

**IN RE CHEM-SOLV, INC. AND AUSTIN HOLDINGS**

RCRA (3008) Appeal No. 14-02

***FINAL DECISION AND ORDER***

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Decided January 26, 2015

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**Syllabus**

Chem-Solv, Inc. (“Chem-Solv”) and Austin Holdings-VA, LLC (“Austin Holdings”) appeal from an Initial Decision issued by Administrative Law Judge Susan L. Biro (“ALJ”) in an administrative enforcement action brought by U.S. EPA Region III (“Region”) for violations of Subtitle C of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia’s federally authorized hazardous waste management program. The alleged violations occurred at Chem-Solv’s chemical blending and distribution facility in Roanoke, Virginia. Specifically, the ALJ found the following violations: (I) owning and operating a hazardous waste storage facility without a permit in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a), and 40 C.F.R. part 270; (II) failure to make or perform required hazardous waste determinations in violation of 40 C.F.R. § 262.11; (III) failure to comply with secondary containment requirements for a hazardous waste tank in violation of 40 C.F.R. § 264.193(a); (IV) failure to obtain or maintain records of a tank assessment in violation of 40 C.F.R. §§ 264.192 and 270.11; (V) failure to conduct or document inspections of a tank system in violation of 40 C.F.R. §§ 264.195(b) and (d); (VI) failure to comply with applicable air emission standards for tanks in violation of 40 C.F.R. §§ 264.1082(b) and 264.1084; and (VII) failure to comply with the closure and post-closure requirements of 40 C.F.R. part 264 subparts G and H, and section 264.197.

For these violations, the ALJ assessed an administrative penalty of \$597,026.28 against Chem-Solv and Austin Holdings, jointly and severally, for multiple violations of the RCRA regulations governing the treatment, storage and disposal of hazardous waste, as alleged in Counts I and III -VII of the seven-count complaint. The ALJ assessed an additional penalty of \$15,312.50 against Chem-Solv, Inc., individually, for the violation alleged in Count II of the complaint.

On appeal, Chem-Solv and Austin Holdings argue that the ALJ erred by holding that: (1) an underground tank at Chem-Solv’s facility, referred to as the “pit tank,” was a hazardous waste storage tank regulated under RCRA; (2) a leaking 55-gallon drum of sodium hydrosulfide at the facility was a “solid waste,” rather than a useful product; and (3) Chem-Solv failed to make hazardous waste determinations for materials in the pit

tank and for certain aerosol paint cans observed at the facility. Chem-Solv alleges further that the ALJ demonstrated bias when she decided the underlying case.

Held: After a thorough review of the record, the Board finds that the ALJ's determination is supported by a preponderance of the evidence. The Board therefore affirms the initial decision in its entirety. In particular, the Board holds that: (1) the ALJ did not err in determining that the pit tank was a hazardous waste storage tank; (2) the ALJ did not err in determining that the leaking 55-gallon drum of sodium hydrosulfide was a hazardous waste; and (3) the ALJ did not err in determining that Chem-Solv failed to make the required hazardous waste determinations. Finally, the Board holds that Chem-Solv's allegations that the ALJ exhibited bias are without merit.

***Before Environmental Appeals Judges Leslye M. Fraser and Randolph L. Hill.***

***Opinion of the Board by Judge Fraser:***

***I. STATEMENT OF THE CASE***

This is an appeal of an Initial Decision issued on June 5, 2014, by Administrative Law Judge Susan L. Biro ("ALJ") in an administrative enforcement action brought by U.S. EPA Region III ("Region") against Respondents Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, LLC ("Austin Holdings") for violations of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous waste management program.<sup>1</sup> See Respondent's Notice of Appeal ("Appeal") (July 7, 2014). The alleged violations occurred at Chem-Solv's chemical blending and distribution facility in Roanoke, Virginia. Chem-Solv operates the facility while Austin Holdings is the owner of the land on which the Chem-Solv facility is located. See Joint Stipulation of Facts, Exhibits and Testimony ("First J. Stip.") ¶¶ 9-11 (Feb. 17, 2012).

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<sup>1</sup> Virginia's authorized hazardous waste management program is codified as Title 9, sections 20-60-260 to 20-60-279, of the Virginia Administrative Code, and is enforceable by EPA pursuant to RCRA § 3008(a), 42 U.S.C. § 6928(a). With exceptions not relevant to this matter, Virginia's authorized program incorporates by reference the applicable federal hazardous waste regulations at issue in this case. For ease of citation, this decision generally cites only to the federal statute and regulations.

After a five-day evidentiary hearing,<sup>2</sup> the ALJ assessed an administrative penalty of \$597,026.28 against Chem-Solv and Austin Holdings, jointly and severally, for multiple violations of the RCRA regulations governing the treatment, storage and disposal of hazardous waste, as alleged in Counts I and III - VII of the seven-count complaint. The ALJ assessed an additional penalty of \$15,312.50 against Chem-Solv individually, for the violation alleged in Count II of the complaint.<sup>3</sup> *See* Initial Decision (“Init. Dec.”) at 119-20. In addition to the liability determination and penalty assessment, the Initial Decision includes a Compliance Order requiring that Chem-Solv and Austin Holdings comply with certain closure and post-closure requirements in 40 C.F.R. §§ 264.112 and 264.197. *See id.* at 123-24.

On appeal, Chem-Solv and Austin Holdings challenge only the ALJ’s liability determinations. Their appeal does not contest the ALJ’s penalty analysis in any respect or any specific provisions of the Compliance Order. The arguments on appeal address the ALJ’s factual determinations underlying her liability conclusions. Having reviewed both the ALJ’s initial decision and the underlying record thoroughly, the Board finds that the ALJ’s decision is well-reasoned and well-supported by the record, and affirms the liability findings and respective penalties against Chem-Solv and Austin Holdings.<sup>4</sup> The Board further finds Chem-Solv’s allegations of bias by the ALJ to be without merit.

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<sup>2</sup> Citations to the five-volume hearing transcript in this matter are abbreviated as “Tr.” followed by the volume number, page number, and, where appropriate, a parenthetical containing the last name of the person testifying, *e.g.*, “Tr. II at \*\* .”

<sup>3</sup> Specifically, the ALJ found the following violations: (I) owning and operating a hazardous waste storage facility without a permit in violation of RCRA § 3005(a), 42 U.S.C. § 6925(a), and 40 C.F.R. part 270; (II) failure to make or perform required hazardous waste determinations in violation of 40 C.F.R. § 262.11; (III) failure to comply with secondary containment requirements for a hazardous waste tank in violation of 40 C.F.R. § 264.193(a); (IV) failure to obtain or maintain records of a tank assessment in violation of 40 C.F.R. §§ 264.192 and 270.11; (V) failure to conduct or document inspections of a tank system in violation of 40 C.F.R. §§ 264.195(b) and (d); (VI) failure to comply with applicable air emission standards for tanks in violation of 40 C.F.R. §§ 264.1082(b) and 264.1084; and (VII) failure to comply with the closure and post-closure requirements of 40 C.F.R. part 264 subparts G and H, and section 264.197. *See* Init. Dec. at 6.

<sup>4</sup> Hereinafter, unless otherwise indicated, Chem-Solv and Austin Holdings will be referred to collectively as “Chem-Solv.”

## II. ISSUES ON APPEAL

The issues to be resolved on this appeal are:

1. Whether the ALJ erred in determining that an underground storage tank at Chem-Solv's facility was a hazardous waste storage tank regulated under RCRA;
2. Whether the ALJ erred in determining that a leaking drum of sodium hydrosulfide at the facility was a "solid waste" rather than a useful product;
3. Whether the ALJ erred in finding Chem-Solv liable for failure to make hazardous waste determinations for materials in the tank and for certain aerosol paint cans; and
4. Whether the ALJ demonstrated bias against petitioners when she decided the underlying case.

## III. SUMMARY OF RELEVANT FACTS

The detailed procedural and factual history of this case is thoroughly recounted in the Initial Decision at pages 5-45. Only the most pertinent facts for this appeal are summarized below.

Chem-Solv operates a chemical blending and distribution facility located in Roanoke, Virginia. Init. Dec. at 15. Jamison Glenn Austin was Chem-Solv's vice president and general manager at all times relevant to this case. Tr. IV at 157-58 (Austin). Chem-Solv primarily purchases unblended substances from producers or wholesalers and then resells these substances to customers, either directly or after repackaging. *See id.* at 165. Chem-Solv also blends substances to make products meeting customer requests. The facility is approximately four

acres in size and is spread over several parcels of land.<sup>5</sup> The violations alleged in this case are focused primarily on a relatively small area of the facility referred to as the “acid pad” and a 1,900-gallon subgrade tank collecting liquids from the acid pad, referred to as the “pit” or the “pit tank.” *See* Init. Dec. at 19. The remaining violations concern a 55-gallon drum of sodium hydrosulfide and aerosol cans observed elsewhere at the facility.

Chem-Solv used the acid pad area to repackage and blend materials from bulk storage tanks. *Id.* at 16-20; Tr. III at 153 (Tickle).<sup>6</sup> After filling drums with various chemicals, the lines from the bulk tanks were flushed to a drain on the floor of the acid pad and were collected in the pit tank. *See* Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA Region 3, at 658 (Dec. 10, 2007) (CX 21); Init. Dec. at 18-19. In addition, Chem-Solv placed the filled drums on the acid pad and washed the outside of the drums to remove chemical residue (including “incidental product drippage”), dirt, and debris before shipping them to customers. *See* Tr. IV at 199-202 (Austin); Tr. III at 128-29, 153 (Tickle); Tr. I at 138 (Lohman). The waste liquids from this washing activity also flowed into the pit tank. Prior to 2000, Chem-Solv also rinsed the interior of drums on the acid pad. Tr. IV at 195, 199 (Austin). When liquid in the pit tank (referred to as “pit water”) reached a certain level, Chem-Solv pumped the liquid into a nearby aboveground storage tank for temporary storage.

EPA and state inspectors from the Virginia Department of Environmental Quality (“VDEQ”) inspected the facility on several occasions between 1999 and 2007. *See* Init. Dec. at 20-27; First J. Stips. ¶¶ 14-16. VDEQ inspector Elizabeth

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<sup>5</sup> *See* First J. Stip. at § 9; Kenneth J. Cox, U.S. EPA Region 3, *Inspection Report for RCRA Subtitle C and Chemicals and Solvents, Inc. (aka Chem-Solv)* at 296 (May 15, 2007) (Complainant’s Exhibit 17). The Initial Decision contains a detailed description of the facility. *See* Init. Dec. at 15-20.

Hereinafter, any citations to the Complainant’s (*i.e.*, the Region’s) or Respondent’s (*i.e.*, Chem-Solv’s and Austin Holding’s) exhibits before the ALJ are abbreviated as “CX” and “RX” respectively, followed by the applicable page number, *e.g.*, “CX \_\_ at \_\_.” Each of the exhibits are paginated by continuous Bates numbering rather than by the exhibit’s internal pagination.

<sup>6</sup> Donald W. Tickle is an employee in Chem-Solv’s maintenance department. Tr. III at 126 (Tickle).

Lohman<sup>7</sup> was present at many of these inspections. Init. Dec. at 20, 22, 23. At the request of VDEQ, EPA inspectors visited the site in May 2007. *Id.* at 31-32. The EPA and state inspectors often were accompanied by Mr. Cary Lester, Chem-Solv's operations manager and the "only employee with training and authority in the area of hazardous waste." *Id.* at 16-17. In addition to observing the pit tank and the associated aboveground storage tank, the inspectors observed discarded aerosol cans and a leaking 55-gallon drum of sodium hydrosulfide. *Id.* at 31-34. During the May 2007 inspection, EPA inspectors Mr. Houghton and Mr. Reyna took samples of the substances in the pit tank, including the pit water and pit sludge.<sup>8</sup> Results from this sampling indicated that the pit water and pit sludge contained hazardous waste.<sup>9</sup>

On several occasions, EPA sought information from Chem-Solv concerning the source, composition, and disposition of the pit water and other materials. *See, e.g.*, Letter from Carol Amend, U.S. EPA Region III, to L. Glen Austin, Chem-Solv (Nov. 16, 2007) (CX 20); Letter from Carol Amend, U.S. EPA Region III, to L. Glen Austin, Chem-Solv (Feb. 4, 2008) (CX 22). In responding to these information requests, Chem-Solv provided information concerning the shipment of pit water off-site. *See* Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA Region 3 (Dec. 10, 2007) (CX 21); Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA Region III (Feb. 6, 2008) (CX 23).

In January 2008, Chem-Solv removed the contents of the pit tank and placed the material into 32 drums. Init. Dec. at 42. In February 2008, Chem-Solv removed the pit tank itself and sent the drums containing waste from the pit tank,

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<sup>7</sup> Ms. Lohman is an Environmental Program Planner with the VDEQ. Tr. I at 20 (Lohman). She was present during several State and EPA inspections of the Chem-Solv facility.

<sup>8</sup> Pit sludge refers to solids that settled out of the pit water, forming a sedimentary sludge at the bottom of the pit tank. *See* Init. Dec. at 25. The Initial Decision includes a full description of Mr. Houghton's pre-sampling preparation, sampling methodology, and sampling results. *See* Init. Dec. at 32, 36-40.

<sup>9</sup> Sampling results indicated that the pit water contained 6.1 mg/L of chloroform. Init. Dec. at 39. The pit sludge contained 457 mg/L of tetrachloroethylene and 15.5 mg/L of trichloroethylene. *Id.* Any solid waste containing more than 6.0 mg/L of chloroform, 0.7 mg/L of tetrachloroethylene, or 0.5 mg/L of trichloroethylene as determined by TCLP analysis, exhibits the characteristic of toxicity and is a hazardous waste under EPA regulations. *See* 40 C.F.R. §§ 261.20, .24.

along with the 55-gallon drum of sodium hydrosulfide, to be disposed as hazardous waste at an off-site facility.<sup>10</sup> *Id.* at 42-44; Tr. IV at 10 (Perkins).

On March 31, 2011, the Region filed its complaint in this matter alleging that Chem-Solv owned and operated an unpermitted hazardous waste storage facility and had accumulated and stored hazardous materials, i.e., the pit water, pit sludge, and the 55-gallon drum of sodium hydrosulfide, in an unlawful manner. The complaint alleged further that Chem-Solv had failed to make hazardous waste determinations as required by 40 C.F.R. § 262.11. Chem-Solv alleged various defenses to these assertions. In particular, Chem-Solv asserted that the pit water was not a solid waste within the meaning of 40 C.F.R. § 261.2 because it was reused to rinse the exterior of drums and as a raw ingredient in the manufacture of FreezeCon, a “freeze conditioning agent” Chem-Solv sold to customers to apply to coal. *See* Init. Dec. at 52-53; Tr. IV at 210 (Austin). Chem-Solv argued further that because the pit water was reused, it was exempt from regulation under 40 C.F.R. § 261.4(c) (manufacturing process unit exemption). Init. Dec. at 53. With regard to the 55-gallon drum of sodium hydrosulfide, Chem-Solv asserted that the material was not a hazardous waste because it was a marketable product in Chem-Solv’s inventory. *Id.*

On June 5, 2014, the ALJ issued her initial decision finding Chem-Solv and Austin Holdings liable for the violations alleged in Counts I and III-VII of the complaint and Chem-Solv solely liable for the violation alleged in Count II of the complaint. In so doing, the ALJ rejected Chem-Solv’s assertion that the pit water was not a solid waste because it was reused or recycled and concluded that the preponderance of the evidence showed that the material in the pit was simply accumulated until it was shipped offsite for disposal. *See* Init. Dec. at 56-62. Similarly, the ALJ rejected the assertion that the 55-gallon drum of sodium hydrosulfide observed at the facility was a useful product in inventory and therefore not a solid waste. *See id.* at 81-89. Rather, the ALJ concluded that the preponderance of the evidence demonstrated that the 55-gallon drum was an abandoned material being accumulated and stored before or in lieu of disposal. *Id.* at 89. Finally, the ALJ held that the Region had met its burden of establishing

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<sup>10</sup> The record shows that on February 20, 2008, the containers of pit sludge bearing U.S. EPA hazardous waste codes D039 (tetrachloroethylene) and D040 (trichloroethylene), with a shipping weight of 17,500 pounds were shipped to a disposal facility in Michigan. Init. Dec. at 43; First J. Stips. ¶ 31. The 55-gallon drum of sodium hydrosulfide, bearing the hazardous waste codes D002 (corrosivity) and D003 (reactivity), was shipped for disposal on the same date to the same facility. Init. Dec. at 44, 82.

that Chem-Solv failed to perform the hazardous waste determinations (required by 40 C.F.R. § 262.11) for the pit materials, the 55-gallon drum of sodium hydrosulfide, and aerosol cans observed at the facility. As stated above, the ALJ assessed a civil penalty of \$597,026.28 against Chem-Solv, Inc. and Austin Holdings-VA, LLC, jointly and severally, and an additional penalty of \$15,312.50 against Chem-Solv, Inc., individually. This appeal followed.

After careful review of the record on appeal, the Board finds that the ALJ's determination is supported by a preponderance of evidence. Accordingly, the Board affirms the ALJ's Initial Decision in its entirety.

#### IV. STANDARD OF REVIEW

The Board reviews an administrative law judge's factual and legal conclusions on a *de novo* basis. See 40 C.F.R. § 22.30(f). However, as this Board has made clear, where, as here, an ALJ has had the opportunity to observe and evaluate witness testimony, the Board typically will grant considerable deference to the ALJ's determinations regarding witness credibility as well as any factual findings based thereon. See *In re Smith Farm Enters., LLC*, 15 E.A.D. 222, 229 (EAB 2011); *In re Gen. Motors Auto.*, 14 E.A.D. 1, 16 (EAB 2008); *In re City of Salisbury*, 10 E.A.D. 263, 276 (EAB 2002); *In re Echevarria*, 5 E.A.D. 626, 639 (EAB 1994). The Board generally defers to an ALJ's factual findings when those findings rely on witness testimony and when the credibility of the witnesses is a factor in the ALJ's decisionmaking. See *In re Ocean State Asbestos Removal, Inc.*, 7 E.A.D. 522, 530 (EAB 1998) (explaining that the appellant failed to demonstrate that any of the ALJ factual findings were unsupported by a preponderance of the evidence after giving due deference to the ALJ's observation of witnesses).<sup>11</sup>

This approach recognizes that the ALJ observes first-hand a witness's demeanor during testimony and therefore is best suited to evaluate his or her credibility. *Id.*; *In re Julie's Limousine & Coachworks, Inc.*, 11 E.A.D. 498, 507 n.19 (EAB 2004); *Echevarria*, 5 E.A.D. at 639 (explaining that when a presiding officer has "the opportunity to observe the witnesses testify and to evaluate their credibility, his factual findings are entitled to considerable deference"); *In re Port of Oakland*, 4 E.A.D. 170, 193 n.59 (EAB 1992) ("[T]he presiding officer's

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<sup>11</sup> The federal courts adhere to a comparable principle. See Fed. R. Civ. P. 52(a)(6) ("Findings of fact \* \* \* must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").



findings are entitled to weight because he has ‘lived with the case.’”) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951)); accord *NLRB v. Transpersonnel, Inc.*, 349 F.3d 175, 184 (4th Cir. 2003) (“The balancing of the credibility of witnesses is at the heart of the fact-finding process, and it is normally not the role of reviewing courts to second-guess a fact-finder’s determinations about who was the more truthful witness.”).

Therefore, the Board will not second-guess an ALJ’s credibility determinations unless they are unsupported by a preponderance of evidence in the record. See *Smith Farm*, slip op. at 43; *In re Bricks, Inc.*, 11 E.A.D. 224, 233, 236-37 (EAB 2003) (rejecting the ALJ’s credibility determination as not sufficiently supported by a preponderance of evidence).

## V. ANALYSIS

### A. *The ALJ Did Not Err in Determining That the Pit Tank Was a Hazardous Waste Storage Tank*

According to Chem-Solv, the ALJ erred in concluding that the pit tank was a hazardous waste storage tank because the pit water is not a “solid waste” as that term is defined in the statute and applicable regulations.<sup>12</sup> In particular, Chem-Solv asserts, as it did before the ALJ, that the pit water was not an abandoned or discarded material because it was reused to clean drums on the acid pad and as an ingredient in FreezeCon. Appeal at 13. Chem-Solv also asserts that the Region failed to prove by a preponderance of the evidence that materials in the pit tank met the definition of hazardous waste because EPA’s sampling methodology was “deeply flawed” and failed to meet EPA’s own standards for sampling. See *id.* at 20. The Board addresses each of these arguments below.

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<sup>12</sup> “Solid waste” is defined as “discarded material,” including solids, liquids, or contained gases, that result from industrial, commercial, mining, or agricultural operations or from community activities. RCRA § 1004(27), 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a)(1); see also 40 C.F.R. § 261.4(a) (listing materials excluded from the definition of solid waste). The regulations define “discarded material” as any material that is abandoned within the meaning of 40 C.F.R. § 261.2(b) or is recycled in a fashion specified in 40 C.F.R. § 261.2(c). 40 C.F.R. § 261.2(a)(2). Hazardous waste is a subset of solid waste. “Hazardous waste” consists of “a solid waste, or combination of solid wastes” that, “because of its quantity, concentration, or physical, chemical, or infectious characteristics,” may cause or significantly contribute to an increase in mortality or serious illness or pose a substantial hazard to human health or the environment when improperly treated, stored, disposed of, or otherwise managed. RCRA § 1004(5), 42 U.S.C. § 6903(5); See also 40 C.F.R. § 261.3.

## 1. *Alleged Reuse of the Pit Water*

### a. *Drum Rinsing*

Under RCRA, only a material that first qualifies as a “solid waste” under the statute can be considered to be a “hazardous waste.” *See* RCRA § 1004(5), (27), 42 U.S.C. §§ 6903(5), (27) (defining “solid waste” and “hazardous waste”); *In re Gen. Motors Auto.*, 14 E.A.D. 1, 5 n.1 (EAB 2008); *Am. Mining Cong. v. EPA*, 824 F.2d 1177, 1179 (D.C. Cir. 1987) (“Because ‘hazardous waste’ is defined as a subset of ‘solid waste,’ \* \* \* the scope of EPA’s [subtitle C] jurisdiction is limited to those materials that constitute ‘solid waste.’”); *see also supra* note 12. Chem-Solv asserts that the pit water did not meet the definition of a solid waste because it reused the pit water to rinse drums prior to shipping the drums to its customers. In support of this assertion before the ALJ, Chem-Solv relied on the testimony of Jamison Austin, Chem-Solv’s owner and general manager, Donald Tickle, a Chem-Solv maintenance department employee, and Scott Perkins, a professional engineer retained by Chem-Solv and Chem-Solv’s expert witness. *See* Appeal at 16; Init. Dec. at 55-62. The Region relied in large part on the testimony of Elizabeth Lohman, a VDEQ inspector and environmental program planner, and Kenneth Cox, an environmental engineer employed by U.S. EPA Region 3, both of whom had the opportunity to inspect the facility and talk to Chem-Solv employees regarding the storage and disposition of the pit materials. The Region also relied on documentation indicating that pit water was routinely and frequently shipped off-site for disposal. *See, e.g.*, Letter from Jamison G. Austin, to Kenneth J. Cox, U.S. EPA Region 3 at 650-54, 795-832 (Dec. 10, 2007) (CX 21).

The Board finds no error in the ALJ’s reasoning or determination that a preponderance of the evidence supports the conclusion that Chem-Solv shipped the pit water off-site for disposal as waste and did not reuse it. First, the underlying record contains no documentation of any systemic company policy or procedure regarding the reuse of pit water in any capacity. On the contrary, the record indicates that pit water was routinely removed and shipped off-site for disposal.<sup>13</sup>

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<sup>13</sup> On average, Chem-Solv disposed of 8,996 gallons of pit water per month between November 14, 2005, and October 10, 2006, using a company referred to as HOH Corporation. Init. Dec. at 26. Chem-Solv continued shipments of pit water off-site in April of 2007, using Shamrock Environmental Service, Inc. *Id.*; Letter from Jamison G. Austin, to Kenneth J. Cox, U.S. EPA Region 3 at 650, 654 (Dec. 10, 2007) (CX 21); *see also* Tr. IV at 215 (Austin) (stating that “there is no question” that pit water was shipped

Mr. Austin testified for Chem-Solv that pit water was regularly reused to rinse drums prior to shipment to customers. *See* Tr. IV at 199-203. Mr. Austin's testimony was supported by that of Mr. Tickle and Mr. Perkins. *See* Tr. III at 127-29 (Tickle); Tr. III at 187 (Perkins). In evaluating Chem-Solv's assertion, the ALJ carefully considered all witness testimony. *See* Init. Dec. at 56-63. With regard to Mr. Austin's testimony that the pit water was reused, the ALJ stated that although "superficially believable," his testimony lacked credibility. *Id.* at 57. "His demeanor lacked the color and tone of one sincerely recollecting from personal memory actual events which he witnessed occurring at the facility, and instead sounded of one coached and determined to say what had been deemed necessary on behalf of the company." *Id.* Further, the ALJ noted that Mr. Austin's personal knowledge of his employee's day-to-day activities was limited. *Id.* at 58 ("Mr. Austin had little real time for or interest in environmental compliance and the facility activities related thereto.").

In evaluating Mr. Tickle's testimony, the ALJ stated that "he had the demeanor at hearing of a subordinate, meekly and uncomfortably reciting the lines he had been instructed to say by Mr. Austin \* \* \* [and] did not give the impression of honestly and independently corroborating the truth of Mr. Austin's claims on the Pit water's reuse to clean drums." *Id.* Finally, although Mr. Perkins testimony was consistent with Mr. Austin's, the ALJ concluded that because Mr. Perkins' firm was not retained until the summer of 2008, which was after the pit tank had been removed from the ground, his knowledge of the pit tank and any alleged reuse of the pit water came entirely from Mr. Austin and other Chem-Solv employees. *Id.* at 59. The ALJ concluded that Mr. Austin's lack of credibility extended to Mr. Perkins and cast doubt on his testimony. *Id.*

In contrast, the ALJ found evidence proffered by the Region "quite potent." *Id.* at 59. For example, the ALJ found that Ms. Lohman, specifically and credibly testified that despite her extended interactions with Chem-Solv, no representative from the facility ever provided her with any information that would lead her to believe that pit water was reused to wash drums. *Id.* On the contrary, Ms. Lohman testified that during a VDEQ inspection on July 26, 2005, Mr. Lester told her that Chem-Solv had begun transferring pit water off-site for disposal. *Id.* at 59-60; Tr. I at 48 (Lohman). Ms. Lohman also testified that during an inspection in May of 2007, Mr. Lester told her that Chem-Solv was looking for potential reuses for the pit water which was still being managed as waste water at

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off-site). Between April 18, 2007, and July 27, 2007, Chem-Solv shipped over 27,000 gallons of pit water offsite for disposal. CX 21 at 654.

that time. *See* Tr. I at 107-11; Init. Dec. at 60-61. Mr. Lester stated further the pit water was transferred from the pit tank to an aboveground storage tank and then to tanker trucks for disposal. Tr. I at 97-98 (Lohman). As the ALJ noted, this testimony strongly contradicted Chem-Solv's claim that pit water was being reused in any capacity. Init. Dec. at 61. Similarly, Mr. Cox testified that during a May 15, 2007 inspection he asked Mr. Austin about the disposition of the pit water. Tr. III at 11. In response, Mr. Austin stated the pit was a solid waste unit and that the water was shipped off-site by a disposal company. *Id.* at 11-12. These contemporaneous responses from company personnel are hardly those to be expected from a facility engaged in the type of reuse that Chem-Solv alleges.

Moreover, in written responses to inquiries from both VDEQ and EPA, Chem-Solv referenced the pit water as waste material, further undermining its assertion that it considered pit water to be a usable product in the normal course of the facility's operation. For example, in a December 16, 2005 response to a warning letter from the VDEQ regarding potential RCRA violations at the facility, Chem-Solv referred to the pit water as "waste" that is shipped to off-site facilities for disposal in an "uninterrupted" stream. Letter from J. Cary Lester, Operations Manager, Chem-Solv, to William E. Klepper, Sr. Enforcement/Compliance Specialist, VDEQ at 1521, 1526 (December 16, 2005) (CX 42). Further, Chem-Solv referred to the pit tank as a "treatment tank" and stated that the "wastes treated in the tank" are hazardous due to corrosivity. *Id.* Chem-Solv did not mention any reuse of the pit water.

This is consistent with a December 10, 2007 response to an EPA information request addressing the disposition of materials collected in the pit tank. *See* Letter from Jamison G. Austin, to Kenneth J. Cox, U.S. EPA Region 3 (Dec. 10, 2007) (CX 21). In his response, Mr. Austin wrote that the pit water "is pumped from the pit into [a] storage tank adjacent to [the] acid pad when full and tested for pH prior to shipment to [a] processing facility." *Id.* at 658. Similarly, in a February 6, 2008 response to an EPA information request, Chem-Solv again indicated that the pit water was routinely disposed of off-site. Letter from Jamison G. Austin, to Kenneth J. Cox, U.S. EPA Region 3 at 1081 (Feb. 6, 2008) (CX 23); *see* Init Dec. at 60. Chem-Solv's response made no mention of pit water reuse.

As the ALJ stated, "[i]t is difficult to believe that Respondents would describe material they were routinely using to wash drums, or as a raw ingredient in a product, as "waste" and potentially *hazardous corrosive waste*. Rather, it is likely that the pit water was disposed of swiftly in an uninterrupted stream as indicated by Mr. Lester's words and by the frequency with which the pit water

was shipped off for disposal.” Init. Dec. at 60 (emphasis in original). For these reasons, and because of the lack of company records or other documentation demonstrating that pit water was reused in the manner Chem-Solv alleges, the ALJ concluded that it was more likely than not that the pit water was not reused for any purpose. *Id.* at 62.

Upon a thorough review of the record on appeal, the Board concludes that the ALJ carefully evaluated the testimony in the record and provided a thorough and rational basis for why she found the Region’s witnesses to be credible and Chem-Solv’s witnesses to be lacking in credibility. *Id.* at 56-62. Moreover, given the lack of record evidence demonstrating that the pit water was reused to rinse drums as Chem-Solv alleges, the Board agrees with the ALJ that a preponderance of the evidence shows that the pit water was not reused but shipped off-site for disposal. This ruling is consistent with the preamble to the Agency’s solid waste rules discussing guidelines for distinguishing “sham” recycling activities from legitimate recycling activities. In this regard, the Agency stated, in part, as follows:

Absence of records regarding the recycling transaction is another indication of a sham situation. Records ordinarily are kept documenting use of raw materials and products. Records likewise are usually retained to document secondary material use and reuse. The Agency consequently views with skepticism situations where secondary materials are ostensibly used and reused but the generator or recycler is unable to document how, where, and in what volumes the materials are being used and reused. The absence of such records in these situations consequently is evidence of sham recycling.

Hazardous Waste Management System; Definition of Solid Waste, 50 Fed. Reg. 614, 638 (Jan. 4, 1985).<sup>14</sup> Under these circumstances, the Board declines to second-guess the ALJ’s credibility determinations and instead defers to her well-supported conclusion.

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<sup>14</sup> The Board notes that the Agency recently published a final rule, effective July 13, 2015, revising 40 C.F.R. § 260.43 and codifying that all recycling must be legitimate by adding a prohibition on sham recycling to 40 C.F.R. § 261.2(g). *See* Definition of Solid Waste, 80 Fed. Reg. 1,694 (Jan. 13, 2015). The prohibition on sham recycling is consistent with the Agency’s longstanding policy and interpretation of legitimate recycling expressed in the January 4, 1985 preamble quoted above.

b. *Ingredient in FreezeCon*

Chem-Solv next argues that the ALJ erred in concluding that the pit water was not reused as an ingredient in a product it manufactures, “FreezeCon.” The Board disagrees. As discussed above, the preponderance of the evidence demonstrates that Chem-Solv generally treated pit water as a waste material rather than a usable product. Despite numerous communications between Chem-Solv and VDEQ and EPA inspectors between 1999 and 2007, Chem-Solv did not make reference to the reuse of pit water in any capacity. This casts doubt on both the alleged use of pit water to wash drums and as an ingredient in FreezeCon.

As with the assertion that pit water was used to rinse drums prior to shipment, Chem-Solv’s assertion that pit water was used as an ingredient in FreezeCon is supported essentially by the testimony of Chem-Solv’s manager, Mr. Austin, and Chem-Solv employees. The ALJ found this testimony unconvincing. Mr. Austin testified that “batch tickets” for FreezeCon orders demonstrate that pit water was used in the blending process.<sup>15</sup> *See* RX 3. These batch tickets, however, do not explicitly identify the pit tank as the source of the water. Rather, the tickets contain varying and ambiguous notations regarding the source of the water. For example, Mr. Austin references batch tickets with the following differing hand written notations concerning the source of the water: “tank behind the blend area marked #84;”<sup>16</sup> “Tanker 1728;”<sup>17</sup> “1G Bulk Pit water totes (see Don);”<sup>18</sup> “1G Bulk;”<sup>19</sup> “Tank 10;”<sup>20</sup> and “1G Bulk Tank beside scales.”<sup>21</sup> Tr. IV at 212-14. Although Mr. Austin testified that each of these notations referred to water from the pit tank, given the ambiguity of these notations, the absence of documentation or company records confirming

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<sup>15</sup> According to Mr. Austin, batch tickets are generated by the Company’s customer service department when a customer places an order. The ticket is then “forwarded to the plant to be blended and prepared for shipment to the customer.” Tr. IV at 211.

<sup>16</sup> RX 3 at 022.

<sup>17</sup> RX 3 at 034.

<sup>18</sup> RX 3 at 035.

<sup>19</sup> RX 3 at 038.

<sup>20</sup> RX 3 at 051.

<sup>21</sup> RX 3 at 052.

Mr. Austin's testimony, and Chem-Solv's consistent failure to reference reuse in any capacity when explaining its handling of pit water to the VDEQ or EPA despite multiple inspections between 1999 and 2007, the ALJ did not find this testimony convincing. *See* Init. Dec. at 58-62. Mr. Perkins' testimony on the use of pit water as an ingredient in FreezeCon was consistent with Mr. Austin's testimony. The ALJ, however, did not find this testimony reliable because Mr. Perkins was not retained until the summer of 2008, after the pit tank had been removed from the ground, and he therefore lacked personal knowledge of the pit tank system and any alleged reuse. Init. Dec. at 59. After a thorough review of the record, the Board finds no reason to disturb the ALJ's determination.

Further, in two respects, Mr. Tickle's testimony on this issue casts doubt on Chem-Solv's assertion that the pit water was the source of the water used in blending FreezeCon.<sup>22</sup> First, Mr. Tickle testified that pit water used to blend FreezeCon was drawn from the aboveground storage tank adjacent to the pit.<sup>23</sup> Tr. III at 130, 134. Mr. Tickle referred to this tank as "the blue tank" or "tank two." *Id.* at 130, 133, 135. However, none of the batch tickets identified by Mr. Austin make any reference to water being drawn either from the "blue tank" or "tank two," nor has the Board been able to locate any such references in the batch tickets. The absence of company records clearly reflecting the use of the pit water from either the aboveground storage tank or other containers casts doubt on Mr. Austin's assertion. In addition, Mr. Tickle stated that, although pit water was sometimes used for blending FreezeCon, employees also would use rain water collected around the facility. *Id.* at 135-36. According to Mr. Tickle, *any water* used in the blending of FreezeCon was referred to as "pit water." *Id.* at 138. Indeed, when asked about the source of the water on the batch ticket containing the notation "1G Bulk Pit water totes (see Don)," Mr. Tickle stated that the water was probably rain water from dike walls at the facility. *Id.*

Under these circumstances and after a thorough review of the record, the Board finds no reason to disturb the ALJ's determination. The Board agrees with the ALJ that a preponderance of the evidence shows that the pit water was not

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<sup>22</sup> Unlike his demeanor during testimony concerning use of the pit water to rinse drums which the ALJ found lacking in indicia of honesty and independence, when responding to questions regarding the use of pit water in the manufacture of FreezeCon, the ALJ found that "Mr. Tickle's testimony and demeanor suggested he actually had personal knowledge" on this subject. Init. Dec. at 59.

<sup>23</sup> As stated above, this above-ground storage tank contains overflow from the pit tank.

reused for any purpose, including as an ingredient in FreezeCon. Rather, the record indicates that pit water was accumulated at the facility and routinely shipped off-site for disposal. Chem-Solv, therefore, has failed to meet its burden of demonstrating that the pit water is not a solid waste or otherwise exempt from regulation. *See* 40 C.F.R. § 261.2(f) (requiring certain documentation); *In re Gen. Motors Auto.*, 14 E.A.D. 1, 54-55 (EAB 2008) (describing burden of proof for affirmative defenses).

## 2. *Manufacturing Process Unit Exemption*

Chem-Solv also asserts that the ALJ erred in determining that the facility's underground storage tank does not qualify for the "manufacturing process unit" exemption in 40 C.F.R. § 261.4(c) (entitled "Hazardous wastes which are exempted from certain regulations"). *See* Init. Dec. at 78. The Board disagrees. Under this provision, hazardous waste "generated in a product or raw material storage tank \* \* \* or in a manufacturing process unit" is exempt from regulation "until it exits the unit in which it was generated." 40 C.F.R. § 261.4(c). Chem-Solv alleges that, if the pit material were hazardous wastes, they were exempt from regulation in this case because the pit was either a manufacturing process unit or a raw material storage tank. This argument is premised on the assertion that the pit water was reused to wash drums on the acid pad and as an ingredient in FreezeCon. However, because the Board agrees with the ALJ that the preponderance of the evidence demonstrates that the pit water was not reused in the manner Chem-Solv alleges, but was collected and regularly shipped off-site for disposal, the ALJ did not err in holding that this exemption does not apply to Chem-Solv's activities.

## 3. *Sampling Methodology*

Chem-Solv asserts that the ALJ erred in finding liability on all counts in the complaint because the Region failed to meet its burden of establishing that the pit materials were hazardous waste. *See* Appeal at 20; *see also* 40 C.F.R. §§ 261.20, .24. Under RCRA, solid wastes are deemed to be hazardous wastes if they are individually listed as hazardous or they exhibit one or more characteristics of a hazardous waste (i.e., ignitability, corrosivity, reactivity, and toxicity). *See* 40 C.F.R. pt. 261. EPA's toxicity characteristic leaching procedure ("TCLP") is a chemical test to determine whether a solid waste is toxic (and therefore hazardous because it exhibits one of the characteristics of a hazardous waste). The regulations provide that a material is deemed a hazardous waste if it meets or exceeds a TCLP threshold for one or more chemicals. The Region's complaint alleged that both the pit water and pit sludge were hazardous because



the Region found through its sampling that the pit water and pit sludge contained chloroform in concentrations exceeding the TCLP threshold of 6.0 mg/L, and the pit sludge contained trichloroethylene and tetrachloroethylene in concentrations exceeding the TCLP thresholds of 0.5 mg/L and 0.7 mg/L, respectively.

Chem-Solv argued before the ALJ and argues before this Board that EPA's sampling methodology was "deeply flawed" because the pit water and pit sludge samples collected on May 23, 2007, used sampling methodologies inconsistent with established EPA sampling procedures provided in EPA guidance documents. Chem-Solv further asserts that the samples were not collected in a manner ensuring they were representative of Chem-Solv's waste stream. Appeal at 20-24. Thus, according to Chem-Solv, EPA's analytical results that indicate the pit water and pit sludge displayed the characteristics of toxicity because they contained chloroform, trichloroethylene, and tetrachloroethylene in concentrations exceeding the TCLP thresholds are flawed and cannot support a liability finding. *Id.*; Appellant's Reply Brief Supporting Reversal of Initial Decision at 1-8 (Aug. 22, 2014).

Under EPA regulations, a solid waste "exhibits the characteristic of toxicity if, using the [TCLP], \* \* \* the extract from a representative sample of the waste contains any" listed contaminants at "the concentration equal to or greater than the" regulatory threshold. 40 C.F.R. § 261.24. A "representative sample" is "a sample of a universe or a whole \* \* \* which can be expected to exhibit the average properties of the universe or whole." *Id.* § 260.10. The regulations do not mandate a particular method for collecting representative samples. Indeed, the regulations specifically state that procedures can vary depending on site conditions and the waste materials being sampled. *See, e.g.*, 40 C.F.R. pt. 261 app. I (stating that the "methods and equipment used for sampling waste materials will vary with the form and consistency of the waste materials to be sampled"). Similarly, the guidance documents Chem-Solv referenced in the proceeding below make clear that they are not mandatory and that procedures may differ depending on site conditions.<sup>24</sup> Thus, the Board does not agree with Chem-Solv

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<sup>24</sup> *See, e.g.*, Office of Solid Waste & Emergency Response, U.S. EPA, SW-846, *Test Methods for Evaluating Solid Waste*, Disclaimer (1986) ("Except where explicitly specified in a regulation, the use of SW-846 methods is not mandatory in response to Federal testing requirements."); Environmental Response Team, U.S. EPA, *Tank Sampling*, SOP # 2010 (Nov. 16, 1994) (stating that recommended procedures "may be varied or changed, as required, depending on site conditions"); *see also* 40 C.F.R. § 261.20(c) (cmt.) (explaining that because sampling methods listed in appendix I to part 261 (Representative Sampling Methods) have not been formally adopted, persons

that the Region's decision not to follow the sampling methodology in EPA's guidance documents, in and of itself, is a basis for finding error. Rather, the issue before the Board is whether the ALJ erred in concluding that the EPA inspectors obtained representative samples of pit water and pit sludge during their May 23, 2007 inspection.

George Houghton, a Region 3 Environmental Protection Specialist and the lead inspector and sampler during the May 23, 2007 inspection, collected the samples of pit water and pit sludge with the assistance of Jose Reyna. *See* Init. Dec. at 69; Tr. I at 201, 206 (Houghton). Mr. Houghton's responsibilities as lead sampler included ensuring the samples were collected properly, taking notes and photographs, and writing a final report. Mr. Reyna was a relatively new inspector training under Mr. Houghton. Tr. I at 205-06 (Houghton). During his tenure at EPA, Mr. Houghton, now retired, had approximately twenty-eight years of experience in performing RCRA sampling inspections and extensive classroom and on-the-job training in conducting RCRA inspections and utilizing appropriate sampling protocols at industrial facilities. Tr. I at 193-97 (Houghton). Mr. Houghton testified at length about the inspection and sampling methodology for both the pit water and pit sludge, including the selection of sampling and safety equipment, decontamination procedures for sampling containers and other equipment, observations of the pit and on-site discussions with Mr. Lester regarding pit materials, sampling collection and preservation methods, recordkeeping, and chain of custody measures. *Id.* at 217-46. The ALJ found this testimony "detailed and credible, [given] with the demeanor of someone well versed and long experienced in his field." Init. Dec. at 69. EPA also presented detailed testimony of Ms. Peggy Zawodny, an EPA environmental scientist who received and analyzed the pit samples. *See* Tr. II at 3-64 (Zawodny). Finally, EPA's expert witness, Dr. Joseph Lowry, Chief Scientist at EPA's National Enforcement Investigations Center in Lakewood, Colorado, an expert in RCRA hazardous waste analysis and environmental chemistry, testified that he reviewed Mr. Houghton's sampling process and found no fault with his procedures or methodology. *See* Tr. II at 65-230. The ALJ found this testimony to be credible and convincing.

Chem-Solv's expert witness, Mr. Perkins, a professional engineer with over twenty years of experience in environmental science and regulatory compliance, testified that the sampling methodology and protocols for extraction

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employing alternative sampling methods need not demonstrate the equivalency of the alternative method).

of both the pit water and pit sludge did not comply with EPA guidance and did not result in a representative sample. *See, e.g.*, Tr. III at 217-36; Tr. IV at 3-40; Appeal at 21. In particular, Perkins testified that the Region failed to use the proper equipment in collecting samples, failed to take multiple grab samples, and failed to account for stratification in the material collected. *See* Appeal at 22 (citing Tr. III at 235-36, Tr. IV at 17-23 (Perkins)). After hearing all witnesses and reviewing the record, the ALJ concluded that the preponderance of the evidence demonstrated that the samples of the pit water and pit sludge were representative and that the analytical results from the samples were “fully reliable and credible.” Init. Dec. at 72.

Upon a thorough review, the Board agrees with the ALJ that the Region met its burden of establishing that the samples of pit water and pit sludge were representative and that the sampling results demonstrated the presence of hazardous wastes.

a. *Pit Water*

Chem-Solv asserts that the ALJ erred in concluding that the pit water was hazardous in two respects: (1) the samples were taken at the pit surface and did not account for variability of chloroform concentrations throughout the tank; and (2) because of a 2% margin of error in the analytical results, EPA failed to meet its burden of demonstrating that the pit water was hazardous. Appeal at 23. The Board disagrees.

As stated above, EPA’s pit water sampling showed a chloroform level of 6.1 mg/L, which is higher than the 6.0 mg/l threshold for regulation as a hazardous waste. *See* 40 C.F.R. § 261.24 tbl.1. According to Chem-Solv, this determination was flawed because the samples were not taken at different depths within the pit and therefore did not adequately represent actual chloroform concentrations. When questioned regarding the pit water sampling at the hearing, however, Mr. Houghton testified samples were taken at a time when the pit appeared to be in use and “the water was fresh and new and had been stirred up” and were therefore representative of the pit water as a whole. Tr. I at 220-21. Similarly, Dr. Lowry testified that diffusion within the pit water likely resulted in the same chloroform concentrations throughout the tank. *See* Tr. II at 101-03. While Chem-Solv’s expert witness, Mr. Perkins, suggested the possibility of different phases in the pit water layer resulting in potentially significant concentration differences at different depths, Dr. Lowry stated that he would not expect this to occur in the pit. *Id.* Rather, he expected that diffusion of materials in the relatively shallow pit tank would “make everything about the same

concentration.” *Id.* at 102. Indeed, if any differences in chloroform concentrations existed, Dr. Lowry stated that these levels would likely increase at lower depths due to volatilization at the surface - *i.e.*, the sample EPA analyzed would have a *lower* concentration of chloroform than a sample taken from deeper in the pit. *Id.* at 101. In her initial decision, the ALJ concluded: “[b]ased on the testimony of these two highly-credible witnesses [Mr. Houghton and Dr. Lowry], and on consideration of the record as a whole, \* \* \* [EPA] did take a sample of the pit water that ‘can be expected to exhibit the average properties’ of the pit water as a whole, and that the sample of the pit water was therefore a representative sample within the meaning of 40 C.F.R. § 260.10.” *Init. Dec.* at 69.

On appeal, Chem-Solv expresses disagreement with the ALJ’s determination and repeats its objection to EPA’s pit water sampling methodology. Based on a review of the initial decision and the record on appeal, the Board concludes that the ALJ’s determination is supported by a preponderance of the evidence in the record. The Board therefore defers to the ALJ’s well reasoned and amply supported determination on this issue. *See In re Smith Farm Enters., LLC*, 15 E.A.D. 222, 256 (EAB 2011).

Chem-Solv asserted at the hearing that a small margin of error in the analytical results for chloroform would put chloroform levels below the regulatory threshold for toxicity. *See Init. Dec.* at 71. Citing Ms. Zawodny’s testimony that the results of her chloroform analysis had a 2% margin of error, plus or minus, *see Tr. II* at 57 (Zawodny), Chem-Solv asserted that EPA failed to sustain its burden of proof that the chloroform levels exceeded the regulatory threshold of 6.0 mg/L. *Id.*

Under 40 C.F.R. § 261.24(a), a solid waste exhibits the characteristic of toxicity if a representative sample contains any listed contaminant, including chloroform, “at the concentration equal to or greater than the respective value” listed in table 1 (in this case 6.0 mg/L). Nothing in this regulation suggests that the regulatory limit requires consideration of a margin of error in this context, nor has either party cited any regulatory or other support for considering such a margin. The sample EPA analyzed demonstrates that the chloroform concentration of 6.1 mg/L in the pit water exceeded the TCLP limit of 6.0 mg/L, thereby establishing the pit water as a hazardous waste.<sup>25</sup>

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<sup>25</sup> The Board notes further that the ALJ concluded that even if a 2% margin of error is taken into consideration, it is more likely than not that the actual concentration was above the 6.0 threshold than below. *See Init. Dec.* at 72. As the ALJ stated, “if the

b. *Pit Sludge*

In collecting samples of the sludge, Mr. Houghton used a stainless-steel “sludge scrape” with an attached pole for lowering the scrape into the pit. *See* Tr. I at 226-32 (Houghton). According to Mr. Houghton, he and Mr. Reyna obtained sludge samples by lowering the scrape into the pit at various locations until they felt resistance. They then pulled the scrape up in an arcing motion and used a tongue depressor to collect samples and place them into sample jars for later analysis. *Id.* at 231-34. As stated above, the sampling results showed that the sludge contained 457 mg/L of tetrachloroethylene, approximately 653 times the regulatory threshold of 0.7 mg/L, and 15.5 mg/L of trichloroethylene, approximately 31 times higher than the regulatory threshold of 0.5 mg/L. Tr. II at 94, 96-97 (Lowry); *Init. Dec.* at 69-71. In her Initial Decision, the ALJ concluded that based on these sampling results and the testimony of Mr. Houghton and Dr. Lowry, the pit sludge exhibited the characteristic of toxicity and was therefore a hazardous waste. *Init. Dec.* at 72.

Chem-Solv asserts that these analytical results were flawed and the ALJ therefore erred in concluding that the Region had established the pit sludge was a hazardous waste. *See* Appeal at 21. Chem-Solv lists several alleged errors, including the failure to use a coring device to obtain sludge samples from lower in the pit or to homogenize the samples. Appeal at 22. Aside from listing these alleged errors, however, the brief on appeal fails to explain how they render the sludge sample unreliable or unrepresentative. While Mr. Perkins opined that a manual coring device would have been more appropriate in sampling the pit sludge, *see* Tr. III at 235-36 (Perkins) & Tr. IV at 17-23 (Perkins), the record does not support the assertion the sludge scrape used by Mr. Houghton failed to obtain a representative sample. Further, as Dr. Lowry testified, concentrations of tetrachloroethylene and trichloroethylene were so high that over 600 additional zero concentration samples would be required for the average concentration to fall

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result of 6.1 mg/L is subject to a 2% swing, than the actual concentration of chloroform in the pit water could be as low as 5.978 mg/L or as high as 6.222 mg/L. \* \* \* The lowest possible concentration is within 0.022 mg/L of the threshold, while the highest possible concentration is 0.222 mg/L over the threshold. Thus, taking the margin of error into account, it is still more likely than not that the concentration of chloroform in the pit water exceeded the regulatory threshold of 6.0 mg/L.” *Id.* In their brief on appeal, Chem-Solv does not contest the ALJ’s analysis. The Board agrees with the ALJ that even taking into consideration a 2% margin of error, the EPA has met its burden of establishing by a preponderance of the evidence the presence of chloroform in the pit water in excess of the 6.0 mg/L regulatory threshold.

below the applicable regulatory threshold. *See* Tr. II at 94-99. In addition, Dr. Lowry stated that due to the nature of the contaminants, concentrations of tetrachloroethylene and trichloroethylene likely would increase towards the bottom of the pit. Tr. II at 95-98 (Lowry). Thus, test results from the pit sludge collected by Mr. Houghton from the upper layers of sludge would be biased low in Chem-Solv's favor. Finally, Chem-Solv's own raw analysis of the of pit sludge in January of 2008 found the presence of tetrachloroethylene and trichloroethylene at levels likely to exceed the regulatory threshold. Init. Dec. at 70; Tr. II at 103-07 (Lowry). The ALJ found the testimony of Mr. Houghton and Mr. Lowry highly credible and concluded that the sampling was appropriate and representative. *See* Init. Dec. at 69.

The ALJ carefully evaluated the testimony in the record and provided a rational basis for why she found EPA's witnesses to be credible. Under the facts of this case and considering the record as a whole, the Board declines to second-guess the ALJ's credibility determinations and instead defers to her well-supported judgments.

*B. The ALJ Did Not Err in Determining That the Leaking 55-Gallon Drum of Sodium Hydrosulfide Was a Hazardous Waste*

During the May 2007 inspection, Ms. Lohman observed three 55-gallon drums of sodium hydrosulfide. *See* Tr. I at 128-45 (Lohman). One of the drums, the drum at issue in this matter, was dented and leaking and was ultimately disposed of off-site as hazardous waste on February 20, 2008. *See* Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA, Region 3 at 1078, 1097 (Feb. 6, 2008) (CX 23) [hereinafter Feb. 2008 Austin Response Letter]. The other two drums were labeled as "partial drums" that according to Mr. Lester, had been returned from customers. Tr. I at 141-45 (Lohman); *see also* VDEQ, RCRA Compliance Evaluation Inspection Visit, Chemical and Solvents (dba Chemsolv) - VAD 980721088 ("VDEQ Inspection Report"), at 381-89 (May 15-23, 2007) (CX 19). As discussed below, these drums were shipped off-site in October of 2008.

The Region alleged, and the ALJ agreed, that the damaged 55-gallon drum of sodium hydrosulfide was both a solid waste and a hazardous waste, and that Chem-Solv unlawfully stored the material without a permit at least from May 23, 2007, until February 1, 2008. *See* Init. Dec. at 86. Before the ALJ, Chem-Solv argued, as it did with the pit materials, that the drums of sodium hydrosulfide, including the leaking drum at issue here, were not solid wastes because, at the time of the inspection, the sodium hydrosulfide was a usable product in Chem-Solv's inventory. *See* Respondent's Initial Post-Hearing Brief at 44 (Aug. 31, 2012). In support of this assertion, Chem-Solv stated that it was able to sell two

of the drums to a customer in the fall of 2008. Although Chem-Solv conceded that it had disposed of the remaining drum as hazardous waste in 2008, Chem-Solv stated that this decision “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.” *Id.* In addition, Chem-Solv argued that the Region failed to establish that the leaking drum observed during the May 23, 2007 inspection was the same drum shipped off-site for disposal on February 20, 2008. *Id.* at 45. Upon review of the record, we agree with the ALJ that the Region met its burden of establishing by a preponderance of the evidence that the 55-gallon drum was a solid waste.

First, there is no indication in the record that Chem-Solv maintained an inventory that included sodium hydrosulfide as a product. Chem-Solv did not produce any records reflecting the purchase, retention in inventory, or bona fide sales of sodium hydrosulfide to any customers. The only documentary evidence in the record indicating that any of the materials were transferred to a customer was one invoice and bill of lading dated October 6, 2008. *See* RX 15. Rather than reflecting a bona fide sale, however, the bill of lading indicates that the two drums of sodium hydrosulfide were shipped *at no charge*. *Id.* And significantly, the transaction was not initiated by the customer, but by Chem-Solv. *See* Tr. IV at 192-94 (Austin). The alleged sale occurred after the May 2007 inspection and during the period in which Chem-Solv was under investigation by both VDEQ and EPA. Although Mr. Austin testified at the hearing that sodium hydrosulfide generally sold for approximately 15-20 cents per pound, Chem-Solv received no compensation for the shipments. *Id.* at 276-77. Indeed Chem-Solv lost money on the transaction because it bore the shipping costs. *Id.* at 277. Standing alone, this is hardly the type of transaction evidencing a bona fide sale. Rather, as the ALJ concluded, the transaction “was in essence one of disposal, not sale.” *Init. Dec.* at 88.

Given the lack of documentation regarding the purchase, handling, or sales of the sodium hydrosulfide, a preponderance of the evidence shows that Chem-Solv considered the material a solid waste rather than a useful product in inventory that could be sold. This conclusion is consistent with the regulatory requirement that parties asserting that certain materials are not solid wastes must demonstrate a known market or disposition for the material and support this assertion with appropriate documentation, such as contracts showing use of the material by other parties. *See* 40 C.F.R. § 261.2(f). Further, Chem-Solv did not handle the drums of sodium hydrosulfide in a manner consistent with the management of a valuable product. Rather, the record indicates that the drums were treated more like a waste product being stored in lieu of or pending disposal.

For example, Chem-Solv could not state how long any of the drums had been stored at the facility or when they had been acquired. *See, e.g.*, Feb. 2008 Austin Response Letter at 1078 (stating that the length of storage is unknown); Tr. IV at 129 (Mr. Perkins unable to state when Chem-Solv acquired the drums of sodium hydrosulfide). Because sodium hydrosulfide has a relatively short shelf life,<sup>26</sup> Chem-Solv's apparent indifference to the length of time the material had been stored casts doubt on its assertion that it was handled as a useful product in inventory. *See* Init. Dec. at 86-87.

Secondly, even assuming *arguendo* that the two drums of sodium hydrosulfide discussed above were a part of Chem-Solv's inventory, a preponderance of the evidence shows that the drum at issue on this appeal – i.e., the leaking drum of sodium hydrosulfide – was treated as a waste product. There is no documentation demonstrating that Chem-Solv either listed or treated the leaking 55-gallon drum of sodium hydrosulfide as a product in inventory. When Ms. Lohman observed the dented and leaking drum of sodium hydrosulfide during her inspection in May of 2007, no one at the facility seemed concerned about the condition of the drum or the fact that it was leaking. Tr. I at 128, 133-34 (Lohman). Ms. Lohman stated that, given the drum's condition, it was not suitable for shipment and was not “being managed in a commodity-like manner because it wasn't ready to go on the road.” *Id.* at 134. Further, Ms. Lohman was told by Chem-Solv employees that the material in one of the other two drums of sodium hydrosulfide was hardening and needed to be tested for efficacy to determine if it could be “put back into product inventory.” VDEQ Inspection Report at 381. Under these circumstances, the record does not support Chem-Solv's assertion that the materials were stored in anticipation of sale to potential customers. Rather, given the damaged condition of the 55-gallon drum at issue in this case, and the apparent lack of concern on the part of Chem-Solv employees, the ALJ reasonably concluded that the sodium hydrosulfide was treated as a waste material. *See In re Bil-Dry Corp.*, 9 E.A.D. 575, 602-04 (EAB 2001) (upholding ALJ's determination that contents of drums were waste materials based, in part, on the condition of drums and the manner of storage).

Finally, contrary to Chem-Solv's assertion, the evidence shows that the leaking drum observed by Ms. Lohman during the May 2007 inspection was the same drum disposed of as a hazardous waste on February 20, 2008. In responding to an EPA information request in February of 2008 seeking information on the

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<sup>26</sup> Dr. Lowry testified that the sodium hydrosulfide has a shelf life of “roughly one year.” Tr. V at 35-37.



ultimate disposition of the leaking drum, Mr. Austin clearly indicated that the drum was disposed of as hazardous waste on February 20, 2008. Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA, Region 3 at 1078, 1097 (Feb. 6, 2008) (CX 23).<sup>27</sup> Chem-Solv thus argues on appeal that notwithstanding (1) the damaged condition of the drum of sodium hydrosulfide at the time of the 2007 EPA inspection; (2) the fact that the drum was leaking a material Chem-Solv asserts is a valuable product in its inventory; (3) the instability of this product when exposed to air (which was happening through the leak in the drum) with no attempts to place the remaining material into a non leaking drum; and (4) the fact that Chem-Solv eventually *did* dispose of the drum of sodium hydrosulfide as hazardous waste, the Board should find that the drum was *not* a hazardous waste during the period covered by the Region's complaint. The Board does not find that the record supports such a conclusion. Rather, for the forgoing reasons, the Board affirms the ALJ's determination that the Region met its burden of proving that the 55-gallon drum of sodium hydrosulfide was a solid waste and a hazardous waste.

C. *The ALJ Did Not Err in Determining That Chem-Solv Failed to Make Required Waste Determinations*

Count II of the complaint alleged that from at least May 23, 2007, until February 1, 2008, Chem-Solv failed to perform a hazardous waste determination on the pit water, pit sludge, or discarded aerosol cans treated, stored, and/or disposed at the facility in violation of 40 C.F.R. § 262.11.<sup>28</sup> *See* Complaint ¶¶ 38-46. This section requires that persons generating solid wastes determine whether or not the wastes are hazardous wastes. In making this determination, generators may engage in testing of the wastes or, in the alternative, apply their own "knowledge of the hazardous characteristics of the waste in light of the materials or the processes used." 40 C.F.R. § 262.11(c)(2). As the preamble to the regulation states, "[this] determination is the crucial, first step in the regulatory

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<sup>27</sup> Specifically, the February 6, 2008 letter states that the disposal record for the leaking 55-gallon drum "is attached in attachment 11b." CX 23 at 1078. Attachment 11b is a hazardous waste manifest indicating that the drum was one of three items shipped from Chem-Solv to a disposal facility in Detroit, Michigan on February 20, 2008. *Id.* at 1097.

<sup>28</sup> During the VDEQ/EPA inspection in May of 2007, inspectors observed totes containing sawdust residues and free liquids as well as discarded aerosol cans on top of the sawdust. Tr. I at 119, 177-78 (Lohman); Tr. III at 77-78 (Cox). According to Mr. Austin, Chem-Solv used cans of black and white spray paint to touch-up and recondition drums. Tr. IV at 249 (Austin).

system, and the generator must undertake this responsibility seriously [and the determination] \* \* \* must be based on factors which are subject to objective review.” Standards Applicable to Generators of Hazardous Waste, 45 Fed. Reg. 12,724, 12,727 (Feb. 26, 1980). *Generators must keep records of this determination, whether completed through testing or reliance on generator knowledge, and maintain these records for at least three years from the date the waste was shipped off-site for disposal. See 40 C.F.R. § 262.40(c).*

Chem-Solv argued before the ALJ that it performed the required waste determinations for the pit water and pit sludge. First, with regard to the pit water, Chem-Solv asserted that it had performed a waste determination using generator knowledge and concluded that the pit water was not a hazardous waste. *See* Init. Dec at 95. Upon consideration of the evidence presented at the hearing, however, the ALJ found that Chem-Solv failed to produce any documentation, as required by 40 C.F.R. § 262.40(c), or testimony demonstrating that it performed the required waste determination. *Id.* at 95-96. Chem-Solv does not dispute this finding on appeal. Rather, Chem-Solv merely repeats its assertion that “it had no reason to believe that [the pit water] was hazardous.” Appeal at 34. Because the record is devoid of any documentation establishing that Chem-Solv performed the required waste determination, as required by EPA regulations, either through testing or generator knowledge, the Board affirms the ALJ’s determination. Moreover, as discussed above, the analytical results from samples of pit water collected during the May 23, 2007 inspection demonstrated that the pit water contained levels of chloroform above the regulatory threshold and was therefore a hazardous waste.<sup>29</sup> Thus, if indeed Chem-Solv performed a hazardous waste determination of the pit water, that characterization was inaccurate or not representative of conditions in the pit at all times.<sup>30</sup> Under these circumstances,

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<sup>29</sup> The preamble to the final rule on waste determinations states that the declaration must be based on factors subject to objective review and that a deliberate or negligent oversight, such as overlooking the presence of hazardous wastes would not support the declaration. 45 Fed. Reg. at 12,727.

<sup>30</sup> The Board notes that Chem-Solv states that it blends and packages chemicals in response to customer orders, and rinses off the outside of the filled drums to remove excess chemicals, dirt, and debris before shipping the drums to the customers. *See* Appeal at 7-9; Tr. III at 127-29 (Tickle); Tr. IV at 200-04 (Austin). The rinse water from this washing operation flows into the pit. Given that it is unlikely that Chem-Solv prepared the same materials every day or every week, or the same amount of chemical, dirt, or debris would exist on every drum washed, or the same amount of water was used to wash every drum, it is implausible that Chem-Solv could believe that the concentration in the pit tank would remain constant. And given the different chemicals involved, it is

and given the lack of documentation relating to this alleged waste determination, the record does not support Chem-Solv's assertion that it conducted a waste determination in compliance with the requirements of 40 C.F.R. § 262.11. *See* Init. Dec. at 95.

Second, with regard to the pit sludge, Chem-Solv asserts that it believed the pit sludge was not hazardous based on testing performed in May of 2006 and on generator knowledge. *See* Tr. IV at 237-40 (Austin); Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA Region 3 (Dec. 10, 2007) (CX 21) [hereinafter 2007 Austin Letter]. In support of this assertion, Chem-Solv cites to a May 24, 2006 analytical report prepared on Chem-Solv's behalf by ProChem Analytical, Inc. *See* 2007 Austin Letter at 1016-21. That report indicated that the sampled material did not contain hazardous concentrations of trichloroethylene or tetrachloroethylene. *Id.* at 1019. The record, however, suggests that the material sampled by Pro-Chem in May of 2006 consisted not only of pit sludge, but of a combination of pit sludge and materials from a storm water drainage swale. *See* 2007 Austin Letter at 660 (stating that the sludge analyzed by ProChem "*was combined with solids removed from the solids accumulated in the drainage swale*") (emphasis added).<sup>31</sup> Thus, the 2006 analysis is of little value and does not constitute an adequate waste determination. Further, as with the pit water, Chem-Solv has not provided any documentation that it conducted a waste determination based on generator knowledge. Under these circumstances, the Board agrees with the ALJ that Chem-Solv did not conduct a waste determination as required by 40 C.F.R. § 262.11.

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also not improbable that chemical reactions from the materials in the rinse water could be occurring in the pit. These observations are supported by statements by Mr. Lester that periodically Chem-Solv would have to treat the pit water to adjust the pH, which could range from below 2.0 to above 12.5, before it could ship it for disposal. *See* Tr. I at 97-98 (Lohman); Appeal at 14 (stating that Chem-Solv employees adjusted the pH of the pit water prior to disposal). Thus, the Board does not find Chem-Solv's argument that it relied on generator knowledge to even be a reasonable attempt at complying with this regulatory obligation. The fact that the pit water changed in concentration and content has no bearing on the liability finding in this case, as a preponderance of the evidence in the record demonstrates that the pit water, pit sludge, and sodium hydrosulfide drums were hazardous wastes when analyzed.

<sup>31</sup> This dilution of the pit sludge with materials from the drainage swale may explain the lower levels of trichloroethylene or tetrachloroethylene detected in the ProChem analysis in comparison to the much higher levels reported in the EPA sampling results discussed above.

Finally, in response to an information request letter from the Region seeking information about any waste determinations conducted on the aerosol cans, Chem-Solv's only response was "N/A." Letter from Jamison G. Austin, Chem-Solv, to Kenneth J. Cox, U.S. EPA, Region 3 at 1079 (Feb. 6, 2008) (CX 23). This response indicates that Chem-Solv did not perform a waste determination. Further, as with the pit water and pit sludge, the record does not contain any evidence that Chem-Solv conducted a hazardous waste determination in compliance with 40 C.F.R. § 262.11.<sup>32</sup>

*D. Chem-Solv's Allegation of Bias by the ALJ Is Without Merit*

Chem-Solv asserts that the ALJ demonstrated systematic bias against Chem-Solv's witnesses. Appeal at 7. However, the only support Chem-Solv provides for this alleged bias is the fact that the ALJ consistently credited the testimony of EPA's witnesses over that of Chem-Solv's witnesses and resolved factual disputes in EPA's favor. As this Board previously has stated, the standard for establishing bias in decisionmaking is very high. *See In re Town of Newmarket*, 16 E.A.D. 182, 243 (EAB 2013). Anyone alleging bias must "overcom[e] the presumption of honesty and integrity attaching to the actions of government decisionmakers." *In re Marine Shale Processors, Inc.*, 5 E.A.D. 751, 788-89 (EAB 1995). Upon review, the Board finds that Chem-Solv's bare assertions of bias fall far short of meeting this standard. Not only is there no evidence of bias in the record, but the ALJ's Initial Decision thoroughly explains why she found each witness' testimony credible or not, and cited to other facts in the record upon which she relied in reaching her decision. The Board finds Chem-Solv's allegations of bias to be without merit.

**VI. CONCLUSION AND ORDER**

The Board affirms the ALJ's findings of liability and penalty and finds no support in the record for Chem-Solv's allegations of bias. Chem-Solv, Inc. and Austin Holdings-VA, LLC are assessed a civil penalty of \$597,026.28 jointly and

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<sup>32</sup> Chem-Solv asserts that it had a policy in place regarding the proper disposal of aerosol cans. *See* Appeal at 11. However, the record does not contain any evidence demonstrating the existence of a centralized policy or process for handling or disposing aerosol cans. Indeed, Chem-Solv's expert, Mr. Perkins, testified at the hearing that Chem-Solv did not have a written policy regarding proper disposal of aerosol cans, nor was he aware of when or how information on proper disposal was communicated to employees. Tr. IV at 131-33. In any case, even if such a policy existed, it would not substitute for a meaningful hazardous waste determination as required by the regulations.

severally, and Chem-Solv, Inc. is assessed a civil penalty of \$15,312.50 individually. Payment of the entire civil penalty amount is due within thirty days of service of this Final Decision and Order, unless otherwise agreed to by the Region. Payment may be by certified or cashier's check payable to the Treasurer, United States of America, and forwarded to:

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, MO 63197-9000

Chem-Solv, Inc. and Austin Holdings shall serve copies of the check or other instrument of payment on the Regional Hearing Clerk and on the Region. *See* 40 C.F.R. § 22.31(c). If appropriate, the Region may modify the above-described payment instructions to allow for alternative methods of payment, including electronic payment options. Failure to pay the penalty within the prescribed time may result in assessment of interest on the civil penalty. *See* 31 U.S.C. § 3717; 40 C.F.R. § 22.31(c).

So ordered.