UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

A.J. D'Angelo (3RC30)
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Hon. Barbara A. Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street, N.W.
Franklin Court, Suite 350
Washington, D.C. 20005

February 7, 2012

Re: In the Matter of: Chemsolv, Inc. and Austin Holdings-VA, L.L.C.
U.S. EPA Docket No. RCRA-03-2011-0068
Notice of Supplemental Appearance of Counsel

Dear Judge Gunning:

Please find enclosed: (1) a copy of my *Notice of Supplemental Appearance of Counsel* on behalf of the Complainant in the above-captioned matter; and (2) a copy of *Complainant's Response in Opposition to Respondent's Motion to Take Depositions Upon Oral Questions*. The original and one copy of each document was filed today the U.S. EPA Regional Hearing Clerk and additional copies have been served today upon Respondents' counsel in the manner set forth in the attached Certificate of Service.

Sincerely,

A.J. D'Angelo
Sr. Assistant Regional Counsel

Enclosures

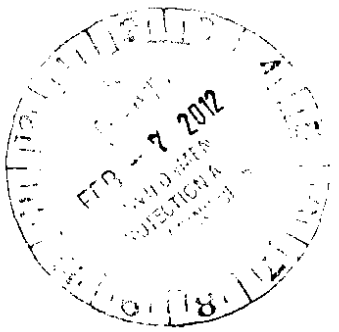
cc: Ms. Lydia Guy (3RC00)
(via Hand Delivery)

Charles L. Williams, Esq.
(via UPS Next Day Air – Courtesy Copy via e-mail)

Mr. Steven Sarno, Esq.
(Courtesy Copy via e-mail)

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	
CHEMSOLV, INC., formerly trading as Chemicals and Solvents, Inc.	
and	
AUSTIN HOLDINGS-VA, L.L.C.	
Respondents,	EPA Docket No. RCRA-03-2011-0068
Chemsolv, Inc. 1111 Industrial Avenue, S.E 1140 Industrial Avenue, S.E Roanoke, Virginia 24013	
	Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6928(a)
Facility.	



NOTICE OF SUPPLEMENTAL APPEARANCE OF COUNSEL

Complainant, the Division Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III, ("EPA"), by and through this Notice of Supplemental Appearance of Counsel, hereby gives notice of Complainant's supplementation of legal counsel in the above-captioned matter. Please be advised that A.J. D'Angelo, Sr. Assistant Regional Counsel, Office of Regional Counsel (3RC30), U.S. Environmental Protection Agency, Region III, hereby enters his supplemental appearance as an attorney of record for the Complainant in this proceeding.

Please be further advised that all Motions, Orders and other correspondence in this proceeding henceforth should be mailed or otherwise directed to the attention of Mr. D'Angelo at the contact information provided below.

Respectfully submitted:

2/7/2012
Dated

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THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of	:	
	:	
CHEMSOLV, INC., formerly trading as Chemicals and Solvents, Inc.	:	
	:	
and	:	
	:	
AUSTIN HOLDINGS-VA, L.L.C.	:	
	:	
Respondents.	:	
	:	EPA Docket No. RCRA-03-2011-0068
Chemsolv, Inc.	:	
1111 Industrial Avenue, S.E.	:	
1140 Industrial Avenue, S.E.	:	
Roanoke, Virginia 24013	:	
	:	Proceeding under Section 3008(a)
	:	of the Resource Conservation and
	:	Recovery Act, as amended, 42 U.S.C.
	:	Section 6928(a)
Facility	:	
	:	

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Notice of Supplemental Appearance of Counsel. I further certify that on the date set forth below, I caused true and correct copies of the same to be mailed via UPS, Next Day Air, to the following persons at the following addresses:

Hon. Barbara A. Gunning
U.S. Environmental Protection Agency
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Franklin Court, Suite 350
Washington, D.C. 20005

Charles L. Williams, Esq.
Gentry, Locke, Rakes & Moore
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10 Franklin Road
Roanoke, VA 24011

Dated: 2/7/2012

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U.S. EPA, Region III
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Philadelphia, PA 19103-2029

BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	
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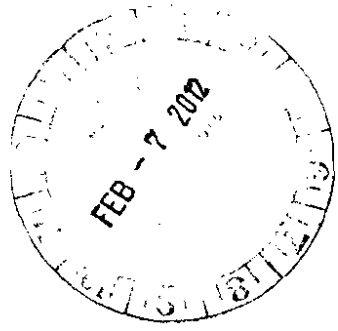

COMPLAINTANT'S RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION TO TAKE DEPOSITIONS UPON ORAL QUESTIONS

I. INTRODUCTION

In Accordance with 40 C.F.R. § 22.16(a) and (b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated Rules", or "CROP"), Complainant offers this Response to Respondent's Motion To Take Depositions Upon Oral Questions (hereinafter, "Motion"). For each of the reasons identified and discussed below, Complainant respectfully requests that the Presiding Officer enter an order DENYING Respondent's Motion.

II. RELEVANT PROCEDURAL BACKGROUND

A. Complaint and Answer

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing ("Complaint") on March 31, 2011. The Complaint alleges that the Respondents Chemsolv, Inc, and Austin Holdings – VA., L.L.C. violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous waste management program by: (1) owning and operating a hazardous waste storage facility without permit or interim status; (2) failing to perform a hazardous waste determination on solid waste generated, treated, stored and/or disposed at the Facility; (3) failing to have secondary containment for a hazardous waste storage tank; (4) failing to obtain a tank assessment for a hazardous waste storage tank; (5): failing to conduct and/or document inspection of a hazardous waste storage tank in the facility operating records; (6) failing to comply with Subpart CC (air emission) standards for Tanks; and (7) failing to comply with the closure requirements for a hazardous waste tank. Respondents subsequently filed a timely Answer to the Complaint and denied the substantive allegations therein.

B. Initial Prehearing Information Exchanges of the Parties

In accordance with the scheduled set forth in the Presiding Officer's May 31, 2011 Prehearing Order, the Parties each filed a timely Initial Pre-Hearing Exchange. Complainant filed its Initial Pre-Hearing Exchange on July 21, 2011 (hereinafter, "Complainant's PHE"). Complainant's PHE included 57 Prehearing Exhibits and identified Kenneth J. Cox, George H. Houghton, Kimberly Thomson, Elizabeth A. Lohman, Peggy Zawodny and Jose Reyna, III as potential Hearing witnesses, with accompanying narrative summaries of their anticipated Hearing testimony. Respondents filed their joint Initial Pre-Hearing Exchange on September 9, 2011 (hereinafter, "Respondents' PHE"). Respondent' PHE included 35 Prehearing Exhibits and

identified 13 potential witnesses, including Jamieson G. Austin, with accompanying narrative summaries of their anticipated Hearing testimony. Complainant filed a timely Rebuttal Prehearing Exchange (hereinafter, "Rebuttal PHE") on September 23, 201. Complainant's Rebuttal PHE identified Joe H. Lowry, PhD as an expert witness with respect to "the sampling and analysis conducted by EPA at Respondents' facility" and included an accompanying narrative summary of his anticipated expert testimony "on the chemical aspects of the evidence presented by the parties" and "concerning the representativeness of the samples taken . . ., the interpretation of the sampling results and the sampling methods employed by EPA in obtaining the samples. . . [and] the regulatory nature of the subgrade tank known as the Pit."[1] Complainant's Rebuttal PHE included seven additional Prehearing Exhibits, including Dr. Lowry's *curriculum vitae*.

C. Complainant's Motion for Partial Accelerated Decision as to Liability

On November 29, 2011, Complainant filed a Motion for Partial Accelerated Decision (as to the allegations set forth in Counts III – VII of the Complaint), along with a Memorandum of Law and Declarations in support thereof (hereinafter, "Motion for Accelerated Decision"). Complainant's Motion for Accelerated Decision included the supporting Declarations of Peggy Zawodny and Kenneth Cox. Respondents filed a timely Response on December 13, 2011 (hereinafter, "Accelerated Decision Response"). Respondents' Accelerated Decision Response included the supporting Second Affidavit of Jamieson G. Austin and the Affidavit of Scott E. Perkins, P.E. Complainant filed a timely Reply on December 22, 2011 (hereinafter, "Accelerated Decision Reply"). Complainant's Accelerated Decision Reply included the supporting second Declaration of Kenneth Cox and declarations of Dr. Joe Lowery, Elizabeth Lohman, Jose Reyna, III and George Houghton.

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[1] Complainant's Rebuttal PHE at 2.

D. Scheduled Hearing Date and Other Pending Motions

As set forth in the Presiding Officer's December 6, 2011 Order Rescheduling Hearing and Prehearing Deadlines, the Hearing in this matter is scheduled to begin on March 20, 2012. The deadline for the filing of non-dispositive prehearing motions, February 3, 2012, has passed and the deadline for the filing of a joint set of stipulated facts, exhibits and testimony is February 17, 2012. The parties have been advised that optional prehearing briefs may be filed by March 9, 2012.

On January 26, 2012, Complainant filed: (i) Complainant's Motion to Correct and Supplement Complainant's Prehearing Exchange, wherein Complainant seeks the Presiding Officer's leave to correct the partial omission and the order (and placement) of portions of several Prehearing Exhibits (*i.e.,* Complainant's Exhibits 17, 18 and 21) and permission to supplement its prior Prehearing Exchanges through the addition of two additional exhibits; and (ii) Complainant's Motion to Compel or in the Alternative, Motion in Limine, wherein Complainant moves: (a) for an Order compelling Respondents, on or before March 1, 2012, to provide written notice, on the record, as to whether it intends to take the position that it is unable to pay the penalty proposed by Complainant in this matter or that payment of such penalty will have an adverse impact on its business(and if so), requiring that each Respondent further produce such evidence to Complaint by such date; or (b) alternatively, for an order precluding the respondents from raising any such inability to pay or adverse business claims in this proceeding. Respondent has not yet filed its response to either of these motions, which response is due on or before February 10, 2012.

On January 30, 2012, Complainant, after prior consultation with Respondents' counsel, filed Complainant's Motion for an Extension of Time in this proceeding. Complainant's counsel, for personal reasons set forth therein, sought a six month delay in the commencement of the hearing in this matter, which currently is scheduled to begin on March 20, 2012. Respondents provided their consent to this Motion and the relief therein requested. The Parties additionally agreed to file

timely responses, in accordance with 40 C.F.R. § 22.16(b), to all outstanding motions in this matter (*i.e.*, Complainant's Motion to Correct and Supplement Complainant's Prehearing Exchange, Complainant's Motion to Compel or in the Alternative, Motion in Limine and Respondents' Motion to Take Depositions Upon Oral Questions). The Parties also requested that the Presiding Officer reschedule the February 3, 2012 deadline for the filing of non-dispositive motions and the current February 17, 2012 deadline for the filing of a Joint Set of Stipulated Facts, Exhibits, and Testimony. Complainant's Motion for an Extension of Time in this proceeding was denied via written Order of the Presiding Officer dated February 3, 2012.

On February 2, 2012, Respondents filed a Motion to Supplement Respondents' Prehearing Exchange. Complainant's Response thereto is being filed, under separate cover, on today's date.

E. Respondents' Motion to Take Depositions Upon Oral Questions

In a letter dated January 12, 2012 (sent via e-mail with a follow-up hard copy by first class mail), counsel for Respondents advised Complainant's counsel, in relevant part, that:

> After reviewing the recent filings, we have concluded that we would like to ask the Court for leave to take several depositions. At this time, we have specifically identified Mr. Cox and Ms. Lohman. We may be interested in Dr. Lowry and Mr. Reyna. Please let me know if the Agency will oppose our request.

The January 12, 2012 letter from Respondents' counsel failed to provide <u>any</u> information as to the proposed nature and scope of the information sought from these individuals, the purported relevance of such information to the factual matters at issue in this proceeding, the need to obtain any such information via oral depositions or the proposed time(s) and place(s) of the requested depositions.

In its Initial and Rebuttal Prehearing Information Exchanges, Complainant identified its intent to make each of the identified witnesses available at the scheduled hearing and provided Respondent with narrative summaries of each witnesses' anticipated testimony and with supporting exhibits. Complainant thereafter filed the detailed, fact specific Declarations of *each* of these

identified witnesses in support of its outstanding Motion for Partial Accelerated Decision[2] and its subsequent Reply[3]. Given the wealth of information previously provided to Respondent and the broad nature and undefined scope of Respondent's instant request for other discovery, Complainant's counsel politely advised Respondent's counsel, via a January 18, 2012 responsive e-mail, that Complainant would oppose Respondent's anticipated motion for leave to take the oral depositions of such individuals.

On January 27, 2012, Respondents' filed the instant Motion wherein Respondents' now seek additional discovery, pursuant to 40 C.F.R. § 22.19(e), in the form the oral depositions of Kenneth J. Cox, Elizabeth A. Lohman and Jose Reyna, III. Motion at 1. Respondent's Motion was accompanied by: a Memorandum of Law in Support of Respondent's Motion to Take Depositions Upon Oral Questions (hereinafter, "Memorandum"); two prior Affidavits of Jamieson G. Austin (Exhibits A[4] and C[5] to Respondents' Motion); and the prior Declarations of Kenneth Cox, Elizabeth Lohman and Jose Reyna, III.

III. REQUISITE LEGAL STANDARDS

A. There is No Right to Pretrial Discovery in Administrative Proceedings

There is no basic constitutional right to pretrial discovery in administrative proceedings. *Silverman v. Commodity Futures Trading Comm'n*,, 549 F.2d 28, 33 (7th Cir. 1977). In this regard,

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[2] Complainant's November 29, 2011 Motion for Partial Accelerated Decision included the supporting Declaration of Kenneth J. Cox, a copy of which has been annexed to Respondents' Motion as **Exhibit B.**

[3] Complainant's December 22, 2011 Reply Brief included the supporting Declarations of Kenneth J. Cox, Dr. Joe Lowry, Elizabeth Lohman, Jose Reyna, III and George Houghton. Copies of the Declarations of Elizabeth Lohman and of Jose Reyna, III also are attached to Respondent's Motion as **Exhibit D** and **Exhibit E**, respectively, thereto.

[4] The "Affidavit of Jamieson G. Austin" that is annexed to Respondents' Motion as **Exhibit A** is dated September 8, 2011 and previously was filed as Exhibit 2 in Respondents' September 8, 2011 Initial Prehearing Information Exchange.

[5] The "Second Affidavit of Jamieson G. Austin" that is annexed to Respondents' Motion as **Exhibit C** is dated December 13, 2011 and previously was filed on December 13, 2011 as Exhibit A to Respondents' Response to Complainant's Motion for Partial Accelerated Decision.

the Administrative Procedure Act ("APA") contains no provision for pretrial discovery in the administrative process and the Federal Rules of Civil Procedure for discovery do not apply to administrative proceedings. *Id*; *see also NLRB v. Valley Mold Co., Inc.*, 530 F.2d 693, 695 (6th Cir. 1976), *citing Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. 1974), cert. denied 421 U.S. 980 (1975) ("The Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings."); *McClelland v. Andrus*, 606 F.2d 1278, 1285 (D.C. Cir. 1979) ("the Federal Rules of Civil Procedure . . . are inapplicable and the Administrative Procedure Act fails to provide expressly for discovery"); *BWT Tech., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000) (While the Federal Rules of Civil Procedure are often looked to for guidance in EPA administrative cases, they do not govern such proceedings).

While the federal courts acknowledge that no constitutional right to pretrial discovery exists in administrative proceedings governed by the APA, they have recognized that the constitutional requirements of due process may, in certain instances, be denied in the absence of discovery. *See Housing Auth. of County of King v. Pierce*, 711 F. Supp. 19, 22 (D.D.C. 1989). As a result, courts recognize that the specific facts of a case must govern, such that "discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process." *See McClelland*, 606 F.2d at 1286. Accordingly, an agency must always ensure that its procedures satisfy the requirements of due process. *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' . . . This applies to administrative agencies which adjudicate as well as to courts."); *see also Swift & Co. v. United States*, 308 F.2d 849, 851 (7th Cir. 1962) ("Due Process in an administrative hearing, of course, includes a fair trial, conducted in accordance with fundamental principles of fair play and applicable procedural standards established by law.").

In accord with the above, the Environmental Appeals Board ("EAB") similarly has held that ". . . in administrative hearings parties do not have a constitutional right to take depositions, or indeed discovery at all, absent a showing of prejudice, denying the party due process." *Chippewa Hazardous Waste Remediation & Energy, Inc.*, 12 E.A.D. 346, 368 (EAB 2005) *citing: McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979); *Silverman v. Commodity Futures Trading Comm'n*, 549 F.2d 28, 33 (7th Cir. 1977).

B. The Standards for "Other Discovery" Under the CROP

The Consolidated Rules, which govern this proceeding, provide several means by which a party may obtain discovery of relevant information from another party. Initially, 40 C.F.R. § 22.19(a) directs each party to exchange prehearing information in accordance with an order issued by the Presiding Officer. The prehearing exchange must include the names of witnesses, copies of documents and proposed exhibits and an explanation of how any proposed penalty has been calculated. The prehearing exchange of the parties has now occurred and Complainant therein provided Respondents with the names of each of its proposed hearing witnesses, brief narrative summaries of their anticipated testimony and numerous documents in support of such testimony, including copies of inspection reports, notes and photographs.

40 C.F.R. § 22.19(b) also provides that at any time before the hearing, the Presiding Officer may direct the parties to participate in a prehearing conference to consider matters including the exchange of exhibits, documents, prepared testimony, and admissions or stipulations of fact which will avoid unnecessary proof. In this regard, the Presiding Officer's December 6, 2011 Order Rescheduling Hearing and Prehearing Deadlines established February 17, 2012 as the deadline for the parties to file a Joint Set of Stipulated Facts, Exhibits, and Testimony, therein reminding the Parties that "[t]he time allotted for hearing is limited [and] [t]herefore, the parties must make a good faith effort to stipulate to as much as possible to matters that cannot reasonably be contested so that

the hearing can be concise and focused solely on those matters that can only be resolved after a hearing." In furtherance of the Presiding Officers directive, on December 1, 2011 Complainant's counsel forwarded to Respondents' counsel a proposed Joint Stipulation of Facts, Exhibits and Testimony for Respondents' review and consideration. To date, Respondents have provided no response to such proposal.

After the information exchange required pursuant to 40 C.F.R. § 22.19(a), the Consolidated Rules provide that a party may be permitted to engage in "other discovery", pursuant to 40 C.F.R. § 22.19(e), if the party is able to demonstrate that specified requirements and conditions have been met. Specifically, 40 C.F.R. § 22.19(e)(1) provides as follows:

> After the information exchange provided for in [40 C.F.R. § 22.19] paragraph (a), a party may move for additional discovery. The motion shall specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted). The Presiding Officer may order such other discovery only if it:
>
> (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
>
> (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
>
> (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(3) further specifies those conditions under which the Presiding Officer may order depositions upon oral questions, providing that:

> The Presiding Officer may order depositions upon oral questions only in accordance with paragraph (e)(1) of this section [40 C.F.R. § 22.19] and upon an additional finding that:
>
> (i) The information sought cannot reasonably be obtained by alternative methods of discovery; or
>
> (ii) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing.

40 C.F.R. § 22.19(e)(4) thereafter provides, in relevant and applicable part, that :

> The Presiding Officer may issue a subpoena for discovery purposes only in accordance with paragraph (e)(1) of this section [40 C.F.R. § 22.19] and upon an additional showing of the grounds and necessity therefore.

C. Prehearing Oral Depositions are Disfavored Under the CROP and May Be Ordered Only Under Limited Conditions and Upon Specific Findings

Upon review and application of the 40 C.F.R. § 22.19(e)(3) requirements, provisions and necessary conditions precedent and pursuant to which a Presiding Officer properly may order the taking of depositions upon oral questions, EPA Administrative Law Judges have recognized that these particular Rules:

> . . . are not hospitable to discovery by means of oral depositions, 40 C.F.R. § 22.19(e)(3) providing that the ALJ may order oral depositions *only* upon findings that, in addition to the requirements for other discovery in Rule 22.19(e)(1), (i.e., the information will not unreasonably delay the proceeding nor unreasonably burden the non-moving party; seeks information which is most reasonably obtained from the non-moving party and which the non-moving party has refused to provide voluntarily; and seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought), the information cannot reasonably be obtained by alternative methods of discovery or there is substantial reason to believe that relevant and probative evidence may not otherwise be preserved for presentation by a witness at the hearing. This stringent provision for discovery by oral depositions means that, in proceedings subject to the Consolidated Rules, oral depositions are seldom granted over the opposition of the opposing party.

In the Matter of: Clarke Environmental Mosquito Management, Inc. , Docket No. FIFRA 02-2005-5203, Order Denying Respondent's Motion for Discovery by Deposition, Directing Complainant's Compliance with Prehearing Exchange Requirement for a Summary of Expected Testimony of its Witnesses, and Directing Complainant's Cooperation in Discovering Testimony of NYDEC Employees (ALJ, September 29, 2005), *citing, e.g., Safety-Kleen Corporation*, Docket Nos. RCRA-1090-11-10-3008(a) and 11-11-3008(a), Order on Discovery, 1991 EPA ALJ LEXIS 21 (ALJ, December 6, 1991).

The Environmental Appeals Board has placed particular emphasis on the fact that ". . . [t]he CROP is specific in . . . stating that the presiding officer may order depositions *only* under certain conditions. *See* 40 C.F.R. § 22.19(e). One of these conditions is that *there must be* a finding that there is a "substantial reason to believe that relevant and probative evidence may otherwise not be

preserved for presentation by at [sic] witness at the hearing." 40 C.F.R. § 22.19(e) (3)(ii). *Chippewa at* 368. (Emphasis supplied).

IV. ARGUMENT

A. Respondents' Motion Fails to Meet Numerous CROP Requirements for "Other Discovery"

As previously noted, a party moving for additional discovery must "describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted)" and that the Presiding Officer may order such other discovery only if: (1) it will not unreasonably burden the non-moving party; (2) seeks information that is most reasonably obtained from the non-moving party ; and (3) seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought. 40 C.F.R. § 22.19(e)(1). In addition, a Presiding Officer may order depositions upon oral questions only in accordance with the above and upon an additional finding that: (1) The information sought cannot reasonably be obtained by alternative methods of discovery; or (2) There is substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing. 40 C.F.R. § 22.19(e) (3). The Presiding Officer may issue a subpoena for discovery purposes, such as the taking of third party oral depositions, only in accordance with the above and upon a further showing of the grounds and necessity therefore. 40 C.F.R. § 22.19(e) (4). (Emphasis supplied).

Respondents' Motion is deficient and does not comport with the requirements for "other discovery" set forth in the CROP because it: (1) fails to describe *in detail* the nature of the information and/or documents sought; (2) *fails to propose any time(s) or place(s)* where such discovery would be conducted; (3) *unreasonably burdens Complainant*, the non-moving party; (4) seeks information that is most reasonably obtained from sources *other than* Complainant (the non-moving party); (5) fails to seek information that has significant probative value on a disputed issue

of material fact that is *relevant to liability or the relief sought*; (6) fails to explain why the information sought cannot reasonably be obtained by *alternative methods* of discovery; (7) *fails to present any reason* to support any (unstated) belief that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing; and (8) fails to provide any showing of the *grounds and necessity* for taking the oral depositions of the three identified witnesses. For each of these reasons, Respondents Motion, and the relief requested therein, should be denied.

1. Respondents Have Failed to Identify, in Any Detail, the Nature of the Information They Seek to Obtain from the Witnesses They Seek to Depose

Respondents seek to depose three of Complainant's listed witnesses. These witnesses are:

(1) **Mr. Kenneth J. Cox** - the EPA Team Leader for RCRA Subtitle C Enforcement matters in EPA Region III's *Philadelphia, Pennsylvania Office* of Land Enforcement, Land and Chemicals Division who performed c compliance evaluation inspection at Respondents' Roanoke, Virginia facility on May 15, 2007;

(2) **Ms. Elizabeth A. Lohman** -a Program Planner in the Virginia Department of Environmental Quality's *Roanoke, Virginia Office* who participated in numerous RCRA Subtitle C and D site monitoring visits to the Respondents' Roanoke Virginia facility; and

(3) **Mr. Jose Reyna, III** - a Physical Scientist in the Enforcement and Compliance Assistance Branch, Office of Enforcement, Compliance and Environmental Justice in EPA Region III's *Ft. Meade, Maryland Office* who assisted in conducting a May 23, 2007 sampling inspection, and in performing associated sampling activities, at the Respondents' Roanoke, Virginia facility.

Respondents note that "[c]ertain statements made [by the above-named witnesses] . . . in their declarations are in conflict with statements made by witnesses identified by Respondents in their Initial Prehearing Exchange in affidavits submitted to the Court by the Respondents in opposition to the Complainant's Motion for Partial Accelerated Decision." Motion at 2, ¶ 2. Respondents thereupon seek to depose each of the above-named witnesses in order to "obtain certain information concerning the Complainant's witnesses' mental impressions and their understanding of certain facts concerning the Sampling Event and Chemsolv's operations."

Memorandum at 8. See also, Motion at 2, ¶ 5. In support of its request for depositions, Respondents assert that "the documents accessible to the Respondents do not fully convey the Complainant's Witnesses' mental impressions or understanding of the disputed material facts at issue in this case" [; and that] "the most reasonable source of the information sought by the Respondents is the Complainant's Witnesses themselves." Memorandum at 10, 11. Respondents summarily conclude that "requiring the Respondents to proceed to hearing without the opportunity to depose the Complainant's Witnesses would be patently unfair, as the Respondents would be deprived of the opportunity to adequately prepare their defense to the Complainant's claims." Motion at 2, ¶ 3.

Respondents, with no supporting factual review or evidentiary analysis, assert that the inspection reports and field notes prepared by Complainant's witnesses and the subsequent Declarations made by them "do not fully convey the Complainant's Witnesses' mental impressions or their understanding of the disputed facts. . ." Memorandum at 10. Without any factual presentation or evidentiary review, Respondents further claim that the unidentified "information sought by the Respondents is most reasonably obtained from the Complainant's Witnesses." Memorandum at 10. In their Motion and supporting Memorandum, Respondents thereupon utterly and completely fail to identify what "certain information" --- of a "mental impression" nature or otherwise --- that they actually seek to obtain from any of the three identified witnesses that they move to depose.[6] In failing to provide any meaningful description of the information it seeks to

[6] Respondents seek support for the vague and overly broad characterization of the unidentified "mental impression" information sought vial oral depositions by citing to *In Re: Easterday Janitorial Supply Co.* In that matter, upon a motion for reconsideration, an EPA Administrative Law Judge explained that his prior order granting a Respondent's request for the oral deposition of witnesses was based upon a specific conclusion that "[r]elevant documentation, even if accessible by Respondent, might not fully convey the inspectors' mental impressions or understanding of the facts in issue . . . **in light of the 2,659 counts of violations and immense proposed civil penalty** [of up to up to $5,500.00 per violation] alleged in the Complaint" such that "Respondent is entitled to depose Complainant's witnesses, consistent with the requirements of due process . . . ." *In Re:*

obtain from any of the three identified witnesses, Respondents have failed to identify at all – let alone "*in detail*" – the "mental impression" information they seek to obtain from any of the three identified individuals. To the contrary, Complainant is left to speculate as to the extent, nature and purported relevance of the vague, overly broad and wholly unidentified "mental impression" information that Respondents seek to obtain. Respondents' Motion therefore fails to satisfy the "other discovery" requirements of 40 C.F.R. § 22.19(e) and its request for depositions upon oral questions can and should be denied on this basis alone. *In the Matter of: Carbon Injection System. LLC*, Docket No. RCRA-05-2011-0009, Order on Motion for Third Party Discovery and Order Postponing Hearing and Revising Case Schedule, 2011 EPA ALJ LEXIS 19 at *13 (ALJ, December 27, 2011) (denying request for deposition where Respondent failed to describe in detail the nature of the information sought such that it was not possible for the Presiding Officer to conclude that the proposed depositions would yield information that could not reasonably be obtained by alternative methods or that there was a substantial reason to believe the evidence may not be preserved for hearing); *In the Matter of David D'Amato*, Docket No. CWA-1—2010-0132, Order on Respondent's Motion to Depose Heather Dean, 2011 EPA ALJ LEXIS 11 at *4 (ALJ, May 27, 2011) (denying motion for prehearing deposition where respondent's request for information identified as "specific application of a scientific method or regulatory methodology" was deemed to

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Easterday Janitorial Supply Co., Docket No. FIFRA-09-99-0015, Order Denying Motion for Reconsideration/Request for Interlocutory Appeal, 2001 EPA ALJ LEXIS 19 at * 15 (ALJ, January 31, 2001). (Emphasis supplied). Respondents fail to note, however, that in the initial order granting the motion for requested depositions, the Presiding Officer made the very specific finding that "[g]iven the complexity of the issues relating to the [2,659] counts alleged" and "[u]nder the specific circumstances . . ., to deny such request might well prejudice Respondent's ability to adequately prepare a defense . . . ." *In Re: Easterday Janitorial Supply Co.*, Docket No. FIFRA-09-99-0015, Order Granting Motion for Depositions 2000 EPA ALJ LEXIS * 3 (ALJ, December 13, 2000). There are only seven allegations herein at issue and Respondents have pointed to no similar "complexity of issues".

be somewhat vague, thereby failing "to describe in detail the nature of the information sought, as required by [40 C.F.R.] Section 22.19 (e) (1).").

2. Respondents Have Failed to Identify the Proposed Time and Place where Such Discovery Would be Conducted

Mr. Kenneth J. Cox and Mr. Jose Reyna, III each are current EPA employees. Mr. Cox is employed in EPA offices located in ***Philadelphia, Pennsylvania*** and Mr. Reyna in EPA offices located in ***Ft. Meade, Maryland***. Ms. Elizabeth A. Lohman is a current Virginia Department of Environmental Quality employee who works in that Department's ***Roanoke, Virginia*** offices. Thus the three individuals that Respondents seek to depose clearly work and reside not only in separate geographic locations, but in different states. Given the advance logistical issues (scheduling deposition times, coordinating schedules, planning associated travel, lodging, etc.) that necessarily would be involved in the prerequisite planning and preparation associated with the taking of any such set of multiple depositions and the short time remaining until the March 20, 2012 scheduled hearing date in this matter, it is abundantly clear that the time(s) and place(s) where Respondents may propose to conduct such multiple depositions are particularly "relevant" to the relief being requested. Yet Respondents have failed to make any proposal whatsoever as to the place(s) where they seek to conduct any of these requested depositions or as to the time(s) when they propose to conduct them.

40 C.F.R. § 22.19(e) requirements applicable to motions seeking "other discovery" specifically require that "[t]he motion shall specify . . . . the proposed time and place where discovery would be conducted." Respondents have made no effort to make any such proposal and have thus failed to meet relevant and applicable CROP procedural requirements prerequisite to the relief requested. Respondents have waited until the eve of hearing to request depositions upon oral questions and yet still have failed to comply with the most basic and fundamental of the CROP's associated and prerequisite procedural requirements for "other discovery".

3. The Relief Requested Will Unreasonably Burden the Complainant

The hearing in this matter is scheduled to begin on March 20, 2012 in Roanoke Virginia. Order Rescheduling Hearing and Prehearing Deadlines at 1; January 3, 2012 letter of Lydia A. Guy, Regional Hearing Clerk. Within the short time span between now and then, Respondents seek to depose three individuals. One of these individuals, Ms. Lohman, is a non-party witness located in Roanoke, Virginia. Any deposition of Ms. Lohman presumably would have to take place in that city, where her VADEQ counsel also is located. Given the distance and travel time from Philadelphia, Pennsylvania (where Complainant's counsel is located) to Roanoke, Virginia (some 400 miles and 7 – 8 hours travel time), the Complainant's mere physical attendance at her deposition alone would require a 3-day commitment (one full day of travel in each direction and one day, or a significant part thereof, for the taking of her deposition). If it somehow could be arranged for the two EPA witnesses to be deposed on one occasion in Philadelphia, Pennsylvania or Fort Meade, Maryland, a minimum of 1 day would be required of Complainant's counsel merely to attend and participate in these depositions. If separate depositions of Messrs. Cox and Reyna were required (whether in Ft. Meade, Maryland and/or Philadelphia, Pennsylvania), Complainant's associated attendance and participation time increases to a minimum of 2 days. If those depositions were to take place in Roanoke, Virginia, yet additional time, effort and expenditures would be required. Deposition preparation (review of documents, etc.) will further add to the travel and attendance time required by Complainant.

As Respondents and the Presiding Officer are aware, Complainant's lead counsel in this proceeding has had to excuse herself from this matter for personal reasons beyond her, or any of the Parties' control. *See, Chemsolv, Inc.,* Docket no, RCRA-03-2011-0068, Order on Complainant's Motion for an Extension of Time (ALJ, February 3, 2012). This has necessitated a much increased role for recently involved counsel (filing his appearance as counsel in this matter simultaneous with

the instant Response) and a very limited time for counsel to meet existing prehearing deadlines, one of which has been accelerated upon recent verbal order issued on February 2, 2007 by the Presiding Officer's law clerk,[7] and prepare properly for the forthcoming hearing. Nevertheless, Respondents now seek a form of relief that, if granted, will require Complainant to expend nearly as much time as has been allotted for the entire hearing in this matter, and to incur associated work day losses that Complainant's counsel had properly planned to devote to hearing preparation, so that Respondents can conduct a broad and unlimited foray (as Respondents have not proposed to limit their deposition inquiries in any way) into the "mental impressions" of three of Complainant's identified fact witnesses --- each of whom Complainant fully intends to present and call as its own witnesses at hearing and who will be available to the Respondents for cross-examination at the hearing. Complainant asserts that the burdens such requested relief (*i.e.*, the most disfavored form of "other discovery) would place upon Complainant are, in fact, "unreasonable" given the above circumstances.

Respondents' Motion and supporting Memorandum leave Complainant to speculate as to the extent, nature and relevance of the vague, overly broad and largely unidentified "mental impression" information that Respondents seek to obtain. Complainant's counsel can neither determine what particular information Respondents' seek, whether Complainant's witnesses even possess such information, the extent of any such information that Complainant likely has already provided to Respondents and whether Complainant can, or should, provide any such information voluntarily. The timing of Respondents' Motion and the relief Respondents now request place an

[7] During a conference call with the Presiding Officer's law clerk, Mr. Steven Sarno, on February 2, 2012, Mr. Sarmo advised the Parties' respective counsel that the Presiding Officer had advanced the deadline for the filing of Complainant's response to the Respondent's instant Motion. Such Response originally was scheduled to be filed by February 13, 2012. However, Mr. Sarno advised the Parties' counsel that the Presiding Officer wished to receive and have such Response in her possession by February 10, 2012, effectively advancing the associated filing and (overnight mail) service date to February 9, 2012. No formal written order has been issued.

unreasonable burden upon Complainant under the particular circumstances of this matter and such requested relief should be denied.

4. The Respondent Seeks Information that is Most Reasonably Obtained From Sources *Other than* Complainant's Witnesses

Respondents seek "information concerning the Complainant's Witnesses' mental impressions and understanding of certain disputed material facts relevant to the issue of liability" and assert that the inspection reports and field notes prepared by Complainant's witnesses and the subsequent Declarations made by them "do not fully convey the Complainant's Witnesses' mental impressions or their understanding of the disputed facts. . ." Memorandum at 10.

A review of the Respondents' supporting Memorandum, however, makes it clear that Respondents do not, in reality, seek "mental impression" information --- whatever that might be --- from Complainant's witnesses. Rather, Respondents seek to determine: (1) whether their representative, Mr. Jamison G. Austin, provided information to an EPA inspector (Mr. Cox) regarding the "trench drain" in the facility "Blend Room" that is in conflict with statements made in Mr. Austin's Second Affidavit and/or with the true facts[8]; and (2) whether Mr. Jamieson G. Austin actually witnessed the May 23, 2007 sampling events at the facility, as set forth in his Initial Affidavit.[9] *See*, Memorandum at 4, 5, 11 and 12. This information is clearly best obtained from sources other than Complainant's witnesses, who already have gone on record, through their inspection reports, field notes, Declarations and post-event correspondence, with their recollections and observations as to the events at issue.

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[8] Respondents cite to Mr. Austin's claims of "inaccuracy" in Mr. Cox statements regarding the process by which rinsewater was accumulated and managed at the Facility and his statement that he "never told Mr. Cox that the 'trench drain' he observed in the 'Blend Room' was connected to Rinsewater Tank No. 1" and that he had alternatively explained to Mr. Cox that such 'trench drain' was "disconnected from Rinsewater Tank No. 1 many years prior to the EPA's inspection in May, 2007." Memorandum at 5-6, citing Motion Exhibit C [at pp. 2-3] ¶¶ 7 and 9.

[9] Mr. Austin specifically states that he "personally observed the EPA's inspector collect samples of rinsewater and settled solids from Rinsewater Tank No. 1 during the Sampling Event" and that he "also personally observed the EPA's inspector collect samples from certain totes and drums located at the Facility." Exhibit A, pp. 3-4] ¶¶ 16-24.

a. Additional Information Concerning the "Trench Drain" in the "Blend Room" at the Time of the May 2007 Inspections is Best Obtained from Documents Already Provided by Complainant and From Respondents' Own Employees and Business Records

Information obtained by Mr. Cox regarding the "trench drain" in the facility "Blend Room" are not based upon "mental impressions". Rather, they are based upon the verbal communications and representations made by to him by Mr. Austin and which were contemporaneously recorded and documented by Mr. Cox. Subsequent to his May 15, 2007 inspection of the Respondents' Roanoke, Virginia facility, Mr. Cox prepared an inspection report in which he therein recounts that events surrounding such conversation and the information provided therein. Mr. Cox very specifically reports that during the course of the inspection ". . . the inspectors went to the blend room which has various size tanks which are used to fill drums. This room has a grated trench drain (Photo 13) which contained a dark wet sludge in the bottom. *Mr. Austin said the drain led to the acid pit outside*." Complainant's Prehearing Exhibit (hereinafter "CX PHE") 17 at 2 (EPA 297) (Emphasis supplied). Mr. Cox again recounts this statement in his Declaration. Motion Exhibit B at 3, ¶14. Mr. Austin apparently took issue with this statement, countering in his Second Affidavit that "this is not true" and that "I never told Mr. Cox that the trench was connected to Rinsewater Tank No. 1 at the time of the May 15, 2007 inspection." Motion Exhibit C at 3, ¶ 9.

In this regard, Complainant notes that it already has provided the Respondents with additional information that bears directly upon the status of the "trench drain" in May 2007. Complainant points to the VADEQ inspection report which specifically documents the events of the follow-up May 18, 2007 inspection conducted by VADEQ at the Respondent's Roanoke, Virginia facility. CX PHE 19. That inspection was not attended by Mr. Cox or by Mr. Austin, but rather by VADEQ Inspectors Kimberly Thompson and Elizabeth Lohman and by Chemsolv's James Carey Lester, Jr. ("Carey Lester"). *Id.* At 3 (EPA 374). Mr. Lester is identified by the Respondents in their December 10, 2007 response to an EPA information request letter (CX PHE 21) as the

Roanoke, Virginia facility "Operations Manager" and as "the only employee with training and authority in the area of hazardous waste. He is the company coordinator and keeper of records." CX PHE 21 at ¶ 4.c. and 4.a. (EPA 657). VADEQ Inspectors Thompson and Lohman note, in their Inspection report pertaining to the events of May 18, 2007, that: "Mr. Lester described the following processes and operation: . . . [t]he facility blends various chemicals in various tanks and containers to make different products. Any product spillage or floor washdown wastewater goes to the floor drain in the blending room which drains to the 'pit area.'" CX PHW 19 at 3 (EPA 374).

As noted above, the evidence that Complainant has developed pertaining to the use and function of the "trench drain" in the "blend area" of the facility in May of 2007 is based upon information provided --- on separate occasions --- to two different inspectors by two different representatives of the Respondents. To the extent that Respondents seek additional information on the status of the "trench drain" at the time of the May 2007 inspections, Complainant respectfully suggests that that such information resides with Respondents' — rather than Complainant's --- witnesses, representatives and/or employees. Specifically, Complainant suggests that Mr. Carey Lester, the Respondent's facility Operations Manager in 2007, would be a potential source of such information. Mr. Lester not only was Respondents' facility Operations Manager at the time of the events at issue, he has been identified by the Respondents as "the company recorder and keeper of records." CX PHE at ¶ 4.a. (EPA 657). If, as Mr. Austin claims in his Second Affidavit, "the 'trench drain' . . . was disconnected from Rinsewater Tank no. 1" at the time of the May 2007 facility inspection, the available records to support such a claim would reside with the Respondents. They have not been provided to the Complainant or to any of the witnesses Respondents seek to depose.

b. Any Additional Information Concerning the "Pit Sampling" Event Are Best Obtained from Documents and Information Already Provided by Complainant and From Respondents' Operations Manager

Mr. Reyna has executed a Declaration describing, in detail and with illustrative photographs, the sampling methods, procedures and equipment that he and Mr. Houghton employed on May 23, 2007 in the collection of liquid and settled solids samples from the "Pit" at the Respondents' Roanoke, Virginia facility. Motion Exhibit E. Ms. Lohman has executed a Declaration in which she describes a brief encounter with Mr. Austin during the course that same sampling inspection. Memorandum at Exhibit D. Ms. Lohman therein recounts that such encounter lasted "a few minutes at most" and that it preceded the sampling activities conducted on that date at the subgrade tank known as the "Pit". *Id.*, at p. 3, ¶ ¶ 8 – 10. Ms. Lohman further states that such encounter was "the only time Mr. Austin was in the presence of the sampling inspection team on May 23, 2007" and that at the conclusion of such brief encounter "Mr. Austin entered his vehicle, a black four-door car and drove what appeared to be extremely fast and passed within several feet of us as he left the property." Id. At p. 3, ¶ 10.

Respondents note that Mr. Austin has executed an Initial Affidavit in which he asserts that he "personally observed the EPA's inspector collect samples of rinsewater and settled solids from Rinsewater Tank No. 1" during such sampling event. Motion Exhibit A at 3, ¶ 16. Respondents now claim to seek information from Ms. Lohman and Mr. Reyna concerning "the apparent conflicts between Complainant's Witnesses statements concerning the sampling methods used by the EPA inspectors and Mr. Austin's statements concerning the same subject." Memorandum at 12. Complainant asserts that Ms. Lohman and Mr. Reyna have provided a clear and concise narrative of the events at issue. Complainant also has provided Declarations of Mr. George Houghton (who assisted Mr. Reyna in the sampling activities at the "Pit") and of its named expert as to such sampling activities, Dr. Joe Lowry, as attachments to Complainant's Reply Brief in Further Support

of Complainant's Motion for Accelerated Decision (hereinafter "Houghton Declaration" and "Lowry Declaration", respectively).

Complainant already has provided Respondents with the relevant and available information that Complainant has regarding the "Pit" sampling event and facility inspection of May 23, 2007. Any additional information that Respondents now seek regarding "the apparent conflicts between Complainant's Witnesses statements . . . and Mr. Austin's statements concerning the same subject" are best obtained from the information that Complainant already has provided to the Respondents and from Respondents' own representative, Mr. Carey Lester, who witnessed portions of that "Pit" sampling event. By way of limited example, Mr. Austin states that he "personally observed the EPA's inspector [singular] collect samples of rinsewater and settled solids from Rinsewater Tank No. 1 during the Sampling Event" and that "Rinsewater Tank No.1 was not full of liquid at the time of the Inspection or the Sampling event." Motion Exhibit A at 3, ¶¶ 16 and 19. Complainant already has provided Respondents with information relevant to such statements. In this regard, Complainant has provided the Declarations of Mr. Reyna and Mr. Houghton in which each of them states that they both (*i.e.*, "together") took the samples collected from the "Pit" on May 23, 2007. Motion Exhibit E at 1, ¶ 3. Houghton Declaration at 1, ¶ 3. Complainant also has provided the Respondents with an e-mail correspondence from Elizabeth Lohman to Kenneth J. Cox, dated May 24, 2007, in which Ms. Lohman summarizes the May 23, 2007 facility inspection and associated sampling events. CX PHE 47 (EPA 1583). Ms. Lohman therein sates that "[t]he Pit was close to being 100% full". *Id.* Similarly, Complainant has provided Respondents with an inspection photograph of the "Pit" at the time of the May 23, 2007 sampling event. CX PHE 18, Photo 027 (EPA 358). It clearly shows the Pit to be full to just shy of the rim, with the interior ceramic lining of the "Pit" only visible in a portion of the "Pit" [upper left in photo]. *Id.*

Thus, any additional information that Respondents now may seek regarding "the apparent conflicts between Complainant's Witnesses statements . . . and Mr. Austin's statements concerning the same subject" are best obtained from the information that Complainant already has provided to the Respondents and/or from Respondents' own representative, Mr. Carey Lester, who accompanied the EPA and VADEQ inspectors throughout their May 23, 2007 inspection of the Roanoke, Virginia facility and was observed by both Ms. Lohman and Mr. Reyna to have been present during portions of the May 23, 2007 "Pit" sampling event.[10] Motion Exhibit D at 3, ¶ 11. Motion Exhibit E at 3, ¶ 21.

5. The Information Sought by Respondents Has No Significant Probative Value on a Disputed Issue of Material Fact *That is Relevant to Liability or the Relief Sought*

The "mental impression" information Respondents seek to obtain from Mr. Cox purportedly pertains to the status of the "trench drain" in the "Blend Room" at the facility and whether such "trench drain" was connected to the "Pit" in May 2007. The status of the "trench drain" at the facility in May 2007 does appear to be "disputed". In that such status relates to potential pathways by which liquids and solids may have entered into the subgrade tank (or "Pit"), it can also be said to have "probative value" on that issue. However, neither the content nor the status (connected to the "Pit" or capped) of the "trench drain" have any bearing on the material facts that are relevant to Respondent's liability in this matter. It is solely the nature of the liquid and solids content of the subgrade tank – or "Pit" that has significant probative value on disputed issues of material fact relevant to the liability issues raised pursuant to the Complaint filed in this proceeding. Complainant therein makes allegations that are relevant to the content of the subgrade tank (or "Pit") only. Complainant makes no allegations in the Complaint regarding the "trench drain".

[10] Respondents, for whatever reason, have elected not to list or identify Mr. Lester as a potential witness in this proeeeding, despite the important events that he witnessed, and the "Operations Manager" responsibilities that he held at the facility during the time periods relevant to this proceeding.

The term "significant probative value" denotes the "tendency of a piece of information to prove a fact *that is of consequence in the case.*" *Chautauqua Hardware Corp.*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, 1991 EPCRA Lexis 2 (CJO, Order on Interlocutory Review, June 24, 1991) (Emphasis supplied). In the present matter, the status of the "trench drain", while disputed, is not a material fact that has "significant probative value" as to any material fact that is relevant to liability or to the relief herein sought.

Similarly, the "mental impressions" of Ms. Lohman and Mr. Reyna, as they pertain to Mr. Jamieson G. Austin's presence or absence from the May 23, 2007 "Pit" sampling event, have no "significant probative value" on a disputed issue of material fact that is relevant to liability or to the relief herein sought. Respondents argue that "the allegation that Mr. Austin did not observe the Sampling Event is a serious one that goes to the heart of the Respondents' defenses . . . ." Memorandum at 9. They claim that "[i]f Mr. Austin were present during the Sampling Event and he observed the EPA's inspectors' flawed sampling methods, then his testimony provides the foundation for Respondents' challenge to the validity of the analytical data upon which a majority of the violations alleged in the Complaint are based." Memorandum at 11. Whether Mr. Austin did or did not witness the sampling event changes little. The EPA inspectors who performed the sampling already have gone on record with a detailed description of the manner in which they performed the sampling, the methodology employed and the equipment used. Complainant has provided all of this information to the Respondents in the form of the prehearing exhibits and Declarations previously identified and discussed. Respondents are correct in asserting that it would be a serious matter if Mr. Austin's failed to observe what he has sworn, under oath, to have observed. However, Mr. Austin's observations, or lack thereof, do not go to the heart of the Respondents' defenses.

The majority of the information about the sampling event that Mr. Austin provides in his Initial Affidavit, and which appears in his prehearing witness testimony summary, do not relate to facts about the manner in which the sampling was conducted. Rather, such statements set forth Mr. Austin's opinions as to why he believes that such sampling methodology was not "representative" in nature. Any such opinion testimony, if presented at hearing, would constitute "expert testimony" on Mr. Austin's part. However Mr. Austin has not been identified as an expert by the Respondents and thus cannot testify as such at the hearing. This is just as well in that Mr. Austin has admitted that "Cary Lester is the only employee with training . . . in the area of hazardous waste" at the Respondents' facility[11] such that Mr. Austin is without the requisite background to speak as an expert to the issue of hazardous waste sampling protocols.

As to the mechanics and the manner in which EPA inspectors Houghton and Reyna collected the liquid and solid samples from the "Pit" on May 23, 2007, Complainant does not believe that the Parties have any significant dispute. Rather, the "disputed issues" center upon the *validity* of the sampling methods and the sampling results from a technical and legal nature. These are not matters of disputed "material fact" but, rather *they are disputes over issues of law*. Should Respondents nevertheless be concerned over their ability "to establish a foundation for Respondent's challenge to the validity of the analytical data upon which the majority of the violations in the Complaint are based",[12] Respondents will have every opportunity to cross-examine Messrs. Reyna and Houghton at the Hearing as to the sampling methods they employed and may seek to introduce the testimony of Mr. Perkins to rebut that of EPA's identified expert, Dr. Joe Lowry.

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[11] *See,* Respondent's 12/10/2007 IRL Response, CX 21 at ¶ 4.a (EPA 657).

[12] See, Memorandum at 11.

Respondents claim that the "mental impressions" sought from these witnesses "goes to the heart of Respondents' defense to the issue of liability" is a complete red herring and Respondents' citation to *In the Matter of: United Refining Company of Pennsylvania, Inc.* in support of the relief requested is wholly inappropriate. In *United Refining Company*, the oral deposition of an EPA inspector was granted when a respondent represented that it had reason to believe that no inspection had taken place at its facility on the date indicated by the inspector --- a disputed matter that clearly would have significant probative value as to material facts relevant to liability that purportedly were identified, observed or obtained during such questioned inspection. *In the Matter of: United Refining Company of Pennsylvania, Inc.*, Docket No. RCRA-III-9006-43, Order Granting Leave to Amend Answer and Requests for Depositions and Denying Requests for Documents, 1997 EPA ALJ LEXIS 63 at * 3 (ALJ, May 13, 1997). In contrast to those facts and circumstances, Mr. Austin's presence or absence from the sampling events that took place at the Facility on May 23, 2007 have little bearing on matters of significant probative value on disputed issues *relevant to the liability of Respondents* or as to the relief herein sought. The relevant matters related to such sampling events, as identified by the Respondents themselves, include the validity of EPA's hazardous waste analytical sampling --- a matter which necessarily involves expert opinion testimony on an issue that Mr. Austin has not been identified as an expert witness and upon which he is without the requisite background to testify. They also include the sampling procedures and protocols employed by the EPA inspectors in gathering the liquid and solid samples from the "Pit" on that date --- a matter upon which the Parties have little or no actual dispute and about which Complainant has provided Respondents with substantial information and about which Respondents have another available source of information (*i.e.*, facility Operations Manager Carey Lester).

To the extent that there are any factual disputes between the Parties as to the physical sampling methods, equipment and/or procedures actually employed by Mr. Reyna and Mr.

Houghton when they sampled the "Pit" on May 23, 2007, Respondents have failed to identify any such disputes in their Motion or supporting Memorandum. Respondents also have failed to explain how such disputes, if any, are significantly probative as to material facts relevant to their liability or requested relief. For these additional reasons, Respondents Motion fails to comport with 40 C.F.R. § 22.19(e)(1)(iii) requirements.

6. Respondents Fail to Explain Why the Information Sought Cannot Reasonably be Obtained by Alternative Methods of Discovery

Respondents assert that documents such as the inspection reports, field notes and declarations provided by Complainant in this proceeding "do not fully convey the Complainant's Witnesses' mental impressions or their understanding of the disputed facts herein" and that it is "unlikely that any additional documents produced by the Complainant . . . or any interrogatories" would do so. Memorandum at 13.

It appears that the "mental impression" information Respondents seek to obtain from Mr. Cox pertains to the status of the "trench drain" in the "Blend Room" of the Roanoke, Virginia facility in May 2007 and that they seek such information because Mr. Jamie Austin disputes the statements attributed to him in verbal communications made to Mr. Cox during the May 15, 2007 inspection of the facility. Respondent, however, fails to explain why they cannot obtain such information about the status of the "trench drain" in the "Blend Room" of the Roanoke, Virginia facility in May 2007 from Mr. Cary Lester, the facility Operations Manager at that time. Mr. Lester is quoted in a VADEQ inspection report as advising VADEQ inspectors Thompson and Lohman, on May 18, 2007, that "[t]he facility blends various chemicals in various tanks and containers to make different products. Any product spillage or floor washdown wastewater goes to the floor drain in the blending room which drains to the 'pit area.'" CX PHW 19 at 3 (EPA 374). Respondents similarly fail to explain why they cannot obtain information about Mr. Reyna's and Mr. Houghton's May 23, 2007 "Pit" sampling activities and about the events on that date witnessed by Ms.

Elizabeth Lohman from Mr. Lester. The Parties acknowledge that Mr. Cary Lester, the facility Operations Manager, observed the inspectors conduct their May 23, 2007 sampling activities at the "Pit". Respondents presumably may obtain whatever further information they may seek about the manner in which such sampling was conducted from Mr. Lester. In his role as the facility "Operations Manager" Respondents have provided evidence that Mr. Lester had received hazardous waste management training proximate to the date of such inspection. *See*, CX PHE 21 at EPA 992 (March 30, 2007 Advanced Hazardous Waste Management Certificate of Achievement issued to James Carey Lester, Jr. by Lion Technologies, Inc.). Mr. Lester, was trained in hazardous waste management, witnessed at least a portion of the sampling activities conducted on that date by about Mr. Reyna and Mr. Houghton and he was in the presence and the company of Ms. Lohman during the course of her inspection activities at the facility on May 23, 3007. As a result, Mr. Lester clearly presents a viable alternative source of the very information that Respondents appear to seek through this Motion.

Complainant has thus illustrated that reliable, alternative and less burdensome sources and means of obtaining the information referenced in their Motion and supporting Memorandum are available to the Respondents and that Respondents appear not to have sought to avail themselves of opportunities to obtain that information. Complaint cannot explain why Respondents' have failed to seek or obtain such information from Mr. Lester or to identify him as a potential witness in Respondents' Prehearing Information Exchange. It is not Complainant's obligation to do so. To the contrary, where alternative means and methods of discovery are available to the Respondents – as they are here -- it is the Respondents' obligation either to avail themselves of such discovery or to explain in any motion for "other discovery" why it is unable to obtain the information it seeks from such alternative means and methods. Respondents have failed to meet these obligations and their instant request for "other discovery" accordingly should be denied.

7. Respondents Fail to Present Reasons in Support of Any Belief that Relevant and Probative Evidence May Otherwise Not be Preserved for Presentation by a Witness at Hearing

Noticeably absent from Respondents' Motion and supporting Memorandum is any representation that Respondents have reason to believe that the information sought from Elizabeth A. Lohman, Kenneth J. Cox or Jose Reyna, III may not, in the absence of depositions upon oral questions, otherwise be preserved for presentation by these witnesses at hearing. The absence of any such representation, however, is not surprising, because Complainant has listed each of these individuals as hearing witnesses and has clearly expressed (as it once again does so herein) its intent to produce each of these witnesses at the scheduled hearing and to have them testify as witnesses, on Complainant's behalf, at such hearing. These witnesses each have been advised of the hearing dates in this matter, have kept their schedules open on those dates and have consented to appearing as witnesses at the hearing. In addition, Respondents have had every opportunity to identify any or all of these witnesses as their own (though they have not elected to do so) and, despite that election, will have the opportunity to cross-examine each of these witnesses at the hearing. As a result, prehearing depositions are not necessary to preserve any probative evidence that these witnesses possess.

8. Respondents Fail to Provide any Showing of the Grounds and Necessity for Taking Oral Depositions

Consistent with due process and applicable CROP requirements governing the administrative prehearing discovery process, Complainant has provided Respondents with full disclosure and a thorough explanation of the facts in its possession on all relevant matters at issue. Yet Respondents not only would have Complainant and the Presiding Officer guess at the "mental impression" information that they seek or believe they have absolute need to obtain through the oral deposition of three of Complainant's witnesses. Rather, Respondents would have us speculate as to the unstated "grounds" and "necessity" for the taking of these requested depositions.

In the "Statement of the Case" section of their Memorandum, Respondents note Mr. Austin's claims of inaccuracy regarding statements attributed to him by Mr. Cox regarding the process by which rinsewater was accumulated and managed at the Facility. They cite to Mr. Austin's statement that he "never told Mr. Cox that the 'trench drain' he observed in the 'Blend Room' was connected to Rinsewater Tank No. 1" and that he had alternatively explained to Mr. Cox that such 'trench drain' was "disconnected from Rinsewater Tank No. 1 many years prior to the EPA's inspection in May, 2007." Memorandum at 5-6, citing Motion Exhibit C [at pp. 2-3] ¶¶ 7 and 9. However, Respondents fail to state what grounds they have for the taking Mr. Cox deposition. If they seek to challenge Mr. Cox' recollections and representations of his May 15, 2007 conversation with Mr. Austin, Respondents will have the opportunity to do that upon cross-examination of Mr. Cox at the hearing. If they have alternate grounds, they are not apparent to Complainant and Respondents fail to explain the necessity for such deposition. If Respondents seek a clearer understanding of the actual status and use of the "trench drain" at the facility in May 2007 and/or whether Mr. Austin's current statements on that issue are correct, the Complainant's witnesses are not the appropriate source of any such information. Rather, the Respondents' own employees and their facility business records should be consulted.

In that the Respondents similarly fail to explain why they cannot obtain further information about Mr. Reyna's and Mr. Houghton's May 23, 2007 "Pit" sampling activities and about the events on that date witnessed by Ms. Elizabeth Lohman from facility Operations Manager Carey Lester – who personally observed these sampling activities and who accompanied Ms. Thompson and Ms. Lohman throughout their May 23, 2007 inspection of the facility --- they cannot now profess the "necessity" of deposing Complainant's witnesses.

V. CONCLUSION

For each of the reasons identified and discussed below, Complainant respectfully requests that the Presiding Officer enter an order DENYING Respondent's Motion to Take Depositions Upon Oral Questions of Complainant's witnesses Kenneth J. Cox, Jose Reyna, III and Elizabeth A. Lohman.

Respectfully submitted:

2/7/2012
DATE

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TABLE OF AUTHORITIES

CASE LAW **Page**

Federal Judicial Decisions:

EPA Administrative Decisions:

Regulatory References

THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of	:	
	:	
CHEMSOLV, INC., formerly trading as Chemicals and Solvents, Inc.	:	
	:	
and	:	
	:	
AUSTIN HOLDINGS-VA, L.L.C.	:	
	:	
Respondents.	:	
	:	EPA Docket No. RCRA-03-2011-0068
Chemsolv, Inc. 1111 Industrial Avenue, S.E. 1140 Industrial Avenue, S.E. Roanoke, Virginia 24013	:	
	:	Proceeding under Section 3008(a) of the Resource Conservation and Recovery Act, as amended, 42 U.S.C. Section 6928(a)
Facility	:	

CERTIFICATE OF SERVICE

I hereby certify that on the date set forth below, I caused to be hand-delivered to Ms. Lydia Guy, Regional Hearing Clerk (3RC00), U.S. EPA Region III, 1650 Arch Street, 5th Floor, Philadelphia, PA 19103-2029, the original and one copy of the foregoing Complainant's Response in Opposition to Respondent's Motion for Prehearing Deposition. I further certify that on the date set forth below, I caused true and correct copies of the same to be mailed via United Parcel Service, Next Day Air delivery, to the following persons at the following addresses:

Hon. Barbara A. Gunning
U.S. Environmental Protection Agency
EPA Office of Administrative Law Judges
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Washington, D.C. 20005

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Dated: 2/7/2012

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