Case No. 23-3765

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MULTISTAR INDUSTRIES, INC.,

Defendant-Appellant.

On Appeal from United States District Court
for the Eastern District of Washington, Spokane
Case No. 2:21-cv-00262-TOR
Hon. Thomas O. Rice

APPELLANT'S OPENING BRIEF

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DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 26.1(a), the undersigned counsel for Appellant MULTiSTAR Industries, Inc. states that Appellant does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Date: March 14, 2024

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I. INTRODUCTION

The controversy at the heart of this appeal is whether the U.S. Environmental Protection Agency (the "EPA") has the authority to regulate the transloading of railcars containing trimethylamine ("TMA") shipped to a location by rail, where it is temporarily stored incident to transportation, and whether this storage incident to the transportation of the TMA triggers obligations under the Clean Air Act ("CAA") and the Emergency Planning and Community Right to Know Act ("EPCRA"). As will be demonstrated, the answer is no.

The shipment of hazardous materials by both rail and truck is heavily regulated by the Department of Transportation ("DOT"). *See e.g.*, 49 C.F.R. Parts 171–180. The EPA regulates "**stationary sources**" under the CAA and "**facilities**" under EPCRA. The EPA Risk Management Program regulations under the CAA are applicable to "an owner or operator **of a stationary source** that has more than a threshold quantity of a regulated substance in a process …." 40 C.F.R. § 68.10(a). (Emphasis added). Stationary sources under the CAA are defined as "**buildings, structures, equipment, installations, or substance emitting stationary activities**." 40 C.F.R. § 68.3.

(Emphasis added). The EPA's regulations provide, however, that **"[t]he term stationary source does not apply to transportation, including storage incident to transportation**, of any regulated substance or any other extremely hazardous substance under the provisions of this part." *Id*. (Emphasis added).

"Facilities" under EPCRA are defined as "all buildings, equipment, structures, and **other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person**…" 42 U.S.C.A. § 11049. (Emphasis added).

Like the CAA, EPCRA provides that "[e]xcept as provided in section 11004 of this title [emergency notification], **this chapter does not apply to the transportation, including the storage incident to such transportation**, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas." 42 U.S.C.A. § 11047. (Emphasis added).

Appellant MULTiSTAR Industries Inc. ("MULTiSTAR") entered into an agreement with non-party Eastman Chemical Company ("Eastman"), whereby Eastman shipped railcars containing TMA from

Pace, Florida to MULTiSTAR's location in Othello, Washington, and MULTiSTAR subsequently transloaded the TMA from railcars to tanker trucks to complete the delivery of TMA to one of Eastman's clients in Moses Lake, Washington. The transloading operation involves the transfer of the TMA from one type of mobile container, a railcar, to a second type of mobile container, a tanker truck. None of the equipment involved in the transloading operation is permanently fixed in place, nor does either container remain permanently at the MULTiSTAR location. This arrangement is commonly referred to as "intermodal transport."[1]

Eastman produces TMA at its facility in Pace, Florida. Eastman's customer in Moses Lake, Washington does not have a rail siding. As a result, Eastman ships the TMA out of Pace, Florida by rail to MULTiSTAR's intermodal transfer operation in Othello, Washington, and the TMA is subsequently transloaded to tanker trucks to complete the shipment to Moses Lake, Washington. From the time the TMA in the railcars leave Pace, Florida, its ultimate destination is always

[1] Intermodal transport is defined as "the transportation of freight using more than one means of carriage and more than one carrier." Black's Law Dictionary 973 (11th Ed. 2019).

Eastman's customer in Moses Lake, Washington. Eastman does not sell TMA to MULTiSTAR, nor does MULTiSTAR ever have an ownership interest in the TMA. Similarly, MULTiSTAR does not own the railcars and MULTiSTAR does not manufacture, process, use, or dispose of TMA for any purpose, nor does it sell, buy, or independently distribute TMA. MULTiSTAR's sole role in the shipment process is limited to receipt of the railcars from Eastman, temporary storage of the Eastman railcars on its rail siding, transfer of the TMA from Eastman's railcars to the tanker trucks upon direction from Eastman, and driving the trucks from Othello, Washington to Moses Lake, Washington. The trip from Pace, Florida to Othello, Washington takes almost three weeks, with changes of locomotives along the way.

In 2021, the Attorney General of the United States, on behalf of the EPA, brought what appears to be a first-of-its-kind civil action against MULTiSTAR in the Eastern District of Washington, seeking injunctive relief and civil penalties for seven counts of alleged violations of the CAA, EPCRA, and the implementing regulations in the Code of Federal Regulations. MULTiSTAR is the only transloading operation in

the state of Washington EPA Region 10 has sought to enforce these regulations against.

The parties each filed motions for summary judgment. The District Court denied MULTiSTAR's motion for summary judgment and granted EPA's motion for partial summary judgment as to counts 1, 2, 5, 6 and 7. Later, after a bench trial, the Court held MULTiSTAR liable under counts 3 and 4 and granted EPA's request for injunctive relief. The Court also imposed an $850,000 penalty against MULTiSTAR, notwithstanding that EPA Region 10 had never before brought such an enforcement action in Washington, and despite these being MULTiSTAR's first alleged violations of section 112(r) of the CAA or section 312 of EPCRA, and that no releases of TMA had occurred at any time. This appeal followed.

As will be demonstrated, the District Court erred. The railcars at issue are actually covered by the transportation exemptions under both the CAA and EPCRA. Because the railcars are by definition neither "stationary sources" under the CAA nor "facilities" under EPCRA, EPA does not have authority to regulate MULTiSTAR's activities related to the transportation and storage incident to transportation of TMA, and

as a result, MULTiSTAR's operations related to TMA do not invoke the regulations EPA alleges MULTiSTAR has violated. In bringing the enforcement action, EPA has overreached its statutory authority by regulating in an area that is otherwise regulated by the DOT.

Even if these activities were within the EPA's purview, the District Court still erred. Because the shipments at issue by definition remained in "transportation" and the TMA was "stored incident to transportation," MULTiSTAR did not violate the CAA or EPCRA and the Court erred in issuing an $850,000 penalty and granting injunctive relief.

By its rulings, the District Court both authorized EPA's overreach and committed errors of statutory interpretation analysis. The implications of the District Court's rulings go beyond the facts of this case and will lead to continued agency overreach, inequitable enforcement, and confusion among the regulated community regarding compliance. This Court should reverse.

II. JURISDICTIONAL STATEMENT

The Attorney General of the United States, on behalf of the EPA, filed a civil action in the District Court asserting seven counts of alleged

violations of the CAA section 112(r)(7), 42 U.S.C. § 7412(r)(7), and for failure to comply with the requirements of section 312, 42 U.S.C. § 1022(a) of EPCRA. The District Court had jurisdiction to determine the matter pursuant to 28 U.S.C. § 1331, 1345, and 1355.

The District Court denied MULTiSTAR's motion for summary judgment and granted EPA's motion for partial summary judgment as to certain counts. After a one-day bench trial, the Court held MULTiSTAR liable on the remaining counts, granted EPA's request for injunctive relief, and imposed an $850,000 penalty against MULTiSTAR.

On August 1, 2023, the District Court entered judgment in EPA's favor. MULTiSTAR timely filed a post-trial motion pursuant to Fed. R. Civ. P. 52 and 59, which the District Court denied on September 28, 2023. MULTiSTAR timely filed its notice of appeal on November 21, 2023. *See* Fed. R. App. P. 4(a)(1)(B), and, *e.g.*, *United States ex rel. Hoggett v. Univ. of Phoenix*, 863 F.3d 1105, 1107–08 (9th Cir. 2017) ("If an FRCP 59 motion to alter or amend the judgment is timely filed, the time to file a notice of appeal begins to run 'from the entry of the order disposing of' the FRCP 59 motion.").

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

III. STATUTORY AND REGULATORY AUTHORITIES

All relevant statutory and regulatory authorities appear in the separately filed Addendum to this brief, cited to herein as "AD."

IV. ISSUES PRESENTED

1. Did the Environmental Protection Agency ("EPA") overreach its regulatory authority by bringing an enforcement action against a transloading operation pursuant to the Clean Air Act and Emergency Planning and Community Right to Know Act?

2. Did the District Court commit reversible statutory interpretation errors when it found the regulations at issue to be clear and unambiguous, but then did not give the plain language of the regulations its meaning, inserted criteria into the regulations, and deferred to EPA's interpretation of the regulations?

V. STATEMENT OF THE CASE

In the 1950's, Jiri Vanourek escaped communist Czechoslovakia and made his way to Eastern Washington, where he lived and worked for the rest of his life. 4–ER–766. In 1963, he started a company called

Soil & Crop Service, Inc., in Othello, Washington. *Id*. For two decades, that company served the fertilizer/chemical industry in the Columbia Basin. *Id*. In 1988, Mr. Vanourek started MULTiSTAR and transitioned his business to become an independent supplier of anhydrous ammonia to industries in the Pacific Northwest. *Id*. at –766-67. Jiri Vanourek passed away in 2015. *Id*. at –767. Since then, his son Peter Vanourek has continued to operate MULTiSTAR as an anhydrous ammonia supplier. *Id*. MULTiSTAR is a small business, with approximately ten employees. 2–ER–272.

In 2017, an opportunity arose for Mr. Vanourek to diversify the business. 4–ER–767. MULTiSTAR entered into an agreement with Eastman, whereby Eastman would ship railcars containing TMA from Pace, Florida to MULTiSTAR's intermodal transfer operation in Othello, Washington, and MULTiSTAR would subsequently transload the TMA from railcars to tanker trucks to complete the delivery of TMA to one of Eastman's client's facilities in Moses Lake, Washington. *Id*. at –767-68. Prior to the start of transloading operations, MULTiSTAR invested substantial funds to upgrade the tracks at its rail siding, upgrade and improve their trucks, and purchased a specialized

transloader to ensure the operations could be conducted safely. 4–ER–768, 2–ER–273 and –283-85. Active operations began in 2018. 4–ER–768.

The trip from Pace, Florida to Othello, Washington takes almost three weeks, with changes of locomotives along the way. 2–ER–269-70. From the time the TMA in the railcar leaves Florida, its ultimate destination is always Eastman's customer in Moses Lake, Washington.

To initiate the transloading of the TMA, the shipper, Eastman, prepares rail shipping paperwork. 4–ER–767. Eastman also issues a bill of lading to MULTiSTAR governing the final portion of the shipping process, which is MULTiSTAR's transport of TMA to Moses Lake by a tanker truck pulled by a large truck cab. 4–ER–769. This bill of lading identifies Eastman's customer as the ultimate consignee, and states, "[t]his shipment is part of a through shipment originating at Pace FL, transloaded at Othello WA, with a final destination of Moses Lake WA." *See, e.g.,* 4–ER–777, 4–ER–699-700, and 4–ER–712. MULTiSTAR does not prepare any of these shipping documents. *Id.* Upon receipt of the bill of lading, MULTiSTAR then transfers the TMA from the railcar to the tanker truck using a transloader. 4–ER–769-70.

After the TMA is transferred to the tanker truck, it is transported by highway to Eastman's customer in Moses Lake. 4–ER–768. MULTiSTAR then notifies Columbia Basin Railroad, which then initiates the return of the empty railcar back to Eastman in Pace, Florida. *Id*. During transloading operations, MULTiSTAR must follow the extensive safety requirements mandated by the Hazardous Materials Regulations ("HMR") promulgated by the DOT Pipeline and Hazardous Materials Safety Administration ("PHMSA") pursuant to the Hazardous Materials Transportation Act. 49 U.S.C. § 5101 *et seq*.; 49 C.F.R. § 174.67.

Eastman does not sell TMA to MULTiSTAR, nor does MULTiSTAR ever have an ownership interest in the TMA. Additionally, MULTiSTAR does not own the railcars and does not manufacture, process, use, or dispose of TMA for any purpose, nor does it sell, buy, or independently distribute TMA. MULTiSTAR's sole role in the shipment process is limited to receipt of the railcars from Eastman, temporary storage of the Eastman railcars on its rail siding, transfer of the TMA from Eastman's railcars to the tanker trucks upon direction from Eastman, and driving the trucks from Othello, Washington to

Moses Lake, Washington. 4–ER–771. The transloading operation involves the transfer of the TMA from one type of mobile container, a railcar, to a second type of mobile container, a tanker truck. None of the equipment involved in the transloading operation is permanently fixed in place, nor does either container remain permanently at the MULTiSTAR location. 4–ER–776-81. Approximately 95% of MULTiSTAR's contract charges to Eastman are for the transloading of the TMA from the railcars to the tanker trucks. 2-ER-271. MULTiSTAR does not perform transloading for any other entity. *Id*.

On September 1, 2021, the Attorney General of the United States, on behalf of the EPA, brought what appears to be a first-of-its-kind civil action against MULTiSTAR (the "Enforcement Action") alleging violations of the CAA, EPCRA, and the respective implementing regulations in the Code of Federal Regulations. 4–ER–841-76. MULTiSTAR is the only transloading operation in the State of Washington that EPA has sought enforcement of these regulations against. 2–ER–178-79.

EPA brought the Enforcement Action without any of its investigators visiting the site – no EPA personnel viewed

MULTiSTAR's transloading operation themselves to verify the actual facts of the operation before EPA filed its Complaint, notwithstanding that EPA allegedly views the MULTiSTAR operation as a CAA section 112(r) Program Level 3 (the most serious) facility. 2–ER–193 and –256. The Complaint asserted seven claims for relief, alleging that:

- [Count 1] MULTiSTAR failed to update a risk management plan ("RMP") for the TMA process as required under 40 C.F.R. § 68.190(a) and (b)(4). This provision requires the owner or operator of a "stationary source" subject to Part 68 to review and update the RMP submitted under 40 C.F.R. § 68.150 no later than the date on which a regulated substance is first present above a threshold quantity in a new process;

- [Count 2] MULTiSTAR failed to conduct a hazard assessment under 40 C.F.R. § 68.20, which requires the owner or operator of a "stationary source" subject to Part 68 to prepare worst-case release scenarios, alternative release scenarios, or off-site consequence analyses prior to accepting delivery of more than 10,000 pounds of TMA;

- [Count 3] MULTiSTAR failed to submit to EPA a compilation of written process safety information and conduct a process hazard analysis ("PHA") in violation of 40 C.F.R. § 68.65, and failed to promptly address the findings and recommendations of its PHA;

- [Count 4] MULTiSTAR failed to develop and implement written operating procedures, conduct training, and establish and implement mechanical

integrity procedures in violation of 42 U.S.C. § 7412(r)(7) and 40 C.F.R. § 68.73(b), (c) and (d);

- [Count 5] MULTiSTAR failed to timely meet the requirements for a "non-responding stationary source," by not timely coordinating response needs with the Local Emergency Planning Committee ("LEPC") in violation of 42 U.S.C. § 7412(r)(7) and 40 C.F.R. § 68.90(b) and 68.93;

- [Count 6] MULTiSTAR failed to submit to the Washington State Emergency Response Commission ("SERC"), the Adams County Local Emergency Planning Committee ("Adams County LEPC"), and the Fire Department, by March 1, 2018, completed EPCRA section 312 Inventory Forms for calendar year 2017 that included TMA, in violation of EPCRA section 312(a), 42 U.S.C. § 11022(a) and 40 C.F.R. § 370.40 to 370.45; and

- [Count 7] MULTiSTAR failed to submit to SERC, the Adams County LEPC, and the Fire Department, by March 1, 2019, completed EPCRA section 312 Inventory Forms for calendar year 2018 that included TMA, in violation of EPCRA section 312(a), 42 U.S.C. § 11022(a) and 40 C.F.R. § 370.40 to 370.45.

4–ER–841-76. These are MULTiSTAR's first alleged violations of section 112(r) of the CAA or section 312 of EPCRA regarding its transloading operation. No releases of TMA were alleged. *Id.*

In its prayer, EPA asked the District Court to enter a judgment finding MULTiSTAR liable for the violations, assessing civil penalties

against MULTiSTAR, and for an injunction to force MULTiSTAR to remedy the alleged violations. 4–ER–875.

The EPA regulates stationary sources under the CAA and facilities under EPCRA. Its case against MULTiSTAR rests entirely on certain premises being true: First, that while the railcars are at MULTiSTAR's intermodal transfer location they are "stationary sources" as defined under the CAA and that the transloading operations are "covered processes" under the CAA, therefore subject to regulation under the CAA. And second, that MULTiSTAR's intermodal transloading operation is a "facility" as defined by EPCRA, and therefore subject to regulation under EPCRA.

Stationary sources under the CAA are defined as "buildings, structures, equipment, installations, or substance emitting stationary activities." 40 C.F.R. § 68.3. The EPA's regulations provide, however, that **"[t]he term stationary source does not apply to transportation, including storage incident to transportation**, of any regulated substance or any other extremely hazardous substance under the provisions of this part." *Id*. (Emphasis added).

Facilities under EPCRA are defined as "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by the same person…" 42 U.S.C.A. § 11049. Like the CAA, EPCRA provides that "Except as provided in section 11004 of this title [emergency notification], **this chapter does not apply to the transportation, including the storage incident to such transportation**, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas." 42 U.S.C.A. § 11047. (Emphasis added).

The parties each filed motions for summary judgment.[2] EPA's argument regarding the alleged CAA violations relied on language in a 1998 Federal Register preamble to an early version of the regulations. That language provides, in pertinent part:

> EPA considers a container to be in transportation as long as it is attached to the motive power that delivered it to the site (e.g., a truck or locomotive). If a container remains attached to the motive power that delivered it to the site, even if a facility accepts

[2] 3–ER–450-636 and 4–ER–638-817. MULTiSTAR sought summary judgment on all claims. EPA sought partial summary judgment on counts 1, 2, and 5 (CAA) and counts 6 and 7 (EPCRA). *Id*.

> delivery it would be in transportation, and the contents would not be subject to threshold determination.

3–ER–541, 63 Fed. Reg. 640, 643 (Jan. 6, 1998), AD–152 (the "1998 Preamble"). As it relates to the alleged EPCRA violations, EPA relied upon legislative history for the proposition that:

> "[S]torage of materials in rail cars…would be exempt from the requirements of [EPCRA] Title III (other than emergency notification) *if the materials were under active shipping papers*."

3–ER–549 (emphasis in original), quoting H. Conf. Rep. No. 962, 99th Cong., 2d Sess. at 311 (1986).

Following a hearing (3–ER–421-48), the District Court entered its order denying MULTiSTAR's motion and granting EPA's motion. With regard to the CAA claims, the Court held:

> Based on the uncontroverted facts and a plain reading of the regulations, the rail cars containing TMA are used as storage outside the scope [*sic*] transportation. It is undisputed the TMA-containing rail cars sit for days or weeks before the TMA is eventually transloaded into trucks for transfer to the Moses Lake customer. The EPA contemplated precisely this type of scenario when addressing the definition of stationary sources. *See* List of Regulated Substances and Thresholds for Accidental Release Prevention; Amendments, 63 Fed. Reg. 640-01, 642–43 (Jan. 6, 1998) (stating a rail car could be considered a stationary source if it remained at one location for a long period of time).

1–ER–50. The Court further held that "the plain language of the CAA is unambiguous in the context of the present case," and that:

> No reasonable fact finder could conclude the rail cars at issue are stored incident to transportation when they sit for extended periods of time on Defendant's rails while completely disconnected from any mode of power. Accordingly, the CAA transportation exemption does not apply to Defendant's operation and Defendant is not entitled to summary judgment on its liability arising under the CAA.
>
> ***
>
> Viewing the facts in a light most favorable to Defendant, there is no genuine dispute that Defendant's TMA operation is subject to the CAA and its implementing regulations, and that Defendant failed to comply with the Risk Management Program requirements. Therefore, Plaintiff is entitled to summary judgment on Claims 1, 2, and 5.

Id. at –50-52.

> With regard to the EPCRA claims, the District Court held:
>
> As previously discussed, the rail cars containing TMA sit at Defendant's location for days, weeks, and months at a time, disconnected from any motive power. They are stationary storage units when used in this manner. The rail cars, therefore, come under the "other stationary items" category of the EPCRA "facility" definition. Whether Defendant's cargo trucks are included in the "facility" definition is irrelevant to the determination of Defendant's liability under EPCRA §

> 312—the issue is the length of time the TMA is stored in the unmoving rail cars.
>
> ***
>
> Viewing [the] evidence in a light most favorable to Defendant, no reasonable fact finder could conclude the TMA is always under active shipping papers, and therefore, always in transportation.
>
> ***
>
> As discussed above, while the rail cars containing TMA sit unmoving on Defendant's rails for weeks and months at a time before the TMA is transloaded and delivered to the Moses Lake customer, the rail cars fall under the "other stationary sources" category in the "facility" definition. Accordingly, Defendant was required to submit the requisite inventory forms for the TMA stored at its location and it is undisputed that Defendant failed to do so. Plaintiff is entitled to summary judgment on Claims 6 and 7.

Id. at –54 and –56-57.

The regulations, however, do not contain "motive power" or "active shipping paper" requirements, and do not contain any specific time period after which, for example, a railcar is no longer considered "in transportation" or becomes a stationary source.

The parties proceeded to a one-day bench trial (2–ER-133-326) on counts 3 and 4 and to determine a remedy. All issues at trial were

predicated on the District Court's determination that MULTiSTAR was subject to the CAA and the EPCRA regulations.

Following the trial, in its findings of fact, the District Court incorporated its order granting EPA's motion for partial summary judgment (1–ER–28) and found that "[t]he rail cars were not attached to motive power while stored and were not 'incident to shipping' because no shipping papers covered the rail cars when they were stored on Multistar's property." *Id*. at –33. And that "[t]he TMA sat on Multistar's rail siding for weeks and months and had to be unloaded and reloaded to another vehicle for delivery. No motive power was attached to the storage rail cars and no bills of lading covered the contents of the rail cars." *Id*. at –35.

The District Court, in its conclusions of law, reiterated that MULTiSTAR was subject to, and therefore violated, the CAA, 42 U.S.C. § 7412(r), its implementing regulations. and EPCRA, 42 U.S.C. § 11022. It assessed an $850,000 penalty and entered an injunction setting forth extensive compliance and reporting requirements, as well as predetermined penalties for failure to perform those requirements. 1–ER–9-26.

MULTiSTAR immediately filed a motion to amend, make additional findings or alter judgment, or for new trial, under Fed. R. Civ. P. 52 and 59, which the District Court denied. 2–ER–81, 1–ER–2. This appeal followed.

Pending resolution of the appeal, MULTiSTAR has provisionally paid the penalty to EPA, and is currently seeking a stay of the injunction in the District Court. 4–ER–933-34.

To MULTiSTAR's knowledge, EPA has not sought to enforce these regulations against the other rail stops on the TMA's three-week journey from Pace, Florida to Othello, Washington when the railcars are not attached to a locomotive. 2–ER–269-70.

VI. SUMMARY OF ARGUMENT

This case appears to be the first time EPA has ever sought to enforce section 112(r) of the CAA or section 312 of EPCRA against a transloading operation. MULTiSTAR is the only transloading operation out of 250 facilities in the state of Washington EPA asserts are subject to the section 112(r) regulations. To MULTiSTAR's knowledge, EPA has not brought a similar enforcement action against any other rail stops on the TMA's three-week journey from Florida to Washington when the

railcars are disconnected from a locomotive. Excluding MULTiSTAR, when EPA enforces these regulations, it appears to only do so against permanent stationary sources, such as brick and mortar buildings.

The shipment of hazardous materials by both rail and truck is heavily regulated by the DOT. In bringing the Enforcement Action, EPA is occupying an area of regulation that is reserved to the DOT. EPA's overreaching argument is based on its incorrect designation of the railcars as a "stationary source" under the CAA and MULTiSTAR's transloading operation as a "facility" under the EPCRA. DOT does not deem railcars "stationary sources," and transloading operations like MULTiSTAR's do not meet the definition of a "stationary source" under section 112(r). EPA's attempt to include moveable rolling stock (railcars) as a "facility" under section 312 of EPCRA conflicts with DOT's regulations and its own.

Neither the CAA nor EPCRA regulations at issue apply to the transportation of a regulated substance, including storage incident to transportation. The criteria EPA applied below to determine the TMA was not stored incident to transportation conflicts with applicable DOT regulations. EPA overreached its regulatory authority in bringing the

Enforcement Action. All of the District Court's rulings below were based on the presumption that EPA had the authority to seek relief against a transloading operation under section 112(r) of the CAA and section 312 of EPCRA. This was an error of law, and this Court should reverse.

The District Court also committed reversible statutory interpretation errors when it found the regulations at issue to be clear and unambiguous but then did not give the plain language of the regulations its meaning, inserted criteria into the regulations, and deferred to EPA's interpretation of the regulations. Neither "transportation" nor "storage incident to transportation" is defined in the regulations. The regulations do not contain a "motive power," or "active shipping paper" requirement and no time period is identified in the regulations after which an object in transportation becomes a "stationary source." Nevertheless, based on information extraneous to the regulations, the District Court held MULTiSTAR's transloading operation was subject to regulation by EPA, because the railcars sat for extended periods of time without connection to motive power, and based on a finding the railcars were not "in transportation" because they were not always under active shipping papers.

The District Court should not have afforded EPA's interpretation of the regulations any deference, because the Agency is not an expert in transportation, the Agency's interpretation of the regulations does not reflect fair and considered judgment, and the totality of the circumstances establish that the railcars remained in transportation. Letting the District Court's rulings stand will lead to continuing Agency overreach and to inequitable enforcement. It will further create confusion among the regulated community with regard to compliance. This Court should reverse.

Alternatively, in the event this Court determines EPA had the authority to seek relief against MULTiSTAR's transloading operation under section 112r of the CAA and section 312 of EPCRA, this Court should remand to the District Court for reassessment of the penalty. The District Court abused its discretion in assessing an $850,000 penalty because this was the first time EPA sought to enforce these regulations against a transloading operation, MULTiSTAR relied in good faith on the plain language of the regulations, this was MULTiSTAR's first alleged violations as it relates to its transloading operations, and there were no releases of TMA at any time.

VII. STANDARD OF REVIEW

"Appellate courts 'review a grant of summary judgment de novo.'" *Los Padres ForestWatch v. United States Forest Serv.*, 25 F.4th 649, 654 (9th Cir. 2022) (*quoting Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1220 (9th Cir. 2011)).

After a bench trial, this Court reviews a district court's findings of fact for clear error and its legal conclusions de novo. *Langer v. Kiser*, 57 F.4th 1085, 1100 (9th Cir. 2023), *cert. denied*, No. 23-742, 2024 WL 674854 (U.S. Feb. 20, 2024).

Statutory interpretation presents a question of law, which is also reviewed de novo. *State of California v. Iipay Nation of Santa Ysabel*, 898 F.3d 960, 964 (9th Cir. 2018).

Issuance of a permanent injunction is reviewed under three standards: "factual findings for clear error, legal conclusions de novo, and the scope of the injunction for abuse of discretion." *Galvez v. Jaddou*, 52 F.4th 821, 829 (9th Cir. 2022) (*quoting United States v. Washington*, 853 F.3d 946, 962 (9th Cir. 2017).

This Court reviews a district court's denial of a motion under Fed. R. Civ. P. 52 for clear error. Fed. R. Civ. P. 52(a)(6). The denial of a

motion under Fed. R. Civ. P. 59(a) is reviewed for an abuse of discretion. *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 728 (9th Cir. 2007). Although the abuse of discretion standard is deferential, "[w]hen a district court makes an error of law, it is an abuse of discretion." *Aircraft Serv. Int'l, Inc. v. Int'l Bhd. of Teamsters*, 779 F.3d 1069, 1072 (9th Cir. 2015) (*quoting Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012) (internal quotation marks omitted).

VIII. ARGUMENT

A. EPA overreached in bringing the Enforcement Action against a transloading operation.

1. This appears to be the first time EPA has ever sought to enforce these regulations against a transloading operation.

At trial, Javier Morales, the RMP Program Coordinator for EPA Region 10, testified that MULTiSTAR is the only transloading operation out of the approximately 250 facilities in the state of Washington EPA asserts are subject to the RMP regulations. 2–ER–177-79. In fact, when EPA enforces the RMP regulations, it appears to only do so against permanent stationary sources, such as brick and mortar buildings and facilities, as the regulations expressly authorize.

For example, *see*:

- *In the Matter of: Cloud Manufacturing, LLC # 10 Williams Drive Union, Missouri 63084*, 2009 WL 2943889, at *3 ("The Cloud facility, located at # 10 Williams Drive, Union, Missouri, is a "stationary source" pursuant to 40 C.F.R. § 68.3.")

- *In the Matter of: Tate & Lyle Ingredients Americas Inc., Van Buren, Arkansas, Respondent*, 2009 WL 5907984, at *4 (finding Tate & Lyle in violation of failure to submit an RMP for regulated substances at its starch manufacturing facility.)

- *In the Matter of Magellan Midstream Partners, Lp, Respondent*, 2004 WL 3141620, at *3 (Respondent's facilities listed in Attachment Number 1 are "stationary sources" pursuant to 40 C.F.R. § 68.3, listing brick and mortar locations.)

- *In the Matter of: Bluewater Thermal Processing, LLC D/b/a Bluewater Thermal Solutions (owner of Former Hi-temp, Incorporated Facility) Northlake, Illinois, Respondent*, 2012 WL 13187860, at *3 ("Respondent owns and operates a facility, located at 75 East Lake Street, Northlake, Illinois 60164, which consists of buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites.")

- *In the Matter of Williams Midstream Natural Gas Liquids, Inc., Respondent*, 2004 WL 3059060, at *3 ("Respondent's facilities listed in Attachment Number 1 are "stationary sources" pursuant to 40 C.F.R. § 68.3," listing brick and mortar locations.)

- *In the Matter of: Solvay USA Inc. Houston, Texas*, 2014 WL 12911407, at *4 ("Respondent is the

owner and operator of a stationary source producing, handling, or storing substances," referring to a chemical manufacturing facility.)

- *In the Matter of: the Dow Chemical Company Freeport, Texas*, 2013 WL 2154358, at *4 ("Respondent is the owner and operator of a stationary source producing, handling, or storing substances," referring to a chemical manufacturing facility.)

- *In the Matter of: the City of North Chicago Water Treatment Plant North Chicago, Illinois EPA Id: 1000 0003 6481, Respondent*, 2011 WL 13365144, at *4 ("Respondent's Facility is a "stationary source" as that term is defined in section 112(r)(2)(C), 42 U.S.C. § 7412(r)(2)(C), and 40 C.F.R. § 68.3," referring to a municipal wastewater treatment plant.)

Counsel for MULTiSTAR has been unable to find a single other example of EPA ever attempting to enforce the regulations at issue in this case against a transloading operation like MULTiSTAR's.

2. By bringing the Enforcement Action, EPA Is trying to occupy an area of regulation reserved to DOT.

The safe shipment of hazardous materials by both rail and truck is an important and essential component of the national economy.[3]

[3] The shipment of hazardous materials makes up approximately 12% of all freight tonnage shipped within the United States, with an estimated worth of $1.9 trillion. *PHMSA's Quarterly Newsletter For Hazardous*

Because of this, the shipment of hazardous materials by both rail and truck is heavily regulated by the DOT. This includes the transloading of hazardous materials from railcars to tanker trucks, which many times is the only viable means of getting these materials to a company's customers. It makes sense that DOT regulates this vital economic activity, as DOT has both the statutory authority to do so and the substantive expertise.

Pursuant to authority delegated to it by the Hazardous Materials Transportation Act, 49 U.S.C.A. § 5101 , *et seq.* (the "HMTA"), the DOT promulgated Hazardous Materials Regulations (the "HMR") to "protect against the risks to life, property, and the environment that are inherent in the transportation of hazardous material in intrastate, interstate, and foreign commerce." 49 U.S.C.A. § 5101. "The scheme erected by the HMTA/HMR is thus controlling during the interstate movement of hazardous materials, and also at various stages before and

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Materials Safety, April-June 2022. AD–158. This Court may take judicial notice of "official information posted on a governmental website, the accuracy of which [is] undisputed." *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727 n. 3 (9th Cir. 2015) (*quoting Dudum v. Arntz*, 640 F.3d 1098, 1101 n. 6 (9th Cir.2011). *See* Appellant's Request for Judicial Notice, filed concurrently with this brief.

after said movement." *Roth v. Norfalco LLC*, 651 F.3d 367, 371 (3d Cir. 2011).

The HMR classify hazardous materials and impose specific safety requirements upon shippers and carriers of such materials. 49 C.F.R. § 171–179. The HMR regulation of transportation of certain hazardous materials applies to "[e]ach carrier by air, highway, rail, or water who transports a hazardous material." 49 C.F.R. § 172.3(a)(2). The HMTA defines "transportation" as "the movement of property and loading, unloading, or storage incidental to the movement." 49 U.S.C.A. § 5102(13). Hazardous materials that are "stored incidental to transportation or otherwise handled during any phase of transportation" are subject to regulation under 49 C.F.R. § 172.600, 172.602 and 172.604.

The EPA has authority to regulate transportation under the CAA in limited circumstances that relate primarily to the regulation of emissions and emission limits. EPA acknowledges that the regulation of the transportation of hazardous substances remains in the purview of the DOT. "The Clean Air Act (CAA) mandates controls on air pollution from mobile sources by regulating both the composition of fuels and

emission-control components on motor vehicles and nonroad engines."[4] There is nothing more in the CAA that purports to address or provide authority for EPA to regulate safety risks associated with the railway transport of hazardous materials. EPA's overbroad attempt in this case to regulate the shipment of hazardous materials through the use of section 112(r) of the CAA and section 312 of EPCRA exceeds the regulatory authority provided to it. All of the District Court's rulings arise from its finding that EPA has the authority to enforce its regulations against a transloading operation like MULTiSTAR's. Whether this Court's review of those findings is de novo, for clear error, or for an abuse of discretion, this Court should reverse because the District Court committed an error of law.

3. EPA's application of its regulations conflicts with DOT's regulations and its own such that both cannot be administered.

As stated above, the shipment of hazardous materials by both rail and truck is heavily regulated by the DOT. EPA's application of the 112(r) regulations to designate an operation like MULTiSTAR's a

[4] EPA *Regulatory and Guidance Information by Topic: Air*. AD–168. *Also see* n. 3, above.

"stationary source" is inconsistent with DOT's regulations, as well as its own.

DOT does not deem railcars "stationary sources." The DOT, Federal Highway Administration ("FHA") Office of Planning, Environment and Realty provides information on its air quality programs, including transportation conformity. Transportation conformity is a process required by section 176(c) of the CAA, which establishes the framework for improving air quality to protect public health and the environment. The goal of transportation conformity is to ensure that FHA and Federal Transit Administration ("FTA") funding and approvals are given to highway and public transportation activities that are consistent with air quality goals.

The FHA publishes a Transportation Conformity Guide which includes basic provisions of the conformity process. The Guide includes a glossary that defines "stationary source" as "[r]elatively large, fixed sources of emissions (i.e. chemical process industries, petroleum refining and petrochemical operations, or wood processing)."[5] Compare

[5] US DOT, *Transportation Conformity*: A Basic Guide for State & Local Officials at 19, FHWA-HEP-17-034, February 2017. AD–219. *Also see* n. 3, above.

that to section 112(r), which defines "stationary source" as "any buildings, structures, equipment, installations or substance emitting stationary activities" that "belong to the same industrial group," are "located on one or more contiguous properties," are "under the control of the same person (or persons under common control)," and "from which an accidental release may occur." 42 U.S.C.A. § 7412(r)(2)(C). Moving, rolling stock[6] such as railcars do not fit within either of these definitions.[7] Here, EPA's attempt to include moveable rolling stock as a "stationary source" under section 112(r) conflicts with both DOT's definition, and its own.

The criteria EPA and DOT respectively use to determine when a shipment remains in transportation are also inconsistent. The definition of "storage incidental to movement of a hazardous material" under the HMR includes "[s]torage at the destination **shown on a shipping document**, including storage at a transloading facility, provided the original shipping documentation identifies the shipment as

[6] "Rolling stock" is a generic term used in the railroad industry to describe anything on rail wheels. **ECF36** p. 53.
[7] It does not appear that EPA has ever objected to or disagreed with DOT's definition of "stationary source."

a through-shipment and identifies the final destination or destinations of the hazardous material." 49 C.F.R. § 171.1. (Emphasis added). EPA, on the other hand, removed a reference to "active shipping papers" when the regulations at issue here were amended in 1998. EPA acknowledged at the time that "'active shipping papers' may not be a suitable criterion for determining whether a container is in transportation." 1998 Preamble at 643, AD–152. In short, comparing the two sets of regulations side by side, DOT uses the "active shipping papers" criteria while the EPA regulations do not. The two are inconsistent with each other.

When two statutes are in conflict, courts must read them "to give effect to each if [the court] can do so while preserving their sense and purpose." *Watt v. Alaska*, 451 U.S. 259, 267, 101 S. Ct. 1673, 1678, 68 L. Ed. 2d 80 (1981). Here, giving effect to each regulation is not possible because of how directly they conflict.

In 1998, EPA acknowledged the "potential for confusion regarding the jurisdiction and regulatory responsibility of EPA and DOT for . . . transportation containers at stationary sources," and as such, that "there may be a future need for EPA to further amend the definition of

stationary source to better comport with DOT classifications or actions."[8] No such amendments have been made, nor have further discussions between EPA and DOT apparently occurred to ensure EPA's definitions are consistent with DOT's classifications, as EPA is still publishing guidance inconsistent with DOT regulations.[9]

It is certainly possible that two agencies could both "administer their [regulatory] obligations and yet avoid inconsistency." *Massachusetts v. E.P.A.*, 549 U.S. 497, 532, 127 S. Ct. 1438, 1462, 167 L. Ed. 2d 248 (2007). For example, in the *Massachusetts* case, EPA declined to regulate new vehicle emissions, arguing that that it could not regulate carbon dioxide emissions without tightening mileage standards, which Congress delegated to DOT. *Id.* at 531-532. The Court

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[8] 1998 Preamble at 642, AD–152. The use of the word "at" between transportation containers and stationary sources infers EPA has always viewed transportation containers and stationary sources as two different things, and supports the argument that transportation containers are not themselves stationary sources.

[9] "Transportation containers that have been unhooked from the motive power that delivered them to the site (e.g., truck or locomotive) and left on your site for short-term or long-term storage are part of your stationary source." *RMP Guidance for Chemical Distributors – Chapter 1: General Applicability*, AD–178. *Also see* n. 3, above.

found EPA's broad authority to regulate "air pollutants" did not get in the way of DOT's mandate to promote energy efficiency. *Id*.

Such dual administration is not possible here. The two regulations do not and cannot fit together, they impose different and inconsistent obligations on regulated parties like MULTiSTAR. EPA and DOT cannot both administer their regulatory obligations while avoiding inconsistency if EPA deems rolling stock (as in this case, railcars) to be both "stationary sources" and in transportation.

EPA's attempt to deem moveable rolling stock a "stationary source" under section 112(r) or a "facility" under section 312 of EPCRA conflicts with its own written regulations and EPA therefore exceeded its regulatory authority in the Enforcement Action. To the extent its attempt to deem moveable rolling stock as a "stationary source" and "in transportation" conflicts with DOT's regulations, such conflict precludes consistent administration of both agencies' regulatory obligations.

All of the District Court's rulings below were predicated on the presumption that EPA has regulatory authority over a transloading operation like MULTiSTAR's. Again, under any applicable appellate

standard of review, this Court should reverse because the District Court committed an error of law.

B. The District Court's statutory interpretation errors warrant reversal.

1. The regulations are clear and unambiguous and transloading operations like MULTiSTAR's are exempted.

The EPA Risk Management Program regulations under the CAA are applicable to "an owner or operator of a stationary source that has more than a threshold quantity of a regulated substance in a process …." 40 C.F.R. § 68.10(a). Stationary sources under the CAA are defined as "buildings, structures, equipment, installations, or substance emitting stationary activities." 40 C.F.R. § 68.3. The EPA's regulations provide, however, that "**[t]he term stationary source does not apply to transportation, including storage incident to transportation**, of any regulated substance or any other extremely hazardous substance under the provisions of this part." *Id.* (Emphasis added).

Facilities under EPCRA are defined as "all buildings, equipment, structures, and other stationary items which are located on a single site or on contiguous or adjacent sites and which are owned or operated by

the same person…" 42 U.S.C.A. § 11049(4). Like the CAA, EPCRA provides that "Except as provided in section 11004 of this title [emergency notification], **this chapter does not apply to the transportation, including the storage incident to such transportation**, of any substance or chemical subject to the requirements of this chapter, including the transportation and distribution of natural gas." 42 U.S.C.A. § 11047. (Emphasis added).

Neither "transportation" nor "storage incident to transportation" are defined in the statutes or the implementing regulations at issue here. The regulations do not contain a "motive power" or "active shipping paper" requirement, and no time period is identified in the regulations after which an object in transportation becomes a stationary source.

A finding by a Court that the language of a statute or regulation is clear and unambiguous must be made based on the explicit language of the statute or regulation. *Kisor v. Wilkie*, ____ U.S. ____, 139 S. Ct. 2400, 2416, 204 L. Ed. 2d 841 (2019). A court is bound to "apply traditional rules of statutory interpretation to regulations, starting with the plain language of the regulation." *Backcountry Against Dumps v.*

Fed. Aviation Admin., 77 F.4th 1260, 1268 (9th Cir. 2023). If the language is clear, then the court shall not look to rules of construction, legislative history, or other extrinsic resources: the language means what it means and a court must simply apply the language. *See United States v. Harrell*, 637 F.3d 1008, 1010 (9th Cir. 2011) (*quoting Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438, 119 S. Ct. 755, 142 L. Ed. 2d 881 (1999)). "Statutory interpretation is a legal question for a judge, not a factual question for the trier of fact." *United States v. F.E.B. Corp.*, 52 F.4th 916, 932 (11th Cir. 2022).

The language in the regulations is clear. To store means "to keep (goods, etc.) in safekeeping for future delivery in an unchanged condition." Black's Law Dictionary 1717 (11th ed. 2019). The TMA in Eastman's rail cars is in storage because it is kept in the rail cars for future delivery to Eastman's customer in an unchanged condition.

Transportation means "the movement of goods or persons from one place to another by a carrier." *Id.* at 1805. The TMA is in transportation because it is being moved from one place (Pace, Florida) to another (Moses Lake, Washington) by rail and highway carriers, including MULTiSTAR. Incidental means "[s]ubordinate to something

of greater importance ….” *Id.* at 911. Storage of TMA is subordinate to the service of greater import, transportation to its final destination.

By the clear and unambiguous meaning of these words the transportation exemption applies, and transloading operations like MULTiSTAR’s are placed outside of the CAA and EPCRA regulation scheme. Here, the clear and unambiguous language of the regulations applies to the railcars at issue and exempts MULTiSTAR’s transloading operation because the TMA is “stored incident to transportation.” The District Court erred in holding otherwise and this Court should reverse.

2. The District Court erred in not giving the plain language of the regulations its meaning.

The District Court found that:

> [T]he plain language of the CAA is unambiguous in the context of the present case. No reasonable fact finder could conclude the rail cars at issue are stored incident to transportation when they sit for extended periods of time on Defendant’s rails while completely disconnected from any mode of power.”

1–ER–50-51.

Rather than apply the words of the regulations as written, the District Court instead evaluated the statutory language “in the context of the present case,” and based its decision on what a “reasonable finder

of fact could conclude." This was reversible error. A statute or regulation either applies as written or it does not. Context is irrelevant and it does not matter what a finder of fact might conclude. A clear and unambiguous statute says what it says. The Court improperly made findings of fact as part of its determination on a question of law, and its decision in this regard cannot stand.

3. The District Court erred in reading criteria into the regulations that are not there.

On summary judgment, the District Court held:

> Based on the uncontroverted facts and a plain reading of the regulations, the rail cars containing TMA are used as storage outside the scope [*sic*] transportation. It is undisputed the TMA-containing rail cars sit for days or weeks before the TMA is eventually transloaded into trucks for transfer to the Moses Lake customer. The EPA contemplated precisely this type of scenario when addressing the definition of stationary sources. *See* List of Regulated Substances and Thresholds for Accidental Release Prevention; Amendments, 63 Fed. Reg. 640-01, 642–43 (Jan. 6, 1998) (stating a rail car could be considered a stationary source if it remained at one location for a long period of time).

1–ER–50. It further held that:

> No reasonable fact finder could conclude the rail cars at issue are stored incident to transportation when they sit for extended periods of time on Defendant's rails while completely disconnected from any mode of

> power. Accordingly, the CAA transportation exemption does not apply to Defendant's operation and Defendant is not entitled to summary judgment on its liability arising under the CAA.
>
> ***
>
> Viewing the facts in a light most favorable to Defendant, there is no genuine dispute that Defendant's TMA operation is subject to the CAA and its implementing regulations, and that Defendant failed to comply with the Risk Management Program requirements. Therefore, Plaintiff is entitled to summary judgment on Claims 1, 2, and 5.

Id. at –51-52.

With regard to the EPCRA claims, the District Court held:

> As previously discussed, the rail cars containing TMA sit at Defendant's location for days, weeks, and months at a time, disconnected from any motive power. They are stationary storage units when used in this manner. The rail cars, therefore, come under the "other stationary items" category of the EPCRA "facility" definition.[10] Whether Defendant's cargo trucks are included in the "facility" definition is irrelevant to the determination of Defendant's liability under EPCRA § 312—the issue is the length of time the TMA is stored in the unmoving rail cars.

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[10] The District Court made this finding notwithstanding that MULTiSTAR has no ownership interest in the railcars, no operational control over the railcars (save for where they are located at the MULTiSTAR rail siding), nor is MULTiSTAR in any way "controlled by, or under common control with" Eastman, the entity that does own the railcars, as would arguably be required under EPCRA.

> ***
>
> Viewing [the] evidence in a light most favorable to Defendant, no reasonable fact finder could conclude the TMA is always under active shipping papers, and therefore, always in transportation.
>
> ***
>
> As discussed above, while the rail cars containing TMA sit unmoving on Defendant's rails for weeks and months at a time before the TMA is transloaded and delivered to the Moses Lake customer, the rail cars fall under the "other stationary sources" category in the "facility" definition. Accordingly, Defendant was required to submit the requisite inventory forms for the TMA stored at its location and it is undisputed that Defendant failed to do so. Plaintiff is entitled to summary judgment on Claims 6 and 7.

Id. at –54 and –56-57

Following the trial, in its findings of fact, the District Court incorporated its order granting EPA's motion for partial summary judgment (1–ER–28) and found that "[t]he rail cars were not attached to motive power while stored and were not 'incident to shipping' because no shipping papers covered the rail cars when they were stored on Multistar's property." *Id.* at –33. And that "[t]he TMA sat on Multistar's rail siding for weeks and months and had to be unloaded and reloaded to another vehicle for delivery. No motive power was attached to the

storage rail cars and no bills of lading covered the contents of the rail cars." *Id*. at –35.

In other words, the District Court concluded that although the regulations were clear and unambiguous, the regulations also included certain requirements that are not actually contained in the regulations themselves. This was reversible error. A court cannot revise a statute to promote what it thinks is a more equitable consequence. *See e. g.*, *Texaco Inc. v. United States*, 528 F.3d 703, 710 (9th Cir. 2008).

a. There is no "motive power" requirement in the regulations.

Instead of giving meaning to the plain language of the statute, the District Court turned to extraneous language in the 1998 Preamble, a preamble to an earlier version of the RMP regulations that provided, "[i]f a container remains attached to the **motive power** that delivered it to the site, even if a facility accepts delivery it would be in transportation, and the contents would not be subject to threshold determination." 1998 Preamble at 643, AD–152. (Emphasis added).

Based on this extraneous language, EPA argued, and the Court agreed, that because the railcars were disconnected from motive power, they were therefore "stationary sources." 1–ER–35. This was error by the Court. There is no "motive power" language in the regulation, and the Court erred by inserting this criteria into the regulations.

"[P]reamble language should not be considered unless the regulation itself is ambiguous." *El Comite Para El Bienestar de Earlimart v. Warmerdam*, 539 F.3d 1062, 1070 (9th Cir. 2008). Language in the preamble of a regulation is not controlling over the language of the regulation itself. *Id*. "[W]here the enacting or operative parts of a statute are unambiguous, the meaning of the statute cannot be controlled by the language in the preamble.'" *Id*. "[A] preamble cannot be relied upon to create ambiguity in a statute." *Cornejo v. Cnty. of San Diego*, 504 F.3d 853, 867 (9th Cir. 2007).

The language at issue here nowhere contains a "motive power" exception that would eliminate the application of the section 112(r) transportation exemption. The District Court impermissibly used the 1998 Preamble to expand the regulation and create a regulatory exception that does not otherwise exist. This was reversible error.

b. There is no "active shipping papers" requirement in the regulations.

The District Court concluded that the "storage incident to transportation" exemption to the definition of "stationary source" did not apply because "no reasonable fact finder could conclude the TMA is always under active shipping papers, and therefore, always in transportation," and "[t]he rail cars . . .were not "incident to shipping" because no shipping papers covered the rail cars when they were stored on Multistar's property." 1–ER–56 and –33. Like the "motive power" exception discussed above, the exception to the "storage incident to transportation" exemption does not require the presence of active shipping papers.

Below, EPA quoted legislative history for the proposition that:

> "[S]torage of materials in rail cars…would be exempt from the requirements of [EPCRA] Title III (other than emergency notification) *if the materials were under active shipping papers*."

3–ER–549 (emphasis in original), quoting H. Conf. Rep. No. 962, 99th Cong., 2d Sess. at 311 (1986).

In ruling in EPA's favor, the District Court inserted an "active shipping papers" requirement into the regulations even though the regulations do not contain such a requirement and despite the fact that in the 1998 Preamble "EPA . . . modified the definition of stationary source to remove the reference to active shipping papers." 1998 Preamble at 643, AD–152. Further, in the 1998 Preamble, EPA acknowledged "active shipping papers may not be a suitable criterion for determining whether a container is in transportation, and that EPA was aware "shipping papers are not always generated, nor are they required under DOT rules." *Id*. Finally, the 1998 Preamble notes, "EPA has also modified the definition [of stationary source] to remove the reference to temporary storage. This reference may have been confused with storage incident to transportation." *Id*.

In other words, the Court read information from the 1998 Preamble into clear and unambiguous regulations to support the "motive power' criteria, then also inserted an "active shipping papers" requirement into those regulations even though that criteria had been **expressly discarded by EPA in the same document.** Because the

regulations are clear and unambiguous and do not contain such a requirement, this was an error of law and this Court should reverse.

c. The District Court erred in reading a temporal aspect into the regulations.

The District Court found at summary judgment that "there is no genuine dispute that the rail cars are stationary sources for the purposes of the CAA where they remain ... at Defendant's location for days and weeks at a time." 1–ER–51-52. After trial, the Court also rejected "Multistar's claim that the TMA was in transit while it was stored on Multistar's rail siding ... [because] [t]he TMA sat on Multistar's rail siding for weeks and months…" **1**–ER–35. This too was an error of law.

As with the purported "motive power" exception and "active shipping papers" requirement, the regulations at issue do not contain any express temporal component. In order to rule the way it did, the District Court had to insert something into the regulations that is not there.

The 1998 Preamble modified the definition of "stationary source," but only "to clarify the exemption of transportation and storage incident to transportation." AD–147. All that amendment did was to clarify that the exemption for regulated substances in transportation, or stored incident to such transportation, is not limited to pipelines. *Id*. at –151. While the 1998 Preamble states that "a tank car could remain at one location for a long period of time, serving as a storage container, and could pose a hazard to the community," it does not state that such a tank car would be deemed a stationary source, much less define the subjective phrase "a long period of time." AD–152. The 1998 Preamble includes no specific guidelines on what a "long period of time" is. Is it a day, a week, a month? Because a preamble does not carry the force of law, it was error on the part of the Court to use language from the 1998 Preamble to create a temporal component that does not exist in the clear and unambiguous regulation itself.

4. Even if the regulations could be considered ambiguous, this Court should still reverse.

a. The District Court erred in deferring to EPA's interpretation of the regulations.

As set forth above, the plain language of the regulations is clear and unambiguous, "there is only one reasonable construction" of the regulations, and the District Court should have stopped its analysis there. *Kisor* at 2415. As the Supreme Court has stated,

> First and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous. If uncertainty does not exist, there is no plausible reason for deference. The regulation then just means what it means - - and the court must give it effect, as the court would any law. . . [I]f the law gives an answer – if there is only one reasonable construction of a regulation – then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency, under the guise of interpreting a regulation, to create de facto a new regulation ."

Id., *quoting Christensen v. Harris County*, 529 U.S. 576, 588, 120 S. Ct. 1655, 146 L. Ed. 2d 621 (2000). Without this restriction, judicial interpretation would be an end-run around the requirements of the Administrative Procedures Act ("APA"): "Under the APA, substantive rules issued by federal agencies through notice-and-comment

procedures bear 'the force and effect of law' and are part of the body of federal law, binding on private individuals, that the Constitution charges federal judges with interpreting." *Id*. at 2438-39, (GORSUCH, J. concurring).

"Courts first decide whether the rule is clear; if it is not, whether the agency's reading falls within its zone of ambiguity; and even if the reading does so, whether it should receive deference." *Kisor* at 2420. Therefore, there are three distinct steps the Court must engage in before even determining whether to defer to an agency's interpretation of its own rules.

The District Court acknowledged that "[t]he regulations do not define what constitutes 'storage incident to transportation' and the parties dispute how this language should be interpreted.'" 1–ER–48. The parties each argued plausible interpretations of the terms at issue. *See e.g.*, 4–ER–760, –661, and –641; and 3–ER–540, –505, and –455.

The Court arguably could have found the regulations ambiguous because the terms are undefined in the CAA and EPCRA and the parties disagreed on their meaning. But, even if the District Court had

done so, EPA's interpretations still do not stand and EPA is not entitled to deference.

(1) EPA is not an expert in transportation.

In order for EPA to be afforded deference, the regulatory interpretation "must in some way implicate its substantive expertise. Administrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to the agency. So, the basis for deference ebbs when the subject matter of the dispute is distant from the agency's ordinary duties or falls within the scope of another agency's authority." *Kisor* at 2417. (Simplified.)

EPA is an environmental agency, and its expertise is in the sciences related to the protection of human health and the environment from sources of pollution. The primary focus of EPA's regulations associated with transportation involve establishing emissions limits from engines and sources of power within the transportation sector.[11] It does not regulate the manner in which railcars or truck trailers carrying hazardous materials are built or maintained, or the safety

[11] EPA *Regulatory and Guidance Information by Topic: Air*. AD–168. *Also see* n. 3, above.

features required to be in place to prevent releases from such containers. The regulations that address the safety features of these containers to eliminate the risk of release are promulgated by DOT. 49 U.S.C. § 5101 *et seq*.; 49 C.F.R, Parts 100-180. Similarly, the safety procedures required to be implemented during transloading operations are mandated under DOT regulations, not EPA. *See e.g.*, 49 C.F.R. Part 174.

The provision in question, whether a container is "in transportation," or "storage incident to transportation" pertains almost purely to transportation and should similarly be interpreted consistent with the purview and expertise of the DOT, not the EPA. As such the EPA's interpretation of its own statutes and implementing regulations relating to transportation and "storage incident to transportation" address terms in a field outside its area of expertise, and is not entitled to deference. To the extent the District Court deferred to EPA's interpretation of the terms "in transportation" or "storage incident to transportation" in its rulings below, it committed reversible error.

(2) The Agency's interpretation does not reflect fair and considered judgment.

An agency's reading of a rule must reflect 'fair and considered judgment' to receive deference. *Kisor* at 2417. EPA's interpretation of the regulations at issue herein is neither "fair" nor "considered."

(a) EPA has never sought to enforce these regulations against a transloading operation before.

As stated above, MULTiSTAR is the only transloading operation out of approximately 250 facilities in the state of Washington EPA asserts are subject to the RMP regulations. 2–ER–177-79. To MULTiSTAR's knowledge, EPA has not sought to enforce these regulations against the other rail stops along the TMA's journey from Pace, Florida, to Othello, Washington, when the railcars are not attached to a locomotive. It brought the Enforcement Action without any of its investigators visiting and observing MULTiSTAR's transloading operation. 2–ER–193 and –256. With the exception of MULTiSTAR, when EPA enforces the regulations, it does so against permanent stationary sources, such as brick and mortar buildings and facilities. *See* VIII. A. 1., above. "[A] court may not defer to a new interpretation, whether or not introduced in litigation, that creates

'unfair surprise' to regulated parties." *Kisor* at 2417-18, *quoting Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 159, 127 S. Ct. 2339, 2342, 168 L. Ed. 2d 54 (2007).

The Supreme Court has declined to extend deference where an agency interpretation would impose retroactive liability on parties for conduct that the agency had never before addressed, which "would seriously undermine the principle that agencies should provide regulated parties fair warning of the conduct [a regulation] prohibits or requires." *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 156, 132 S. Ct. 2156, 183 L. Ed. 2d 153 (2012) (internal quotation marks omitted). In the *Christopher* case, the Supreme Court found that to defer to such an interpretation would result in precisely the kind of "unfair surprise" against which our cases have long warned." *Id.*

Because the District Court erred in deferring to EPA's interpretation of the regulations, this Court should reverse.

(b) The totality of the circumstances establish the railcars remained in transportation.

(i) There was a "continuity of transit" with the TMA shipments.

EPA argued, and the District Court accepted, that the TMA shipments should be evaluated in component parts. By doing so, the Court failed to consider long held precedent that it is necessary to evaluate the totality of the circumstances and the intent of the parties in a shipping transaction.

For over 90 years the Supreme Court has recognized the "continuity of transit" as the appropriate analytical framework for evaluating transportation arrangements in a variety of contexts, including circumstances when there is a pause in the movement of the goods being shipped. *See Carson Petroleum Co. v. Vial*, 279 U.S. 95, 98, 49 S. Ct. 292, 292, 73 L. Ed. 626 (1929).

In *Carson Petroleum Co.,* an oil company transported shipments of oil via train to a port, at which time the oil was transloaded from the railcars to ocean going tankers. The state authorities alleged two separate shipments occurred, where the first was subject to state and local taxes, even though the shipment was at all times intended for an

international destination. The oil company asserted a "single shipment" of oil occurred, which involved transferring the oil from railcars to a ship, because the intent of the shipment from the outset was for the oil to be sent overseas. The Supreme Court agreed with the oil company. "The oil in each railroad tank car, however, is not segregated or assigned or destined to any particular cargo or shipment abroad, but is pumped into the large storage tanks, having the capacity of many tank cars, and is held in the tanks until a ship arrives, or until a sufficient quantity of oil is accumulated to make up a cargo." *Id*. at 100. The Court in *Carson Petroleum Co.* held that what was important was the "selection of the point of shipment and the equipment at that point were solely for the speedy and continuous export of the product abroad and for no other purpose." *Id*. at 109.

That same analysis should apply in the context of the CAA with respect to the determination of whether something is "in transportation" or "storage incident to transportation." Under the facts of this case, the pause in shipment at the MULTiSTAR facility in Othello, Washington, was solely to facilitate the transloading of the TMA from railcars to tanker trucks and allow for the continued

shipment of the product to its originally intended final destination, Eastman's customer's facility in Moses Lake, Washington. But for the lack of rail siding in Moses Lake, MULTiSTAR would not even be involved because transloading would not be necessary.

The continuity of transport analysis has also been incorporated by other federal agencies involved in the regulation of transportation commerce, including the Interstate Commerce Commission ("ICC") and the Federal Energy Regulatory Commission ("FERC"), when evaluating whether various goods are the subject of "interstate" versus "intrastate" transport, with "character of shipment" being a key consideration. *See Merchant Fast Motor Lines v. ICC*, 5 F.3d 911, 917 (5th Cir. 1993) ("The critical factor in determining the shipment's essential character is the fixed and persisting intent of the shipper at the time of the shipment," and even a 45-day break in movement did not alter the fact that the goods were being stored incident to transportation.); *also see Aircraft Serv. Int'l, Inc. v. FERC*, 985 F.3d 1013, 1019 (D.C. Cir. 2021) (When goods come to rest solely to facilitate continued transportation, the break is insufficient to defeat continuity of transportation).

There is simply no dispute that the shipments of TMA were always intended by Eastman to ship from Pace, Florida to Eastman's customer in Moses Lake, Washington, with the stop in Othello, Washington solely to enable the transloading of the TMA from railcars to tanker trucks. The "continuity of transit" analysis is an apt analogy and should be applied to the facts herein.

(ii) Transloading is the principal purpose of the MULTiSTAR-Eastman contract.

The parties below agreed that "incident to" is when storage is subordinate to the principal purpose of transporting the material to the end customer. 3–ER–428 and –506. Assessing the facts in this matter under that understanding demonstrates the TMA was stored incident transportation.

The word "store" means "to keep (goods, etc.) in safekeeping for future delivery in an unchanged condition." Black's Law Dictionary 1717 (11th ed. 2019). There is no dispute that the TMA in the railcars was "stored" as it remained in an unchanged condition and in safekeeping for future delivery to Eastman's customer. Transportation means "the movement of goods or persons from one place to another by a carrier." *Id.* at 1805. There is no dispute that the TMA was in

transportation as it was moved from one place (Florida) to another (Moses Lake, Washington) by rail and highway carriers, including MULTiSTAR. Incidental means "[s]ubordinate to something of greater importance …." *Id*. at 911.

Storage of the TMA in the railcars at MULTiSTAR's rail siding is incidental to its transportation because the thing of importance in the Eastman and MULTiSTAR agreement was the transloading and ultimate transportation of the product from Eastman to its customer. Approximately 95% of MULTiSTAR's charges to Eastman under the parties' agreement are for transloading services. 2–ER–270. Temporary storage of the TMA is subordinate to the principal purpose of facilitating the continued transport of the TMA.

EPA argued below that the agreement's principal purpose was storage of TMA. 4–ER–461-62. But its argument failed to consider all of the facts and the totality of the circumstances. For example, EPA pointed to the title of the document memorializing the agreement, a "Warehousing Services Agreement," to support its contention that MULTiSTAR's principal obligation under the agreement was storing TMA. This is oversimplifies and ignores the plain language of the

Agreement itself. Though the word "warehousing" might connote storage, "warehousing **services**" under the actual terms of the agreement means something entirely different.

Exhibit A to the agreement is a schedule of fees. This is the only place in the agreement where "warehousing services" are defined, and the services in question do not include storage. The Agreement defines the "Warehousing Services" as:

> [T]aking operational control of the railcar after the spotting of the railcar by Eastman Chemical and its designated transporting agent (the rail carrier) on the Multistar rail siding, attachment of the railcar to the transloader and providing all utilities necessary to insure proper functioning of the transloading operation and transloading (transferring) product from the railcar into another legal container.[12]

Storage of TMA is never mentioned in this provision. A separate "rail car storage fee" is described as a "fee to be charged starting on the date Warehouseman accepts care, custody and control of the railcars and the product contained therein regardless of unloading date or date of warehouse receipt." By the terms of the agreement, "warehousing

[12] 5-ER-945. This document was subject to a protective order and filed and seal below. Volume 5 of the Excerpts of Record has been provisionally filed under seal along with MULTiSTAR's Notice of Intent to Unseal.

services" does **not** include storage, only handling and transferring the TMA.

Storage of the TMA in the railcars at MULTiSTAR's rail siding is incidental to its transportation because the thing of importance in the parties' agreement, the agreement's main purpose, is the transloading and ultimate transportation of the product from Eastman to its customer. The temporary storage of the TMA is subordinate to the principal purpose of facilitating the continued transport of the TMA.

The contract price for rail car storage was a fraction of that for "warehousing services," which shows the intent of the agreement was to govern transportation and transloading, not storage. The agreement provides that the railcar storage fee is a nominal $10 per railcar per day. 5–ER–946. On the other hand, under "Warehousing Services," fees for "attachment of the railcar to the transloader and providing all utilities necessary to insure proper functioning of the transloading operation and transloading (transferring) product from the railcar into another legal container" is based on throughput, which is guaranteed to be two million pounds annually. *Id*. at –945.

The District Court also found that MULTiSTAR was the consignee of the railcars, but this is inaccurate. Taminco US LLC ("Taminco"), Eastman's subsidiary, is the shipper and consignee (c/o MULTiSTAR) on the bill of lading for the rail leg of the TMA shipments. For the trucking portion of the shipment, the shipper again is Taminco and the consignee is Moses Lake Industries, the entity for whom the shipment of TMA was always intended from the outset. In addition, the bill of lading for the trucking leg of the shipment states "[t]his shipment is part of a through-shipment originating at Pace, FL, transloaded at Othello WA, with a final destination of Moses Lake WA." *See e.g.*, 4–ER–777.

The record makes clear that the parties' intended arrangement was for one "continuous" shipment, as Taminco/Eastman is on the shipping documents all the way from Florida through to the final destination in Moses Lake, Washington. And that MULTiSTAR's intermodal transloading operation was simply a mid-point to facilitate the final leg of what was always intended as a single shipment of TMA.

Simply put, the primary purpose of the agreement between Eastman and MULTiSTAR was the transloading of the TMA from

Eastman's railcars to tanker trucks to facilitate the continued shipment of the TMA from Pace, Florida to Moses Lake, Washington. It was always Eastman's intent for the TMA to be delivered to Moses Lake, Washington.

When the facts are viewed in their totality, and under the continuity of transport analysis set forth above, the shipments of TMA are always "in transportation," and the stop-over at MULTiSTAR's intermodal transloading operation is "storage incident" to that transportation. Therefore, MULTiSTAR's operations are not subject to regulation under section 112(r) of the CAA or section 312 of EPCRA. The District Court erred in deferring to EPA's interpretation of the regulations, and this Court should reverse.

(c) In the event this Court does not reverse, it should remand because the District Court abused its discretion in calculating the penalty.

For the reasons set forth above, section 112(r) of the CAA and section 312 of EPCRA do not apply to MULTiSTAR's transloading operations. Under the clear and unambiguous language of the regulations, transportation and "storage incident to transportation" are exempt from regulation. The TMA in the railcars/rolling stock remains

in transportation, and the temporary storage of the railcars/rolling stock is incident to that transportation. Therefore, MULTiSTAR's activities are not subject to statutes and their implementing regulations.

Alternatively, however, if this Court should decide that transloading operations are subject to these regulations, this case should be remanded to the District Court with a directive to reassess and reduce the penalty imposed.

The District Court's calculation of the penalty based on multiple overlapping violations was excessive and an abuse of discretion for several reasons. First, this is the first time the EPA sought to enforce these regulations against a transloading operation. Second, MULTiSTAR relied in good faith on the plain language of the regulations, which do not expressly provide that they apply to transloading operations. Third, this was MULTiSTAR's first alleged violations related to their transloading operations. Fourth, there were no releases of TMA at any time.

The statute expressly provides that "[a] penalty *may* be assessed for each day of violation." (Emphasis added). The "imposition of a civil

penalty is not mandatory under the CAA; rather, the decision whether to impose a penalty rests in the discretion of the court." *See e.g., Pound v. Airosol Co., Inc.*, 498 F.3d 1089, 1094 (10th Cir. 2007) (referring to "the penalty, if any, to be assessed for a violation of the Act*"). Also see Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 852 (5th Cir. 2013) ("[T]he penalty assessment criteria ... are considered ... in determining whether or not to assess a civil penalty for violations and, if so, the amount."; and 42 U.S.C. § 7413(e)(1) ("In determining the amount of *any* penalty to be assessed ...". (emphasis added)).

The applicable penalty provision of the CAA requires a court to:

> …take into consideration (in addition to such other factors as justice may require) the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence (including evidence other than the applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation.

42 U.S.C.A. § 7413(e)(1).

Penalizing MULTiSTAR in this case epitomizes "unfair surprise." The regulations, and EPA's past enforcement history under section 112(r) of the CAA and section 312 of EPCRA, gave no clear indication

that transloading operations like MULTiSTAR's would be subject to regulation, providing little to no warning to the regulated community that EPA viewed its regulatory authority in this manner.

Prior to initiating the transloading operations, MULTiSTAR inquired extensively as to the applicability of the CAA to transloading operations and found nothing to support a determination that transloading TMA from one bulk package to another for truck shipment to its final destination is subject to these regulations. 3–ER–349; 2–ER–274-76 and –285-86. The record demonstrates MULTiSTAR's good faith efforts to comply with applicable regulations.

Even though MULTiSTAR had a reasonable and good faith belief that its TMA transloading operations were not subject to the CAA section 112(r) and EPCRA section 312 regulations, it nevertheless submitted a Risk Management Plan, Operating Procedures, Emergency Response Plan, and inventory reports beginning in 2019. 2–ER–276-77. The District Court erroneously held that MULTiSTAR did not submit any evidence supporting mitigation of the penalty.

Further, although the District Court noted MULTiSTAR is a small business with fewer than ten employees (1–ER–36), the Court then failed to properly account for this factor in calculating its penalty, as shown by the inclusion of "retribution" punishment:

> Because the purpose of civil penalties goes beyond mere restitution, the penalty amount is not limited to damages actually suffered as a result of the violations. Instead, the penalty amount must be "large enough to hurt," and to deter future violations not only by the violator itself but by the general population regulated by the Act.

Id. at –39. It is indisputable that the District Court intended for this penalty to punish MULTiSTAR for failing to timely comply with CAA and EPCRA. But, whether these regulations even apply to a transloading operation, is a matter of first impression. Given the totality of the circumstances, it was an abuse of discretion for the District Court to impose a penalty "large enough to hurt," while ignoring both that MULTiSTAR is a small business and that this is an issue of first impression.

The Eighth Amendment of the United States Constitution contains a prohibition on imposition of excessive fines. The Supreme Court has held that "[t]he purpose of the Eighth Amendment, putting

the Bail Clause to one side, was to limit the government's power to punish." *Austin v. United States*, 509 U.S. 602, 113 S. Ct. 2801, 125 L. Ed. 2d 488 (1993). *Also see Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 266, 109 S. Ct. 2909, 2916, 106 L. Ed. 2d 219 (1989). The penalty imposed should be reduced in light of the protection offered by the Eighth Amendment.

The assessed penalty is also substantially out of proportion with other publicly documented fines and settlements for similar violations of the CAA.[13] On examination, this Court will find EPA historically assessed much lower penalties for alleged transgressions at least as serious as those alleged against MULTiSTAR in this case, and most were much more serious, including those which involved actual and significant releases of hazardous chemicals into the environment, accidents, and injuries to employees.[14]

In contrast, here it was not clear that the CAA or EPCRA applied to MULTiSTAR's transloading operation, no release of hazardous substances occurred, no injuries occurred, and MULTiSTAR

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[13] *See e.g.*, 2–ER–91-95, where the highest fine imposed was just $45,000.

[14] *Id.*

demonstrated its intended compliance. The penalty imposed is excessive, and its imposition constitutes an abuse of discretion.

The District Court also based the penalty on its calculation of violations covering a duration of 6,859 days, which equates to over 18 years. 1–ER–36. The Court did so by compounding the days of violation against multiple overlapping violations. *Id*. Each alleged violation, however, stems from MULTiSTAR's belief that it was not subject to the regulations at all. An appropriate and equitable means of calculating the penalty in these circumstances is to consolidate each of the individual violations into a single violation. Calculating the penalty in this manner, the entire period of time from the first day that any Eastman TMA was in a rail car on the leased siding at MULTiSTAR, to the day of trial, July 17, 2023, was 2,049 days. Using the per day penalty imposed by the District Court, the total fine would be roughly $307,350, assuming MULTiSTAR were found to be in violation each and every day of that time period. 2–ER–99.

Based on the circumstances of this case and the evidence before the District Court on mitigation, if MULTiSTAR is to be penalized at all, a drastically reduced amount is equitable, and still could accomplish

the goals of the penalty policy, which is to remove any economic gain achieved from non-compliance, and to incentivize future compliance.

b. The implications of the District Court's rulings go beyond MULTiSTAR.

The District Court's rulings should not stand for all the reasons argued above. Beyond how it has impacted MULTiSTAR, the District Court's acceptance of EPA's interpretation and enforcement of these statutes will lead to further agency overreach. Although this appears to be EPA's first foray into this type of enforcement, with the District Court's blessing it will not be the last.

Letting the decision below stand could also lead to inequitable enforcement, and to confusion by potentially regulated parties regarding compliance with conflicting regulations.

For example, consider the hypothetical railcar storing a hazardous material, which remains stationary in one place for a year, but is attached to a locomotive the entire time. Alternatively, there is another hypothetical railcar, but this one is detached from a locomotive for an hour. Whether a rail car is attached to the motive power that delivered it to the site is not indicative of either: 1) the amount risk involved; or 2) whether the materials it holds are stored "incident to transportation."

To further illustrate the point, under EPA's interpretation of the regulations, a railcar containing hazardous materials that remained attached to the locomotive that delivered it to the site would not be a "stationary source" and would be exempt from the regulation even if during the time it was stationary the locomotive lacked fuel or a locomotive engineer was unavailable to move it. Conversely, a railcar in the same rail yard and containing the same hazardous materials that was not connected to a locomotive would be subject to regulation as soon as it was disconnected. This is an absurd result that does nothing to protect the public or the environment and makes it impossible for potentially regulated parties to determine their compliance obligations. This Court should reverse.

IX. CONCLUSION

EPA overreached its regulatory authority by attempting to regulate a transloading operation under section 112(r) of the Clean Air Act and section 312 of Emergency Planning and Community Right to Know Act, and in ruling for the EPA below, the District Court

committed reversible statutory interpretation errors. This Court should reverse.

Date: March 14, 2024

JORDAN RAMIS PC

By: /s/ David A. Rabbino
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STATEMENT OF RELATED CASES

The undersigned attorney states the following:

I am unaware of any related cases currently pending in this Court.

Date: March 14, 2024

JORDAN RAMIS PC

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Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s) 23-3765

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Signature /s/ David A. Rabbino **Date** March 14, 2024

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on the date shown below, I electronically filed the foregoing OPENING BRIEF with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the Appellate Case Management System ("ACMS"). I certify that all participants in the case who are registered case participants will be served by the ACMS.

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