

**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 No. RCRA-03-2011-0068)	

**APPELLEE'S
RESPONSE IN OPPOSITION TO
APPELLANTS' MOTION FOR LEAVE TO FILE REPLY BRIEF**

Respondents-Appellants Chem-Solv, Inc., formerly trading as Chemicals and Solvents, Inc., and Austin Holdings – VA, L.L.C. (“Appellants”) filed their Notice of Appeal and appeal brief with the Environmental Appeals Board (“Board”) in this matter on July 7, 2014. See *Appellant Notice (Respondents’) of Appeal and Brief in Support*, Docket No. 2 (July 7, 2014)(hereinafter, “Appeal Brief”). Complainant-Appellee, the Director of the Land and Chemicals Division, U.S. Environmental Protection Agency (“EPA”), Region III (“the Region”), filed its responsive brief on July 25, 2014. See *Complainant’s Response to Respondents’ Appeal*, Docket No. 6 (July 25, 2014)(hereinafter, “Response Brief”). By motion dated August 8, 2014 and entitled Appellants’ Motion for Leave to File Reply Brief, Appellants now seek leave to file a reply to the Region’s Response Brief. See *Appellants’ Motion for Leave to File Reply Brief*, Docket No. 7 (August 8, 2014) (“Motion”).

ARGUMENT

The Appellants' Motion is procedurally deficient¹ and is opposed by the Region because it: fails to identify new controlling case law, new issues or new arguments that warrant further briefing; fails to explain with particularity the reasons why Appellants deem it necessary to reply to the Region's wholly responsive arguments; fails to explain why proposed reply brief arguments were not, and could not have been, previously raised in Appellants' initial Appeal Brief; and fails to explain how Appellant's proposed supplemental briefing would assist the Board in its deliberations. For each of the reasons set forth below, and in light of the extensive post-hearing briefing papers previously filed in this proceeding, the Region respectfully requests that the Board deny Appellants' Motion and their requested relief. Alternatively, the Region requests that the Board: (a) grant the Region leave to file a surreply brief within 15 days of the filing of Appellants' reply brief; (b) provide a short and equal page limitation for each brief; and (c) provide strict limitations as to the issues to be briefed.

¹ The August 2013 Environmental Appeals Board Practice Manual ("*Practice Manual*"), available at www.epa.gov/eab, is the Board's acknowledged source of "detailed information about procedures for filing documents before the Board." See, *Revised Order Authorizing Electronic Filing in Proceedings Before the Environmental Appeals Board Under 40 C.F.R. Part 22*, August 12, 2013. As an agency guidance document, the *Practice Manual* lacks the force of law. *Practice Manual* at 2, citing *In re V-1 Oil Co.*, 8 E.A.D. 729, 748 (EAB 2000). It nevertheless provides important guidance to litigants on matters related to practice before the Board.

With respect to motions filed with the Board in proceedings governed by the *Consolidated Rules*, the *Practice Manual* instructs that: "A motion shall state whether the opposing party concurs or objects to granting the request set forth in the motion." Further instruction provides that "[i]f the requestor cannot determine the position of the opposing party on the motion after making a reasonable effort to do so, the requestor shall represent that fact in its pleading." *Practice Manual* at 27, fn 22.

Appellants' Motion is procedurally deficient in that it contains neither a statement identifying the Region's objection to the Motion nor any representation as to any "reasonable efforts" Appellants' counsel may have employed in an effort to learn of the Region's objection. EPA Regional counsel were not contacted by Appellant's counsel in advance of the Motion's filing and the undersigned counsel is unaware of any pre-filing attempt by Appellants' counsel to contact EPA Regional counsel to ascertain the Region's position regarding the Motion.

1. Leave to File a Reply Brief is Discretionary with the Board and is Typically Granted Only in Discrete Circumstances That Actually Warrant Supplemental Briefing

The provisions of 40 C.F.R. § 22.30 govern the appeal from, or review of, an Initial Decision under 40 C.F.R. Part 22, the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits* (“*Consolidated Rules*”). 40 C.F.R. § 22.30(a)(1) of the *Consolidated Rules* provides, in pertinent part, that an appellant’s “[n]otice of appeal shall summarize the order or ruling, or part thereof, appealed from” and that “[t]he appellant’s brief shall contain . . . a statement of the issues presented for review . . . the facts relevant to the issues presented for review (with appropriate references to the record) [and] argument on the issues presented . . .”. 40 C.F.R. § 22.30(a)(2) further provides, in pertinent part, for the appellee’s filing of “a response brief responding to argument of appellant, together with reference to the relevant portions of the record, initial decision, or opposing brief.” Pursuant to 40 C.F.R. § 22.30(a)(2), “[f]urther briefs may be filed only with the permission of the [Board].”

The *Consolidated Rules*, much like the 40 C.F.R. Part 124 general rules governing permits, do not provide for reply briefs as a matter of right. The Board, under either set of rules, clearly has discretion to grant requests to file reply and/or surreply briefs and has often done so in cases where new arguments are raised in opposing response briefs or where the Board deems that further briefing would assist in its resolution of disputed claims. See *E.g., In re Arcelor Mittal Cleveland, Inc.*, NPDES Appeal No. 11-01 at 1 (EAB Dec. 9, 2011) (Order Granting in Part EPA’s Motion to File Surreply, Denying Petitioner’s Request to Provide Additional Information, and Granting Oral Argument); *In re D.C. Water & Sewer Auth.*, NPDES Appeal Nos. 05-02, 07-10 to 12, at 1-2 (EAB Aug. 3, 2007) (Order Granting Leave to File Surreply and Accepting Surreply for Filing). However, the Board has also declined to exercise such discretion

and, in the interest of finality, efficiency and the effective use of its resources, has readily denied requests for supplemental briefing when a party has “cite[d] no new controlling case law and [identified] no new issues or arguments that could not have been submitted in its principal brief.” See *In re: Smith Farm Enterprises, LLC*, CWA Appeal No. 08-02 (EAB Sept, 28, 2010) (Order Denying Motion for Leave to File Supplemental Briefing at 1, 5).

In *Smith Farm Enterprises*, the EAB found it to be “axiomatic that an appellant’s principal brief should contain all issues presented for review.” *Smith Farm Enterprises*, CWA Appeal No. 08-02 (EAB Sept, 28, 2010) (Order Denying Motion for Leave to File Supplemental Briefing at 2), citing 40 C.F.R. § 22.30(a) and *In re Louisiana-Pacific Corp.*, 2 E.A.D. 800, 802 (CJO 1989). In the permitting context, the EAB has expressed a propensity “to frequently decline to review issues not raised in an initial petition for review.” See *Smith Farm Enterprises, supra*, citing *In re Dominion Energy Brayton Point, L.L.C.*, 13 E.A.D. 407, 438 (EAB 2007) (characterized by the Board as “rejecting as untimely certain issues raised for the first time in Petitioner’s post-remand appeal because they could have been raised in the initial appeal”) and *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126 n.9 (EAB 1999) (characterized by the Board as holding that “new issues raised in reply briefs are equivalent to late-filed appeals and must be denied as untimely”). The EAB has openly acknowledged this propensity and has further held that the principle behind it “applies equally in the enforcement context.” *Smith Farm Enterprises, supra*, at 2.

2. Appellants’ Motion Fails to Identify Any New Case Law, New Issues or New Arguments that Would Warrant the Requested Relief

Appellants make no claim that any new controlling case law affects this proceeding. Rather, Appellants erroneously assert that the Region’s Response Brief “raises new issues that the Appellants did not previously have the opportunity to address” and that the Region

“misconstrues certain arguments made by Appellants on appeal.” *Motion at 1.* Appellants claim the need to “address[] these new issues and clarify[] the nature of their arguments on appeal.” *Id.* Specifically, Appellants identify four (4) “issues” which they incorrectly claim to be “new” and erroneously represent as warranting “clarification.” These unsupported claims and representations focus upon: (i) EPA sampling procedures and the authoritative value of certain guidance documents; (ii) purported conclusory statements made by the Region regarding Appellants’ neutralization of Pit water prior to disposal; (iii) the evidence and respective burdens of proof surrounding the regulatory status of a particular drum of sodium hydrosulfide; and (iv) Appellants’ stated desire to further clarify the manner in which they purport to have used “generator knowledge” to make required waste determinations. *Motion at 2 - 3.*

In actuality, the Region’s Response Brief does not raise a single “new issue.” Each of the issues that the Region addressed in its Response Brief, and each of the Region’s associated arguments, was directly responsive to a specific issue and associated argument raised by the Appellants in their Appellate Brief to the Board.² Rather than raising “new issues,” the Region’s Response Brief appropriately addressed each of the issues and arguments *raised by the Appellants*, on appeal. The Region accomplished that task by properly citing to, and discussing, the relevant facts and the specific evidence in the case record and by providing the associated

² Arguments pertaining to the issue of EPA sampling procedures and guidance documents are set forth at pages 23 – 36 of the Region’s Response Brief and directly addressed Appellants’ stated argument that “The EPA failed to meet its burden of proof that the Pit materials (water and settled solids) were hazardous wastes, because the samples were not sufficiently representative or reliable.” See Appeal Brief at 20 - 24. The Region’s purported “conclusory statement[s]” relating to the issue of Appellants’ neutralization of Pit water are set forth at pages 36 - 41 of the Region’s Response Brief and directly addressed Appellants’ argument that “The Pit qualifies for the MPU Exemption.” See Appeal Brief at 24 - 30. Arguments regarding evidence and burdens of proof determinative of whether a particular drum of sodium hydrosulfide was a valuable product or a solid and a hazardous waste are set forth at pages 41 - 42 of the Region’s Response Brief and directly addressed Appellants’ argument that “The ALJ erred by determining that a 55-gallon drum of sodium hydrosulfide was hazardous waste, rather than a product in inventory at the time of inspection.” See Appeal Brief at 31 - 33. Finally, the Region’s page 42 - 45 Response Brief discussion of Appellants’ claimed use of “generator knowledge” to meet waste determination regulatory requirements was directly responsive to Appellants’ Appeal Brief argument that “The ALJ erred by rejecting Chem-Solv’s reliance on ‘generator knowledge’.” See Appeal Brief at 33 - 35.

context and clarity necessary to accurately frame, clearly outline, specifically address and wholly rebut each of the issues appealed and each of the arguments made by the Appellants in their Appeal Brief.

3. Appellants Fail to Explain Why Their Proposed Reply Brief Arguments and Clarifications Were Not -- and Could Not Have Been -- Made Previously, Why They are Necessary Now or How They Might Assist the Board in its Deliberations

Appellants' Motion is significantly devoid of any explanation as to why Appellants now deem it necessary to file an additional reply brief given the extensive number of issues addressed in the parties' various post-hearing briefs below (which remain an integral part of the case record) and the Appellants' clear opportunity to appeal, further develop, and fully argue each or any such issue in their opening Appellate Brief to the Board. Moreover, Appellants wholly neglect to explain why the arguments and purported "clarifications" they now seek leave to make in a proposed reply brief were not made, and could not have been made, in Appellants' opening Appellate Brief. Appellants further neglect to address or explain how such a proposed additional briefing is necessary for the resolution of this matter and/or how it might assist the Board in its deliberations.

4. The Board Has Held That Purported Arguments Over "Mischaracterizations" Generally Provide an Insufficient Basis for Discretionary Supplemental Briefing

The Region has clearly illustrated that none of the several issues that Appellants have identified in their Motion are "new" in any way, shape or form. Yet the Appellants have also argued that the Region "misconstrues certain arguments made by Appellants on appeal." *Motion* at 1. The Region disputes that claim and more importantly notes that the Board has held that argument over a supposed "mischaracterization" is generally insufficient grounds to warrant a responsive brief. See *e.g., In re: City of Keene Wastewater Treatment Facility* at 3, NPDES

Appeal No. 07-18 (EAB Jan. 31, 2008) (Order Granting Motion for Leave to File a Reply Brief) (granting City's request to file a reply brief, but "put[ting] the City "on notice that we will entertain the substance of that brief only to the extent that it indeed addresses arguments newly raised by the Region").

5. Leave to File a Reply Brief is Inappropriate Where Appellants Seek to Cure a Failure to Raise Relevant Issues or Make Desired Arguments in Their Opening Appellate Brief

It appears that Appellants now realize that they have failed to address all relevant issues and make all of their desired arguments in the opening Appellate Brief that they filed with the Board. If that is indeed the case, then the relief requested in Appellant's Motion is clearly inappropriate because the Appellants cannot use the vehicle of a reply brief to, in effect, raise their own "new issues" or make their own "new arguments" before the Board. See, *e.g. Knauf Fiber Glass, GmbH*, 8 E.A.D. 126 n.9 (EAB 1999) ("new issues raised in reply briefs are equivalent to late-filed appeals and must be denied as untimely").

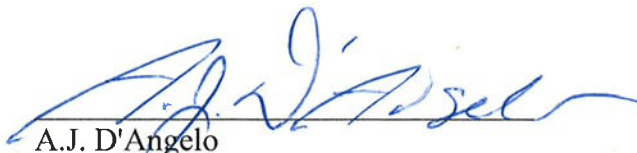
CONCLUSION

Appellants' Motion fails to identify new issues, new arguments or other reasons that are sufficiently compelling as to warrant further briefing in this proceeding --- and none are readily apparent. Appellants have further failed to explain why issues and arguments they now seek to make were not, and could not have been, made in their opening Appellate Brief, why such proposed additional briefing is necessary for the resolution of this matter or how such further briefing would assist the Board in its deliberations. To the further extent that Appellants' effort appears aimed at raising issues and supplementing arguments that could, and should, have been raised and made in their Appeal Brief, Appellants' request should be denied.

For each of the foregoing reasons and in the interests of fairness, finality, efficiency and the effective use of its resources, the Region urges the Board to deny Appellants' Motion for Leave to File Reply Brief. In the event that the Board determines to grant Appellant's Motion, the Region alternatively requests: (a) leave to file a responsive surreply brief within 15 days of the filing of Appellants' reply brief; (b) that the Board provide a short and equal page limitation for each brief; and (c) that the Board provide strict limitations as to the issues to be briefed.

Respectfully Submitted,

8/14/2014
DATE



A.J. D'Angelo
Benjamin D. Fields
Joyce Howell
Counsel for Complainant
U.S. EPA Region III
Office of Regional Counsel
1650 Arch Street
Philadelphia, PA 19103-2029

OF COUNSEL:

Jennifer Lewis
Office of General Counsel
(Mail Code 2366A)
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Peter J. Raack
Office of Civil Enforcement
(Mail Code 2249A)
U.S. EPA Headquarters
Ariel Rios Building
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

**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 **Appellee's Response in Opposition to Appellees' Motion for Leave to File Reply Brief** 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:

Ms. Eurika Durr
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1201 Constitution Avenue, NW
WJC East, Room 3332
Washington, DC 20004

Charles L. Williams, Esq.
Gentry, Locke, Rakes & Moore
800 Sun Trust Plaza
10 Franklin Road
Suite 800
Roanoke, VA 24011

Hon. Susan L. Biro
Chief Administrative Law Judge
c/o Maria Whiting-Beale, Staff Assistant
U.S. Environmental Protection Agency
EPA Office of Administrative Law Judges
Ronald Reagan Building, Room M1200
1300 Pennsylvania Avenue, NW
Washington, DC 20460

Dated: August 14, 2014



A.J. D'Angelo
Benjamin D. Fields
Joyce Howell
Sr. Assistant Regional Counsel
U.S. Environmental Protection Agency, Region III
Office of Regional Counsel (3RC30)
1650 Arch Street
Philadelphia, PA 19103-2029