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December 13, 2011

Via Federal Express Overnight Delivery

Lydia Guy
Regional Hearing Clerk (3RC00)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Re: IMO Chem-Solv, Inc., and Austin Holdings-VA, L.L.C.
EPA Docket No.: RCRA-03-2011-0068

Dear Ms. Guy:

Enclosed is an original and one copy of Respondents' Response to Complainant's Motion for Partial Accelerated Decision as to Liability in this proceeding.

Please let us know if you have any questions concerning the enclosed documents. We appreciate your assistance in this matter.

Very truly yours,

GENTRY LOCKE RAKES & MOORE, LLP

Maxwell H. Wiegard

MHW:ccm

Enclosures

cc: The Honorable Barbara A. Gunning
Charles L. Williams, Esq.
Joyce A. Howell, Esq., Sr. Assistant Regional Counsel
Mr. Jamison G. Austin

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY
CHEM-SOLV, INC., formerly trading as Chemicals and Solvents, Inc. and AUSTIN HOLDINGS-VA, L.L.C. Respondents. Chem-Solv, Inc. 1111 Industrial Avenue, S.E. 1140 Industrial Avenue, S.E. Roanoke, VA 24013, Facility.	U.S. EPA Docket Number RCRA-03-2011-0068 Proceeding Under Section 3008(a) of the Resource Conservation and Recovery Act, as amended 42 U.S.C. Section 6928(a)

RESPONDENTS' RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY

COME NOW respondents, Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings – VA, L.L.C. ("Austin Holdings") (collectively, "Respondents"), by counsel, pursuant to 40 C.F.R. §§ 22.16(b), and file this Response to Complainant's Motion for Partial Accelerated Decision As to Liability (the "Motion"). In the Motion, Complainant moves this Court for an order summarily finding Respondent Chem-Solv liable for the claims asserted in Counts III –VII of the Administrative Complaint, Compliance Order and Notice and Opportunity for a Hearing (the "Complaint"). (Mot. Accelerated Decision 1.) Respondent Chem-Solv opposes Complainant's

Motion for the reasons set forth herein, since when viewed in the light most favorable to Respondents, the evidence submitted thus far creates significant and genuine issues of material facts exist as to all Counts in the Complaint and with respect to the Motion, particularly Counts III- VII. Counts III – VII of the Complaint are dependent on the Complainant establishing the existence of certain hazardous waste generation and storage at Chem-Solv's facility, which did not and does not exist. Therefore, the hazardous waste management requirements that the Complainant alleges in Counts III-VII of the Complaint that Chem-Solv violated do not apply to Chem-Solv.

I. Statement of the Case.

The Complainant commenced this matter on March 31, 2011 by filing the Complaint. In the Complaint, Complainant alleges, in pertinent part, that Chem-Solv and Austin Holdings violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, in the following respects:

(1) By failing to have secondary containment for regulated hazardous waste storage tanks (Count III);

(2) By failing to obtain a tank assessment for regulated hazardous waste storage tanks (Count IV);

(3) By failing to conduct and document inspections of regulated hazardous waste storage tanks (Count V);

(4) By failing to comply with air pollutant emissions standards applicable to regulated hazardous waste storage tanks under RCRA Subpart CC (Count VI); and

(5) By failing to comply with closure requirements applicable to regulated hazardous waste storage tanks (Count VII).

Respondents timely filed an Answer denying the substantive allegations set forth in the Complaint.

In accordance with a Prehearing Order issued on May 31, 2011 by the Honorable Barbara A. Gunning, the parties have each filed extensive Initial Prehearing Exchanges. The hearing in this matter originally scheduled to begin on January 18, 2012 has been continued until March 20, 2012. Before the hearing was continued, the Complainant filed the Motion seeking a partial accelerated decision as to Chem-Solv's liability under the allegations set forth in Counts III – VII of the Complaint. Respondent respectfully opposes the Complainant's Motion on the grounds that significant and genuine issues of material fact exist as to all counts set forth in the Complaint, including Counts III – VII, for the reasons set forth below and in the Affidavits of Jamison G. Austin and Scott Perkins attached hereto and the referenced exhibits previously filed by the Complainant and the Respondents.

II. Statement of Undisputed and Disputed Facts.

With respect to the Statement of Facts set forth in Complainant's Memorandum in Support of the Motion for Partial Accelerated Decision as to Liability (the "Memorandum"), Respondents reply to all separately numbered paragraphs in turn:

1. Respondents admit that Chem-Solv operates a chemical distribution business on certain real property located in Roanoke, Virginia known in part as Tax Parcel 4240104 and in part as Tax Parcels 4240102 and 4240103, with street addresses of 1111 and 1140 Industry Avenue, S.E., Roanoke, Virginia. (Correct reference: Answer ¶ 4.) Chem-Solv's business is not located on "Industrial Avenue," as the Complainant alleges.

2. Respondents admit that the United States Environmental Protection Agency (the "EPA") and the Virginia Department of Environmental Quality (the "VADEQ") conducted an inspection at the Respondents' property on May 15, 2007 (the "Inspection"). (Correct reference: Answer ¶ 7.)

3. Respondents admit that representatives of the VADEQ conducted inspections at Respondents' property on May 15, 17, 18 and 23, 2007. (Correct reference: Respondents' Answer ¶ 9.)

4. Respondents admit that the EPA took certain samples during its inspection of Respondents' property on May 23, 2007. (Correct reference: Respondents' Answer ¶ 8.) However, Respondents challenge the EPA's data and conclusions that are based on such sampling. Id.

5. Respondents admit that on November 16, 2007, the EPA sent Chem-Solv an information request letter pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a) and that Chem-Solv replied to this information request letter by letter dated December 10, 2007. (Correct reference: Respondents' Answer ¶ 10.)

6. Respondents admit that on February 4, 2008, the EPA sent Chem-Solv an information request letter pursuant to Section 3007(a) of RCRA, 42, U.S.C. § 6927(a) and that Chem-Solv replied to this information request letter by letter dated February 6, 2008. (Correct reference: Respondents' Answer ¶ 11.)

7. Respondents admit that on April 1, 2008, the EPA sent Chem-Solv an information request letter pursuant to Section 3007(a) of RCRA, 42 U.S.C. § 6927(a) and that Chem-Solv replied to this information request letter by letter dated April 4, 2008. (Correct reference: Respondents' Answer ¶ 12.)

8. Respondents do not admit the existence of a "subgrade tank" located on Tax Parcel 4240104 from May 23, 2007 until February 1, 2008. The Complainant's allegation to this effect is incomplete and potentially misleading.

In its Memorandum, Complainant cites Paragraph 14 of Respondents' Answer as the source of an admission of this allegation. In Paragraph 14 of Respondents' Answer, the following response appears: "Respondents deny the allegations in Paragraph 13 as written." Respondents believe that the Complainant actually intended to refer to Paragraph 15 of Respondents' Answer, which states as follows:

> With regard to the allegations in Paragraph 14, Respondents admit that EPA took samples of water contained in a rinsewater holding tank located on Tax Parcel 4240104 on May 23, 2007. The remaining allegations in Paragraph 14 state legal conclusions, to which no response is required. To the extent that a response is required, Respondents deny the allegations in Paragraph 14. In further response to the allegations in Paragraph 14, Respondents state that the samples of water taken from the rinsewater holding tank on May 23, 2007 were flawed for the following reasons: (1) they were not collected in compliance with EPA's prescribed sample collection requirements; and (2) the materials sampled were not representative of any waste stream at the point of generation, because they were collected from an intermediate process tank.

(Respondents' Answer ¶ 15.)

In Response 7(d) of Chem-Solv's Information Request Letter Response dated December 10, 2007 (Complainant Ex. 21, EPA 658), another source cited by the Complainant in support of this allegation, Chem-Solv stated as follows:

> d. Submit the waste determination for the sludge and documentation of its disposal.
>
> The wastewater from the pit typically contains a solid content of 10-30% by volume. These solids, generated from hydroxide precipitation, are characteristically light and easily conveyed with routine wastewater removal and have been profiled as apart (sic) of the wastewater stream; therefore, sludge removal is only required in frequently (sic).
>
> Chemsolv has used the services of W.E.L., Inc. to remove the heavier, bottom sediments on two occasions. A composite sample of the first removal was sent to ProChem Analytical, Inc. for hazard characterization in May 2006. The sample was checked for corrosivity, ignitability and reactivity. The Total Characteristic Leaching Procedure was run for RCRA metals, semivolatiles and volatiles. All constituents were below

> regulatory levels. The material was shipped to Shamrock Environmental Services, Inc. on April 23, 2007.
>
> The second removal occurred in June 2007. This material is currently stored at Chemsolv awaiting the analytical work being performed by the EPA.

(Complainant Ex. 21, EPA 658.)

Moreover, the drawing, attached as Attachment 17e, EPA 1139, to Chem-Solv's Information Request Response Letter dated February 6, 2008 (not February 4, 2008, as alleged by the Complainant) (Complainant Ex. 23, EPA 1139), does not support this allegation by the Complainant as contended. Although the rinsewater holding tank at issue ("Rinsewater Tank No. 1") did exist on May 23, 2007, it was used, decommissioned and eventually removed as set forth in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006) and the Declaration of Jamison G. Austin attached hereto.

9. Respondents deny that Rinsewater Tank No. 1 was installed after July 1986. Respondent believes that Rinsewater Tank No. 1 was installed after a catastrophic flood in November 1985 and before the Summer of 1986. (See Second Aff. of Jamison G. Austin ¶ 10 attached hereto as **Exhibit A**.) Respondents further believe that Rinsewater Tank No. 1, as it appeared on May 23, 2007, was constructed at different times. The vessel that the Complainant refers to as the "Pit" was installed and used before July 1986 and some additional construction was done in approximately 1989-1990. Id.

10. Respondents admit that Rinsewater Tank No. 1 was referred to by the Complainant as the "Pit" in its Information Request Letters (Complainant Ex. 20, EPA 641A-649; Complainant Ex. 22, EPA 1065-1074; and Complainant Ex. 24, EPA 1140-1144.) In its Information Request Letter Responses (Complainant Ex. 21, EPA 650-1064; Complainant Ex. 23, EPA 1075-1139; and Complainant Ex. 25, EPA 1145-1164), Chem-Solv correspondingly

used the term "Pit" to reference Rinsewater Tank No. 1. The term "pit" raises no inferences and implies nothing as to the actual role or use of Rinsewater Tank No. 1.

11. Respondents admit that the EPA took samples of water and settled solids from Rinsewater Tank No. 1 on May 23, 2007. (Respondents' Answer ¶¶ 15 and 17.) In the same Paragraphs of the Respondents' Answer, however, the Respondents stated that such samples were flawed for reasons set forth and further explained in the expert report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314) and now as further set forth in the Affidavit of Scott E. Perkins, P.E. attached hereto as **Exhibit B**.

12. The Statement of Facts set forth in the Complainant's Memorandum contains two paragraphs numbered 11. In the second such Paragraph 11, Complainant states that the analysis of the water sample taken from Rinsewater Tank No. 1 by the EPA on May 23, 2007 was performed using the Toxicity Characteristic Leaching Procedure ("TCLP") described in 40 C.F.R. § 216.24 (incorporated by reference in 9 VAC 20-60-261) and further cites the Declaration of Peggy Zawodny in support of this contention. As set forth in the Expert Report of Scott Perkins (Respondents' Ex. 30, CS 307-314) and the Affidavit of Scott Perkins, P.E. attached hereto, there are serious and legitimate questions of fact and regulation regarding the validity of the sampling and testing in question and correspondingly, the results thereof and the data and conclusions based thereon. Mr. Perkins concludes that in addition to sampling irregularities, there are documentary irregularities regarding the chain of custody and the permitted hold time for such samples. Moreover, as set forth in Mr. Perkins Expert Report (Respondents' Ex. 30, CS 307-314), the sampling methodology used by the EPA is fatally flawed.

13. With respect to the EPA's contention in Paragraph 12 of the Statement of Facts set forth in the Complainant's Memorandum that the water sample taken from Rinsewater Tank No. 1 by the EPA on May 23, 2007 indicated that the water in Rinsewater Tank No. 1 contained 6.1 mg/L chloroform, the Respondents challenge the validity and therefore the factual accuracy of such sampling and the analytical methodology used by the EPA as set forth in Mr. Perkins' Affidavit (Aff. of Scott Perkins, P.E. ¶ 13) and Mr. Perkins's Expert Report (Respondents' Ex. 30, CS 307-314).

14. For the same reasons stated in Paragraph 13 above, Respondents challenge as a matter of fact the validity of the sampling methodology used by EPA in collecting the sample of the settled solids from Rinsewater Tank No. 1 on May 23, 2007. Thus, Respondents further challenge the validity of the analytical results of the May 23, 2007 settled solids sample and all data and conclusions based thereon.

15. Respondents admit that tetrachloroethene ("PCE") and trichloroethene ("TCE") are commonly referred to as volatile organic compounds ("VOCs").

16. For the reasons stated herein above, and explained in the attached Affidavit of Scott Perkins, P.E., the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314) and the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), Respondents challenge as a matter of fact the validity of the facts forming the basis of the Complainant's assertion that the analysis of the sample of the settled solids collected from Rinsewater Tank No. 1 on May 23, 2007 indicated that such settled solids contained 28 different VOCs.

17. For the reasons stated herein above, and explained in the attached Affidavit of Scott Perkins, P.E., the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314) and the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), Respondents

challenge as a matter of fact the validity of the facts forming the basis of the Complainant's assertion that the EPA's analysis of the settled solids sample collected by the EPA from Rinsewater Tank No. 1 on May 23, 2007 accurately indicated that such settled solids contained a VOC concentration of greater than 500 parts per million by weight.

18. Respondents deny the assertion made by the Complainants in Paragraph 18 of the Statement of Facts set forth in the Complainant's Memorandum that the concentration of tetrachloroethene in the settled solids indicated that the volume of tetrachloroethene in such settled solids was approximately 71 gallons. Such assertion is without basis in fact. The analysis set forth in the Declaration of Kenneth Cox is fatally flawed for the reasons set forth in Paragraph 8 of the Affidavit of Scott Perkins, P.E. (Perkins Aff. ¶ 8) and Paragraph 16 the Second Affidavit of Jamison G. Austin attached hereto (Austin Second Aff. ¶ 16).

19. Respondents deny the assertion made by the Complainants in Paragraph 19 of the Statement of Facts set forth in the Complainant's Memorandum that the concentration of trichloroethene in the settled solids indicated that the volume of trichloroethene in such settled solids was approximately 1.5 gallons. Such assertion is without basis in fact. The analysis set forth in the Declaration of Kenneth Cox is fatally flawed for the reasons set forth in Paragraph 8 of the Affidavit of Scott Perkins, P.E. (Perkins Aff. ¶ 8) and Paragraph 17 of the Second Declaration of Jamison G. Austin attached hereto (Austin Second Aff. ¶ 17).

20. Respondents admit that Rinsewater Tank No. 1 was constructed of ceramic coated carbon steel. (Correct reference: Respondents' Answer ¶ 21.)

21. Respondents admit that Rinsewater Tank No. 1 was completely removed on or about March 27, 2008. (Correct reference: Respondents' Answer ¶ 21.)

22. Respondents deny that Chem-Solv owns the real property on which Rinsewater Tank No. 1 is located. Austin Holdings is the owner of the real property on which Rinsewater Tank No. 1 is located. (Austin Second Aff. ¶ 8.) Chem-Solv leases such real property from Austin Holdings. Id.

23. Respondents admit that Chem-Solv operated Rinsewater Tank No. 1 at all times relevant to the allegations in the Complaint. (Respondents' Answer ¶ 3.)

24. Respondents deny the assertion made by the Complainant in Paragraph 24 of the Statement of Facts set forth in the Complainant's Memorandum that Chem-Solv's chemical distribution business located at 1111 and 1140 Industry Avenue, SE, Roanoke, Virginia, is a "facility" within the meaning of 9 VAC 20-60-260.A or 40 C.F.R. § 260.10. In order to constitute such a facility, hazardous waste activities of certain enumerated types must be conducted by the Respondents. For the reasons set forth in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), the attached Second Affidavit of Jamison G. Austin, the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), and the Affidavit of Scott Perkins, P.E. attached hereto, such enumerated types of hazardous waste activities were not conducted at Chem-Solv's chemical distribution business located at 1111 and 1140 Industry Avenue, SE, Roanoke, Virginia.

25. For the reasons set forth above, and explained in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), the Second Affidavit of Jamison G. Austin and the Affidavit of Scott Perkins, P.E. attached hereto, there is no basis in fact to conclude that Chem-Solv accumulated 6,000 kilograms (13,200 lbs.) at one time of hazardous waste or more at its chemical distribution business located at 1111 and 1140 Industry Avenue, SE, Roanoke, Virginia

from March 23, 2007 through and including February 20, 2008. Rather, Chem-Solv did accumulate materials which were determined to be hazardous waste and properly disposed of them in accordance with applicable laws and regulations. (See Austin Aff., Respondents' Ex. 2, CS 002-006; Expert Report of Scott Perkins, P.E., Respondents' Ex. 30, CS 307-314.)

III. Argument and Authorities.

A. Accelerated Decision Standard.

Section 22.20(a) of the Consolidated Rules of Practice provides in pertinent part:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). Motions for accelerated decision under 40 C.F.R. § 22.20(a) are akin to motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. See Rogers Corp. v. EPA, 275 F.3d 1096,1103 (D.C. Cir. 2002); In re: BWX Technologies, Inc., 2000 EPA App. LEXIS 9, *34 (E.A.B. April 5, 2000). Thus, the standard for summary judgment under Federal Rule of Civil Procedure 56 and federal court decisions interpreting such standard provide guidance for adjudicating motions for accelerated. See Puerto Rico Aqueduct and Sewer Authority v. EPA, 35 F.3d 600, 607 (1st Cir. 1994).

The party moving for accelerated decision carries the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. In re: Elementis Chromium, Inc., 2011 EPA ALJ LEXIS 18, *26 (August 8, 2011) (*citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986)). "A factual dispute is material where it "might affect the outcome of the suit under the governing law" and is genuine "if the evidence is such that a

reasonable [fact finder] could return a verdict for the nonmoving party." Id. at 26-27 (quoting Anderson, at 248).

It is well settled that, in considering a motion for accelerated decision, "the tribunal must construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party." Id. at 27 (August 8, 2011) (*citing* Anderson, at 255). "At the [motion for accelerated decision] stage, the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Id. (*quoting* Anderson, at 249). Ultimately, "even where [a motion for accelerated decision seems technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order for the case to be more fully developed at hearing." Id. at 27-28 (*citing* Roberts v. Browning, 610 F.2d 528, 536 (8th Cir. 1979); Anderson, at 255.

B. Prima Facie Case.

The Complainant contends that there is a prima facie case in its favor based on certain undisputed facts.

Respondents agree that in order for the Complainant's Motion to prevail, it necessarily must establish: (1) that the rinsewater in question and/or the settled solids in question are solid wastes; (2) that the rinsewater and/or the settled solids are hazardous wastes; (3) that Chem-Solv generated hazardous wastes; and (4) that Rinsewater Tank No. 1 is a regulated hazardous waste storage tank. Respondents further agree that in order to prevail on its Motion as to Count VI, the Complainant also must establish that Chem-Solv is the owner and/or operator of Rinsewater Tank No. 1 and that Rinsewater Tank No. 1 contained a hazardous waste with a VOC concentration of greater than 500 parts per million by weight.

For the reasons set forth in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), the Second Affidavit of Jamison G. Austin filed herewith, the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314) and the Affidavit of Scott E. Perkins, P.E. filed herewith as Exhibit B, when the evidence submitted in this matter is viewed in the light most favorable to Respondents, such evidence creates genuine issues of material fact regarding certain essential elements of the alleged violations, the Complainant's Motion must fail.

1. The Rinsewater and the Settled Solids Were not Solid Wastes.

In support of its contention that the Rinsewater and the Settled Solids are solid wastes, the Complainant relies in part on hearsay within hearsay set forth in a VADEQ report, which attributes a statement to a Mr. Lester. The report of the VADEQ describes the transport of Rinsewater and an adjustment of the pH of the Rinsewater. (Complainant Ex. 19, EPA 375). The quote from the VADEQ's report relied upon by the Complainant describes the VADEQ's understanding that the pH of the Rinsewater "is adjusted in tanker by adding acid or caustic as needed as the [Rinsewater] is transferred from the AST to the tanker." (Complainant Ex. 19, EPA 375). Respondents assume that "tanker" means a motor vehicle. Therefore, this statement by the VADEQ is inaccurate. To the extent that any pH adjustment was performed on the Rinsewater, it was done in stationary vessels, such as storage tanks, more particularly the rinsewater tank in question, owned and operated by Chem-Solv. (Aff. of Jamison G. Austin ¶¶ 21-22.) This could be a simple typographical error whereby the term "tanker" was used instead of "tank."

The Complainant further relies on Response No. 7(c) set forth in Chem-Solv's Information Request Response Letter dated December 10, 2007 (Complainant Ex. 21, EPA 658)

in support of its contention that the rinsewater is a solid waste. Response No. 7(c) provides as follows:

> c. How often is the pit cleaned out?
>
> Wash water is pumped from the pit into storage tank adjacent to acid pad when full and tested for pH prior to shipment to processing facility.

(Complainant Ex. 21, EPA 658.) The statement contained in Chem-Solv's Response No. 7(c) is accurate and in context. The Complainant over reads and misconstrues the meaning of such statement. A plain reading of Response No. 7 (c) does not lead to the conclusion that all water from the tank is waste but rather establishes that some rinsewater was pumped from Rinsewater Tank No. 1 into a storage tank and from this storage tank some was shipped. It does not communicate that all water was a waste and we know some water was used as a constituent of a product Chem-Solv sold or reused as rinsewater. If Chem-Solv made an election or determination to dispose of the rinsewater, it then became a waste, and not before such point in time. A full description of this process is contained in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006) and explained in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314) and the Affidavit of Scott Perkins, P.E. attached hereto as Exhibit B.

The Complainant further misconstrues the terms "waste water," "Pit water," and "acid pad wash water" to conclude that all rinsewater in Rinsewater Tank No. 1 was a waste. As stated in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), certain rinsewater passing through Rinsewater Tank No. 1 eventually did become waste and, thus, such rinsewater was properly referred to as "waste water" after Chem-Solv made the election to dispose of such rinsewater. Not all such rinsewater, however, became waste. Therefore, not all rinsewater

associated with Rinsewater Tank No. 1 is properly construed or described as "waste water." (Respondents' Exhibit 2, CS 002-006.)

In further support of its contention that the Rinsewater was a solid waste, the Complainant relies on Respondents' Response No. 8(d) set forth in Chem-Solv's Information Request Response Letter dated December 10, 2007. (Complainant Ex. 21, EPA 658.) Specifically, the Complainant misconstrues the statement made by Chem-Solv in Response No. 8(d) as an admission that the rinsewater was a waste with a waste code of "D002." When read in context and accurately interpreted, Response No. 8(d) communicates that prior to the point in time that Chem-Solv began maintaining pH logs in 2005, rinsewater that Chem-Solv elected to dispose was shipped to Nobel Oil and to support the proposition that such rinsewater was not hazardous, it was noted that Nobel Oil could not and did not accept hazardous waste with a waste code of "D002." (Complainant Exhibit 21, EPA 658.) Commonly waste recipients independently verify waste stream quality. Furthermore, it is clear from the chart in response No. 8(d) that the rinsewater of the type referenced in the Response did not exhibit a pH in the hazardous waste range.

The Complainant curiously relies on the reported existence of a "floor trench" from a blending room to Rinsewater Tank No. 1 as evidence that the rinsewater was a waste. To the extent that such a "floor trench" existed at the time of the Inspection, it was a vestige of its former use and had no application to Chem-Solv's operations at that time or during the alleged period of violation. (Austin Second Aff. ¶¶ 9-11; Perkins Aff. ¶ 6.)

When viewed in the light most favorable to the Respondents, for the foregoing reasons, the evidence submitted thus far creates genuine issues of material fact regarding whether the

rinsewater and settled solids were wastes. For this reason alone, the Complainant is not entitled to judgment as a matter of law and the Complainant's Motion should be denied.

2. The Rinsewater and Settled Solids are Not Hazardous Wastes.

The Complainant's contention that the rinsewater and the settled solids are hazardous waste is based on the flawed assumption that the Complainant's analytical results are reliable. For the reasons set forth in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), the Affidavit of Scott E. Perkins, P.E. attached hereto as Exhibit B and the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), such analytical results are not reliable. The data upon which the Complainant's conclusion that the Rinsewater and the Settled Solids are hazardous wastes is based on and is the product of samples that were flawed in the following respects: (1) they were not representative of the ultimate waste stream that was shipped off site for disposal; (2) they were collected using a sampling methodology that is wholly inconsistent with established EPA procedures; and (3) the EPA failed to incorporate sufficient quality control steps to ensure reliability. (Respondents' Ex. 30, CS 307-314, Perkins Aff. ¶¶ 13-14, and Respondents' Ex. 2, CS 002-006.) Due to these fatal flaws in the sampling and analytical methodology used by EPA, at a minimum, there is a genuine dispute of material fact regarding whether the rinsewater and the settled solids were hazardous. The rinsewater and the settled solids cannot be considered hazardous wastes unless they are proven by the Complainant to be hazardous. For the reasons set forth in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006), and the Affidavit of Scott Perkins attached hereto, when the evidence submitted thus far in this matter is viewed in the light most favorable to the Respondents, such evidence creates genuine issues of material fact concerning the Complainant's allegation that the Rinsewater and the

Settled Solids were hazardous. Accordingly, the Complainant is not entitled to judgment as a matter of law and the Complainant's Motion should be dismissed.

The rinsewater and settled solids likewise cannot be considered hazardous wastes unless the Complainant first establishes that they are wastes. Thus, in addition to the EPA's flawed sampling collection and analytical procedures and protocols, as set forth above, the evidence in this case creates genuine issues of material fact concerning whether the rinsewater and the settled solids constitute hazardous wastes exists because when viewed in the light most favorable to the Respondents, the evidence cited by the Complainant does not establish that such materials were wastes, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314.)

In its Memorandum, the Complainant suggests that the rinsewater and the settled solids were solid wastes at all relevant times. This contention is incorrect. As explained in the Affidavit of Jamison G. Austin (Respondents' Ex. 2, CS 002-006) and the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), the rinsewater and settled solids could not be considered a solid waste, much less a hazardous waste, until they were removed from Rinsewater Tank No. 1. The rinsewater was not a waste until Chem-Solv made the election to dispose of it because prior to that point in time it was not destined for disposal, but rather stored for possible reuse in rinsing the exterior of drums or as a constituent in a marketable product that Chem-Solv sold. Moreover, under the manufacturing process unit ("MPU") exemption set forth in 40 C.F.R. § 261.4, which is explained in the Expert Report of Scott Perkins, P.E. (Respondents' Ex. 30, CS 307-314), the Settled Solids were not a waste. For these reasons, the Complainant's assertion that "[t]here is no question ... that the Pit contained hazardous waste" is without basis in fact or any merit. In fact, the opposite is true. For the reasons set forth above, there are serious and

legitimate questions concerning the validity of the Complainant's contention that Rinsewater Tank No. 1 contained hazardous waste. Moreover, when viewed in the light most favorable to Respondents, the evidence submitted by the parties creates significant genuine issues of material fact regarding whether the rinsewater and the settled solids were hazardous wastes. For this reason too, the Complainant is not entitled to judgment as a matter of law and an accelerated decision as to Chem-Solv's liability under Counts III-VII would be inappropriate.

3. Chem-Solv is Not a Generator of Hazardous Wastes.

The Complainant's assertion that Chem-Solv is a hazardous waste generator that is obligated to comply with the RCRA regulatory scheme, is based on the following inaccurate assumptions: (1) Chem-Solv accumulated more than 1,000 kg of hazardous waste on site; and (2) Chem-Solv did not perform a waste determination on the Settled Solids. The Complainant's contention that Chem-Solv stored over 7,954 kg of hazardous waste on-site from at least May 15, 2007 through February 1, 2008 is presumably based on the mass of waste shipped off-site by Chem-Solv on February 20, 2008 under Manifest #004172818 JJK (Complainant Exhibit 23, EPA 1127). This contention is further based on the presumption that the settled solids in Rinsewater Tank No. 1 were hazardous.

As explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), the settled solids were not a waste subject to regulation under RCRA until the point at which they were removed from the tank, due to the application of the MPU exemption under 40 C.F.R. § 261.4. (Respondents' Exhibit 6, CS 132). Moreover, the Complainant's contention that Chem-Solv was a hazardous waste generator is further based on its assertion that Chem-Solv did not perform a hazardous waste determination on the Settled Solids in Rinsewater Tank No. 1. This assertion is not true. Chem-Solv made a hazardous waste determination on a representative

sample of settled solids that was collected in May 2006. (Respondents' Exhibit 30, CS 307-314). From May 2007 until the majority of the settled solids were removed from Rinsewater Tank No. 1 in early 2008, Chem-Solv was a conditionally exempt small quantity generator of hazardous waste, since it had made a waste determination on the Settled Solids removed in June 2006 and it did not store an excess of 1,000 kg of hazardous waste until early 2008. Therefore, contrary to the Complainant's contentions, the evidence in this matter, when viewed in the light most favorable to Respondents, creates genuine issues of material facts regarding the Complainant's allegation that Chem-Solv is a generator of hazardous waste subject to the RCRA regulatory scheme.

4. *Chem-Solv is Not Liable for the Violations Alleged in Counts III-VII of the Complaint.*

The Complainant fails to establish that Chem-Solv is liable for the violation of RCRA's regulatory requirements set forth in Counts III-VII of the Complaint because, as explained above, there are genuine issues of material fact concerning whether the rinsewater and the settled solids were hazardous and/or wastes. Accordingly, the Complainant's Motion must fail.

a. Chem-Solv Was Not Required to Have Secondary Containment for Rinsewater Tank No. 1 (Count III).

Because, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), Rinsewater Tank No. 1 was not a regulated hazardous waste storage tank a genuine issue of material fact exists as to Chem-Solv's alleged violation of the secondary containment requirements of 40 C.F.R. § 264.193(1)(a), (d) and (e). Therefore, the Complainant's Motion as to Count III is without merit and should be denied.

b. Chem-Solv Was Not Required to Obtain a Tank Assessment for Rinsewater Tank No. 1 (Count IV).

Because, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), Rinsewater Tank No. 1 was not a regulated hazardous waste storage tank a genuine issue of material fact exists as to Chem-Solv's alleged violation of the tank assessment requirements of 40 C.F.R. § 264.192(b) - (f). Therefore, the Complainant's Motion as to Count IV is without merit and should be denied.

c. Chem-Solv Did Not Fail to Conduct and/or Document Inspections of Rinsewater Tank No. 1 (Count V).

Because, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), Rinsewater Tank No. 1 was not a regulated hazardous waste storage tank a genuine issue of material fact exists as to Chem-Solv's alleged violation of the waste storage tank inspection requirement contained in 40 C.F.R. § 264.195. Therefore, the Complainant's Motion as to Count V is without merit and should be denied.

d. Chem-Solv Was Not Required to Comply with Subpart CC Standards for Rinsewater Tank No. 1 (Count VI).

Because, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), Rinsewater Tank No. 1 was not a regulated hazardous waste storage tank a genuine issue of material fact exists as to Chem-Solv's alleged violation of the regulatory requirement to control pollutant emissions from a hazardous waste storage tank contained in 40 C.F.R. § 264.1082 (b) and 264.1084(b). Therefore, the Complainant's Motion as to Count VI is without merit and should be denied.

e. Chem-Solv Was Not Required to Comply with Closure Requirements for Rinsewater Tank No. 1 (Count VII).

Because, as explained in the Expert Report of Scott Perkins, P.E. (Respondents' Exhibit 30, CS 307-314), Rinsewater Tank No. 1 was not a regulated hazardous waste storage tank a

genuine issue of material fact exists as to Chem-Solv's alleged violation of the hazardous waste storage tank closure requirements under 40 C.F.R. Part 264. Therefore, the Complainant's Motion as to Count VII is without merit and should be denied.

IV. Conclusion.

For the foregoing reasons, the Complainant's Motion for Partial Accelerated Decision as to Liability must fail because when viewed in the light most favorable to Respondents, the evidence submitted by the parties thus far creates genuine issues of material fact concerning the foundational elements of the violations alleged in Counts III-VII of the Complaint, and Chem-Solv's liability therefor. Thus, the Complainant is not entitled to an accelerated decision as to Chem-Solv's liability under Counts III-VII of the Complaint and the Complainant's Motion for Partial Accelerated Decision as to Liability should be denied.

Dated: 12-13-11

Chem-Solv, Inc. and Austin Holdings-VA, L.L.C.

By _____
Of Counsel

Charles L. Williams (VSB No. 1145)
Maxwell H. Wiegard (VSB No. 68787)
GENTRY LOCKE RAKES & MOORE
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Telephone: 540-983-9300
Facsimile: 540-983-9400

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	)	
	)	
	)	
CHEM-SOLV, INC., formerly trading as Chemicals and Solvents, Inc.	)	
	)	
	)	
and	)	
	)	
AUSTIN HOLDINGS-VA, L.L.C.	)	U.S. EPA Docket Number
	)	RCRA-03-2011-0068
	)	
	)	
	)	Proceeding Under Section 3008(a) of
Respondents.	)	the Resource Conservation and
	)	Recovery Act, as amended 42 U.S.C.
Chem-Solv, Inc.	)	Section 6928(a)
1111 Industrial Avenue, S.E.	)	
1140 Industrial Avenue, S.E.	)	
Roanoke, VA 24013,	)	
	)	
Facility.	)	

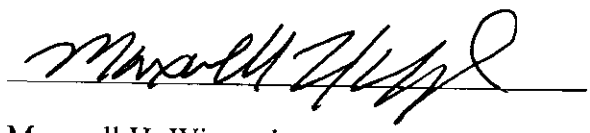
CERTIFICATE OF SERVICE

I certify that, I sent by FedEx, next day delivery, a copy of Respondents' Response to Complainant's Motion for Partial Accelerated Decision as to Liability to the addressees listed below. The original and one copy of the Respondents' Initial Prehearing Exchange to the Regional Hearing Clerk, U.S. EPA Region 3, 1650 Arch Street, Philadelphia, PA19103-2029.

Hon. Barbara A. Gunning, A.L.J.
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Suite 350 Franklin Court
Washington, D.C. 20005

Joyce A. Howell
Senior Assistant Regional Counsel
U.S. EPA – Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Date: 12-13-11



Maxwell H. Wiegard
Gentry Locke Rakes & Moore, LLP
P.O. Box 40013
Roanoke, VA 24022-0013

Counsel for Respondents

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	SECOND AFFIDAVIT OF JAMISON G. AUTHOR
CHEM-SOLV, INC., formerly trading as Chemicals and Solvents, Inc. and AUSTIN HOLDINGS-VA, L.L.C. Respondents. Chem-Solv, Inc. 1111 Industrial Avenue, S.E. 1140 Industrial Avenue, S.E. Roanoke, VA 24013, Facility.	U.S. EPA Docket Number RCRA-03-2011-0068 Proceeding Under Section 3008(a) of the Resource Conservation and Recovery Act, as amended 42 U.S.C. Section 6928(a)

SECOND AFFIDAVIT OF JAMISON G. AUSTIN

I, Jamison G. Austin, hereby make oath and state as follows:

1. I am a male over the age of 18 years and I reside at 135 Chesney Place, Blue Ridge, Virginia 24064.

2. This Affidavit is executed of my own free will with the understanding that it will be submitted to judicial and governmental authorities including the United States Environmental Protection Agency (the "EPA").

3. I have been employed by Chem-Solv, Inc. ("Chem-Solv") since 1984, and I now am Vice President and General Manager. As such, I have personal knowledge of the facts set forth herein.

4. In Paragraph 4 of his Declaration, Kenneth J. Cox states that 1111 Industry Avenue was not inspected on May 15, 2007 because I "terminated the inspection." This is not true. After completing their inspection of 1140 Industry Avenue during the afternoon of May 15, 2007, Mr. Cox and Virginia Department of Environmental Quality (the "DEQ") inspectors, Beth Lohman and Kimberly Thompson (the "DEQ Inspectors"), advised that they planned to continue their inspection across the street at 1111 Industry Avenue. I explained to Mr. Cox, Ms. Lohman, and Ms. Thompson that I could not continue the inspection at that time because of a prior engagement and no other Chem-Solv personnel were available to accompany them at the time. I then invited the inspectors to resume their inspection of 1111 Industry Avenue the next day, May 16, 2007. Although they were unavailable to continue the inspection the next day, the DEQ inspectors resumed their inspection on May 18, 2007. Apparently, Mr. Cox was "not able to return at a later date as requested because of other commitments." (Complainant Ex. 17, EPA 299). For the foregoing reasons, Mr. Cox's contention that I "terminated the inspection" is inaccurate and misleading.

5. I have no knowledge of the alleged October 21, 2008 visit to "the area of the Facility" described in Paragraph 6 of Mr. Cox's Declaration. If such were conducted, it was either from a remote site not on company property or without permission on the property.

6. The nature and description of Chem-Solv's business set forth in Paragraph 9 of Mr. Cox's Declaration is inaccurate. Chem-Solv is a chemical distributor. As such, Chem-Solv is in the business of purchasing and reselling industrial chemical products. (Respondent's Exhibit 2, CS 003-004). Therefore, the primary activities of the company are the purchase and resale of chemical products.

7. The description of the process by which rinsewater accumulated and was managed set forth in Paragraph 11 of Mr. Cox's Declaration is inaccurate. As I stated in my earlier Affidavit (Respondent's Ex. 2, CS 003-004), at the time of the May 17, 2007 inspection (the "Inspection"), water used to rinse off the outside of containers in the acid/base operation area (the "Acid Pad") collected in a sub-grade tank with a total capacity of approximately 1,872 gallons ("Rinsewater Tank No. 1"). Contrary, the contentions set forth in Paragraph 11 of Mr. Cox's Declaration, at the time of the Inspection, all tanks located in the Acid Pad area are gravity fed and Chem-Solv did not use pumps, meters, or other equipment to package drums in the Acid Pad area. Thus, Chem-Solv had no need to flush equipment in the Acid Pad area. Chem-Solv occasionally would rinse hoses in order to prevent small amounts of acid/base residue contained on the inside surfaces of hoses from drying and compromising the integrity of the hose material over time. Any such hoses rinsed by Chem-Solv, however, were void of any free liquid product. The outside of the containers were washed off due to the accumulation of dirt, mud, small rocks, and other organic material that collected on the containers as a result of being stored outside. Chem-Solv now stores its reusable containers inside, in order to keep them out of the elements and to protect the integrity of the containers and the products they contain. Thus, it is no longer necessary for Chem-Solv to rinse off the exterior surfaces of its drums.

8. Mr. Cox states in Paragraph 12 of his Declaration that "Chem-Solv is the owner of the portion of the Chemsolv Facility where the Pit was located." This is not correct. Chem-

Solv leases and has leased the property on which Rinsewater Tank No. 1 was located from its owner, Austin Holdings – Va, LLC.

9. In Paragraph 14 of his Declaration, Mr. Cox states that I told him that the "trench drain" he observed in the "Blend Room" was connected to Rinsewater Tank No. 1. This is not true. I never told Mr. Cox that the trench was connected to Rinsewater Tank No. 1 at the time of the May 15, 2007 inspection. Mr. Cox asked me about the purpose and function of the "trench drain." In my response, I explained in detail that many years prior to the Inspection, when Chem-Solv used to discharge rinsewater into the municipal sewer system, a plumbing connection was attached to Rinsewater Tank No. 1 in order to rinse out the tank when we would dilute caustic soda or other acid/base materials. (Complainant Exhibit 23, EPA 1084). After Chem-Solv closed the sewer connection and curtailed its discharge of water into the City's sewer system, the plumbing connection to the Blend Area was capped and sealed, our blending procedures changed and the "trench drain" identified by Mr. Cox was disconnected from Rinsewater Tank No. 1. In my December 10, 2007 response letter to Mr. Cox, I emphasized to Mr. Cox that the trench drain connection was no longer active as the "drainage from the Blend Room has been capped and the trench closed." (Complainant Exhibit 21, EPA 657). Concerning Mr. Cox's statement that the trench "contained wet black sludge" on the date of the Inspection, the trench drain had a damp mixture of water and dirt and dust. Dirt, dust, and small wood particles collected in the trench as a result of routine housekeeping measures. This material was wet because Chem-Solv uses clean deionized water from cylinders that are drained after each use. Although Chem-Solv tries to collect all the water from such cylinders, it often drips onto the concrete floor and into the trench.

10. The drawing (Complainant Ex. 23, EPA 1139) referenced in Paragraph 13 of Mr. Cox's Affidavit was part of the engineering drawings concerning the installation of Rinsewater Tank No. 1 in the mid 1980's. As I explained to Mr. Cox, at the time the Rinsewater Tank No. 1 was installed, the "trench drain" identified by Mr. Cox was connected to Rinsewater Tank No. 1. However, the trench was capped, closed, and sealed many years prior to the Inspection. Therefore, Mr. Cox's characterization of the partial line drawing referenced in Paragraph 15 of his Declaration, is inaccurate and misleading. Rinsewater Tank No. 1 was installed shortly after a catastrophic flood in November 1985 and well before the Summer of 1986.

11. Mr. Cox states in Paragraph 16 of his Declaration that "[b]y December, 2007, the grated tank drain trench had been cemented over by Chemsolv." These comments, however, suggest that Chem-Solv capped, closed, and sealed the "drainage trench" between the Inspection and December, 2007. This is not true. Chem-Solv discontinued its use of the trench when it stopped discharging rinsewater to the municipal sewer system many years prior to the Inspection. (Complainant's Ex. 23, EPA 1084.)

12. In Paragraph 17 of his Declaration, Mr. Cox states that based in part on his "review of the Information Request Letter Responses and documents submitted by Chemsolv," the Pit is a single walled tank constructed of carbon steel with a ceramic interior coating. This is an inaccurate and misleading summary of statements made by Chemsolv in such documents. In its Request for Information letter dated February 4, 2008, the EPA asked the following question:

"Is the pit lined either internally or externally with an impermeable liner?" (Complainant Exhibit 22, EPA 1069).

Chem-Solv's response was as follows: "The tank is ceramic lined carbon steel." (Complainant Exhibit 23, EPA 1083).

Chem-Solv has never admitted that Rinsewater Tank No. 1 was "single walled" or any other aspects of the physical nature of the system.

13. I am aware that some of the materials in Rinsewater Tank No. 1 were sampled by EPA May 23, 2007. However, I do not recall Mr. Cox being present during the May 23, 2007 sampling event.

14. In Paragraph 19 of Mr. Cox's Declaration, he states that the pit held 1,872 gallons. As set forth in Chem-Solv's February 6, 2008 response to EPA's request for information, 1,872 gallons was the maximum calculated capacity of Rinsewater Holding Tank No. 1 (Complainant Ex. 23, EPA 1083.) On the date of the May 15, 2007 inspection and the May 23, 2007 sampling event, the pit did not contain and at no time has it ever contained 1,872 gallons of material.

15. Mr. Cox's statement, in Paragraph 23 of the Declaration, that settled solids that were sampled on May 23, 2007 were finally disposed of by Chem-Solv as hazardous waste on February 20, 2008 is misleading. (Complainant Ex. 23, EPA 1127-1137.) In fact, the Rinsewater Tank No. 1 was used by Chem-Solv until and through the end of 2007 and briefly into 2008. Thus, it is reasonable to conclude that additional solids with different characteristics were introduced into the tank between the sampling event on May 23, 2007 and the end of 2007, when Rinsewater Tank No. 1 was taken out of service. A vast majority of "Pit" related solids disposed of in 2008 was removed from the tank in 2008.

16. Concerning the conclusion that the materials in Rinsewater Tank No. 1 contained more than 71 gallons of Perchloroethene, set forth by Mr. Cox in Paragraph 29 of his Declaration, I have reviewed Chem-Solv's inventory records for 2007 and determined that Chem-Solv never had a total aggregate of 71 gallons of Perchloroethene on site at its Roanoke facility in 2007. Chem-Solv did not process, package, blend, or otherwise handle Perchloroethylene at the time of, before, or after the Inspection. Moreover, sales of Perchloroethene by Chem-Solv were limited to the resale of the same package purchased by Chem-Solv. Perchloroethylene is a chlorinated solvent, which is not handled in the Acid Pad area at Chem-Solv's Roanoke facility.

17. In response to Mr. Cox's statement in Paragraph 30 of his Declaration, Trichloroethene is packaged in 55 gallon steel drums that are not reused. The outside of these containers were not and are not washed off and any activity regarding Trichloroethene was conducted in a diked area separate from the Acid Pad. We do not have a tank for Trichloroethene and did not process such material through any hoses or pumps.

18. Mr. Cox's statement in Paragraph 32 of his Declaration that Chem-Solv has never produced any written records documenting the inspections of Rinsewater Tank No. 1. To the contrary, Chem-Solv has supplied copies of documentation of visual inspections of Rinsewater Holding Tank No. 1 on more than one occasion. Specifically, during the March 27, 2008 site visit, Mr. Cox was provided with evidence of the daily inspections done on all tanks and plumbing in the Acid Pad area.

19. Mr. Cox's statement in Paragraph 33 of his Declaration that Chem-Solv never showed EPA copies of written materials regarding the design and installation of Rinsewater Tank No. 1 is inaccurate. To the contrary, Chem-Solv provided the EPA available information concerning the original design of the tanks in the mid 1980's. After some investigation, we learned that shortly after the November 4, 1985 flood, when plant repairs to and reconstruction of Chem-Solv's Roanoke, Virginia facility took place. Rinsewater Tank No. 1 was then installed and was operated for several years prior to Chem-Solv's original general estimate of approximately 1989 - 1990. It is further believed that certain construction activities took place after initial installation to complete the tank area as seen by the EPA.

20. The statement set forth in Paragraph 33 of Mr. Cox's Declaration, which suggests that Chem-Solv never showed the EPA copies of written statements regarding to the design and installation of Rinsewater Tank No. 1 is inaccurate. To the contrary, Chem-Solv provided EPA a copy of available information and drawings concerning the original design of the tanks from the mid 1980's.

21. The EPA relies on hearsay statements made by Mr. Lester to DEQ inspectors to conclude that certain pH adjustments were done in a "tanker". This implies a tanker truck. Any such adjustment was done in the tank called the "Pit". No carrier would permit or tolerate such activity on or in its rolling stock. Moreover, it was not possible for Chem-Solv to engage in such activity because we did not possess the equipment necessary to proportionally meter material onto a tanker in order to adjust pH.

22. In Paragraph 36 of Mr. Cox's Declaration, question is shed on the sampling done in 2006 and the origin of materials sampled and dated. At the time, materials from the Pit were removed, sampled, and analyzed and shown to be non-hazardous. The disposal event was coordinated with the disposal of materials not "Pit" related.

23. In Paragraphs 42-44, it is asserted that Chem-Solv never provided certain information. Chem-Solv at every instance provided all and the most accurate information requested. Since at the times of inspections and submission of requests for information, Chem-Solv had no idea of the nature of any violations that would be asserted, it was impossible to anticipate the positions of the EPA and preemptively provide information. Any and all information relevant to the alleged violations will be presented in the proceeding.

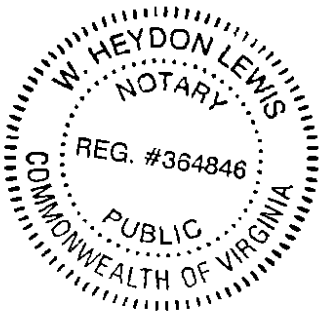
Jamison G. Austin

COMMONWEALTH OF VIRGINIA
CITY/~~COUNTY~~ OF Roanoke

I, W. Heydon Lewis, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Jamison G. Austin, whose name is signed to the foregoing affidavit, has acknowledged the same before me this 13th day of December, 2011.

Notary Public

Print Name: W. Heydon Lewis
Notary Registration No.: 364846
My Commission Expires: 3/31/13



BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	AFFIDAVIT OF SCOTT E. PERKINS, P.E.
CHEM-SOLV, INC., formerly trading as Chemicals and Solvents, Inc. and AUSTIN HOLDINGS-VA, L.L.C. Respondents. Chem-Solv, Inc. 1111 Industrial Avenue, S.E. 1140 Industrial Avenue, S.E. Roanoke, VA 24013, Facility.	U.S. EPA Docket Number RCRA-03-2011-0068 Proceeding Under Section 3008(a) of the Resource Conservation and Recovery Act, as amended 42 U.S.C. Section 6928(a)

AFFIDAVIT OF SCOTT E. PERKINS, P.E.

I, Scott E. Perkins, hereby make oath and state as follows:

1. I am a male over the age of 18 years and I reside at 2718 Carolina Avenue, Roanoke, Virginia 24014.

2. This Affidavit is executed of my own free will with the understanding that it will be submitted to judicial and governmental authorities including the United States Environmental Protection Agency (the "EPA").

3. I am a licensed Professional Engineer in the State of Virginia employed by Faulkner & Flynn, Inc. ("F2"), a consulting firm in Roanoke, Virginia. In 2008, F2 was retained by Chem-Solv, Inc. ("Chem-Solv") to assist in addressing allegations made by the EPA and the Virginia Department of Environmental Quality (the "DEQ") related to environmental compliance issues under the Resource Conservation and Recovery ACT ("RCRA"), the Clean

Air Act and the Emergency Planning and Community Right-to-Know Act ("EPCRA"). (See Respondent Exhibit 31, CS 315-317 for my CV.)

4. I have investigated the EPA's allegations and performed a detailed analysis of Chem-Solv's operations, including several thorough site visits and employee interviews. I also have reviewed the EPA's allegations and related documentation exchanged by Chem-Solv and regulatory authorities over the course of this matter including documents filed in administrative proceedings. As such, I have actual knowledge of the facts set forth herein.

5. The description of Chem-Solv's operations associated with the subgrade tank identified by Mr. Cox in Paragraph 11 of his Declaration as the "Pit" ("Rinsewater Tank No. 1") is inconsistent with Chem-Solv's actual operations during the time period in question and at the time of the May 17, 2007 inspection by EPA and DEQ (the "Inspection"). (Respondent Exhibit 2, CS 003-004.)

6. Contrary to the contentions made by Mr. Cox in Paragraphs 14 and 15 of his Declaration, the "trench drain" identified by Mr. Cox was not connected to Rinsewater Tank No. 1 at the time of the Inspection. The design drawing referenced by Mr. Cox in paragraph 15 of his Declaration (Complainant Exhibit 23, EPA 1139) reflects the physical condition in place from the date of installation of Rinsewater Tank No. 1 until it stopped discharging from Rinsewater Tank No. 1 to the Western Virginia Water Authority (the "WVWA") sewer system many years prior to the Inspection. When Chem-Solv stopped discharging from Rinsewater Tank No. 1 to the WVWA sewer system, it disconnected "trench drain" identified by Mr. Cox from Rinsewater Tank No. 1. (Complainant Exhibit 23, EPA 1084). Thus, such "trench drain" was not connected to Rinsewater Tank No. 1 at the time of the Inspection.

7. I am aware that, in Paragraphs 27 and 28 of his Declaration, Mr. Cox states that: (1) "Chem-Solv did not have a permit of (sic) interim status to store hazardous waste as required by [9] VAC 20-60-270.A, 40 C.F.R. Part 270 ..."; and (2) "[b]ecause Chemsolv accumulated over 6000 kilograms of hazardous waste on site between May 23, 2007 and February 1, 2008, Chemsolv was not a Conditionally Exempt Small Quantity Generator ... nor did Chemsolv qualify as a small quantity generator ...., and was obligated to comply with the entire RCRA regulatory scheme, as applicable to Chemsolv's operation." These conclusions by Mr. Cox are based on the presumption that the settled solids in Rinsewater Tank No. 1 were hazardous waste at the time of the Inspection. Chem-Solv disputes this presumption for the reasons stated in Respondent Exhibit 30 (CS 307-314). For such reasons, Chem-Solv was not required to comply with interim status rules or to comply with the entire RCRA regulatory scheme. Furthermore, Mr. Cox assumes that all materials shipped off site by Chem-Solv in 2008 was stored from May 23, 2007. In actuality, most of the material shipped by Chem-Solv in 2008 was generated in 2008.

8. The opinions offered by Mr. Cox in Paragraphs 29 and 30 of his Declaration concerning the volume of Tetrachloroethene ("PCE") and Trichloroethene ("TCE") contained in Rinsewater Tank No.1 are based on several erroneous assumptions and a flawed calculation methodology. One such erroneous assumption is that the samples collected by EPA were representative of the entire matrix sampled. For the reasons stated in Respondent Exhibit 30 (CS

307-314), they were not. Moreover, instead of Mr. Cox's stated volumetric calculation ("# drums" X "volume per drum" X "percentage of contaminant"), a mass-based calculation that incorporates the dry weight concentration of the contaminant, the moisture content of the matrix, the density of the contaminant and the mass of the matrix should have been used. Consequently, Mr. Cox's analysis concerning the volume of PCE and TCE in Rinsewater Holding Tank No. 1 is over-simplified and fatally flawed.

9. Mr. Cox states in Paragraph 31 of his Declaration that the "sample that Chemsolv took prior to disposal found 9 VOC's totaling 4,531 PPM of which 2,100 PPM was Tetrachloroethene, or over four times the regulatory threshold of 500 PPM for the application of the requirements set forth in 40 C.F.R. 264 Subpart CC." Chem-Solv's sample collection and analysis referenced in Paragraph 31 of Mr. Cox's Declaration was not intended to provide results for use in making Subpart CC comparisons. The sample collection methodology and analytical methodology used by Chem-Solv are not appropriate for this determination pursuant to the requirements of 40 C.F.R. 265.1084, as applied by 9 VAC 20-60-265. Making a Subpart CC applicability determination pursuant to these regulations requires a completely different approach to sampling and analysis.

10. In Paragraph 37 of his Declaration, Mr. Cox concludes that, because "material from the Pit had a VO concentration that exceeded 500 PPM," Rinsewater Tank No. 1 is a "hazardous waste storage tank" that is "subject to the requirements of 9 VAC 20-60-264.A, 40 C.F.R. Part 264, Subpart J ...". These conclusions are based on two flawed assumptions: (1) the samples collected by the EPA were valid; and (2) the material sampled by EPA was a waste at the time of the Inspection. With regards to whether the samples are valid, 40 C.F.R. 265.1084, and VAC 20-60-265 have explicit requirements related to sample collection and analysis for Subpart CC purposes. These explicit requirements were not followed. Moreover, as explained in Respondent Exhibit 30, the materials sampled by the EPA on May 23, 2007, were not wastes at that time.

11. I understand that Mr. Cox concludes in Paragraph 38 of his Declaration that Rinsewater Holding Tank No. 1 "was not exempt for (sic) RCRA Subpart CC requirements because it had an open top with no air emission controls." This conclusion by Mr. Cox ignores the other potential exemptions found in 40 C.F.R. 265.1083(c), which includes an exemption for tanks with wastes that meet the LDRs. There is no evidence suggesting that Mr. Cox performed such an evaluation or analysis.

12. I further understand that, in Paragraph 41 of his Declaration, Mr. Cox concludes that "Since the Pit contained hazardous waste and did not have secondary containment, Chemsolv was obligated to have a closure plan of the Pit." Again, this conclusion is based upon the flawed presumption that Holding Tank No. 1 contained hazardous waste. For the reasons stated in Respondent Exhibit 30 (CS 307-314), it did not contain hazardous waste. Therefore, the Chem-Solv was not required to have a closure plan for Rinsewater Tank No. 1.

13. In Ms. Zawodny's Declaration, Paragraphs 3-7, it is not clear to which analysis Ms. Zawodny is referencing in #3. For the samples collected on May 23, 2007, there were two sets of analyses performed. There are significant inconsistencies between the laboratory reports

and the Chain of Custody provided (Complainant's Exhibits 15 and 16) that shed doubt on the validity of the analytical results.

In Paragraph 10 of Ms. Zawodny's Declaration, it is not clear what a "water solids sample" is in reference to.

There is no Chain of Custody or other corroborating documentation validating the allegation in Ms. Zawodny's Declaration, Paragraph 14, that the Exhibits 15 and 16 are "true and correct".

Scott E. Perkins, P.E.

COMMONWEALTH OF VIRGINIA
CITY/~~COUNTY~~ OF Lynchburg

I, W. Heydon Lewis, a Notary Public in and for the jurisdiction aforesaid, do hereby certify that Scott E. Perkins, P.E., whose name is signed to the foregoing affidavit, has acknowledged the same before me this 13th day of December, 2011.

Notary Public

Print Name: W. Heydon Lewis
Notary Registration No.: 364846
My Commission Expires: 3/31/2013

W. HEYDON LEWIS NOTARY PUBLIC REG. #364846 COMMONWEALTH OF VIRGINIA