

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
ENVIRONMENTAL APPEALS BOARD

In the Matter of:)	
)	
CHEM-SOLV, INC., formerly trading as)	
Chemicals and Solvents, Inc.)	
)	
and)	
)	
AUSTIN HOLDINGS-VA, L.L.C.)	RCRA (3008) Appeal No. 14-02
)	
)	Docket No. RCRA-03-2011-0068
Appellants.)	
)	

APPELLANTS' REPLY BRIEF SUPPORTING REVERSAL OF INITIAL DECISION

Pursuant to the Order entered August 12, 2014 by the Environmental Appeals Board, the Appellants reply to certain issues raised by the EPA in its response to the Notice of Appeal.

I. EPA Inspectors Did Not Collect Representative Samples from the Pit.

At the hearing, the Appellants developed persuasive evidence that the samples collected by the EPA did not meet the agency's own standards for sampling. (*See* TR3 at 217-20; 233-36; TR 4 at 1-24.) The inspectors used the wrong sampling equipment, and did not follow the necessary quality control steps. (TR3 at 219-20; TR 4 1-24.)

In her initial decision, the ALJ ruled that the agency's guidance documents – specifically, EPA Tank Sampling SOP #2010 – were not binding on EPA Inspectors, Mr.

Houghton or Mr. Reyna. (Initial Decision at 67-68.) Guidance documents represent an agency's take on matters discussed therein and set forth its optimal approach. *See, e.g., In re Hallar Enterprises, Inc.*, No. RCRA-VI-815-H, 1999 EPA ALJ LEXIS 1 (1999). Furthermore, irrespective of whether agency guidance documents are mandatory or merely advisory, "the necessity for a scientifically acceptable method of sampling is not thereby affected." *Hallar Enterprises, Inc.*, 1999 EPA ALJ LEXIS 1 at *14. For the reasons set forth below, the EPA Inspectors could not have collected "representative" samples for purposes of 40 C.F.R. § 261 without following these guidance documents. Representative samples are required to generate reliable analytical results. (TR3 at 218-19.)

a. Sampling of Settled Solids

To ensure that potentially hazardous wastes are sampled and analyzed in a reliable and defensible manner, the EPA has both promulgated regulations and published guidance providing detailed sampling requirements. During the May 2007 sampling event, however, the EPA Inspectors ignored these requirements. They collected settled solids using inappropriate tools and methods and thus generated analytical results that were not representative of the Pit's contents. The ALJ erred in ruling that the EPA met its burden of proof despite basing its case on these flawed samples.

The inspectors sampled settled solids from the 1800-gallon Pit using what they described as a "stainless [steel bottom] scrape." (RX 19 at CS 216; TR1 229-31.) The actual sample collection technique was described by the EPA as follows:

Essentially, the entire piece of equipment was thrust into the solids to be sampled and through an arching motion [sic]. The scrape was brought to the surface, with the open side up, to retain the sludge. The excess liquid was decanted ... The equipment was thrust to the bottom of the pit until resistance prevented further penetration. The actual depth was not recorded. The area of the pit collected was from the center to the [sic] where the EPA inspector stood while collecting the sample. The sample was a composite sample in that a number of dips were made to attain sufficient quantity of material. The field observations of the sample are that it was a wet, solid material with some soft lumps and pieces of material.

(RX 19 at CS 216.) Using the sampling device as described could not possibly have resulted in a representative sampling of the entire depth of the settled solids. (TR1 at 235-36; TR4 at 19-22.) The settled solid composition varied significantly over the depths of the solids, as these solids were deposited over an extended period of time. (See TR4 at 15-16, noting "higher concentration of solids as you go deeper.") Furthermore, because they used a scoop that lifted the sample up through the water column, the resulting sample was a combination of the settled solids as well as the overlying water column. (TR1 at 230-31; TR4 at 15-16.) For all of these reasons, the samples collected were not "representative."

EPA's regulations at 40 C.F.R. § 261.20 state that samples collected using methods listed in Appendix 1 of 40 C.F.R. § 261 will be considered "representative." Appendix 1 does not provide appropriate methods for sampling settled solids from tanks like the Pit. Therefore, an appropriate secondary reference is the EPA Tank Sampling SOP#2010 (RX 24.) This reference includes, in Section 7.3, appropriate sampling procedures for settled solids of the type found in the Pit. Specifically, this reference includes two relevant statements: First, "Determine the depth of any and all liquid, solid, and liquid/solid interface, and depth of sludge using a weighted tape measure, probe line, sludge judge or equivalent." (RX 24 at 3.) There was no evidence that EPA's inspectors took this crucial step. (See TR4 at 15-16.) Rather, they just estimated the depth based on feeling resistance. (TR1 at 230.) There was a remarkable lack of detail regarding their methodology and field observations, in direct violation of Section 9.0, which states that "[a]ll data must be documented on field data sheets or within site logbooks." (RX 24 at 7; see TR3 at 230-32 and TR4 at 15-16, noting lack of field notes.)

The EPA Inspectors ignored standard operating procedure with respect to appropriate sampling devices. EPA Tank Sampling SOP#2010 states that "[s]ludges can be collected using a bacon bomb sampler, glass thief, or sludge judge." (RX 24 at 3.) These devices are specifically designed to allow inspectors to sample the entire depth of the waste stream and bring it to the surface unimpacted by the overlying water column, something the EPA inspectors could not have done with the device they chose to use.

(TR3 at 231; TR4 at 16; "...they brought it up through the water column, which is a potential problem for cross contamination.")

Evidence at the hearing established that the EPA Inspectors materially deviated from these regulatory standards. (TR3 at 229; TR4 at 1-24.) As a result, the samples relied upon by the EPA were in no way reliably representative of the settled solids in the Pit.

b. Sampling of Pit Water

EPA inspectors sampled water from the 1800-gallon Pit using what they described as a "quart glass bottle" attached to a "swing sampler" (RX 19 at CS 215.) They described their sampling methodology as follows:

The bottle was attached to a swing sampler and dipped into the pit. The sample was collected from the surface to just below the surface. The sampling container was attached to the end of a pole. The equipment is called a swing sampler. The end is manufactured to attach a container for sampling. The liquid appearance was: the liquid was turbid, brown color, minimal solids, single phase, and no discernible temperature.

(RX 19 at CS 215.) As with the settled solids discussed above, to understand the appropriate sampling methodology that EPA Inspectors should have used in this case, one starts with 40 C.F.R. § 261.20. This regulation states that samples collected using methods listed in Appendix 1 of 40 C.F.R. 261 will be considered "representative."

Appendix 1, in turn, states that a “Coliwasa” would be considered acceptable to obtain a representative sample.

The American Society for Testing and Materials (ASTM) has published a Standard Practice for Sampling with a Composite Liquid Waste Sampler (Coliwasa). (See ASTM D5495-03 at RX 26.) This reference material provides a detailed discussion of the Coliwasa sampling device and confirms that its appropriateness for use in sampling Pit water. It states, “The Coliwasa is an appropriate device for obtaining a representative sample from stratified or unstratified liquids. Its most common use is for sampling containerized liquids, such as tanks, barrels and drums. It may also be used for pools and other open bodies of stagnant liquid.” (RX 26.) A swing sampler, on the other hand, is not considered to be an appropriate for use in obtaining a representative sample from potentially stratified liquids.

The EPA’s RCRA Waste Sampling Draft Technical Guidance describes a swing sampler as a “surface sampler,” which is how the inspectors used it to grab water from the Pit. (RX 27 at CS 300.) But a swing sampler is not used for liquid waste streams when a representative sample relative to depth is required. (TR 220; RX 30 at CS 314.) The EPA inspectors neglected to determine to what degree the liquid column varied with depth; they simply assumed the liquid at the surface represented the entirety of the water column. Their claim that the sample was “single phase” is unsupportable given their failure to view and evaluate the entire water column. (RX 30 at CS 314.)

The principle of sampling the entirety of the depth of the water column is reinforced by the sampling guidance provided in ASTM D5358-93 which provides the “Standard Practice for Sampling with a Dipper or Pond Sampler” (RX 29). It states that “this practice will not provide accurate results with multiphase liquids” and “[n]o attempt should be made to take subsurface samples with a dipper because mixing and dilution will occur as the dipper is brought to the surface. Subsurface layers must be sampled using a device that can be closed prior to bringing it to the surface (for example, a coliwasa, tube sampler, or bottle sampler). The dipper is not appropriate for sampling multiphase liquids if quantitative characterization is needed.” (RX 29 at CS 305.) Again, because EPA Inspectors made no effort to determine to what degree the liquid column was stratified, the analytical results cannot be considered representative. (See TR3 at 220-29.) Finally, the same limitations regarding the lack of documentation noted in the discussion of the settled-solids sampling above shed further doubt on the results. (TR3 at 230, 232.)

As the Appellants’ expert Scott Perkins testified, “I don’t know that I have ever seen a sampling event by a regulator that so blatantly ignores the standard practice that we all follow.” (TR3 at 233.) Regardless of whether agency guidance documents are mandatory or merely advisory, the EPA’s Inspectors were nevertheless required to follow a scientifically acceptable method of sampling, which they failed to do.

Therefore, the analytical results upon which the EPA's claims are based are unreliable, due to the unrepresentativeness of the samples collected by the EPA's inspectors.

II. No admission that that the Pit is a hazardous waste treatment unit.

In its opposition brief, the EPA contends that the Appellants "admitted that they intermittently used the Pit as a hazardous waste treatment unit." (Br. at 40.) The Appellants have made no such admission. Evidence that Chem-Solv neutralized some Pit water after deciding to dispose of a certain quantity of Pit water and before such Pit water was disposed does not constitute an "admission" that the Pit was a hazardous waste treatment unit, nor that neutralization was a prerequisite to reuse. There was no evidence that anyone other than the POTW, when Chem-Solv discharged water to the POTW, under a Clean Water Act pre-treatment permit, required the Appellants to neutralize Pit water. Nor was there any evidence that the Appellants treated water from the Pit before reusing it to rinse off drums. Finally, there was no evidence that Pit water had to be treated prior to incorporation into FreezeCon. (TR4 at 223.) The Appellants have not admitted that the Pit was a hazardous waste treatment unit or hazardous waste storage unit.

III. EPA failed to meet its burden of proof with respect to drums of sodium hydrosulfide.

In its opposition brief, the EPA argued that the Appellants' evidence did not support their position that a certain drum of hydrogen sulfide was a usable product in Chem-

Solv's inventory and, therefore, that the ALJ correctly determined that the drum was a waste. (Br. at 41.) But it was the EPA's burden of proof to establish that the drum was a waste, not the Appellants' burden of proof to establish it wasn't.

The EPA failed to meet its burden of proof with respect to the drums of sodium hydrosulfide in at least three ways. First, and most importantly, the EPA never tested the contents of the drums but, instead, relied on the sight and smell of inspectors.

Second, and relatedly, a drum's external appearance is insufficient evidence that contains a waste. As the Appellants' expert testified, an air-tight poly drum may be "compressed" or "bulged" simply because of temperature variations in the warehouse, not because it is unusable product in a defective container or has been discarded. (TR5 at 44-45.)

Third, the EPA relied on inference – not actual evidence – to establish that the drum observed by inspectors during the May 2007 sampling event was precisely the drum shipped off site as hazardous waste on February 20, 2008. (See TR4 at 271-77.) Although some sodium hydrosulfide was shipped offsite as hazardous waste on February 20, 2008, the drum observed by inspectors during the sampling event was not a "solid waste" or "hazardous waste" on that date. (TR3 at 180-82.) Instead, it was one of several partial drums of sodium hydrosulfide usable product that were in Chem-Solv's inventory at that time. (TR4 at 192-93.) The Appellants' evidence established that a customer committed to purchasing two such drums in 2007 but wouldn't take delivery

until the fall of 2008. (TR4 at 192-93.) Rather than continue to store the portion of its inventory of sodium hydrosulfide that its customer did not want, however, Chem-Solv ultimately decided to dispose of it. (TR4 at 194.) The Appellants' decision to dispose of the remainder of its inventory of sodium hydrosulfide was based upon its perception that the EPA had specific concerns about such material, despite the fact that it was a marketable product at that time. (TR4 at 194.)

The EPA failed to meet its burden of proof that the sodium hydrosulfide in the drum observed by inspectors on May 23, 2007 constituted a hazardous waste. The EPA's evidence on this issue is merely that (1) inspectors observed a drum that appeared to be leaking on May 23, 2007; and (2) a shipping manifest shows that one drum of hydrogen sulfide was shipped off as hazardous waste on February 20, 2008. (CX 23 at EPA 1097, 1098.) The ALJ erred by accepting the EPA's invitation to infer that the observed drum and the shipped drum were the same drum. The evidence in the record does not clearly establish that they were the same drum. (TR4 at 271-74.) However, even if they were the same drum, the fact that sodium hydrosulfide was shipped as hazardous waste in February 2008 does not establish that it was hazardous waste as of May 2007 because it was, at that earlier time, a product in Chem-Solv's inventory. (TR 4 at 273-77.)

RCRA enforcement must be premised on facts, not unsubstantiated guesses. Accordingly, the Board should reverse the ALJ's decision with respect to the drums of sodium hydrosulfide.

IV. Based on its “generator knowledge,” Chem-Solv in fact made waste determinations and, therefore, is not liable for Count II.

Contrary to the EPA’s position, the record is replete with evidence forming the basis of Chem-Solv’s “generator knowledge” that should have shielded it from liability under Count II.

In Count II, the EPA alleged that Chem-Solv failed to make hazardous waste determinations required of a generator of solid waste, in violation of 9 Va. Admin Code § 20-60-262(A), which incorporates by reference 40 C.F.R. § 262.11. Specifically, Count II asserted that Chem-Solv failed to perform hazardous waste determinations on the Pit water, settled solids, and aerosol paint cans generated, treated, stored, or disposed of at the facility. The ALJ found Chem-Solv liable under Count II, but in so doing failed to account for Chem-Solv’s “generator knowledge.”

Likewise, the EPA has faulted the Appellants for being “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 [led] to the supposed generator knowledge conclusion.” (Br. at 43.)

Chem-Solv’s “generator knowledge” derived from the Pit’s history – the evolution of the Pit’s purpose and use. Until the early 2000s, it was an “elementary neutralization unit” used for neutralizing water prior to discharge to the POTW under a Clean Water Act pre-treatment permit. (TR4 at 195; CX 42 at 1521, 1526.) After Chem-Solv’s rights to

discharge water to the POTW expired, the Pit was used to collect rinse water in connection with Chem-Solv's drum-rinsing operations and connection with its production of a marketable product called FreezeCon. (TR4 at 200; TR3 at 127-29, 133, 202-05.) After its rights to discharge water to the POTW expired, Chem-Solv maximized its reuse of Pit water but occasionally shipped some Pit water off-site for disposal as non-hazardous waste. (See, e.g., TR4 at 215-16; 219-20.)

Chem-Solv's "generator knowledge" also came from previous sampling of settled solids from the Pit. (See TR4 at 237-239; RX 12.) Specifically, in May 2006, Chem-Solv collected and analyzed settled solids, learning that such settled solids did not meet the regulatory definitions of "hazardous waste" under 40 C.F.R. § 260.10 and 40 C.F.R. § 261.3. Thereafter, Chem-Solv managed settled solids contained in the Pit in accordance with its knowledge of these analytical results. (See TR4 at 235-241.)

Chem-Solv's "generator knowledge" was also informed by its history of shipping Pit water offsite for disposal by licensed commercial carrier, indicating that materials from the Pit passed freely along the roads of commerce without objection. (TR4 at 221-23.) No load was ever rejected by the carrier or the receiving facility. (*Id.*) Furthermore, during sampling in May of 2007, of ten containers ostensibly containing Pit-related material, nine showed no evidence of hazardous characteristics. (CX 18 at 333.)

Chem-Solv's "generator knowledge" also derived from the fact that its employees only rinsed off the exterior of drums. Based on its knowledge of what went into the Pit,

Chem-Solv had no reason to expect chloroform, tetrachloroethene or trichloroethene to be in the Pit. (See TR4 at 240.) Instead, Chem-Solv's "generator knowledge" caused it to conclude that the water and solids contained in the Pit would only be considered hazardous due to corrosivity, if at all. (TR4 at 231-32.)

Because of this generator knowledge, Chem-Solv in fact made waste determinations related to Pit water and settled solids. Accordingly, the ALJ erred in finding Chem-Solv liable under Count II.

CONCLUSION

For the reasons stated above, and in addition to the reasons set forth in its Notice of Appeal, the Appellants respectfully request that the Environmental Appeals Board reverse the Initial Decision of the ALJ on all Counts and enter a final order in favor of the Appellants.

Dated: August 22, 2014

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

By: 

Of Counsel

Charles L. Williams (VSB No. 1145)
J. Scott Sexton (VSB No. 29284)
Maxwell H. Wiegard (VSB No. 68787)
Abigail E. Murchison (VSB No. 80728)
GENTRY LOCKE RAKES & MOORE
10 Franklin Road, SE, Suite 800, Roanoke, VA 24011
P. O. Box 40013, Roanoke, VA 24022-0013
Telephone: 540-983-9300
Facsimile: 540-983-9400

CERTIFICATE OF SERVICE

I certify that, on August 22, 2014, I e-filed the Appellants' Reply Brief with the Environmental Appeals Board, and mailed copies by Federal Express to the address listed below:

A.J. D'Angelo, Esq.
Benjamin Fields, Esq.
Joyce Howell, Esq.
Senior Assistant Regional Counsel
U.S. EPA – Region III
Mail Code 3RC30
1650 Arch Street
Philadelphia, PA 19103-2029

Chief Administrative Law Judge Susan L Biro
c/o Maria Whiting-Beale, staff assistant
U.S. Environmental Protection Agency
Office of Administrative Law Judges
Mail Code 1900R
1200 Pennsylvania Ave, NW
Washington, D.C. 20460



A handwritten signature in blue ink, appearing to read "Maria Whiting-Beale", is written over a horizontal line.