UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
CHEMSOLV, INC., formerly trading as Chemicals and Solvents, Inc.	)	
	)	DOCKET NO. RCRA-03-2011-0088
and	)	
	)	
AUSTIN HOLDINGS-VA, L.L.C.,	)	
	)	
RESPONDENTS	)	

ORDER ON MOTIONS TO SUPPLEMENT THE PREHEARING EXCHANGE

I. Complainant's Motion

On January 26, 2012, Complainant filed a Motion to Supplement and Correct Complainant's Prehearing Exchange ("Complainant's Motion"), seeking leave to make clerical corrections to Proposed Exhibits 17, 18, and 21. In addition, Complainant's Motion sought leave to add two new additional documents, Proposed Exhibits 65 and 66, to Complainant's Prehearing Exchange. On February 9, 2012, Respondents submitted a Response to Complainant's Motion to Supplement and Correct Complainant's Prehearing Exchange ("Respondents' Response"), stating that they do not object to the proposed corrections or to the new Proposed Exhibits 65 or 66 and noting that at this time they take no position as to the authenticity or admissibility of the latter exhibits.

For good cause shown, Complainant's unopposed Motion is **GRANTED**. The corrections set forth in Complainant's Motion are accepted and the new Proposed Exhibits 65 and 66 are added to Complainant's Prehearing Exchange.

II. Respondents' Motion

A. Positions of the Parties

On February 3, 2012, the undersigned received a Motion to Supplement Respondents' Prehearing Exchange ("Respondents' Motion" or "Mot.")), in which Respondents seek leave to identify an additional witness, Mr. Robert W. List ("Mr. List"), and to supplement their Prehearing Exchange with four new Proposed Exhibits (numbers 36 - 39). Mr. List is identified as follows:

> Robert List is a licensed geologist and an environmental consultant with Faulkner & Flynn, Inc. Mr. List will testify about his inspections of the facility and explain his findings and records. It appears the Virginia Department of Environmental Quality and now the U.S. Environmental Protection Agency have relied and will rely upon Mr. List's work product.

Mot. at 2.

On February 7, 2012, Complainant filed its Response to Respondents' Motion to Supplement Respondent's [sic] Prehearing Exchange ("Complainant's Response" or "C's Resp."), in which it objects to the identification of Mr. List as a witness based, in part, on the Respondents' alleged failure to include a brief narrative summary as required by 40 C.F.R. § 22.19(a)(2)(I). Complainant identifies Complainant's Proposed Exhibit 35 as the "only document involving Mr. List" present in the Prehearing Exchange. Resp. at 2. According to Complainant, Complainant's Exhibit 35 relates to certain events that occurred at the Chemsolv facility in 2003. Complainant states that it would not object to the inclusion of Mr. List in the Prehearing Exchange if his testimony at hearing is limited to "his findings as set forth in [Exhibit 35]." *Id.*

In addition, Complainant objects to the inclusion of Respondents' Proposed Exhibit 38 in the Prehearing Exchange because the photographs contained therein "are of such poor quality that it is completely impossible to determine what the photographs depict." C's Resp. at 3. Complainant states that it does not object to the inclusion of Respondents' Proposed Exhibits 36, 37, or 39 in the Prehearing Exchange. *Id.*

On February 16, 2012, Respondents submitted a Reply Brief in Support of Respondents' Motion to Supplement Respondents' Prehearing Exchange ("Reply"). In the Reply, Respondents assert that in addition to Complainant's Proposed Exhibit 35, Complainant's Proposed Exhibit 45 is also a document authored by Mr. List. Reply at 3. Respondents indicate that calling Mr. List would be conditioned upon Complainant's use of either or both of its Proposed Exhibits 35 and 45. *Id.* at 2.

With respect to Respondents' Proposed Exhibit 38, Respondents state that the "pictures contained in Exhibit 38 are copies of copies of the original photographs contained in the [Virginia Department of Environmental Quality]'s file for Chem-Solv's facility" and were obtained pursuant to the Freedom of Information Act. Reply at 4. Respondents further state that they do not possess better quality copies.

B. Discussion

With respect to the inclusion of Mr. List on Respondents' list of proposed witnesses, Complainant indicates that its opposition is based on the concern that Mr. List's testimony will cover topics not related to documents already exchanged. In their Reply, Respondents state that the identification of Mr. List is based on Complainant's apparent intention to rely on certain documents authored by Mr. List and that Respondents would only call him as a witness to the extent that Complainant uses its Proposed Exhibits 35 and 45. For good cause shown, Respondents' Motion is **GRANTED** with respect to listing Mr. Robert W. List as a potential witness. However, if called, Mr. List's testimony will be restricted, as indicated in Respondents' Motion, to the work product identified by Complainant in the Prehearing Exchange (i.e., Complainant's Proposed Exhibits 35 and 45).

With respect to Respondents' Proposed Exhibit 38, I note that the photographs depicted therein are of very poor quality and, contrary to Respondents' assertions, it is not readily apparent that these photographs have probative value. Nevertheless, this cannot be determined at the present time, and thus, Respondents' Motion is **GRANTED** with respect to Respondents' Proposed Exhibit 38. Complainant may renew any objection as to admissibility at hearing.

With respect to Respondents' Proposed Exhibits 36, 37, and 39, for good cause shown, the unopposed Motion is **GRANTED**.[1/]

Barbara A. Gunning
Administrative Law Judge

Dated: February 22, 2012
Washington, DC

[1/] On September 9, 2011, Respondents submitted "replacement pages" for certain exhibits that lacked color in the version submitted one day earlier in Respondents' Initial Prehearing Exchange. The Bates numbered pages affected were: CS 007-09, 020, 022, 034-35, 047, 049-52, 064, 067-68, 071-73, 080-82, 132, 134-35, 155, 157-58, 167, 183, 192-95, 199, 206, 214-16, 224, 239-44, 248, 259, 300, and 305-06. Complainant did not file a response. Accordingly, this submission is deemed an unopposed supplement to Respondents' Prehearing Exchange and the attached pages shall be included therein.

In the Matter of *Chemsolv, Inc., formerly trading as Chemicals and Solvents, Inc., and Austin Holdings-VA, LLC,* Respondent.
Docket No. RCRA-03-2011-0068

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this **Order on Motions to Supplement the Prehearing Exchange**, issued by Barbara A. Gunning, Administrative Law Judge, dated February 22, 2012, in Docket No. RCRA-03-2011-0068, was sent to the following parties on this 22nd day of February 2012, in the manner indicated:

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Dated: February 22, 2012
Washington, DC