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 JOINT REPLY IN SUPPORT OF MOTION TO DISMISS AND OPPOSITION TO MOTION TO STRIKE

Respondent ISP Freetown Fine Chemicals, Inc. ("ISP") submits the following reply in support of its June 25, 2019 motion to dismiss the complaint in the above-captioned case.

EPA's July 25, 2019 opposition brief fails to counter the key points raised in ISP's motion – specifically, that the key provision at issue in this case, 40 C.F.R. § 262.17, is not in effect in Massachusetts, and that EPA cannot bring a claim against ISP without § 262.17. The agency attempts to argue that it can make a *prima facie* case against ISP without § 262.17, under Part 265 of RCRA's federal regulations. EPA, however, neither *can* make such a claim, as a matter of law, nor *does*, in fact, plead such a case.

The agency's arguments in favor of its Count Eight, regarding personnel training, likewise do not address ISP's legal arguments, and therefore do not undermine them.

Finally, EPA has filed a superfluous "motion to strike" two affirmative defenses filed with ISP's Answer in this case. Such a motion to strike is procedurally improper at this stage, would prejudice ISP's later defenses in this case if granted, and does no more than provide EPA the opportunity to file an unmerited surreply brief that would not otherwise be allowed here.

I. THE 2016 GENERATOR IMPROVEMENTS RULE DELETED § 262.34 AND MADE ITS REPLACEMENT, § 262.17, INAPPLICABLE IN MASSACHUSETTS.

The following procedural facts are undisputed, and are dispositive of this case: EPA's 2016 Generator Improvements Rule deleted § 262.34 and replaced it with § 262.17; EPA promulgated § 262.17 under non-HSWA authority; and regulations promulgated under non-HSWA authority are not applicable in states like Massachusetts with base RCRA program authorizations. Accordingly, § 262.17 is not applicable in Massachusetts.

A. The Generator Improvements Rule indisputably deleted § 262.34 and replaced it with § 262.17.

As a matter of federal law, there is no question that, effective May 30, 2017, 40 C.F.R. § 262.34 has been removed from the Code of Federal Regulations, and that 40 C.F.R. § 262.17 has been added. This is not disputed. It is likewise undisputed that EPA can no longer enforce § 262.34, as the agency itself tacitly acknowledged by amending its complaint to substitute references to § 262.17 for prior references to § 262.34. *See* ISP's Memorandum In Support of Motion to Dismiss ("Mot."), Exhibit 1 (providing redlines of Amended Complaint).

B. EPA indisputably promulgated § 262.17 under non-HSWA authority.

Notwithstanding EPA's efforts in its opposition brief to parse the language of its own Generator Improvements Rule beyond recognition, there is no question that the agency added § 262.17 to the Code of Federal Regulations under its non-HSWA authority. EPA's statement of authority is direct about this point:

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

See 81 Fed. Reg. 85732, 85801 (Nov. 28, 2016) (promulgating final Hazardous Waste Generator Improvements Rule) (emphasis added). This language – "[t]his document finalizes regulations that amend certain sections of the hazardous waste generator regulations in 40 C.F.R. parts 260 through 265" – indisputably includes the deletion of 40 C.F.R. § 262.34 and the substitution of § 262.17. EPA does not claim otherwise, and could not. The amendment to Part 262 is expressly included in the "regulations that amend… parts 260 through 265." And yet this action – "amend[ing] certain sections of… 40 C.F.R. parts 260 through 265" – is what the Generator Improvements Rule is referencing when it says that "[t]hese changes are promulgated under non-HSWA authority." *Id.* (emphasis added).

For its part, EPA regularly distinguishes between the use of HSWA and non-HSWA authority even within the promulgation of a single rule. *See, e.g.*, 55 Fed. Reg. 50450, 50470 (Dec. 6, 1990) (final rule on wood preserving wastes) ("portions of this rule are promulgated to HSWA … Other portions of today's rule … will not be imposed pursuant to the Hazardous and Solid Waste Amendments of 1984."); 63 Fed. Reg. 42110, 42171 (Aug.. 6, 1998) (final rule on petroleum refining wastes) ("Today's rule is promulgated pursuant in part to HSWA authority and in part pursuant to non-HSWA authority"); 67 Fed. Reg. 48393, 48408 (July 24, 2002) (final rule on waste-derived zinc fertilizers) ("Today's rule is promulgated pursuant in part to HSWA authority and in part to non-HSWA authority"); 84 Fed. Reg. 5816, 5936 (Feb. 22, 2019) (final rule on hazardous waste pharmaceuticals) ("This action … is being finalized in part under the authority of HSWA and in part under non-HSWA authority."). The agency could have drawn such a distinction here, but did not.

EPA's defenses are unavailing on the point of HSWA authority. The agency argues that the repeal of § 262.34 and substitution of § 262.17 was not "substantive" – a mere

"renumbering" – such that the distinction between HSWA and non-HSWA authority should have no bearing. Opp. at 12. The flaw in this argument is that even if a non-substantive change was the agency's intent in 2016 – which ISP does not concede – the plain language of the rule in fact effectuates a significant substantive change. The agency's post-hoc attempt to affix its preferred labels ("non-substantive," "renumbering") does not alter the rule as written. The agency's final action in the Generator Improvements Rule – the creation of a new regulatory provision, § 262.17, under non-HSWA authority – cannot be disputed, and it cannot now be undone by the agency's belated claim that the change was not intended to be "substantive." The distinction EPA now seeks to make with the subjective labels "substantive" and "non-substantive" is not relevant to the source of EPA's regulatory authority, and ignores the reality that EPA indeed created § 262.17 with non-HSWA authority. That action has a certain fixed legal effect, no matter how EPA chooses to describe its own work qualitatively after the fact. *See Glob. Van Lines, Inc, v. Interstate Commerce Comm'n*, 714 F.2d 1290, 1298-99 (explaining that in litigation "[s]peculations about what might have been good reasons had the agency only thought of them do not suffice.").

Nor is the agency saved by the fact that its declaration that it was using non-HSWA authority appeared in the "preamble" of the Generator Improvements Rule. Opp. at 9-13. The agency is required to state the source of its authority, and the preamble is always where the agency explains the source of its rulemaking authority. *See* 5 U.S.C. 553(b)(2) (providing that notices of proposed rulemaking shall include "reference to the legal authority under which the rule is proposed . . . ."); *Nat'l Tour Brokers Ass'n v. United States*, 591 F.2d 896, 900 n.11 (D.C. Cir. 1978) (providing that a notice of legal authority would be stated with specificity in a rule preamble); *Louisiana Forestry Ass'n, Inc. v. Solis*, 889 F. Supp. 2d 711, 732 (E.D. Pa.

2012), *aff'd sub nom. Louisiana Forestry Ass'n Inc. v. Sec'y U.S. Dep't of Labor*, 745 F.3d 653 (3d Cir. 2014) (looking to the rule's preamble for an agency's legal authority). Here, the agency's stated source of authority is legally relevant, and indeed binding. *See Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (confining review of agency action "upon the validity of the grounds upon which the [agency] itself based its action. . . ."); *see also N.L.R.B. v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001) (same).

Finally, the agency's argument that it promulgated the Generator Improvements Rule without providing the public notice and opportunity to comment on the replacement of the relevant parts of § 262.34 with § 262.17 under non-HSWA authority is inaccurate. *See* Opp. at 13. When EPA proposed the Generator Improvements Rule, it specifically included a proposal to delete § 262.34 and create a new § 262.17. *See* 80 Fed. Reg. 57918, 57999-58002 (Sept. 25, 2015) (proposing new § 262.17); *id*. at 58002 (proposing to "remove and reserve" § 262.34). Moreover, the agency stated in the proposed rule, as in the final rule, that these changes would be issued under non-HSWA authority. *Id.* at 57987. EPA invited public comment on all of these issues. *Id*. at 57918 ("Comments must be received on or before November 24, 2015").

C. Regulations promulgated under non-HSWA authority are not applicable in states like Massachusetts with base RCRA program authorizations.

It is not disputed in this case that regulations promulgated under non-HSWA authority are inapplicable in states like Massachusetts with base RCRA program authorizations. EPA made this point on the same page of the Generator Improvements Rule on which the agency stated that it was acting under non-HSWA authority in creating § 262.17. Specifically, EPA explained that the new regulatory provisions – including § 262.17 – are "applicable on the effective date … in those states that do *not* have final authorization of their base RCRA programs." 81 Fed. Reg. at 85801 (emphasis added). Like any other non-HSWA rules, Section

262.17 "d[oes] not take effect in an authorized state [like Massachusetts] until the state adopt[s] the equivalent state requirements." *Id*.

EPA seeks in this enforcement action to reject the consequences of its language in the Generator Improvements Rule, but it cannot fairly dispute the existence of that language, or its plain meaning. Under that plain meaning, the Generator Improvements Rule made § 262.17 inapplicable in Massachusetts.

II. EPA DOES NOT ALLEGE A *PRIMA FACIE* CASE UNDER PART 265.

EPA argues that it has alleged a *prima facie* case against ISP under Subparts BB and CC of Part 265 of the RCRA regulations – but it is wrong for two reasons. First, as a matter of basic pleading sufficiency, EPA has not pled the necessary elements for a claim under either Subpart BB or CC of Part 265. Second, even if EPA *had*, in fact, pled the required elements, such allegations could not, as a matter of law, state a *prima facie* case on the basis of Part 265, because Part 265 by its own terms does not apply to generators like ISP that accumulate hazardous waste on site. These two inescapable conclusions are addressed in turn below.

Without a *prima facie* claim under Part 265, and without a claim under the non-existent § 262.17 in Massachusetts, EPA states no claim at all.

A. EPA does not allege the necessary elements of a *prima facie* claim under either Subpart BB or CC of Part 265.

EPA claims it has alleged a *prima facie* case against ISP under Subparts BB and CC of Part 265 of the RCRA regulations, but the agency's Amended Complaint fails to allege basic elements of Subpart BB and CC violations. To survive a motion to dismiss, each material element of an allegation must be pled. *Gagliardi v. Sullivan*, 513 F.3d 301, 305 (1st Cir. 2008) ("Dismissal for failure to state a claim is appropriate if the complaint fails to set forth factual allegations, either direct or inferential, respecting each material element necessary to sustain

recovery under some actionable legal theory.") (internal quotations omitted); *In re: Envt'l Prot. Serv., Inc.*, 13 E.A.D. 506 (E.P.A.), 2008 WL 464834 at *44 (Feb. 15, 2008) (same). EPA has failed to do so here, so the Amended Complaint must be dismissed.

The applicability provision for Subpart BB provides:

> [T]his subpart applies to equipment that contains or contacts hazardous wastes with organic concentrations of at least 10 percent by weight that are managed in one of the following:
>
> (1) A unit that is subject to the permitting requirements of 40 CFR part 270, or
>
> (2) A unit (including a hazardous waste recycling unit) that is not exempt from permitting under the provisions of 40 CFR 262.17 (i.e., a hazardous waste recycling unit that is not a 90-day tank or container) located at a hazardous waste management facility otherwise subject to the permitting requirements of 40 CFR part 270, or
>
> (3) A unit that is exempt from permitting under the provisions of 40 CFR 262.17 (i.e., a "90-day" tank or container) and is not a recycling unit under the provisions of 40 CFR 261.6.

40 C.F.R. § 265.1050(b).

Thus, to properly allege a Subpart BB violation, EPA must allege that the units at issue are one of the three types of units specified in § 265.1050(b)(1)-(3). Here, while EPA alleged that the relevant equipment contains or contacts hazardous wastes with organic concentrations of at least 10 percent, Am. Compl. ¶ 25, the agency failed to take the necessary next step by alleging that one of the three circumstances in § 265.1050(b)(1)-(3) actually applies.

EPA is taking the position that the applicable units were not exempt under Part 262, so (b)(3) would not be applicable. If this is accurate, then EPA can proceed only under (b)(1) or (b)(2), both of which require that either the unit or the facility be subject to the permitting requirements of 40 C.F.R. Part 270. The agency has not alleged this: The Amended Complaint is completely devoid of any reference to the applicability provision for Subpart BB (*i.e.*, Section

265.1050(b)), to the permitting requirements of Part 270, or even to ISP being "subject to" permitting. Without any allegations in the Amended Complaint regarding the fundamental applicability of Subpart BB, EPA has failed to state a claim for violation of Subpart BB, which subjects Counts 3-6 and part of Count 7 to dismissal.

Likewise, the applicability provision of Subpart CC provides:

> The requirements of this subpart apply to owners and operators of all facilities that treat, store, or dispose of hazardous waste in tanks, surface impoundments, or containers subject to either subpart I, J, or K of this part except as § 265.1 and paragraph (b) of this section provide otherwise.

40 C.F.R. § 265.1080(a). Under this language, however, Subpart CC does not apply to ISP. EPA's allegations in this case relate only to tanks and tank systems, so Subpart I (containers) and Subpart K (surface impoundments) are not applicable here. And Subpart J, relating to tanks, is not relevant either, because Massachusetts has been authorized to implement its hazardous waste tank regulations in lieu of the federal tank regulations. *See* EPA, Authorization Status of All Resource Conservation and Recovery Act (RCRA) and Hazardous and Solid Waste Amendments (HSWA) Rules (Mar. 31, 2019), at 70-73 and 106-107.[1] The applicability provision for Subpart CC does not extend to tanks – like those of ISP – subject to authorized state equivalents to Subpart J. When EPA intends to apply its rules in such a manner, it does so explicitly. *See, e.g.*, 40 C.F.R. § 262.14(a)(5) (requiring very small quantity generators to ship wastes to certain types of facilities, including those that are "Permitted under [40 C.F.R.] part 270 … [or] Authorized to manage hazardous waste by a state with a hazardous waste management program approved [by EPA]") and § 262.81 (defining exporter to include a person

[1] Available at https://www.epa.gov/sites/production/files/2019-05/documents/authall.pdf (last visited Aug. 23, 2019).

required to initiate a manifest "in accordance with subpart B of this part, or equivalent State provision. . . ."). The inapplicability of Subpart CC is fatal to EPA's Count 2 and part of Count 7.

Even if EPA *could* plead a violation under Part 265, Subpart CC – it has not. To allege an independent violation of Subpart CC, EPA must actually plead that ISP was subject to Subpart I, J, or K of Part 265. The Amended Complaint lacks any such allegation, which is a required pleading element here.

B. Part 265 – including Subparts BB and CC – does not apply to a generator, like ISP, "accumulating waste on site," except where specified by Part 262.

Even if EPA *had* attempted to allege the necessary elements of a *prima face* claim under Part 265, such allegations would fail as a matter of law under Part 265's own terms, because Part 265's applicability section explicitly carves out generators that accumulate waste on site except where specified by Part 262, and as discussed in Section I above, the potentially relevant exceptions in Part 262 do not apply in Massachusetts.

Part 265's overall applicability section provides:

> The requirements of this part [Part 265] do not apply to… [a] generator accumulating waste on site in compliance with applicable conditions for exemption in §§ 262.14 through 262.17 and subparts K and L of part 262 of this chapter, except to the extent the requirements of this part are included in those sections and subparts[.]

40 C.F.R. § 265.1(c)(7). ISP is within the carve-out to the scope of Part 265 that Part 265 itself defines here. Specifically, ISP is "a generator accumulating waste on site in compliance with *applicable* conditions for exemption" in § 262.17. *Id.* (emphasis added). Because § 262.17 is not applicable in Massachusetts, ISP *is* in compliance with its "applicable" requirements. ISP is not legally subject to the requirements in question, which apply to generators in certain other states but not to ISP. Accordingly, ISP is "in compliance" with § 262.17 in the same sense that a driver in Massachusetts is "in compliance" with Rhode Island traffic laws: The Massachusetts

driver does not violate the Rhode Island laws by driving in Massachusetts, so she is "in compliance" with the Rhode Island laws. In this sense, ISP is "a generator accumulating waste on site in compliance with *applicable* conditions for exemption" in § 262.17, and as such, is within the carve-out from Part 265 applicability under § 265.1(c)(7). Accordingly, EPA cannot state a *prima facie* case against ISP under Part 265.

This is a technical argument to be sure. But RCRA regulations are technical by nature, and EPA – as the drafter and promulgater of the regulations – is bound to them as written. And the history of Part 265 supports this interpretation: When Subpart BB of Part 265 was first codified in 1990 – before Subpart CC even existed – EPA made clear that Subpart BB did not apply to generators, like ISP, accumulating hazardous wastes for limited periods: "the final [Subpart BB] standards do not apply to generator tanks that accumulate hazardous wastes for 90 days or less." *See* 55 Fed. Reg. 25454, 25467 (June 21, 1990). In other words, even in 1990, no *prima facie* case against ISP would have been available to EPA under Part 265. Subsequent recodifications and rearrangements have not changed this basic structure of the law. Part 265 was unavailable as a *prima facie* source of liability for generators like ISP in 1990, and Part 265 is similarly unavailable now.

In the interim, of course, EPA added a regulatory provision codifying that Subparts BB and CC of Part 265 could be applied to generators like ISP. Specifically, EPA codified 40 C.F.R. § 262.34(a)(1)(i)-(ii) in 1994 for that purpose. *See* 59 Fed. Reg. 62896, 62926 (Dec. 6, 1994). As set forth *supra*, however, § 262.34 was repealed under the Generator Improvements Rule in 2016; it was replaced by § 262.17, but that replacement is not yet effective in Massachusetts. In the absence of a provision like § 262.34(a)(1)(i)-(ii) or the new § 262.17(a)(2) in Massachusetts, the original structure of the law prevails: Subparts BB and CC of Part 265 are

not independently enforceable against generators like ISP. In other words, *EPA has no case against ISP in the absence of § 262.17 – prima facie or otherwise.* Accordingly, not only has EPA failed to plead a *prima facie* case against ISP under Part 265, EPA *cannot* do so, even theoretically, in a future second amended complaint.

III. COUNT EIGHT FAILS BECAUSE STATE, NOT FEDERAL, TRAINING RULES APPLY AND DO NOT REQUIRE THE TRAINING EPA SEEKS TO ENFORCE.

ISP moved to dismiss Count Eight because there is no legal basis for it. Of the three legal bases offered by EPA for Count Eight in the Amended Complaint, none are viable: (1) 40 C.F.R. § 262.17(a)(7) is not applicable in Massachusetts for the reasons explained above; (2) Massachusetts state regulations do not require personnel to be trained on the federal RCRA provisions at Subparts BB and CC; and (3) 40 C.F.R. § 265.16 does not apply in Massachusetts because Massachusetts regulations govern *in lieu* of § 265.16. Mot. at 7-8.

EPA's opposition brief concedes one of these arguments and addresses the other two only vaguely. First, the concession: EPA acknowledges that the Massachusetts regulations do not provide a legal basis for the agency's allegations, admitting that "the citations to the state authorized provisions … may technically be unnecessary" and were included merely "to provide a complete picture of the full scope of the training obligations." Opp. at 16 n.12. Massachusetts training regulations require training only with respect to state requirements, which do not incorporate or have a counterpart to Subparts BB and CC. *See* 310 C.M.R. §§ 30.341, 30.516. In short, Massachusetts law does not require the conduct that is the basis for EPA's allegations in Count Eight. And EPA tacitly acknowledges this; if these Massachusetts regulations are "technically unnecessary" in EPA's Amended Complaint, they are not a legal basis for the agency's claims.

EPA's reliance on federal RCRA regulations is no more effective. Neither 40 C.F.R. § 262.17(a)(7) nor 40 C.F.R. § 265.16 applies to ISP. Section 262.17, including subsection (a)(7), is inapplicable in Massachusetts for the reasons set forth in the sections above. Indeed, the predecessor to § 262.17(a)(7) (*i.e.*, § 262.34(a)(4)) was part of the base RCRA program for which Massachusetts received authorization. And the same is true for § 265.16. Accordingly, the corresponding Massachusetts provisions operate "in lieu of" of the federal rules. *See* RCRA § 3006(b), 42 U.S.C. § 6926(b). The phrase "in lieu of" means"[i]nstead of or in place of. . . ." *In lieu of*, Black's Law Dict. (11th ed. 2019). When a state receives EPA authorization, "its standards supersede federal regulations," and the corresponding federal regulations are "ineffective." *AM Int'l, Inc. v. Datacard Corp.*, 106 F.3d 1342, 1350 (7th Cir. 1997). EPA does not dispute that Massachusetts has been authorized with respect to the training requirements; indeed the agency admits it. Opp. at 15-16. And the agency does not dispute the effect of that authorization.

EPA attempts to sidestep the significance of this authorization by arguing, without citation, that training requirements apply "for all hazardous waste requirements the facility is subject to," based on "the plain wording of the training requirement provisions and the operation of the Section 3006(g) statutory mandate for HSWA provisions. . . ." Opp. at 16. This argument is not cited or explained; the supposedly relevant language is not quoted. The agency's conclusory assertion does not undercut the basic point here: Massachusetts rules do not require training on federal Subpart BB and CC requirements, and the Massachusetts rules supersede the federal rules in this area because Massachusetts has received the relevant authorization. *See, e.g., Clean Harbors Servs., Inc. v. Illinois Int'l Port Dist.*, No. 12 C 7837, 2013 WL 678271, at *5 (N.D. Ill. Feb. 25, 2013) (dismissing citizen suit claims for failure to state a claim when

citizens' claims were based on federal regulations but Illinois had been authorized to implement those regulations).

Finally, EPA makes the bald assertion that it simply cannot be the case that training with respect to Subparts BB and CC is not required in Massachusetts. Opp. at 15 (asserting that "by necessity" there "must" be a Subpart BB/CC training requirement); *id.* at 16-17 (stating a contrary conclusion "cannot be valid" and is not "sustainable"). But it does not matter whether EPA believes there *should* be a Subpart BB/CC training requirement in Massachusetts; the only issue is whether there *is* such a requirement. *See e.g.*, *Diamond Roofing Co. v. Occupational Safety & Health Review Comm'n*, 528 F.2d 645, 649 (5th Cir. 1976) ("a regulation cannot be construed to mean what an agency intended but did not adequately express."). Here, there is not.

In sum, EPA's Count Eight fails to state a claim because none of the cited state or federal regulations provide a legal basis for the agency's allegations.

IV. EPA'S MOTION TO STRIKE IS IMPROPER AND NO "REPLY" IS MERITED.

In addition to opposing ISP's motion to dismiss Counts Two through Eight of the Amended Complaint, EPA has moved to "strike" two affirmative defenses in ISP's Answer – #3 and #16 – the affirmative defenses that roughly correspond with the arguments at issue in the motion to dismiss. This is highly improper. Affirmative defenses may rely on affirmative proof, so ISP's affirmative defenses are not finally defeated even if ISP fails to carry the burden applicable to this motion to dismiss. The failure of a motion to dismiss does not imply the failure of an affirmative defense; EPA's conflation of the two ignores the principle that differing burdens are at issue.

Motions to strike are generally viewed with disfavor. *See e.g., In the Matter of: Eagle Brass Co.*, No. EPCRA-03-2015-0127, 2016 WL 7488188 (EPA ALJ), at *16 (Dec. 21, 2016). Although motions to strike are not expressly provided for in EPA's Consolidated Rules of

Practice, administrative judges look to the Federal Rules of Civil Procedure and federal court interpretations of those rules for guidance. *Carbon Injection Systems LLC* EPA Docket No. RCRA 05-2011-009 at 2 (EPA ALJ Feb. 14, 2012).

Under the federal rules, "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Given the scope of the federal rule, "the prevailing rule is that a court should grant a motion to strike a defense 'only if the defense is legally insufficient, and presents no question of law or fact that the court must resolve.'" *Tobin v. Univ. of Maine Sys.*, No. CIV. 98-237-B, 2000 WL 863228, at *1 (D. Me. Mar. 3, 2000) (quoting 2A *Moore's Federal Practice*, ¶ 12.21[3] at 12–210 (1995)).

By contrast, if an affirmative defense presents substantial questions of fact or law, a court must deny a motion to strike the affirmative defense. *Rodriguez v. Lambert*, No. 12-60844-CIV, 2012 WL 4838957, at *1 (S.D. Fla. Oct. 11, 2012) ("When the sufficiency of the defense depends upon disputed issues of fact or questions of law, a motion to strike an affirmative defense should not be granted.") (citing *United States v. Marisol, Inc.*, 725 F. Supp. 833, 836 (M.D. Pa. 1984)). Although courts may determine if a defense is legally insufficient, the scope of the Court's analysis is narrow. Striking defenses is only proper if there are "no set of circumstances" under which the legal issues raised by the defenses could succeed. *Malibu Media, LLC v. Parsons*, No. CV 12-1331 (BAH), 2013 WL 12324463, at *2 (D.D.C. May 31, 2013); *see also Searle v. Convergent Outsourcing, Inc.*, No. CIV.A. 13-11914-PBS, 2014 WL 4471522, at *6 (D. Mass. June 12, 2014) ("motions to strike defenses are disfavored and should be granted only when it is beyond cavil that the defendant could not prevail on them.") (internal quotations omitted).

ISP's affirmative defenses raise fundamental questions of law regarding whether EPA alleged violations of relevant law as applied to ISP. There is nothing frivolous, redundant, immaterial, impertinent, or scandalous about these defenses. Accordingly, striking ISP's defenses now would be highly improper. Even if ISP's motion to dismiss is denied, ISP may be able to raise the defenses or related issues in other contexts later in this case. Striking ISP's defenses would prematurely deny ISP an opportunity to later raise these defenses; this result should be avoided. *Allen by Allen v. Families Thru Int'l Adoption, Inc.*, No. CV 08-4614, 2009 WL 10690639, at *1 (D.N.J. July 9, 2009) ("courts are reluctant to grant such motions out of a concern that they often involve a premature evaluation of a defense's merits….").

Finally, by pairing its opposition to ISP's motion to dismiss with a motion to strike based on the same substantive arguments, EPA may believe it is entitled to an extra brief – a "reply" in support of the motion to strike that, substantively, would be indistinguishable from a surreply on the original motion to dismiss. This is also improper, and provides EPA the last word in a briefing cycle to which it would not otherwise be entitled. This tribunal should not permit such a "reply," and should not consider one if filed. To the extent EPA files any such "reply," it should confine itself to arguments in this section, which apply only to the propriety of a motion to "strike" in this context, and do not address the substance of EPA's motion to "strike."

CONCLUSION

For the reasons set forth above, Counts Two through Eight of EPA's Amended Complaint should be dismissed with prejudice, and EPA's motion to strike should be denied. As the motion to strike is merely a substantive opposition to the motion to dismiss in another guise, the Court should not permit or consider a "reply" in support of the agency's motion to strike, which would be no more than an unauthorized and unmerited surreply to the motion to dismiss.

/s/ *Eric L. Klein*

Aaron H. Goldberg
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6052
agoldberg@bdlaw.com

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

Counsel for Respondent
ISP Freetown Fine Chemicals, Inc.

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