

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

In the Matter of:)
)
Chem-Solv, Inc., formerly trading as)
Chemicals and Solvents, Inc.)
)
and) RCRA (3008) Appeal No. 14-02
)
Austin Holdings-VA, L.L.C.)
)
Docket Number RCRA-03-2011-0068)

**COMPLAINANT'S
RESPONSE
TO RESPONDENTS' APPEAL**

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Federal Judicial Decisions:

Abad v. Bayer Corp., 531 F. Supp. 2d 957, 966-67 (N.D. Ill. 2008)

United States v. Santarsiero, 566 F. Supp. 536 (S.D.N.Y. 1983)

EPA Administrative Decisions:

In re Bil-Dry Corp., 9 E.A.D. 577, 596; 602-604 (EAB 2001)

In re Boliden-Metech, Inc., TSCA Appeal No 89-3, at 13 (CJO, Nov. 21, 1990)

In re Chempace Corp., 9 E.A.D. 119, 134 (EAB 2000)

In re Echevarria, 5 E.A.D. 626, 638 (EAB 1994)

In re Great Lakes Division of National Steel Corp, 5 E.A.D. 355, 372 (EAB 1994)

In the Matter of Morrison Bros Co., EPA Docket No. VII-98-H-0012, 2000 EPA ALJ LEXIS 68, at *13 (ALJ, Aug. 31, 2000)

In re Ocean State Asbestos Removal, Inc., 7 E.A.D. 522, 530 (EAB 1998)

In re Ram, Inc., 14 E.A.D. 357, 364, (EAB 2009)

In re Wego Chemical & Mineral Corp., TSCA Appeal No. 92-4 at 12, n.9 (CJO February 24, 1993)

REFERENCES

Statutory:

RCRA Section 3005(a), 42 U.S.C. § 6925(a)

RCRA Section 3008(a)

9 Va. Admin Code § 20-60-264(a)

Regulatory:

Code of Federal Regulations (July 1, 2001)

40 C.F.R. Part 22

40 C.F.R. § 22.30(f)

40 C.F.R. Part 260

40 C.F.R. §§ 260.20, 260.21

40 C.F.R. Part 261, Appendix I

40 C.F.R. §§ 261.1(c)(1), 261.2(a)(1), 261.2(c), 261.2(c)(2)(B), 261.2(c)(3), 261.3(a)(2)(iv), 261.4(c), 261.11, 261.20(c), 261.20(c)(3), 261.24, 261.24(a)

40 C.F.R. §§ 262.10, 262.11

40 C.F.R. Part 264, Subparts G and H

40 C.F.R. §§ 264.112, 264.117, 264.192(b) – (f), 264.193(a), (d) and (e), 264.195(b) and (d), 264.197, 264.1082(b), 264.1084(b)

40 C.F.R. Part 270

45 *Fed. Reg.* 12724, 12727 (February 26, 1980)

50 *Fed. Reg.* 614, 633 (Jan. 4, 1985)

53 *Fed. Reg.* 34079, 34080 (Sept. 2, 1988)

Federal Rules of Evidence, Rule 801(d)(2)

GUIDANCE DOCUMENTS

EPA Guidance:

RO 13790 (December 19, 1986) (Letter from Joseph E. Cara, Acting Director, Waste Management Division to Mr. Hadley Bedbury, Diamond Shamrock Chemicals Company, “Tank Systems Applicable to Production Tanks During Cleanout, Process Transfer Equipment, and Hose Lines”; RPPC No. 9483.1986(11))

RO 14469 (May 26, 2000) (Memorandum from Elizabeth A. Cotsworth, Director, Office of Solid Waste to George Pavlou, Director, Division of Enforcement and Compliance Assistance, EPA Region II, “Kodak Claim for Manufacturing Process Unit Exemption to the RCRA Subpart BB Air Emission Requirements)

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**COMPLAINANT'S
RESPONSE TO RESPONDENT'S APPEAL**

I. INTRODUCTION

Respondent Chem-Solv, Inc. (formerly trading as Chemicals and Solvents, Inc., hereinafter "Chem-Solv"), operates a chemical distribution facility located at 1111 Industry Avenue, S.E. and 1140 Industry Avenue, S.E., Roanoke, Virginia 24013 (the "Facility"). Respondent Austin Holdings – VA, L.L.C. ("Austin Holdings") is the owner of the land on which most of the Facility sits.

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing ("Complaint") against Respondents on March 31, 2011. The Complaint generally alleged that the Respondents violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous

waste management program.¹ The Complaint initiated a RCRA enforcement proceeding with a resulting lengthy procedural history.²

Count I of the Complaint alleged that the Respondents owned and operated a hazardous waste storage facility without interim status or a permit, in violation of 40 C.F.R. Part 270 and Section 3005(a) of RCRA, 42 U.S.C. § 6925(a). Counts II – VII of the Complaint further alleged that Respondent Chem-Solv failed to: make or perform required hazardous waste determinations on solid waste generated at the Facility, in violation of 40 C.F.R. § 262.11; have secondary containment for a Facility hazardous waste storage tank, in violation of 40 C.F.R. § 264.193(a), (d) and (e); obtain a tank assessment for a Facility hazardous waste storage tank, in violation of 40 C.F.R. § 264.192(b) – (f); conduct and/or document inspections of a hazardous waste storage tank in the facility operating records, in violation of 40 C.F.R. § 264.195(b) and (d); comply with applicable air emission standards for tanks, in violation of 40 C.F.R. §§ 264.1082(b) and 264.1084(b); comply with the applicable closure requirements of 40 C.F.R. Part 264, Subparts G and H, in violation of 40 C.F.R. § 264.197.

Respondents jointly filed their Answer to the Complaint (“Answer”) on May 20, 2011. After the filing of Initial Prehearing Exchanges and Complaint’s Rebuttal Prehearing Exchange (which included its proposed civil penalty), Complainant filed a November 29, 2011 Motion for Partial Accelerated Decision. In a December 13, 2011 Response, Respondents amended their Answer pertaining to the ownership of that portion of the Facility on which the sub-grade “tank” (or “Pit”) was located, admitting that “Austin Holdings is the owner of the real property on

¹ The authorized Virginia hazardous waste management program (“VHWMP”), with exceptions not relevant to this matter, incorporates by reference the federal hazardous waste regulations as set forth in the July 1, 2001 Code of Federal Regulations. Complainant will, therefore cite to the EPA-issued federal regulations for ease of reference throughout this Brief.

² The full procedural history of this proceeding is set forth in Complainant’s Initial Post-Hearing Brief at pp. 6 – 13. A summary is set forth in the Initial Decision at pp. 5 – 8.

which Rinsewater Tank No. 1 is located.” *See* Resp. Acc. Dec. Response at 10, ¶ 22; *see also* 2nd Austin Affidavit at 2-3, ¶ 8. In a December 22, 2011 Reply, Complainant moved the Court to “enter an Order . . . conforming the pleadings to the facts as against both Respondents . . . [b]ased on the admission . . . [that] Chem[- S]olv is liable as an operator of the Facility [and] Austin Holdings, L.L.C. – VA. is liable as an owner of the Facility.” Comp. Acc. Dec. Reply at 4, ¶ 22. The Presiding Officer’s February 7, 2012, Order denied Complainant’s Motion for Accelerated Decision, but did not address Complainant’s request to amend and conform the pleadings to allege the Respondents’ joint and several liability for each of the violations alleged in the Complaint. Complainant, therefore, renewed its request at the subsequent Hearing held in this matter, and in its post-hearing briefs.

On March 2, 2012, Chief Administrative Law Judge Susan L. Biro issued an Order of Redesignation, in which she designated herself as the Administrative Law Judge to preside in this proceeding. A five-day administrative hearing, under Section 3008(a) of RCRA, was held pursuant to the 40 C.F.R. Part 22 *Consolidated Rules* in Roanoke, Virginia from March 20, 2012 through March 24, 2012.³

The parties filed their post-hearing briefs between June 29, 2012 and November 1, 2012 and the Chief Administrative Law Judge issued a 125 page Initial Decision on June 5, 2014. In that Initial Decision, Judge Biro evaluated the witnesses’ credibility; made specific factual findings and legal conclusions; and granted Complainant’s request to amend the Complaint. Initial Decision at pp. 8 – 14. She found Respondents Chem-Solv, Inc. and Austin Holdings-VA, L.L.C. jointly and severally liable for the violations alleged in Counts I, III, IV, V, VI, and VII

³ Each of the five hearing transcript volumes in this proceeding corresponds to a particular (and singular) hearing date. For citation brevity, Complainant cites to the hearing transcript by relevant volume number, rather than by date, in the following manner: TR1 at __.

and found Respondent Chem-Solv, Inc. solely liable for the violation alleged in Count II. Initial Decision at p. 102. She assessed a total aggregate penalty of \$597,026.28 against Respondents Chem-Solv, Inc. and Austin Holdings-VA, L.L.C., jointly and severally, for the violations alleged in Counts I, III, IV, V, VI, and VII and an additional penalty of \$15,312.50 against Respondent Chem-Solv, Inc., individually, for the violation alleged in Count II. Initial Decision at p. 120. Finally, she issued a Compliance Order to the Respondents requiring RCRA closure (pursuant to 9 Va. Admin. Code § 20-60-264(a), which incorporates by reference 40 C.F.R. §§ 264.112 and 264.117, with exceptions not herein relevant) of the area where a unit known as the Acid Pit had been located at the Facility. Initial Decision at pp. 123 – 124.

Copies of the Initial Decision were served upon the parties by the Regional Hearing Clerk on June 6, 2014. Respondents filed a timely Notice of Appeal and associated Appellate Brief with the Environmental Appeals Board on July 7, 2014. Complainant received a copy of the same on July 8, 2014 and responds accordingly herein.

II. ISSUES PRESENTED FOR REVIEW

1. Whether Respondents have demonstrated compelling reasons for the Environmental Appeals Board to reject the deference given to a Presiding Officer's credibility determinations.
2. Whether the Presiding Officer correctly ruled that the "Acid Pit" was a hazardous storage tank regulated under RCRA.
3. Whether the Presiding Officer correctly ruled that the leaking drum of sodium hydrosulfide was a hazardous waste.
4. Whether the ALJ correctly ruled that Chem-Solv failed to make hazardous waste determinations.

III. NATURE OF THE CASE

The hearing in this matter addressed many different issues. However, the core issue on appeal is the reasonableness of the credibility determinations made by the Presiding Officer. These credibility determinations concern three major issues in the case: (1) Respondents' claim that water collected in a tank known as the "Acid Pit" or the "Pit" was repeatedly reused to rinse drums and was used to manufacture a coal anti-freeze product known as "Freeze-Con"⁴; (2) Respondents' claim that sodium hydrosulfide in a leaking drum discovered by inspectors was a useful product and not a waste; and (3) Respondents' claim that it performed hazardous waste determinations on material in the Acid Pit using "process knowledge" and performed hazardous waste determinations on aerosol cans by ensuring that the cans were completely non-hazardous before disposal. On each of these issues the Presiding Officer found Complainant's witnesses and other evidence to be more credible and persuasive than Respondents' witnesses and evidence.

The Consolidated Rules provide for the Board to perform a *de novo* review of a presiding officer's factual and legal conclusions. 40 C.F.R. § 22.30(f). However, the EAB has consistently held that it will give "considerable deference to a presiding officer's determinations as to the credibility to be afforded the testimony of witnesses at a hearing." *In re Great Lakes Division of National Steel Corp.*, 5 E.A.D. 355, 372 (EAB 1994), citing *In re Wego Chemical & Mineral Corp.*, TSCA Appeal No. 92-4 at 12, n.9 (CJO February 24, 1993); *see also, In Re Chempace Corp.*, 9 E.A.D. 119, 134 (EAB 2000)(citing *In re Echevarria*, 5 E.A.D. 626, 638 (EAB 1994)); *In re Ram, Inc.*, 14 E.A.D. 357, 364, (EAB 2009), *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998). A presiding officer's "factual determination

⁴ This claim is essential to Respondents' argument that the material in the Acid Pit was subject to an exemption from RCRA regulation.

involving issues of credibility is ordinarily entitled to deference absent compelling reasons to the contrary.” *Great Lakes*, 5 E.A.D. at 372, quoting *In re Boliden-Metech, Inc.*, TSCA Appeal No 89-3, at 13 (CJO, Nov. 21, 1990).

The parties in this case presented very different views as to the basic underlying facts. On some issues the parties’ testimony was in direct conflict: if one party’s witnesses were accurate, then the other party’s witnesses were not. In the face of such stark conflicts, the Presiding Officer, Chief Administrative Law Judge Susan Biro, was called upon to perform one of the classic functions of a trial-level finder of fact: assessing the relative credibility of the various witnesses. Judge Biro’s credibility determinations considered whether the other evidence, including documentary evidence, corroborated or cast doubt on a given witness’s testimony, and considered the relative plausibility of each witness’s testimony considered in the context of the entire evidentiary record. In addition, the Presiding Officer’s credibility determinations explicitly included consideration of the demeanor of each witness.

As Respondents’ Brief points out, Judge Biro’s credibility determinations in this matter were on the whole quite unfavorable to Respondents. Judge Biro’s findings, as discussed below, were based upon the strength of Complainant’s evidence, inconsistencies in the testimony of Respondents’ witnesses, the implausibility of the facts claimed by Respondents, and the demeanor of the parties’ witnesses. Respondents are correct in asserting that Judge Biro found that EPA’s witnesses were credible, and that Respondents’ witnesses generally were not. In doing so, she was performing precisely the function assigned to her as the initial trier of fact. Although Respondents are not pleased with the conclusions Judge Biro drew from the evidence and from her observation of the witnesses, they have failed to provide any “compelling reasons”

why the Board should not in this case afford its usual deference to the Presiding Officer's factual findings.

IV. FACTUAL SUMMARY

Respondents' Brief presents a skewed summary of facts, and makes no mention of evidence which contradicts Respondents' preferred narrative. Further, Respondents' factual summary often relies upon testimony presented without foundation as to the basis for the witness's knowledge. For example, Respondents repeatedly refer, without foundation, to allegedly factual testimony from its contractor, Scott Perkins, who admitted that he lacked personal knowledge of the events and processes at Respondents' Facility because he was not retained by Respondents in this matter until the summer of 2008, after the events at issue were concluded. TR4 at 107-108. In other instances Respondents' summary is simply inaccurate, and states alleged facts – often without citation -- which are not found anywhere in the record.

Given that the central issue on appeal is the reasonableness of the Presiding Officer's credibility determinations, it is necessary to substantially augment Respondents' selective factual summary so that the Board can look at the evidence presented by all parties in determining whether there is a compelling reason to reject Judge Biro's factual findings.

A. Use and Reuse of Pit Water

Citing the testimony of Jamison Austin, Chem-Solv's Vice-President and Don Tickle, a Chem-Solv employee, Respondents claim that Chem-Solv "regularly reused the water from the Pit to rinse the outside of drums and totes," and used the water from the Pit in the production of a product known as "Freeze-Con."⁵ Respondents' Appeal Brief at 8 -9. Mr. Austin and Mr. Tickle did indeed make such claims, but the veracity of these claims was highly contested.

⁵ This factual question is relevant to Respondents' argument, discussed below, that wastes in the Pit were exempt from RCRA regulation because the Pit was either a manufacturing process unit or a raw material storage unit.

Respondent neglects to mention the significant evidence contrary to the claims made by Mr. Austin and Mr. Tickle. An examination of that evidence – described by Judge Biro as “quite potent,” Initial Decision at 59 – lead the Presiding Officer to make findings of fact very different than those facts claimed in Respondents’ Brief.

Respondents completely omit references to statements made by Cary Lester, a former Chem-Solv employee who was a key figure in the company at the time of the violations at issue. As the Presiding Officer specifically noted, Mr. Lester was Respondents’ primary contact with regulatory agencies at the time of the VADEQ and EPA investigations at issue. Initial Decision at 57-58. Mr. Lester served as “Operations Manager” for the entire Roanoke Facility, *see* Complainant’s Ex. 21 at EPA 657, ¶ 4.e., and his job description, provided by Chem-Solv to EPA in an information request letter (“IRL”) response, Complainant’s Ex. 21 at EPA 657, ¶ 4.d. and EPA 993-994, describes very broad duties with regard to the operation of the Facility, including specific authority to “[l]iaise with local, state and Federal government agencies to ensure ChemSolv compliances with regulations.” In fact, when EPA and the Virginia Department of Environmental Quality (“VADEQ”) inspected the Chem-Solv Facility on May 15, 2007, Mr. Lester was not in the office, and Mr. Austin thus asked if the inspectors could return later on another day when Mr. Lester was available. TR1 at 85. The May 15 inspection initially proceeded without Mr. Lester, but after lunch Mr. Austin directed that the inspection be ended and resumed at a later date when Mr. Lester would be available to meet with the inspectors. TR1 at 93. This evidence clearly establishes that Mr. Lester was not only *authorized* to make statements on Chem-Solv’s behalf, but he was in fact the company’s *preferred* spokesperson. The Presiding Officer made a finding to this effect. Initial Decision at 15.

Information from Mr. Lester was included in Chem-Solv's written responses to EPA and VADEQ IRLs. In addition, many of his relevant statements were recorded and testified to by VADEQ and EPA inspectors, most notably Elizabeth Lohman, an inspector with VADEQ who visited the Facility on a number of occasions. Respondents have challenged Ms. Lohman's credibility, although the Presiding Officer rejected the claim that Ms. Lohman was biased, Initial Decision at 14, and relied extensively on her testimony throughout the Initial Decision.

The Initial Decision summarizes Mr. Lester's many discussions about the Acid Pit with state and federal regulators during a series of five inspections of the Facility, and notes Chem-Solv's written answers to three EPA IRLs. Never during these many communications did Mr. Lester or any other Chem-Solv representative indicate that anything was done with the water in the Pit other than storing it and eventually sending it off-site for disposal. *See* Initial Decision at 59-61. In fact, during the May 18, 2007 inspection Mr. Lester affirmatively indicated that Chem-Solv was "looking for potential reuses" of the pit water, but had not yet found any, and was thus managing the water as waste. Initial Decision at 60-61. The Presiding Officer gave significant weight to Chem-Solv's failure to mention the alleged reuse of Pit water in the numerous oral and written communications with EPA and the State. The Presiding Officer found that "[i]f Chem-Solv was reusing the Pit water as it claims, it is incredible that no company representative ever mentioned that reuse to a government official when describing the operations surrounding the Pit and Pit water." Initial Decision at 60. Moreover, during the May 18, 2007 inspection Mr. Lester discussed the use of the Pit at length with the inspectors, and, also discussed the manufacture of Freeze-Con⁶, without once noting any connection whatsoever between Freeze-Con and the Pit. TR1 at 106-108, CX 19 at EPA 376.

⁶ EPA's interest in Freeze-Con at the time was due to the use of off-spec glycols in the product, which raised potential RCRA issues unrelated to the Pit. TR1 at 106-107, CX 19 at EPA 376.

In response to an EPA IRL, Chem-Solv in December, 2007 detailed recent changes made to its processes (which Chem-Solv claimed would decrease the generation rate of wash water for disposal) but made no mention of the alleged reuse of the Pit water for rinsing or the alleged use of Pit water in Freeze-Con. *See*, Initial Decision at 61. Again, the Presiding Officer found these omissions to be notable: “If Chem-Solv was reusing Pit water as it claims, it is again incredible that Chem-Solv would alert the Region to ‘dedicated containers, hoses, nozzles and pumps’ while omitting any reference to Freeze-Con or the Pit water’s reuse in washing.” Initial Decision at 61.

In addition, Respondents claim that the numerous “batch tickets” for the blending of Freeze-Con indicated that Pit water was used in the blend, and implies that these batch tickets provide corroboration for the claims of Respondents’ witnesses. Respondents’ Brief at 9. In fact, these batch tickets by themselves give no indication that the water used came from the Pit; any linking of the batch tickets and Pit water relies completely on Mr. Austin’s testimony. *See*, Initial Decision at 58-59; Complainant’s Initial Post-Hearing Brief at 85-87.

B. Drum of Sodium Hydrosulfide

Respondents’ factual summary of the evidence concerning the leaking drum of sodium hydrosulfide observed at the Facility on May 23, 2007 is incomplete and misleading.

Respondents do not mention the deteriorated condition of the drum in question, which “came to the inspectors’ attention when they detected an ‘obnoxious,’ ‘sulfur’ odor consistent with sodium hydrosulfide emanating from the dented drum.” Initial Decision at 87. Respondents fail to acknowledge the evidence of the drum’s condition provided by the VADEQ inspector, Ms. Lohman, whose testimony that the drum was leaking and carelessly handled was found by the

Presiding Officer to be “amply supported by contemporaneous photographic evidence.” Initial Decision at 87, citing TR1 at 128-33 and CX 19 at 593-598.

Respondents claim that the drum in question was “product . . . in the Chem-Solv’s [sic] inventory at that time.” Respondents’ Brief at 10. Yet, the sole authority they cite for this claim is Mr. Austin’s testimony that “to the best of [his] recollection” there were three partial drums of sodium hydrosulfide present at the Facility. TR4 at 192-193. In the testimony cited, Mr. Austin did not say that the sodium hydrosulfide was listed on a written inventory and Respondents introduced no product inventory records into evidence, or any other documentation of an inventory listing sodium hydrosulfide. The failure to come forward with any such inventory records is an important factor in determining whether the drum in question was discarded material. *See, In Re Bil-Dry Corp.*, 9 E.A.D. 575, 603-604 (EAB 2001).

Respondents present without qualification Mr. Austin’s claim that two non-leaking drums of sodium hydrosulfide were “sold” to a “customer.” However, in February, 2008, in response to a question in an EPA IRL about the disposition of the leaking drum of sodium hydrosulfide, Respondents stated that the drum identified as leaking at the inspection had been disposed of as a hazardous waste. CX 23 at 1078, 1127; TR at 271-273. This led the Presiding Officer to conclude that the two drums allegedly sold to a customer were not the same as the leaking drum. Initial Decision at 88-89, citing TR4 at 271-273.

Even for the two drums transferred to an alleged “customer,” the invoice for the transaction indicates that the drums were not sold, but were instead transferred to the “customer” with no charge,⁷ leading the Presiding Officer to conclude that “the transfer of sodium hydrosulfide to the customer was in essence one of disposal, not sale.” Initial Decision at 88.

⁷ Respondents attempt to argue that “it makes no difference that the ultimate Bill of Lading suggests that there was “no charge” to the alleged customer, suggesting that the customer “presumably [had] a credit arrangement with

Respondents also ignored the expert testimony of Dr. Joseph Lowry, who provided a scientific basis explaining why sodium hydrosulfide in a partially-filled drum, such as the leaking drum in question, was likely to have been unsuitable for commercial sale. TR5 at 35-41. Dr. Lowry explained that sulfides, the commercially valuable component of sodium hydrosulfide, degrade rapidly when in contact with air. The degradation would slow or stop if all of the oxygen and carbon dioxide in a closed container is used up, but if a container is opened, or if it has a leak which allows air to reenter the container, then the air would be replenished and the degradation would continue. For this reason sodium hydrosulfide has a relatively short shelf-life as a commercial product. TR5 at 35-41.

C. Aerosol Cans

Respondents' summary of the facts details a claimed policy regarding the disposal of aerosol cans. Respondents' Brief at 11. Unfortunately for Respondents, there is little evidence in the record that any such policy existed, and no evidence of the specific elements noted in Respondents' Brief. Respondents' only record citation regarding an alleged aerosol can policy is to the testimony of Mr. Austin at TR4 at 249-250, but this testimony addresses only Chem-Solv's efforts to reduce the use of aerosol paint cans, and contains nothing regarding the supposed policy discussed in Respondents' Brief.

Although Respondents' Brief does not cite to it, Scott Perkins' testimony does posit the existence of a policy against throwing away non-empty aerosol cans. TR4 at 60-61. Mr. Perkins speculated, under examination by the Presiding Officer, that this alleged policy included an

Chem-Solv." Respondents' Brief at 33. Respondents presented no evidence of any such "credit arrangement." Moreover, the documentation of the transfer included an "invoice" for the transaction. RX15 at CS195. According to both the Merriam-Webster Dictionary and Black's Law Dictionary, an "invoice" is an itemized list of items sold, usually specifying the price and terms of sale. The invoice for the transaction in question lists a unit price of "0.0000" and contains a notation of "No Charge" instead of a customer order number. RX 15 at CS 195-196.

admonition not to throw away non-empty cans. TR4 at 131. However, Mr. Perkins provided no indication as to the basis for his knowledge of the existence of such a policy, much less the specific elements of such a policy. As noted above, Mr. Perkins was not retained by Chem-Solv until the summer of 2008, and thus could not have testified to any such policy from personal knowledge. Further, Mr. Perkins admitted that Chem-Solv did not have a *written* policy on disposal of aerosol cans, either in 2006 or even by the time of the March, 2012 hearing, TR4 at 131-133, and admitted that he did not know how or when information regarding the alleged unwritten policy was communicated to Chem-Solv workers. TR4 at 132.⁸

D. 17,500 Pounds of Hazardous Waste Removed From the Pit

Although Respondents stipulated to the authenticity and admissibility of a hazardous waste manifest showing that 17,500 pounds of hazardous Pit solids were shipped off-site from the Facility on February 20, 2008, Joint Stipulation ¶ 31, *see* CX 23 at 1127, Initial Decision at 81, Respondents' factual summary claims that amount of hazardous waste removed from the Pit was less than stipulated.⁹ Respondents presented a number of conflicting narratives as to what was removed from the Pit, how and how much. As discussed below, the evidence indicates that the amount of hazardous waste removed from the Pit was at least the 17,500 pounds shown on Chem-Solv's hazardous waste manifest, and may have been significantly greater than that figure.

⁸ Even if the policy claimed in Respondents' Brief had been communicated to all necessary employees -- which the evidence does not show -- the policy would still have been insufficient to eliminate the possibility that a given can could be a hazardous waste -- and thus the alleged policy would have been insufficient to serve as a *de facto* waste characterization. As discussed in Complainant's Initial Post-Hearing Brief, aerosol cans may potentially be hazardous due to hazardous properties of the product in the can, the propellant in the can and/or the pressure in the can. Complainant's Initial Post-Hearing Brief at 168-171, *see, also*, TR3 at 183-185. Even if Respondents had in place a policy that ensured that no product remained in the can, the can might remain hazardous due to the remaining propellant within a RCRA empty aerosol can. *See* Complainant's Initial Post-Hearing Brief at 169.

⁹ Although Respondents do not clearly explain the significance of their arguments with regard to the amount of hazardous sludge removed from the Pit, it appears that Respondents may be trying to argue that they qualified for the small quantity generator exemption, which would exempt them from some of the RCRA requirements. This potential argument is discussed and rejected in the Initial Decision at 89-90.

In an affidavit dated September 8, 2011, Mr. Austin stated that there was less than twenty-four inches of settled solids at the bottom of the Pit as of January, 2008, and claimed that a backhoe was used to remove the solids. RX2 at CS 005, ¶ 21. He explained his determination of the level of solids as follows:

After the rinsewater was removed from Rinsewater Holding Tank No. 1, Chem-Solv used a backhoe to remove settled solids from the bottom of the tank. The depth of the settled solids that had collected at the bottom of Rinsewater Holding Tank No. 1 was determined by noting the level of the settled solids on the backhoe's bucket, which was twenty-four inches in height.

RX 2 at CS 005, ¶ 21. However, Mr. Austin's hearing testimony regarding the exact same event was inconsistent with the account in his own affidavit:

We first tried to remove the settled solids with a back hoe, and we were unsuccessful in doing that. I think the machine was too large to manipulate a bucket down in the tank effectively and we felt like there was a more efficient way to remove the solids by hand and so we started with a five-gallon pail attached to a rope. . . . So the guy down in the tank would scoop a five-gallon pail out and personnel up on the surface would rope the pail out and into a drum -- an open-head drum that was sitting adjacent to the tank area.

TR4 at 243-244. Mr. Austin testified that this process yielded 32 drums of solids. TR4 at 244. *See, also*, CX23 at EPA 1083, 1127. Additional solids had earlier been removed from the Pit in June, 2007, CX 23 at EPA 1083; First Set of Stipulations, ¶ 28, which accounts for the fact that 35 drums of Pit solids – 32 metal drums (DM) and 3 fiberboard or plastic drums (DF) -- were shipped off-site on February 20, 2008. CX 23 at EPA 1127.

The shipping manifest for the Pit solids shipped off-site in February, 2008 shows a total of 35 drums, with a total weight of 17,500 pounds, CX 23 at EPA 1127, representing an average of 500 pounds per drum. *See, also*, First Set of Stipulations, ¶ 31. Mr. Austin testified that the drums were not completely full, TR4 at 242. Whether or not the drums were *completely* full, it is

reasonable to assume that Chem-Solv filled the drums as much as practicable, because their agreement with their disposal contractor was “on a dollars per container basis.” TR4 at 242. *See, also*, Initial Decision at 8. Mr. Perkins testified that he “heard reports that some of the drums were as low as one third full. Others were more full.” TR4 at 10. As with his other factual testimony, Mr. Perkins did not identify the source of the “reports” he was referring to, and had no personal knowledge since he had not yet been engaged by Chem-Solv at the time of the tank removal.

Mr. Tickle also testified that there were about two feet of solids in the bottom of the Pit when he assisted in the emptying of the tank. TR3 at 144-145. However, an examination of Mr. Tickle’s testimony indicates that the 32 drums of solids removed from the Pit in January, 2008 had to have been *in addition to* the two feet of solids which Mr. Tickle helped remove. Chem-Solv has repeatedly referred to the solids in the tank as “light” and claimed that the solids are easily conveyed in the liquid when they enter the Pit, and for some time thereafter. CX 23 at EPA 1081. This would indicate that the bulk of the solids, even when consolidated, would have consisted of relatively small, easily entrained particles, in contrast to a sedimentary material with large, heavy particles, such as sand. Mr. Tickle, however, unequivocally described the material he removed from the Pit as “sand.” TR3 at 140. As anyone who has been to a beach can attest, sand has a relatively large particle size and is unlikely to be entrained in a liquid for any significant length of time. Based on Mr. Tickle’s prior experience in a factory, he believed that the sand in the bottom of the Pit was of a type put into tanks “to hold them down,” TR3 at 157 -- in effect as a type of ballast. Thus it appears that the sand was something distinct from the solids which settled out of the wastewater.

Moreover, Mr. Tickle's description of the removal of the sand at the bottom of the Pit differs significantly from either of the two different processes of solids removal described in Mr. Austin's affidavit and testimony. Mr. Austin's hearing testimony was that someone in the Pit would "scoop a five-gallon pail out" of the Pit, the pail would be roped out, and emptied into an "open-head drum that was sitting adjacent to the tank area." TR4 at 243-244. Mr. Tickle, in contrast, described a process where the sand was "shoveled" out, TR3 at 140, and placed into a "hopper," TR3 at 150, which Mr. Tickle described as similar to a dumpster, TR3 at 154, about 3 feet tall by 12 feet long by 7 feet high. TR3 at 150. When asked if the sand was placed in drums or only in the hopper, Mr. Tickle's unequivocal response was "[i]n the hopper." TR3 at 150. He estimated that the depth of the sand before he removed it was about 2 feet. TR3 at 144.

There is no way that either Mr. Austin or Mr. Tickle could mistake 55 gallon drums for a 12 foot long hopper, or vice versa. Mr. Austin and Mr. Tickle were clearly describing two different processes, i.e. two different phases of the removal of solids from the Pit. Chem-Solv stated in response to an EPA information request letter that the final removal of solids from the Pit occurred on three separate days: January 30, 31 and February 1, 2008. CX 23 at EPA 1083; First Set of Stipulations, ¶ 29. The two different operations described by Mr. Austin and Mr. Tickle could easily have occurred on separate days. When Mr. Tickle was done removing the sand, the tank was empty, TR3 at 141-142, so the removal of the sand must have occurred subsequent to the removal of the 32 drums of solids. Thus, the total amount of solids stored in the Pit prior to the removal of the tank included the solids that ended up in the 35 drums, *plus* the two foot depth of sand removed by Mr. Tickle and placed into the hopper.

In their Initial Post-Hearing Brief, Respondents initially stated that "[a]pproximately two feet of solids settled to the bottom of the Pit." Respondents' Initial Post-Hearing Brief at 20

(citing Mr. Tickle's testimony at TR 3 at 144, that there was two feet of solids that he "removed from the tank, right before [he] removed the tank from the ground"). But, Respondents then claimed that Mr. Tickle was *not* involved in the removal of the settled solids that were placed into the steel drums, but was instead involved only in the removal of the sand inside the Pit, which occurred "after the cleanout of settled solids." Respondents' Initial Post-Hearing Brief at 21-22. Since Respondents admit that the sand removal occurred "after the cleanout of settled solids," Respondents' Initial Post-Hearing Brief at 21-22, the two feet of sand had to have been stored in the Pit *in addition to* the 17,500 pounds of settled solids previously removed from the Pit and placed into drums. The total level of solids before the removal of 32 steel drums of solids had to have been considerably greater than the 2 feet of sand left after this initial removal, and the total weight of solids stored in the Pit had to have been considerably more than 17,500 pounds. Respondents conclude their discussion of the solids removal by confirming that "the sand was shoveled only into the hopper and never made it to the steel drums," Respondents' Brief at 22, thus confirming that the two feet of sand was in addition to the solids removed from the Pit and placed in the 32 steel drums.¹⁰

Dr. Lowry's testimony provides evidence that the sand removed by Mr. Tickle from the bottom of the Pit was a hazardous waste. As explained further in Section V.B., below, and in Complainant's Initial Post-Hearing Brief, the levels of tetrachloroethene and trichloroethene in the Pit solids were so high that there can be no doubt as to the hazardous character of the solids. Complainant's Initial Post-Hearing Brief at 52-53. Dr. Lowry, testified that the tetrachloroethene in the Pit exceeded the tetrachloroethene's solubility limit, and thus would

¹⁰ In addition, it should be noted, three plastic drums of solids had been removed from the Pit in June, 2007, and were shipped offsite as hazardous waste along with the 32 drums removed in January, 2008. See Complainant's Initial Post-Hearing Brief at 33-34.

exist as droplets which would tend to settle toward the bottom of the tank.¹¹ TR2 at 95-96. Thus the level of tetrachloroethene would increase the further down one went in the tank. TR2 at 96. Respondents attempted unsuccessfully to get Dr. Lowry to change his opinion on cross-examination, but presented no scientific evidence of their own to rebut Dr. Lowry's clear and persuasive expert testimony on this point. Thus the total amount of hazardous waste stored in the Pit prior to removal -- including the material placed into the 35 drums and the sand placed into the hopper -- was significantly greater than the 17,500 pounds of hazardous waste noted in Respondents' manifest.

Respondents also argue that some of the material in the 35 drums was not hazardous waste, because it included some amount of concrete that was broken up in order to remove the Pit, fell into the solids already in the tank, and was placed in the drums along with the settled solids. This contention is highly implausible. As the Presiding Officer pointed out, Chem-Solv paid for disposal of the wastes on a per container basis, and "common business sense would seem to dictate that the Pit sludge be placed into as few drums as possible." Initial Decision at 81. Judge Biro also found it "incredible that Chem-Solv would allow nonhazardous waste material such as concrete to occupy any significant amount of space in the drums Chem-Solv was paying to dispose of as hazardous waste." Initial Decision at 81, citing *United States v. Santarsiero*, 566 F. Supp. 536 (S.D.N.Y. 1983) (judge is entitled to consider all the facts presented to him and to draw reasonable inferences from those facts based upon his common sense and experience); *Abad v. Bayer Corp.*, 531 F. Supp. 2d 957, 966-67 (N.D. Ill. 2008) (a

¹¹ Dr. Lowry also testified that the level of trichloroethene in the Pit solids was below the solubility limit, and thus would likely not vary within the Pit solids, although there was a possibility that the levels would be higher lower down in the tank if some trichloroethene had dissolved in the liquid tetrachloroethene droplets. TR2 at 96-99.

judge may "consider the inherent plausibility" of the testimony, in light of the judge's own common sense or relevant experience, when evaluating a witness's credibility).

Further, Respondents failed to explain the need to break the concrete surrounding the Pit prior to removing the hazardous solids from the Pit. There is no reason to believe that the concrete anchor surrounding the tank in any way interfered with the removal of the solids in the tank, and it would have made no sense to remove the concrete before removing the solids. Breaking the concrete into the still-full tank would have risked splattering the sludge-like solids, allowed the broken pieces to fall into the sludge, and needlessly increased the volume of material which would have had to be disposed of as hazardous waste. Safety considerations would dictate that the tank be stable and steady when workers entered the tank to remove the solids, so it would have been unsafe to break up the tank's concrete anchor prior to the workers entering the tank. It strains credulity to believe that the breaking of the concrete – which Mr. Tickle testified was accomplished using a jackhammer, TR3 at 143-144 -- would have occurred prior to the removal of the solids in the tank.

V. RESPONSE TO RESPONDENTS' ARGUMENTS

A. Claimed Use and Reuse of Pit Water

In support of their argument of eligibility for an exemption from the full RCRA requirements, Respondents now ask the Board to overturn Judge Biro's factual finding that Pit water was not reused or incorporated into a product. However, Respondents have not identified a compelling reason to overturn the Presiding Officer's credibility determinations on this issue.

The Initial Decision contained an extended discussion of and evaluation of the evidence related to Respondents' claims that Pit water was reused for spraying and used as a raw material in Freeze-Con. Initial Decision at 56-62. Judge Biro evaluated the testimony of Respondents'

witnesses in the context of all of the evidence, and she specifically evaluated and relied upon the witnesses' demeanor in discounting the testimony of two witnesses, Mr. Austin and Mr. Tickle with regard to the claimed reuse of Pit water. Initial Decision at 57-58. This reliance on witness demeanor is appropriate given her role as the initial trier of fact. Judge Biro explained the weakness of Mr. Austin's testimony with regard to Freeze-Con batch tickets, Initial Decision at 58-59, and discussed the evidence casting doubt on Mr. Austin's personal involvement in the shop floor activities at the Facility. Initial Decision at 57-58.

With regard to Respondents' expert witness, Scott Perkins, Judge Biro noted that Mr. Perkins had no personal knowledge of the facts regarding the claimed reuse of Pit water, since he was not retained by Chem-Solv until the summer of 2008, and thus his testimony could not provide independent corroboration of the other witnesses' testimony. Initial Decision at 59.

Judge Biro's consideration of the witnesses' demeanor was an important factor in her credibility determinations, but she did not rely on witness demeanor in a vacuum. She instead considered her observations of the witnesses in the context of all of the extensive evidence she examined. In particular, she noted that Chem-Solv made no mention of the alleged use or reuse of Pit water during numerous regulatory inspections, nor in answers to letters from VADEQ or the three EPA IRLs, and found it "incredible" that so many discussions about the Pit and its contents could take place without such a critical fact being brought to the attention of the regulators. Initial Decision at 61. She notes that Chem-Solv's designated spokesperson, Mr. Lester, repeatedly referred to Pit water as a "waste," and specifically stated that Chem-Solv was "looking" for potential reuses for the water, but had not found any and was therefore managing it as a waste. Initial Decision at 59-61. She further noted the implausibility of Respondents' claims that they reused untreated Pit water to spray containers in an open area with a high-

powered industrial sprayer, even though the pH of the Pit water was at times dangerously corrosive (pH below 2 or above 12.5). Initial Decision at 61.

Respondents are wrong in claiming that Judge Biro “disregarded” Respondents’ evidence. *See, e.g.*, Respondent’s Brief at 3, 16, 18, 36, 37. It is clear from her extended discussion of the evidence that Judge Biro did not disregard Respondents’ evidence, but rather considered and rejected it as either not credible, not persuasive, or both. As such, she was performing precisely the role assigned to a presiding officer in an EPA administrative proceeding. Respondents are not pleased with Judge Biro’s conclusions as to the credibility of their witnesses, but have not suggested anything even approaching a “compelling reason” to disregard the deference normally accorded to a presiding officer’s evaluation of the credibility of live witnesses.

Respondents complain that Judge Biro “played up contradictions between Mr. Austin and Mr. Tickle as to whether tap water was ever introduced into the drum-washing system.” Respondent’s Brief at 16. The use of the term “played up” seems to connote some impropriety, yet it is difficult to see why a contradiction of such significance -- between two witnesses representing the same party and describing the exact same alleged process -- would *not* be an important factor in the assessment of the witnesses’ credibility.

Respondents’ argument contains additional dismissive language which appears to connote some sort of impropriety in Judge Biro’s credibility findings. *See*, Respondent’s Brief at 16-17. Respondents correctly noted that Judge Biro attached little credibility to the testimony of Mr. Austin, Mr. Tickle or Mr. Perkins, while finding both Ms. Lohman and Mr. Lester to be credible. There is, however, no evidence that her credibility findings were the result of any improper considerations. The Initial Decision demonstrates that Judge Biro engaged in very

careful consideration of the witnesses' testimony and the supporting evidence before drawing her conclusions regarding witness credibility.

Respondents argue that Mr. Lester's statements to Ms. Lohman and the EPA inspectors should not be given weight because they are "hearsay." Respondent's Brief at 17-18. This argument ignores relevant law, under which Mr. Lester's statements are considered statements of a party-opponent, and are not hearsay. *See*, Rule 801(d)(2) of the Federal Rules of Evidence. *See, also*, Initial Decision at 15. Moreover, it was reasonable and appropriate for Judge Biro to accord significant weight to Mr. Lester's statements about the company's shop-floor operations. At the time of the EPA and VADEQ investigation in 2007-2008, Mr. Lester served as the Chem-Solv's Operations Manager and designated regulatory spokesperson, and thus would be expected to be completely knowledgeable as to the company's shop-floor operations. His statements were made and recorded at the time that the events in question were actually occurring (in contrast to Mr. Austin and Mr. Tickle, who each were testifying years after the events). In contrast to Mr. Lester, Mr. Austin and Mr. Tickle each had a limited basis for knowledge of the company's full operations, and each had an incentive to testify consistent with the interests of their employer.

Respondents complain that EPA did not subpoena Mr. Lester for the hearing. Respondent's Brief at 17. It is not clear why this should matter. Mr. Lester made his statements at a time when he was designated as Chem-Solv's primary regulatory spokesperson, and he made statements which were inconsistent with the company's current position in litigation. Statements made by Mr. Lester as company spokesperson would be admissible against Chem-Solv in any United States court, and there was thus no need for Complainant to subpoena Mr. Lester. If Respondents believed that Cary Lester would have provided testimony favorable to their positions, nothing prevented them from subpoenaing Mr. Lester themselves.

Respondents further argue that Ms. Lohman's testimony should have been discounted due to an alleged "bias." Respondent's Brief at 18-20. The only evidence Respondents presented of this alleged bias consists of (1) Ms. Lohman's use of the term "revoked" to describe the hazy circumstances surrounding the termination of the permit under which Chem-Solv formerly discharged water from the Pit into a local treatment works, and (2) Ms. Lohman's testimony regarding what Cary Lester told her about the pumping of storm water, which Respondents believed to be inaccurate. Respondent's Brief at 18-20. It is difficult to understand how Ms. Lohman's testimony on these highly peripheral points demonstrates any bias whatsoever, much less the type of bias necessary to overturn the Presiding Officer's finding that Ms. Lohman was a credible witness.

For the forgoing reasons, Respondents have failed to demonstrate any compelling reason to reject the Presiding Officer's finding that water collected in the Pit was not reused to clean drums or incorporated into Freeze-Con.

B. Representative Sampling

Respondents contest the Presiding Officer's findings that the sludge and water in the Pit were hazardous wastes. Respondents argue that the samples taken by Complainant were not "reliable" or "representative." Respondents' Brief at 20. Respondents insist that "EPA's sampling methodology was deeply flawed," Respondents' Brief at 20, and on this basis argue that the results of that sampling should be completely ignored. Respondents' argument is long on legal conclusions, but short on specific reasons, and lacking in scientific rationale.

The sampling in this case was conducted under the direction of a veteran EPA inspector, George Houghton. Complainant presented exhaustive evidence in support of the sampling results, including detailed evidence regarding the collection of samples (summarized and cited in

Complainant's Initial Post-Hearing Brief at 38-47) and detailed evidence regarding the laboratory analysis of those samples. *See* Complainant's Initial Post-Hearing Brief at 47-50. Complainant also presented the testimony of an expert chemist, Dr. Joseph Lowry, who carefully examined the sampling protocol and results, and opined that the sampling procedures used by EPA resulted in reliable and representative results for both the Pit water and the Pit sludge. *See*, Complainant's Initial Post-Hearing Brief at 50-57.

Respondents' Brief is vague as to what it was about EPA's sampling procedures they claim rendered the results unreliable. On Page 21 of Respondents' Brief, Respondents purport to list two ways in which they claim EPA's sampling was flawed: (1) the sampling was not representative, and (2) EPA's methodology was inconsistent with EPA procedures. However, this statement in Respondents' Brief does not explain *why* the sampling was not representative, or *how* the methodology differed from established procedures.

Respondents do identify four more specific reasons why they believe that EPA's sampling should be rejected: EPA allegedly (1) failed to measure the depth of the Pit's settled solids, (2) failed to use a coring device, (3) failed to homogenize the samples, and (4) took only a singular grab from the surface of the Pit. Respondents' Brief at 21-22. However, Respondents offer no scientific explanation as to why these factors, even if true, should render the sampling unreliable.¹² Respondents merely rely on the conclusory testimony of their "expert," Scott Perkins, whose position seems to be that any deviation from procedures set forth in any EPA guidance document renders sampling unrepresentative.¹³

¹² Dr. Lowry strongly disagreed with Respondents' suggestion that a coring device should have been used, testifying that the use of such a device is generally not favored because of the risks it poses to the integrity of the tank. TR1 at 88.

¹³ As discussed below, Mr. Perkins' position with regard to EPA's sampling is inconsistent with his opinion that results of sampling performed by Chem-Solv in 2006 was representative of the sludge in the Pit, despite a complete lack of information regarding the procedures used in the 2006 sampling event.

It is important to note that the guidance documents relied upon by Mr. Perkins are explicitly non-mandatory and non-exclusive. Mr. Perkins referred to a document known as SW-846, which includes a “Disclaimer” section which states that “[e]xcept where explicitly specified in a regulation, the use of SW-846 methods is not mandatory in response to Federal testing requirements.” Complainant’s expert, Dr. Lowry, confirmed that SW-846 was not required. TR2 at 126-127, 136. Nor is SW-846 or any other sampling methods “explicitly specified” to be mandatory for purposes of RCRA sampling. 40 C.F.R. § 261.20(c) states that “the Administrator will consider a sample obtained using any of the methods specified in appendix I [to 40 C.F.R. Part 261] to be a representative sample within the meaning of part 260 of this chapter.” This language does not in any way require the use of the specified methods, but is instead the “safe harbor” provision mentioned by Dr. Lowry: the methods listed in appendix I are not required, but if a regulated entity follows such a method then EPA will consider the sampling to be representative. TR2 at 74, 218-219. Allowing a regulated entity to rely on the specified methods does not in any way imply that those methods are exclusive.

Where specific methods *are* required under the RCRA regulations, there are procedures, set forth in 40 C.F.R. §§ 260.20 and 260.21, for petitioning for the acceptance of an equivalent method. 40 C.F.R. § 261.20(c)(3) provides that a sample obtained using any of the methods specified in appendix I to Part 261 will be considered a representative sample, but the comment inserted into 40 C.F.R. § 261.20(c) makes it explicit that such procedures are unnecessary with regard to the methods specified in appendix I because such methods are not required: “Since the appendix I sampling methods are not being formally adopted by the Administrator, a person who desires to employ an alternative sampling method is not required to demonstrate the equivalency of his method under the procedures set forth in §§ 260.20 and 260.21.”

Respondents argue that there were discrepancies between the procedures followed by Mr. Houghton and a 1994 tank sampling document, which appears to have been prepared by the EPA Environmental Response Team, an EPA unit which assists EPA on-scene coordinators in dealing with emergency removals. RX 24 at CS 242. This document appears to be specific to the EPA Environmental Response Team and did not apply to Mr. Houghton, who was not an on-scene coordinator and was not part of the Environmental Response Team. The document itself states that the procedures “may be varied or changed as required, dependent on site conditions, equipment limitations or limitations imposed by the procedures or other procedure limitations.” RX 24 at CS 242.

Complainant does not argue that Mr. Houghton followed each and every one of the varied recommendations in EPA’s different guidance documents. However, Respondents’ focus on the guidance documents is merely a distraction from the real issue, which is whether the procedures Mr. Houghton used in sampling the Pit were sufficiently reliable and representative to answer the question the sampling was intended to answer: did the Pit contain toxic hazardous constituents at concentrations exceeding regulated levels. As discussed below, EPA’s expert witness answered this question in the affirmative, and explained the scientific reasons for his opinion. In response, Respondents’ expert, Scott Perkins, argued only that some of the non-mandatory suggestions were not followed, but presented no scientific rationale as to why these alleged deviations negate the reliability and representativeness of the samples taken.

At hearing Complainant presented Mr. Houghton’s exhaustive testimony detailing every aspect of the sampling event, including but not limited to: decontamination procedures and the procedures for testing the effectiveness of the decontamination procedures; observations of the Pit area; the equipment and methods used to collect and preserve the samples; quality control

measures; and chain of custody measures. *See* Complainant's Initial Post-Hearing Brief at 38-47. Complainant also presented detailed testimony from Peggy Zawodny, the EPA environmental scientist and lab analyst, who analyzed the samples collected by Mr. Houghton. *See* Complainant's Initial Post-Hearing Brief at 47-50. Ms. Zawodny's analysis (which Respondents do challenge) showed: (1) the presence of chloroform in the Pit water TCLP-prepared¹⁴ sample at 6.1 mg/L, exceeding the regulatory limit of 6.0 mg/L, TR2 at 33; CX 16 at EPA 285; 40 C.F.R. § 261.24; the presence of tetrachlorethene in the TCLP-prepared sample of Pit sludge at 457 mg/L, exceeding the regulatory limit of 0.7 mg/L; and the presence of trichloroethene in the TCLP-prepared sample of Pit sludge at 16 mg/L, exceeding the regulatory limit of 0.5 mg/L. TR2 at 33; CX 16 at EPA 285; 40 C.F.R. § 261.24.

EPA's expert chemist, Dr. Lowry, explained the scientific basis for his conclusion that the samples collected by Mr. Houghton were sufficiently representative to conclude that the Pit contained hazardous waste. Pursuant to 40 C.F.R. §261.24, a solid waste is a hazardous waste if a "representative sample of the waste" which has been processed using the TCLP procedure contains any of the contaminants listed in the table in the regulation at levels equal to or exceeding the value listed in the table. "Representative sample" is defined in 40 C.F.R. §262.10 as "a sample of a universe or whole (e.g., waste pile, lagoon, ground water) which can be expected to exhibit the average properties of the universe or whole."

The definition of "representative sample" does not specify that a sample is only representative if it exhibits the exact average concentration of each hazardous constituent found in the whole. The definition instead speaks of exhibiting the average "properties" of the whole.

¹⁴ "TCLP" is the abbreviation commonly used for the Toxicity Characteristic Leaching Procedure ("TCLP"), required in 40 C.F.R. § 261.24(a).

In this case the “property” which the samples must exhibit to the representative degree is the property of toxicity under 40 C.F.R. § 261.24. Logically, a sample or set of samples is representative if it can be concluded from the sample that the whole contains toxic constituents at some level exceeding the regulatory limits.

As explained by Dr. Lowry, any time one takes a sample one is going to have to use that portion of the whole to make an inference to the whole. TR2 at 81-82. Since EPA did not specify an exact, regulatory-required protocol for taking a representative sample, one has to interpret the requirement of a representative sample as one would in the “science world,” where a representative sample would be a sample sufficient to answer question posed. TR2 at 82, 95. In this instance, the question posed is whether the average of the whole contains leachable hazardous constituents in excess of the regulatory limits. So, for example, the sample EPA took from the Pit sludge is sufficiently representative to determine if the sludge is hazardous for perchloroethylene (another name for tetrachloroethene, TR2 at 77; TR4 at 232) if the sample is “sufficient to answer the question is the average value over .7?” TR2 at 95.

The composite Pit sludge sample taken by EPA in this case is a representative sample for tetrachloroethene and trichloroethelene if one can conclude from the sample result that the average property of the Pit sludge is that it exhibits the characteristic of toxicity for tetrachloroethene and trichloroethelene. There is no need to show with statistical certainty that the level of tetrachloroethene and trichloroethelene in the sample is the exact same as the average level of the contaminants in the whole. Similarly, the Pit water sample is a representative sample for chloroform if one can conclude from the sample result that the average property of the Pit water is that it exhibits the characteristic of toxicity for chloroform.

The inspectors' compositing of sludge samples from different locations in the Pit provided a significant degree of horizontal coverage. TR2 at 90-91. The inspectors' inability to penetrate the sludge beyond approximately two feet did mean that the vertical coverage was limited. However, that unavoidable constraint is not important for two distinct reasons, explained further below: (1) the two hazardous contaminants found at regulated levels in the Pit sludge would be expected be found at the same or greater concentrations at lower levels in the tank; and (2) the concentration of each of the two contaminants at issue was so high that additional sampling could not have demonstrated average concentrations that were below the regulated levels.

Dr. Lowry explained that the total concentration of tetrachloroethene in the Pit sludge,¹⁵ approximately 1.6 %, means that this contaminant was past its solubility in the sludge layer, and some would thus exist in droplets. TR2 at 95-96. Because tetrachloroethene is denser than water, it is going to settle to the bottom: "there would be more . . . the lower you went in the tank because the droplets would work their way down to the bottom of the tank." TR2 at 96.

The other contaminant, trichlorethene, was found at a level which did not quite exceed its solubility limit; since the trichlorethene was fully dissolved, the concentration would not be likely to be found in varying layers. TR2 at 98. The only possible exception to this would be if some of the trichlorethene was dissolved in the tetrachloroethene droplets, in which case it would sink with the droplets and be found at higher levels further down in the tank. TR2 at 99.

In sum, the samples taken from the Pit sludge provided a good degree of horizontal coverage and, due to the nature of the contaminants, the lack of extensive vertical coverage would either have no impact on the result or would cause the result to be biased low. There is

¹⁵ The total concentration is the concentration prior to the implementation of the TCLP preparation.

thus a strong initial basis to find representativeness even *prior* to examining the contaminant levels found in the laboratory testing.

In fact, the extremely high levels of contaminants found in the lab provides a particularly strong basis from which to find that the samples were representative. After running the samples through the TCLP process, Ms. Zawodny's analysis showed 457 mg/L of tetrachloroethene remaining in the leachate, and 16 mg/L of trichloroethene. The regulatory limits for these hazardous constituents after TCLP preparation are 0.7 mg/L for tetrachloroethene and 0.5 mg/L for trichloroethene. Tetrachloroethene was thus present at approximately 653 times the regulatory limit, and trichloroethene at 32 times the regulatory limit.

Given these extremely high levels of hazardous constituents, there is essentially no possibility that additional sampling of the Pit sludge could establish that the sludge was not hazardous for both tetrachloroethene and trichloroethene. One would need to take at least 652 additional samples of the sludge, and have each sample show zero tetrachloroethene, in order for the average level in the sludge to be less than the regulatory limit. For trichloroethene, one would need to take at least 31 additional zero-concentration samples in order to average below the regulatory limit. There is thus no reasonable likelihood that additional sampling would alter the conclusion that the Pit sludge is a hazardous waste. TR2 at EPA 94-95, 97-98.

Chem-Solv's own analysis of the Pit sludge also showed very high concentrations of tetrachloroethene and trichloroethene. EPA contacted the disposal facility where Chem-Solv sent the 32 drums of sludge removed from the Pit in January, 2008 and the 3 drums of sludge removed in June, 2007. TR3 at 97-99; CX 63. The laboratory report EPA obtained from the disposal facility¹⁶ showed analysis, undertaken by ProChem, Inc. on behalf of Chem-Solv, of a

¹⁶ EPA obtained the report directly from the disposal facility. Chem-Solv did not itself provide these results to EPA or even inform EPA of the existence of the results. See, Initial Decision at 41, n. 66; CX 63 at EPA 1791-1796.

sample of "pit sand sludge" collected on January 24, 2008. CX 63 at EPA 1797-1801. ProChem's analysis showed significant concentrations of a number of volatile organic compounds, many of which were also identified in EPA's lab report, including high concentrations of tetrachloroethene and trichloroethene. CX 63 at EPA 1799. Although the total concentrations¹⁷ shown in the ProChem analysis are lower than those in the samples taken by EPA, the ProChem samples were taken many months later, so there may have been volatilization loss, particularly since the documentation provides no information as to where or how the samples were obtained and what measures, if any, were taken to minimize the loss of volatiles during the collection and transportation of the samples. Nonetheless, these samples and analysis, commissioned by Chem-Solv, showed total levels of tetrachloroethene and trichloroethene that were so far above the regulatory limit that they would be expected to show regulated concentrations had Chem-Solv requested a TCLP preparation of the samples. TR2 at 105-106. Chem-Solv apparently was convinced that further analysis was not necessary, and sent the Pit sludge off as hazardous waste. CX 23 at EPA 1127.

The Pit water sampling and analysis result is admittedly a closer call. The regulatory standard for chloroform is 6 mg/L, and the chloroform found in EPA's sample was determined to contain 6.1 mg/L. The level of chloroform does not provide the same not overwhelming evidence of the representativeness of the sample compared to the super-high levels of tetrachloroethene and trichloroethene found in the Pit sludge. Nonetheless, the evidence supports a finding that the Pit water sample was sufficiently representative to conclude that the Pit water was itself a hazardous waste.¹⁸

¹⁷ See footnote 15, above.

¹⁸ It should be pointed out that the question of whether or not the Pit water is a hazardous waste actually has little impact on Respondents' liability for the alleged violations. Given the extremely strong evidence that the Pit sludge

According to Dr. Lowry, the chloroform dissolved in the Pit water would be expected to diffuse, which would “more or less make everything the same concentration.” TR2 at 102. The only exception to this would be that samples taken at the surface of the water – as were Mr. Houghton’s Pit water samples – might have a slightly *lower* concentration than samples taken further below the surface, due to the active volatilization occurring at the interface between the water and the air. TR2 at 101. Although Respondents posited the potential existence of separate phases within the water layer, Dr. Lowry testified that there was no scientific reason why this should occur in the Pit water, other than the thin emulsion layer observed at the surface (which would have been incorporated into the surface samples taken by Mr. Houghton). TR2 at 102. Respondents’ lawyers posited that separate phases could have existed, but presented no evidence of a scientific basis to rebut Dr. Lowry’s opinion to the contrary.

Respondents argue that the 2% margin of error Ms. Zawodny agreed was present in her chloroform analysis result prevents that result from being used to show that the Pit water contained chloroform above regulated limits. As discussed in Complainant’s Initial Post-Hearing Brief at 56-57, there is significant reason to believe that the 6.1 mg/L analytic result was biased low. It is unnecessary to further address this evidence, however. As Judge Biro points out, a 2% margin of error means that the “true” result could be as low as 0.022mg/L below the regulatory threshold, or as high as 0.222 mg/L above the threshold. Initial Decision at 72. Since the vast majority of this range is above the 6.0 mg/L threshold, it is more likely than not that the “true” concentration of chloroform exceeded the regulatory threshold, and thus Complainant has met its burden of demonstrating this by a preponderance of the evidence. Initial Decision at 72.

was a hazardous waste, and the evidence, discussed below, that the Pit contained hazardous discarded chemical products, Complainant can establish that the Pit was a RCRA-regulated unit containing hazardous waste regardless of whether or not the Pit water was by itself a hazardous waste.

In contrast to Complainant's extensive sampling evidence and Dr. Lowry's detailed explanation of the science behind his conclusions, Respondents provide no scientific basis for rejecting Dr. Lowry's expert opinion. Instead, Respondents merely repeat, over and over, Mr. Perkins' ultimate conclusion – that Mr. Houghton's failure to conduct the sampling as Mr. Perkins would have preferred renders the sampling results *ipso facto* invalid. Mr. Perkins provided no scientific explanation for his conclusion, and Respondents have not suggested any in their appeal brief.

Mr. Perkins' credibility on the issue of representative sampling is further damaged by his opinion that the sampling and analysis conducted by Chem-Solv in 2006 *did* result in a representative sample showing that the Pit sludge was *not* a hazardous waste. Mr. Perkins complained vociferously about Mr. Houghton's failure to create detailed field notes, but Mr. Houghton, as noted above, provided detailed in-person testimony regarding all aspects of the sampling event. In contrast, Respondents presented no eyewitness testimony at all regarding their 2006 sampling, and the extremely limited written documentation contained almost no information about the 2006 sampling event. What little documentation does exist appears to indicate that the 2006 sampling was of a composite material which contained little or no Pit sludge. Mr. Perkins' expert opinion that the 2006 sampling was representative of the Pit sludge, despite his complete lack of information with regard to that sampling event, is utterly inconsistent with his attack on the representativeness of Mr. Houghton's sampling procedures and documentation.

Mr. Perkins testified that the 2006 sampling represented an analysis of sludge removed from the Acid Pit. TR3 at 211-215. On direct examination Mr. Perkins admitted that the samples taken in 2006 may have included material from sources other than the Acid Pit. TR3 at

212-213. He nonetheless testified that “[t]he indication that I got is that the vast majority of the materials sampled was materials from the sub grade tank” (another name Respondents used to describe the Acid Pit) whereas the other materials were a “minority” of the materials in the container. TR3 at 212. He gave no explanation as to the nature of or source of the “indication” he was relying on, but he was nonetheless willing to opine that the documentation regarding this sampling event told him that “the waste that was sampled was not a hazardous waste.” TR3 at 214. He confirmed on cross examination that it was his opinion that the 2006 sample was “representative” of the Pit solids. TR4 at 83-84.

Mr. Perkins admitted on cross-examination that the *only* information he had about the 2006 sampling and analysis event consisted of the documents contained in Attachment 9, CX 21 at 1015-1021, to Chem-Solv’s December, 2007 information request response (“Attachment 9”). TR4 at 76-77. He further admitted that he had no information about the type of equipment used to take the sample, or a map of where the samples were taken, TR4 at 77-78, although he had insisted that such information was essential and mandatory when discussing Mr. Houghton’s sampling. TR4 at 13.

Despite Mr. Perkins’ stated belief that the material Respondents sampled in 2006 was primarily from the Pit, he admitted on cross-examination that the documentation¹⁹ appeared on its face to indicate that the material analyzed was wholly or primarily from a source *other* than the Pit. TR4 at 78-79. Despite the indications that the material tested was not Pit sludge, Mr. Perkins made the incredible claim that he was free to find such sampling representative of the properties of the Pit sludge because the documentation – prepared by his client, Chem-Solv -- was *probably not accurate*:

¹⁹ As noted above, Mr. Perkins admitted that this documentation was the *only* information he had about the sampling event.

- Q. Now, where it says here “name of waste: retention basin sediments,” you agree that retention basin sediments are not what is in the Pit, is that correct?
- A. I am not sure how they are using the term. I understand that intuitively retention basin would suggest somewhere else, but in my experience in dealing with Chem-Solv and other clients, the use of terminology isn’t always the terminology we would use. So, I am not ready to conclude that because it says retention basin sediments it is sediments from the solids that you all have been referring to as the retention basin.
- Q. Okay, if you will turn to the next page, 1017, and at the beginning of the page where it says “process generating waste.” And it talks about “the sediments are moved by sheet flow precipitation runoff from the paved parking lot of the facilities production area.” You would agree that they are not talking about anything that is flowing into the acid pit, are they?
- A. That is right.
- Q. Okay, so clearly, to the extent that samples were taken here, at least some of these samples were not taken of the pit sludge, is that correct?
- A. We have heard that there were other things in a container in addition to the pit solids, and I don’t have enough information to say what and how much. I agree with you that if you read this and take it at face value, it would seem to indicate that there were no pit solids whatsoever. But in my experience over 20 some odd years in dealing with industrial clients and waste contractors, the process of generating a waste profile and associating it with a shipment going off site is far from an exact science. Often times there are profiles that are generated at a very generic nature, and a waste contractor will mandate that profile be generated, and, in my experience, a company often times in the heat of the moment will say – just use this profile, or will generate a profile that is not perfectly accurate. It is unfortunately common, and so correlating a profile to a manifest for anyone that has ever done any work with shipping hazardous waste understand that rarely is there a one to one correlation.

TR4 at 78-79.

In ruling on the parties' sampling arguments, Judge Biro found EPA's witnesses to be highly credible. She found that "Mr. Houghton gave detailed credible testimony, with the demeanor of someone well versed and long experienced in his field." Initial Decision at 69. She further described Mr. Houghton and Dr. Lowry as "two highly credible witnesses," Initial Decision at 69, and concluded on the basis of their testimony that the sampling of Pit water and Pit sludge was representative, and that the results showed the presence of chloroform in the Pit water and tetrachloroethylene and trichloroethylene in the Pit sludge in excess of the RCRA regulatory limits. Initial Decision at 69-72. In the face of the extremely strong evidence supporting these conclusions, Mr. Perkins vague and conclusory testimony, devoid of scientific explanation, does not provide a "compelling reason" to reject the deference normally afforded to the credibility determinations of a presiding officer who observes the actual live testimony.

C. Application of the Storage/Manufacturing Process Unit Exemption

Respondents have attempted to establish, as an affirmative defense, that the Pit was exempt from regulation under RCRA as a "raw material storage tank" and/or "manufacturing process unit," as set forth in 40 C.F.R. § 261.4(c). Respondents' arguments rely on their claims that the Pit water was repeatedly reused to spray drums and used in the manufacture of Freeze-Con. The Presiding Officer ruled that the Pit water was not reused for drum spraying and not used in the manufacture of Freeze-Con, and thus ruled that Respondents' claimed exemptions from regulation, set forth in 40 C.F.R. § 261.4(c), do not apply. Initial Decision at 78. Having rejected as untrue the alleged facts Respondents relied upon, the Presiding Officer could have stopped and declined to further address Respondents' exemption arguments, which relied on the rejected factual claims. Instead, Judge Biro exercised her discretion to address Respondents'

exemption arguments, ruling that the exemption would not apply “even if the Pit water was reused as Respondents’ claim.” Initial Decision at 78.

It is understandable that the Presiding Officer would want to address Respondents’ claimed exemptions, in the event her factual findings were questioned by Respondents on appeal. However, if the Board upholds Judge Biro’s factual findings with regard to the claimed reuse of Pit water, Respondents’ appeal can be rejected solely on that basis, without considering hypothetical scenarios which did not occur. While Complainant believes that the exemptions do not apply in any event, it may be inefficient and confusing to make law at the appellate level based upon factual claims which have been rejected by the Presiding Officer and are thus purely hypothetical. This is particularly so in this case because Respondents’ witnesses were not consistent between themselves as to the facts they were claiming, leading to potential confusion as to just which hypothetical facts to address.

If the Board does choose to address Respondents’ claimed exemptions, it should uphold the Presiding Officer’s ruling that the exemptions do not apply under if Respondents’ claimed facts are deemed to be true.

As noted above, the Pit was used to collect rinse water. Once in the Pit, the rinse water could, hypothetically, be reused for subsequent washing, incorporated into Freeze-Con, or stored until disposal. Respondents have not claimed that the Pit water was subject to any of the exclusions set forth in 40 C.F.R. § 261.2(a)(1). If the Pit water was incorporated into Freeze-Con, the used water, a by-product under 40 C.F.R. § 261.2(c), would be considered a discarded material and a solid waste (because a by-product which is incorporated into a fuel which is to be burned continues to be a solid waste, as is any fuel which incorporates such material). 40 C.F.R. § 261.2(c)(2)(B).

Respondents have claimed that even if material in the Pit would be considered solid and hazardous waste, that material was subject to the Manufacturing Process Unit exemption. At the outset, the Presiding Officer found that the spray cleaning of drums was not itself part of any manufacturing process. Even if the washing of drums is considered “manufacturing,” the washing of Respondents’ drums occurred on the Acid Pad, not in the Pit. TR 3 at 127-128. The Pit was merely the repository of the residue of the washing operation, conveyed from the Acid Pad via a drain and a pipe. TR 3 at 128-129. The Pit was therefore not a manufacturing process unit, and thus could qualify for the 40 C.F.R. § 261.4(c) exemption, if at all, solely as a raw material storage tank.

With regard to the claimed reuse of Pit water for spraying drums on the Acid Pad, the evidence is clear that the Pit water was sometimes highly caustic (pH below 2.0 or above 12.5), TR1 at 97-98, CX 19 at EPA 375, and thus had to be neutralized, either in the Pit or elsewhere. TR1 at 97-98. TR3 at 139. CX 19 at EPA 375. Respondents have claimed in their briefs that this neutralization only occurred in the Pit, and only occurred when the water was going to be disposed of, Respondents’ Brief at 14, but the hearing testimony Respondents cite on this point, even if taken most favorably to Respondents, does not clearly support their position. More importantly, it is unlikely that Respondents would or could reuse highly dangerous liquid – with a pH of below 2 or above 12.5 -- to clean drums using a high-powered industrial power washer in an open area, as discussed more fully in Complainant’s Post-Hearing Reply Brief at 10-11.²⁰

If in fact the rinse water on occasion had to be neutralized prior to the alleged reuse, the rinse water would also be considered a “spent material”: a material which had been used, and “could no longer serve the purpose for which it was produced without processing.” 40 C.F.R.

²⁰ Judge Biro addresses this issue in a paragraph discussing “the questionable nature of the reuse” described by Respondents’ witnesses. Initial Decision at 61.

§ 261.1(c)(1). As such, the spent rinse water in the Pit that was neutralized was a solid waste, even if it was eventually reused after reclamation. *See* 40 C.F.R. § 261.2(c)(3). *See, also* 50 *Fed. Reg.* 614, 633 (January 4, 1985)(“If the material is to be put to use after it has been reclaimed, it is still a solid waste until reclamation has been completed . . .the fact that wastes may be used after being reclaimed does not affect their status as wastes before and while being reclaimed”).

Even if one were to accept as true Respondents’ claim that the Pit water was *never* neutralized before being reused to wash drums, Respondents’ defense would still not succeed. As discussed in more detail in Complainant’s Post-Hearing Reply Brief at 13-16, the manufacturing process unit and raw material storage tank exemptions were designed to apply to units which are *dedicated* to manufacturing or raw material storage.²¹ As the Presiding Officer pointed out, Respondents paid for the disposal of tens of thousands of gallons of rinse water during a time when they were supposedly reusing the water to spray drums or incorporating it into Freeze-Con. Initial Decision at 79-80. Respondents were disposing of a volume of water considerably greater than the volume of water (allegedly from the Pit) which was used to manufacture Freeze-Con; in fact, “the overwhelming majority of the Pit water was always destined to be disposed of as a solid waste.” Initial Decision at 79-80. The Pit was therefore not

²¹ *See*, RO 13790 (December 19, 1986)(Letter from Joseph E. Carra, Acting Director, Waste Management Division to Mr. Hadley Bedbury, Senior Environmental Engineer, Diamond Shamrock Chemicals Company, “Tank Systems Applicable to Production Tanks During Cleanout, Process Transfer Equipment, and Hose Lines”; RPPC No. 9483.1986(11)) (“any process transfer equipment, even if normally used for production purposes, that is also used to transfer hazardous waste residue during equipment washout/cleanout procedures to a hazardous waste storage/treatment tank, would be considered part of a hazardous waste tank system and thus subject to the standards for such.”); RO 14469 (May 26, 2000)(Memorandum from Elizabeth A. Cotsworth, Director, Office of Solid Waste to George E. Pavlou, Director, Office of Enforcement and Compliance Assurance, EPA Region I; “Kodak Claim for a Manufacturing Process Unit Exemption to RCRA Subpart BB Air Emission Requirements”)(equipment was not exempt under the MPU exemption if it at times handled hazardous waste); 53 *Fed. Reg.* 34079, 34080 (Sept 2, 1988) (wastewater treatment unit exemption applies only to unit that is dedicated to on-site wastewater treatment, while units intermittently used for other purposes are not exempt).

dedicated to the storage of water for re-use, but was also used to store water destined from the outset for disposal.

In addition to storage of rinse water in the Pit, Respondents admitted that they intermittently used the Pit as a hazardous waste treatment unit. Respondents agreed that the water in the Pit *sometimes* had to be neutralized, at least prior to disposal. Under Respondents' scenario, Respondents would, when necessary, treat that waste by neutralization while the material remained in the Pit. Respondents' Initial Post-Hearing Brief at 40. The Pit was therefore used, at least part of the time, as a hazardous waste treatment unit, a further reason why the Pit was not a unit dedicated to the storage of a raw material.

Finally, Complainant argued below that the Pit, at least at the time of the violations alleged, was holding listed hazardous wastes consisting of discarded commercial chemical products. *See* Complainant's Initial Post-Hearing Brief at 73-78. There is simply no other explanation for the presence of the hazardous constituents found in EPA's analysis of the material in the Pit, particularly the extremely high levels of tetrachloroethene and trichloroethene. Respondents have not and cannot offer any alternative explanation for the presence of these contaminants in the Pit. These listed discarded commercial chemical products became hazardous wastes at the point where they were spilled, *prior to* being conveyed to the Pit, and thus the MPU exemption does not apply to such wastes because the wastes were not generated by any process occurring in the Pit. Further, once hazardous wastes listed as U210 and U228 were introduced into the Pit and mixed with the other contents, the entire contents of the Pit would be a hazardous waste pursuant to 40 C.F.R. § 261.3(a)(2)(iv).

Even if the Board assumes the truth of the factual claims rejected by the Presiding Officer, the Board should nonetheless reject Respondents' exemption arguments and uphold the

ruling in the Initial Decision that Respondents have not met their burden of establishing an exemption from RCRA regulation.

D. Drum of Sodium Hydrosulfide

The Presiding Officer ruled that the leaking drum of sodium hydrosulfide discovered by the inspectors at the Facility was a hazardous waste, rejecting Respondents' claims that the sodium hydrosulfide was a usable product maintained in Chem-Solv's inventory. Initial Decision at 86-89. The evidence does not support Respondents' claim that the leaking drum of sodium hydrosulfide was a product instead of a waste. As discussed in the Initial Decision, and in Section IV.B, above, the evidence demonstrates that the drum in question was not maintained in the condition one would expect for a useful product, particularly given the tendency of sodium hydrosulfide to degrade rapidly when in contact with air. The Board has specifically held that evidence of the condition and handling of a drum is a relevant factor in determining whether the drum's contents is product or waste. *Bil-Dry*, 9 E.A.D. at 602-604.

Respondents claim that the sodium hydrosulfide was in "inventory," but provided no written documentation that any sodium hydrosulfide product was on a written inventory for the Facility. Respondents' claimed sale of two other partial drums of sodium hydrosulfide turns out, on closer inspection, to be a transfer at no charge. *See*, factual summary in Section IV.B above.²²

Judge Biro carefully enumerated the extensive evidence she considered in determining whether the sodium hydrosulfide at issue was waste or product, and concluded that the material

²² It is worth noting a specific erroneous claim in Respondents' argument. Respondents claim that Ms. Lohman's testimony supports the idea that Chem-Solv found the drums of sodium hydrosulfide to be useable product. Respondents' Brief at 32. Respondents cite a passage in the transcript where Ms. Lohman stated 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." Respondents' Brief at 32, citing TR1 at 64. An examination of the transcript makes it clear that this quoted passage has absolutely nothing at all to do with the discovery of a leaking drum of sodium hydrosulfide in 2007. The passage instead referred to a number of unidentified drums discovered in an inspection in 2005, containing chemicals which Mr. Lester claimed he was going to attempt to use to make saleable products. *See* TR1 at 63-65.

was waste. Initial Decision at 86-89. The evidence to the contrary consists solely of the testimony of Mr. Austin and Mr. Perkins, and was uncorroborated by – and in fact contradicted by – the physical evidence and relevant written documentation. The Presiding Officer thus rightfully rejected Mr. Austin’s and Mr. Perkins’ testimony as lacking credibility. Initial Decision at 87-89. Respondents have provided no compelling reason to disturb the deference presumptively afforded to such a determination by the Presiding Officer.

E. Waste Determinations

Respondents argue that the Presiding Officer erred by “rejecting Chem-Solv’s reliance on ‘generator knowledge’” in performing a hazardous waste determination on the Pit water and sludge. Respondents’ Brief at 33. This argument faces an insurmountable initial hurdle, identified by the Presiding Officer: “Chem-Solv was not able to produce any documentation or testimony specifically showing that it performed a hazardous waste determination as described in 40 C.F.R. § 261.11.” Initial Decision at 95. Respondents have at best provided arguments as to how such a “generator knowledge” analysis *might have been* performed, but have provided no evidence identifying who performed the analysis, when, and on what basis. Nor have Respondents articulated a reasonable basis, even after the fact, from which one could conclude that the Pit water and Pit waste was not hazardous based on generator knowledge.

The regulatory inclusion of generator knowledge as a basis for a waste determination was never intended to allow a waste generator to use guesswork as to the nature of its waste. In the preamble to the final rule on waste determinations, EPA explained that a generator could declare a waste hazardous or nonhazardous without testing on the basis of a “review of the materials or processes used,” where “the generator *is certain* about the nature of the waste.” 45 *Fed. Reg.* 12724, 12727 (February 26, 1980)(emphasis added). An application of generator knowledge

must be based on “an objective review of the materials and processes involved in the generation of the waste.” 45 *Fed. Reg.* at 12727. EPA specifically rejected the concept of a “good faith” mistake provision, stating that a declaration of generator knowledge “must be based on factors which are subject to objective review.” 45 *Fed. Reg.* at 12727. A negligent oversight would not support a generator knowledge declaration. 45 *Fed. Reg.* at 12727. Where the products, processes and wastes change frequently, the generator must conduct new waste determinations as often as necessary. 45 *Fed. Reg.* at 12727.

In a December, 2007 IRL response, Chem-Solv responded to a request for its Pit sludge waste determination by stating that Attachment 9 to their IRL response constituted their waste determination for the Pit sludge. CX 21 at EPA 659-660, 1015-1021. Attachment 9 was the 2006 “profile,” discussed above, which contained no information whatsoever from which to determine the reliability or representativeness of the tested sample, and on its face appeared to refer only to wastes which had nothing to do with the Acid Pit. See Section V.C., above. Chem-Solv did not claim in its December, 2007 IRL response to have utilized generator knowledge at all in the waste determination for the Pit sludge.

Even now, Respondents are unable to identify the person or persons who performed the supposed generator knowledge analysis, when the analysis was performed, and the substantive elements of the analysis which lead to the supposed generator knowledge conclusion. As discussed above, Mr. Perkins in his testimony opined regarding a hypothetical generator knowledge determination, but Mr. Perkins could not have performed the waste determination for the Pit water and sludge because he was not even retained by Chem-Solv until after the wastes had been disposed of.

Absent evidence of a clearly-articulated and contemporaneous generator knowledge analysis, it is hard to give any credibility to Respondents' claim that such an analysis was performed. This is particularly so given the significant variability of the waste stream entering the Acid Pit, and the uncertainty of what might be washed into the Pit at a facility handling numerous hazardous chemicals of many different types. Respondents attempt to paint a picture of the Pit receiving only dirt and a few drops of chemicals from drum washing operations, but this picture is inconsistent with the evidence, not contested by Respondents, that the pH of the 1,800 gallon tank varied from below 2.0 to above 12.5. TR1 at 97-98, CX 19 at EPA 375. It is highly unlikely that such extreme variation between acid and base would be caused water containing only dirt and a few drops of chemical. In the absence of a cogent showing otherwise, it is hard to imagine a scenario where Respondents' could be "certain" that none of the numerous hazardous substances at the Facility could have made their way into the Pit.

The Presiding Officer correctly notes that the Pit water and sludge *did in fact* contain regulated levels of chloroform, tetrachloroethene and trichloroethene in 2007. Initial Decision at 95-96. Thus even if a generator knowledge determination had been performed, such determination was incorrect and did not comply with the applicable waste determination requirements. Initial Decision at 95-96; *see, also, Morrison Bros Co.*, EPA Docket No. VII-98-H-0012, 2000 EPA ALJ LEXIS 68, at *13 (ALJ, Aug 31, 2000).

With regard to aerosol cans, Respondents have not provided a basis to believe that any waste determination was performed. As discussed in Section IV.C, above, there is no actual evidence of Respondents' supposed policy on emptying aerosol cans, which is referenced in the record only in Respondents Briefs. Mr. Perkins acknowledged that there was a significant risk that aerosol cans would constitute hazardous waste. TR3 at 184. Given this risk, it would be

particularly inappropriate to conclude that the cans were nonhazardous on the basis of generator knowledge without very clear steps to assure that the hazards potentially posed by the product in the can, the propellant in the can and the pressure in the can, had in all cases been completely eliminated.

F. Fairness of Credibility Determinations

Respondents reserve an entire section of their brief to a rehashing of their displeasure at Judge Biro's rejection of the credibility of Respondents' witnesses, and her rejection of the strength of Respondents' arguments with regard to the non-testimonial evidence. Respondents' Brief at 36-42. In doing so, Respondents appear to be attacking the role of the Presiding Officer in the administrative process. Complainant is not aware of any rule of law, in any court in the United States, which states that the trier of fact must give equal weight to the testimony of both sides' witnesses and must draw inferences from the evidence with equal favor to both sides. On the contrary, the trier of fact, in any court, is required to assess the relative persuasiveness of testimony and other evidence, draw inferences and make determinations commensurate with the level of persuasiveness attached to each witness and each piece of evidence.

In this instance the record contains significant evidence in support of the Presiding Officer's findings. In fact, it would not be unreasonable to assert that the record contains *overwhelming* evidence in support of those findings. The rhetoric on pages 36-42 of Respondents' Brief seems to imply that Judge Biro somehow acted improperly, but Respondents' have provided no evidence whatsoever that Judge Biro's findings are the result of any improper basis. Respondents' are essentially arguing that Judge Biro acted improperly simply because she did not agree with Respondents' positions. As such, Respondents have

provided no reason at all, much less a compelling reason, for the Board to reject Judge Biro's findings.

VI. CONCLUSION

For the reasons set forth above, the Environmental Appeals Board should uphold in full the Initial Decision in this matter, finding Respondents' liable for the violations of RCRA set forth in the Initial Decision. Respondents' Appeal challenged only the Presiding Officer's findings of liability, and did not challenge the relief ordered by the Presiding Officer as a result of those findings of liability. Respondents did not challenge on appeal the amount of the penalty, the manner in which it was calculated, or the scope of the compliance order. In upholding the Initial Decision, the Board should impose the penalty assessed by Judge Biro and the compliance order set forth in the Initial Decision.

Respectfully Submitted,

7/25/14
DATE



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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ENVIRONMENTAL APPEALS BOARD

In the Matter of:)
)
Chem-Solv, Inc., formerly trading as)
Chemicals and Solvents, Inc.)
)
and) RCRA (3008) Appeal No. 14-02
)
Austin Holdings-VA, L.L.C.)
)
Docket Number RCRA-03-2011-0068)

CERTIFICATE OF SERVICE

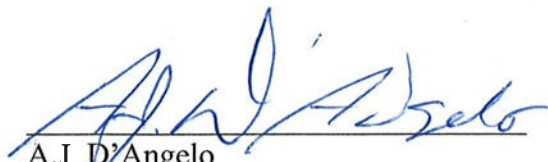
I hereby certify that on the date set forth below, I e-filed a copy of **Complainant's Response to Respondents' Appeal** in the above-captioned matter with the Environmental Appeals Board, United States Environmental Protection Agency, and caused the identical original to be mailed to the Clerk of the Board and true and correct copies of the same to be mailed to Respondents' counsel and to the Chief Administrative Law Judge via United Parcel Service, Next Day Air delivery, at the following addresses:

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