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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
Respondents.	)	Proceeding Under Section 3008(a) of the Resource Conservation and Recovery Act, as amended 42 U.S.C. Section 6928(a)
Chem-Solv, Inc. 1111 Industry Avenue, S.E. 1140 Industry Avenue, S.E. Roanoke, VA 24013,	)	
Facility.	)	

RESPONDENTS' PRETRIAL BRIEF

COME NOW respondents Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, LLC ("Austin Holdings") (collectively, the "Respondents"), by counsel, in accordance with the Court's December 6, 2011 Order Rescheduling Hearing and Prehearing Deadlines, and file this Pretrial Brief summarizing the defenses that the Respondents intend to pursue at the hearing scheduled for March 20-30, 2012. Because the Court is familiar with the Complainant's allegations and the Respondents' defenses from prior briefing, the Respondents will briefly recount the jurisdictional facts and violations alleged in the Complainant's Administrative Complaint, Compliance Order and Opportunity for a Hearing (the "Complaint"), and the Respondents' defenses thereto.

I. Summary of Alleged Jurisdictional Facts

As to Chem-Solv, the Complainant generally alleges it is the "owner" and "operator" of a "facility" located at 1111 and 1140 Industry Avenue, S.E., Roanoke, Virginia (collectively, the

"Property"), as those terms are defined in 40 C.F.R. § 260.10. (Compl. ¶ 3.) As to Austin Holdings, the Complainant also generally alleges that it is the "owner" of a "facility", as those terms are defined in 40 C.F.R. § 260.10. (Compl. ¶ 4.)

The United States Environmental Protection Agency (the "EPA") inspected the Property beginning on May 15, 2007 (the "Inspection") and collected samples of certain materials found during a site visit to the Property on May 23, 2007 (the "Sampling Event"). (See Compl. ¶¶ 6-7.) During the Sampling Event, the EPA took samples of rinsewater and settled solids contained in a subgrade rinsewater holding tank sometimes referred to as the "Pit" ("Rinsewater Tank No. 1") located on a portion of the Respondents' real property. (See Compl. ¶¶ 14, 16.) Based upon the EPA's Inspection and its analysis of the samples collected during the Sampling Event, the Complainant generally alleges that Chem-Solv is a "generator" of "hazardous waste" as those terms are defined in 40 C.F.R. § 260.10. (See Compl. ¶ 5.)

The Complainant claims that the analysis of the sample of rinsewater collected by the EPA during the Sampling Event indicated that such rinsewater contained 6.1 mg/L chloroform. (See Compl. ¶ 14.) Accordingly, the Complainant further claims that such rinsewater is a hazardous waste, under 40 C.F.R. § 261.24, because it is a "solid waste" with a concentration of chloroform greater than 6.0 mg/L. (See Compl. ¶ 15.)

The Complainant also claims that the analysis of the sample of settled solids collected by the EPA during the Sampling event indicated that such settled solids contained 457 mg/L tetrachloroethene and 15.5 mg/L of trichloroethene. (See Compl. ¶ 16.) Consequently, the Complainant further alleges that such settled solids were "hazardous wastes", under 40 C.F.R. §261.24, because they were a "solid waste" with a concentration of tetrachloroethene greater than 0.7 mg/L and concentration of trichloroethene greater than 0.5 mg/L. (See Compl. ¶ 17-18.)

For the foregoing reasons, the Complainant claims that the rinsewater and settled solids contained in Rinsewater Tank No. 1 at the time of the Inspection and the Sampling Event were "solid wastes" and "hazardous wastes" as such terms are defined in 40 C.F.R. § 260.10. (See Compl. ¶ 21.) The Complainant additionally alleges, based on its analysis of the sample of settled solids collected during the Sampling event, that the settled solids contained in Rinsewater Tank No. 1 contained a volatile organic compound ("VOC") concentration greater than 500 parts per million by weight. (See Compl. ¶ 19.)

The Complainant also claims that Chem-Solv accumulated at least 1,000 kilograms (2,200 lbs.) of hazardous waste at the Property from May 15, 2007 through February 20, 2008. (See Compl. ¶ 25.) The Respondents dispute this claim and believe that their evidence at the hearing will show that no measurement of weight was taken and that the Complainant cannot establish this claim by a preponderance of the evidence.

II. Summary of Violations Alleged by the Complainant

In its Complaint, the Complainant alleges that Chem-Solv and Austin Holdings violated Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939e, in the following respects:

A. Count I - Operating a Hazardous Waste Storage Facility Without a Permit or Interim Status.

In Count I of the Complaint, the Complainant alleges that, from May 23, 2007 until February 1, 2008, Respondents owned and operated a hazardous waste storage facility without a permit or interim status, in violation of 40 C.F.R. Part 270 and Section 3005(a) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6925(a). (See Compl. ¶ 37.) This conclusion is based on the following assumptions:

(1) Respondents stored a drum of sodium hydrosulfide at the Property from at least May 23, 2007 until February 20, 2008, when the Complainant alleges that Respondents shipped it off-site for disposal after 273 days of storage.

Complainant further alleges such sodium hydrosulfide was a "hazardous waste", under 40 C.F.R. § 261.22(b) and 23(b), because it exhibited characteristics of corrosivity and reactivity. (See Compl. ¶ 30.)

(2) Respondents stored "hazardous waste", including the settled solids referenced above, in Rinsewater Tank No. 1, from May 23, 2007 until February 20, 2008, when it shipped such settled solids off-site for disposal after storing it on site for 273 days. (Compl. ¶¶ 31-32.)

(3) Respondents did not properly inspect Rinsewater Tank No. 1 from May 23, 2007 until February 1, 2008. (See Compl. ¶ 33.)

(4) Respondents have never had a permit or interim status, pursuant to 40 C.F.R. Part 270 and Section 3005 (a) and (e) of RCRA, 42 U.S.C. § 6925 (a) and (e), for its chemical distribution business located on the Property. (See Compl. ¶ 34.)

(5) Respondents failed to qualify for the "less than 180 day" generator accumulation exemption set forth in 40 C.F.R. § 262.34(d), with respect to the alleged storage of the 55 gallon drum of sodium hydrosulfide and the settled solids allegedly stored in Rinsewater Tank No. 1, from May 23, 2007 until February 1, 2008 by failing to satisfy the conditions for such exemption. (See Compl. ¶ 36.)

The Respondents' evidence at the hearing in this matter will challenge the assumptions concerning certain jurisdictional facts upon which Count I is based.

B. Count II - Failure to Make Waste Determinations.

In Count II of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 262.11 by failing to perform a hazardous waste determination on "solid waste" allegedly generated at Chem-Solv's chemical distribution business located on the Property. (See Compl. ¶¶ 45-46.) This conclusion is based on the following assumptions:

(1) Chem-Solv stored and/or disposed of "hazardous wastes", including the rinsewater and settled solids referenced above, from May 23, 2007 until February 1, 2008, without performing a hazardous waste determination on such alleged "hazardous wastes" in accordance with 40 C.F.R. § 262.11. (See Compl. ¶¶ 40-42.)

(2) Chem-Solv treated, stored and/or disposed of "solid waste", including used aerosol cans, without performing a hazardous waste determination, in accordance with 40 C.F.R. § 262.11, on such alleged "solid waste". (See Compl. ¶¶ 43-44.)

The evidence presented to the Court at the hearing by the Respondents will challenge these assumptions and the applicability of the regulatory requirements upon which the violations alleged in Count II are based under the circumstances present here

C. Count III – Failure to Have Secondary Containment for Regulated Hazardous Waste Storage Tank.

In Count III of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.193(a), (d) and (e), by failing to provide secondary containment for Rinsewater Tank No. 1, which the Complainant alleges qualifies as a regulated "new tank system" under 40 C.F.R. § 264.193(a), (d) and (e). (See Compl. ¶¶ 48-50, 52.) This claim is based on the following assumptions:

(1) Rinsewater Tank No. 1 was a "new tank system" regulated under 40 C.F.R. § 264.193(a), (d) and (e). (See Compl. ¶¶ 48-50.)

(2) Chem-Solv did not design or install an external liner secondary containment device in accordance with 40 C.F.R. § 264.193(d), from May 23, 2007 until February 1, 2008. (See Compl. ¶ 51.)

The Respondents will offer evidence to the Court at the hearing challenging the validity of these assumptions and the applicability of the regulatory requirements upon which Count III is based under the circumstances of this case.

D. Count IV - Failure to Obtain Tank Assessments for Regulated Hazardous Waste Storage Tanks.

In Count IV of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.192(a) and (g) by allegedly failing to obtain a written certification of the design of Rinsewater Tank No. 1 in accordance with the requirements of 40 C.F.R. § 264.192(b)-(f). (See Compl. ¶ 56-57.) This claim is based upon the following assumptions:

(1) Rinsewater Tank No. 1 was installed at the Property after July 14, 1986. (See Compl. ¶ 54.)

(2) Rinsewater Tank No. 1 was a "new tank system" within the meaning of 40 C.F.R. §§ 260.10 and 264.192(a). (See Compl. ¶ 55.)

Respondents' evidence at the hearing will be that these assumptions are without basis in fact.

E. Count V - Failure to Conduct and Document Inspections of Regulated Hazardous Waste Storage Tanks.

In Count V of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. § 264.195(b) and (d), by allegedly failing to inspect the aboveground portions of Rinsewater Tank No. 1 each operating day. (See Compl. ¶¶ 50-60, 62.) This conclusion is based upon the assumption that Chem-Solv did not inspect the aboveground portions of Rinsewater Tank No. 1 on all "operating days" occurring between May 23, 2007 and February 1, 2008, in accordance with 40 C.F.R. § 264.195(b) and (d). (See Compl. ¶ 61.) The evidence offered to the Court by Respondents at the hearing will dispute this assumption by the Complainant.

F. Count VI - Failure to Comply with Air Pollutant Emissions Standards Applicable to Regulated Hazardous Waste Storage Tanks Under RCRA Subpart CC.

In Count VI of the Complaint, the Complainant claims that Chem-Solv violated 40 C.F.R. §§ 264.1082(b) and 1084(b), by allegedly failing to control air pollutant emissions from Rinsewater Tank No. 1 in accordance with 40 C.F.R. § 264.1084(c) or (d). (See Compl. ¶¶ 64, 68-71.) This claim is based upon the following assumptions:

(1) The sample of settled solids taken from Rinsewater Tank No. 1 by the EPA during the Sampling Event indicated that such settled solids contained a VOC concentration greater than 500 parts per million. (See Compl. ¶ 67.)

(2) Rinsewater Tank No. 1 was a hazardous waste storage tank subject to the requirements of 40 C.F.R. Part 264, Subpart J at the time of the Sampling Event. (See Compl. ¶ 65.)

(3) Rinsewater Tank No. 1 was not exempted from regulation under 40 C.F.R. § 264.1080 pursuant to 40 C.F.R. § 264.1060(b) or exempt from the standards in 40 C.F.R. § 264.1084-1087 pursuant to 40 C.F.R. § 1084(c). (See Compl. ¶ 66.)

The Respondents' evidence at the hearing in this proceeding will show that the above-noted assumptions upon which Count IV is based are incorrect.

G. Count VII – Failure by Failing to Comply With Closure Requirements Applicable to Hazardous Waste Storage Tanks.

In Count VII of the Complaint, the Complainant alleges that Chem-Solv violated 40 C.F.R. § 264.197 by failing to comply with the closure requirements applicable to hazardous waste storage tanks under 40 C.F.R. Part 264, Subparts G and H. (See Compl. ¶¶ 73-77, 84.) This claim is based upon the following assumptions:

(1) Rinsewater Tank No. 1 was a hazardous waste storage tank system that did not have secondary containment that met the requirements of 40 C.F.R. § 264.193(b) and (c) and had not been granted a variance pursuant to 40 C.F.R. § 264.193(g). (See Compl. ¶ 78.)

(2) Chem-Solv removed Rinsewater Tank No. 1 from the ground on or about February 1, 2008. (See Compl. ¶ 80.)

(3) Chem-Solv took samples of the soil surrounding Rinsewater Tank No. 1 but did not analyze such soil samples. (See Compl. ¶ 81.)

(4) Chem-Solv did not remove or decontaminate all waste residues or potentially contaminated components, soils or other materials associated with Rinsewater Tank No. 1 and manage them as hazardous waste following the closure of Rinsewater Tank No. 1. (See Compl. ¶ 82.)

(5) Chem-Solv did not have a closure plan meeting the requirements specified in 40 C.F.R. Part 264, Subparts G and H. (See Compl. ¶ 83.)

The evidence offered by the Respondents at the hearing in this matter will establish that the regulatory requirements upon which Count VII is based do not apply in this context of the underlying facts.

III. Summary Defenses That Respondents Intend to Pursue at the Hearing

The alleged violations enumerated above are premised upon five (5) erroneous assumptions made by the Complainant: (1) rinsewater contained in Rinsewater Tank No.1 was a "solid waste"; (2) settled solids contained in Rinsewater Tank No. 1 were a "regulated waste"; (3) the 55 gallon drum of sodium hydrosulfide identified by the EPA contained a "solid waste"; (4) empty aerosol cans allegedly observed in a solid waste receptacle had not been characterized by Chem-Solv; and (5)

samples of rinsewater and settled solids collected by the EPA properly characterized such materials. The evidence presented by the parties at the hearing will demonstrate that all five (5) of the above-listed assumptions are incorrect.

Generally, RCRA establishes certain management requirements for materials that are "hazardous wastes." In order to be a RCRA regulated "hazardous waste", a material must (1) meet the definition of a "solid waste" and (2) meet one of the definitions of "hazardous waste". With the exception of Count II of the Complaint, all of the alleged violations asserted in the Complaint are contingent upon each of the materials in question – rinsewater, settled solids, sodium hydrosulfide and aerosol cans – falling within the scope of the definitions of "hazardous waste" under RCRA. For example, if the rinsewater contained in Rinsewater Tank No. 1 is not "solid waste," then Chem-Solv is not liable for the violations alleged in Counts III through VII of the Complaint. Likewise, if the rinsewater contained in Rinsewater Tank No. 1 and the sodium hydrosulfide identified by EPA were not "solid wastes", and the settled solids contained in Rinsewater Tank No. 1 were subject to an exemption from regulation as a "hazardous waste", Chem-Solv is not liable for the violation alleged in Count I of the Complaint.

Moreover, if, as the evidence presented by the Respondents at the hearing will demonstrate, the samples of the rinsewater and settled solids contained in Rinsewater Tank No. 1 taken by the EPA did not properly represent and, therefore, characterize such materials or if the analysis of such samples were not properly performed, then the Complainant cannot establish by a preponderance of the evidence that such materials meet the definitions of "hazardous waste" under 40 C.F.R. §§ 260.10 and 261.3. Thus, if the EPA's flawed samples do not properly characterize the rinsewater and settled solids contained in Rinsewater Tank No. 1, and its analysis of such samples does not establish by a preponderance of the evidence that such materials meet the definitions of "hazardous waste", then

Chem-Solv is not liable for the violations alleged in Counts I, III, IV, V, VI and VII of the Complaint.

A. The Rinsewater in Rinsewater Tank No. 1 Was Not a "Solid Waste."

1. Definition of "Solid Waste"

In 40 C.F.R. § 260.10, the term "solid waste" is defined as "solid waste defined in [40 C.F.R. §261.2]." The term "solid waste" is further defined in 40 C.F.R. §261.2(a)(1) as "any discarded material that is not excluded by § 261.4(a) or that is not excluded by variance granted under §§ 260.30 and 260.31." The term "discarded material" is defined in 40 C.F.R. §261.2(a)(2) as "any material which is: (i) *abandoned*, as explained in paragraph (b) of this section; (ii) *recycled* as explained in paragraph (c) of this section; or (iii) considered *inherently waste-like*, as explained in paragraph (d) of this section ...". Notably, the Complainant has not alleged that the rinsewater contained in Rinsewater Tank No. 1 was "inherently waste like" as that term is defined in 40 C.F.R. §261.2(d) or that such materials were "recycled" within the meaning of 40 C.F.R. §261.2(c).

Under 40 C.F.R. §261.2(b), materials are "discarded material" and, therefore, "solid waste" if they are "abandoned" by being: (1) disposed of; (2) burned or incinerated; (3) accumulated, stored or treated (but not recycled) before or in lieu of being abandoned by being disposed of, burned or incinerated. The evidence presented to the Court by the Respondents at the hearing will demonstrate that the rinsewater contained in Rinsewater Tank No. 1 was not "solid waste" within the meaning of 40 C.F.R. § 260.10 or 40 C.F.R. § 261.2 because such materials had not been "abandoned" or "recycled" as those terms are defined in 40 C.F.R. § 261.2(b) and 40 C.F.R. § 261.2(c), respectively.

2. Definition of "Hazardous Waste"

The term "hazardous waste" is defined in 40 C.F.R. § 260.10 as "hazardous waste as defined in § 261.3 of this chapter." 40 C.F.R. § 261.3 provides, in pertinent part, that a "solid waste" is a "hazardous waste" if: "(1) it is not excluded from regulation as a hazardous waste under § 261.4(b);

and (2) it meets any of the following criteria: (i) it exhibits any of the characteristics of hazardous waste identified in subpart C of [40 C.F.R. § 261] ... (ii) it is listed in Subpart D of [40 C.F.R. § 261] and has not been excluded from the lists in Subpart D of [40 C.F.R. § 261] under §§ 260.20 and 260.22 of this chapter." In addition to the § 261.4(b) exclusion cited above, there are exemptions that limit the requirements that hazardous wastes are subject to. For example, even if a material meets the definition of "solid waste", if it is exempted from regulation as a "hazardous waste" under 40 C.F.R. 261.4(c), then it is not subject to the requirements set for in RCRA allegedly violated.

3. *Summary of Respondents' Anticipated Evidence Concerning Chem-Solv's Drum Rinsing Operation.*

The evidence presented by the Respondents at the hearing will show that, in May 2007, as part of its business of repackaging chemical products from bulk storage containers such as tanks and tanker trucks into drums, Chem-Solv rinsed off the exterior surface of drums after they had been used in order to remove dust, dirt, and debris that had accumulated on them during outdoor storage of the empty drums. Respondents' evidence further will show that the rinsewater used to rinse off the exterior of such drums was collected in Rinsewater Tank No. 1. Respondents' evidence will establish the rinsewater was then pumped up and out of the Rinsewater Tank No. 1 into a 6,000 gallon above ground storage tank ("Rinsewater Tank No. 2") through a particulate filter. Respondents' evidence will be that such particulate filter was used in order to protect the pump by preventing it from becoming clogged. Respondents' evidence also will show that, thereafter, the rinsewater was reused to rinse the exterior of additional drums in the same manner described above. Chem-Solv's drum rinsing operation was designed and implemented with the intent of conserving water and limiting its consumption of tap water and further reducing Chem-Solv's operating costs.

The evidence offered by the Respondents at the hearing will further show that, primarily during winter months, the rinsewater contained in Rinsewater Tank No. 1 and Rinsewater Tank No. 2 was used as a raw ingredient in the creation of a glycol and water based anti-freeze conditioning

agent product called FreezeCon. Chem-Solv sold FreezeCon to its coal industry customers, who applied it directly to coal during loading into rail cars in preparation for transportation in cold weather. The Respondents' evidence will establish the ongoing production of Chem-Solv's FreezeCon product using rinsewater during winter months for several years and after the tank was removed in early 2008.

Because the Respondents' evidence will establish that some of the rinsewater contained in Rinsewater Tank No. 1 was used as a raw ingredient in a marketable product, FreezeCon, or reused to rinse the exterior surface of additional drums containing Chem-Solv's chemical products, such rinsewater was not a "discarded material" within the meaning of 40 C.F.R. §261.2(b). The Respondents' evidence at the hearing further will show that the rinsewater contained in Rinsewater Tank No.1 did not become a "discarded material" and, thus, it was not a "solid waste" until Chem-Solv made an election or determination to dispose of it and pumped it from the tanks, and not before such point in time. For these reasons, the Complainant will not establish by a preponderance of the evidence that the rinsewater was a "solid waste" at the time of the Sampling Event. Accordingly, for the reasons set forth above, and those further discussed below, the Complainant will not be able to establish by a preponderance of the evidence that the Respondents are liable for the violations alleged in Counts I, III, IV, V, VI and VII of the Complaint.

B. The Settled Solids Contained in Rinsewater Tank No. 1 Were Not a Regulated Waste.

1. The Settled Solids Contained in Rinsewater Tank No. 1 Are Exempted from Regulation Under 40 C.F.R. § 261.4(c).

The Respondents' evidence additionally will establish that, assuming for the sake of argument that the settled solids contained in Rinsewater Tank No. 1 met the definitions of a "discarded material" and a "solid waste", such settled solids are exempted from regulation as "hazardous waste" under the Manufacturing Process Unit ("MPU") exemption found in 40 C.F.R.

§261.4(c). The Respondents' evidence specifically will show that, from a regulatory perspective, the settled solids contained in Rinsewater Tank No. 1 are subject to the exemption set forth in 40 C.F.R. §261.4(c), which provides, in pertinent part, that:

> A hazardous waste which is generated in a product or raw material storage tank ... or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to regulation under parts 262 through 265, 268, 270, 271 and 124 of this chapter or to the notification requirements of section 3010 of RCRA until it exits the unit in which it was generated, unless the unit is a surface impoundment, or unless the hazardous waste remains in the unit more than 90 days after the unit ceases to be operated for manufacturing, or for storage or transportation of product or raw materials.

40 C.F.R. §261.4(c).

As provided in 40 C.F.R. §261.4(c), materials generated in a product or raw material storage tank, a manufacturing process unit, or an associated non-waste-treatment-manufacturing unit generally are not subject to regulation as "hazardous waste" under RCRA, including the waste determination requirements set forth in 40 C.F.R. §262.11, the permitting requirements found in 40 C.F.R. Part 270, and the tank requirements contained in 40 C.F.R. §265, Subpart J. Stated differently, the exemption set forth in 40 C.F.R. 261.4(c) expressly applies to every regulatory requirement referenced by the Complainant regarding the settled solids, including 40 C.F.R Part 270 (Count I – Operating a Regulated Facility Without a Permit), 40 C.F.R. § 262.11 (Count II – Failure to Make a Waste Determination), 40 C.F.R. §264.193 (Count III – Failure to Have Secondary Containment), 40 C.F.R. §264.192 (Count IV – Failure to Obtain a Tank Assessment), 40 C.F.R. §264.195 (Count V – Failure to Conduct Inspections), 40 C.F.R. §264.195 (Count VI – Failure to Comply with Subpart CC Emissions Standards for Tank), and 40 C.F.R. §264.197 (Count VII – Failure to Properly Close a Regulated Tank).

When the MPU exemption took effect in 1980, the EPA expressed its intent behind the exemption was to regulate potentially "hazardous waste" contained in tanks that are integral to a

manufacturing process, such as Rinsewater Tank No. 1. See Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4). The evidence offered by the Respondents at the hearing will demonstrate that the EPA did not intend to apply the containment requirements under RCRA to "hazardous waste" contained in tanks that are integral to the manufacturing process until such waste is removed for disposal or until such wastes exit the manufacturing process. Furthermore, such evidence additionally will establish that the EPA intended to provide relief to manufacturers in cases where the point of "hazardous waste" generation could be the tank itself.

As applied in the context of Rinsewater Tank No. 1, the Respondents' evidence at the hearing will show that the settled solids contained in Rinsewater Tank No. 1 did not become a regulated waste until they were physically removed from the tank for the purpose of disposal, and not before that point in time. As such, the Respondents' evidence will show that, at the time of Sampling Event, the settled solids contained in Rinsewater Tank No. 1 were not a regulated waste under RCRA. For this reason too, Chem-Solv is not liable for the violations alleged in Counts I through VII of the Complaint.

2. *Respondents' Evidence Will Show that Chem-Solv Properly Characterized the Settled Solids Contained in Rinsewater Tank No. 1.*

Moreover, contrary to the Complainant's claim in Count II that Chem-Solv failed to characterize the settled solids contained in Rinsewater Tank No. 1, the evidence offered by the Respondents at the hearing will establish that Chem-Solv had, in fact, previously characterized the settled solids. Specifically, the Respondents expect that their evidence will show that samples of the settled solids contained in Rinsewater Tank No. 1 collected and analyzed by Chem-Solv in May 2006, indicated that such settled solids did not meet the regulatory definitions of "hazardous waste" under 40 C.F.R. § 260.10 and 40 C.F.R. § 261.3. The Respondents' evidence at the hearing further will be that, thereafter, Chem-Solv managed the settled solids contained in Rinsewater Tank No. 1 in

accordance with its knowledge of the results of the analysis of the samples of settled solids it collected in May 2006. Based on the Chem-Solv's generator knowledge of the particulars of its drum rinsing process and the results of the analysis of the samples of settled solids it collected in May 2006, there was no basis to expect chloroform, tetrachloroethene or trichloroethene to be in Rinsewater Tank No. 1.

For these reasons, the evidence that will be offered to the Court by the Respondents will demonstrate that the violations alleged in Counts I through VII of the Complaint are without merit, and Chem-Solv is not liable therefor.

C. The Drum of Sodium Hydrosulfide Observed by the EPA During the Sampling Event Was Not "Solid Waste."

As set forth above, in Count I of the Complaint, the Complainant alleges that it observed a 55 gallon drum of sodium hydrosulfide during the Sampling Event and that such drum of sodium hydrosulfide was shipped off site as a hazardous waste on February 20, 2008. (See Compl. ¶ 30.) The Respondents' evidence will show that, even though sodium hydrosulfide was shipped off site as a hazardous waste on February 20, 2008, the sodium hydrosulfide observed by the EPA during the Sampling Event was not a "solid waste" or a "hazardous waste" on that date. This is the case, because, as the Respondents' evidence will establish, the drum of sodium hydrosulfide observed by the EPA during the Sampling Event was one of several partial drums of sodium hydrosulfide product that were in Chem-Solv's inventory at the Property at that time. The other partial drums of sodium hydrosulfide in Chem-Solv's inventory at the time of the Sampling Event were not noted by the EPA.

The Respondents' evidence will demonstrate that the sodium hydrosulfide in its inventory at the time of the Sampling Event was useable product. Thereafter, Chem-Solv combined several partially full drums of sodium hydrosulfide, including the drum observed by the EPA during the Sampling Event into three drums and contacted one of its customers to determine if it wanted this product. This customer, Respondents' evidence will show, committed to purchasing two such drums

of sodium hydrosulfide, but they would not take delivery until the fall of 2008. The Respondents' evidence additionally will indicate that, after Chem-Solv determined that some, but not all, of its inventory of sodium hydrosulfide would be sold to this customer later in 2008, it decided to dispose of the remainder of the product, rather than continue to store it. This decision by Chem-Solv to dispose of the remainder of its inventory of sodium hydrosulfide, according to the Respondents' evidence, was based upon its perception that the EPA had specific concerns about such material, despite the fact that it was a marketable product at that time.

Consequently, the evidence offered to the Court during the hearing will be that Chem-Solv shipped the unneeded drum of sodium hydrosulfide off site as hazardous waste on February 20, 2008, the same month that its customer advised that it only wanted a portion of such product in Chem-Solv's inventory. Such evidence will further show that, in October 2008, Chem-Solv shipped the desired portion of Chem-Solv's inventory of sodium hydrosulfide to its customer as planned.

In summary, the evidence at the hearing will establish that the drum of sodium hydrosulfide observed by the EPA during the Sampling Event was not a "solid waste" at that time. Thus, for these reasons, in addition to those set forth above, Chem-Solv is not liable for the violations alleged in Count I of the Complaint.

D. Empty Aerosol Cans Observed During the Inspection and the Sampling Event Had Been Properly Characterized.

As set forth above, the Complainant claims in Count II of the Complaint that Chem-Solv did not properly characterize aerosol cans that the EPA allegedly observed in a solid waste receptacle during the Sampling Event. (See Compl. ¶¶ 43-44.) The evidence presented to the Court during the hearing will demonstrate that this claim is without merit. In fact, as the Respondents' evidence will show, Chem-Solv had previously determined that such aerosol cans, when emptied of their contents using standard means, such as depressing the spray nozzle until no additional material comes out, met the definition of "empty" as that term is defined in 40 C.F.R. § 261.7. Moreover, the

Respondents' evidence will be that Chem-Solv determined that such aerosol cans satisfied each relevant element of the definition of "empty" under 40 C.F.R. § 261.7. The Respondents' evidence will include the fact that Chem-Solv personnel had been instructed to only deposit completely "empty" aerosol cans into solid waste receptacles located on the Property and that any and all non-empty aerosol cans were to be used until they were, in fact, "empty" or, if an aerosol can were determined to be inoperable before they were empty, such personnel were instructed to return it for credit to the vendor from which it had been purchased.

For these reasons, the Respondents' evidence at the hearing will indicate that Chem-Solv made a waste determination concerning the aerosol cans observed by the EPA during the Sampling Event. Thus, the Complainant will not be able to prove by a preponderance of the evidence that Chem-Solv is liable for the violations alleged in Count II of the Complaint concerning the aerosol cans at issue in this proceeding.

E. Samples of Rinsewater and Settled Solids Collected by the EPA During the Sampling Event Do Not Properly Characterize these Materials.

Assuming for the sake of argument that the rinsewater and settled solids contained in Rinsewater Tank No. 1 met the definitions of "discarded materials" and "solid wastes", the Complainant cannot prove by a preponderance of the evidence that such materials met the definition of "hazardous waste", because the Complainant's evidence as well as the Respondents' evidence will show that the samples collected by the EPA during the Sampling Event and the EPA's analytical results do not meet the EPA's own standards for sampling and analysis. Accordingly, the Respondents expect that the evidence offered to the Court during the hearing will indicate that the analytical results upon which the violations alleged in Counts I through VII of the Complaint are based are not reliable or valid. Specifically, the Respondents' evidence at the hearing will be that the data upon which the Complainant's conclusion that the rinsewater and the settled solids contained in Rinsewater Tank No. 1 is based were flawed in the following respects: (1) they were not

representative of the ultimate waste streams generated and shipped off site for disposal; (2) they were collected using sampling protocols and methodology that is wholly inconsistent with established EPA procedures; and (3) the EPA failed to incorporate sufficient quality control to ensure the reliability of its analytical results.

The evidence offered by the Respondents at the hearing in this proceeding will include certain regulations promulgated by the EPA, certain guidance documents published by the EPA and certain guidance authored by other professional organizations, such as the American Society for Testing and Materials ("ASTM") providing detailed sampling requirements, which regulations and guidance were promulgated and published to ensure that potentially hazardous wastes are sampled and analyzed in a reliable and defensible manner. The Respondents' evidence further will demonstrate that the methodology used by the EPA did not conform to such regulatory requirements or such published guidance documents and, thus, the samples collected by the EPA generated analytical results that are not representative of the waste streams at issue in this matter. Consequently, the evidence presented to the Court at the hearing will show that the Complainant's conclusion that the rinsewater and the settled solids met the definition of "hazardous waste" under 40 C.F.R. §§ 260.10 and 261.3 cannot reasonably be based upon EPA's flawed analytical results. For the same reasons, such flawed analytical results do not provide the Complainant a defensible basis for this regulatory enforcement proceeding.

The rinsewater and settled solids contained in Rinsewater Tank No. 1 cannot be considered "hazardous waste" unless they are proven by the Complainant to meet the definition of "hazardous waste" set forth in 40 C.F.R. §§ 260.10 and 261.3. Thus, due to these fatal flaws in the sampling and analytical protocols and methodology used by the EPA, the Complainant will not be able to prove by a preponderance of the evidence that the rinsewater and the settled solids were "hazardous wastes."

Therefore, for these reasons, in addition to those set forth above, the evidence presented to the Court by the parties at the hearing will demonstrate that Chem-Solv is not liable for the violations alleged in Counts I through VII of the Complaint, all of which are based upon the EPA's unreliable and invalid analytical results.

The Respondents hereby reserve their right to pursue any and all defenses that are supported by the evidence offered by the parties at the hearing in this matter.

Dated: March 8, 2012 Chem-Solv, Inc. and Austin Holdings-VA, L.L.C.

By ______________
Of Counsel

Charles L. Williams (VSB No. 1145)
J. Scott Sexton (VSB No. 29284)
Maxwell H. Wiegard (VSB No. 68787)
GENTRY LOCKE RAKES & MOORE
10 Franklin Road, SE, Suite 800, Roanoke, VA 24011
P. O. Box 40013, Roanoke, VA 24022-0013
Telephone: 540-983-9300
Facsimile: 540-983-9400

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BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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In the Matter of: 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)

CERTIFICATE OF SERVICE

I certify that, on March 8th, 2012, I sent by Federal Express, next day delivery, a copy of the Respondents' Pretrial Brief to the addressees listed below.

The Honorable Susan L. Biro
EPA Office of Administrative Law Judges
1099 14th Street, NW
Suite 350 Franklin Court
Washington, DC 20005

A.J. D'Angelo
Senior Assistant Regional Counsel
U.S. EPA – Region III
1650 Arch Street
Philadelphia, PA 19103-2029