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 ISP'S OPPOSITION TO REGION 1'S
MOTION FOR ACCELERATED DECISION

Respondent ISP Freetown Fine Chemicals Inc. ("ISP") submits this Opposition to EPA Region 1's June 23, 2021 Motion for Accelerated Decision.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authorities

ARGUMENT

I. REGION 1'S INTERPRETATION OF THE "MANUFACTURING PROCESS UNIT" EXEMPTION IS INCOMPLETE AND INACCURATE.

A. Region 1's motion ignores broad areas of dispositive law.

Region 1 advances a handful of arguments about the meaning of the "manufacturing process unit" exemption; these are addressed in detail below. It is worth noting at the outset, however, that the Region 1 Motion ignores large swathes of relevant – and, in many cases, dispositive – law. Region 1 fails to address, *inter alia*, the following key points:

- The legal test this Tribunal established to define "manufacturing process unit" in *In re General Motors Automotive-North America*, RCRA-05-2004-0001, 2006 WL 3406333 (March 30, 2006) ("*General Motors*"), *rev'd on other grounds*, 14 E.A.D. 1 (EAB 2008). Specifically, that the exemption applies to an "integral part" of a "production system" that is used to "create a product" – but not downstream of production where wastes have become a "waste disposal problem." *Id.*, *32-33; ISP Mot., § I.B.2. *General Motors* is dispositive in this case and is addressed in detail *infra* at § I.C.2.

- The basis for this Tribunal's holding in *In the Matter of Chem-Solv, Inc.*, RCRA-03-2011-0068, 2014 WL 2593697 (June 5, 2014) ("*Chem-Solv*"), *aff'd* 16 E.A.D. 594 (EAB 2015), which was that merely "washing off some dusty barrels" is not manufacturing. *Id.*, *76; *see also* ISP Mot., § I.B.2; *infra*, § I.C.1.

- The agency's own Federal Register reference to a "distillation unit" as an example of an exempt manufacturing process unit, and the many ways that the law identifies a receiver as a component of a "distillation unit." ISP Mot., § I.A.

- The agency's citation in the Federal Register of "discharge trays of screens" as an example of exempt equipment. Discharge trays of screens are a near-precise analogue to EPA's own conception of distillate receivers; the trays are passive "receivers" in a screening separation process, serving the sole function that EPA (incorrectly) contends that receivers serve in the distillation separation process. ISP Mot., § I.B.3.b.

- The agency's definitions of a variety of other types of "manufacturing process units" – chemical MPUs, polyether polyol MPUs, pharmaceutical MPUs – to explicitly include distillate receivers or storage tanks. ISP Mot., § I.B.3.d.

- The widespread definition of "process unit" to the effect of "equipment assembled and connected by pipes or ducts to process raw materials and to manufacture an intended product." ISP Mot., § I.B.3.e.

Region 1's most significant omission – on par with its failure to address the applicable legal test for this case from *General Motors* – is in its treatment of the word "unit" in 40 C.F.R. § 261.4(c), the manufacturing process unit exemption provision. Properly understood, the broad sense of the term "unit" as used by EPA in the exemption provision itself is dispositive of this case. The substantive section of this Opposition starts there.

B. A "unit" includes equipment *systems*, not just singular hardware components, and Region 1's contrary argument makes basic legal errors.

The key interpretive question in this case is the meaning of the word "unit" in Section 261.4(c), and in addressing that question, the Region 1 Motion makes a basic error of law. Specifically, Region 1 says: "the term ['manufacturing process unit'] occurs in a larger list of terms in Section 261.4(c), each one of which is singular: a tank, a vehicle, a vessel, a pipeline." Region 1 Mot., at 27. While this may be narrowly accurate as a matter of grammar, it is flatly wrong as a matter of substantive meaning. A "vehicle" is obviously not a single piece of hardware.[1] Likewise a "vessel" – meaning a "watercraft," not a container – is obviously not a single piece of hardware. Nor is a "pipeline," which includes "line pipe, valves, and other appurtenances connected to line pipe, pumping units, fabricated assemblies associated with pumping units, metering and delivery stations and fabricated assemblies therein, and breakout tanks." 49 C.F.R. § 195.2. Even a "tank" is not exempt by itself; the exemption includes the

[1] Citation to this point should not be necessary, but Region 1 is advancing the argument that a "vehicle" is a singular piece of hardware, so for the record: *See, e.g.*, 49 C.F.R. Part 393 ("Parts and Accessories Necessary for Safe Operation [of Commercial Motor Vehicles]"); *id.* at Subpart B ("Lamps, Reflective Devices, and Electrical Wiring"); *id.* at Subpart C ("Brakes"); *id.* at Subpart D ("Glazing and Window Construction"); *id.* at Subpart E ("Fuel Systems"); *id.* at Subpart F ("Coupling Devices and Towing Methods"); *id.* at Subpart G ("Miscellaneous Parts and Accessories") (including tires, sleeper berths, heaters, windshield wiping and defrosting systems, rear-vision mirrors, horn, speedometer, exhaust systems, floors, rear impact guards, warning flags, seat belt assemblies, etc.); *id.* at Subpart H ("Emergency Equipment"); *id.* at Subpart J ("Frames, Cab and Body Components, Wheels, Steering, and Suspension Systems"). And this list does not include actual engine or transmission components.

tank's broader constellation of equipment, such as piping, valves, pumps, vents, and monitoring equipment. *See* ISP Mot., 31-32 (collecting regulatory citations).

Region 1 is therefore making the opposite of its intended point. The term "manufacturing process unit" appears in a list of equipment *systems*, none of which is limited to a singular piece of hardware, as a "manufacturing process unit" must be in order for Region 1 to have a chance to prevail in this case. The two sides agree on the principle of *Beecham v. United States*: "That several items in a list share an attribute counsels in favor of interpreting the other items as possessing that attribute as well." 511 U.S. 368, 371 (1994). But in the list of exemptions in Section 261.4(c), this principle favors ISP, not Region 1.

Indeed, Region 1 appears to focus generally on grammar to the exclusion of meaning, also arguing that "[t]he term itself – a 'manufacturing process unit' – is singular." Region 1 Mot., 27. But the grammatical form of all these words in Section 261.4(c) – plural versus singular – is not relevant here; the provision would have the exact same meaning if every category were expressed in plural form ("hazardous waste… generated in… storage tanks… transport vehicles or vessels… manufacturing process units…" etc.). It would not strengthen ISP's argument if the exemption applied to "manufacturing process units," plural, and the singular form does not weaken ISP's argument. The word "unit" in Section 261.4(c) means "system" – another grammatically singular but collective noun that refers to a whole comprised of multiple parts. The agency itself has acknowledged this sense of "unit" in prior "manufacturing process unit" guidance. *See* E. Letter from E. Cotsworth, Office of Solid Waste, EPA, to Jill A. Walker, Thompson, Hine, & Flory LLP, RCRA Online No. 14152 (July 29, 1997) (Attachment 16) (EPA Office of Solid Waste noting that the "manufacturing process unit" exemption applies to a "production <u>system</u>") (emphasis added).

EPA also provided a window into its definition of the word "unit" in Section 261.4(c) in the way the agency used the word in the remainder of the provision, after the list of exemptions, where "unit" plainly refers to various multicomponent systems. Section 261.4(c) says:

> 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 regulation… until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

Id. (emphasis added). The word "unit" in "manufacturing process unit" must mean the same thing as the word "unit" in the remainder of the sentence. And the word "unit," where underlined in the text above, refers to all of the exemptions collectively, meaning that it refers to a "storage tank," a "transport vehicle or vessel," a "pipeline," and a "manufacturing process unit." In Section 261.4(c), a *pipeline* is a "unit"; a *vehicle* and a *vessel* are "units." These "units" are not "individual pieces of equipment," as Region 1 argues. Region 1 Mot., § V.B.3. The word "unit" in Section 261.4(c) is variously referencing *systems* of equipment that contain, or can contain, more than one component. If the word "unit" is to be interpreted consistently in this sentence – as it must be – "manufacturing process units" must have the same broad scope as vessel, vehicle, and pipeline "units," *i.e.*, as equipment *systems*. A manufacturing process unit is no more limited to a single piece of hardware than these other units.

Not only are the examples of exempt units all systems of equipment, but EPA has explicitly clarified that the exemption covers the *whole* system, not just individual components within it. The agency held in 1986 that the exemption for a vessel included "all waste generated in the vessel," not just "any particular tank or unit in the vessel." *See* 1986 WL 352168, RCRA Online No. 12727 (Sept. 3, 1986) (Attachment 13 to ISP Motion). This includes "engine room

wastes" even if they are "not directly associated with the storage or transport of valuable product." *Id.* This document refutes Region 1's suggestion that the categories of exemption in Section 261.4(c) – vehicles, vessels, etc. – are merely "individual pieces of equipment." [2]

Region 1 resorts to the dictionary to define "unit," but its citations only confirm ISP's interpretation. According to Region 1, the Cambridge Dictionary defines "unit" as "a small machine or part of a machine that has a particular purpose." Region 1 Mot, at 28 (citation omitted). But if a "small machine" can be comprised of independent components – as must be possible, if a "unit" can also mean "part of a machine" – then the Cambridge Dictionary is also confirming that a "unit" can mean a multicomponent system. Region 1 also cites to the Oxford Dictionary of Chemical Engineering. But this is a British dictionary authored by a Scottish engineer using British English, as exemplified by the use of the British sense of the word "plant" in the definition of "unit" ("an item of process equipment or plant") – *i.e.*, "plant" as an uncountable noun meaning "equipment," rather than the countable American noun that means "industrial facility." [3] This British English dictionary is not a proper authority for the construction or interpretation of American regulatory language.

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[2] Region 1 cites a handful of examples from the preamble to Section 261.4(c) to "confirm [the] singularity" of the categories of exemption in Section 261.4(c) (vessel, vehicle, etc.). Region 1 Mot., at 27 n.13. Region 1 cites "the tank of a tank truck, the tank or hold of a ship or a barge, a distillation column, a flotation unit, a cooling tower." *Id.* (citing 45 Fed. Reg. 72025) (Attachment 1 to ISP Motion). Region 1 is incorrect that this Federal Register citation references "the tank of a tank truck." It does reference "the tanks or holds of ships and barges that have carried products or raw materials" as examples of equipment affected by the rule, but as the agency later clarified in its Sept. 3, 1996 letter, *supra*, the "vessel unit" exemption applies to the whole vessel, not just its "tanks or holds." It is also true that a "distillation column, a flotation unit, [and] a cooling tower" are listed as examples of manufacturing process units, but these are not "individual pieces of equipment"; each is a complex system of equipment. Region 1 notably omits "discharge trays of screens," the other example in the same list.

[3] A "countable" noun is preceded by the word "a," or by numbers – *a* pen; *two* power plants. A "mass" or "uncountable" noun instead takes descriptors – *some* food; *lots of* equipment. Countable and uncountable nouns are not interchangeable; one would not say "Hand me some pen" or "I'd like a food." In American English, "plant" is countable; Americans do not say "This facility has a great deal of plant." But the British say exactly that. In British English, the uncountable form of "plant" means "equipment." *See* Collins English Dictionary (specifying British and "uncountable" definitions, online at www.collinsdictionary.com/us/dictionary/english/plant (last visited June 25, 2021). Region 1's citation to the Oxford Dictionary of Chemical Engineering uses "plant" in the British sense.

An American federal court, using an American dictionary (Webster's), unpacked the word "unit" and defined it as "a piece or complex of apparatus serving to perform one particular function," where "apparatus" is "a collection or set of materials instruments, appliances, or machinery designed for particular use." *See* ISP Mot., 37; *see also United States v. Amoco Oil Co.*, 64 F. Supp. 2d 801, 804-05 (N.D. Ind. 1999) (citing Webster's Third New Int. Dict. (Unabridged) (1971) at 1808, 2500) (emphasis added).[4] Notably, in *Amoco Oil*, it was ***EPA itself*** arguing that a single "process unit" should include a grouping of multiple thermal reactors and their associated catalytic reactors – the exact opposite of the position EPA takes here regarding the scope of a "unit." And EPA successfully persuaded the court in *Amoco Oil*, which held, based on the Webster's definition above, that all the reactors at issue were collectively a single "process unit" that included multiple components. *Id.* EPA cannot come before this Tribunal and contradict its own prior position in court by cherry-picking definitions from foreign dictionaries.

Moreover, this Tribunal has no need to look to a foreign chemical engineering source – Region 1 has already put a leading American chemical engineering treatise into evidence here, and the Region's own exhibit from this treatise defines "unit" to mean a system, not an individual component. Specifically, Region 1 submitted Exhibit CX-26, which is "Distillation," Section 13 from *Perry's Chemical Engineers' Handbook*. The Region's treatise defines "unit"

[4] The court in *Amoco Oil* recognized, as have all the relevant definitional authorities cited in this case, that "unit" can mean "a piece or complex of apparatus" – *i.e.*, it can mean a collection of parts, or the individual part itself, depending on context. ISP does not contend that "unit" can never refer to a single piece of equipment. The critical point, however, is that a word that *also* means a collective system cannot be interpreted solely as Region 1 proposes, as a word that can *only* mean a single piece of equipment. ISP does not have to demonstrate that "unit" can *only* mean a collective system; it has to demonstrate that "unit" *includes* a collective system. If a "unit" includes a collective system, then a "manufacturing process unit" includes a collection of components that collectively serve an integrated manufacturing process function, regardless of the function of each individual component. It is indisputable that the word "unit" includes the collective meaning, as even EPA successfully argued in *Amoco Oil*.

as "a combination of elements," where "elements" are characterized as single pieces of equipment like condensers. Ex. CX-26, at 58 (emphasis added).

Region 1's argument about the definition of "unit" is unsupportable, not least because the RCRA exemption provision itself, Section 261.4(c), plainly uses the word to refer to multicomponent equipment systems like vehicles and vessels. Moreover, Region 1's interpretation of the word as necessarily singular – just an "individual piece of equipment" – is not only wrong, but it directly contradicts the agency's own position in prior federal litigation, which prevailed then and should prevail now. And if a "manufacturing process unit" is interpreted to mean an equipment *system* used for the purpose of manufacturing – as it must be – there is simply no question that ISP's distillate receivers are exempt, for the reasons set forth in Section II of ISP's Motion. ISP's receivers are an integral, inextricable part of the distillation systems that distill solvents out of consumer products, an essential production step. These distillation systems – including the receivers – are manufacturing process units.

C. Region 1 ignores this Tribunal's test for the "manufacturing process unit" exemption, and its proposed substitutes are inconsistent and incorrect.

This Tribunal established the test for a "manufacturing process unit" in *General Motors*: equipment is exempt as part of a manufacturing process unit when it is an "integral part" of a "production system" used to "create a product," but not downstream of production where wastes have become a "waste disposal problem." 2006 WL 3406333, *32-33; *see also* ISP Mot., § I.B.2. Region 1's motion ignores this test. Instead, Region 1 suggests several alternative tests, which are all uncited, legally incorrect to varying degrees, and internally inconsistent with one another.

1. Region 1's various formulations of the manufacturing process unit exemption are wrong.

Region 1 proposes a variety of tests to define the manufacturing process unit exemption, most of which are apparently based in one line of dicta in this Tribunal's decision in *Chem-Solv*.

In one instance, Region 1 asserts that for the manufacturing process unit exemption, "the emphasis is on whether raw materials are being transformed into products within the exempted unit." Region 1 Mot., 31. Region 1 offers no citation for this assertion, and none exists. It is also not clear what "emphasis" Region 1 is referring to, or in what source the emphasis appears. In another instance, Region 1 asserts that an exempt "manufacturing process unit" must be "the locus of manufacturing and hazardous waste generation," such that "[t]he only way to properly determine if the terms of the MPU Exemption are met is to examine each individual tank, vessel, or other piece of equipment that is potentially exempt to determine if manufacturing and hazardous waste generation occurs therein." *Id.*, 29. This assertion too is uncited.

Notably, in its Jan. 27, 2021 Rebuttal Prehearing Exchange ("Rebuttal Exchange"), Region 1 offered yet another, quite different definition, also without citation – one that came much closer to the actual test established in *General Motors*. In that definition, Region 1 asserted that a singular piece of equipment is exempt if it serves a "manufacturing function" and generates hazardous waste.[5] *See* Rebuttal Exchange, at 4. A manufacturing "function" is very different than a manufacturing "locus," and a definition based on whether a piece of equipment is performing a manufacturing function bears at least some resemblance to the *General Motors* test.

It is ultimately unnecessary for this Tribunal to identify which test Region 1 is relying on. None is cited to legal authority, and actual existing legal authority – the *General Motors* case – provides the applicable test, as set forth below. All of Region 1's interpretations of the exemption are flawed, and all appear to flow from a basic misreading of the *Chem-Solv* case.

[5] Region 1 is inconsistent about whether the "manufacturing function" must be "exclusive," *see* Rebuttal Exchange, at 6 (exemption "does not make sense if ... manufacturing[ ] is not the exclusive function of the unit"), or merely "primary," *see* Region 1 Mot., at 27 (purpose of exemption was to avoid "sweeping into the RCRA waste management program individual units whose primary function is ... manufacturing").

As set forth in detail in ISP's own motion at § I.B.2, this Tribunal in *Chem-Solv* confronted a respondent contending that it was engaging in "manufacturing" merely by using a small amount of water drawn from its open-air liquid trash pit – called, evocatively, "the Pit," though it was more like a pool of liquid wastes and trash – to spray dirt off prefabricated drums. *Chem-Solv*, *72-73. The respondent in *Chem-Solv* in no way "manufactured" the actual drums themselves, but nevertheless argued that the "organization" and "division of labor" required to spray the drums with water from the liquid trash pit was "manufacturing," and was sufficient to make the Pit itself a "manufacturing process unit." [6] *Id.*, *76. The Tribunal rejected this argument on the grounds that no "manufacturing" involving the drums was occurring in the first place; "washing off some dusty barrels" was not "manufacturing" at all. *Id.* Importantly, the Tribunal did not treat *Chem-Solv* as a line-drawing question about where manufacturing stops and waste management begins, which was the relevant question in *General Motors*, as it is here. In *Chem-Solv*, there was simply no manufacturing at issue.[7] *Id.* Chem-Solv itself was just a distributor, not a manufacturer. *Id.*, *75; *supra*, n.6.

In explaining why no manufacturing was occurring involving the Pit, this Tribunal in *Chem-Solv* noted, among other points, that "[n]o intentional physical or chemical change would occur in the Pit[.]" *Id.* While true, this was classic dicta – *i.e.*, it was illustrative but not decisive

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[6] The respondent's "manufacturing process unit" argument in *Chem-Solv* must surely be one of the more unpersuasive arguments made before this Tribunal. If a trash pit is a "manufacturing process unit" merely because a small amount of its water is used to hose off prefabricated equipment, then *everything* can be a "manufacturing process unit," and the term has no meaning. This Tribunal said just that in *Chem-Solv*; *id.*, *75. Indeed, Chem-Solv itself was not even a manufacturer at all – its "core business" was "repackaging chemicals from bulk storage containers into drums suitable for sale and distribution to its customers." *Id.* Chem-Solv, the company, was a distributor, not a manufacturer like ISP. *Chem-Solv*, the case, is a poor precedent for Region 1 in the instant matter.

[7] This Tribunal in *Chem-Solv* pointed to two instances of EPA guidance holding that transfer equipment carrying material away from a manufacturing process unit – pipes, pumps, manifolds, etc. – is not itself part of the manufacturing process unit. *See Chem-Solv*, *70 (citing "Carra Letter," RCRA Online No 13790 (Dec. 19, 1986); "Cotsworth Memorandum," RCRA Online No. 14469 (May 26, 2000) (Attachment 18)); *see also* Region 1 Mot., 32 & n.18, 19. ISP does not contest that the transfer equipment in its facility carrying material away from the manufacturing process unit – *i.e.*, from the distillation unit, including its receiver – is regulated under RCRA.

to the outcome. Rather, the determinative factor in *Chem-Solv* was that "washing off some dusty barrels" is just cleaning up, not making or "manufacturing" anything.[8] *Id.* This Tribunal's point about "intentional physical or chemical change" in the Pit was an incidental explanation in service of this broader point that no manufacturing was happening at all in connection with the drum-spraying process.

Region 1, however, has apparently seized on this dicta from *Chem-Solv* as the basis for its proposed core definition of a "manufacturing process unit": a singular piece of equipment in which "intentional physical or chemical change" must occur. *See, e.g.*, Region 1 Mot., 31. This *Chem-Solv* language appears to be the sole legal authority Region 1 is using to define a manufacturing process unit as a "locus" where "raw materials are being transformed into products within the exempted unit," and to assert that "[t]he only way to properly determine if the terms of the MPU Exemption are met is to examine each individual tank, vessel, or other piece of equipment that is potentially exempt to determine if manufacturing and hazardous waste generation occurs therein." *Id.* at 29, 31.

There are multiple reasons that this Tribunal should not treat dicta from *Chem-Solv* about "intentional physical or chemical change" in a liquid trash pit as the global test for the "manufacturing process unit" exemption in Section 261.4(c).

First, this is not what the Tribunal intended in *Chem-Solv* when it discussed "physical or chemical change" in the Pit. This Tribunal was suggesting one reason – among multiple obvious reasons – that "manufacturing" was not occurring when liquid from the Pit was used to spray off

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[8] The distinction between cleaning and manufacturing was central to both *Chem-Solv* and *General Motors*. For instance, the Tribunal in *Chem-Solv* cited EPA guidance determining that a "parts-washer" is not exempt as a manufacturing process unit, and Region 1 cites the same guidance in its motion. *See* Region 1 Mot., 31-32 & n.18 (citing Exhibit CX-29, RCRA Online No. 12790). But the parts-washer is not a manufacturing process unit for the same reason that the purge solvent management system was not in *General Motors*, and the drum-spraying was not in *Chem-Solv*: Mere cleaning is not "manufacturing."

prefabricated drums. (The more central reason: "the washing process began and ended with finished drums"; *i.e.*, nothing was actually "manufactured.") In referencing "physical or chemical change" in the Pit, the Tribunal was not defining the scope of the "manufacturing process unit" in general and for future cases, and it was not drawing the line between manufacturing and waste management, which the Tribunal had done in *General Motors* but which was not necessary in *Chem-Solv*.

This Tribunal should not defer to dicta in *Chem-Solv* for the usual reasons courts do not defer to dicta: The *Chem-Solv* dicta was not published in consideration of all the law that bears on the meaning of the "manufacturing process unit" exemption, or of the effect such a definition would have in future cases. As the early Supreme Court said: "The question actually before the court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it [*i.e.* dicta], are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." *Cohens v. Virginia*, 19 U.S. 264, 400 (1821). Or, in a more modern form: "Dicta is inherently unreliable for what a court will do once faced with a question squarely and once its best thoughts, along with briefs and oral argument, are focused on the precise issue." *Santamorena v. Georgia Mil. College*, 147 F.3d 1337, 1342 n.13 (11th Cir. 1998) (quotation omitted).

And this Tribunal would not have actually defined the "manufacturing process unit" exemption in this way. Such a definition would have been a reversal of the Tribunal's earlier holding in *General Motors*, which found that automated paint spray guns, and the containers of paint supplying them, were exempt from RCRA regulation as part of a "manufacturing process unit." 2006 WL 3406333, *6, 32. No "intentional physical or chemical change" occurred in those paint spray guns or their supply containers – they were merely holding and spraying paint –

yet this Tribunal recognized in *General Motors* that they were "integral parts" of the "production system" for making cars, and thus were part of a manufacturing process unit. *See infra*, § I.C.2. This Tribunal in *Chem-Solv* would not have reversed – and did not reverse – its sole prior holding in this area silently, without noting such a significant change in approach. This is particularly true given that under Region 1's interpretation of *Chem-Solv*, every engine, motor, electrical component, drive shaft, belt, gear, assembly line apparatus, hydraulic system, lubricant system, etc. in every factory in the country – none of which is the locus of "physical or chemical change" – would be regulable under RCRA, a vast change in existing application of the law.

Moreover, a manufacturing process unit exemption requiring "intentional physical or chemical change" in every individual piece of equipment in a manufacturing process would be inconsistent with the focus in Section 261.4(c) on equipment *systems*: vehicle units; vessel units; pipeline units; and manufacturing process units. *See supra*, § I.B. EPA has already clarified that these exemptions apply to the entire units specified, at the system level. For example, the entire ship is exempt under the "vessel" exemption, including engine wastes, even if products or raw materials are transported in the ship's hold alone; *see supra*. In other words, the component-by-component inspection that Region 1 contends is required ("examine each individual tank, vessel, or other piece of equipment that is potentially exempt"; identify the "locus" of hazardous waste generation; *supra*) is exactly what the agency has clarified is *not* required for a "vessel" unit.

Indeed, Region 1's proposed component-by-component inquiry treats the exemption as if it were a mere "manufacturing unit" exemption, rather than a "manufacturing process unit" exemption. For a manufacturing *process* unit, the relevant inquiry must occur at the *process* or *system* level. In fact, this distinction is explicit in the text of Section 261.4(c), which also exempts, in conjunction with a manufacturing process unit, an "associated non-waste-treatment-

manufacturing unit," conclusively demonstrating, by the contrast between the adjacent terms, that something more than a mere "manufacturing unit" is exempted by the "manufacturing process unit" exemption. *Id.* (emphasis added). This Tribunal must therefore give effect to the word "process," which EPA clearly intended to mean something when it distinguished a "manufacturing unit" from a "manufacturing process unit." The significance of "process" here is EPA's recognition that manufacturing, for the purpose of the "manufacturing process unit" exemption, is a *process*.[9] This means that "manufacturing" in a "manufacturing process unit" must be evaluated at the level of the *process* – the system – not in each individual manufacturing component.[10] Accordingly, "physical or chemical change" cannot be required in every unique component of that system.

Nor is Region 1's proposed definition consistent with two crucial examples of "manufacturing process units" in EPA's preamble to Section 261.4(c): "discharge trays of screens" and "flotation units." 45 Fed. Reg. at 72025 (Attachment 1 to ISP Motion). First, "discharge trays of screens": As discussed in more detail in ISP's own motion at § I.B.3.b, "screening" in manufacturing means filtering or separating material by allowing components smaller than a certain particle size to pass through a screen while other components cannot. *Id.* A "discharge tray" in a screening unit is a receptacle into which screened or filtered material that has passed through the screen is collected for discharge. *Id.* No "intentional physical or chemical change" occurs in the discharge tray merely because screened material collects in it, yet

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[9] The widespread definition of the term "process unit" in EPA regulations – versions of "equipment assembled and connected by pipes or ducts to process raw materials and to manufacture an intended product," *e.g.*, 40 C.F.R. § 63.1001 – is in accord, and is discussed in detail in ISP's Motion, § I.B.3.e.

[10] This interpretation, in addition to being correct on its own terms, is why EPA (and this Tribunal) are spared from constantly having to evaluate the RCRA exemption status of every manufacturing component noted *supra* – every engine, motor, hydraulic line, etc. in every factory in America. EPA knew what it was doing when it exempted manufacturing *process* units.

it is the agency's own specific example of a manufacturing process unit. Likewise, according to EPA, a "flotation unit" "incorporate[s]... chemical mix tanks, flotation vessels, and sludge collection into a single unit." *See* EPA, "Technical Development Document for the Final Action Regarding Pretreatment Standards for the Industrial Laundries Point Source Category" (revised March 2000) at 6-32 to 6-34 (emphasis added) (Attachment 17.) In particular, the sludge collection component of a flotation unit is analogous in significant ways to the receiver component in a distillation unit. No "intentional physical or chemical change" takes place in the sludge collector, yet EPA has explicitly labeled it part of a "single unit" constituting a "flotation unit," exempt from RCRA.

Additionally, a requirement that "intentional physical or chemical change" must occur in a piece of equipment in order for it to be exempt as a manufacturing process unit would be inconsistent with the statutory basis for the exemption. Congress intended RCRA *not* to regulate the production process. *See* ISP Mot., § I.B.1. Region 1's proposal that EPA should dive into the production process of every regulated entity and cherry-pick individual production elements for regulation if they are not individually the locus of "physical or chemical change" is not consistent with Congress's intent that EPA regulate only wastes, not production. *Id.*

Finally, Region 1's proposed definitions of "manufacturing process unit" are unworkable on a practical level. In addition to the practical difficulty of evaluating the exemption status of every gear, switch, motor, hydraulic line, etc. in the country based on whether it is the locus of "physical or chemical change," *see supra*, Region 1's argument that solely the individual locus of hazardous waste generation can be exempt – if true – means that hazardous waste cannot travel through multiple components in a manufacturing process unit without disqualifying from exemption all components subsequent to the point of generation. For instance, under Region 1's

theory, a ubiquitous type of system in which lubricating or hydraulic oils are used throughout an entire manufacturing process, but when spent, are drained at a single port, would pose impenetrable – and practically speaking, useless and unnecessary – questions about the "locus" of generation and the subsequent outer boundary of the exemption within the system.[11] Neither Congress nor EPA itself intended that such a deep dive into the technical specifics of every production system should be necessary to identify manufacturing process units on a component-by-component basis. Rather, the law provides that the *entire process or system* is exempt. Even EPA has acknowledged this point, referring in guidance to the exemption's applicability to a production "system." *See* Cotsworth letter, *supra* at 3.

2. This Tribunal established the applicable test in *General Motors*.

All of the complications and contradictions inherent in Region 1's proposed test for the "manufacturing process unit" exemption are unnecessary for the Tribunal to resolve, because this Tribunal has already established a clear test for determining the scope of the exemption – *i.e.*, where "manufacturing" ends and waste management begins. This Tribunal did so in *General Motors*, and that test squarely governs this case, though Region 1 does not address it.

In *General Motors*, this Tribunal held that the manufacturing process unit exemption applies to "integral parts" of a "production system" that is used to "create a product," but not downstream of production, where wastes have become a "waste disposal problem." *General Motors*, *32-33. Specifically, the Tribunal held that a mechanical system that paints vehicles is an integral part of a production system, and is exempt from RCRA, but that the downstream

[11] Similarly, under Region 1's theory, in manufacturing operations that take place in a series of tanks, any small amount of sludge or other waste carried over from one manufacturing tank to another would cause the second manufacturing tank to be regulated under RCRA. *Cf.* RCRA Online #14334 (January 1, 1999) (discussing carryover or "dragout" of liquids from a tank containing steel pickling liquors into a rinse tank containing water, but concluding that the liquids in that case were not yet wastes) (Attachment 19); RCRA Online #14314 (October 1998) (same for liquids carried over from electroplating tanks to rinsewater tanks) (Attachment 20).

system for handling residues from cleaning the paint applicators afterwards is not. *Id.*, *32-34. At the GM factories, vehicle paint applicators, including robotic spray guns, were frequently cleaned after vehicle painting by spraying the applicators and their associated manifolds and piping with specialized solvents. *Id.*, *6-8. The used "purge" solvents were then piped away from the newly-cleaned paint applicators, ultimately to "purge mixture" storage tanks. *Id.*, *8-10. GM argued that this post-painting system for handling the used purge solvents was part of a "manufacturing process unit" at its facilities, but the Tribunal disagreed, determining that the boundaries of the "manufacturing process unit" included vehicle painting itself but excluded the handling of the used purge solvent that cleaned the paint applicators. *Id.*, *32.

The Tribunal's reasoning was key, and provides the applicable test in this case. "It is undisputed that painting automobiles is an integral part of the manufacturing process." *Id.* (emphasis added). Spraying paint is part of a "production system" that "create[s] a product" – painted vehicles – in contrast to the downstream used solvent management system, which does not create a product, but merely cleans up. *Id.* (emphasis added). The factual application of the *General Motors* test in this case is simple and straightforward, and is addressed *infra* at § II.A.

Even apart from its factual application, however, the legal existence of this test has important consequences for Region 1's argument. Specifically, a significant aspect of the Region's argument is a "slippery slope" warning:

> If, as Respondent suggests, the MPU Exemption were expanded to include multiple connected, distinct pieces of equipment performing different functions, a regulated entity could claim that a waste storage tank that was connected at the end of a manufacturing process and that received hazardous waste generated within the manufacturing process was exempt from RCRA regulation.

Region 1 Mot., 28-29. But "slippery slope" arguments are misplaced where a simple legal test exists, like a guardrail against slipping. Here, the *General Motors* test cures any "slippery slope"

concern: Equipment that satisfies the *General Motors* test will be exempted; equipment that does not meet the test will be regulated.[12] For example, no regulated entity "could claim that a waste storage tank that was connected at the end of a manufacturing process" was exempt, *supra*, because such a claim would fail the *General Motors* test; such a waste storage tank is not an "integral part" of a "production system" that "creates a product."[13] *General Motors*, *32-33.

Moreover, ISP is not asking this Tribunal to "expand" the manufacturing process unit exemption to "include multiple connected, distinct pieces of equipment performing different functions," *supra*. Such equipment, if functioning as "integral parts" of a single "production system" used to "create a product," is already covered by the exemption, under *General Motors*. That is why GM's paint spray guns, the paint containers, and the piping connecting them – all distinct pieces of equipment performing a specialized function in an integrated production system, even without serving as the locus of "physical or chemical change" – were exempt. The "production system" was defined as painting cars, *id.* at *32, and it included many individual components working together, all of which collectively constituted a "manufacturing process unit." *Id.* As set forth below, ISP's distillate receivers easily meet the same definition.

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[12] The Region's "slippery slope" argument also cites language from this Tribunal in *Chem-Solv*, *id.* at 29, but the quotation is out of context. The Tribunal in *Chem-Solv* was not expressing concern that *every* manufacturing process unit argument is a slippery slope – just one particularly slippery example that is not relevant here. Specifically, in stating that "Respondents' logic would allow every tank, hose, or pipeline associated with industry or manufacturing to be an MPU," *Chem-Solv*, *75, the "logic" this Tribunal was referring to was Chem-Solv's contention that the Pit was a manufacturing process unit merely because the company's business *in general* was "manufacturing." *Id.* ("Chem-Solv's core business of repackaging chemicals from bulk storage containers into drums suitable for sale and distribution to its customers falls within the definition of 'manufacturing,' and… the Pit is therefore an MPU") (quoting and characterizing Chem-Solv argument). This argument was obviously overbroad, *id.*, and ISP makes no such argument here.

[13] The *General Motors* test offers the same protection against the other "slippery slope" examples that Region 1 proffers, *i.e.*, "where product manufacturing occurred in one tank, hazardous waste generation occurred in another tank, and hazardous waste storage occurred in a third tank," Region 1 Mot., 29, or "a hazardous waste storage tank in which neither product manufacturing nor waste generation was occurring," *id.* at 29-30. The exemption would apply where such equipment was an "integral part" of a "production system" that "creates a product," *General Motors*, *32-33, and not otherwise. Mere hazardous waste storage tanks should never qualify for the exemption under this test. ISP is not claiming that its own hazardous waste accumulation tank qualifies.

II. THE UNDISPUTED FACTUAL RECORD IN THIS CASE OVERWHELMINGLY DEMONSTRATES THAT ISP'S RECEIVERS ARE EXEMPT FROM RCRA.

Most of ISP's briefing in this case focuses on the second element of the legal standard in 40 C.F.R. § 22.20(a): that ISP is entitled to judgment as a matter of law. But this case also satisfies the first element, because there are no genuine issues of material fact in dispute. While ISP does not agree with every detail of Region 1's factual assertions, ISP does not contest any factual assertions in this briefing, because it is not necessary; there are no *material* facts in dispute.[14] This case does not turn on disputed facts.

As set forth below, the undisputed factual record in this case demonstrates that ISP's receivers are exempt from RCRA regulation under the *General Motors* test, and even under Region 1's own inaccurate "locus" test.

A. Region 1's own factual arguments about ISP's receivers depict an "integral part" of a "production system" used to "create a product."

The facts set forth in Region 1's motion are consistent with ISP's own central factual argument in this case: that ISP's distillate receivers are an "integral part" of a "production system" used to "create a product" at the ISP facility. *General Motors*, *32-33. Specifically, the distillate receivers are an integral and inextricable part of ISP's distillation systems, which perform the necessary production step of removing solvents from ISP's products. This argument is set forth in detail in ISP's own motion, but is set forth in summary here to demonstrate its consistency with Region 1's own factual assertions.

The most central fact not in dispute is that the ISP manufacturing processes at issue require solvent distillation, and distillation physically could not occur without the receivers. ISP

[14] This is particularly true with respect to assertions in the Schanilec and Piligian affidavits that are not cited in Region 1's brief. The absence of such assertions in briefing is a clear indication that these assertions are not material and need not be litigated. If such assertions were material, Region 1 would have cited them in its brief.

Mot., at 38-40. This simple fact alone satisfies the *General Motors* test ("integral part" of a "production system"). Region 1 does not dispute that as solvent vapors from ISP's reactors are condensed back into liquid form in the condensers, the condensers must be continuously "cleared" or they would quickly cease functioning, or that the receivers serve as the necessary collection point. *Id.* Region 1 does not contest that neither the reactors nor the condensers at ISP can serve that collection function. *Id.*; *see also* Schanilec Decl., ¶ 21 ("the reactors and condensers are not designed to accumulate unwanted and separated liquid solvent distillate"). The Region likewise does not contest that ISP's distillation processes must be performed under an inert, oxygen-free atmosphere so as to prevent fire hazards, degradation of raw materials or products, or other undesired reactions, such that the internal atmosphere in each distillation system must be closed to the intrusion of air from the outside environment. ISP Mot., at 38-40. Nor does Region 1 contest that in each ISP distillation system, this closed-off internal atmosphere must include the reactor, condenser, and receiver. *Id.*

ISP's motion also sets forth a variety of other critical manufacturing functions performed by ISP's receivers that further belie Region 1's central argument that the receivers are mere passive storage tanks. Region 1 does not contest these facts either:

First, the receiver is a key element for controlling the pressure within the entire distillation system, including the reactor, condenser, and receiver. ISP Mot., at 41-42. Such control is achieved by opening and closing valves that connect each receiver to a vacuum source and a nitrogen tank, based on readings from a pressure sensor within the reactor; in most instances, electrical signals from the reactor sensor control the receiver valves automatically. *Id.* The Region's expert witness acknowledges that the pressure in the entire system is sometimes controlled through the receiver. *See* Schanilec Decl., ¶ 33 ("the vacuum system is applied to the

receiver tanks to draw a vacuum on the receiver tanks, as well as on the condensers and reactors, during those distillation steps when decreased pressure is desired in the reactors"); *id.*, ¶ 34.a ("During certain distillation steps, ISP uses the vacuum system to draw a vacuum on the receiver tank, which is further connected to the condenser and to the reactor").

Second, the receivers are necessary for ISP to track the progress of distillation and to make critical production decisions. *See* ISP Mot., at 42-44. The tracking is achieved through continuous and precise monitoring of the volume of liquid inside each receiver using radar; the measured receiver levels are used to decide when certain steps of the manufacturing process are complete and the next step should be initiated. *Id*. Region 1 implicitly recognizes this function of the receivers, acknowledging in its motion that "some of the batch records contain steps that state… specific volumes of used solvent distillates that are to be collected in the Receiver Tanks at certain stages of the production process." Region 1 Mot., at 35. These steps could not be carried out without receivers to allow the monitoring of solvent distillate volume.[15]

Third, the receivers play an important role throughout the entirety of the production processes at issue as a place for materials that unexpectedly "bump" out of the reactor, without being properly distilled, to collect for potential return to the reactor for reprocessing. *See* ISP Mot., at 44-45. Region 1's expert witness acknowledges that "[i]n distillation processes generally, there is the potential for 'bumping.'" Schanilec Decl., ¶ 31; *see also* CX-26, at 111

[15] The examples that Region 1 cites in its discussion of "specific volumes" actually highlight the receivers' role in the production process. In those examples production processes, ISP collects a small amount of distillate in the receiver and then sends that material to the facility-wide hazardous waste accumulation tank S-535. *See* Region 1 Mot., at 35-36 (citing RX-21, RX-24). This is done because the "initial distillate contains impurities that must be removed or the concentration will build up in the recycled [solvent being collected in the receiver]." *See* RX-21, Step 29; RX-24, Step 32 (referring to the initial distillate as a "forecut"). Starting immediately after the initial distillate with impurities is removed, all of the solvent distillate collected in the receivers (in far larger quantities) is routed for direct use "as is" in other production processes at the facility. *See, e.g.*, RX-21, Steps 31, 33. In short, the receiver is monitored to determine when the solvent distillate being produced is pure enough for further use in production, and then to collect that pure material until it can be removed from the system for such productive use. These are manifestly manufacturing functions.

(Region 1 exhibit discussing steps that may be taken during distillation to minimize potential for bumping). Region 1's expert also notes that in these cases, "the contents of the reactor vessel [including 'ingredients' for the production process] may enter the… receiver tanks." *Id*. When bumping occurs, the valuable "ingredients" (*i.e.*, raw materials or products) that end up in the receiver may be returned to the reactor for reprocessing. Without the receivers, such materials would be wasted.

Fourth, the receivers produce additional distillate from vapors and mists that fail to form distillates in the condensers, thereby serving as a back-up to the condensers that Region 1 itself concedes are part of the manufacturing process. *See* ISP Mot., at 45-46; Rebuttal Exchange, at 6 ("manufacturing occurs in… [the] condensers"). Region 1, in fact, acknowledges that "[a] very small amount of… condensation [and thus distillate formation] could potentially occur in the Receiver Tanks." Region 1 Mot., at 37. n.25. If distillate production via vapor condensation is "manufacturing" in the condenser, it must also be "manufacturing" in the receiver.

Fifth, in some of the manufacturing processes at issue, the receivers play an important role in transferring liquid raw materials into the reactors for processing. ISP Mot., at 47. The Region 1 Motion notes the introduction of raw materials into the reactors, and does not dispute the involvement of the receivers in this essential production step. Region 1 Mot., at 17, 33.

Sixth, in order for the receivers to perform all the manufacturing functions discussed above, they are designed and operated for performance in a production capacity, not as mere storage tanks. ISP Mot., at 47-50. Each receiver is dedicated for use with a single reactor and is hard-piped to that reactor through the associated condenser. *Id.* The receivers are built and maintained to withstand the same "full" vacuum as ISP's other production equipment. *Id.* In all but one system, valves on the receiver are physically connected to a pressure sensor in the

reactor, so that electrical signals from the reactor sensor can automatically control the receiver valves which, in turn, control the pressure in the reactor. *Id.*; *supra*. Unlike storage tanks, the receivers only hold distillates during production, and are emptied and cleaned out at the conclusion of each production batch. None of these design and operational characteristics of the receivers is necessary or common for tanks that merely serve to accumulate hazardous wastes, and are not found in the ISP facility's own hazardous waste accumulation tank.

EPA itself has long recognized that receivers are fundamentally different from downstream waste storage tanks. *See, e.g.*, 55 Fed. Reg. 25462 (concluding that a receiver that initially collects distillates within a distillation unit and a "holding tank following the distillate receiver" may be regulated differently under RCRA) (emphasis added) (Attachment 5 to ISP Motion). No facts cited in Region 1's motion undermine this basic conclusion. Unlike a mere storage tank, a receiver is an "integral part" of a "production system" used to "create a product," *General Motors*, *32-33. Unlike a storage tank, a receiver is not downstream of the production process, where waste is managed; it is linked – conceptually, physically, electronically – with the rest of the ISP distillation system. *Id.* Receivers are so integral to the production process that they must be maintained within a common, inert internal atmosphere with other distillation equipment – reactors and condensers – that Region 1 concedes are production devices. Under the *General Motors* test, receivers indisputably function as parts of manufacturing process units and are exempt from RCRA regulation.

B. The undisputed facts support the conclusion that the ISP receivers are exempt even under Region 1's own proposed standard for exemption.

The conclusion that the ISP receivers are exempt under the manufacturing process unit exemption holds true even under Region 1's proposed alternative test for applying the exemption. Under that test, a unit is only exempt if it is both "the locus of… hazardous waste

generation" and "the locus of manufacturing." Region 1 Mot., at 29. Both elements of the Region's proposed test are satisfied, based on the undisputed facts in this case.

1. Receivers are the locus of hazardous waste generation.

Region 1 states that in order for a unit to be covered by the manufacturing process unit exemption, hazardous wastes must be generated within the unit. Region 1 Mot., at 36. ISP agrees; the exemption explicitly states that it applies to "hazardous waste which is generated… in a manufacturing process unit." *See* 40 C.F.R. § 261.4(c). But Region 1 is wrong to assert that the receivers are not covered by the exemption as a result. As discussed in detail *supra* and in ISP's own motion, the relevant unit to be evaluated here is the *distillation unit*, consisting of the reactor, condenser, and receiver, together with their connecting pipes and related equipment. The parties agree that hazardous wastes are generated within this "unit."

Even if the relevant "unit" is the receiver alone rather than the distillation unit, however, ISP satisfies this aspect of Region 1's proposed test. While parties agree that the vast majority of the distillates are *produced* upstream of the receivers, in the condensers, *see* Region 1 Mot., at 37 n.25, such distillates are not *generated as wastes* until after they are collected in the receivers.

Under RCRA, materials may be classified as solid and potentially hazardous wastes only if they are "discarded." *See* RCRA § 1004(27), 42 U.S.C. § 6903(27); *American Mining Congress v. EPA*, 824 F.2d 1177, 1193 (D.C. Cir. 1987) ("Congress clearly and unambiguously expressed its intent that 'solid waste' (and therefore EPA's regulatory authority [under RCRA]) be limited to materials that are 'discarded' by virtue of being disposed of, abandoned, or thrown away"). Courts have repeatedly admonished that materials being saved are clearly not being discarded, and thus are not wastes. *See, e.g.*, *Association of Battery Recyclers v. EPA*, 208 F.3d 1047, 1053 (D.C. Cir. 2000) (overturning portions of EPA's regulatory definition of solid waste under RCRA, stating that "[t]o say that when something is saved it is thrown away is an

extraordinary distortion of the English language. Yet that is where EPA's definition leads."), *quoted in American Petroleum Institute v. EPA*, 862 F.3d 50, 58 (D.C. Cir. 2017) (overturning additional portions of EPA's regulatory definition of solid waste).

In the present case, ISP collects and saves distillates in the receiver throughout each distillation process for multiple reasons. First, the distillates are saved in the receiver (during the process only) because at any moment during the distillation, valuable raw materials or products could unexpectedly "bump" out of the reactor and into the receiver. ISP Mot., at 44-45. If the liquids were not saved in the receiver, it would be impractical to return the valuable materials back to the reactor for reprocessing and those materials would instead have to be wasted.[16] *Id*. Second, ISP saves the distillates in the receiver as an important means to track the progress of the production process and make key production decisions. *Id*. at 42-44. The facility continuously and precisely measures the volume of liquid in the receivers, and uses such data to determine when to proceed from one step of the process to another and to decide when the product of the production process can be expected to meet specifications.[17] *Id*. Third, ISP saves the distillates in the receivers because the distillation has to be performed in a system closed off from the intrusion of air, and releasing distillates requires that the system be opened. *Id*. at 38-40.

Because ISP collects and saves the distillates in the receivers during each distillation process, the distillates are not discarded materials and are not wastes as long as the process is still ongoing. Only at the end of the process, when all of the distillates have been collected in the

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[16] Although bumping is not frequent because the facility takes steps to minimize such occurrences, ISP Mot. at 3 n.3, & 45, ISP has an incentive to capture and save materials that do bump: to avoid wasting valuable materials.

[17] EPA has frequently stated that materials saved and used for essential informational purposes are not wastes until they are no longer needed, even if it is known in advance that they will ultimately be disposed. *See, e.g.*, RCRA Online #11363 (August 11, 1988) (stating that explosives stored "for analysis and possible use in law enforcement proceedings" are not wastes until they are "no longer needed") (Attachment 21); RCRA Online #14881 (January 6, 2014) ("[i]f the owner [of airplane crash debris] will use the materials for their own investigation ... the materials may not become waste until that investigation ... is complete") (Attachment 22).

receiver and there is no longer any need for the facility to retain the material (*e.g.*, because bumping is no longer possible, there is no more process to track, and the closed system is ready to be opened for removal of both products and wastes), do the distillates become wastes. The hazardous wastes are thus "generated" within the receivers.[18]

2. Receivers are the locus of manufacturing.

Region 1 asserts that a second requirement of the manufacturing process unit exemption is that manufacturing must take place "within" the unit. *E.g.*, Region 1 Mot., at 31. As discussed at length elsewhere in this briefing, this formulation is incorrect: the "manufacturing process unit" exemption does not itself require that "manufacturing" take place "within" a unit, whatever that might mean; instead, the *General Motors* test establishes that the proper test is whether the unit is *integral* to manufacturing. But even under the Region's proposed alternative "locus" test, the receivers would be exempt.

First, manufacturing *does* take place "within" ISP's distillation units, as properly defined. As set forth at length *supra* and in ISP's own motion, a "unit" for these purposes is a *system*, not just a single piece of equipment, and the relevant production system here is the distillation system. Region 1 does not contest that "manufacturing" takes place "within" the distillation units at ISP, and those units necessarily include receivers. That should be the end of the analysis.

But even if the receiver alone were the relevant "unit" to be evaluated, the receiver is exempt, because manufacturing also takes place "within" the receiver. The Region has explicitly

[18] Region 1 asserts that it is "predetermined… before production begins" when the distillates leaving the condenser will be discarded as wastes, Region 1 Mot., at 34-35, suggesting that the distillates are thus wastes before they reach the receiver. But this argument fails for two reasons. First, while it may be true that ISP knows upfront that some of the distillates from certain processes will be wasted *if the process proceeds normally*, industrial production processes do not always proceed according to plan. The disposition of the distillates collected in the receivers during distillation is never set until the process completes without bumping or other incidents. Second, even if it were somehow known with certainty that the distillates would be disposed, as long as there are valid production reasons to save the materials, they are not *yet* wastes. Only after those reasons no longer exist – here, after the production process has come to an end – do the materials become wastes.

stated that "manufacturing occurs in ... condensers," which is where "[t[he vast majority of solvent vapor… is condensed[.]" Rebuttal Exchange at 6; Region 1 Mot. at 37 n.25. The Region also states that "[a] very small amount of… condensation could potentially occur in the Receiver Tanks." *Id*. As noted above, if distillate production via vapor condensation is "manufacturing" in the condenser, it must also be "manufacturing" in the receiver.

Accordingly, Region 1 concedes that at least some "manufacturing" occurs in the receivers. The Region attempts to dismiss this fact as being "without consequence" on the ground that the amount of distillate produced in the receiver is only a fraction of the amount produced in the condenser. Rebuttal Exchange, at 8. But a small amount of manufacturing is still manufacturing. *See, e.g.*, *American Petroleum Institute v. EPA*, 216 F.3d 50, 57 (D.C. Cir. 2000) (rejecting an EPA argument that a particular process in the petroleum refining industry is not a manufacturing process because it "only recovers a small amount of oil relative to the entire output of a typical refining facility"); *American Mining Congress v. EPA*, 824 F.2d 1177, 1181 (D.C. Cir. 1987) ("In the mining industry ... [e]xtractive metallurgy proceeds incrementally. Rome was not built in a day, and all metal cannot be extracted in one fell swoop."). Even under Region 1's mistaken view that a "potentially exempted unit [must] be the locus of manufacturing" – and even under its equally mistaken view that each piece of equipment must be evaluated as a separate unit – the ISP receivers are exempt from regulation.

CONCLUSION

ISP's distillate receivers are part of "manufacturing process units" at the facility, and Region 1 has set forth no valid legal argument or factual assertion to the contrary. Region 1's motion for accelerated decision must be denied, and accelerated decision should be granted in favor of ISP, as set forth here and in ISP's own motion.

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Respectfully submitted,

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