system that as a whole Respondent believes ought to be considered a “manufacturing process unit.” Complainant is not seeking to regulate the units in Respondent’s production process; this case is simply about the regulation of the Receiver Tanks that intermittently store hazardous waste.²

¹ For example, if the MPU Exemption included multiple pieces of equipment, a generator could simply add storage units for hazardous waste at a facility, physically link them to a process at the facility, and claim they were part of a “unit” where the waste was generated. *See In the Matter of: Chem-Solv, Inc. and Austin Holdings*, RCRA-03-2011-0068, at 78-79 (June 5, 2014), *affirmed*, 16 E.A.D. 594 RCRA (3008) 14-02 (EAB January 26, 2015).

² Respondent also argues that the Clean Air Act’s (“CAA”) definition of “Chemical Manufacturing Process Unit” regulating air emissions in production systems should be applied to the RCRA MPU Exemption for hazardous waste. Each term serves a separate purpose within the particular statutory program. The term “Chemical Manufacturing Process Unit” in the CAA applies broadly to ensure emissions from equipment carrying product are fully regulated to address harmful impacts from chemical releases to the air. The MPU Exemption, on the other hand, is used for excluding RCRA regulation from units that would otherwise be drawn into the program and, as is the case with jurisdictional exemptions, should be construed narrowly to ensure only those units that legitimately qualify for the exemption be excluded. These terms are not merely describing pieces of equipment but are serving separate jurisdictional tasks, pulling in opposite directions with the CAA term being inclusionary while the RCRA term is exclusionary. It makes no sense and there is no basis to attempt to force a CAA term, originating in its own

The plain language of the MPU Exemption also specifically states that “manufacturing” must occur within the unit for the Exemption to apply. No manufacturing of product occurs in the facility’s Receiver Tanks; instead, manufacturing occurs in other tanks – specifically, reactors and condensers – where chemical reactions take place.³

Because Respondent cannot credibly argue that manufacturing occurs in the Receiver Tanks, Respondent focuses instead on engineering aspects of the facility operations encompassing multiple units. But the facility’s decisions regarding how to configure its operations cannot transform the Receiver Tanks’ non-manufacturing solvent collection function into a manufacturing function. Respondent’s claims that the Receiver Tanks are “integral” or “necessary” to the overall manufacturing processes at the facility cannot, and do not, render the tanks eligible for the MPU Exemption. Hazardous waste collection tanks are often integral and necessary to the proper operation of industrial facilities, since the absence of such tanks could cause machinery and actual manufacturing units to back up and shut down or could result in waste discharges within facilities that could put employees at risk. Nonetheless, such tanks are still hazardous waste tanks subject to RCRA regulation.

In addition, for the MPU Exemption to make sense, the unit in question must be *exclusively* dedicated to manufacturing. An exemption from regulation of this type does not make sense if the underlying function that is the basis for the exemption (here, manufacturing) is not the exclusive function of the unit. Because there is no such thing as a part-time exemption

distinct regulatory context and having a CAA program import, into a different regulatory setting such as the one at issue here.

³ To determine what Respondent regards as the function of each piece of equipment in its facility, one need not look any further than Respondent’s names for its equipment, referring to the chemical reactor vessels as “reactors,” the used solvent condenser units as “condensers,” and the collection tanks that receive the distilled used solvent as “receivers.”

from (nor part-time compliance with) the RCRA tank regulations, the Exemption cannot attach if the unit is sometimes used for manufacturing and sometimes used for hazardous waste management. Here, as discussed above, because no manufacturing happens at any time in the used solvent collection tanks, this criterion cannot be met. However, even if the Tanks had a part-time manufacturing function, according to well established RCRA principles, because hazardous waste enters the Receivers, they are regulated by RCRA.

Finally, the MPU Exemption's plain language also makes clear that the Exemption applies only to units where hazardous waste is generated *within* the unit. This element is fundamental to the Exemption and the main reason the Exemption was promulgated in the first place – to alter the point where regulation of the waste first begins (ordinarily at the point of generation) to avoid RCRA regulation of a unit with a manufacturing function rather than a waste management function. In the present case, hazardous waste is generated outside of the Receiver Tanks. Specifically, liquid used solvents, which Respondent refers to as “distillates,” are generated in the facility's condensers. These used liquid solvents, which are sometimes hazardous wastes, are accumulated in the Receiver Tanks and are sent to hazardous waste tank S-535 or otherwise drummed up as hazardous waste. Because these hazardous wastes are not generated in the Receiver Tanks but are instead accumulated there, neither the wastes nor the Tanks are covered by the MPU Exemption.⁴

Although almost all of the solvent distillate vapors emanating from Respondent's reactors are condensed and become liquid used solvent in the condensers, Respondent claims that a *de minimis* volume of used solvent vapor makes its way from the condensers into the Receiver

⁴ Even if hazardous waste is generated in the Receiver Tanks, the MPU Exemption would not apply because there is no manufacturing taking place in the Receiver Tanks.

Tanks where it condenses into solvent liquid. However, this claim is without consequence given that the vast majority of the used solvent distillate has been condensed (generated) into liquid form in the upstream condenser units. It is common in waste tanks that contain volatile organic compounds that a small portion of the waste is in a constant state of fluctuation, with vapor condensing to liquid (as Respondent notes) as well as liquid volatilizing into gas. But this totally predictable and frequent phase change of a relatively minute volume of waste material cannot negate the fact that the Receiver Tanks' function remains the accumulation of used liquid solvent, including hazardous waste, that is generated in the upstream condenser units.

It is clear, and Respondent acknowledges, that the Receiver Tanks serve to accumulate used liquid solvent. The question presented here - whether the MPU Exemption applies to units that accumulate and hold used liquid material that is at times regulated hazardous waste - is not one of first impression for the Agency and has been adjudicated by an Agency Presiding Officer. For example, in 1986, EPA was asked whether a used solvent drum that was a component of a parts washer process was an exempt MPU. After initially concluding it could be, the Agency considered the issue further and revised that determination, concluding that the drum of used solvent that at times was held for reuse and at times was discarded, could not qualify as an MPU. The Agency then published that guidance for the regulated community. CX28 and CX29. In the Chem-Solv, Inc. matter, the Presiding Officer was also presented with the question of whether a unit that collected used rinsate claimed by the respondent to be reused a portion of the time and discarded at other times qualified for the MPU Exemption. After a very thorough analysis considering the regulatory preamble, administrative case law, and Agency guidance, the Presiding Office concluded it did not. *In the Matter of: Chem-Solv, Inc.*

and Austin Holdings, RCRA-03-2011—0068 (June 5, 2014) at 79, *affirmed*, 16 E.A.D. 594 RCRA (3008) 14-02 (EAB January 26, 2015).

As outlined above, even a cursory review of the plain language of the MPU Exemption – which requires an individual unit that has a manufacturing function and in which hazardous waste is generated – reveals that the Exemption is inapplicable to the Receiver Tanks. To avoid this result, Respondent attempts to apply the Exemption to the Receiver Tanks by alleging various facts and technical propositions to support its claim that the tanks are an “integral part” of the facility’s chemical manufacturing processes. However, numerous factual and technical assertions Respondent seems to be making (and likely will re-assert and develop in subsequent stages of this litigation) are not supported by Respondent’s own documents. For example, as factual and technical matters, Complainant will show, among other things:

- Respondent’s exhibits establish that prior to production, Respondent knows whether hazardous wastes will be generated in the condensers and accumulated in the Receiver Tanks (*see, e.g.*, RX21 (steps 17, 26, 29) and RX24 (steps 16 and 31) which describe that predetermined volumes of condensed liquids are always sent directly to tank S-535 as hazardous waste);
- Respondent’s exhibits establish that distillate accumulated in the Receiver Tanks is not routinely held for evaluation (*see, e.g.*, RX21 (steps 17, 26, 29) and RX24 (steps 16 and 31), as well as RX22 (table on page 38 of 48) and RX28 (table on page 33 of 48) which all describe the transfer of the contents of the Receiver Tank to tank S-535 without prior evaluation);
- Respondent’s exhibits establish that the Receiver Tanks, reactors and condensers do not always share an inert, oxygen-free atmosphere and that Respondent does not always operate a closed system with a shared atmosphere (*see, e.g.*, RX21 (step 28), RX24 (step 31) and RX26 (step 29) which describe use of reactor pressure to push flammable vapors into the condenser, with the condensed distillate liquid directed to the Receiver Tank which is at atmospheric pressure);
- Respondent’s exhibits establish that Respondent’s distillation process can and does at times proceed without the Receiver Tanks (*see, e.g.*, RX23 (step 9) and RX25 (step 50) which describe the use of distillation (*i.e.*, vaporization and condensation) of solvent

which is returned to the reactor as reflux, without any distillate being directed to the Receiver Tank);

- Respondent's exhibits establish that pressure in the reactor, condenser and Receiver Tank is not always controlled through the Receiver Tank during the production of hazardous waste in the condenser (*see, e.g.*, RX21 (step 29) which describes the control of pressure in the reactor to control the generation rate of hazardous waste).

These factual inaccuracies and unsupported technical claims compound the legal difficulties

Respondent faces in presenting this affirmative defense. Complainant looks forward to the

opportunity to further demonstrate Respondent's misinterpretation of the Exemption, the

supportable factual and technical nature of the relevant portions of Respondent's operations and,

ultimately, the proper application of hazardous waste regulation to the waste management in

question.

**Complainant's Rebuttal of Respondent's Prehearing Exchange Statement
Regarding Complainant's Proposed Penalty**

Complainant's Prehearing Exchange contains an Explanation of Penalty Calculation ("Penalty Calculation") attached as CX5 that describes in detail Complainant's reasoning and calculations for the penalties proposed for the five counts that remain in this case. Respondent's Prehearing Exchange contains a statement identifying Respondent's objections to Complainant's penalty calculations and proposing either no or substantially reduced penalties for the five counts. Complainant finds Respondent's arguments unavailing and stands by its Penalty Calculation.

Respondent's first overarching argument is that because the four Receiver Tanks still at issue in this case are exempt from RCRA federal and federally-authorized state regulations due to the MPU Exemption, no penalties are appropriate for any of the counts. As described above, the MPU Exemption does not apply to the Receiver Tanks. Accordingly, Complainant's

proposed penalties for the Receiver Tanks in Counts 1 and 2, and for certain equipment associated with the Receiver Tanks (the “Upstream Equipment”) in Counts 3, 4, and 5, are appropriate.

Respondent’s remaining arguments, which are more specifically based on Complainant’s penalty calculations, are advanced to support penalties that are substantially less than those Complainant proposed: Complainant’s total proposed penalty for the five counts is \$99,999; Respondent’s total counterproposal is \$6,242. Complainant’s Penalty Calculation sets out in detail why the potential for harm presented by each of Respondent’s violations is either “major” or “moderate” under EPA’s RCRA Penalty Policy; in contrast, Respondent argues that the potential harm posed by the violations is uniformly “minor.” Respondent’s minimization of the violations’ potential harm results in substantially reduced calculated penalties.

In large part, Respondent’s arguments for a reduced potential for harm parrot its arguments that the Receiver Tanks are part of the facility’s manufacturing processing unit. For example, Respondent argues that since the “production system” (which allegedly includes the Receiver Tanks) is monitored throughout the production process and is generally kept under negative pressure, air pollutant leaks from the Receiver Tanks would be less likely to occur.

As discussed above, the Receiver Tanks are not part of the facility’s manufacturing process, and thus Respondent’s argument is plainly wrong. Further, the Receiver Tanks and the materials collected in them – particularly when the materials are hazardous solvent wastes – are not monitored as closely as the reactors and condensers that are upstream of the Receiver Tanks. In addition, the Receiver Tanks are at times maintained at atmospheric pressure during hazardous waste collection, which offers no protection against air pollutant leaks. And not only do Respondent’s violations of RCRA tank and air emission requirements create a substantial

potential for harm to human health and the environment, they also pose substantial harm to the RCRA regulatory program which is intended to be self-implementing.

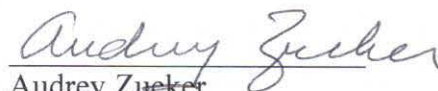
Finally, although Respondent simply notes that the Receiver Tanks are inside the facility's production building, the fact remains that the Tanks do not have adequate secondary containment as required by RCRA regulations. The lack of such containment increases the potential harm of any tank or equipment leaks that may occur. Without secondary containment, releases of hazardous waste may leak out of the building into the environment. Moreover, releases of volatile liquid waste solvent from the Receiver Tanks or associated equipment would pose a danger to the health of the employees at the facility.

Respondent's other main contention regarding Complainant's penalty calculations focuses on the extent to which Respondent's violations deviated from RCRA regulatory requirements. Complainant assigned a "major" or "moderate" extent of deviation for each count's violations; Respondent argues for a "moderate" or "minor" extent of deviation instead. For Counts 1 and 2, Respondent acknowledges that the Receiver Tanks were not in compliance with RCRA hazardous waste standards but points to another downstream hazardous waste tank (tank S-535) to argue that the Receiver Tanks' noncompliance should be considered a "moderate" rather than a "major" deviation. Respondent's attempt to substantially shift the extent of deviation inquiry from the Receiver Tanks' noncompliance is misplaced because the only violations currently at issue are those of the Receiver Tanks. At the time of EPA's inspection of the facility, all four of the Receiver Tanks were not in compliance in any relevant way with applicable RCRA requirements, representing a substantial deviation from those requirements.

Similarly, for Counts 3, 4, and 5, Respondent acknowledges that the Upstream Equipment did not comply with RCRA regulations, but points to other downstream equipment (some of which came into compliance under the Partial CAFO) as the reason why the Upstream Equipment's extent of deviation should be "minor" instead of "moderate." Complainant recognizes that a significant portion of the originally alleged Subpart BB-subject equipment is no longer in the case, but believes that a "moderate" extent of deviation remains appropriate because Complainant is proposing a 50% overall penalty reduction for each of these counts to reflect the decreased amount of equipment still in question.

Respectfully submitted,

Date: Jan. 27, 2021



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Complainant's Rebuttal Prehearing Exchange was served on this 27th day of January 2021 in the following manner on the addressees listed below:

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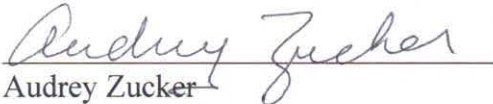
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January 27, 2021


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