UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of:	)	
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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.	)	

RESPONDENTS' NOTICE OF APPEAL

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RESPONDENTS' NOTICE OF APPEAL

I. INTRODUCTION

Respondents Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, LLC ("Austin Holdings") (collectively "Respondents"), by counsel, in accordance with 40 C.F.R. § 22.30, file this their Notice of Appeal of the Initial Decision in the above-styled matter, served June 5, 2014.

II. NATURE OF THE CASE

This is an appeal of an Initial Decision issued June 5, 2014 by Administrative Law Judge Susan Biro ("ALJ"). The ALJ ruled that the Respondents violated Subtitle C of the Resource Conservation and Recovery Act of 1975 ("RCRA" at 42 U.S.C. §§ 6921 – 6939e), and Virginia's Administrative Code sections 20-60-260 through 20-60-279.

This RCRA enforcement action has a protracted history.[1] Region 3 of the Environmental Protection Agency ("EPA") filed its administrative complaint on March 31, 2011. The Respondents answered May 20, 2011. The previously-assigned ALJ denied the EPA's motion for partial accelerated decision on February 7, 2012, finding that "several genuine issues of material fact and several practical considerations remain," making an accelerated decision inappropriate. (Op. at 7 (quoting Order).) The ALJ wrote:

> As Complainant implicitly concedes, the conflicting affidavits and declarations offered by each party on the various issues, including the purpose of the Pit/Rinsewater Storage Tank, the characterization of its contents, the quantity of its contents, and the ultimate disposition of those contents, concern the credibility of multiple individuals (including expert witnesses). Such issues of credibility are best addressed in the context of an evidentiary hearing.

(*Id.*)

A five-day evidentiary hearing ensued to resolve these factual issues involving the purpose and use of the so-called "Pit."[2] Other factual issues included disposition of the Pits' contents, whether a certain drum of sodium hydrosulfide was inventory or waste, and whether the Respondents properly disposed of cans of spray paint. The EPA tendered forty-one exhibits and five witnesses: Elizabeth A. Lohman, George

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[1] The full procedural history is set forth in the Initial Decision. (Op. at 5-8.)

[2] The Respondents prefer the term "Rinsewater Storage Tank" for the unit at issue, given its integration into drum-rinsing operations and the manufacture of FreezeCon. For the sake of convenience, however, the Respondents will refer to it as the "Pit" in this brief.

Houghton, Peggy Zawodny, Kenneth J. Cox, and expert Dr. Joe Lowry. The Respondents countered with twenty-three exhibits and three witnesses: Jamison G. Austin, Donald Tickle, and expert Scott Perkins, P.E.

The parties exchanged post-hearing briefs, continuing to dispute the facts and the application of RCRA's regulatory scheme. Specifically, throughout this case, the Respondents have invoked an exemption at 40 C.F.R. § 261.4(c), which permits manufacturing process units (and other similar vessels) to hold hazardous materials without violating RCRA. Under this "MPU Exemption," the settled solids in the Pit are not subject to regulation as "hazardous waste" under RCRA until purposefully removed from the Pit. The Respondents have also maintained that Chem-Solv's drum-rising process satisfies the elements of EPA's "continued use policy," such that Pit water was not a waste until disposed of. *See* Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614, 624 (Jan. 4, 1985).

The ALJ issued her Initial Decision two years later. Over the course of 126-pages, she "resolved" substanially all factual issues in EPA's favor, systematically preferred EPA's witnesses, and disregarded credible evidence adduced by the Respondents.

Most troubling is the ALJ's determination that the Pit water was not reused to rinse drums or to manufacture FreezeCon. These facts were essential to the Respondents' reliance on the RCRA exemption set forth in 40 C.F.R. § 261.4(c), and to their argument that the water in the Pit was not "solid waste." To reach her conclusion,

the ALJ dismissed volumes of evidence and credible witness testimony. Her ruling effectively implied that the Respondents concocted a reuse narrative post hoc to sidestep EPA enforcement and to avoid civil penalties. (*See, e.g.*, Op. at 57-58.) That, however, is a practical impossibility.

The ALJ's determination also reflects a fundamental misunderstanding of how the Respondents' business operates. The best evidence of day-to-day operations at Chem-Solv's facility should come from the live testimony of Chem-Solv's employees and environmental consultant, but the ALJ instead favored the testimony of regulators and dubious hearsay statements of a single former employee, Cary Lester – whom the EPA failed to produce at the hearing. The ALJ erred by not giving sufficient weight to the live testimony of Chem-Solv's Vice President and General Manager Jamison Austin and employee Donald Tickle. She strained to find inconsistencies in their testimony and insinuated they had been coached by counsel.

Similarly, the ALJ was unfairly dismissive of the Respondents' expert Scott Perkins, a professional engineer who has consulted with Chem-Solv on environmental matters since 2008. (TR3 at 174.) Not only is Perkins intimately familiar with Chem-Solv's business operations, but he qualified as an expert in the fields of environmental compliance with RCRA, sampling methodologies, and risk analysis, among other things. (TR3 at 174.) Nevertheless, the Initial Decision never mentions his credentials or

experience, and it routinely writes off his testimony as either unreliable (Op. at 59) or unauthorized legal opinion. (Op. at 76 n.93.)

Therefore, in resolving factual disputes, the ALJ categorically and arbitrarily favored the EPA over the Respondents.

For these reasons, which are developed more fully below, the Environmental Appeals Board should reverse the Initial Decision of the ALJ on all Counts and enter a final order in favor of the Respondents.

III. SUMMARY OF ORDER APPEALED FROM

Under Count I, the ALJ found that the Respondents owned and operated a hazardous waste storage facility without the requisite permit or interim status in violation of 9 Va. Admin Code § 20-60-270(A), which incorporates by reference 40 C.F.R. Part 270, and Section 3005(a) 42 U.S.C. § 6925(a). The ALJ specifically found that, without a permit or interim status, from at least May 23, 2007 until February 1, 2008, the Respondents stored at their facility hazardous waste consisting of Pit water, Pit sludge, and a 55-gallon drum of waste sodium hydrosulfide.

Under Count II, the ALJ found that Chem-Solv failed to make hazardous waste determinations required of a generator of solid waste, in violation of 9 Va. Admin Code § 20-60-262(A), which incorporates by reference 40 C.F.R. § 262.11. The ALJ specifically found that, from May 23, 2007 until February 1, 2008, the Respondents failed to perform hazardous waste determinations on the Pit water, Pit sludge, and discarded aerosol

paint cans generated, treated, stored, or disposed of at the facility. The ALJ found that Austin Holdings is not liable for this Count.

Under Count III, the ALJ found that the Respondents failed to provide the secondary containment for the Pit as required by 40 C.F.R. § 264.193(a), (d), and (e), as incorporated by reference in 9 Va. Admin Code § 20-60-264(A).

Under Count IV, the ALJ found that the Respondents did not obtain and/or keep on file the requisite written certification as to the design and installation of the Pit in accordance with 40 C.F.R. § 265.192(b)-(f) as required by 9 Va. Admin. Code § 20-60-264(A).

Under Count V, the ALJ found that the Respondents failed to inspect or document inspections of the Pit and surrounding area, including any secondary containment structures, in violation of 9 Va. Admin. Code § 20-60-264(A), which incorporates by reference 40 C.F.R. § 265.195.

Under Count VI, the ALJ found that the Respondents failed to control air pollutant emissions from the Pit in accordance with Tank Level 1 or 2 controls specified in 40 C.F.R. § 265.1084(c) or (d), and so violated 9 Va. Admin. Code § 20-60-264(A).

Under Count VII, the ALJ found that the Respondents failed to have a closure plan and comply with tank closure requirements specified in 40 C.F.R. Part 264 in regard to its closure and removal of the Pit on or about February 1, 2008, in violation of 9 Va. Admin. Code § 20-60-264(A), which incorporates by reference 40 C.F.R. § 264.197.

The ALJ imposed a total aggregate penalty of $597,026.28 against both Respondents, jointly and severally, for the violations alleged in Counts I, III, IV, V, VI, and VII. An additional penalty of $15,312, 50 was assessed against Chem-Solv, Inc., individually, for the violation alleged in Count II.

IV. ISSUES PRESENTED FOR REVIEW

(1) Did the ALJ erroneously determine that the "Pit" was a hazardous waste storage tank regulated by RCRA?

(2) Did the ALJ erroneously rule that Chem-Solv failed to make required waste determinations with respect to Pit materials and aerosol paint cans?

(3) Did the ALJ err by systematically disregarding, dismissing, or otherwise drawing all negative inferences from the Respondents' evidence?

V. FACTS RELEVANT TO ISSUES PRESENTED FOR REVIEW

A. The Respondents reused "Pit" water to wash the exterior surface of drums.

Until 1999, Chem-Solv rinsed the inside of polyethylene drums and totes instead of sending them off site for reconditioning. (TR4 at 195.) At that time, the Pit was connected to the City of Roanoke's POTW system, and the water from Chem-Solv's drum-rinsing operations collected in the Pit and was discharged directly to the City Sewer. (TR4 at 195.) For that period, all parties concur that there was no violation of applicable regulations. In 1999, Chem-Solv voluntarily discontinued this practice because the POTW's reporting limits for zinc increased. (TR4 at 196-97.)

By May 2007, at the time of the EPA's inspection and sampling, Chem-Solv's use of the Pit had changed: it collected the water used to rinse off the outside of drums and totes that were going to be filled or had been filled on the acid pad prior to shipping them to a customer. (TR4 at 127-29, 199.) Chem-Solv rinsed only the outside of containers as part of its packaging and distribution process because its customers required clean containers. (TR4 at 199-200.) Shipping clean drums also makes good business sense. (*See id.*)

Chem-Solv regularly reused the water from the Pit to rinse the outside of drums and totes. (TR4 at 200; TR3 at 127-129, 133.) In fact, Chem-Solv reused such water multiple times in an effort to maximize its cost savings. (See TR4 at 202, 205.) This water drained into a drum on the acid pad that flowed through PVC pipe into the Pit. (TR4 at 202-203.) From the Pit, the water was pumped into a 6,200 gallon above ground storage tank (the "AST") that Chem-Solv installed adjacent to the Pit after it stopped discharging water to the POTW. (TR3 at 130; TR4 at 203.)

The Pit was an approximately 1,800 gallon capacity below ground tank with an opening at the top that was approximately 6 feet wide. (TR4 at 203; TR3 at 129.) The Pit was approximately 7.5 feet deep. (TR3 at 129.) The Pit had a wall that was between three and four feet high around the top. (TR3 at 129; TR4 at 203.)

When the water that collected in the Pit reached a certain level, Chem-Solv would pump it into the adjacent AST. (TR4 at 204.) Chem-Solv employees then would

pump the water from the AST using a commercial grade power washer unit and use it for rinsing additional drums on the acid pad. (TR4 at 200, 204.) From there, the water again would flow through the drain in the acid pad into the Pit. (TR4 at 204.) When the Pit filled up again, Chem-Solv's employees would pump this reused water into the AST. (TR4 at 204.)

Chem-Solv occasionally pumped water from the AST into totes for future reuse of the water. (TR3 at 135-38; TR4 at 204-05; 213-14.)

B. The Respondents reused "Pit" water to manufacture FreezeCon.

Chem-Solv also reused the water that collected in the Pit as a raw material in the production of a freeze conditioning agent known as FreezeCon. (TR4 at 204; TR3 at 134-137.) Mr. Tickle testified that he personally used water that collected in the Pit to make FreezeCon. (TR3 at 134-137; RX 3 at CS032, CS035.) The evidence presented at the Hearing included Chem-Solv sales records for FreezeCon and Chem-Solv batch tickets for FreezeCon, some of which establish that rinsewater was used as a raw material in the production of FreezeCon. (TR4 at 210-214; TR3 at 136-137; RX 4 at CS123-CS127; RX 3 at CS032, CS035.) The Pit and the appearance of its water was irrelevant to the usefulness of the water as a raw material in the production of FreezeCon. (TR 4 at 223.)

The Respondents reused Pit water in an effort to control costs. (TR4 at 205.) Specifically, Chem-Solv's cost per gallon of water decreased as the number of times it

reused rinsewater increased. (TR4 at 205.) The Respondents preferred to reuse water instead of paying to have it removed for disposal. (TR4 at 205.)

Although Chem-Solv attempted to maximize its reuse of water that collected in the Pit, it occasionally shipped the water off site for disposal. (TR4 at 215-216; TR4 at 219-220.) Prior to doing so, Chem-Solv employees adjusted the water's pH in the Pit. (TR4 at 203-224; TR3 at 139.) Chem-Solv had no reason to believe that Trichloroethene or Tetrachloroethene would be found in the water, or in the Pit's settled solids. (*See* TR4 at 248.)

C. The 55-gallon drum of sodium hydrosulfide was inventory.

The 55-gallon drum of sodium hydrosulfide observed by the EPA during the May 2007 Sampling Event was not a "solid waste" or a "hazardous waste" on that date. (*See* TR3 at 180-182.) The drum was one of several partial drums of sodium hydrosulfide product that were in the Chem-Solv's inventory at that time. (TR4 at 192-193.) These drums contained useable product. (*See* TR4 at 192.) Chem-Solv contacted one of its customers to determine if it wanted this product. (*See* TR4 at 192.) These drums of sodium hydrosulfide may have been slow-moving products, but they were still useable and valuable products in Chem-Solv's inventory. This customer committed to purchasing two such drums of sodium hydrosulfide, but would not take delivery until the fall of 2008. (*See* TR4 at 192-193.) After the Respondents 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. (*See* TR4 at 194.) The Respondents' decision to dispose of the remainder of its inventory of sodium hydrosulfide 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. (*See* TR4 at 194.)

Consequently, the Respondents 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 that was in inventory. (*See* TR4 at 194-195.) In October 2008, the Respondents shipped the desired portion of its inventory of sodium hydrosulfide to its customer as planned. (*See* TR4 at 275; *see* also RX 15 at CS 196; RX2 at CS003, ¶ 7.).)

D. The Respondents only threw away aerosol cans of spray paint when empty.

Chem-Solv had a policy against throwing away aerosol cans of spray paint that were not empty. Chem-Solv understood aerosol cans to be "empty" when the spray nozzle was depressed but no material came out. Chem-Solv personnel had been instructed only to deposit completely empty cans into solid waste receptacles on site and that any and all non-empty aerosol cans were to be used until they were, in fact, empty. Or, if an aerosol can was found to be inoperable before empty, Chem-Solv personnel were instructed to return it to the vendor for credit. (TR 4 at 249-50.)

E. When the Respondents removed the Pit, not all 17,500 lbs shipped offsite for disposal were settled solids or "sludge" from the Pit.

The Pit was cleaned out between late January and early February 2008. (TR 4 at 241.) The exact measure of settled solids removed from the Pit is uncertain for several reasons.

Approximately two feet of solids settled to the bottom of the Pit. (TR3 at 144.) Chem-Solv employees used a backhoe, shovels, and pails to remove the solids. (TR3 at 144; TR4 at 243-244.) The settled solids were containerized in 32 individual steel drums filled to varying depths, some as low as one-third full. (TR4 at 10.) Each drum contained a unique solid-to-liquid ratio. (TR4 at 10.) Also packed into these drums was broken concrete from the demolition of the wall around the Pit. (TR4 at 244; *see* TR3 at 144.) The drums may also have included other debris, such as sand anchoring the Pit into the ground. (TR3 at 150.)

Since all of the 32 steel drums contained some arguably hazardous waste all of them were shipped off as hazardous waste along with three polyethylene drums containing material from an earlier June 2007 cleanout. (TR3 at 242; *see* CX 23 at EPA 1127.) The drums were not weighed, as Chem-Solv paid for their removal on a dollars per container basis. (TR4 at 242.)

VI. ARGUMENT ON ISSUES PRESENTED

(1) The ALJ erroneously determined that the "Pit" was a hazardous waste storage tank.

A. The Pit water was not a solid waste as defined by 40 C.F.R. § 261.2 because it was not "abandoned" and therefore not "discarded material." Instead, the Respondents reused the Pit water to rinse drums and manufacture FreezeCon.

The ALJ concluded that the Respondents did not reuse Pit water to rinse drums or as an ingredient in FreezeCon. (Op. at 62.) Instead, she found that the Respondents simply accumulated, stored, or treated Pit water until it was shipped offsite for disposal. (*Id.*) This conclusion departs from the clear weight of evidence, and it insinuates that the Respondents concocted a reuse narrative in reaction to the enforcement action.

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. (TR3 at 199-200; TR4 at 127-129, 133.) The water used to rinse off the exterior of such drums was collected in the Pit. (TR3 at 127-129; TR4 at 199.) The water was then pumped up and out of the Pit into the AST through a diaphragm pump. (TR4 at 203.) Thereafter, the water was reused to rinse the exterior of additional drums in the same manner described above. (TR4 at 202-203; TR3 at 130.) Chem-Solv's drum-rinsing operation was designed and implemented with the intent of conserving water, limiting its

consumption of municipal tap water, and further reducing Chem-Solv's operating costs. (TR4 at 205.)

Chem-Solv did not "reclaim" the rinsewater as defined in 40 C.F.R. § 261.1(c)(4), and is therefore not a "solid waste" under 40 C.F.R. § 261.2(a)(2)(i)(B), 40 C.F.R. §261.2(c)(3), and 40 C.F.R. §261.1(c)(7). "A material is 'reclaimed' if it is processed to recover a usable product, or if it is regenerated." 40 C.F.R. § 261.1(c)(4). There was no "processing" or "regeneration" of the Pit water prior to reuse. Chem-Solv's reuse of Pit water to rinse drums did not require adjustments to the pH. Chem-Solv employees only adjusted the pH of rinsewater designated for disposal, not before reusing the rinsewater to wash off drums. (TR 4 at 203-24; TR 3 at 139.)

The Pit water was also used as a raw ingredient in the blending of FreezeCon, a glycol- and water-based anti-freeze conditioning agent. (TR3 at 134-38; TR4 at 212-13; RX 3.) Chem-Solv sold large quantities of FreezeCon to its coal industry customers (*See* RX 3, 4 and 5), who applied it directly to coal during loading into rail cars in preparation for transportation in cold weather. (TR3 at 137-38; TR4 at 212.) In 2007, for example, Chem-Solv grossed $231,826.65 in sales of FreezeCon it produced. (RX4.)

Because some of the water contained in the Pit 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 water was not a "discarded material" within the meaning of 40 C.F.R. §261.2(b). (*See* TR4 at 6-7.) The water

contained in the Pit 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. (TR3 at 191-196.)

Similarly, the Respondents' drum-rinsing process satisfied the elements of the EPA's continued use policy. (TR3 at 192-194). *See In re Gen. Motors Auto. – N.A.*, No. RCRA-05-2004-0001, RCRA (3008) Appeal No. 06-02, 2008 EPA App. LEXIS 30 (EAB June 20, 2008) (holding that the "continued use exception" applies when the continued used of a material is similar or consistent with its initial deployment, and when the continued use is legitimate, i.e. (1) effective; (2) necessary; and (3) not in excess of the quantity that would normally be required to achieve the task). *See also* Letter from David Bussard, Waste Identification Division, Office of Solid Waste, U.S. EPA, to Catherine A. McCord, Safety-Kleen 1-2 (Aug. 21, 1998) ("RO 14281"). In RO 14281, the EPA concluded that a used parts washing solvent that is subsequently used for drum washing does not require characterization as a potential solid waste under RCRA's recycling regulations. Specifically, the EPA concluded that "[b]ecause the material... remains a product, your question about the applicability of 40 C.F.R. 261.2(e)(1) is moot. That regulatory section is intended to apply to secondary materials, which is not the case for used solvents that are not yet 'spent.'"

Reusing Pit water to rinse drums is undeniably consistent with Chem-Solv's initial deployment of tap water to do so. (TR3 at 193.)[3] Moreover, reusing Pit water was undoubtedly a legitimate continued use. Pit water was effective in rinsing off debris and dirt from the outside of drums, even as reused water got somewhat dirty itself (*Id.*) It was a necessary step before shipping drums to customers, who expected to receive drums in clean condition, and who would complain to Chem-Solv otherwise. (TR3 at 193-94) Finally, Chem-Solv did not use an excessive amount of Pit water to rinse off drums, only what was needed to get the job done. (TR 3 at 194.) Chem-Solv's reuse of Pit water in this fashion thus satisfies the elements of EPA's continued use policy.

The ALJ disregarded the Respondents' evidence that Pit water was reused to rinse barrels and manufacture FreezeCon. She dismissed the testimony of Jamie Austin, Don Tickle, and expert Scott Perkins, as well as evidence of "batch tickets" documenting the production of FreezeCon.[4] She played up contradictions between Mr. Austin and Mr. Tickle as to whether tap water was ever introduced into the drum-washing system. She doubted that any of the Respondents' witnesses had personal knowledge of Pit-related activities. Mr. Austin, she decided, was an aloof executive

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[3]The ALJ dismissed the testimony of Respondents' expert Scott Perkins regarding application of the continued use policy due to lack of personal knowledge. However, as discussed elsewhere in this brief, Mr. Perkins has been an environmental consultant with Chem-Solv since 2008, has interviewed past and present employees, and therefore is thouroughly familiar with Chem-Solv's business past and present business operations. (*See* TR3 at 194.)

[4] For example, she was skeptical of batch tickets which post-dated the removal of the Pit. (Op. at 58 n.83.) But this skepticism arbitrarily ignores evidence that Chem-Solv occasionally pumped water from the AST into totes for future reuse. (TR3 at 135-38; TR4 at 204-05; 213-14.)

coached by his attorneys. Mr. Tickle, she decided, was a meek subordinate reciting the party line as best he could. Mr. Perkins, she decided, was a hired gun dispensing legal opinions premised on questionable facts from unnamed employees. Finally, like the EPA itself, the ALJ invoked the specter of Cary Lester and polished the halo of Elizabeth Lohman. (Op. at 57-60.) Mr. Lester was Chem-Solv's Operations Manager who was involved in the company's response to government inspections during the relevant time period. Ms. Lohman is an inspector with Virginia's Department of Environmental Quality.

The EPA chose not to subpoena Mr. Lester for the evidentiary hearing yet depended significantly on his hearsay statements to build its case. While the rules of this administrative proceeding permit consideration of out-of-court statements, the ALJ nevertheless accorded Mr. Lester's statements far greater weight than deserved – especially insofar as they were tendered through the testimony of Ms. Lohman who, as described below, exhibited a determined bias against the Respondents.

For example, the ALJ fixated on Mr. Lester's out-of-court statement to Ms. Lohman that Chem-Solv was "looking for potential reuses of waste water," but that it was "still being managed as waste water" at the time of the May 18, 2007 inspection. (Op. at 60 (quoting TR1 at 108-11).) Mr. Lester's "failure" to report reusing Pit water – an out-of-court silence to which Ms. Lohman testified – was also significant to the ALJ. (*Id.*). The ALJ erred by relying substantially on Mr. Lester's out-of-court statements and

silences, especially as conveyed through the testimony of Ms. Lohman, and by disregarding credible evidence contracting Mr. Lester's out-of-court statements offered by the Respondents.

For her part, at the hearing, Ms. Lohman never missed an opportunity to convey negative commentary about Chem-Solv and its employees. The "facts" she presented were tinged with bias. For example, Ms. Lohman routinely testified that Chem-Solv's permit to discharge to the POTW was suspended or revoked:

- "...what we learned is that the Western Virginia Water Authority, the waste water authority, the POTW had revoked [Chem-Solv's] privileges to discharge to the sanitary sewer system." (TR1 at 47.)
- "Mr. Lester explained to us that when [Chem-Solv's] privileges to discharge to the POTW had been revoked or suspended, they began shipping waste water off site." (TR1 at 109.)

Thus, Ms. Lohman was very clear on direct examination that Chem-Solv's privileges to discharge water to the POTW were revoked. Ms. Lohman's use of words like "suspended" or "revoked" on direct examination implied that Chem-Solv misbehaved and was thus the target of punitive measures by the POTW. This negative spin stood in marked contrast to her handwritten field notes, which neutrally observed as follows: "pretreatment permit: no permit currently." (CX 37 at EPA 1477.) Furthermore, on cross-examination, Ms. Lohman acknowledged that the word "revoke" was her word – not anything she learned from the POTW or from Chem-Solv:

> ...I don't know the circumstances or the mechanism that was used, but what I did understand is that the POTW, it was the understanding between the POTW and Chem-Solv, that they could no longer discharge to the POTW. **"Revoked" is just the best word I could use to describe the situation.**

(TR1 at 172-73) (emphasis added). The evidence at trial was that Chem-Solv ceased discharging to the POTW around 1999 or 2000, when the POTW changed its zinc limits. (TR4 at 195-98.) Chem-Solv had determined that its municipal tap water supply was high in zinc and made a business decision to stop discharging to the POTW and, instead, ship waste water offsite. (TR4 at 195-98.) This evidence, coupled with Ms. Lohman's acknowledgment that "revoked" (with its punitive connotations) was her word, clearly show that she did not know the circumstances of Chem-Solv's cessation of discharge to the POTW.

What is more, Ms. Lohman was wedded to the idea that Chem-Solv collected storm water in a swale, directed it toward a low point at the back of the facility against a concrete jersey barrier, and then pumped it into an above-ground tank to be shipped offsite. (TR1 at 98-99; TR at 101.) She testified that storm water from the swale was comingled with Pit water. (TR1 at 101-02.) She further testified that Chem-Solv measured the pH of Pit water only after it was commingled with storm water. (TR1 at 102.) Ms. Lohman's testimony, however, simply echoed out-of-court statements by Mr. Lester and contradicted the practical realities of Chem-Solv's business operations and the evidence in the record from all other sources. As such, it deserved very little weight.

The evidence was that the concrete drainage way and above-ground tank were produced for and constructed in connection with a contingency plan for tanker-truck spills. (TR4 at 186-89.) This was not part of storm water management plan. (TR4 at 187.) Storm water was not combined with water from the Pit and then hauled off. (TR4 at 187.) Chem-Solv had to pay to ship water offsite. Indeed, the primary reason Chem-Solv reused Pit water to rinse the outside of drums and to make FreezeCon was to minimize water purchase and shipment costs. It makes no sense, therefore, that Chem-Solv would purposefully collect storm water only to turn right around and pay to ship it away. Ms. Lohman's testimony thus represented a fundamental misunderstanding of Chem-Solv's operations.

The ALJ afforded both Mr. Lester and Ms. Lohman a high degree of credibility despite these issues of hearsay, bias, and lack of personal knowledge. The ALJ's consistently negative and dismissive review of the Respondents' credible evidence should raise a red flag for this Appeals Board.

B. The EPA failed to meet its burden of proof that the Pit materials (water and settled solids) were hazardous wastes, because the samples were not sufficiently representative or reliable.

The ALJ concluded that the samples taken from the Pit were sufficiently reliable and representative. (Op. at 67-71.) However, the EPA failed to prove by a preponderance of the evidence that such materials met the definition of "hazardous waste," because the EPA's sampling methodology was deeply flawed, failing even to

meet the agency's own standards. (*See* TR3 at 217-220; TR3 at 233-236.) Specifically, the EPA's samples of rinsewater and settled solids from the Pit were flawed in the following ways: (1) they were not representative of the ultimate waste streams generated and shipped off site for disposal; and (2) they were collected using sampling protocols and methodology that are wholly inconsistent with established EPA procedures. (*See* TR3 at 218-220; TR3 at 225-230; TR3 at 233-236; RX 23, 24, 25, 26 and 27.) It was error for the ALJ to conclude, based on these flawed analytical results, that the EPA met its burden of proof that the rinsewater and the settled solids met the definition of "hazardous waste" under 40 C.F.R. §§ 260.10 and 261.3.

In her Initial Decision, the ALJ found no problem with the EPA's substandard sampling methodology. She acknowledged that certain regulations and guidance documents were relevant, but firmly stated that they were not mandatory or binding on the inspectors who visited Chem-Solv on May 23, 2007. (Op. at 68; *see* TR3 at 217-218.) From the ALJ's perspective, the inspectors could do no wrong under the auspices of EPA-veteran Mr. Houghton. (Op. at 69.) But, as the ALJ points out, Mr. Houghton did not even come to Chem-Solv with a written plan, because he "pretty well knew" what to expect. (*Id.* (quoting Tr1:219).) Mr. Houghton and his colleague, Mr. José Reyna, encountered unexpected conditions; they improvised their way through the inspection, missing critical steps and not using appropriate equipment. Their most glaring errors included: failing to measure the depth of the Pit's settled solids prior to sampling;

failing to use a coring device; failing to homogenize the samples; and taking only a singular grab from the surface of the Pit. (TR3:235-36; TR4:17-23.)

The Respondents' expert, Scott Perkins, testified about these errors and their impact on the analytical data. Specifically, he testified about how Mr. Houghton and Mr. Reyna deviated from the EPA's own guidance documents. (TR3:235-36; TR4:17-23.) But the ALJ rejected these critiques and, in so doing, rejected the basic notion that EPA inspectors must have a plan, take preliminary steps to understand what they are sampling, use proper equipment, take multiple grabs, and account for stratification in the material collected. These are the hallmarks of representative sampling no matter what rule, regulation, or guidance document one consults.

The ALJ attempts to salvage the flawed sampling by pointing to the expert opinion of Dr. Lowry, who "testified that the concentrations of trichloroethylene and tetrachloroethylene found in the sampled Pit sludge were so high, that it was unlikely additional sampling could bring the average concentration of those chemicals below the regulatory threshold." (Op. at 69 (quoting TR2:92-99, 196-97, 199-200, 227-29).) In other words, the samples were so saturated with hazardous materials that the outcome would be no different, even if the EPA inspectors employed adequate techniques. But given the gravity of deviation described by the Respondents' expert Mr. Perkins, Dr. Lowry's opinion is speculative at best. The ALJ erred by letting Dr. Lowry's opinion tip the balance in the EPA's favor.

The ALJ committed further error with respect to Pit water. (*See* Op. at 72.) For its part, the EPA contended that Pit water was a hazardous waste based on one positive analytical result for the substance chloroform. The chloroform yield reported was 6.1 ppm. The regulatory threshold is 6.0 ppm. The EPA's own expert, Dr. Joe Lowry, candidly acknowledged his low confidence in these results, agreeing with the Respondents that a very small margin of error would put the chloroform quantity below the regulatory threshold. (TR2 at 103, 124.) The EPA's laboratory analyst, Peggy Zawodny, commented that the criteria in question for the instrument used would render anything within 20 percent to be highly accurate. (TR2 at 57.) Obviously, however, any variation over 2 percent would yield a result that would make the subject water non-hazardous. Because these chloroform analytical results were within the margin of error, the ALJ erred in ruling that the EPA sustained its burden of proof that any of the water related to the subgrade tank was hazardous.

The natural expected variability of the chloroform concentrations throughout the tank makes the alleged exceedence even more uncertain. This variability was not accounted for by the singular grab sample that was collected at the surface of the tank. The tank was in use and new water introduced creating agitation which together with the added dynamic of potential chloroform creation via the interaction of chlorine with organics, (TR3 at 197-199), even more strongly mandates the use of multiple grab samples being collected to ascertain the true concentration of chloroform.

Due to these fatal flaws in the sampling and analytical protocols and methodology used by the EPA, it failed to prove by a preponderance of the evidence that the rinsewater and the settled solids were "hazardous wastes." Accordingly, the ALJ erred by finding that Chem-Solv is 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.

C. The Pit qualifies for the MPU Exemption.

Under the RCRA regulations, hazardous waste in a "manufacturing process unit" ("MPU") is not subject to subtitle C regulation until it is removed from the unit. The regulations specify:

> A hazardous waste [that] is generated in a product or raw material storage tank, a product or raw material transport vehicle or vessel, a product or raw material pipeline, or in a manufacturing process unit or an associated non-waste-treatment-manufacturing unit, is not subject to [the hazardous waste] regulation[s] ... 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). The "MPU Exemption" thus applies to several categories of units, including: tanks, transport vessels, or pipelines for products or raw materials; a manufacturing process unit; and an associated non-waste-treatment manufacturing unit. Neither the statute nor the regulations define what constitutes an MPU, a "manufacturing process," a "manufacturing unit," or "manufacturing" alone.

The ALJ concluded that the MPU Exemption does not apply in this case. She reached this conclusion based on a factual determinations that the Pit water was not reused to wash drums or manufacture FreezeCon. Further, she determined that even if the Respondents reused Pit water as claimed, the exemption would not apply due to lack of "manufacturing." (Op. at 78.) With respect to the MPU Exemption, the ALJ has made errors of both fact and law.

From a factual standpoint, as discussed above, the clear weight of evidence is that the Respondents reused Pit water to rinse off drums and to manufacture FreezeCon. On these facts, the Pit satisfies the requisite elements of the MPU Exemption. (TR3 at 201-208; TR4 at 140-144.)

The ALJ also misinterprets the law, applying too narrow a definition of "manufacturing." She states that "manufacturing entails an element of creation or transformation as raw materials or components are turned into substantively different products" and that this "creative element is emphasized in the definition of 'manufacturer' found in Black's Law Dictionary, i.e. 'A person or entity engaged in producing or assembling new products'" (Opinion at 78-79) (ALJ's emphasis).

But applicable guidance documents published by the EPA support a broader definition of manufacturing. When it promulgated the MPU Exemption in 1980, the EPA stated that its intent behind the exemption was to recognize that potentially hazardous waste is generated in various industries in operating processes and material

storage units that the EPA did not intend to regulate as hazardous waste tanks or containers. *See* Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4.) Put differently, the EPA did not intend to apply the containment requirements under RCRA to "hazardous waste" contained in units that are integral to the manufacturing process until such waste is removed for disposal or until such wastes exit the manufacturing process. The MPU exemption provides relief to manufacturers in cases where the point of "hazardous waste" generation could be the unit itself.

The EPA has provided a non-exhaustive list of examples of systems that fall within the scope of the MPU Exemption in the Federal Register, including: (1) distillation columns, flotation units, discharge trays or screens and "in associated non-waste-treatment process units such as cooling towers." *See* Hazardous Waste Management System, 45 F.R. 72,024 (Oct. 30, 1980) (Codified at 40 C.F.R. § 261.4) In subsequent guidance documents, the EPA provided the regulated community additional examples of tanks that qualify for the MPU Exemption.

One example of a manufacturing process unit identified by the EPA is a solvent parts washer. In the RCRA/Superfund Industry Assistance Hotline monthly report for May 1986, the EPA responded to a question about whether a solvent-based parts washer in use at a service station constituted a manufacturing process unit for purposes of the application of the MPU Exemption. *See* Memorandum from Joan Warren, Office

of Solid Waste, and Nancy Parkinson, Office of Emergency and Remedial Response, RCRA/Superfund Industry Assistance Hotline Report for May 1986 (530R86113) ("May 1986 Hotline Report"). In spite of the undisputed fact that the service station was not engaged in manufacturing in the conventional sense, the EPA nonetheless concluded that the solvent-based parts washer was "functioning as a manufacturing process unit." (May 1986 Hotline Report at 4.) Settled solids in solvent parts washers, which are potentially hazardous waste due to their propensity to contain elevated concentrations of metals, are consequently not fully regulated under RCRA until they are removed from the unit.

The operation of a solvent-based parts washer is favorably analogous to Chem-Solv's drum rinsing operation in 2007. In both instances, the rinsing operation is conducted outside of a storage unit and the liquid used to clean a particular item flows back to its source storage tank. Moreover, in both cases, the liquid used for the purpose of cleaning is periodically disposed by the operator.

Not all solvent-based parts washers fall under the MPU Exemption. For example, the EPA has concluded that if the drum of solvent is detached from the wash unit, a solvent-based parts washer is not exempted from regulation under RCRA by the MPU Exemption. *See* RCRA/Superfund Hotline Monthly Summary, December 1986, Wastes Generated in Process Units (RO 12790) ("December 1986 Hotline Summary"). There is no comparable periodic detachment of the storage unit from the cleaning unit in Chem-

Solv's drum-rinsing operation. Therefore, the EPA's May 1986 Hotline Report remains the most applicable guidance on the subject of the application of the MPU Exemption in the factual context set forth in the record.[5]

Another example of a commonly used unit that qualifies for the MPU Exemption and, yet, is not associated with manufacturing in an conventional sense, is an absorption refrigeration unit. (*See* TR3 at 206-07.) As Mr. Perkins testified, such devices, which are used for chilling materials in industrial and commercial settings, contain a refrigerating liquid such as ammonia or water, and often contain an anti-scaling agent such as arsenic trioxide that can result in a settled solid with elevated arsenic, sometimes in excess of the regulatory threshold for toxicity. (TR3 at 206-207.) In the absence of the savings of the MPU Exemption, these absorption refrigeration units would otherwise be considered regulated hazardous waste storage tanks or containers. However, due to the application of the MPU Exemption, they are not.

Both the solvent-based parts washer and the absorption refrigerator address concerns raised by the ALJ in her Initial Decision, namely that "manufacturing" necessarily entails an element of creation or transformation. While the ALJ would strictly limit the exemption to units that create a product or transform it into something

[5] In her Initial Decision, the ALJ states that the December 1986 Hotline Summary reflects the EPA "changing course." (Op. at 74.) But it simply answers a narrower question about whether the MPU Exemption applies to detachable storage units.

new, the EPA's regulations and guidance documents clearly contemplate something broader.

Indeed, what is key is that the Pit is integrated into the Respondents' core operations of repackaging chemicals from bulk storage containers into drums suitable for sale and distribution to customers. These operations constitute manufacturing because they were performed according to an organized plan with a division of labor. *See In re Gen. Motors Auto.-N. Am.*, No.RCRA-05-2004-0001, RCRA (3008) Appeal No. 06-02, 2008 EPA App. LEXIS 30, at *199 & n.54 (EAB June 20, 2008). In that case, the Appeals Board looked to the dictionary definition of manufacturing for guidance. *Id.* at 199 n.54. This definition includes "to make (as raw material) into a product suitable for use" and "to produce according to an organized plan and with division of labor." *Id.* (quoting Webster's Third New International Dictionary 1378). Manufacturing, therefore, could easily include Chem-Solv's business of making drums suitable for re-packaging and distributing a variety of chemicals. (TR4 at 200-201.) The evidence establishes that this process was done according to an organized plan and with a division of labor. Mr. Austin testified about this process, describing how empty drums were stored outside and, when ready to be re-filled, would first be rinsed off by Chem-Solv employees with water that had collected in the Pit. (TR4 at 200-204.)

The Pit also falls into the category of a "raw material storage tank" in the MPU Exemption. The applicable regulations promulgated under RCRA draw a distinction

between "materials" and "wastes". Since, as discussed above, Chem-Solv did not "reclaim" the water in the Pit, it was not a "solid waste". Rather, as Mr. Perkins testified, based on the testimony of Mr. Austin and Mr. Tickle, this water constituted a "material" under applicable regulations.

Until this Appeals Board weighs in, the regulated community will be left guessing about the scope of the MPU Exemption. For Chem-Solv, it was simply not practical to make a waste determination each and every millisecond a new particle settled out of the water in the Pit. Nor would it occur to Chem-Solv to do so, since it was actively reusing this water to rinse drums and manufacture FreezeCon. The Pit is just the sort of unit to which the MPU Exemption was designed to apply. By reversing the ALJ's decision, this Board will not only get the law right, but it will also provide some much-needed clarity to the regulated community.

Because of the MPU Exemption, the settled solids contained in the Pit 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, at the time of the sampling event, the settled solids contained in the Pit were not a regulated waste under RCRA. For the reasons set forth above, the Respondents are not liable for the violations alleged in Counts I through VII of the Complaint, and the ALJ erred by concluding otherwise.

D. The ALJ erred by determining that a 55-gallon drum of sodium hydrosulfide was hazardous waste, rather than a product in inventory at the time of inspection.

The EPA failed to meet its burden of proof that the sodium hydrosulfide drum observed by EPA and VADEQ inspectors on May 23, 2007 contained a hazardous waste. The EPA's evidence on this issue is merely that (1) inspectors observed a drum that appeared to be leaking on May 23, 2007; and (2) a shipping manifest shows that one drum of hydrogen sulfide was shipped off as hazardous waste on February 20, 2008. (CX 23 at EPA 1097, 1098.) The ALJ concluded that the observed drum and the shipped drum was the same drum. The evidence in the record does not clearly establish that it was the same drum. (TR4 at 273.) However, even if they were the same drum, the fact that sodium hydrosulfide was shipped as hazardous waste in February 2008 does not establish that it was hazardous waste as of May 2007 because it was, at that earlier time, a product in Chem-Solv's inventory. A leaking drum, if it is believed that the drum in question was leaking, does not prove the contents to be waste. In any event, the violation alleged is not that the drum leaked but that it was a waste.

According to evidence offered by both the EPA and the Respondents, the sodium hydrosulfide was a product in Chem-Solv's inventory. At the time of the EPA's May 15, 2007 Inspection and the May 23, 2007 Sampling Event, Chem-Solv had at least three partial drums of sodium hydrosulfide in inventory at its Roanoke facility. (Affidavit by Jamie Austin, ¶6; TR4 at 192.) Jamie Austin testified that these three drums were heels

from a bulk drum-off. (TR4 at 192.) Chem-Solv employees evaluated the drums of sodium hydrosulfide observed by the inspectors and determined it to be a useable product. (RX 30 at CS 311; TR4 at 192-193.) The Respondents' evidence on this fact is supported by the EPA's own witness, Ms. Lohman, who testified that Mr. Lester "reworked approximately two-thirds of the drums back into different products, and ... that they were working as quickly as they could to ... evaluate the remainder of the materials in question." (TR1 at 64.) Jamie Austin testified that Chem-Solv had a customer, CH Patrick Corporation, which was a consumer of sodium hydrosulfide and used it intermittently in a batching process. (TR4 at 192-193.) CH Patrick committed to taking a portion of Chem-Solv's stock of hydrogen sulfide by the end of 2008 and the rest later if still available. (Affidavit by Jamie Austin, ¶7; *see* TR4 at 193.) Therefore, the sodium hydrosulfide drum observed by inspectors was not a waste but, rather, was a useable product.

It makes no difference that the sodium hydrosulfide was stored in a container that was less than pristine. It was part of Chem-Solv's business operations to use refurbished drums. Furthermore, the fact that a product may be stored in a leaking drum does not make the product waste. The significant fact is that Chem-Solv's business involves receiving bulk shipments of sodium hydrosulfide, which it then apportions into drums for purposes of re-distributing to customers like CH Patrick.

Indeed, it also makes no difference that the ultimate Bill of Lading suggests that there was no charge to CH Patrick. Chem-Solv contacted CH Patrick in January 2008 but shipment did not occur until October 2008. (TR4 at 274.) CH Patrick was a long-time customer, presumably with a credit arrangement with Chem-Solv.

Even though some hydrogen sulfide was shipped offsite as a hazardous waste on February 20, 2008, it was not a "solid waste" or a "hazardous waste" on May 23, 2007.

In summary, the Respondents' evidence conclusively establishes that the drum of sodium hydrosulfide observed by the EPA during the sampling event did not contain "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.

(2) The ALJ erroneously ruled that Chem-Solv failed to make required waste determinations with respect to Pit materials and aerosol cans.

In her Initial Decision, the ALJ determined that the Respondent Chem-Solv generated solid waste in the form of Pit water, Pit sludge, and aerosol cans, and did not perform hazardous waste determination with regard to these wastes, all in violation of 9 Va. Admin. Code § 20-60-262(A) and 40 C.F.R. § 262.11. (Op. at 96.) However, the EPA failed to meet its burden of proof on these issues.

A. The ALJ erred by rejecting Chem-Solv's reliance on "generator knowledge."

RCRA's regulatory scheme requires that generators of solid waste determine if is a hazardous waste. The ALJ correctly ruled that Respondent Austin-Holdings, LLC is

not a "generator" of solid waste, and thus not liable under Count II. (Op. at 95.) The ALJ erred, however, by refusing to permit Respondent Chem-Solv to rely on its "generator knowledge" as to whether Pit materials and aerosol cans were hazardous wastes.

The concept of "generator knowledge" is embedded in the regulations implementing RCRA. *See* 40 C.F.R. § 262.11(c)(2) (noting that the generator may make a hazardous waste determination through reliance on generator knowledge, i.e. "knowledge of the hazard characteristic of the waste in light of the materials or the processes used"). In other words, the generator of solid waste is permitted to make hazardous-waste determinations based on its knowledge of the waste itself and the processes through which it is generated.

With respect to Pit water, Chem-Solv had no reason to believe that it was hazardous, given its immediate knowledge of its own drum-rinsing operations. With respect to settled solids from the Pit, Chem-Solv honestly and reasonably believed them to be non-hazardous based on previous testings. (TR4 at 237-239; *see* CX 21 at 660, 1016-21.) Specifically, samples of the settled solids contained in the Pit 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. Thereafter, Chem-Solv managed the settled solids contained in the Pit in accordance with its knowledge of the results of the analysis of the samples of settled solids it collected in May 2006. (*See* TR4 at 235-241.) Based on 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 the Pit – and, as argued earlier, they were not adequately proven to be present there. (*See* TR4 at 240.)

The ALJ rejected Chem-Solv's reliance on generator knowledge. She found that documentation did "not clearly indicate whether the sampled material was Pit sludge or a composite of Pit sludge and other material." (Op. at 95.) But Chem-Solv's generator knowledge was informed by more than just one test; it was also informed by knowledge of the particulars of its drum-rinsing process, business operations, and products that came through its Roanoke, Virginia facility. Furthermore, the ALJ's conclusion that Chem-Solv's generator knowledge proved to be inaccurate disregards the Respondents' other argument that investigators employed flawed sampling methodology. For these reasons, the evidence offered to the Court by the Respondents demonstrates that the violations alleged in Counts I through VII of the Complaint are without merit, and Chem-Solv is not liable therefor. The ALJ erred in concluding otherwise.

B. The ALJ erred in determining that the Respondents failed to make waste determinations with respect to aerosol cans observed during the inspection.

The ALJ also concluded that Chem-Solv did not properly characterize aerosol cans that the EPA allegedly observed in a solid waste receptacle during the Sampling

Event. (Op. at 96.) In fact, Chem-Solv had previously concluded 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. 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. (TR4 at 249-250.)

The Respondents' evidence established that Chem-Solv made a waste determination concerning the aerosol cans observed by the EPA during the sampling event based on generator knowledge. The ALJ erroneously determined that Chem-Solv is liable for the violations alleged in Count II of the Complaint concerning the aerosol cans.

(3) The ALJ erred by systematically disregarding, dismissing, and otherwise drawing all negative inferences from the Respondents' evidence.

The ALJ "resolved" all factual disputes in the EPA's favor. As detailed above, she ruled that the Respondents simply did not reuse Pit water to rinse drums or to manufacture FreezeCon. In reaching this decision, she disregarded volumes of reliable evidence and credible witness testimony to the contrary.

In another example, the ALJ dismissed the Respondents' evidence that fewer than 17,500 pounds of hazardous waste were shipped offsite after the Pit was cleaned out. (Op. at 80-81.) The Respondents' evidence showed that two feet of settled solids from the Pit were containerized into 32 steel drums at varying depths, some as low as one-third full. (TR3 at 144; TR4 at 10.) Also packaged into these drums were liquids, concrete from the demolished wall around the Pit, and the sand that had anchored the Pit to the ground. (TR4 at 244; TR3 at 144, 150.) Since all 32 drums contained some arguably hazardous waste, all were shipped off as hazardous waste, along with three polyethylene drums containing material from an earlier June 2007 cleanout. (TR3 at 242; *see* CX 23 at EPA 1127.) The drums were not weighed, as Chem-Solv paid for their removal on a dollars per container basis. (TR4 at 242.)

The ALJ rejected these facts. Instead, she applied her own "common business sense" that would "dictate that the Pit sludge should be placed into as few drums as possible." (Op. at 81.) But it is not the ALJ's role to opine as to the prudence of Chem-Solv's financial decisions and practical considerations, nor to swap in her own business judgment. The ALJ erred by favoring her "common business sense" over the evidence adduced by the Respondent at the hearing.

Furthermore, the Environmental Appeals Board should not countenance the ALJ's blanket disregard of the Respondents' witnesses. The Initial Decision speaks in glowing terms of the EPA's witnesses, crediting them with years of experience and

service to their fields. For example, the ALJ extolled Mr. Houghton for having performed "RCRA sampling inspections as an EPA employee for approximately twenty-seven years" during which "he receive extensive training in proper sampling techniques both on the job and in the classroom." (Op. at 69.) She lauded Dr. Lowry for his "doctorate in Environmental Health Sciences" and for his "over thirty years of experience with EPA sampling procedures, and who had been chief scientist at EPA's National Enforcement Investigations Center for fourteen years at the time of the hearing." (*Id.*) Ms. Zawody's credentials were also on display, described as an "environmental scientist and lab analyst with over twenty years of experience." (Op. at 38.)

The credentials of Scott Perkins, by contrast, are nowhere to be found in the Initial Decision, except that he is a professional engineer whose firm has worked for Chem-Solv since summer of 2008. (Op. at 7, 59.) At the hearing, counsel for the Respondents carefully questioned Mr. Perkins about his education and expertise.[6] He graduated from Duke University with a degree in civil and environmental engineering, and he received a Master's degree in civil engineering from the University of Colorado, with an emphasis on environmental engineering. He has worked in the field of environmental science since 1990, and throughout that time developed significant

[6] Mr. Perkins was ultimately qualified as an expert in the field of environmental compliance, sampling methodologies, risk analysis, "fate and transport" (i.e. evaluation of what happens when a contaminant is released into the environment), and RCRA penalty factors analysis. (TR3 at 174.)

experience in sampling methodologies and laboratory analysis. He served as an officer in the Army for four years, consulting on environmental impact issues around the world. He then spent four years as a contractor with the National Science Foundation, deployed seasonally to Antarctica to monitor the impact of United States research activities. Again, this job required much sample collection. He has also worked for various national laboratories and environmental groups. Throughout his experience, he has performed environmental audits for industrial facilities, analyzing their compliance with federal, state, and local requirements. (TR3 at 160-74.)

But the Initial Decision mentions none of this, not even Mr. Perkins' over twenty years of experience in environmental science and regulatory compliance.

With respect to the Respondents' fact witnesses, the ALJ could not have been more negative. As to Mr. Austin, she found that "while on paper [his] testimony appears superficially believable, when heard and seen in person, his testimony on this issue [reuse of Pit water], and many others in this case, lacked credibility. His demeanor lacked the color and tone of one sincerely recollecting from personal memory actual events which he witnessed occurring at the facility, and instead sounded of one coached and determined to say what had been deemed necessary on behalf of the company." (Op. at 57.)

Similarly, the ALJ described Mr. Tickle as a "subordinate, meekly and uncomfortably reciting the lines he had been instructed to say by Mr. Austin, whose

hearing demeanor in contrast was that of a very intimidating, dominating boss...Mr. Tickle seemed so eager to support the company's position on the drum washing issue that he was willing to deny that tap water was ever used to rinse drums at the acid pad, something even Mr. Austin could not bring himself to do." (Op. at 58.)

The ALJ also dismissed Mr. Perkins' factual testimony as to the reuse of Pit water: "Mr. Perkins's knowledge of the Pit tank system and the alleged reuse of Pit water comes entirely from Mr. Austin and other unnamed Chem-Solv employees. ... Mr. Austin's lack of credibility extends to Mr. Perkins, and casts doubt on the reliability of Mr. Perkins's other unnamed sources." (Op. at 59.) Even though Perkins did not consult with Chem-Solv until 2008, he was still thoroughly familiar with its business operations – present and past – and should not have been summarily ignored on this issue.

Despite live testimony from three witnesses with personal knowledge of Chem-Solv's business, the ALJ chose to embrace the testimony of Ms. Lohman: "Ms. Lohman's testimony generally was coherent, and was consistent with the inspection notes and other documentation prepared contemporaneously with the events she recounted. Ms. Lohman gave the impression of one sincerely attempting to accurately recount her personal observations and beliefs." (Op. at 14.) The ALJ did not account for any bias Ms. Lohman may have had, for example, to say and do the "right" thing in the presence of other regulators. The ALJ was undeterred by Ms. Lohman's purposefully negative spin

discussed above. Furthermore, although Ms. Lohman's testimony might have been "precise" insofar as it echoed her notes from 2007, it was not therefore an "accurate" account of what actually occurred during the sampling event. This distinction between precision and accuracy, however, was lost on the ALJ.

The Respondents are cognizant that, while the standard of review is de novo, in practice the Environmental Appeals Board defers to the ALJ's factual findings, especially if factual findings involve the testimony of witnesses. *See* 40 C.F.R. § 22.30(f); *In re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000). But when the ALJ systematically resolves all facts against one party, and categorically discredits all of that party's witnesses, such deference is inappropriate. Such is the case here.

"When the presiding officer's credibility determinations are unsupported by the record … the Board will not defer to the presiding officer and is not bound by any findings of fact based on such determination." *In re Henry Stevenson and Parkwood Land Co.*, Docket No. CWA-06-2011-2709, 2013 EPA App. LEXIS 36 (EAB Oct. 24, 2013); *see also W.F. Bolin Co. v. NLRB*, 70 F.3d 863, 872 (6th Cir. 1995) ("[A]n administrative law judge's opportunity to observe witnesses' demeanor 'does not, by itself, require deference with regard to his or her derivative inferences.'" (quoting *Penasquitos Vill., Inc. v. NLRB*, 565 F.2d 1074, 1079 (9th Cir. 1977))).

The Environmental Appeals Board should apply traditional de novo review of the ALJ's Initial Decision, examining the record afresh rather than deferring to the ALJ's systematic disfavor of the Respondents' evidence.

VII. CONCLUSION

a. Alternative Findings of Fact

i. The Respondents reused water contained in Rinsewater Tank No. 1 (the "Pit") to rinse off the exterior surface of drums.

ii. The Respondents reused water contained in the Pit as a raw ingredient in the manufacture of a marketable product, FreezeCon.

iii. The 55-gallon drum of sodium hydrosulfide observed by the EPA on May 23, 2007 was a useable product in the Respondents' inventory and not abandoned or discarded.

iv. The Respondents properly characterized materials contained in the Pit as non-hazardous, based on their own testing and knowledge of business operations, and disposed of these materials properly.

v. The Respondents had a policy to dispose of aerosol cans only when empty, and the employees followed that policy. Accordingly, the Respondents properly characterized and disposed of the aerosol cans at issue as non-hazardous.

vi. The samples of water and settled solids collected by the EPA on May 23, 2007 were not representative of the waste streams allegedly generated, and they were collected using flawed sampling methodology. The EPA's resulting analytical data, therefore, did not accurately characterize these materials.

b. Alternative Conclusions of Law

i. The water that collected in the Pit was not a "solid waste" as defined by 40 C.F.R. §§ 260.10, 261.2(a)(1), and 261.2(a)(2).

ii. The water that collected in the Pit was not a "hazardous waste" as defined by 40 C.F.R. §§ 260.10 and 261.3.

iii. The settled solids contained in the Pit were exempted from regulation under 40 C.F.R. § 261.4(c), and they did not become a regulated waste until physically removed from the Pit for the purpose of disposal.

iv. The Respondents properly characterized Pit materials based on generator knowledge.

v. The Respondents properly characterized the aerosol cans based on generator knowledge.

vi. The EPA failed to prove that the drum of sodium hydrosulfide was a "solid waste" as defined by 40 C.F.R. §§ 260.10, 261.2(a)(1), and 261.2(a)(2), because it was a useable product in inventory at the time it was observed on May 23, 2007.

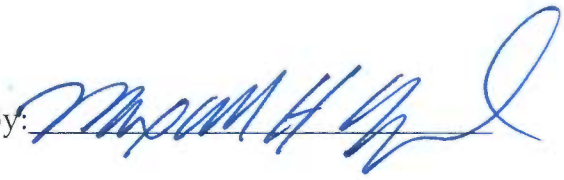
vii. The EPA failed to prove any of the violations alleged in Counts I through VII because they were based on analytical data resulting from the EPA's flawed sampling methodology

c. Relief Sought

The Environmental Appeals Board should reverse the Initial Decision of the ALJ on all Counts and enter a final order in favor of the Respondents.

Dated: July 7, 2014

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

By: 

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CERTIFICATE OF SERVICE

I certify that, on July 7th, 2014, I e-filed the Respondents' Notice of Appeal with the Environmental Appeals Board, and mailed copies by Federal Express to the address listed below:

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